

THE FORTY-EIGHTH MEMBERS' ANNUAL CONFERENCE PAPER

PROBLEMS IN
CONDUCTING
FREE AND FAIR
ELECTIONS

*Lessons from the
Fourteenth Lok Sabha
and some
State Assembly Polls*

JAYTILAK GUHA ROY



INDIAN INSTITUTE OF
PUBLIC ADMINISTRATION

NEW DELHI

2004

**PROBLEMS IN CONDUCTING
FREE AND FAIR ELECTIONS**

*Lessons from the
Fourteenth Lok Sabha and some
State Assembly Polls*

JAYTILAK GUHA ROY
Professor of Political Science

Theme Paper for the Forty-eighth Members'
Annual Conference of the IIPA



Indian Institute of Public Administration
New Delhi
2004

© Indian Institute of Public Administration, New Delhi,
2004

Lessons from the Fourteenth Lok Sabha and some State Assembly Polls

CONTENTS

	PAGE
1. Introduction	5
2. Importance and Implications of Free and Fair Elections	7
3. Criminalisation of Politics and its Impact on Free and Fair Elections	8
4. Recent Initiatives of Election Commission	10
5. Organising the Fourteenth Lok Sabha and some State Assembly Polls, 2004: Unique Features	16
6. Reflection on some Major Events	18
7. Constraints and Limitations of Election Commission	28
8. Learning Lessons	31
9. Issues for Discussion	35
3	THEME PAPER FOR THE 48TH MEMBERS' ANNUAL CONFERENCE OF THE IIPA

Published by: Indian Institute of Public Administration, I.P. Estate, Ring Road,
New Delhi-110 002 and printed at New United Process, A-26, Naraina
Industrial Area, Phase-II, New Delhi-110 028, Phone 25709125

**PROBLEMS IN CONDUCTING FREE AND
FAIR ELECTIONS:
LESSONS FROM THE
FOURTEENTH LOK SABHA AND
SOME STATE ASSEMBLY POLLS**

JAYTILAK GUHA ROY

INTRODUCTION

The superintendence, direction and control of all elections to Parliament and State Legislatures are vested in the Election Commission by the Constitution of India under Article 324. The word "elections" under this Article, as interpreted by the Supreme Court in *Union of India v. Association for Democratic Reforms & Others*,¹ is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps. The jurisdiction of the Election Commission is also wide enough to include *all powers necessary* for smooth conduct of elections.

Further, under Sections 14 and 15 of the Representation of the People Act, 1951, the Election Commission is under a statutory mandate to hold general elections to Lok Sabha and State Legislative Assemblies any time within a period of six months before the expiration of the term of the House concerned.

Conducting elections based on universal adult suffrage in a country like ours with 675 million registered voters spread over 28 States and seven Union Territories of varied sizes,

¹ (2002) 5 SCC 294.

and 750,000 polling booths including those located "in sky high and snow-clad mountains in North, scattered tiny islands in south, thick forests in East, and vast tracks of marshy and desert lands in West"² is indeed a gigantic and challenging task which no other election body in the world has to perform. The Election Commission officials are required to travel across all kinds of terrain, braving even swamps and snakes to ensure that the 750,000 polling booths are open and safe. Some voters live in villages 5,000 metres up in the icy heights of Ladakh. Some are in the far south, in the Andaman and Nicobar islands, near the equator. Others are in the deserts of Rajasthan in the west and in the dense jungles of the north-east, where polling booths have to be protected against wild elephants.³ If organising the elections in India is an amazing exercise, it is indeed a much more difficult and delicate task to ensure *free and fair elections*, particularly in the contemporary context of criminalisation of politics.

² Government of India, Ministry of Law and Justice, *Report of the Committee on Electoral Reforms* (Chairman: Dinesh Goswami), May 1990, p.1, para 1.3.

³ Alexandre, "Organising the elections in India". Downloaded from internet.

IMPORTANCE AND IMPLICATIONS OF FREE AND FAIR ELECTIONS

Free and fair elections constitute the bedrock of democracy. If democracy and democratic institutions are to sustain and flourish in this country, then it is indispensable to create conditions that facilitate the conduct of free and fair elections. Elections, to be free and fair, must satisfy, *inter alia*, three basic conditions: (i) that all political parties and candidates have a level playing field; (ii) that the voters have the right to know the full particulars of all the contesting candidates; and (iii) that the voters are able to cast their votes in secrecy without fear and according to their free will.

Secondly, elections are an integral part of politics in a constitutionally ordained democratic system of governance. While politics is the art and practice of dealing with political power, election is the process of legitimization of such power.⁴ Purity of elections is, therefore, the essence of democracy.

Last but not the least, a democratic government cannot succeed and sustain without the trust of the governed. Free and fair elections are considered as the first and foremost step to ensure the trust of the governed.

Thus, there is no denying that free and fair elections ensure not only the legitimacy but also the sanctity and sustainability of the political institutions of governance in a democracy such as the Parliament and the State Legislatures.

⁴ Jaytilak Guha Roy, "Elections and Corruption in India", *The Other Side*, 10(4), November 1986, p.5.

**CRIMINALISATION OF POLITICS AND ITS
IMPACT ON
FREE AND FAIR ELECTIONS**

During the Nehruvian era when political idealism and political morality were very much in the air, elections used to have been by and large free and fair. A steady decline in moral standards began in the post-Nehruvian era, especially since the Fourth General Elections in 1967. Over the years, the decline in standards continued in such an alarming proportion that by the end of the decade of the 80s, competitive use of money and muscle powers alongwith gross misuse of government power and machinery became an integral part of our political culture and tended to erode the credibility of our electoral system.

The all-pervasive corruption in contemporary India is attributed by many scholars and observers to the electoral system that requires "unbelievably enormous expenditures collected, through dubious means, by the political parties and their candidates."⁵ As the Supreme Court has observed very poignantly in a case⁶ relating to corrupt practice in election: "Apart from the other adverse consequences, the growing influence of money power has also the effect of promoting criminalisation of politics".

The competitive use of muscle power which now seems to have acquired a kind of legitimacy in our electoral system, was, in the beginning confined to booth-capturing by organised and armed goons and hoodlums especially in Bihar.⁷

⁵ Satish C. Kakati, "Poll and Corruption – One Inseparable from the Other", *The Statesman*, September 13, 1984.

⁶ *Gadakh Jashwantrao Konkarnao v. E.V. Alias Balasaheb Vikhe Patil*, (1994) 1 SCC 682.

⁷ Election Commission of India, *Report on the Fifth General Election in India, 1971-72*, p. 192.

Subsequently, the political parties and their candidates and supporters, by and large, resorted to various other illegal and immoral means such as impersonation, intimidation or violence to win elections. In certain states ruled by organised or cadre-based parties, electoral malpractices have now been extended to what is euphemistically called "scientific rigging of elections". While booth capturing or booth management is a crude form of electoral malpractice which takes place in media and public gaze, the "scientific rigging" is a very sophisticated and subtle technique applied at every stage of the electoral process – from exclusion of genuine voters sympathetic to the rival political parties and inclusion of bogus voters in the electoral rolls to manipulation of election results at the time of counting.

The menace of muscle power appeared with an altogether different dimension during the 1980 elections when notorious history-sheeters or people with criminal records or background were put up for the first time for the Lok Sabha seats, especially in Bihar and Uttar Pradesh. The emergence of these unwanted and unscrupulous elements "strengthens the theory of the *babu-neta* syndrome in politics. Since the interests of both groups are common and may even overlap, each accepts the other as a partner in the process."⁸ Over the years, this process of what has been euphemistically called the 'criminalisation of politics' had become a reality,⁹ and by the beginning of the decade of the 90s, politics in our country had degenerated to such levels

⁸ "Power without Politics" (editorial article), *The Statesman*, Calcutta, December 9, 1984. Here, *babu* implies the elite politicians and *neta* means the alleged criminal or the person with criminal background having emerged as a political leader.

⁹ For further details on the roles of money and muscle powers and the nature and forms of misuse of government power and machinery, see Jaytilak Guha Roy, "Electoral Reforms" in Anil Kumar Jana (ed.), *Indian Politics at the Crossroads*, Delhi, Commonwealth Publishers, 1998, pp. 261-65.

that "the demand on the Election Commission was to become proactive and ensure that the spirit of the Constitution and legislations regarding elections and electoral matters were adhered to by the practitioners of politics in the country. This was the only way it could discharge its constitutional mandate of conducting free and fair elections".¹⁰ Thus, with the growing menace of criminalisation of politics in India, there had been a paradigm shift in the role of the Election Commission – from a passive to a proactive body, from a "low-profile organization wedded to the letter of the law and rules during the Nehruvian era" to a catalytic agency committed to the cleansing of the electoral system since the nineties.

RECENT INITIATIVES OF ELECTION COMMISSION

The Election Commission of India deserves to be appreciated for its sincere efforts in discharging its constitutional duty and obligation of conducting free and fair elections in the world's largest functioning and stable democracy, which has earned for India a great honour and reputation in the international community.

In order to ensure that the elections are conducted in a free, fair and peaceful manner, and more smoothly, the Election Commission (EC) has taken several innovative and proactive steps and measures, in the recent past, particularly during the 1998 and 1999 general elections to the Lok Sabha and several State Legislative Assemblies. Some of these steps and measures, relevant for our present discourse, are enumerated briefly, as follows:

¹⁰ Sayan Chatterjee, "A Critical Appraisal of Electoral Reforms Proposals of Election Commission of India", M.Phil dissertation, 29th APPPA, Delhi, IIPA, 2003-04, p.179.

(i) Computerisation of the Electoral Rolls

Electoral rolls are the first and foremost requirement for the conduct of smooth and fair elections. Widespread and frequent complaints against errors and omissions including missing names in the voters' list have, therefore, convinced the EC to undertake the computerisation of the electoral rolls throughout the country, since this would lead to vast improvements in the accuracy and speed with which the electoral rolls could be updated. This has already been completed in most of the States and rolls in the new computerised format were put to use for the general election in 1999. These computerised rolls are now available on computer CD ROM disks, for almost all the constituencies. All the recognised national and state political parties are supplied these disks, free of cost, while other parties and candidates can obtain them on a very nominal price at the time of elections.

(ii) Electors' Photo Identity Cards

In an attempt to further improve the accuracy of the voters' list, prevent electoral fraud in the form of impersonation of voters, and protect the citizen's right to vote, the EC had introduced the innovative scheme of electors' photo identity cards (EPIC) in August 1993. The scheme was conceived as a project with a time-frame for completion. It was indeed a massive task, and yet, thanks to the EC's endeavour and commitment, over 374 million out of 614 million electors on rolls had been provided with photo identity cards by the year 2000. The Commission is now considering ways and means to deal with the problem in regard to the issue of cards to the remaining electors, and the difficulties in keeping track of voters, especially the mobile urban electorate.

The term "elector" has been defined in the law, as a person whose name figures in the electoral roll, and hence, an EPIC can only be issued to a person whose name is included in an

electoral roll. It was, therefore, imperative that the EC took an integrated and holistic approach in regard to electronic management of electoral rolls and the scheme of EPIC. Accordingly, the programme for computerisation of electoral rolls created the basic conditions in which integration of EPIC with the electoral rolls became a reality. The entry of EPIC number against the name of the elector in the rolls is a fundamental element that facilitates a realistic assessment of the task achieved so far and the residual work required to be done for achieving higher coverage of electors with EPICs.

(iii) Model Code of Conduct

An unique feature of the Indian electoral system is that during the election campaign, the political parties and contesting candidates are expected to abide by a Model Code of Conduct which was formulated on the basis of a consensus among political parties and became effective since the Seventh General Elections to the Lok Sabha in 1979. The Model Code of Conduct is an innovative document¹¹ which has been hailed by many democratic countries across the world as a significant contribution by the Election Commission of India to the cause of free and fair elections. It contains guidelines for the ruling parties, both at the Centre and in the States, to ensure that a level playing field between the candidates of the ruling and the opposition parties is maintained and that the party in power does not enjoy any "disproportionate advantage" over its rivals during elections.

It also lays down guidelines as to how the political parties and candidates should conduct themselves during the election

¹¹ The credit for this innovation should actually go to Kerala where the State administration introduced such code with the approval of the recognised political parties in the State during the 1962 General Elections. Subsequently, a comprehensive Model Code of Conduct was formulated and made operative by the Election Commission of India in 1979.

campaign. On the whole, it seeks to ensure the election campaign on healthy lines, avoid clashes and conflicts between political parties and their supporters and to maintain peace and order during the elections – from the campaign period till the declaration of results.

Though the Model Code of Conduct, in some form or other, had been in existence from the 60s, its observance was mainly left to the good sense of the political parties and the candidates, and there was hardly any action from any competent authority to ensure its strict implementation. It was only during the Tenth General Elections to the Lok Sabha in 1991 that the EC became very proactive in the implementation of the Model Code of conduct.¹² Since then, the EC has been trying its best to enforce the Model Code of Conduct and ensure its strict observance by the ruling parties, at the Centre and in the States, so as to provide a level playing field for all political parties and contestants, as mandated by the Constitution vide Article 324.

(iv) Electronic Voting Machines

One of the most revolutionary steps taken by the EC to make the electoral process simpler, smoother and speedier was the use of Electronic Voting Machines (EVMs) instead of the traditional system of ballot papers and ballot boxes for taking polls and counting of votes. In its endeavour to bring about significant improvements in the election procedure, by taking advantage of the scientific and technological advancements, the EC had introduced EVMs since 1998 for recording and counting of votes. These machines had been manufactured, in close collaboration with the EC, by two public sector undertakings, namely, Bharat Electronics Limited, Bangalore and Electronics Corporation of India Limited, Hyderabad.

¹² *Supra.*, n. 10, p. 143

To begin with, 150,000 machines were procured by the Commission in 1989-90. However, they could not be put to use till 1998 mainly due to some misgivings and apprehensions expressed by certain political parties. After constant interaction and persuasion, the Commission finally succeeded in ensuring the use of these machines in sixteen Assembly constituencies during the general elections to the Legislative Assemblies of Madhya Pradesh, Rajasthan and Delhi in November, 1998. Subsequently, the EVMs had been put to use for elections in more and more constituencies.

The use of EVMs is indeed an important initiative, not only to simplify the voting procedures and quicken the process of counting of votes, but also to make the electoral process far cheaper, as use of these machines has dispensed with the printing of hundreds of millions of ballot papers and also of their counting for several days after the polls. It is also eco-friendly since there is no need to cut down acres of trees to produce 8,000 tonnes of paper for ballots as in previous years. Transporting these machines over vast distances is much easier because the machine is in the size of a briefcase and much lighter than the very heavy ballot boxes used earlier.

Another advantage of EVMs is that there are no invalid and wasted votes at all, as every single vote recorded in the machine is accounted for in favour of the candidate for whom it was cast. This is indeed a great advantage especially for a country like ours where millions of people are illiterate.

Last but not the least, the use of EVMs eliminates possibility of looting or snatching ballot papers or ballot boxes and also facilitates to bring about more transparency in ascertaining the results of elections, and thereby reduces the scope for corrupt practices at the time of polling as well as counting of votes.

(v) **Election Observers**

As elections have become more and more contentious

in the new era of coalitional politics during the last decade or so, there is now a greater need to keep close watch on the election campaigns of political parties and contestants, and also on the conduct of election machinery in the field. Consequently, in all elections to the Lok Sabha and the State Assemblies, the EC now appoints a large number of Observers, who are senior civil servants, to ensure that the election campaigns are conducted fairly, that people are free to vote as they choose, and the election machinery behaves in an impartial manner. In order to provide statutory powers to the Observers to watch the conduct of elections, and particularly counting of votes, a new section 20B was added to the Representation of the People Act, 1951 vide an amendment in August, 1996.

Two types of Observers are appointed by the EC, namely, General Observers and Expenditure Observers. The General Observers oversee that the elections are conducted according to the law and the directions of the EC and in a free and fair manner, whereas the Financial Observers are appointed for closely watching, analysing and reporting the instances of misuse of money power by candidates and political parties for manipulating the will of the voters.

For a Parliamentary constituency, normally, two General Observers and one Expenditure Observer are appointed. In sensitive constituencies, however, additional observers are deputed to monitor the conduct of elections. Over and above, additional Counting Observers are also appointed to cover all Counting Centres in the country as the number of Counting Centres is much larger than the number of Parliamentary constituencies.

Over the years, there had been a steady increase in the total number of Observers appointed by the EC – from 1667 in General Elections 1996, and 1687 in General Elections 1998 to 1979 in General Elections 1999. This increase is mainly because

of the appointment of more number of Additional Observers – from 54 in 1996 and 67 in 1998 to 350 in 1999 General Elections.¹³

ORGANISING THE FOURTEENTH LOK SABHA AND SOME STATE ASSEMBLY POLLS, 2004: UNIQUE FEATURES

The Fourteenth Lok Sabha election (alongwith some Assembly polls), staggered over five phases between April 20 and May 10, 2004, was indeed a “historic election”, as claimed by the Chief Election Commissioner (CEC) T.S. Krishna Murthy. It was not only a “different and exciting election” but also a *first*¹⁴ in many ways:

1. For the first time, nomination papers across the country included candidates’ criminal, educational and financial antecedents on affidavits.
2. It was India’s *first fully electronic election* for which one million Electronic Voting Machines were deployed to cover all of 750,000 polling booths.
3. As expected by the Election Commission, the counting was wound up in one day (May 13) instead of dragging through three days.
4. The EC had overseen the entire process by remote control through electronic devices, with an actual staff of only around 400.
5. A vast army of five million polling personnel and security forces helped the EC in the conduct of the elections.

¹³ For further information on these and other initiatives of the EC, see Election Commission of India, *Elections in India: Major Events and New Initiatives 1996-2000*, Delhi, 2000, Part II, pp. 251-398.

¹⁴ *India Vote 2004*, www.mantraonline.com, pp.1-2.

6. Some 2,000 Observers were deployed by the Commission to monitor the polling across the country.
7. The entire process was estimated to cost about Rs.10 billion (\$ 220 million).
8. Polling in Jammu & Kashmir was spread across the four phases, while polling in Bihar and Uttar Pradesh, the two states which send the largest number of MPs, was spread over three phases.
9. Elections in Andhra Pradesh, Assam, Jharkhand, Karnataka, Madhya Pradesh, Maharashtra, Manipur and Orissa were conducted in two phases, while polling in 24 States and Union Territories was wrapped up in a single phase.
10. In the midst of the Central Government’s *India Shining* advertising campaign, the CEC T.S. Krishna Murthy had urged political parties: “Let India shine in the conduct of elections. We do not want the election to be conducted on the basis of violence or personal attacks”.

REFLECTION ON SOME MAJOR EVENTS

Let us now discuss some major events of the present elections which had far-reaching implications for the conduct of free and fair elections. These events are as follows:

(i) 'India Shining' Advertising Campaign

The multi-crore *India Shining* advertising campaign of the BJP-led National Democratic Alliance (NDA) Government at the Centre had invited criticism not only from the Opposition parties but also from the concerned citizens and independent political observers. With the Union Cabinet's decision to dissolve the Lok Sabha and go in for early polls, on January 27, 2004, the EC could not have been expected to prepare the poll schedule in a hurry. Consequently, there existed a time gap between the dissolution of the Lok Sabha and the announcement of the poll schedule. It was, therefore, reasonably expected that the Union Government would voluntarily adhere to the Model Code of Conduct during this interim period, knowing full well that the polls were imminent following the dissolution of the Lok Sabha.

Unfortunately, the then Prime Minister A.B. Vajpayee defended the campaign under the plea that the Code would come into force only when the EC would announce the election schedule. At the all-party meeting convened by the EC on February 20, the Opposition parties expressed their concern over this blatant violation of the spirit of the Code by the Union Government. Earlier, on February 8, T.S. Krishnamurthy soon after he took over as CEC, said that in his personal view, taxpayers' money should not be used to gain electoral advantage. His observation was in response to questions from the media on what he felt about the 'India Shining' advertising campaign of the Central Government.¹⁵

¹⁵ V. Venkatesan, "Model code and actual conduct," *Frontline*, Vol.21(6), March 13-26, 2004.

It is necessary to recall in this context that according to the EC's affidavit before the Punjab and Haryana High Court in 1997 in response to a petition challenging the legality of the Code, the philosophy underlying the Code was that the ruling party should not take *unfair advantage* of its position to tilt the views of the electorate on the eve of the election. As one political observer has observed very poignantly, "The Central government may well stop its 'India Shining' campaign with the EC's announcement of the poll schedule, but by insisting on its right to run the campaign until the poll schedule is announced, it has reduced the EC to a *hapless spectator* to its blatant violation of the philosophy and spirit of the model code".¹⁶

(ii) Sari Stampede in the Prime Minister's Constituency

Ironically, the *India Shining* campaign received a severe setback following the tragic death of 22 poor women on April 12 in Lucknow at BJP leader Lalji Tandon's birthday bash where the stampede occurred when free saris were being distributed. Next day a memorandum was submitted by a delegation of the leaders of Opposition parties comprised of Congress, CPI-M, CPI and Janata Dal-S to the EC. The memorandum sought to bring to the notice of the EC a "blatant violation of the Model Code of Conduct... and the law by the leaders of the BJP in the Prime Minister's constituency". Quoting the relevant provision in the Model Code of Conduct which stipulates that "All parties and candidates shall avoid scrupulously all activities which are 'corrupt practices' and offences under the election law, such as bribing of voters, intimidation of voters..."¹⁷, the memorandum urged the EC to take appropriate action against the persons who violated the Model Code of Conduct and the law.¹⁷

¹⁶ *Ibid.* (emphasis added).

¹⁷ "Opposition Urges EC to Take Action", *People's Democracy*, Weekly Organ of the CPI-M (downloaded from the internet).

According to the FIR lodged on April 17 at the Mahanagar police station, Tandon and others "induced the prospective voters to come and receive the free gifts of saris".¹⁸ Perhaps the saddest part of this event was Lalji Tandon's response to the tragedy. As he reportedly said after the sari stampede: "*Log to chhup-chhup ke ghoos dete hain, hum to khule aam de rahe the* (People bribe covertly, I was doing it in broad daylight)."¹⁹

(iii) Media-Driven opinion Polls

The Fourteenth Lok Sabha and some State Assembly polls witnessed unprecedented media craze for opinion and exit polls which led the political parties to have called for a ban on opinion polls ahead of these elections in April and May. There was even consensus among the political parties that the opinion polls should be banned from the first day of notification. As regards the exit polls, the parties felt that the results should not be announced before the end of the last phase of the polls.

While the Congress had reportedly dubbed the opinion polls as *unfair*, the Rashtriya Janata Dal went to the extent of demanding that even *astrological predictions* should not be published or telecast. Some analysts, however, said that the EC might find it difficult to ban the election-related polls legally because of a ruling of the Supreme Court in 1999 in favour of an Indian newspaper which challenged a similar order. The Court declared that the order had been "devoid of merit" and the Election Commission had no powers to issue such orders. It also reminded the Commission that a consensus at an all-party meeting did not provide the required sanction.²⁰

¹⁸ Bhavdeep Kang and Sutapa Mukerjee, "Mind of a Worried Man", *Outlook*, Vol. XLIV (17), May 3, 2004, pp.41-42.

¹⁹ *Ibid.*, p.40.

²⁰ MTNL Internet Express Services, *India Election 2004*, p.1 (emphasis added).

As the EC could not go ahead with a ban without any legal protection, and the Central Government's reported move to enact an ordinance empowering the Commission did not materialise, the media-driven opinion and exit polls continued zealously.

The criticisms against opinion and exit polls rest on the following arguments:

1. Media-driven opinion polls and forecasts based on these are widely noted by the public at large.
2. These polls therefore influence the process by which people make up their mind about who to vote for.
3. This influence is either illegitimate, for most of the forecasts are not correct, or understandable anyway as it adversely affects the level-playing ground in politics.²¹

It is to be noted in this context that media-driven election-related opinion/exit polls are allowed freely in some countries such as Belgium, Denmark, Germany and Ireland, whereas there are embargoes on such polls in some countries namely China, South Korea and Mexico.

There is, however, a basic question as to whether such a law, if enacted, would not violate the fundamental right to freedom of expression guaranteed by the Constitution of India [Article 19(1) (a)]. There is indeed a strong argument here which may well be "a clincher in the legal battle that is bound to follow any attempt to ban opinion polls".²²

(iv) Registration of Protest Vote

As more and more criminal elements are being elected and re-elected to the Parliament and State Legislative

²¹ *Ibid.* pp.1-2.

²² *Ibid.* p.2.

Assemblies, there is now a growing realisation that the Indian voters should have *the right to reject* undesirable and frivolous candidates. Such a right could be exercised only when the electors are given an opportunity to record their rejection of all the candidates by pushing a button on the EVM in favour of 'non-of-the above' (NoTA) option. Ideally, the NoTA option becomes most effective if the election law provides for a *repeat election* with a new set of candidates in case the NoTA option receives the largest number of votes.

Though the election law in India does not provide for the NoTA option, the Indian voters, many of whom are disgusted with what is on offer in this election, had discovered an *opt-out option* to cast *protest votes*, by filling Form 17A and signing in the column *Not Voted* to ensure that the vote is not misused. Mumbai's Kiran Mehta was reported to have got his vote cancelled by filling Form 17A at his Chembur polling booth since he did not find any candidate worthy of his vote. The EC had reportedly endorsed that such protest votes are permissible under rules and had also assured that the process can not be misused.²³ Taking cue from Kiran Mehta, some Delhites had reportedly decided to cast 'protest votes'.²⁴

The 'protest vote' is indeed a welcome initiative. But whether it could be an effective substitute for the NoTA option would remain an issue for serious discourse.

(v) Open Threat to Poll Observers

The CPM-led Left Front Government in West Bengal has the unique distinction of being *the world's largest-serving democratically-elected Marxist government*. It has also been credited by analysts with strengthening grass-root democracy, implementing vigorous land reforms and maintaining

²³ For further details, see *Times of India*, Delhi, May 3, 2004, p.7.

²⁴ *Times of India*, Delhi, May 7, 2004, p.1.

communal peace and harmony at a time of heightened religious tensions in India. However, it does not appear to have held any impressive record in so far as the election management is concerned. The Opposition parties as well as a large chunk of the common men in the State firmly believe that the unique electoral success of the Left Front Government is due to the CPI-M's "scientific electoral weapons" including skillful execution of "booth control" and "vote management". No wonder that as in the past, this time too, many parties had approached the EC with the apprehension that the polls in the State might not be "free and fair". Consequently, apart from the visit of the three-member EC in West Bengal on March 17 to oversee the arrangements for the Lok Sabha polls in the State, the EC also initiated subsequently a number of measures to ensure free and fair polls.

The EC's concern for holding free and fair polls in West Bengal as well as its pro-active role in that direction were enough to cause displeasure and anger for the Marxists of the ruling Front so much so that the Chairman of the Left Front and a member of the CPM's politburo, Biman Bose exhorted his party workers on the eve of polling in the State to "drag the Election Commission's observers to police stations". In an unusually sharp and instant censure, the EC had reportedly warned the CPM with severe action – its *de-recognition* and *countermanding of the polls* in the whole of West Bengal – if it continued to obstruct the poll observers in performing their legitimate duty. While wielding the "stop behaving, or else" threat, the EC also directed the State government to ensure adequate security to the observers "so that they are able to move freely in the constituency and observe the elections".²⁵ Further, under instruction from the EC, the State's Chief Electoral Officer, Basudev Bandopadhyay, filed an FIR with the Taltala Police Station in Kolkata against Biman Bose for his

²⁵ *Times of India*, Delhi, May 10, 2004 (emphasis added).

'unsavoury and provocative comments' against the official poll observers. All the sections mentioned in the FIR were reported to be *non-bailable*.²⁶

(vi) **Patna High Court's Order to EC regarding Candidates with Criminal Background**

Another significant event in the present elections was the Patna High Court's order dated 30th April directing the Election Commission to consider countermanding the election in a constituency where a person in jail is seeking entry to Parliament or a Legislative Assembly. The Court also reportedly asked the Commission to "act and act with speed before the declaration of election results". As the Court had observed: "A right to vote is a statutory right given by the law which may be taken away. Persons convicted of crime are kept away from elections to the legislature... The court has no hesitation in interpreting the Constitution and extending the laws framed under it that persons in lawful custody... will neither be voters nor electors".²⁷ The order also referred to Article 326 of the Constitution which has regarded crime as one of the disqualifications for contesting an election. To quote the Court's order: "Crime may mean conviction, and yet it may also be understood as criminality".

While the EC had decided to move the Supreme Court against the Patna High Court Order, the legal experts were of the view that the court's order would be set aside because the law does not disqualify an undertrial from contesting, and only voting by anyone in jail is barred. Even the apex court which had to deal with the issue of banning entry of criminals in the legislature, has more than once lobbied the issue back to Parliament for a possible legislation prohibiting

²⁶ *Times of India*, Delhi, May 11, 2004 (emphasis added).

²⁷ *Times of India*, Delhi, May 1, 2004.

law-breakers from becoming *law-makers*.²⁸ The EC had also recommended to the Centre to amend the Representation of the People Act, 1951 barring the entry of chargesheeted persons in Parliament and state legislatures.²⁹ There is no doubt that the political parties will unanimously oppose any such move primarily on the ground of inordinate delay in dispensation of justice in our existing criminal justice system. It is also true that the cases against many candidates have not been proved, and there are several instances of politicians being falsely implicated in criminal cases due to political rivalry. With a view to overcoming these hurdles and cleansing our political system, some experts are now advocating for the establishment of fast track courts to dispose of all the criminal cases in which politicians or elected members of the Central and State legislatures are involved. However, our experience with such courts has not been either satisfactory or encouraging. Hence, any initiative for debarring criminal elements from contesting elections would require detailed deliberations on all these relevant and critical factors.

(vii) **Emergence of Election Watch Committees of Citizens**

The elections had witnessed this time the emergence of election watch committees of citizens in a number of states. For instance, in Karnataka where elections were held simultaneously for the Lok Sabha and the State Assembly, several distinguished citizens had founded the Karnataka Election Watch Committee (KEWC). The Committee was composed of citizens with no political affiliations. Its members included Justice Venkatchalaiah, former Chief Justice of India, former judges of Karnataka High Court, retired civil servants and police officers, eminent professors and leading writers.

²⁸ *Ibid.* (emphasis added).

²⁹ *Times of India*, Delhi, May 5, 2004.

Formally launched on March 6, the Committee had planned to ensure wide dissemination of the candidates' financial and criminal record backgrounds through various media channels and also to track the filing of campaign expenses wherever feasible and make them publicly available. As part of this process, the Committee sought the assistance of like minded organizations, citizens and the media for voter roll verification, go out and vote campaigns and poll monitoring.

The members of the KEWC said that this Committee was "merely a facilitative and non-partisan body and not a legal representative of the citizens in any way". They held the view that citizen and media driven vigilance would help reduction of criminal elements contesting. Their optimism was based on the data that "major political parties are already asking ticket aspirants to fill out internal proforma to effect background checks on the aspirants", and that "parties are making attempts to reduce the numbers of new entrants with criminal backgrounds".³⁰

In West Bengal, a 17-member citizen's panel comprising eminent citizens and retired civil servants and police officers was reportedly constituted on the eve of the present elections. The panel, West Bengal Election Watch Committee (WBEWC), was modelled on similar bodies functioning in Karnataka, Gujarat, Madhya Pradesh, Chhatisgarh and Delhi. Taking up the responsibility of joining the *crusade for fair and clean elections* along with the original poll watchdog – Election Commission, the WBEWC intended to investigate the background of candidates and disseminate the information to the voters so they can make an *informed choice*. It also sought to keep a watch on the candidates' poll expenses and take up

³⁰ For further information on KEWC, see "Watching the Candidates", indiatgether.org/2004/mar/gov-watch2004.htm, pp.1-3

with the EC the cases of those voters whose names did not figure on the electoral rolls.³¹

It needs to be noted in this context that the EC had reportedly ordered that the media and citizens can obtain copies of candidate disclosure affidavits from the Returning Officers and the Election Officers of the corresponding constituencies.³² This order had indeed paved the way for *civil society vigilance of the elections*.

³¹ For further information on WBEWC, see Kumkum Dasgupta, "EC's little helpers in Bengal", *Times of India*, May 8, 2004.

³² *Supra*, n.30, p.1.

CONSTRAINTS AND LIMITATIONS OF ELECTION COMMISSION

For the 14th time, India held the "largest elections in human history" during April-May 2004. To quote the CEC, Krishnamurthy, "nowhere in the world is there such a mammoth exercise".³³ The Election Commission of India, an independent constitutional body that oversees the world's largest democratic exercise, has an actual staff of only around 400, and as such, it had to take the help of a vast army of polling personnel and security forces. The polling personnel were deployed mostly from the state governments, while the security forces included both the State and Central Police Organisations. As far as possible, the presiding officers were drawn from among officials of the Central Government and, for the first time, from those of public sector undertakings. This time round, the EC also made an endeavour to ensure that in all the States, except in single-parliamentary constituency States and Union Territories, 50 per cent of the presiding officers and polling officers in even district were from outside the district.³⁴ These apart, the EC did not even hesitate to remove the delinquent and crooked officials as and where necessary. Despite all these measures, both proactive and reactive, there were abundant complaints from the candidates, workers of political parties and voters in regard to the election officials acting in a 'partisan manner' on the polling day, especially in Bihar and West Bengal where the ruling parties have been in power for a long time. In reality, it was not at all possible for just two or three Poll Observers to oversee polling in all the booths of a Parliamentary constituency which is usually quite large in terms of size and population.

³³ "India holds largest elections in human history", www.indembassyhavana.cu, p.2 of 5.

³⁴ *Ibid.* p.2.

Secondly, in a large number of polling booths especially in the States of Bihar and West Bengal, the polling agents of the Opposition parties were allegedly either subjected to intimidation or not allowed to enter the booths at all, thereby indulging in 'booth capturing' or 'booth control' in collusion with district administration officials and poll personnel. Apart from deploying a large contingency of Central Police Forces, the EC had also made arrangements for videography during polls in many constituencies which had been declared *sensitive and hyper-sensitive*. Finding that there had been large scale booth capturing in Bihar's Chhapra parliamentary constituency on April 26, the EC countermanded the election in this constituency and ordered fresh poll on May 31 under "strict security arrangement". It also ordered repoll in a large number of polling booths across the country including 622 booths in Bihar alone. In spite of all these measures, there is widespread feeling that even much larger number of polling booths, where there had been electoral irregularities and malpractices, might have remained out of reach of the EC's observers. As evidence of this, one may cite the list culled from the affidavit filed by the 542 eventual winners which reveals that not less than 100 MPs in the Fourteenth Lok Sabha including some Ministers in the United Progressive Alliance Government have been chargesheeted in criminal cases ranging from minor misdemeanours like "disturbing the peace" to the ominous charge of "rioting" to serious offences like murder, rape and dacoity.³⁵

Thirdly, a "clean and accurate electoral roll", according to the Election Commission, "is the basis of good elections".³⁶ However, complaints in regard to the missing names in voters' list are quite common. Even the CEC had reportedly admitted sometime back that "despite setting up help desks, voters did not

³⁵ For details, see *Outlook*, Vol.XLIV (24), June 21, 2004, pp. 32-36.

³⁶ *Supra.*, n.13, p.vii.

find their names". He also said that the EC has to "depend on government staff, of whom the lower rung do not carry out the revision properly".³⁷ It is, however, heartening to note that the EC has now planned *photo electoral rolls* to eliminate the problem. It has planned further to provide the *option for electronic filing* for any person who does not find his/her name in the electoral roll. It will also seek the assistance of post offices and NGOs to verify the registration.

Last but not the least, all civil officers performing election work are deemed, by law, to be on deputation to the Election Commission, while deployed on election duties, and are also subject to the Commission's control, superintendence and discipline, during that period. Though the overall Constitutional scheme in Article 324 and the statutory provisions under the Representation of the People Act confer on the EC disciplinary control over all officers and staff performing election duties, the Central Government had taken the stand in 1993 that the Commission can only *recommend disciplinary action* against erring election officers, but cannot take action against them on its own. The Commission was, and is still, of the view that the stand taken by the Government was not in conformity with the law enacted by the Parliament, which in its collective wisdom, vested the disciplinary control over all election officers in the Election Commission. The Commission was, therefore, compelled to approach the Supreme Court for determination of this vital legal issue. As the matter is still pending before the apex court, it had suggested at the latest hearing that the Union Government and the Election Commission may resolve the matter on their own after mutual discussions. The Commission had subsequently taken up the matter at the highest level of Prime Minister.³⁸

³⁷ *Times of India*, Delhi, June 28, 2004.

³⁸ *Supra*, ii, 13, pp.343-44.

LEARNING LESSONS

From our forgoing discourse on the problems in conducting free and fair elections in the context of the Fourteenth Lok Sabha and some State Assembly polls, we may now identify some learning lessons for the future. These are briefly as follows:

1. The multi-crore *India Shining* advertising campaign of the NDA Government was indeed a "blatant violation of the philosophy and spirit of the model code". However, by giving a clear verdict against the *India Shining* campaigners, it was the *Indian voters* who had ultimately become *shining*. To quote a journalist of repute: "... it is Indian democracy which has triumphed. Not only has the country been stunned by the awesome verdict, the entire free world must *learn* from the courage of the poor, the illiterate, the voiceless and the underprivileged of the earth's largest democracy as they punish rulers who thought their realm consisted of 150 million for whom India was definitely *shining*".³⁹
2. Sari stampede tragedy in the Prime Minister Vajpayee's constituency had amply revealed that in spite of the sincere efforts of the EC to enforce the Model Code of Conduct, political parties actually observe the Code more in breach than compliance. This was not just one stray incidence but one of the several instances of violation of the Code that occurred in the present polls. However, from the tragic impact of this particular incidence, the Election Commission must learn that instead of being complacent, it should find out some other means,

³⁹ Vinod Mehta, "You can't buy the people of India" (Editorial), *Outlook*, Vol.XLIV (20), May 24, 2004, p.34. (emphasis added).

- such as civil society's vigilance to enforce the model code more effectively.
3. The futility of media-driven opinion and exit polls provided a great learning lesson for the media. It is now upto them to decide the future course of action. However, at least one widely heralded magazine has come out openly against such polls. As the editor of Outlook, Vinod Mehta, has observed very forthrightly: "...I am concretising my apology on behalf of those puffed-up opinion pollsters who get their results so *completely and consistently wrong*. For the next couple of years, certainly for the Maharashtra assembly elections in October, Outlook has decided to *eschew printing election-oriented opinion polls*...Some readers are convinced Outlook manipulates its polls. I would like to inform them that I only pay huge sums of money to pollsters so that they can *embarrass me with hopelessly inaccurate predictions*".⁴⁹ Significantly, Mehta has urged other publications to join him in the ban so as to get the pollsters clean up their act.
 4. While casting *protest votes* or exercising *opt-out options* are welcome initiatives on the part of the enlightened voters, they cannot be as effective as the voter's *right to reject* undesirable and frivolous candidates by exercising *none-of-the-above* (NoTA) option.
 5. Taking cue from the persistent problems of booth capturing, rigging and intimidation of voters as well as polling agents of the Opposition parties by the

⁴⁹ "Delhi Diary: Exit, Opinion Poll", Outlook, Vol.XLIV (24), p.74 (emphasis added).

- workers of the ruling parties in collusion with district administration officials and poll personnel as reported from Bihar, West Bengal and some other states and also from the fact that two or three Poll Observers are not enough to oversee polling in all the booths in a Parliamentary constituency, the Election Commission may work out some modalities for utilising the services of public-spirited NGOs and the Election Watch Committees of the Citizens.
6. In response to EC's appeal, the Citizen's Watch Committees, on their part, may also consider the prospect of playing a proactive role in the process of revision of the electoral rolls rather than confining their activities only at the time of elections.
 7. In view of the growing problem of the civil officers' connivance with the ruling parties at the time of elections, the Election Commission must have disciplinary control over all officers and staff performing election duties. Although the Commission had taken up the matter at the highest level of Prime Minister, it would be too much to expect that the Government will readily do the needful. It is where the civil society intervention is required to generate public pressures on the Government.
 8. With the backing of the apex court's order, it was for the first time in this Lok Sabha elections that nomination papers across the country included candidates' criminal, educational and financial antecedents on affidavits. In order to facilitate civil society vigilance of the elections, the EC had reportedly ordered that the media and citizens can obtain copies of these affidavits from the concerned election officers. Since the disclosure affidavits were very detailed, the Karnataka Election Watch

Committee had evolved simple formats for summarising the affidavit details to use for its dissemination work. The civil society organizations including Election Watch Committees in other states may learn from the Karnataka experience.

9. There is no denying that the conduct of every election poses new challenges and provide new learning lessons for the future. The challenges also vary from state to state and even within the state. Hence, the empirical researches on election management and the documentation as well as dissemination of innovative initiatives in election management will provide valuable inputs for formulation of short-term and long-term strategies and guidelines relating to efficient and effective management of elections in the country. There is, therefore, an urgent need that a specialised centre be established in a national institute of eminence which, in close consultation with the Election Commission, should conduct detailed studies on election management in the country and also provide a national forum to deliberate upon the need and mode of electoral reforms and other election-related issues. It is heartening to note at the end that the IIPA has already submitted a Concept Paper with the Election Commission in regard to the need and mode for setting up such a centre.⁴¹

⁴¹ This list of learning lessons is illustrative and in no way exhaustive.

ISSUES FOR DISCUSSION

1. What additional measures are required for effective enforcement of the Model Code of Conduct?
2. Should media-driven opinion and exit polls as also publication of astrological predictions be banned by enactment of a law, or should this matter be left to the conscience of the Media?
3. What are the areas where partnership and collaboration between civil society organizations and the Election Commission would be of immense help to facilitate free and fair elections? What should be the modalities for such partnership?
4. What steps would be necessary to strengthen civil society vigilance of the elections?
5. Is there any need for fast track courts to dispose of all criminal cases in which politicians or elected representatives of the Central and State legislatures are involved? If not, what alternative mechanism could be evolved to discourage or debar criminal elements from contesting elections?
6. Should the Election Commission be empowered to take disciplinary action against delinquent election officers or should it continue with its limited authority of only recommending disciplinary action?
7. Should the Indian voters be empowered with the right to reject undesirable and frivolous candidates by exercising none-of-the-above (NoTA) option?
8. Any other issue relevant to the Theme.

XXXX