

ELECTORAL REFORMS: ISSUES AND CHALLENGES IN THE DOMAIN OF CRIMINALIZATION

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Introduction

Free and fair election is a mandate given by the Constitution of India, 1950 for a parliamentary democracy. The word “democracy” coined in the Preamble of the Constitution can be realized if we have the content of free, fair and effective election process in our system. Only free and fair elections to the various legislative bodies in the country can guarantee the growth of a democratic polity.¹

In India election is always a gigantic exercise because the country having biggest democracy in the world, millions of electorates goes to polls to elect members for Parliament, state legislative bodies and Legislatures of the Union Territories. In *Kihoto Hollohan*² the court emphasized that democracy is a basic feature of the Constitution and election conducted at regular prescribed intervals is essential to the democratic system envisaged in the Constitution. So it is current requirement and need to protect and sustain the purity of electoral process. For that it would be better to assess the electoral process, its legislation, and issues and challenges for its reforms. Several committees like Goswami Committee on Electoral Reforms (1990), Indrajit Gupta Committee on State Funding of Elections (1998), Vohra Committee (1993), as well the Law Commission Report on Reform of the Electoral Laws (1999), the Election Commission of India–Proposed Electoral Reforms (2004) verified the issue of electoral reform. They suggested the solution for the same; but still some vacuum has been left under the gamut of constitutional mandate of election and under the other statutes like the Representation of People Act, 1951 (RPA).

Therefore, there is a dire need to analyze the process of election to protect the democracy. This paper attempts to reveal issues and challenges in election reforms in India in relation with criminalization

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¹ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 872 (Butterworths and Wadhawa, reprint 2012).

² A.I.R. 1993 S.C. 1535.

of politics. As this issue is very basic, it needs to be corrected at the earliest so that to some extent we can save not only system of election but also the democracy from being criminalized.

Criminalization Prevalent in Elections in India

During the period of election one gets to read in newspapers very often that, a particular *x y z* candidate contesting election has 200 criminal cases pending in courts against him; a Member of Legislative Assembly (MLA) is contesting in election as an independent candidate while he is still serving a life term in the jail. He was convicted in a kidnapping case but an appeal has been entered in the High Court. These kinds of stories have now become very familiar to citizens of India. It is shameful for the world's biggest democracy like ours that these criminals, who have many cases of murder, rape and dacoity charged against them, are sitting in a forum of law making i.e., Parliament and State Legislatures. According to the Central Bureau of Investigation (CBI) report to the Vohra Committee: "[A]ll over India crime syndicates have become a law unto themselves; even in the smaller towns and ruler areas muscle man becomes the order of the day". The reflection of this can be found not only in election to House of People or a State Legislature, but even in at the ground level of corporation elections.³ The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country.⁴ To curb this element of criminalization law proves to be very short.

Legal Mandate for De-criminalization under Section 8 of RPA

Certain legal provisions are provided in Section 8 of the Representation of the People Act, 1951⁵ which provides for the

³ SAKAL TIMES, Feb. 21, 2012: After Pune Municipal Corporation election in Sutarwadi, a supporter of an independent candidate attacked on the supporter of National Congress Party candidate who won the seat from Pashan.

⁴ NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, REVIEW OF ELECTION LAW, PROCESSES AND REFORM OPTIONS, 2001.

⁵ **8. Disqualification on conviction for certain offences.** 5[

(1) A person convicted of an offence punishable under--
(a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or

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- ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code; or
- (b) the Protection of Civil Rights Act, 1955 which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or
- (c) section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or
- (d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or
- (e) the Foreign Exchange (Regulation) Act, 1973 (76 of 1973); or
- (f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or
- (g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or
- (h) section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or
- (i) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub-section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; [or]
- (j) 6[section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991,"] [or] 7
- (k) 7[section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971);] shall be disqualified for a period of six years from the date of such conviction.
- (2) A person convicted for the contravention of--
- (a) any law providing for the prevention of hoarding or profiteering; or
- (b) any law relating to the adulteration of food or drugs; or
- (c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); or
- (d) any provisions of the Commission of Sati (Prevention) Act, 1987 (3 of 1988), and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.
- (3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]
- (4) Notwithstanding anything in sub-section (1), sub-section (2), or sub-section (3)] a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

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1. Subs. by Act 47 of 1966, s. 20. for Chapter II (w.e.f. 14-12-1966). Previous ss. 10 and 11 were rep. by Act 103 of 1956, s. 66.
 2. Subs. by Act 35 of 1969, s. 5. for certain words.
 3. Ins. by Act 106 of 1976, s. 21, (w.e.f. 19-11-1976).

disqualifications for membership of Parliament and State Legislatures on conviction for certain offences.

1. Sub-section (1) of Section 8 provides disqualification for a person who had committed and convicted for the offences mentioned in this section for 6 years from the date of conviction.
2. Sub-section (2) offences mentioned in this subsection, if attracted, the sentence of imprisonment for not less than 6 months, then person shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of 6 years since his release.
3. Sub-section (3) provides offences other than specified in subsection (1) and (2), for which sentence is more than 2 years, person convicted for such offence shall be disqualified from the date of conviction and shall be continue to be disqualified for further period of 6 years since his release.
4. Sub-section (4) provides that disqualification take into effect in case of Member of Parliament (MP) or State Legislature until 3 months elapsed from date of conviction or if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Issues and Suggested Reforms under Section 8 of RPA

- Section 8 of RPA needs to be amended at the earliest. Offences mentioned in sub-section (1) of Section 8 except the offence of rape, provides punishment of less than 3 years in Indian Penal Code, 1860. Proposed candidates are mostly committing offences like extortion, kidnapping, murder. Whether they entitled to hold position in any government? In 1950 politicians were considered as pioneers of good governance. That was the moral content of then society. So the legislatures of that time not even think that in future politics will be criminalized with this motion; this could be the reason of insertion of specific offences in Section 8(1).

4. Ins. by Act 3 of 1988, s. 19 (w.e.f. 21-3-1988).

5. Subs. and renumbered by Act 1 of 1989 s. 4 (w.e.f. 15-3-1989).

6. Ins. by Act 42 of 1991, s. 8 (w.e.f. 18-9-1991).

7. Added and Ins. by Act 21 of 1996, s. 3 (w.e.f. 1-8-1996).

- Disqualification of candidate should be attracted for every offence committed by the candidate, or otherwise to fulfill the objectives of the Section 8 of RPA, the punishment provided in related statutes (e.g., Indian Penal Code, 1860) mentioned in Section 8 should be enhanced.
- In this section there is need to include other grave offences of person, property and election etc., with enhanced punishment. For that in RPA one specific schedule should be provided for enhanced punishment for the offences referred in Section 8 of RPA on the ground of public interest to disqualify the proposed candidate for election or member of State Legislature or Parliament.
- The Election Commission of 2004⁶ proposed on the issue that, disqualification for criminal offences provided for in Section 8 of RPA, applies to a person (disqualified from contesting election) only on the conviction by the court of law. It means this provision sets in motion after the decision of court. There have been several instances of candidates charged with serious and heinous crimes like murder, rape, dacoity etc. contesting elections. As a result, in mean time during pending of the trial, the person may contest and be elected with majority. This may leads to undesirable and unethical situation i.e., a person who is a law breaker becomes the law maker.

Therefore, the Commission proposed that the law should be amended to provide that any person who is accused of an offence punishable by imprisonment for 5 years or more should be disqualified from contesting election, even when the trial is pending in which charges have been framed against him by a competent court. But this bar on a candidate might be used against the innocent persons; for that there is need of establishment of special court of Election Commission to determine the qualification of candidate who has criminal antecedents, and this court will determine the cases summarily which will not affect the actual cases of court. There may be possibility that cases of false charges would be raised. Such situations can be dealt by imposing time frame on the cases filed prior to 6 months of election alone would lead to disqualification, and not otherwise.

⁶ REPORT OF ELECTION COMMISSION OF INDIA, 2004.

- Sub-section (4) of Section 8 says that disqualification takes into effect in case of MP or member State Legislature until 3 months elapsed from date of conviction, or if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

This privilege of 3 months for attraction of disqualification for MP is nothing but an instance of destruction of basic tenets of equality. It is arbitrariness once the lower court convicted the person who is MP or member of State Legislature that order should be final one to attract the disqualification. Law should be effective from the date of decision of conviction of MP. If law allows enjoying all the privileges to MP during pendency of appeal in higher court then it would be like issuance of license for them to commit crime and be there in the power and exploits the democratic principles of the system. This convicted clause should be amended to the effect that: “Disqualification takes into effect in case of MP or member of State Legislature from the date of decision of the court decided the conviction, though the appeal or application for revision is brought in respect of the conviction or the sentence in higher court, the conviction order should be treated as final for disqualification and such person shall cease to be MP or member of State Legislature”.

- From the side of legislatures there has been half-hearted attempt made because ultimately legislative or law making power in relation with election recognized from Parliament or Legislatures of States. Political parties they use these *dadas* and *goondas* in elections so that they will secure some seats in the Parliament or in State Legislatures. This should mandated to each political party that, if any political party gives ticket for election to the person charged with criminal case such person will disqualify from contesting election, and further such party should be derecognized by the Election Commission of India. Such power should be given to the Election Commission. But time and again it was realized that the intention of these legislatures is to protect their interests and not the democracy.
- Criminal antecedent in Sections 33A and 33B of RPA: In relation with the criminal antecedents of the candidates the Supreme

Court in *Union of India v. Association for Democratic Rights*⁷ observed that it is right of voters to access the information guaranteed in Article 19(1)(a) is equally vital as like right of citizens for the same. This was considered as dynamic judgment delivered by the Supreme Court which is having the authority of law under Article 141 of the Constitution. But the ordinance issued by the President which is known as the Representation of the People (Amendment) Ordinance, 2000 made amendment in RPA which can be seen in the form of Sections 33A and 33B.

In this Ordinance Section 33A provides for right to information which is recognized as a fundamental right of every citizen to know the past antecedents their proposed candidate. This section obligates to furnish the information as to whether—(1) he is accused of any offence punishable with imprisonment for 2 years or more in a pending case in which a charge has been framed by the court of competent jurisdiction, (2) he has been convicted of an offence and sentenced to imprisonment for 1 year or more.

The Ordinance then adds the following section as Section 33B:

“Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made there under.”

This provision is an illustration of fraud committed by the legislature itself, under the umbrella of the right to privacy. It nullifies the effect of Section 33A which is unconstitutional and out of legislative competence. A person who is going to hold public office cannot be allowed to undisclosed the information required for public purpose. This Ordinance or Amendment was beyond the legislative competence.

*Peoples Union for Civil Liberties v. Union of India*⁸ emphasized that to disclose the antecedents is the necessity of the day because of statutory provisions of controlling wide spread corrupt practices as repeatedly pointed out by all concerned including various reports of Law Commission and other committees. The

⁷ A.I.R. 2003 S.C. 2363.

⁸ A.I.R. 2003 S.C. 2408.

Supreme Court had not made any radical suggestion but even these suggestions are not acceptable to the politicians. It means that Section 33B takes away the judicial competence. This shows that there exists a wide gulf between preaching and practice in today's political arena. This section directly nullifies Article 19(1)(a) of the Constitution. It is undemocratic and directly strikes at the peoples' right to know—a democratic right.⁹ This decision will be known as the milestone for the process of reforms in election. This judicial order nullifies the legislative order of Section 33B of RPA.



⁹ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 896 (Butterworths and Wadhawa, reprint 2012).