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LAW COMMISSION OF INDIA

ELECTORAL DISQUALIFICATIONS

*Report No. 244*

February, 2014

The 20<sup>th</sup> Law Commission was constituted for a period of three years from 1<sup>st</sup> September, 2012 by Order No. A-45012/1/2012-Admn.III (LA) dated the 8<sup>th</sup> October, 2012 issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi.

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D.O. No. 6(3)240/2013-LC(LS)

Dated, the 24<sup>th</sup> of February, 2014

**Dear Shri Kapil Sibal Ji,**

1. While the Law Commission was working towards suggesting its recommendations to the Government on Electoral Reforms, an Order was passed by the Hon'ble Supreme Court dated 16.12.2013 in *Public Interest Foundation and Ors. Vs. Union of India and Anr.*, vide D.O. No. 4604/2011/SC/PIL(W) dated 21<sup>st</sup> December, 2013.
2. In the aforesaid Order, the Hon'ble Supreme Court noted that Law Commission may take some time for submitting a comprehensive report on all aspects of electoral reforms. However, the Hon'ble Court further mentioned that "the issues with regard to de-criminalization of politics and disqualification for filing false affidavits deserve priority and immediate consideration" and accordingly requested the Law Commission to "expedite consideration for giving a report by the end of February, 2014, on the two issues, namely:
  1. Whether disqualification should be triggered upon conviction as it exists today or upon framing of charges by the court or upon the presentation of the report by the Investigating Officer under Section 173 of the Code of Criminal procedure? [Issue No. 3.1(ii) of the Consultation Paper], and
  2. Whether filing of false affidavits under Section 125A of the Representation of the People Act, 1951 should be a ground for disqualification? And if yes, what mode of mechanism needs to be provided for adjudication on the veracity of the affidavit? [Issue No. 3.5 of the Consultation Paper]"
3. The matter was accordingly adjourned for three months within which period, the Law Commission was expected to submit its response on the aforesaid two issues to the Government of India to be forwarded to the Hon'ble Supreme Court.

4. Pursuant to the above order dated 16.12.2013, the Law Commission took up the two issues as mentioned above. The Commission had detailed discussions with cross-section of stakeholders and members of the general public along with detailed deliberations within the Commission including the National Consultation organized by the Commission.
5. Accordingly, the Commission has prepared its recommendations in the form of 244<sup>th</sup> Report titled "*Electoral Disqualifications*" enclosed herewith.
6. As per the directions of the Hon'ble Court, the present Report is required to be placed before the Court. The next date of hearing in the matter before the Hon'ble Court is 10.03.2014.
7. The Commission appreciates the valuable assistance rendered by young lawyers, Mr. Arghya Sengupta, Ms. Srijoni Sen, Mr. Gaurav Gupta, Ms. Prachee Satija and Ms. Manu Panwar, to the Law Commission of India.

Regards and Wishes

Yours Sincerely,



**(Ajit Prakash Shah)**

**Shri Kapil Sibal**

Hon'ble Minister for Law and Justice,  
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## I. INITIATION OF THE PROCESS

The Ministry of Law and Justice, Government of India had addressed a letter dated 16<sup>th</sup> January, 2013 requesting the Twentieth Law Commission to consider the issue of ‘Electoral Reforms’ in its entirety and suggest comprehensive measures for changes in the law.

Accordingly, the Commission initiated work on the different facets of the subject by collecting, collating and analysing the literature on the subject including previous reports by several Committees and Commissions. Apart from the above, recognising the complexity of the subject and its integrated relationship with the status and health of democracy, the Commission considered it imperative to elicit views and opinions from different stakeholders. This included political parties, jurists, academics, eminent persons in public life, civil society representatives and others, who were consulted on various debates, dialogues and issues on the legal, political, social and other facets of the subject, necessary for determining the Commission’s approach to making recommendations. After detailed deliberations, a Consultation Paper was prepared by the Commission under the guidance of the then Chairman, Mr Justice (Retd.) D. K. Jain, former Judge of the Supreme Court of India. The paper concentrated on several suggestive issues including, *inter alia*, de-criminalisation of politics and disqualification of candidates with criminal antecedents, and the need to strengthen provisions relating to the period of disqualification.

The Consultation Paper was widely circulated to obtain feedback from various stakeholders and members of the general public and a number of responses have been received. We shall advert to the responses received and the Commission’s views thereon below.

While the Commission was working towards suggesting its recommendations to the Government on reforms in electoral laws, W.P. (Civil) No. 536 of 2011 titled *Public Interest Foundation. v. Union of India*, a public interest litigation (PIL) was filed in the Supreme Court in the year 2011 praying *inter alia* for guidelines or framework to be laid down by the Court to deal with the menace of criminalisation of politics and debar those charged with serious offences from contesting elections. The Hon’ble Supreme Court in the above noted matter has, on 16<sup>th</sup> December, 2013, taken note of the Consultation Paper prepared and circulated by the Commission. Appreciating that the Commission may take some time for submitting a comprehensive report on all the aspects of electoral reforms, the Court in its order dated 16<sup>th</sup> December, 2013 in the aforementioned petition, has observed that “the issues with regard to de-criminalisation of politics and disqualification for filing false affidavits deserve priority and immediate consideration” and accordingly directed the Law Commission to “expedite consideration on the two issues, namely,

- “1. Whether disqualification should be triggered upon conviction as it exists today or upon framing of charges by the court or upon the presentation of

the report by the Investigating Officer under Section 173 of the Code of Criminal Procedure? [Issue No. 3.1(ii) of the Consultation Paper], and

2. Whether filing of false affidavits under Section 125A of the Representation of the People Act, 1951 should be a ground for disqualification? And if yes, what mode and mechanism needs to be provided for adjudication on the veracity of the affidavit? [Issue No. 3.5 of the Consultation Paper]”

The matter was accordingly adjourned for three months within which period the Law Commission was expected to submit its response on the aforesaid two issues to the Government of India to be forwarded to the Hon’ble Court.

## **II. RESPONSES RECEIVED TO THE CONSULTATION PAPER**

The Consultation Paper prepared by the Law Commission was disseminated to all registered political parties, both at the national and state level, the Houses of Parliament, the State Legislatures, to the High Courts, Bar Associations, Election Commission, Heads of important National Commissions and institutions, National Law Universities, prominent media personalities, associations and civil society organisations as well as many other public spirited persons. The Consultation Paper was also uploaded on the website of the Law Commission. Out of over 157 responses received till August, 2013, largest number of responses have been received from individuals followed by various civil society organizations and associations. Amongst various Commissions, only the Election Commission of India responded. The response to the Consultation Paper from the political parties and Members of the Parliament has been tepid with only one national political party viz. the Indian National Congress and a registered political party being the Welfare Party of India having sent their views on the issues raised in the Consultation Paper. Only eight sitting Members of Parliament have responded to the Consultation Paper, four each from Lok Sabha and the Rajya Sabha.

The civil society group, Public Interest Foundation, suggested that the existing provisions relating to disqualification to contest elections need to be amended to ensure that disqualification is triggered upon framing of charges by the court on serious and heinous offences amounting to imprisonment for a term of minimum five years or more, which should include the expanded list largely drawn from Justice JS Verma Committee (JVC) Report but restricted only to serious and heinous offences attracting an imprisonment of five or more years in the proposed Section 8(1)(a) of The Representation of the People Act, 1951 (hereinafter "RPA"). In this scenario, only cases filed in the court and charges framed by the court six months prior to an election would lead to disqualification of a candidate. This proposed recommendation is to co-exist with the present provision for disqualification as stated under Section 8(3) of the RPA debaring candidates from contesting elections on being convicted of any offence and sentenced to an imprisonment of two or more years.

The Public Interest Group further suggested that, with respect to elected representatives to the House of Parliament and the Legislature of State facing criminal charges, a new sub-section (5) be inserted to Section 8 of the RPA for establishing special fast-track courts for time bound disposal of the cases. This sub-section could act as a deterrent to those with cases of criminal offence, pending against them in the court from contesting elections in order to avoid a speedy and time bound adjudication of the case by a special fast-track court resulting in their possible conviction and imprisonment. The case with respect to charges pending against an elected representative and also, where charge has been framed after the declaration of election results should automatically be placed under the consideration of the special fast-track court of competent jurisdiction immediately after the candidate is declared elected. These fast-track courts should be required to dispose of the cases within six months from the date the court has

taken cognizance of the offence committed by the elected representative. The appellate courts in such instances shall dispose the cases finally within six months of the date of the order of the original court.

An alternative proposal has also been suggested where, a person charge-sheeted for serious and heinous offences amounting to imprisonment for a term of minimum five years should be allowed to contest elections. In case a candidate facing charges is elected to be a Member of Parliament (MP)/Member of Legislative Assembly of States (MLA), then the case against the concerned individual will automatically be placed under the special fast-track court in the proposed sub-section of 8(5) to the RPA for time bound disposal of the matter. This would apply to an elected representative who has been charge sheeted by a court after elections. The elected representative should be allowed to discharge his/her duties in full potential until he is convicted, or convicted and sentenced by the fast-track court.

Once the conviction of the elected representative has attained finality, the representative should automatically be disqualified by the Speaker or Presiding Officer of the House. It is clarified that the disqualification would also apply in cases where an elected representative has not filed any revision/appeal on conviction.

The Association for Democratic Reforms (ADR) has recommended that any person against whom a charge has been framed by a court of law, in a criminal case for which the punishment is imprisonment of two years or more should not be allowed to contest elections. In particular, any candidate against whom charges have been framed for serious offences like murder, rape, kidnapping etc. should be banned from contesting elections.

On the issue of consequences on the candidature and membership of a person who furnishes false information in the affidavit filed alongwith the nomination paper, there is unanimity on the need for prescribing stringent consequences in law for filing false affidavits, in particular, making it a ground for disqualification. The Election Commission has also suggested that Section 125A should be included in the list of offences provided under Section 8(1) which attract disqualification irrespective of the quantum of punishment. It has also been suggested by Mr. P.P. Rao, Senior Advocate that filing of false affidavits should be made a ground for setting aside election under Section 100.

The Commission has also conducted deliberations with Mr. T.S. Krishnamurthy (Former Chief Election Commissioner under whose aegis the 2004 Report on Electoral Reforms was prepared by the Election Commission), Dr. S.Y. Quraishi (Former Chief Election Commissioner), Mr. S.K. Mendiratta (Consultant-cum-Legal Advisor to the Election Commission of India), Mr. K.F. Wilfred (Principal Secretary, Election Commission of India) and Prof. Jagdeep S. Chhokar (Founder Member of Association for Democratic Reforms). All of their recommendations have greatly influenced the Commission and the recommendations in their report.

### III. NATIONAL CONSULTATION

In addition to the aforesaid Consultation Paper and responses received to it, a one-day National Consultation on Electoral Reforms was organized by the Commission on 1<sup>st</sup> February, 2014 in New Delhi. Considering the short span of time within which the Report on the two issues of disqualification of candidates with criminal background and consequences of filing false affidavits was to be submitted, the Consultation was confined only to the two specific issues of decriminalisation of politics and consequences of filing false affidavits.

The National Consultation was widely advertised in the press and media to ensure maximum participation and political parties and other delegates were invited by sending invitations through post and email. All India NR Congress (Pondicherry), All Jharkhand Students Union Party (Jharkhand), Biju Janata Dal, Communist Party of India, Communist Party of India (Marxist), Nationalist Congress Party, , J & K National Panthers Party, , Rashtriya Lok Dal,, and TelanganaRashtraSamithi were represented. All the registered National and Regional Parties were invited though most did not attend. The fundamental idea behind holding the National Consultation was to receive as many and as varied inputs from various stakeholders as possible, and to draw upon the expertise on the two issues from a cross-section of those involved in administering the political system. This was based on the widespread belief that electoral reforms must flow from the floor of the House rather than being imposed from the outside. To create momentum for change, in the words of Mr. Fali S. Nariman, “we need to rely on the public opinion on the outside to put pressure on those inside to do the right and the honourable thing”.

The Consultation began with an Opening Session and comprised three Technical Sessions. Mr. Justice (Retd.) B.P. Jeevan Reddy (Former Judge of Supreme Court and former Chairman of the Law Commission of India) under whose Chairmanship the 170<sup>th</sup> Report on Electoral Reforms was submitted by the Law Commission in 1999 and which Report remains the reference point for all subsequent work on the issue, gave the inaugural address in the Opening Session. The First Technical Session after the opening ceremony focused on the increasing criminalisation of the Indian polity and the means to deal with the same. Mr. Fali S. Nariman (Senior Advocate) presented the opening ideas and issues and proffered valuable suggestions on the same. The second session focussed on the determining stage of the legal procedure in criminal cases for the disqualification of candidates and sitting Members of Parliament and Legislative Assemblies/Councils accused of criminal offences. Mr. T.R. Andhyarujina (Senior Advocate and former Solicitor General of India) and Mr. P.P. Rao provided impetus to the discussion by putting forth two opposite perspectives on the issue. The third and final Technical Session was devoted to the consequences of furnishing false information in the affidavit filed along with nomination paper. Mr. Soli J. Sorabjee (Senior Advocate and former

Attorney General of India) and Mr. K.N. Bhat (Senior Advocate) advanced their suggestions on the issue of filing false affidavits.

Besides the abovenamed, the Consultation was attended by Dr. S.Y. Quraishi (Former Chief Election Commissioner), Mr. S.K. Mendiratta (Consultant-cum-Legal Advisor to the Election Commission of India), Mr. K.F. Wilfred (Principal Secretary, Election Commission of India), Mr. H.K. Dua (Member of Parliament, Rajya Sabha), Mr. Dinesh Dwivedi, (Senior Advocate) along with several other representatives from the Bar, Bench, civil society organizations, concerned citizens, academia, media and other stakeholders all of whom fruitfully participated in the debates and discussions. The participants put forth several suggestions, reflections, observations and comments all of which have been duly recorded in the minutes of the Consultation prepared by the Commission.

Broadly, the public consultation brought to the fore sharply divided opinions, with views on the one end of the spectrum suggesting that individual interest or concerns if any in the context of representing people in democracy should be sacrificed to secure the larger public good, namely, purity and integrity of the electoral democratic process, and on the other end emphasised the view that the time tested principles of criminal jurisprudence of the presumption of innocence until a person is tried and convicted should not be jeopardized or diluted.

On the issue of criminalisation of politics, Justice B.P. Jeevan Reddy stayed firm in his opinion that the field of disqualification of candidates has to be enlarged by providing that candidates against whom charges have been framed for offences (under the IPC or any other enactment) punishable with death, imprisonment for life or for ten years (with or without fine) shall stand disqualified, provided such charges are framed six months prior to the date of scrutiny of the nomination papers. He also suggested the introduction of a List System of elections. The List system would involve publication by the Election Commission of a constituency-wise list of candidates having declared criminal background.

Justice Reddy also proposed a reduction in the period between publication of validly nominated candidates and the day of polling. These measures, he opined, would have the merit of breaking the bond between candidates and the constituency, leaving minimal scope for influencing voters.

Mr Fali S. Nariman found that the procedure relating to criminal cases prescribed in the Code of Criminal Procedure, 1973 held all the answers. He ruled out disqualification upon filing of charge-sheet or report under Section 173 by the Police in the Magistrate's Court, and strongly advocated disqualification upon framing of charges by the competent Court. He articulated the need for enlarging the whole concept of disqualification and emphasized that the law needs to go ahead in order to promote purity and integrity of the democratic process. In his opinion, there are sufficient safeguards within the Code of Criminal Procedure, 1973 (CrPC) which can address the concerns against false prosecution.

According to Mr P.P. Rao, credibility is the life-blood of institutions in a democracy. Accordingly a person who is under a cloud should not be allowed to function as it damages the faith of the people in the institutions. He submitted that the presence of tainted people is the main reason for deterioration in the credibility enjoyed by the institutions and therefore said that the time has come to make efforts to regain it. He admitted that the criminal justice is protracted and many legislative terms may pass by before conviction or acquittal is pronounced. But the changing reality with changing times demands innovative methods. In the light of the same, he also suggested disqualifying candidates upon framing of charges by the competent Court. Representing the Biju Janata Dal, Mr. Pinaki Misra, while strongly supporting disqualification upon framing of charges for aspiring candidates, opined that automatic disqualification of sitting members upon charges being framed would mean re-election for that seat. He suggested that the disqualification for a sitting MP should not be triggered immediately as huge investments are made in the conduct of elections and it is impossible to turn the clock back, and that the membership should be kept in abeyance as in cases of electoral offences. He cited the example of the interim order of the Supreme Court of India in *Indira Gandhi v Raj Narain* judgment. His suggestion was that the court must expedite the cases of such indicted MPs.

All the other political parties that participated in the Consultation strongly dissented on the introduction of disqualification upon framing of charges. Shiromani Akali Dal in its written response on the issue has stated that the existing provisions of the RPA are sufficient to prevent entry of people with criminal antecedents into the political arena and therefore need no amendment. The overpowering consideration behind the common thread running through the opposition from the political fraternity to disqualification being triggered upon framing of charges is the fear of its misuse on account of 'political vendetta'.

Mr T.R. Andhyarujina also opposed the operation of disqualification upon framing of charges though for different reasons. He highlighted the legislative history of Section 8 of the RPA to bring home the fact that when it was enacted, the yardstick for disqualification was conviction and not framing of charges. Admitting that the moral perception of the first Parliament was drastically different from the present situation with several elected representatives with "criminal" antecedents, he still stressed that our settled jurisprudence of presumption of innocence until proven guilty ought not to be subverted. The disclosure of information including criminal antecedents in the affidavits are sufficient for the electorate to make well informed choices. Dr S.Y. Quraishi and Mr S.K. Mendiratta in this regard pointed out that the jurisprudence of presumption of innocence until found guilty already has been displaced to a large extent in practice inasmuch as there are lakhs of under-trial prisoners in our country.

A valuable suggestion by one of the participants was that if a person is disqualified from being a candidate for election or a member of the Parliament, then he must be disallowed from holding any position in the party as well for a certain period of time. Allowing the disqualified person to hold a position in the party has the potential of the same member issuing a whip on

the other members of the party and ultimately achieving indirectly what could not be achieved directly. It was further suggested that any political party that allows a position to a disqualified person should be de-recognized.

On the aspect of filing of false affidavits, Mr Soli J. Sorabjee, stressed that filing of false affidavits in the matter of elections is a serious issue having a direct bearing on the purity of an election. He said that the Supreme Court has acknowledged the right of the elector to have 'correct' information about the candidate who is standing for the elections in order to make an informed choice. Thus filing of false affidavit should certainly be made a ground for disqualification, particularly in cases of returned candidates who furnished false information in affidavits. This is essential to ensure free and fair elections which is a basic feature of our Constitution. He suggested that the CVC may be entrusted with the task of auditing the information in the affidavits to ascertain the correctness thereof. The CVC on finding falsehood having been practiced, shall send a report to the Election Commission. The Election Commission after hearing the returned candidate, shall report to the President of India and the President after examining the report and the material may disqualify the returned candidate so as to not allow him to enjoy the fruits of his victory achieved by filing false affidavit.

Mr K.N. Bhat, stated that even though Sections 33A and 125A have been inserted in the statute book after the 170th Report of the Law Commission (1999), yet false affidavits are filed routinely. Delay in the court procedures resulting in an unduly long period between the framing of charges and conviction, coupled with only six months punishment under Section 125A makes a mockery of the provision. He suggested the omission of the words "with the intent to be elected in an election" in Section 125A as in his opinion falsehood is always deliberate. He also suggested that a week's time may be given after the filing of the affidavit for filing objections and subsequently, the Returning Officer must have the right to reject the candidature based on valid evidence. He further suggested that Section 125A be included under Section 123 as a corrupt practice, as an election petition can be filed thereafter and election can be set aside on this ground under Section 100.

While some other participants also suggested making filing of false affidavits a corrupt practice under Section 123 of the RPA and thus a ground for setting aside election, the same has been disagreed by others on the ground that discovery of falsehood after the limitation for filing election petition expires would enable the wrongdoer escape the consequence. Mr NripendraMisra from the Public Interest Foundation (the petitioner in the PIL pending before the Hon'ble Supreme Court) also suggested that punishment under Section 125A should be enhanced to two years with no alternative of fine. He recommended that power should be given to the Chief Election Commissioner to hear and decide the issue of falsity of affidavit on a reference being made to him by the Returning Officer instead of the CVC investigating it. However, the same has been disagreed with by the other participants as being impractical particularly owing to the time gap between nominations and polls being only 14 days. Further, he suggested that the disqualification for violation of Section 125A should be three years as in

Section 10A. Dr S.Y. Quraishi also added that disqualification for filing false affidavit should not be limited to the returned candidate but equally to all candidates who have been found guilty of having furnished false information. Mr S.K. Mendiratta, put forth the proposals of the Election Commission on the issue at hand i.e. punishment under Section 125A should be at least 2 years and not 6 months and Section 125A should be included in the offences covered under Section 8(1) so that conviction thereunder irrespective of the quantum of sentence would lead to disqualification of the candidate, returned or otherwise.

The Commission took into consideration the diverse views expressed at the National Consultation while preparing its recommendations in this Report. At the same time it recognised a distinct sense emerging from the day-long meeting, i.e. that the law relating to disqualification of tainted politicians needs to be enlarged in order to be attuned to modern realities. A detailed justification of why such enlargement needs to happen and the exact scope of such enlargement are discussed in turn in the next three chapters

## IV. THE NEED FOR REFORM

### A. FREE AND FAIR ELECTIONS

*“If the people who are elected are capable and men of character and integrity, then they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them...It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas...We can only hope that the country will throw up such men in abundance.”*

- Dr Rajendra Prasad, President, Constituent Assembly of India, 26<sup>th</sup> November, 1949 before putting the motion for passing of the Constitution on the floor

Democracy as a form of governance was the central plinth of the constitutional scheme envisaged by the framers of the Constitution of India. The ultimate aim, as evidenced in the Constituent Assembly debates and gleaned from their personal writings, was the empowering of each and every Indian citizen to become a stakeholder in the political process. To this end, the citizen was given the power to elect members of the Parliament and their respective State Legislative Assemblies through the exercise of their vote, a system that the framers believed would ensure that only the most worthy candidates would be elected to posts of influence and authority. Representative government, sourcing its legitimacy from the People, who were the ultimate sovereign, was thus the kernel of the democratic system envisaged by the Constitution. Over time, this has been held to be a part of the ‘basic structure’ of the Constitution, immune to amendment, with the Supreme Court of India declaring,

*“It is beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of Constitution, it is that India is a Sovereign Democratic Republic.”<sup>1</sup>*

Thus, inherent in the model of representative government based on popular sovereignty is the commitment to hold regular free and fair elections. The importance of free and fair elections stems from two factors— instrumentally, its central role in selecting the persons who will govern the people, and intrinsically, as being a legitimate expression of popular will. Stressing

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<sup>1</sup>*Indira Gandhi v. Raj Narain and Others*, 1975 Supp SCC 1, 252 para 664.

the importance of free and fair elections in a democratic polity, the Supreme Court held in *Mohinder Singh Gill v. Chief Election Commissioner*,<sup>2</sup>

*“Democracy is government by the people. It is a continual participative operation, not a cataclysmic periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions... It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more.”*

To ensure free and fair elections, and give impetus to the vision of the framers, Parliament enacted The Representation of the People Act, 1951 (hereinafter ‘RPA’) which *inter alia* provides qualifications and disqualifications for membership of Parliament and State Legislatures, lays down corrupt practices that are punishable by law, creates other offences in connection with such elections and for the resolution of disputes arising out of or in connection with them. The underlying rationale for the legislation is thus to create a systemic framework conducive to free and fair elections. Implicit in this framework is the need to prescribe certain qualifications and disqualifications, which are deemed to be respectively essential or unsuitable for holders of public office.

It is a truism that criminal elements of society, i.e. those accused of breaking the laws that their predecessors have given the force of law, and which they are themselves entrusted with enforcing being MPs and MLAs, would be antithetical to the vision of the framers, the nature of Indian democracy and the rule of law. The Supreme Court held as such in *K Prabhakaran v. P Jayarajan*<sup>3</sup> where it said,

*“Those who break the law should not make the law. Generally speaking the purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent persons with criminal background from entering into politics and the house – a powerful wing of governance. Persons with criminal background do pollute the process of election as they do not have many a holds barred (sic) and have no reservation from indulging into criminality to win success at an election.”*

DrRajendra Prasad, in his concluding address to the Constituent Assembly categorically said,

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<sup>2</sup>(1978) 1 SCC 405, 424 at para 23.

<sup>3</sup> (2005) 1 SCC 754, 780 para 54.

*“A law giver requires intellectual equipment but even more than that capacity to take a balanced view of things to act independently and above all to be true to those fundamental things of life – in one word – to have character.”*<sup>4</sup>

A three Judge Bench of the Supreme Court in *Centre for Public Interest Litigation v. Union of India*<sup>5</sup>(the “CVC case”) raised the standards of qualification for appointment to a public office. Holding it imperative for the members to uphold and preserve the integrity of the ‘institution’, it was laid down that not the desirability of the candidate alone but the “institutional integrity” of the office which should be the reigning consideration in appointments to a public office. The spirit of this judgment, applicable to all public offices, is that it is not only imperative for the candidate for such office to have the highest standards of integrity, but independently that the integrity of the institution must be preserved. Having criminal elements in politics, no matter whether they are convicted or not, indubitably tarnishes the latter, if not the former as well.

## **B. THE EXTENT OF CRIMINALISATION IN POLITICS**

Despite the best intentions of the drafters of the Constitution and the Members of Parliament at the onset of the Indian Republic, the fear of a nexus between crime and politics was widely expressed from the first general election itself in 1952. In fact, as far back as in 1922, Mr C. Rajagopalachari had anticipated the present state of affairs twenty five years before Independence, when he wrote in his prison diary: *“Elections and their corruption, injustice and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us...”*<sup>6</sup>

Interestingly, observers have noted that the nature of this nexus changed in the 1970s. Instead of politicians having suspected links to criminal networks, as was the case earlier, it was persons with extensive criminal backgrounds who began entering politics.<sup>7</sup> This was confirmed in the Vohra Committee Report in 1993, and again in 2002 in the report of the National Commission to Review the Working of the Constitution (NCRWC). The Vohra Committee report pointed to the rapid growth of criminal networks that had in turn developed an elaborate system of contact with bureaucrats, politicians and media persons.<sup>8</sup> A Consultation Paper published by the NCRWC in 2002 went further to say that criminals

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<sup>4</sup> Vol. XI, C.A.D. (November 26<sup>th</sup>, 1949).

<sup>5</sup> (2011) 4 SCC 1.

<sup>6</sup> Per C Rajagopalachari in Kishor Gandhi, *India's Date with Destiny: Ranbir Singh Chowdhary Felicitation Volume*, 1<sup>st</sup> Ed. (Allied Publishers, 2006) 133.

<sup>7</sup> Milan Vaishnav, ‘The Market for Criminality: Money, Muscles and Elections in India’ (2010) <<http://casi.sas.upenn.edu/system/files/Market+for+Criminality++Aug+2011.pdf>> accessed 14 January 2014.

<sup>8</sup> Government of India, ‘Vohra Committee Report on Criminalisation of Politics, Ministry of Home Affairs’ (1993) < <http://indiapolicy.org/clearinghouse/notes/vohra-rep.doc>> accessed 13 January, 2014.

were now seeking direct access to power by becoming legislators and ministers themselves.<sup>9</sup>

Since the judgment of the Supreme Court in *Union of India v. Association for Democratic Reforms*,<sup>10</sup> which made the analysis of criminal records of candidates possible by requiring such records to be disclosed by way of affidavit, the public has had a chance to quantitatively assess the validity of such observations made in the previous reports. The result of such analysis leads to considerable concern.

In the ten years since 2004, 18% of candidates contesting either National or State elections have criminal cases pending against them (11,063 out of 62,847). In 5,253 or almost half of these cases (8.4% of the total candidates analysed), the charges are of serious criminal offences that include murder, attempt to murder, rape, crimes against women, cases under the Prevention of Corruption Act, 1988, or under the Maharashtra Control of Organised Crime Act, 1999 which on conviction would result in five years or more of jail, etc. 152 candidates had 10 or more serious cases pending, 14 candidates had 40 or more such cases and 5 candidates had 50 or more cases against them.<sup>11</sup>

The 5,253 candidates with serious cases together had 13,984 serious charges against them. Of these charges, 31% were cases of murder and other murder related offences, 4% were cases of rape and offences against women, 7% related to kidnapping and abduction, 7% related to robbery and dacoity, 14% related to forgery and counterfeiting including of government seals and 5% related to breaking the law during elections.<sup>12</sup>

Criminal backgrounds are not limited to contesting candidates, but are found among winners as well. Of these 5,253 candidates with serious criminal charges against them, 1,187 went on to winning the elections they contested i.e. 13.5% of the 8,882 winners analysed from 2004 to 2013. Overall, including both serious and non-serious charges, 2,497 (28.4% of the winners) had 9,993 pending criminal cases against them.

In the current Lok Sabha, 30% or 162 sitting MPs have criminal cases pending against them, of which about half i.e. 76 have serious criminal cases. Further, the prevalence of

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<sup>9</sup> National Commission to Review the Working of the Constitution, 'A Consultation Paper on Review of the Working of Political Parties Specially in Relation to Elections and Reform Options' (2002) <<http://lawmin.nic.in/ncrwc/finalreport/v2b1-8.htm>> accessed 13 January, 2014.

<sup>10</sup> (2002) 5 SCC 294.

<sup>11</sup> Association for Democratic Reforms, 'Press Release - Ten Years of Election Watch: Comprehensive Reports on Elections, Crime and Money' (2013) 1, <[http://adrindia.org/sites/default/files/Press%20Note%20-%20Ten%20Years%20of%20Elections,%20Crime%20and%20Money\\_0.pdf](http://adrindia.org/sites/default/files/Press%20Note%20-%20Ten%20Years%20of%20Elections,%20Crime%20and%20Money_0.pdf)> accessed 14 January, 2014  
TrilochanSastry, 'Towards Decriminalisation of Elections and Politics', *Economic & Political Weekly*, 4 January, 2014.

<sup>12</sup>TrilochanSastry, 'Towards Decriminalisation of Elections and Politics', *Economic & Political Weekly*, 4 January, 2014.

MPs with criminal cases pending has increased over time. In 2004, 24% of Lok Sabha MPs had criminal cases pending, which increased to 30% in the 2009 elections.<sup>13</sup>

The situation is similar across states with 31% or 1,258 out of 4,032 sitting MLAs with pending cases, with again about half being serious cases.<sup>14</sup> Some states have a much higher percentage of MLAs with criminal records: in Uttar Pradesh, 47% of MLAs have criminal cases pending.<sup>15</sup> A number of MPs and MLAs have been accused of multiple counts of criminal charges. In a constituency of Uttar Pradesh, for example, the MLA has 36 criminal cases pending including 14 cases related to murder.<sup>16</sup>

From this data it is clear that about one-third of elected candidates at the Parliament and State Assembly levels in India have some form of criminal taint. Data elsewhere suggests that one-fifth of MLAs have pending cases which have proceeded to the stage of charges being framed against them by a court at the time of their election.<sup>17</sup> Even more disturbing is the finding that the percentage of winners with criminal cases pending is higher than the percentage of candidates without such backgrounds. While only 12% of candidates with a “clean” record win on average, 23% of candidates with some kind of criminal record win. This means that candidates charged with a crime actually fare better at elections than ‘clean’ candidates. Probably as a result, candidates with criminal cases against them tend to be given tickets a second time.<sup>18</sup> Not only do political parties select candidates with criminal backgrounds, there is evidence to suggest that untainted representatives later become involved in criminal activities.<sup>19</sup> The incidence of criminalisation of politics is thus pervasive making its remediation an urgent need.

### **C. THE ROLE OF POLITICAL PARTIES**

Political parties are a central institution of our democracy; “*the life blood of the entire constitutional scheme.*”<sup>20</sup> Political parties act as a conduit through which interests and issues of the people get represented in Parliament. Since political parties play a central role

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<sup>13</sup> Association for Democratic Reforms, ‘National Level Analysis of Lok Sabha 2009 Elections’ (2009) <[http://adrindia.org/sites/default/files/0.9%20final%20report%20\\_%20lok%20sabha%202009.pdf](http://adrindia.org/sites/default/files/0.9%20final%20report%20_%20lok%20sabha%202009.pdf)> accessed 13 January, 2014.

<sup>14</sup> ADR, (n.11).

<sup>15</sup> Association for Democratic Reforms, ‘Press Release – Analysis of Criminal, Financial and other details on Newly Elected MLAs of the Uttar Pradesh Assembly Elections, 2012’, (2012) <<http://adrindia.org/download/file/fid/2668>> accessed 13 January, 2014

<sup>16</sup> *Id*

<sup>17</sup> Vaishnav, (n.7), 10

<sup>18</sup> Sastry(n.12), 3

<sup>19</sup> Christophe Jaffrelot, ‘Indian Democracy: The Rule of Law on Trial’(2002) 1(1) *India Review* 77

<sup>20</sup> *Subhash Chandra Agarwal v. Indian National Congress and Others*, [2013] CIC 8047 <[http://www.rti.india.gov.in/cic\\_decisions/CIC\\_SM\\_C\\_2011\\_000838\\_M\\_111223.pdf](http://www.rti.india.gov.in/cic_decisions/CIC_SM_C_2011_000838_M_111223.pdf)> accessed on February 4, 2014

in the interface between private citizens and public life, they have also been chiefly responsible for the growing criminalisation of politics.

Several observers offer explanations of why parties may choose candidates with a tainted background. As discussed above, studies show that candidates with criminal records have fared better in elections and that criminals seem to have an electoral advantage.<sup>21</sup> Since electoral politics is a combination of several factors, often issues like ethnicity or other markers of the candidate may overcome the reputational loss he suffers from the criminal records.

Further, electoral politics is largely dependent on the money and the funding that it receives. Several studies by economists estimate that candidates and parties in the 2009 general elections alone spent roughly \$3 billion on campaign expenditures.<sup>22</sup> Huge election expenses have also resulted into large-scale pervasiveness of so-called 'black money'.<sup>23</sup> The Law Commission has earlier also expressed the concern of election expenses being far greater than legal limits.<sup>24</sup> Therefore, campaign funding is one of the most important concerns for political parties. Since candidates with criminal records often possess greater wealth, the negative effect of the stigma of criminal charges can be overcome by greater campaigning resources.<sup>25</sup> Thus, even if a candidate has any criminal record, he may fare well in elections due to the positive effect of the other markers. Thus, overall a candidate with a criminal record can prove beneficial to political parties in several ways. Not only does he ensure greater inflow in money, labour and other advantages that may help a party in successful campaign, but also possess greater 'winnability'.<sup>26</sup> Many studies have consequently highlighted the direct relationship between the membership of local criminals and inflow of money into the coffers of political parties.<sup>27</sup> This is dealt with in detail later in the report.

Further, candidate selection procedure is another factor for parties declaring candidates with criminal records. Since political parties in India largely lack intra-party democracy and the decisions on candidature are largely taken by the elite leadership of the party, the politicians with criminal records often escape the scrutiny by local workers and organisation of the party.<sup>28</sup>

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<sup>21</sup>B. Dutta & P. Gupta, 'How Do Indian Voters Respond to Candidates with Criminal Charges: Evidence from the 2009 Lok Sabha Election' (MPRA Paper Series 38417, 2012)

<sup>22</sup> Timmons, Heather and Hari Kumar, 'India's National Election Spreads Billions Around', THE NEW YORK TIMES (May 14, 2009).

<sup>23</sup>*Background Report on Electoral Reforms*, Ministry of Law and Justice (2010).

<sup>24</sup>Background Report (n.23)

<sup>25</sup> Dutta & Gupta, (n.21).

<sup>26</sup>Dutta & Gupta, (n.21).

<sup>27</sup>Vaishnav, (n.7).

<sup>28</sup>Vaishnav, (n.7).

Thus, the crime-politics nexus demands a range of solutions much broader than disqualification or any other sanctions on elected representatives. It requires careful legal insight into the functioning of the political parties and regulating the internal affairs of parties. This report will also suggest the reforms for regulating the organisational posts of political parties.

The Law Commission of India, in its 170<sup>th</sup> report quoted in *Subhash Chandra Agarwal*,<sup>29</sup> by the Central Information Commission (“CIC”) has made certain observations which are very pertinent to describing the position of political parties in our democracy:

*“It is the Political Parties that form the Government, man the Parliament and run the governance of the country. It is therefore, necessary to introduce internal democracy, financial transparency and accountability in the working of the Political Parties. A political party which does not respect democratic principles in its internal working cannot be expected to respect those principles in the governance of the country. It cannot be dictatorship internally and democratic in its functioning outside”.*<sup>30</sup>

Additionally, under Section 29A(5) of the Representation of People Act, 1951, which currently regulates the functioning of political parties, the political parties are required to bear “true faith” and “allegiance to the Constitution” of India as by law established.<sup>31</sup> Further, in order to reach to the conclusion that political parties are public authorities, the CIC also referred to several constitutional provisions which accord rights and obligations to political parties.<sup>32</sup> Thus, political parties are not merely any other organisation, but important institutions having constitutional rights and obligations.

The NCRWC highlighted similar concerns on the functioning of political parties and recommended a separate law for regulating some of the internal affairs of political parties in order to deal with the crime-politics nexus.<sup>33</sup> It also opined that in case of conviction on a criminal charge, apart from disqualification of the representative, a political party should be held responsible and be sanctioned in some way, for example, by de-recognition of the party.

Though the RPA disqualifies a sitting legislator or a candidate on certain grounds, there is nothing regulating the appointments to *offices within the organisation* of the party. Political parties play a central role in Indian democracy. Therefore, a politician may be disqualified from being a legislator, but may continue to hold high positions within his

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<sup>29</sup>*Subhash Chandra Agarwal* (n. 20).

<sup>30</sup> “Reform of Electoral Laws”, 170<sup>th</sup> Report of the Law Commission of India, 1999.

<sup>31</sup> Sec. 29A(5), The Representation of People Act, 1951.

<sup>32</sup> Schedule X, The Constitution of India, 1951.

<sup>33</sup> Chapter 4, Vol. I, ‘National Commission to Review the Working of the Indian Constitution’ at <<http://lawmin.nic.in/ncrwc/finalreport/volume1.htm>> accessed February, 4, 2014.

party, thus also continuing to play an important public role which he has been deemed unfit for by the law. Convicted politicians may continue to influence law-making by controlling the party and fielding proxy candidates in legislature. In a democracy essentially based on parties being controlled by a high-command, the process of breaking crime-politics nexus extends much beyond purity of legislators and encompasses purity of political parties as well.

Thus any reform proposal must include relevant recommendations for political parties since the need for reform is crucial in this context as well. It is suggested that political parties should refrain from appointing or allowing a person to continue holding any office within the party organisation if the person has been deemed to lack the qualities necessary to be a public official. Therefore, the legal disqualifications that prevent a person from holding office outside a party should operate within the party as well. For holistic reform, this recommendation must be taken into account. This is to be dealt with in a detailed manner in the report to be submitted to the Government of India on all issues relating to the Consultation Paper.

#### **D. EXISTING LEGAL FRAMEWORK**

Legally, the prevention of the entry of criminals into politics is accomplished by prescribing certain disqualifications that will prevent a person from contesting elections or occupying a seat in Parliament or an Assembly. Qualifications of members of Parliament are listed in Article 84 of the Constitution, while disqualifications can be found under Article 102. Corresponding provisions for members of State Legislative Assemblies are found in Articles 173 and 191.

Article 102 states that a person shall be disqualified from being chosen, and from being a member of either House of Parliament if he holds an office of profit, if he is of unsound mind and so declared by a competent court, if he is an undischarged insolvent, if he is not a citizen of India and if he is disqualified by any other law made by Parliament.

Parliament through the RPA has prescribed further qualifications and disqualifications for membership to Parliament or to a Legislative Assembly. Section 8 of the Act lists certain offences which, if a person is convicted of any of them, disqualifies him from being elected, or continuing as, a Member of Parliament or Legislative Assembly. Specifically, Section 8(1) lists a number of offences, convictions under which disqualify the candidate irrespective of the quantum of sentence or fine – these include certain electoral offences, offences under the Foreign Exchange Regulation Act, 1973, the Narcotics Drugs and Psychotropic Substances Act, 1985 the Prevention of Corruption Act, 1988 etc. Section 8(2) lists other offences, convictions under which would only result in disqualification if imprisonment is for six months or more. Section 8(3) is a residuary provision under which if a candidate is convicted of any

offence and imprisoned for two years or more, he is disqualified.<sup>34</sup> Disqualification operates from the date of conviction and continues for a further period of six years from the date of release.

The scheme of disqualification upon conviction laid down by the RPA clearly upholds the principle that a person who has conducted criminal activities of a certain nature is unfit to be a representative of the people. The criminal activities that result in disqualification irrespective of punishment under S. 8(1) are either related to public office, such as electoral offences or insulting the national flag, or are of grave nature, such as offences under terrorism laws. S. 8(3), on the other hand, envisages that any offence for which the minimum punishment is two years is of a character serious enough to merit disqualification. In either case, it is clear that the RPA lays down that the commission of serious criminal offences renders a person ineligible to stand for elections or continue as a representative of the people. Such a restriction, it was envisaged, would provide the statutory deterrent necessary to prevent criminal elements from holding public office, thereby preserving the probity of representative government.

However, it is clear from the above account of the spread of criminalisation in politics that the purpose behind S. 8 of the RPA is not being served. The consequences of such criminalisation and the possible reform measures that may be considered shall be discussed in the following chapters.

With respect to the filing of affidavits by candidates, a candidate to any National or State Assembly elections is required to furnish an affidavit, in the shape of Form 26 appended to the Conduct of Election Rules, 1961, containing information regarding their assets, liabilities, educational qualifications, criminal convictions against them that have not resulted in disqualification, and cases in which criminal charges are framed against them for any offence punishable with two years or more.

Failure to furnish this information, concealment of information or giving of false information is an offence under S. 125A of the RPA. However, the sentence under S. 125A is only imprisonment for a period of 6 months, and the offence is not listed under S. 8(1) or (2) of the RPA. Therefore, conviction under S. 125A does not result in disqualification of the candidate. Neither is the offence of false disclosure listed as a corrupt practice which would be a ground for setting aside an election under Section 100.

Therefore, there is currently little consequence for the offence of filing a false affidavit, as a result of which the practice is rampant.

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<sup>34</sup>Section 8(4), which existed previously, was struck down by the Supreme Court in *Lily Thomas v. Union of India*, (2013) 7 SCC 653.

## **E. SUPREME COURT JUDGMENTS INTERPRETING THIS FRAMEWORK**

The judiciary has sought to curb this menace of criminalisation of politics through several seminal judgments and attendant directions to the government and the Election Commission primarily based on the aforesaid provisions. Specifically, orders of the Supreme Court seeking to engender a cleaner polity can be classified into three types: *first*, decisions that introduce transparency into the electoral process; *second*, those that foster greater accountability for holders of public office; *third*, judgments that seek to stamp out corruption in public life. The discussion below is not meant to be an exhaustive account; it merely illustrates the trends in Supreme Court jurisprudence relating to the question of de-criminalisation of politics.

In *Union of India v. Association for Democratic Reforms*<sup>35</sup> (hereinafter 'ADR') the Supreme Court directed the Election Commission to call for certain information on affidavit of each candidate contesting for Parliamentary or State elections. Particularly relevant to the question of criminalisation, it mandated that such information includes whether the candidate is convicted/acquitted/discharged of any criminal offence in the past, and if convicted, the quantum of punishment; and whether prior to six months of filing of nomination, the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by a court. The constitutional justification for such a direction was the fundamental right of electors to know the antecedents of the candidates who are contesting for public office. Such right to know, the Court held is a salient facet, and the foundation for the meaningful exercise of the freedom of speech and expression guaranteed to all citizens under Article 19(1)(a) of the Constitution.

Again in *People's Union for Civil Liberties v. Union of India*<sup>36</sup> (hereinafter 'PUCL') the Supreme Court struck down Section 33B of the Representation of People (Third Amendment) Act, 2002 which sought to limit the ambit of operation of the earlier Supreme Court order in the ADR case. Specifically it provided that only the information that was required to be disclosed under the Amendment Act would have to be furnished by candidates and not pursuant to any other order or direction. This meant, in practical terms, that the assets and liabilities, educational qualifications and the cases in which he is acquitted or discharged of criminal offences would not have to be disclosed. Striking this down, the Court held that the provision nullified the previous order of the Court, infringed the right of electors' to know, a constituent of the fundamental right to free speech and expression and hindered free and fair elections which is part of the basic structure of the Constitution. It is pursuant to these two orders that criminal antecedents of all candidates in elections are a matter of public record, allowing voters to make an informed choice.

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<sup>35</sup> (2002) 5 SCC 294.

<sup>36</sup> (2003) 2 SCC 549.

At the same time, the Supreme Court has also sought to foster greater accountability for those holding elected office. In *Lily Thomas v. Union of India*<sup>37</sup> the Court held that Section 8(4) of the RPA, which allows MPs and MLAs who are convicted while serving as members to continue in office till an appeal against such conviction is disposed of, is unconstitutional. Two justifications were offered — first, Parliament does not have the competence to provide different grounds for disqualification of applicants for membership and sitting members; second, deferring the date from which disqualification commences is unconstitutional in light of Articles 101(3) and 190(3) of our Constitution, which mandate that the seat of a member will become vacant automatically on disqualification.

Again in *People's Union for Civil Liberties v. Union of India*<sup>38</sup> (hereinafter 'NOTA'), the court held that the provisions of the Conduct of Election Rules, 1961, which require mandatory disclosure of a person's identity in case he intends to register a no-vote, is unconstitutional for being violative of his freedom of expression, which includes his right to freely choose a candidate or reject all candidates, arbitrary given that no analogous requirement of disclosure exists when a positive vote is registered, and illegal given its patent violation of the need for secrecy in elections provided in the RPA and widely recognised as crucial for free and fair elections. Thus by allowing voters to express their dissatisfaction with candidates from their constituency for any reason whatsoever, the Supreme Court order has a significant impact in fostering greater accountability for incumbent office-holders. When its impact is combined with the decision in *Lily Thomas*, it is clear that the net effect of these judgments is to make it more onerous for criminal elements entrenched in Parliament from continuing in their positions.

*Third*, the Supreme Court has taken several steps for institutional reform to sever the connection between crime and politics. In *Vineet Narain v. Union of India*<sup>39</sup> a case concerning the inertia of the Central Bureau of Investigation (CBI) in investigating matters arising out of certain seized documents known as the 'Jain diaries' which disclosed a nexus between politicians, bureaucrats and criminals, who were recipients of money from unlawful sources, the Supreme Court used the power of continuing *mandamus* to direct large-scale institutional reform in the vigilance and investigation apparatus in the country. It directed the Government of India to grant statutory status to the Central Vigilance Commission (CVC), laid down the conditions necessary for the independent functioning of the CBI, specified a selection process for the Director, Enforcement Directorate (ED), called for the creation of an independent prosecuting agency and a high-powered nodal agency to co-ordinate action in cases where a politico-bureaucrat-criminal nexus became apparent. These steps thus mandated a complete overhaul of the investigation and prosecution of criminal cases involving holders of public office.

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<sup>37</sup> (2013) 7 SCC 653.

<sup>38</sup> (2013) 10 SCC 1.

<sup>39</sup> (1998) 1 SCC 226.

Addressing the problem of delays in obtaining sanctions for prosecuting public servants in corruption cases, *Vineet Narain* also set down a time limit of three months for grant of such sanction. This directive was endorsed by the Supreme Court in *Subramaniam Swamy v. Manmohan Singh*,<sup>40</sup> where the Court went on to suggest the restructuring of Section 19 of the Prevention of Corruption Act such that sanction for prosecution will be *deemed* to have been granted by the concerned authority at the expiry of the extended time limit of four months. In these and other cases,<sup>41</sup> the Supreme Court has attempted to facilitate the prosecution of criminal activity, specifically corruption, in the sphere of governance.

The Supreme Court, through its interpretation of statutory provisions connected with elections as well as creative use of its power to enforce fundamental rights, has made great strides towards ensuring a cleaner polity, setting up significant barriers to entry to public office for criminal elements as well as instituting workable mechanisms to remove them from office if they are already in power. The Commission appreciates that these decisions demonstrate the need for the law itself to be reformed on a dynamic basis taking cognizance of latest developments. The same view is echoed by the several committees and commissions in the past which have recommended fundamental changes to laws governing electoral practices and disqualifications. A brief survey of such reports is undertaken in the section below.

## **F. PREVIOUS REPORTS RECOMMENDING REFORMS**

The issue of electoral reforms has been the concern of several Commissions and Committees previously. This part surveys the key findings and recommendations of these bodies with a view to incorporating relevant suggestions in this Report.

In the year 1999, Law Commission in its 170<sup>th</sup> report recommended the addition of Section 8B in the RPA. This section included certain offences (electoral offences, offences having a bearing upon the elections viz. S. 153A, 505 of IPC and serious offences punishable by death or life imprisonment), *framing of charges* with respect thereto was sufficient to disqualify a person from contesting elections. The proposed provision further stipulated the disqualification to last for a period of five years from the framing of charges or till acquittal whichever event happens earlier. It also recommended mandatory disclosure of such (and other) information with the nomination paper under Section 4A in the RPA. This suggestion has already been incorporated by inserting Section 33A in RPA with effect from 24 August 2002.

The National Commission to Review of the Working of the Constitution (2002) also maintained the yardstick for disqualification as *framing of charges* for certain offences (punishable with maximum imprisonment of five years or more). There were however certain modifications in its recommendations. *First*, the Commission proposed that this disqualification

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<sup>40</sup>(2012) 3 SCC 65.

<sup>41</sup>See, for example, *V.S. Achuthanandan v. R. Balakrishna Pillai*, (2011) 3 SCC 317 on the issue of delay in trial of corruption cases involving public servants.

would apply from one year after the date of framing of charges and if not cleared within that period, continue till the conclusion of trial. *Secondly*, in case the person is *convicted* of any offence by a court of law and sentenced to imprisonment of six months or more, the period of disqualification would apply during the period of sentence and continue for six years thereafter. *Thirdly*, in case a person is *convicted* of heinous offences, it recommended a permanent bar from contesting any political office. *Fourthly*, it recommended that Special Courts be set up at the level of the High Courts (with direct appeal to the Supreme Court) to assess the legality of charges framed against potential candidates and dispose of the cases in a strict time frame. *Finally*, it recommended de-registration and de-recognition of political parties, which knowingly fielded candidates with criminal antecedents.

The Election Commission of India has also made several recommendations from time to time to reform election law. In August, 1997, it mandated filing of affidavits disclosing conviction in cases covered under Section 8 of the RPA. In September 1997, the Commission in a letter addressed to the Prime Minister recommended amendment to Section 8 of RPA, to disqualify any person who is convicted and sentenced to imprisonment for six months or more, from contesting elections for a period totalling the sentence imposed plus an additional six years. In 1998, the Commission reiterated its above suggestion besides recommending that any person against whom *charges are framed* for an offence punishable by imprisonment of five years or more should be disqualified. The Commission admitted that in the eyes of law a person is presumed to be innocent unless proved guilty; nevertheless it submitted that the Parliament and State Legislatures are apex law-making bodies and must be composed of persons of integrity and probity who enjoy high reputation in the eyes of general public, which a person who is accused of a serious offence does not. Further, on the question of disqualification on the ground of corrupt practice, the Commission supported the continuation of its power to decide the term of disqualification of every accused person as uniform criteria cannot be applied to myriad cases of corruption- ranging from petty to grand corruption.

Further, taking note of the inordinate delays involved in deciding questions of disqualification on the ground of corrupt practice, the Commission recommended that the Election Commission should hold a judicial hearing in this regard immediately after the receipt of the judgment from the High Court and tender its opinion to the President instead of following the circuitous route as prevalent then. Recommendations to curb criminalisation of politics were made again in the year 2004. It reiterated its earlier view of disqualifying persons from contesting elections on *framing of charges* with respect to offences punishable by imprisonment for five years or more. Such charges, however, must have been framed six months prior to the elections. It also suggested that persons found guilty by a Commission of Enquiry should also stand disqualified from contesting elections. Further, the Commission suggested streamlining of all the information to be furnished by way of affidavits in one form by amending Form 26 of the Conduct of Election Rules, 1961. It also recommended the addition of a column for furnishing the annual detailed income of the candidate for tax purpose and his profession in the said form.

To tackle the menace of wilful concealment of information or furnishing of false information and to protect the right to information of the electors, the Commission recommended that the punishment under Section 125A of RPA must be made more stringent by providing for imprisonment of a minimum term of two years and by doing away with the alternative clause for fine. Additionally, conviction under Section 125A RPA should be made a part of Section 8(1)(i) of the Representation of People Act, 1950.

The Second Administrative Reforms Commission in its fourth report on Ethics in Governance (2008) deliberated upon the fallouts of disqualifying candidates on various grounds. It recommended that Section 8 of RPA needed to be amended to disqualify all persons facing charges related to grave and heinous offences (viz. murder, abduction, rape, dacoity, waging war against India, organised crime, and narcotics offences) and corruption, where charges have been framed six months before the election. It also supported the proposal of including filing of false affidavits as an electoral offence under Section 31 of Representation of the People Act, 1950 as recommended by the Election Commission in the year 1998.

Recently the Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013) proposed insertion of a Schedule 1 to the Representation of People Act, 1951 enumerating offences under IPC befitting the category of 'heinous' offences. It recommended that Section 8(1) of the RP Act be amended to cover inter alia the offences listed in the proposed Schedule 1. It would then provide that a person in respect of whose acts or omissions a court of competent jurisdiction has taken cognizance under section 190(1)(a),(b) or (c) of the CrPC or who has been convicted by a court of competent jurisdiction with respect to the offences specified in the proposed expanded list of offences under Section 8(1) shall be disqualified from the date of taking cognizance or conviction as the case may be. It further proposed that disqualification in case of conviction shall continue for a further period of six years from the date of release upon conviction and in case of acquittal, the disqualification shall operate from the date of taking cognizance till the date of acquittal.

The Committee further recommended that the Election Commission must impose a duty forthwith on all candidates against whom charges are pending, to give progress reports in their criminal cases every three months. Further it recommended that in case of conviction under Section 125A of the RPA, disqualification must ensue to render the seat vacant. Moreover, the Commission suggested amendment to the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 to allow a deeper investigation of assets and liabilities declared at the time of filing a nomination paper or, as soon as may be practical thereafter. It recommended the scrutiny of assets and liabilities of each successful candidate, if not all contesting the elections to the Parliament and State Legislature by the CAG.

The elaborately researched and clearly articulated reports of the committees and commissions in the past have greatly informed our recommendations made in this report. Primarily, the reports are testimony to the need for a change in the law, a need which was felt as early as

1999. This, when seen in the context of the data demonstrating the growing prevalence of criminalisation of politics, Supreme Court judgments responding to this growth, the recalcitrance of political parties to take decisive action to prevent it and compared to the overarching democratic and constitutional need for free and fair elections, makes reform of the law not only imperative but an urgent necessity. The contours of such reform relating to the two questions referred to the Law Commission by the Supreme Court are dealt with in turn below.

## V. **DISQUALIFICATION AT THE STAGE OF FRAMING OF CHARGES**

### A. **RATIONALE**

At the outset, the question that needs to be considered is whether disqualification should continue to be triggered only at the stage of conviction as is currently the case under Section 8 of the RPA. As detailed below, the current law suffers from three main problems: the rate of convictions among sitting MPs and MLAs is extremely low, trials of such persons are subject to long delays, and the law does not provide adequate deterrence to political parties granting tickets to persons of criminal backgrounds. This has resulted in a massive increase in the presence of criminal elements in politics, which affects our democracy in very evident ways.

#### (i) *Low Rates of Conviction*

The proportion of sitting MPs and MLAs facing some form of criminal proceedings is at around 30% - 1,460 out of 4,807 legislators face some kind of criminal charge. By contrast, only 24 out of the 4,807 or 0.5% have been convicted at some point of criminal charges in a court of law.<sup>42</sup>

Among all candidates, the percentage is even lower, at 0.3% having declared that they have faced convictions in a court of law. 155 out of 47,389 candidates have faced convictions, although 8,041 candidates have criminal cases pending.

Even taking into account the suppression of data by candidates, it is clear that there is an extremely wide gap between legislators with trials pending and those whose trials have actually resulted in convictions. Further, while 24 legislators have declared convictions, the number disqualified as a result of convictions is even lower, as not all convictions result in disqualification. Following the *Lily Thomas* judgment<sup>43</sup> only 3 legislators were disqualified as a result of convictions. In contrast with the number of pending cases against legislators, the number of convicted MPs and MLAs continues to be an extremely low figure, indicating a need for a change in the law.

#### (ii) *Delays in trials*

The problem of delays in the judicial system in India has been extensively studied and discussed from a number of perspectives. While in the case of criminal trials the chief concern is mainly for under-trial prisoners, delays in trials of politically influential persons like MPs and MLAs pose a different set of challenges. In such cases, with delay, there is an ever-increasing chance that the accused will be in a position to compromise the trial process, distort

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<sup>42</sup> This number represents convictions that does not result in disqualification under Section 8 of the Representation of the People Act, 1951. Association for Democratic Reforms, 'Comparison of pending cases and convictions declared by elected representatives', (2013) <http://adrindia.org/content/comparison-pending-cases-and-convictions-declared-elected-representatives> accessed on February 4, 2014.

<sup>43</sup> *Lily Thomas v. Union of India*, (2013) 7 SCC 653.

evidence, and delay proceedings further. Delays are also caused by prolonged absence from court proceedings by influential persons, where the police do not enforce their presence.<sup>44</sup>

The issue of delays in trials of influential public personalities have been recognized and tackled by the Law Commission in its 239<sup>th</sup> report submitted to the Supreme Court in the case of *Virender Kumar Ohri v. Union of India*<sup>45</sup>. The Supreme Court has also remarked on this issue in *Ganesh Narayan v. Bangarappa*<sup>46</sup>, saying “*the slow motion becomes much slower motion when politically powerful or high and influential persons figure as accused*”. Due to such tactics, delays are thought to be directly related to low rates of convictions in the country.

Ample evidence of this may be gathered from a perusal of affidavits submitted by candidates during elections – a sample of twenty affidavits from the 2009 Lok Sabha elections where criminal charges were pending revealed that over half of these had charges pending for more than six years, some pending for over two decades.<sup>47</sup>

As a result, the safeguard provided in the RPA against convicted criminals acting as representatives does not operate effectively, due to the low numbers of convictions and the high levels of delay.

(iii) **Lack of adequate deterrence**

Given the low levels of convictions of MPs and MLAs, and the lack of consequences for pending criminal charges, political parties are not deterred from continuing to hand out party tickets to persons with criminal backgrounds. In fact, as pointed out earlier, data suggests that a criminal background, rather than being a disadvantage for a political career, seems to operate as a benefit. One researcher, having analysed available affidavit data, has come to the conclusion that candidates charged with a crime have a 2:1 chance of winning the election over candidates with no criminal backgrounds.<sup>48</sup> This means that political parties liberally and repeatedly hand out tickets to criminally charged candidates - 74% of candidates with criminal background have re-contested elections in the last ten years.<sup>49</sup>

The explanation for the success of criminally tainted candidates in elections lies in their financial assets as discussed earlier in Chapter IV. To briefly recapitulate, there is a strong positive correlation between a candidate’s criminal status and his level of wealth.<sup>50</sup> While an average legislator’s wealth stands at Rs. 3.83 crores, it rises to Rs. 4.30 crores for

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<sup>44</sup> Law Commission of India, *Expedition Investigation and Trial of Criminal Cases Against Influential Public Personalities*, Report No.239 (2012) <<http://lawcommissionofindia.nic.in/reports/report239.pdf>> accessed February 2<sup>nd</sup>, 2014.

<sup>45</sup> Writ Petition (Civil) No. 341 of 2004.

<sup>46</sup> (1995) 4 SCC 41.

<sup>47</sup> Law Commission of India, *Links to Candidate Affidavits*, <[http://eci.nic.in/eci\\_main1/LinktoAffidavits.aspx](http://eci.nic.in/eci_main1/LinktoAffidavits.aspx)> accessed February 19<sup>th</sup>, 2014

<sup>48</sup> Milan Vaishnav, (n.7).

<sup>49</sup> Association for Democratic Reforms (n.11).

<sup>50</sup> Milan Vaishnav, (n.7).

candidates with criminal backgrounds and to Rs. 4.38 crores for candidates with serious criminal backgrounds.<sup>51</sup> Wealthier candidates, particularly those able to raise more assets, can fund their own elections and raise further capital for the political party in question. Candidates with criminal backgrounds fit well into this profile, as they can raise funds through various illegal means that are then funnelled into politics and elections. It thus appears that the soaring cost of elections, opaque processes of candidate selection, and the ability of criminal elements to raise and provide funding are the major reasons for the widespread and persistent connections between crime and politics.

It is clear from this data that, the way the law currently operates poses little threat to political parties wishing to give tickets to tainted persons. On the contrary, the current situation actually incentivizes political parties to increase among their ranks persons with criminal backgrounds, because of their financial muscle. Therefore, a reduction in the prevalence of crime in politics will not take place unless the law is changed such that political parties face a disincentive when they foster persons of criminal backgrounds within the party.

(iv) *Negative effects on democracy*

The increasing presence of persons with criminal backgrounds has several negative effects on the quality of democracy in the country. *First*, enormous amounts of illegal money are pumped into the electoral process due to extensive links with the criminal underworld. Along with the money, candidates with criminal backgrounds employ illegal tactics such as voter intimidation. Together, this distorts electoral outcomes and consequently compromises the very basis of our democracy. It also initiates a vicious cycle whereby viable candidates are required to spend increasing amounts of money in order to compete, intensifying connections with criminal elements.

*Secondly*, one of the reasons for the entrance of criminals into politics is a desire to avoid or subvert judicial proceedings through political patronage. Criminalisation of politics thus also has the consequence of obstructing the process of justice and causing further delays in trials.

The law in its present form is incapable of curbing the growing cancer of criminalisation of politics. Long delays in trials coupled with rare convictions ensure that politicians face little or no consequences when engaging in criminal activity. The law needs to evolve to meet this threat to our democracy, and to effectively curb the steady flow of criminals into the political process. The reformed law must meet two challenges - the limited deterrence posed by disqualification upon conviction, and the issue of delays in trials of influential persons that result in a subversion of the process of justice.

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<sup>51</sup> Association for Democratic Reforms, (n.11).

## **B. REFORM PROPOSAL**

### **(i) Explanation of the charging process**

The purpose of a charge in a criminal trial is to give precise information to the accused about the accusation against him. A charge serves as notice to the accused, drawn up in precise and unambiguous legal language, of the nature of the accusation the accused has to answer to in trial.<sup>52</sup>The charges should contain all particular details with respect to the manner, time, place, and persons against whom it was committed etc.<sup>53</sup>

The procedure leading up to the framing of charges is as follows. After the investigation of a case, the police may file either a charge-sheet or a closure report with the Magistrate. Upon the filing of the charge-sheet, a Magistrate may take cognizance of the offences in the charge-sheet and summon the accused. Charges are framed thereafter in accordance with Section 228 of the CrPC. The framing of charges requires the court to look into the evidence presented by the Prosecution and apply its mind to the question of what offences, if any, the accused should be charged with. The framing of charges signifies the commencement of a trial. Alternatively, the Judge may hear arguments on charge and find that no *prima facie* case against the accused is made out, upon which the accused is discharged.

### **(ii) Why disqualification may not be made operative at the stage of filing of charge-sheet**

Before examining the proposal to introduce disqualification at the stage of framing charges, it is worthwhile to consider other points during criminal prosecution where such a step may be introduced. It has been suggested that the stage of filing of charge-sheet by the police under Section 173 of the CrPC is one such stage which may result in disqualification of the accused. This section will evaluate this suggestion in more detail.

When filing a charge-sheet, the Police is simply forwarding the material collected during investigation to a competent Court of law for the Court to consider what provisions the accused should be charged under. At this stage, there is not even a remote or *prima facie* determination of guilt of the accused by a Court of law. At the stage of filing or forwarding the charge-sheet to the Court, the material which is made a part of the charge-sheet has not even tested by a competent Court of law and the Judge has clearly not applied his mind to the said material. Courts have repeatedly held that a charge-sheet does not constitute a substantive piece of evidence as it not yet tested on the anvil of cross-examination.<sup>54</sup>No rights of hearing are granted to the accused at this stage. At the stage of filing of charge-sheet, before summons are issued, the accused does not even have a copy of the charge-sheet or any connected material.

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<sup>52</sup> *VC Shukla v. State through CBI*, 1980 Cri LJ 690, 732.

<sup>53</sup> Sections 211, 212, and 213, Code of Criminal Procedure, 1973.

<sup>54</sup> *Rajnikanta Meheta v. State of Orissa*, 1976 Cr.L.J. 1674 (Ori-DB); *Jagdamba Prasad Tewari v. State of Uttar Pradesh*, 1991 Cr.L.J. 1883.

Disqualifying a person therefore, simply on the basis of something which he has had no opportunity to look into, or no knowledge of, would be against the principles of natural justice.

Disqualifying a person at this stage would mean that a person is penalized without proceedings being initiated against him. This would be tantamount to granting the judicial determination of the question of disqualification to the police, who are a prosecuting authority. At the National Consultation it was agreed by consensus that this was an inappropriate stage for disqualification of candidates for elected office.

It is also worthwhile to consider whether the stage of taking of cognizance by the Court would be an appropriate stage to introduce disqualifications. The taking of cognizance simply means taking judicial notice of an offence with a view to initiate proceedings in respect of such offence said to have been committed by someone. It is an entirely different matter from initiation of proceedings against someone; rather, it is a precondition to the initiation of proceedings.<sup>55</sup> While taking cognizance, the Court has to consider only the material put forward in the charge-sheet. It is not open for the Court at this stage to sift or appreciate the evidence and come to a conclusion that no *prima facie* case is made out for proceeding further in the matter.<sup>56</sup>

An accused does not have the right to approach the Court till cognizance is taken and summons are issued. At the stage of taking cognizance, the accused has no right to present any evidence or make any submissions. Although the accused may provide exculpatory evidence to the Police, the latter are under no obligation to include such evidence as part of the charge-sheet.

Due to the absence of an opportunity to the accused to be heard at the stage of filing of charge-sheet or taking of cognizance, and due to the lack of application of judicial mind at this stage, it is not an appropriate stage to introduce electoral disqualifications. Further, in a case supposed to be tried by the Sessions Court, it is still the Magistrate who takes cognizance. Introduction of disqualifications at this stage would mean that a Magistrate who has been deemed not competent to try the case still determines whether a person should be disqualified due to the charges filed.

Because of these reasons, it is our view that the filing of the police report under Section 173 CrPC or taking of cognizance is not an appropriate stage to introduce electoral disqualifications. A closer look will now be taken at the stage of framing of charges.

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<sup>55</sup>*S.K. Sinha, Chief Enforcement Officer v. Videocon International Ltd.*, (2008) 2 SCC 492; *State of West Bengal v. Mohammed Khalid*, (1995) 1 SCC 684.

<sup>56</sup>*Rashmi Kumar v. Mahesh Kumar Bhada*, (1997) 2 SCC 397.

(iii) Cases on framing of charges

a. **Provisions Dealing with Discharge**

There are three sets of provisions dealing with the framing of charge and discharge of an accused, depending on the type of case and the court in question— Sections 227 and 228 for trials before the Court of Session; Sections 239 and 240 in warrants cases tried by Magistrates where a police report has been filed but evidence has not been led; Sections 245 and 246 in warrants cases tried by Magistrates where no police report is filed but after the recording of evidence. This note deals primarily with the first category since most offences that are relevant for the purpose of disqualification are matters that fall within the remit of Sections 227 and 228.<sup>57</sup>

Section 227 deals with discharge of an accused at the stage when hearing is fixed to frame charges. It reads:

**“227.Discharge-** If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.”

This section is part of Chapter XVII of the Code of Criminal Procedure, 1973 (CrPC.). This part deals with “charges” and requires precise framing of charges as evidenced by several provisions under this chapter. Framing of charges *“is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.”*<sup>58</sup> Further, the words describing a charge should be interpreted *“in the sense attached to them respectively by the law under which such offence is punishable.”*<sup>59</sup> Further, the charges should also contain all particular details with respect to the manner, time, place, persons against whom it was committed etc.<sup>60</sup> Therefore, the sections construed together prove that the “framing of charges” is an important judicial step.

The requirement of precision in framing of charges is further strengthened by the Supreme Court judgements on the purposes and the role of charging stage in criminal process. The “charge” serves the purpose of *“notice or intimation to the accused, drawn up according to specific language of law, giving clear and unambiguous or precise notice of the nature of accusation”*.<sup>61</sup> Additionally, the Supreme Court has also recognized that since framing of the

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<sup>57</sup>For a distinction between the procedures for framing of charges and discharge of an accused under each of these categories, see *R S Nayak v. A R Antulay*, (1986) 1 SCC 716.

<sup>58</sup>Sec. 211 (5), Code of Criminal Procedure, 1973.

<sup>59</sup>Sec. 214, Code of Criminal Procedure, 1973.

<sup>60</sup> Sec. 211, 212, 213, Code of Criminal Procedure, 1973.

<sup>61</sup>*VC Shukla v. State Through CBI*, 1980 Cri LJ 690.

charges gravely impacts a person's liberty, the material on record should be properly considered by the court.<sup>62</sup>

**b. Nature of Enquiry under Sec. 227: Interpretation of “not sufficient ground for proceeding against the accused”**

In *A.R. Antulay*<sup>63</sup> the Supreme Court distinguished discharge under Section 239 and Section 227. In order to discharge the accused under Section 239, it has to be proved that the charge is “groundless”. However, under Section 227, mere presence of a “ground” is not enough; the “sufficiency” of the ground also has to be proved. Thus, if the charge does not contain any “sufficient ground”, the accused can be discharged under Section 227. Since Section 227 requires higher level of judicial scrutiny, it provides greater protection to the accused.<sup>64</sup>

The words “not sufficient ground for proceeding against the accused” show that the Judge is not a mere “post office”<sup>65</sup> or “recording machine”<sup>66</sup> to frame the charge at the behest of the prosecution, but has to apply his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution.<sup>67</sup>

The level of judicial scrutiny at charging stage need not be the same as expected at the trial level adjudication. However, the judge cannot simply accept the prosecution's story while framing the charges:

*“[The] Judge has to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.”*<sup>68</sup>

**c. The Burden on Prosecution at the charging stage**

The Supreme Court, in *DebendraNathPadhi*<sup>69</sup>, overruling *Satish Mehra*<sup>70</sup>, held that the accused cannot lead any evidence at charging stage. Thus, the decision of the judge has to be based solely on the record of the case, i.e. the investigation report and documents submitted by the prosecution. Though the determination of framing of charges is based on the record of the

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<sup>62</sup>*State of Maharashtra v. SomNathThapa*, (1996) 4 SCC 659.

<sup>63</sup>*R.S. Nayak v. A.R. Antulay*, (1986) 1 SCC 716.

<sup>64</sup>*R.S. Nayak v. A.R. Antulay*, (1986) 1 SCC 716.

<sup>65</sup>*Union of India v. Prafulla Kumar Samal*, (1979) 3 SCC 4.

<sup>66</sup>*Almohan Das v. State of West Bengal*, (1969) 2 SCR 520.

<sup>67</sup>*K.P. Raghavan v. M.H. Abbas* AIR 1967 SC 740; *Union of India v. Prafulla Kumar Samal*, (1979) 3 SCC 4; *Almohan Das v. State of West Bengal*, (1969) 2 SCR 520.

<sup>68</sup>*Union of India v. Prafulla Kumar Samal*, (1979) 3 SCC 4, 8 para 8.

<sup>69</sup>*State of Orissa v. DebendraNathPadhi* (2005) 1 SCC 568.

<sup>70</sup>*Satish Mehra v. Delhi Administration* (1996) 9 SCC 766.

case, the Supreme Court jurisprudence on Section 227 also imposes certain burdens to be discharged by the prosecution:

*“If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence; if any, cannot show that the accused committed the offence then there will be no sufficient ground for proceeding with the trial”*.<sup>71</sup>(emphasis added)

Additionally, the burden on the prosecution at charging level also involves proving a *prima facie* case. A *prima facie* case is said to be in existence “if there is ground for presuming that the accused has committed the offence.”<sup>72</sup>This also provides a certain degree of protection for the accused.

Finally, in order to establish a *prima facie* case, the evidence on record should raise not merely some suspicion with regard to the possibility of conviction, but a “grave” suspicion<sup>73</sup>:

*“If two views are possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.”*<sup>74</sup> (emphasis added)

Since the stage of framing of charges is based on substantial level of judicial scrutiny, a totally frivolous charge will not stand this scrutiny. Therefore, given the concern of criminalisation of politics in India, disqualification at the stage of charging is justified having substantial attendant legal safeguards to prevent misuse.

(iv) **Justifications to enlarge scope of disqualification to include those against whom charges framed**

As explained above, the Supreme Court has made it clear that the framing of charges under **Section 228 of the CrPC** requires an application of judicial mind to determine whether there are sufficient grounds for proceeding against the accused.<sup>75</sup> Further, the burden of proof at this stage is on the prosecution who must establish a *prima facie* case where the evidence on record raises ‘grave suspicion’.<sup>76</sup> Together, these tests offer protection against false charges being imposed.

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<sup>71</sup>*State of Bihar v. Ramesh Singh*, (1977) 4 SCC 39, 42 para 4.

<sup>72</sup>*State of Maharashtra v. SomNathThapa*(1996) 4 SCC 659.

<sup>73</sup>*DilawarBaluKurane v. State of Maharashtra*,(2002) 2 SCC 135; *Sajjan Kumar v. Central Bureau of Investigation*, (2010) 9 SCC 368.

<sup>74</sup>*Prafulla Kumar Samal*, (n 65), 9, para 10.

<sup>75</sup>*K.P. Raghavan v. M.H. Abbas*AIR 1967 SC 740.

<sup>76</sup>*State of Orissa v. DebendraNathPadhi*(2005) 1 SCC 568.

In addition to the safeguards built in at the stage of framing of charges, an additional option is available in the shape of Section 311 of the Code of Criminal Procedure. Section 311 grants power to the Court to summon or examine any person at any stage of the trial if his evidence appears essential to the just decision of the case. Although this section is not very widely used, and the Supreme Court has cautioned against the arbitrary exercise of this power,<sup>77</sup> it grants wide discretion to the court which may even be exercised *suomotu*. This section may be used by the Court to examine additional evidence before framing charges where the consequence of such framing may disqualify the candidate.

The framing of charges is therefore not an automatic step in the trial process, but one that requires a preliminary level of judicial scrutiny. The provisions in the CrPC require adequate consideration of the merits of a criminal charge before charges are framed by the Court. The level of scrutiny required before charges are framed is sufficient to prevent misuse of any provision resulting in disqualification from contesting elections.

Moreover enlarging the scope of disqualifications to include the stage of framing of charges in certain offences does not infringe upon any Fundamental or Constitutional right of the candidate. RPA creates and regulates the right to contest and be elected as a Member of Parliament or a State Legislature. From the early years of our democracy, it has been repeatedly stressed by the Supreme Court that the right to be elected is neither a fundamental nor a common law right.<sup>78</sup> It is a special right created by the statute and can only be exercised on the conditions laid down by the statute.<sup>79</sup> Therefore, it is not subject to the Fundamental Rights chapter of the constitution.<sup>80</sup>

(i) **Rebutting counter-arguments**

The last section demonstrated why disqualification of contesting candidates at the stage of framing of charges is justified, both in principle and practice. In the context of the excessive criminalisation of politics in India today, such a step has considerable potential to exclude criminal elements from the electoral fray, restoring the dignity and high status that the Parliament and State Legislative Assemblies are constitutionally expected to possess. At the same time, it is imperative to take cognizance of the possibility of misuse of such a provision. In an effort to keep criminal elements out of legislatures, one must not create disabilities for honest candidates who find themselves foisted with false criminal charges. An optimal balance must be found, maximising the former and minimising the latter.

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<sup>77</sup>*Natasha Singh v. CBI Crl*, Appeal No. 709 of 2013 Supreme Court of India

<sup>78</sup>*N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, 1952 SCR.

218: (AIR 1952 SC 64); *JaganNath v. Jaswant Singh*, AIR 1954 SC 210; *Dr. N. B. Khare v. Election Commission of India*, AIR 1958 SC 139.

<sup>79</sup>*Jumuna Prasad Mukhariya v. Lachhi Ram* AIR 1954 SC 686.

<sup>80</sup>*Jagdev Singh Sidhanti v. Pratap Singh Daulta*, AIR 1965 SC 183; *Smt. Indira Nehru Gandhi v. Shri Raj Narain*, AIR 1975 SC 2299; *Ebrahim Sulaiman Sait v. M. C. Muhammad*, AIR 1980 SC 354, (1980) 1 SCR 1148.

At the National Consultation, several representatives of political parties expressed a fear that such a disqualification would be used as a tool for political vendetta. Many believed the fear of misuse was so large that it warranted a rejection of the proposal itself. At the same, a consistent stream of Supreme Court decisions have held that the framing of charges is done by the Court on the basis of the police report and other documents led by the prosecution; neither does the accused have a right to cross-examine witnesses nor lead any documents at that stage. The implication thus is that if there is misuse of the provision and false charges are framed in order to disqualify candidates, the accused would have very little legal remedy. Thirdly, it must be frankly admitted that enlarging the scope of disqualification by making it attendant on the framing of charge rather than conviction is a diversion from strict principles of criminal jurisprudence. As Mr. TA Andhyarujina, pointed out at the Consultation, a man is still technically innocent, till proven guilty and convicted by a competent court of law. Disqualifying him at the stage of framing of charge would thus be premature with considerable jurisprudential difficulties.

These three concerns—misuse, lack of remedy for the accused and the sanctity of criminal jurisprudence—all have some merit. However none of them possess sufficient argumentative weight to displace the arguments in the previous section. While misuse is certainly a possibility, that does not render a proposal to reform the law flawed *in limine*. The Supreme Court has repeatedly pointed out in the context of statutory power vested in an authority that the possibility of misuse of power is not a reason to not confer the power or strike down such provision.<sup>81</sup> Similarly a potential fear of misuse cannot provide justification for not reforming the law *per se*. It does point to the requirement of instituting certain safeguards, circumscribing the conditions under which such disqualification will operate. This matter is dealt with below.

Though there is a view that the accused has limited rights at the stage of framing of charge, the legal options available to him are fairly substantial. As the previous section shows, the stage of framing of charges involves considerable application of judicial mind, gives the accused an opportunity to be heard, places the burden of proof on the prosecution to demonstrate a *prima facie* case and will lead to discharge unless the grounds pleaded are sufficient for the matter to proceed to trial. Thus it is not as if the accused has no remedy till charges are framed—on the contrary, he has several legal options available to him prior to this stage.

Finally, though criminal jurisprudence presumes a man innocent till proven otherwise, disqualifying a person from contesting elections at the stage of framing of charges does not fall foul of this proposition. Such a provision has no bearing on whether indeed the person concerned is guilty of the alleged offence or not. On the contrary, it represents a distinct legal determination of the types of persons who are suitable for holding representative public office in India. Given the proliferation of criminal elements in Parliament and State Assemblies, it is indicative of a public resolve to correct this situation. Further, the existing provisions which

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<sup>81</sup>*Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

disqualify persons on conviction alone have been unable to achieve this task. Thus it is now strongly felt that it is essential to disqualify those persons who have had criminal charges framed against them by a court of competent jurisdiction, subject to certain safeguards, from contesting in elections. Such a determination of suitability for representative office has no bearing on his guilt or innocence which can, and will, only be judged at the criminal trial. To conflate the two and thereby argue that the suggested reform is jurisprudentially flawed would be to make a category mistake.

The question that remains thus pertains to the safeguards which are necessary in order to prevent misuse of this provision leading to false charges being framed. Since the purpose of such safeguards is to ensure that the possibility of false charges being framed is minimized, a three-pronged approach is adopted. *First*, the type of offence in relation to which charge is framed is circumscribed to include only those offences which represent serious and heinous crimes. This has a twofold justification—preventing the routine filing of charges in petty offences which are easier to fabricate; emphasizing that such disqualification only operates in limited circumstances when the offences in question are of a nature that those charged with having committed them are entirely unsuitable to be elected representatives of the people. *Second*, a cut-off period before the election is provided for, charges framed during which time will not attract this disqualification. The rationale for such a protected window is to obviate the impact of false charges being framed very close to the elections with the sole intention of getting a political rival disqualified. *Third*, the disqualification will only last for a specified period of time. An appropriately designed cap on disqualification of this nature will underline that the impact of a charge-based disqualification is optimally structured. At the same time it will check any incentive that a person may have to file false charges. Each of these is discussed below in the section on safeguards built-in to the law.

### **C. SAFEGUARDS**

#### ***(i) Offences in relation to which this disqualification applies***

Some previous reports have made various recommendations with respect to the range of offences. For example, the Election Commission Proposal of 2004 recommended that a person charged with any offence punishable with imprisonment for a maximum term of five years or more should be subject to disqualification. The ARC in its report “Ethics and Governance” and Ministry of Law and Justice in “Background Paper on Electoral Reforms, 2010” also concurred with the 5 year punishment threshold.

On the basis of the survey of recommendations above, it is clear that limiting the offences to which this disqualification applies has two clear reasons, i.e. those offences which are of such nature that those charged with them are deemed unsuitable to be people’s representatives in Parliament or State Legislatures are included and the list is circumscribed optimally to prevent

misuse to the maximum extent possible. The determination of what these offences are differ depending on the report in question— their fundamental underpinning however is the same.

If these two principled considerations are taken into account, we believe that all offences which have a maximum punishment of five years or more ought to be included within the remit of this provision. Three justifications support this proposal: *first*, all offences widely recognised as serious are covered by this provision. This includes provisions for murder, rape, kidnapping, dacoity, corruption under the Prevention of Corruption Act and other crimes of a nature that justify those charged with them being disqualified from holding public office. *Second*, the data extracted above demonstrates that a large portion of offences for which MPs, MLAs and contesting candidates face criminal prosecutions relate to such provisions. Thus the reformed provision will ensure that such candidates are disqualified thereby creating a significant systemic impact. *Third*, it has the benefit of simplicity—by prescribing a standard five-year period, the provision is uniform and not contingent on specific offences which may run the risk of arbitrariness. The uniform five-year period thus makes a reasonable classification— between serious and non-serious offences and has a rational nexus with its object—preventing the entry of significantly criminal elements into Parliament and State Legislature.

(ii) *Cut-off period*

An apprehension was raised that introducing such a disqualification will lead to a spate of false cases in which charges might be framed immediately prior to an election with the sole intention of disqualifying a candidate. This is sought to be offset by a cut-off period before the date of scrutiny of nomination for an election, charges filed during which period, will not attract disqualification. The basis for this distinction is clear— to prevent false cases being filed against political candidates. The question that arises is with regard to the duration of this cut-off period.

NCRWC recommended that disqualification should commence on the expiry of one year from the date of framing of charges. Election Commission Proposal of 2004 and Second Administrative Review Commission Report (Ethics in Governance) of 2008 called for disqualification in those cases which were filed prior to six months before an election.

Further at the Consultation, a seeming consensus emerged that the cut-off period should be one year from the date of scrutiny of the nomination, i.e. charges filed during the one year period will not lead to disqualification. We feel that one year is an appropriate time-frame. It is long enough so that false charges which may be filed specifically to disqualify candidates will not lead to such disqualification; at the same time it is not excessively long which would have made such disqualification redundant. It thus allows every contesting candidate at minimum a one year period to get discharged. It thus strikes an appropriate balance between enlarging the scope of disqualification while at the same time seeks to disincentivise the filing of false cases solely with the view to engineer disqualification.

(iii) Period of applicability

The present scheme of disqualification in Section 8(1) prescribes a time period for the duration of which the said disqualification applies. For convictions under Section 8(1) a person is disqualified for six years from conviction in case he is punished only with a fine or for the duration of the imprisonment in addition to six years starting from his date of release. For convictions under Section 8(2) and 8(3) he is disqualified simply for the duration of his imprisonment and six years starting from the date of release. Given that disqualifications on conviction have a time period specified, it would be anomalous if disqualification on the framing of charges omitted to do so and applied indefinitely. It is thus essential that a time period be specified.

There have been various suggestions with respect to the time period for which the disqualification should remain effective. According to the JS Verma Committee and the NCRWC, disqualification should continue till acquittal. However, the 170<sup>th</sup> Report of Law Commission suggested that the applicability of disqualification should extend to 5 years from the date of framing of charge or acquittal, whichever is earlier.

In this regard, having earnestly considered many views presented, we would be inclined to make a minor modification in the proposal contained in the report of the 170<sup>th</sup> Law Commission under the Chairmanship of Justice B P Jeevan Reddy. In this report the specified period of disqualification was suggested to be five years from the date of framing of charge, or acquittal, whichever is earlier. We find great merit in this proposal. However it must be noted that the report did not recommend a cut-off period before the election, a charge framed during which would not lead to disqualification. Thus the rationale behind the five-year period was that the charged person would at least be disqualified from contesting in one election.

This however will not be the case if a one-year cut off period is created. This is because if a person has a charge framed against him six months before an election, then he will not be disqualified from this election because it is within the protected window. At the same time, assuming that the next election is five years later (which is a standard assumption) then he will not be disqualified from the second election as well because five years from the date of framing of charge will have lapsed by then. To take into account the effect of this cut-off period, it is thus recommended that the period of disqualification is increased to six years from the date of framing of charge or acquittal whichever is earlier.

The rationale for this recommendation is clear: if a person is acquitted, needless to say the disqualification is lifted from that date. If he is not, and the trial is continuing, then the six-year period is appropriate for two reasons—*first*, it is long enough to ensure that the enlarged scope of disqualification has enough deterrent effect. A six-year period would at least ensure that a person will be disqualified from one election cycle thereby serving as a real safeguard against criminals entering politics. At the same time it is the same as the period prescribed when a

person is disqualified on conviction for certain offences, which such provision is comparable to. It thus has the added merit of uniformity. For these reasons, it is recommended that in the event of a charge being framed in respect of the enumerated offences against a person, he will be disqualified from contesting in elections for a period of six years from the date of framing of charge or till acquittal whichever is earlier, provided that the charge has not been framed within the protected window before an election.

#### **D. CHARGES FRAMED AGAINST SITTING MPs/MLAs**

The proposal above thereby makes charges framed at a certain point of time a ground for disqualification under the RPA. Thus only if a person has charges framed against him more than one year and less than six years before an election in relation to offences which have maximum punishment of five years or more then the said person is disqualified. A mere framing of charge *simpliciter* without reference to this time period is not sufficient to disqualify him. The rationale for this proposal is clear—if someone has charges in the protected window (cut-off period), then the law protects them cognizant of the possibility of misuse before an election; if someone has charges pending for more than six years then the law makes a determination that the period of disqualification on this ground cannot exceed the period of disqualification that is occasioned by conviction. Thus a person is disqualified on the basis of the time at which charges have been framed against him.

This however does mean that in certain situations sitting MPs/ MLAs may have charges framed against them while holding office. This may happen when a charge is framed against him during the protected window (cut-off period) before an election and he wins the election and when a charge is framed against him more than six years before the date of scrutiny of nominations for an election, i.e. the charge has lapsed. In addition, a charge may be framed against such an MP/ MLA while he is in office. It is essential that in law these three situations are treated similarly.

In the first two situations, the law, for reasons clearly delineated aforesaid, allows the candidate to contest elections. Thus it is clear that in these situations such a person who has charges framed against him but is nonetheless allowed to contest cannot be disqualified merely because he has won the election. That would render the protection that the law gives him illusory. To provide uniformity, it is thus necessary that an MP/ MLA has charges framed against him while in office is also not disqualified immediately at the moment charges are framed. However at the same time it is anomalous to the very idea of keeping Parliament free from criminal elements if such persons are allowed to continue functioning in their incumbent offices without any attendant sanctions. This is especially true in light of the data above which demonstrates particularly acute delays in trials involving political candidates and office-holders. Thus for sitting MPs/ MLAs who are in office with charges framed against them, certain provisions are necessary in order to ensure that the probity of public office is maintained.

**We believe two steps are necessary:**

1. Expediting trials—It is recommended that in the case of sitting MPs/ MLAs who have relevant charges framed against them (in the three situations above) the trial is concluded speedily. However given the data on delays in trials, especially involving powerful persons, this is unlikely to happen as a matter of course. **Thus we suggest that the Supreme Court be pleased to order that in all cases when a sitting MP/ MLA has charges framed against him, the relevant court where he is being tried conducts the trial on a day-to-day basis with an outer limit of completing the trial in one year.** In the first two cases above, this time period would begin to run from the date on which the person takes oath as a member; in the third case it would run from the date on which charges are framed against him. This would expedite the trial to the extent possible and thereby ensure that he is either convicted, and disqualified, or acquitted in a reasonable period.
2. **If the trial cannot be completed within the said time period or the charge is not quashed in the said period, the trial judge shall give reasons in writing to the relevant High Court in whose jurisdiction it is based, as to why the trial could not be completed. In formulating its reasons, it can follow the guidelines of the Supreme Court laid down in *RS Nayak v. AR Antulay*.<sup>82</sup> Once the said period expires, two consequences may ensue:**
  - a. The person may be automatically disqualified at the end of the said time period **OR**
  - b. The right to vote, remuneration and perquisites of office shall be suspended at the end of the said period up to the expiry of the House.

Both these alternatives, in our opinion, provide sufficient disincentives for political parties to field candidates with criminal charges against them. While the former has the benefit of uniformity with how contesting candidates who have charges framed against them and consequently disqualified are dealt with, the latter takes away significant facets of a person's membership of the House. Both these options, disqualification in the first case and severe disabilities in the second, will operate till the dissolution of the House. The Supreme Court might be pleased to direct the implementation of one of the aforesaid options, which in its wisdom, it believes is more appropriate.

In conclusion to this part, it must be reiterated that we recommend that disqualification must ensue on the framing of charges in relation to specific offences when framed at a particular time. This balanced provision is recommended as an optimal harmonisation between the need to keep criminal elements out of politics while at the same time not creating an over-inclusive provision that disqualifies honest candidates from being disqualified owing to false cases against them. This will keep a majority of criminals charged with serious offences out of the electoral fray. At the same time for the residue who are the beneficiaries of the safeguards in the law, a strict provision dealing with sitting MPs and MLAs is also provided for. Such a

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<sup>82</sup>(1992) 1 SCC 279.

combination of provisions, it is hoped, will deter political parties from handing out tickets to tainted candidates. Such candidates, will either not be able to take part in elections, or even if they are, will be subject to an expedited trial of their case along with a taking away of key benefits of their membership or disqualification as last resort measures. We thus believe that this reform has the potential to significantly cleanse Indian elections and politics of criminal elements.

#### **E. RETROACTIVE APPLICATION**

As discussed in Section V-A, the trials of legislators are subject to inordinate delays. Some criminal trials of sitting MPs and MLAs have been pending for over two decades.<sup>83</sup> While ordinarily the above reform proposal on disqualification on framing of charges would apply only with prospective effect, we believe that due to the current extent of criminalisation of politics and the quantum of delay in pending trials, the reform proposal will only be effective if applied retroactively. That is, on the date of these amendments coming into effect, all persons with criminal charges (punishable by more than five years) pending on that date are liable to be disqualified subject to certain safeguards.

However, the following situations must be considered before disqualification is effected:

- i. Charges have been framed at the time of the law coming into effect, but less than a year before the date of scrutiny of nominations before elections – in this case, the cut-off period would apply as explained in Section V-C(ii) will apply and the person will not be disqualified.
- ii. Charges have been framed at the time of the law coming into effect, but more than six years before the date of scrutiny of nominations– in this case, we believe that the person should be disqualified, since the disability of disqualification has not operated against him prior to the amendments coming into force. Since the person has not suffered from any disability as a consequence of charges being framed against him, it is appropriate that he be disqualified once the Act comes into effect.
- iii. Charges are pending, but the person is a sitting MP or MLA on the date of enactment of this law – in such cases, we believe that the administrative burden of expediting more than two thousand trials of sittings MPs and MLAs will be too great. Therefore the law should apply against a person only when he contests elections for the first time after the enactment of this provision, but not against a person who holds office on the date of enactment.

Unless the law is applied retroactively in this manner, it will not have a significant deterrent effect on the criminalisation of politics in the country.

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<sup>83</sup> Candidate affidavits sourced from the Election Commission Website

## **VI. CONSEQUENCES UPON FILING OF FALSE AFFIDAVITS**

### **A. RATIONALE**

A candidate to any National or State Assembly elections is required to furnish an affidavit, in the shape of Form 26 appended to the Conduct of Election Rules, 1961, containing certain information regarding their assets, liabilities, and criminal proceedings against them, if any. Specifically, the following information is required under Form 26 read with Rule 4A of the Conduct of Election Rules:

- i. In case the candidate is accused of any offence punishable with two years or more, and charges have been framed by the Court, information such as the FIR No., Case No. and the date of framing of charges;
- ii. Details of conviction in any case not included in Section 8 of the RPA, where the sentence was for one year or more;
- iii. PAN Number and status of filing of Income Tax Return for the candidate, spouse and dependents;
- iv. Details of movable and immovable assets the candidate, spouse and all dependents;
- v. Details of liabilities of the candidate to public financial institutions or to the government; and
- vi. Details of profession or occupation and of educational qualifications.

#### ***(i) Legislative history on the requirement of disclosures***

The 170<sup>th</sup> Law Commission Report on Electoral Reforms, 1999 was the first to suggest that a new Section 4A be added to the Representation of the People Act, 1951 (RPA), mandating that a person shall be ineligible to contest elections unless he files an affidavit declaring assets possessed by him, his spouse, and dependent relatives. Also required was a declaration whether charges had been framed against him in respect of any of certain specified offences by a criminal court.<sup>84</sup>

In 2002, the Association of Democratic Reforms petitioned the Court to have the above recommendation implemented, among others.<sup>85</sup> The Supreme Court directed the Election Commission to require details on assets and liabilities, pending and convicted criminal cases and educational qualifications to be filed on affidavit along with the nomination papers of all candidates.

Pursuant to this judgment, the Election Commission issued directives to the effect that failure to file an affidavit containing the above details would result in the nomination paper being deemed incomplete within the meaning of S. 33(1) of the RPA, apart from inviting penal

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<sup>84</sup> Law Commission of India, 'One Hundred Seventieth Report on Reform of the Electoral Laws', (1999).

<sup>85</sup> *Union of India v. Association of Democratic Reforms*, (2002) 5 SCC 294.

consequences under the Indian Penal Code. The Returning Officer would conduct a summary inquiry at the time of scrutiny of nomination papers, and only defects of a substantial character shall be considered grounds for rejection.<sup>86</sup>

Later that same year, the RPA was amended to add Sections 33A and 33B. Section 33A said that information shall be filed along with nomination papers about any charges framed by a court against the candidate for an offence punishable by more than two years imprisonment, and any conviction which did not disqualify him, but resulted in imprisonment of 1 year or more. Section 33B said that notwithstanding any judgment, decree or order by the Election Commission, no candidate shall be liable to disclose any information other than that mandated by the RPA or rules made thereunder. Therefore, directions of the Supreme Court regarding further disclosure of assets and educational qualifications stood reversed by this amendment.

Section 33B was challenged in *PUCL v. Union of India*.<sup>87</sup> The Supreme Court held that Section 33B nullified the directives issued by the Election Commission pursuant to the judgment in *Association of Democratic Reforms*. The plain effect of the embargo contained in Section 33B is to nullify substantially the directives issued by the Election Commission pursuant to the judgment of this Court.

The Judges gave three separate opinions in this case. The effect of the judgment was to render Section 33B unconstitutional, as it imposed a blanket ban on the dissemination of information, irrespective of the need of the hour. The legislature could deviate from the directives of the court, but not substantially disregard them, as it had done with the introduction of Section 33B. Further, the *Association of Democratic Reforms* had recognized and enforced a fundamental right of the act of voting as freedom of expression, and Section 33B could not take away the same.

(ii) **Current law on disclosure of candidate information**

As a result of this series of events, candidates are now required to furnish the following information:

Under Section 33A of the RPA, read with Rule 4A of Conduct of Election Rules, 1961, an affidavit in Form 26 appended to the Conduct of Election Rules, giving information on

- i. Cases in which the candidate has been accused of any offence punishable with imprisonment for two years or more in a pending case in which charges have been framed by the court.

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<sup>86</sup> Election Commission of India, Order dated 28<sup>th</sup> June, 2002, No. 3/ER/2002/JS-II/Vol-III, <[http://eci.nic.in/archive/press/current/PN\\_28062002.htm](http://eci.nic.in/archive/press/current/PN_28062002.htm)> accessed January 29<sup>th</sup>, 2014.

<sup>87</sup>(2003) 4 SCC 399.

- ii. Cases of conviction for an offence other than any of the offences mentioned in Section 8 of the Representation of the People Act, 1951, and sentenced to imprisonment for one year or more.

Also, in pursuance of the *PUCL* judgment, the candidate has to furnish information relating to all pending cases in which cognizance has been taken by a Court, his assets and liabilities, and educational qualifications.<sup>88</sup> In 2012, the format of Form 26 was revised to include both sets on information.<sup>89</sup>

(iii) **Current legal consequences on false disclosure**

While the *PUCL* judgment clarified the obligations of a candidate with respect to the furnishing of information, it was less clear on the consequences if the information provided happened to be false. It held that a Returning Officer could not reject nomination papers on the ground that candidate information was false. Neither was verification of assets by the Returning Officer through a summary inquiry justified, as it did not give a fair hearing to the candidate.

As a result of this finding, the Election Commission ordered its earlier directive on the rejection of nomination papers non-enforceable. It instead directed that if a complaint is submitted regarding furnishing of false information, supported by documentary evidence, the Returning Officer should initiate action to prosecute the candidate under Section 125A of the RPA which provides penalty for filing false affidavits.<sup>90</sup> A candidate who fails to furnish the required information, gives false information or conceals any information, may be punished with imprisonment for a term up to six months or with fine or with both.

There is no readily available data on the count of candidates prosecuted for filing false information, though there seem to be no reported conviction on this crime.

However, Section 125A of the RPA has not been included in the list of offences under Section 8 of the RPA. This means that a conviction under Section 125A does not lead to disqualification of the candidate for the duration of imprisonment and a further period of 6 years.

Therefore, filing of false information, even if proved under Section 125A, is not a ground for setting aside the election, or for further disqualification. This matter was in question in the 2007 Bombay High Court decision of *ArunDattaraySawantv. Kishan Shankar Rathore*<sup>91</sup> in an Election Petition involving false declaration regarding assets in a candidate affidavit. The

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<sup>88</sup> Election Commission Of India- Proposed Electoral Reforms (2004).

<sup>89</sup> Election Commission of India, Instruction Dated 24<sup>th</sup> August, 2012, [http://eci.nic.in/eci\\_main/CurrentElections/ECI\\_Instructions/AFFI29082012.pdf](http://eci.nic.in/eci_main/CurrentElections/ECI_Instructions/AFFI29082012.pdf) accessed January 27<sup>th</sup>, 2014.

<sup>90</sup> Election Commission's letter No. 3/ER/2004-JS-II, dated 02.06.2004.

<sup>91</sup> El. Pet 10/2004, (Bom. HC) (16<sup>th</sup> Aug, 2007) (Unreported). See also *KuldeepPednekar v. AjitGogate*, 2006 (4) Bom CR 392.

Election Judge said that the Returning Officer, in accordance with *PUCL*, could not reject the nomination paper on the ground that information in the affidavit was false. Nevertheless since the candidate's nomination paper suffered from defects, it amounted to a case of improper acceptance of nomination paper under Section 100(1)(d)(i) and the election was set aside on this ground. Further, it was also clear that the election was materially affected by the false nomination since the improper acceptance was of the returned candidate's papers.

The Judge went on to say that "The solemnity of affidavit cannot be allowed to be ridiculed by the candidates by offering incomplete information or suppressing material information, resulting in disinformation or misinformation to the voters."<sup>92</sup> He recommended that Parliament consider enacting a provision stipulating disqualification of a candidate whose election is invalidated by the Court on the finding that he had filed false and incomplete affidavit whose defect was of a substantial character.

This matter was also in question in the Delhi High Court decision of *Nand Ram Bagri v. Jai Kishan*. Here, the court said that conviction under Section 125A was a ground for setting aside the election, as the election would then be rendered 'impure'.<sup>93</sup> However, this may be taken as *obiter*, since the main finding in the case was that the respondent was not guilty of misrepresentation on his affidavit.

A similar approach has been taken by other High Courts as well. In *Krishnamoorthy v. Siva Kumar*<sup>94</sup> the Court, in a case involving Panchayat elections, held that failure to disclose complete information may amount to undue influence, and that incorrect or false information interferes with the free exercise of the electoral right of the voter.

Further, in *Resurgence India v. Election Commission of India*<sup>95</sup> decided by the Supreme Court in 2013, the problems faced by the Election Commission due to the fact that nomination papers could not be rejected for incomplete affidavits, was addressed. The court said that if an affidavit is filed with blank particulars, it renders the entire exercise of filing affidavits futile, and infringes the fundamental right of citizens under Article 19(1)(a). Therefore the Returning Officer should remind the candidate to fill the blanks, and if such reminder is ignored, the nomination is fit to be rejected.

The court rejected the argument that the *PUCL* judgment barred such a holding, and explained that *PUCL* merely pointed out that the candidate lacked the ability to make a reply at the time of scrutiny, but did not intend to bar the Returning Officer from rejecting nomination papers.

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<sup>92</sup> Per Khanwilkar J. (as he then was), Para 138, *Arun Dattaray Sawant v. Kishan Shankar Rathore*, El. Pet 10/2004, (Bom. HC) (16<sup>th</sup> Aug, 2007) (Unreported).

<sup>93</sup>(2013) 200 DLT 402.

<sup>94</sup>(2009) 3 CTC 446.

<sup>95</sup> WP No. 121 of 2008, (SC) (13<sup>th</sup> September, 2013) (Unreported).

Certain High Courts including the Kerala High Court, however, seem to have taken a contrary view on the question of disqualification for filing of false affidavits. They have based their stance on the ground that filing of false affidavits has not been stated in the statute as either a ground for disqualification under Section 8, a ground for rejection of nomination papers or a ground for setting aside elections under Section 100 of the RPA.<sup>96</sup> It was further held by the Kerala High Court that non-compliance of the Election Commission's order cannot be treated as non-compliance with the provisions of the Constitution, to set aside an election under sub-Section 1(d)(iv) of Section 100 of the Act.

Therefore, from the decisions above, one can conclude that if details are omitted in the nomination papers, it is fit to be rejected. If information is believed to be false, prosecution under Section 125A is possible, however the consequences upon conviction are unclear. While the Bombay High Court in *ArunDattaraySawant* maintains that filing of false affidavit is a ground for setting aside the election, other High Courts have taken a contrary view. The filing of false affidavits can therefore at most lead to six months imprisonment and fine, without altering the election verdict or the candidate's ability to contest future elections.

This greatly undermines the very basic value of candidate disclosures – due to the lack of consequences, candidates have little incentive to provide accurate information. This in turns affects the fundamental right of the citizen under Article 19(1)(a) to know the antecedents of a candidate, as recognized in the *Association for Democratic Reforms* judgment.

## **B. REFORM PROPOSAL**

It has been noted by the Election Commission that candidates have repeatedly failed to furnish information, or grossly undervalued information such as the quantum of their assets.<sup>97</sup>

The reform suggestion is three-fold, *first*, that the punishment for filing false affidavits under Section 125A be increased to a minimum of two years, and that the alternate clause for fine be removed. *Second*, conviction under Section 125A should be made a ground for disqualification under Section 8(1) of the RPA.<sup>98</sup> These penalties should not apply for trivial errors or inconsistencies, or for inadvertent omissions. *Third*, the filing of false affidavits should be made a corrupt practice under Section 123 of the RPA.

Further, the ECI has suggested that any complaint regarding false statement in the affidavit be submitted to the Returning Officer concerned within a period of 30 days from the date of declaration of the election. The Returning Officer shall then initiate action to prosecute the impugned candidate under Section 125A. It has also been established that the Returning Officer

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<sup>96</sup>*Mani C. Kappan v K.M. Mani*, 2007 (1) KLT 228; *Narayan GunajiSawant v. Deepak VasantKesarkar*, 2011 (3) Bom CR 754.

<sup>97</sup> Election Commission of India – Proposed Electoral Reforms (2004).

<sup>98</sup>*Id.*

is not the only route to initiate prosecution in this regard. Alternatively, a complaint by any member of the public can lie directly to the Magistrate's Court.<sup>99</sup>

Thus, disqualification under Section 8 for the filing of a false affidavit follows conviction under Section 125A. As discussed previously, trials against influential persons, especially trials where conviction can result in disqualification, are subject to inordinate delays. **Therefore, the Supreme Court may be pleased to order that all cases being tried under Section 125A of the RPA be tried by the relevant court on a day-to-day basis.**

**The process for scrutiny of nominations should also be strengthened in order to curb the rampant filing of false affidavits. To this end, a gap of one week should be introduced between the last date of filing of nominations by the returning officer and the date of scrutiny, to allow adequate time for the filing of objections which the returning officer shall consider under Section 36 of the RPA.**

(i) ***The reform proposal: an assessment***

The lack of any serious consequences for making false disclosures has certainly contributed to the widespread flouting of the Supreme Court and the Election Commission's directives on this matter. Such misrepresentation affects the voters' ability to freely exercise their vote. Therefore, there is an urgent need to:

- i. **Introduce enhanced sentence of a minimum of two years under Section 125A.**
- ii. **Include conviction under Section 125A as a ground of disqualification under Section 8(1) of the RPA.**
- iii. **Set-up an independent method of verification of winners' affidavits to check the incidence of false disclosures in a speedy fashion.**
- iv. **Include the offence of filing false affidavit as a corrupt practice under S. 123 of the RPA.**

This set of suggestions is by the way of abundant caution. Increasing minimum punishment to two years would result in Section 125A being included in the ambit of Section 8(3), under which conviction for offences punishable by at least two years results in disqualification. To further eliminate any possible loopholes, such as if a judge happens to prescribe a lower sentence, the Election Commission suggests that Section 125A also be brought under the offences listed in Section 8(1), which results in disqualification irrespective of the quantum of punishment.

Corrupt practices under Section 123, when committed by a candidate or his election agent, are grounds for setting aside an election under Section 100(1)(b). Inclusion of the offence of filing

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<sup>99</sup> Election Commission of India, 'Important Electoral Reforms proposed by the Election Commission' <[http://eci.nic.in/eci\\_main/electoral\\_ref.pdf](http://eci.nic.in/eci_main/electoral_ref.pdf)> accessed February 3<sup>rd</sup>, 2014.

false affidavit under Section 123 results in the option of filing an election petition becoming available to an elector or candidate who want to challenge a particular election.

This reform suggestion by the Election Commission has ample basis in the current law. Section 8(1) already carries the penalty of disqualification for a number of other electoral offences – Section 8(1)(i) disqualifies upon conviction for promoting enmity between classes, removal of ballot papers, booth capturing and fraudulently defacing or destroying any nomination paper. Even though the quantum of punishment in some of these offences is low, ranging from six months to a year, they result in disqualification because the offence is directly connected to the conduct of elections. False disclosures in nomination papers falls within the scheme of such offences, and should therefore be included under Section 8(1)(i).

## VII. RECOMMENDATIONS AND PROPOSED SECTIONS

### A. CONCLUSIONS AND RECOMMENDATIONS

In light of the above discussions, the Law Commission makes the following recommendations on the two issues considered in this report in accordance with the directions of the Hon'ble Supreme Court in its order dated 16<sup>th</sup> December, 2013 in *Public Interest Foundation &Ors. V. Union of India and Anr*, (W/P Civil No. 536 of 2011):

- I. Whether disqualification should be triggered upon conviction as it exists today or upon framing of charges by the court or upon the presentation of the report by the Investigating Officer under Section 173 of the Code of Criminal Procedure? [Issue No. 3.1(ii) of the Consultation Paper]
  1. Disqualification upon conviction has proved to be incapable of curbing the growing criminalisation of politics, owing to long delays in trials and rare convictions. The law needs to evolve to pose an effective deterrence, and to prevent subversion of the process of justice.
  2. The filing of the police report under Section 173 Cr.PC is not an appropriate stage to introduce electoral disqualifications owing to the lack of sufficient application of judicial mind at this stage.
  3. The stage of framing of charges is based on adequate levels of judicial scrutiny, and disqualification at the stage of charging, if accompanied by substantial attendant legal safeguards to prevent misuse, has significant potential in curbing the spread of criminalisation of politics.
  4. The following safeguards must be incorporated into the disqualification for framing of charges owing to potential for misuse, concern of lack of remedy for the accused and the sanctity of criminal jurisprudence:
    - i. Only offences which have a maximum punishment of five years or above ought to be included within the remit of this provision.
    - ii. Charges filed up to one year before the date of scrutiny of nominations for an election will not lead to disqualification.
    - iii. The disqualification will operate till an acquittal by the trial court, or for a period of six years, whichever is earlier.
    - iv. For charges framed against sitting MPs/ MLAs, the trials must be expedited so that they are conducted on a day-to-day basis and concluded within a 1-year period. If trial not concluded within a one year period then one of the following consequences ought to ensue:
      - The MP/ MLA may be disqualified at the expiry of the one-year period; OR

- The MP/ MLA's right to vote in the House as a member, remuneration and other perquisites attaching to their office shall be suspended at the expiry of the one-year period.
5. Disqualification in the above manner must apply retroactively as well. Persons with charges pending (punishable by 5 years or more) on the date of the law coming into effect must be disqualified from contesting future elections, unless such charges are framed less than one year before the date of scrutiny of nomination papers for elections or the person is a sitting MP/MLA at the time of enactment of the Act. Such disqualification must take place irrespective of when the charge was framed.
- II. Whether filing of false affidavits under Section 125A of the Representation of the People Act, 1951 should be a ground for disqualification? And if yes, what mode and mechanism needs to be provided for adjudication on the veracity of the affidavit? [Issue No. 3.5 of the Consultation Paper]”
1. There is large-scale violation of the laws on candidate affidavits owing to lack of sufficient legal consequences. As a result, the following changes should be made to the RPA:
    - i. Introduce enhanced sentence of a minimum of two years under Section 125A of the RPA Act on offence of filing false affidavits
    - ii. Include conviction under Section 125A as a ground of disqualification under Section 8(1) of the RPA.
    - iii. Include the offence of filing false affidavit as a corrupt practice under S. 123 of the RPA.
  2. Since conviction under Section 125A is necessary for disqualification under Section 8 to be triggered, the Supreme Court may be pleased to order that in all trials under Section 125A, the relevant court conducts the trial on a day-to-day basis
  3. A gap of one week should be introduced between the last date for filing nomination papers and the date of scrutiny, to give adequate time for the filing of objections to nomination papers.

## **B. PROPOSED SECTIONS**

In order to implement the aforesaid recommendations, the following legislative reforms are suggested:

**(i) Amendments on disqualification upon framing of charges**

The Law Commission proposes that a new section (Section 8B) be inserted in the RPA after Section 8A. It should read:

**“8B. Disqualification on framing of charge for certain offences.”** - (1) A person against whom a charge has been framed by a competent court for an offence punishable by at least five years imprisonment shall be disqualified from the date of framing the charge for a period of six years, or till the date of quashing of charge or acquittal, whichever is earlier.

(2) Notwithstanding anything contained in this Act, nothing in sub-section (1) shall apply to a person:

(i) Who holds office as a Member of Parliament, State Legislative Assembly or Legislative Council at the date of enactment of this provision, or

(ii) Against whom a charge has been framed for an offence punishable by at least five years imprisonment;

(a) Less than one year before the date of scrutiny of nominations for an election under Section 36, in relation to that election;

(b) At a time when such person holds office as a Member of Parliament, State Legislative Assembly or Legislative Council, and has been elected to such office after the enactment of these provisions;

(3) For Members of Parliament, State Legislative Assembly or Legislative Council covered by clause (ii) of sub-section (2), they shall be disqualified at the expiry of one year from the date of framing of charge or date of election, whichever is later, unless they have been acquitted in the said period or the relevant charge against them has been quashed.

**OR**

(3) For Members of Parliament, State Legislative Assembly or Legislative Council covered by clause (ii) of sub-section (2), their right to vote in the House as a member, remuneration and other perquisites attaching to their office, shall be suspended at the expiry of one year from the date of framing of charge or date of election, whichever is later, unless they have been acquitted in the said period or the relevant charge against them has been quashed.

(4) Any disqualification/ suspension under sub-section (3) shall operate till the dissolution of the House, or for Members of the Rajya Sabha or State Legislative Council, up to the end of their present term as Member.

[Clause 3 is to be read with the direction to be issued by the Supreme Court to all courts that trial of Members of Parliament, State Legislative Assembly or Legislative Council against whom charges have been framed for an offence punishable by at least five years imprisonment shall be expedited and heard on a day-to-day basis with a view to completing the trial in one year from the date of framing of charge or date of election whichever is later.]

**“8C. Transitory provision**

A person against whom a charge has been framed by a competent court for an offence punishable by at least five years, before the enactment of this provision irrespective of when the charge was framed, shall, unless exempted under sub-section (2) of Section 8B, be disqualified

for a period of six years from the date of enactment of this provision or till the date of quashing of charge or acquittal, whichever is earlier.”

(ii) **Amendments on false disclosures**

The Law Commission recommends that the following changes be made to the law on false disclosure on affidavits

i. **Section 125A of the Representation of the People Act, 1951 should be amended by substituting the words “may extend to six months, or with fine, or with both” with the words “shall not be less than two years, and shall also be liable to fine”. The amended Section 125A would read as follows:**

**“125A. Penalty for filing false affidavit, etc.—**A candidate who himself or through his proposer, with intent to be elected in an election,—

(i) fails to furnish information relating to sub-section (1) of section 33A; or

(ii) give false information which he knows or has reason to believe to be false; or

(iii) conceals any information,

in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than two years, and shall also be liable to fine.”

[Section 125A is to be read with the direction to be issued by the Supreme Court to all courts that trial under Section 125A shall be expedited and heard on a day-to-day basis]

ii. Section 8(1)(i) of the Representation of the People Act, 1951 be amended by inserting the words “or section 125A (penalty for filing false affidavit, etc.)” after the words “section 125 (offence of promoting enmity between classes in connection with the election)”. The amended Section 8(1)(i) would read as follows:

**“8. Disqualification on conviction for certain offences.** —(1) A person convicted of an offence punishable under—

(a)...

\*

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(i) section 125 (offence of promoting enmity between classes in connection with the election) or section 125A (penalty for filing false affidavit, etc.) 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;

\*  
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\*”

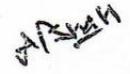
iii. Section 123 of the Representation of the People Act, 1951 be amended by inserting clause 4A after clause 4 as follows:

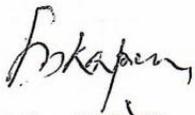
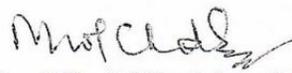
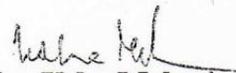
“**123. Corrupt practices.**—The following shall be deemed to be corrupt practices for the purposes of this Act:

(1)...

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\*  
\*

(4A) failure by a candidate to furnish information relating to sub-section (1) of section 33A, or giving of false information which he knows or has reason to believe to be false, or concealment of any information in the nomination paper delivered under subsection (1) of section 33 or in the affidavit delivered under sub-section (2) of section 33A”.

  
(Justice A.P. Shah)  
Chairman

 (Justice S.N. Kapoor) Member	 (Prof.(Dr.) Moolchand Sharma) Member	 (Justice Usha Mehra) Member
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(N.L. Meena)  
Member-Secretary