20989
2020

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO ..... OF 2020

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

ASHWINI KUMAR UPADHYAY ...PETITIONER

VERSES

UNION OF INDIA & OTHERS ...RESPONDENTS

PAPER BOOK

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(ADVOCATE FOR PETITIONER: ASHWANI KUMAR DUBEY)

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A

PERFORMA FOR FIRST LISTING

Section: PIL

The case pertains to (Please tick / check the correct box):

☐ Central Act: Constitution of India

☐ Section: Articles 14 and 324 of the Constitution

☐ Central Rule: N/A

☐ Rule No: N/A

☐ State Act: N/A

☐ Section: N/A

☐ State Rule: N/A

☐ Rule No: N/A

☐ Impugned Interim Order: N/A

☐ Impugned Final Order / Decree: N/A

☐ High Court: N/A

☐ Name of Judges: N/A

☐ Tribunal / Authority Name : N/A

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1. Nature of Matter: Civil
2. (a) Petitioner / Appellant : Ashwini Kumar Upadhyay

   (b) Email ID: aku.adv@gmail.com,

   (c) Phone No: 08800278866,

3. (a) Respondent: Union of India and others

   (b) Email ID: N/A

   (c) Phone No: N/A

4. (a) Main Category: 08 PIL Matters

   (b) Sub Category: 0812, others

5. Not to be listed before: N/A

A1

6(a). Similar disposed of matter: WP(C)1011/2019

6(b). Similar pending matter: No similar matter pending

7. Criminal Matters: N/A

(a) Whether accused / convicted has surrendered: N/A

(b) FIR / Complaint No: N/A

(c) Police Station: N/A

(d) Sentence Awarded: N/A

(e) Period of Sentence Undergone including period of detention / custody under gone: N/A

8. Land Acquisition Matters:

(a) Date of Section 4 Notification: N/A

(b) Date of Section 6 Notification: N/A

(c) Date of Section 17 Notification

9. Tax Matters: State the Tax Effect: N/A

10. Special Category: N/A

11. Vehicle No in case of motor accident claim matters: N/A

Date: 28.09.2020

ADVOCATE FOR PETITIONER

(ASHWANI KUMAR DUBEY)

Advocate-on-Record

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B

SYNOPSIS & LIST OF DATES

Petitioner is filing this writ petition as a PIL under Article 32 of the Constitution seeking writ order or direction or a writ in the nature of mandamus to Centre and Election Commission to take apposite steps to debar the chargesheeted person from contesting election, against whom charges have been framed in serious offences.

On 7.9.1974, Jaya Prakash Narayan Committee consisting of EPW Decosta, AG Noorani, RD Desai, PH Mavalankar, MR Masani & VM Tarkunde recommended steps for electoral reforms but Centre had not taken steps to implement the suggestions. On 20.05.1990, Goswami Committee on Electoral Reform suggested various steps to ensure free-fair election and improve transparency but Centre did nothing to implement those suggestions. On 10.10.1993, Vohra Committee submitted report on criminals and politicians nexus but Centre did nothing to weedout criminalization. On 29.05.1999, the Law Commission in its 170th Report suggested many measures to regulate the functioning of political parties but Centre failed to implement those suggestions also. On 31.03.2002, the National Commission to Review the Working of the Constitution (Venkatachaliah Commission) submitted its detailed proposals to

regulate functioning of political parties & decriminalize the politics but Centre failed again to implement the suggestions. On 05.07.2004, the Election Commission of India submitted its proposals to regulate the functioning of political parties and decriminalize the electoral process but Centre remained ignorant. On 08.12.2010, 'Background Paper on Electoral Reforms', prepared by Law Ministry endorsed the proposals of Election Commission and Law Commission of India, but no further steps were taken. On 24.02.2014, the Law Commission submitted its 244th report on decriminalization of politics, but Centre did nothing. On 12.03.2015, the Law Commission submitted its 255th report on Electoral Reform, but Centre took no step to implement them. On 05.12.2016, Election Commission again suggested steps for electoral-democratic reform, but Centre did not implement them. Moreover, on 25.9.2018, this Hon'ble Court in [WP(C) 536 / 2011] had held that criminalization of politics is a bitter manifest truth and termite to the citadel of Indian democracy. The Court recommended to bring law for decriminalization of politics. The landmark Judgment reads thus: "**2.** *The constitutional functionaries, who have taken the pledge to uphold the constitutional principles, are charged with the*

responsibility to ensure that the existing political framework does not get tainted with the evil of corruption. However, despite this heavy mandate prescribed by the Constitution, Indian democracy, which is the world's largest democracy, has seen a steady increase in the level of criminalization that has been creeping into the Indian polity. This unsettlingly increasing trend of criminalization of politics, to which our country has been a witness, tends to disrupt the constitutional ethos and strikes at the very root of our democratic form of government by making our citizenry suffer at the hands of those who are nothing but the liability to our country.

*"**114.** In multi-party democracy, where members are elected on party lines and are subject to party discipline, we recommend to the Parliament to bring out a strong law whereby it is mandatory for the political parties to revoke membership of persons against whom charges are framed in heinous and grievous offences and not to set up such persons in elections, both for Parliament and State Assemblies. This, in our attentive and plausible view, would go a long way in achieving decriminalization of politics and usher in era of immaculate spotless unsullied virtuous constitutional democracy.*

***123.** Keeping the aforesaid in view, we think it appropriate to issue*

*the following directions which are in accord with the decisions of this Court :- **(i)** Each contesting candidate shall fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein. **(ii)** It shall state, in bold letters, with regard to the criminal cases pending against the candidate. **(iii)** If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him / her. **(iv)** The concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents. **(v)** The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that same shall be done thrice after filing of nomination papers. **124.** These directions ought to be implemented in true spirit and right earnestness in a bid to strengthen the democratic set-up. There may be certain gaps or lacunae in a law or legislative enactment which can definitely be addressed by the legislature if it is backed by the proper intent, strong resolve and determined will of right-thinking*

minds to ameliorate the situation. It must also be borne in mind that the law cannot always be found fault with for the lack of its stringent implementation by the concerned authorities. Therefore, it is the solemn responsibility of all concerned to enforce the law as well as the directions laid down by this Court from time to time in order to infuse the culture of purity in politics and in democracy and foster and nurture an informed citizenry, for ultimately it is the citizenry which decides the fate and course of politics in a nation and thereby ensures that —we shall be governed no better than we deserve‖, and thus, complete information about the criminal antecedents of the candidates forms the bedrock of wise decision-making and informed choice by the citizenry. Be it clearly stated that informed choice is cornerstone to have a pure and strong democracy.

125. *We have issued the aforesaid directions with immense anguish, for the Election Commission cannot deny a candidate to contest on the symbol of a party. A time has come that the Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. It is one thing to take cover under the presumption of innocence of the accused but it is equally imperative that persons who enter public life and participate in law making*

should be above any kind of serious criminal allegation. It is true that false cases are foisted on prospective candidates, but the same can be addressed by the Parliament through appropriate legislation. The nation eagerly waits for such legislation, for the society has a legitimate expectation to be governed by proper constitutional governance. The voters cry for systematic sustenance of constitutionalism. Country feels agonized when money and muscle power become the supreme power. Substantial efforts have to be undertaken to cleanse the polluted stream of politics by prohibiting people with criminal antecedents so that they do not even conceive of the idea of entering into politics. They should be kept at bay.

126. *We are sure, the law making wing of the democracy of this country will take it upon itself to cure the malignancy. We say so as such a malignancy is not incurable. It only depends upon the time and stage when one starts treating it; the sooner the better, before it becomes fatal to democracy. Thus, we part."*

28.9.2020: Despite the above stated recommendations and the directions of the Court, Centre and ECI has not taken steps to debar criminals from contesting against whom charges have been framed in serious cases. Hence, PIL.

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO ..... OF 2020
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

Ashwini Kumar Upadhyay
S/o Sh. Suresh Chandra Upadhyay
[Office: 15, M.C. Setalvad Chambers Block
Supreme Court of India, New Delhi-110001]
Res: G-284, Govindpuram, Ghaziabad-201013 ...Petitioner

Verses

1. Union of India
   Through the Secretary,
   Ministry of Home Affairs,
   North Block, New Delhi-110001,
2. Union of India
   Through the Secretary,
   Ministry of Law & Justice (Legislative Department)
   Shastri Bhawan, New Delhi-110001,
3. Election Commission of India
   Through the Director-Law,
   Nirvachan Sadan,
   Ashoka Road, New Delhi-110001, ...Respondents

PIL TO BAN CHARGESHEETED PERSON FROM CONTESTING ELECTION AGAINST WHOM CHARGES HAVE BEEN FRAMED IN SERIOUS OFFENCES

To,
THE HON'BLE CHIEF JUSTICE
AND LORDSHIP'S COMPANION JUSTICES
OF THE HON'BLE SUPREME COURT OF INDIA
HUMBLE PETITION OF ABOVE-NAMED PETITIONER
THE MOST RESPECTFULLY SHOWETH AS THE UNDER:

1. Petitioner is filing this writ petition as a PIL under Article 32 of the Constitution seeking writ order or direction or a writ in the nature of mandamus to Centre and Election Commission to take apposite steps to debar the chargesheeted person from contesting election, against whom charges have been framed in serious offences.

2. On 7.9.1974, Jaya Prakash Narayan Committee consisting of EPW Decosta, AG Noorani, RD Desai, PH Mavalankar, MR Masani & VM Tarkunde recommended steps for electoral reforms but Centre had not taken steps to implement the suggestions in letter and spirit.
3. On 20.05.1990, Goswami Committee on Electoral Reform suggested various steps to ensure free-fair election and improve transparency but Centre did nothing to implement those suggestions.
4. On 10.10.1993, Vohra Committee submitted report on criminals and politicians nexus but Centre did nothing to weedout criminalization. Vohra Committee was formed after the Mumbai Bomb Blast.
5. On 29.05.1999, the Law Commission of India in its 170th Report suggested many measures to regulate the functioning of political parties but Centre failed to implement those suggestions.
6. On 31.03.2002, the National Commission to Review the Working of the Constitution(Venkatachaliah Commission) submitted its detailed proposals to regulate functioning of political parties & decriminalize the politics but Centre failed again to implement the suggestions.
7. On 05.07.2004, the Election Commission of India submitted its proposals to regulate the functioning of political parties and decriminalize the electoral process but Centre remained ignorant.

8. On 08.12.2010, 'Background Paper on Electoral Reforms', prepared by Law Ministry endorsed the proposals of Election Commission and Law Commission of India, but no further steps were taken.

9. On 24.02.2014, the Law Commission submitted its 244th report on decriminalization of politics, but Centre still did nothing.

10. On 12.03.2015, the Law Commission submitted its 255th report on Electoral Reform, but Centre took no steps to implement them.

11. On 05.12.2016, Election Commission again suggested steps for electoral & democratic reform, but Centre did not implement them.

12. On 25.9.2018, this Hon'ble Court in [WP(C) 536 / 2011] had held that criminalization of politics is a bitter manifest truth and termite to the citadel of Indian democracy. The Court recommended to bring law for decriminalization of politics. The Judgment reads thus:

"2. *The constitutional functionaries, who have taken the pledge to uphold the constitutional principles, are charged with the responsibility to ensure that the existing political framework does not get tainted with the evil of corruption. However, despite this heavy mandate prescribed by the Constitution, Indian democracy, which is the world's largest democracy, has seen a steady increase in the level of criminalization that has been creeping into the Indian*

polity. This unsettlingly increasing trend of criminalization of politics, to which our country has been a witness, tends to disrupt the constitutional ethos and strikes at the very root of our democratic form of government by making our citizenry suffer at the hands of those who are nothing but the liability to our country.

*"**114.** In multi-party democracy, where members are elected on party lines and are subject to party discipline, we recommend to the Parliament to bring out a strong law whereby it is mandatory for the political parties to revoke membership of persons against whom charges are framed in heinous and grievous offences and not to set up such persons in elections, both for Parliament and State Assemblies. This, in our attentive and plausible view, would go a long way in achieving decriminalization of politics and usher in era of immaculate spotless unsullied virtuous constitutional democracy.*

123.** Keeping the aforesaid in view, we think it appropriate to issue the following directions which are in accord with the decisions of this Court :- **(i)** Each contesting candidate shall fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein. **(ii)** It shall state, in bold letters, with regard to the criminal cases pending against the candidate. **(iii)

If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him / her. ***(iv)*** *The concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents.* ***(v)*** *The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that same shall be done thrice after filing of nomination papers.* ***124.*** *These directions ought to be implemented in true spirit and right earnestness in a bid to strengthen the democratic set-up. There may be certain gaps or lacunae in a law or legislative enactment which can definitely be addressed by the legislature if it is backed by the proper intent, strong resolve and determined will of right-thinking minds to ameliorate the situation. It must also be borne in mind that the law cannot always be found fault with for the lack of its stringent implementation by the concerned authorities. Therefore, it is the solemn responsibility of all concerned to enforce the law as well as the directions laid down by this Court from time to time in*

order to infuse the culture of purity in politics and in democracy and foster and nurture an informed citizenry, for ultimately it is the citizenry which decides the fate and course of politics in a nation and thereby ensures that —we shall be governed no better than we deserve‖, and thus, complete information about the criminal antecedents of the candidates forms the bedrock of wise decision-making and informed choice by the citizenry. Be it clearly stated that informed choice is cornerstone to have a pure and strong democracy.

125. *We have issued the aforesaid directions with immense anguish, for the Election Commission cannot deny a candidate to contest on the symbol of a party. A time has come that the Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. It is one thing to take cover under the presumption of innocence of the accused but it is equally imperative that persons who enter public life and participate in law making should be above any kind of serious criminal allegation. It is true that false cases are foisted on prospective candidates, but the same can be addressed by the Parliament through appropriate legislation. The nation eagerly waits for such legislation, for the society has a legitimate expectation to be governed by proper constitutional*

governance. The voters cry for systematic sustenance of constitutionalism. Country feels agonized when money and muscle power become the supreme power. Substantial efforts have to be undertaken to cleanse the polluted stream of politics by prohibiting people with criminal antecedents so that they do not even conceive of the idea of entering into politics. They should be kept at bay. ***126.*** *We are sure, the law making wing of the democracy of this country will take it upon itself to cure the malignancy. We say so as such a malignancy is not incurable. It only depends upon the time and stage when one starts treating it; the sooner the better, before it becomes fatal to democracy. Thus, we part.* ***127.*** *Writ petitions and appeals are disposed of accordingly."* Despite the recommendations and directions, Centre has not taken steps to debar criminals from contesting, against whom charges have been framed in serious cases

13. The facts constituting cause of action accrued on 25.5.2019, when out of 539 winners of 17th Loksabha, 233 (43%) declared criminal cases against themselves. Out of 542 winners analyzed after 2014 Lok Sabha elections, 185 (34%) winners had declared criminal cases against themselves. Out of 543 winners analyzed after 2009 Lok Sabha elections, 162 (30%) winners had declared criminal cases

against themselves. There is an increase of 44% in the number of MPs with declared criminal cases since 2009. Similarly, 159 (29%) winners in Lok Sabha 2019 Elections have declared serious criminal cases including cases related to rape, murder, attempt to murder, kidnapping, crimes against women etc. Out of 542 winners analyzed during Lok Sabha elections in 2014, 112 (21%) winners had declared serious criminal cases against themselves. Out of 543 winners analyzed during Lok Sabha elections in 2009, 76 (14%) winners had declared serious criminal cases against themselves. There is an increase of 109% in the number of MPs with declared serious criminal cases since 2009. Winner from Idukki constituency, Mr. Dean Kuriakose has declared 204 criminal cases against himself, including cases related to committing culpable homicide, house trespass, robbery, criminal intimidation etc. What is alarming is that the percentage of candidates with criminal antecedents and their chances of winning have actually increased rapidly over the years. In fact, empirical analysis shows that, where the charges against a candidate are serious, it slightly increases the statistical probability of his winning the election. Criminals who earlier used to help politicians win elections in the hope of getting favors, appear to

have cut out the middle-man in favor of entering politics themselves and political parties in turn have become steadily more reliant on criminals as candidates "self-finance" their own elections in an era, where election contests have become phenomenally expensive, but also because candidates with criminal antecedents are more likely to win than clean candidates. Political parties are competing with each other in a race to the bottom because they cannot afford to leave their competitors free to recruit criminals.

14. The injury caused to people is large because criminalization of politics is at extreme level and political parties are still setting-up candidates with serious criminal antecedents. Therefore, voters find it difficult to cast their vote freely and fairly though it is their fundamental right, guaranteed under Article 19. Criminals are able to get votes based on their caste or religious affiliation, their money power, their perceived willingness to bend and break the law in favor of their constituents and also coercion and intimidation of their rivals. Criminals have no interest in standing as independents and generally stand as candidates of recognized political parties because political parties are connected to distinct leaders, families, ethnic groups and social bases. Criminals tap these networks to

expand their appeal beyond their own narrow support bases. It is necessary to state that in a country like ours, with high rates of poverty illiteracy and unemployment, party symbols hold great weight as they serve as an important visual cue through which millions of voters connect to electoral politics.

15. The consequences of permitting criminals to contest elections and become legislators are extremely serious for our democracy and secularism: **(i)** during the electoral process itself, not only do they deploy enormous amounts of illegal money to interfere with the outcome, they also intimidate voters and rival candidates. **(ii)** Thereafter, in our weak rule-of-law context, once they gain entry to our system of governance as legislators, they interfere with, and influence, the functioning of the government machinery in favor of themselves and members of their organization by corrupting government officers and where that does not work, by using their contacts with Ministers to make threats of transfer and initiation of disciplinary proceedings. Some even become Ministers themselves, which makes the situation worse. **(iii)** Legislators with criminal antecedents also attempt to subvert the administration of justice and attempt by hook or crook, to prevent cases against themselves

from being concluded and where possible, to obtain acquittals. Long delays in disposal of cases against sitting MP's and MLA's and low conviction rates is testimony to their influence. The empirical evidence supports the view, therefore, that to the extent that the current legislative framework permits criminals to enter electoral process and become legislators, it **(a)** interferes with the purity and integrity of electoral process; **(b)** violates the right to choose freely the candidate of the voter's choice and, therefore, the freedom of expression of voter under Article 19(1); **(c)** amounts to a subversion of democracy, which is part of the basic structure; and, finally, **(d)** is antithetical to the rule of law which is at core of the Article 14.

16. The importance of insights from the social sciences in constitutional decision-making should not be minimized. Without innovations such as the Brandeis brief, that relied as much on data and analysis from the social sciences as legal arguments, many path-breaking decisions by the U.S. Supreme Court that led to the fundamental reorientation of constitutional law in the United States, would not have been possible. The landmark decision in *Brown v. Board of Education*, [347 U.S. 483 (1954)] on affirmative action was based on similar data and analysis from the social sciences.

17. When 43% of MP's in the Lok Sabha cutting across all political parties have criminal cases pending against them, it is not surprising that a Parliamentary Standing Committee in 2007 itself simply rejected the recommendation of the Law Commission in its 170th Report and the Election Commission's "*Proposal for Electoral Reforms*" to amend the RPA to impose an electoral disqualification on persons against whom charges have been framed for serious offences punishable by sentences of 5 years or more. It is evident that electoral reform is not priority of any government.

18. This Hon'ble Court has repeatedly issued directions in the past to the Election Commission to exercise its plenary powers under Article 324 with respect to "*superintendence, direction and control*" of the conduct of elections to Parliament and State legislatures to redress not only the violations of the fundamental rights of voters guaranteed under Article 19(1) but also to protect purity of electoral process and ensure free and fair election. There are many reasons why this Hon'ble Court must take steps to control the problem of criminalization of politics. Host of reports by eminent commissions and committees including the Election Commission (which has constitutional status) in its "*Proposed Electoral Reforms*" (2004),

the Law Commission in its 170th and 244th Reports (1999 & 2014), the Consultation Paper on Electoral Reforms issued by the National Commission to Review Working of the Constitution headed by the eminent former CJI Venkatachaliah (2002), Second Administrative Reforms Commission (2009) and the Vohra Committee (1993) have drawn attention to the severity of the problem and have suggested electoral reforms to stem the tide of criminals flowing into polity.

19. Taking note of these reports, this Hon'ble Court has in a series of decisions over the last two decades taken steps to address the problem including by: (i) recommending the setting up a high level committee to consider Vohra Committee Report in *Dinesh Trivedi v. Union of India* [(1994) 4 SCC 306]; (ii) directing the ECI to ensure that candidates file affidavits along with their nomination papers setting out the criminal cases pending against them in ADR Case, [(2002) 5 SCC 294]; (iii) holding that the disqualification under Section 8 of the RPA would apply even where sentences run consecutively beyond two years in *K.Prabhakaran v. P.Jayarajan,* [(2005) 1 SCC 754]; (iv) striking down Section 8(4) of RPA, which permitted sitting MP's and MLA's to continue in office if they have filed an appeal within a period of three months after conviction in

Lily Thomas v. Union of India, [(2013) 7 SCC 653]; and (iv) most recently, in petitioner's PIL [WP(C)699/2016] directing the High Courts to set up fast track courts to complete the trial of pending criminal cases against sitting MP's and MLA's within one year. Despite the reports referred to above and the efforts of this Hon'ble Court, Centre has taken serious action to tackle the problem.

20. In this background, the decisions of this Hon'ble Court also support the compelling necessity to take immediate steps to deter candidates who have charges framed against them from standing for elections: ***First*:** In the context of upholding the denial of the right to vote to those confined in jail or in police custody, this Hon'ble Court in *Anukul Chandra Pradhan v. Union of India,* (1997) 6 SCC 1, (para. 5), held that "*...criminalization of politics is the bane of society and negation of democracy. It is subversive of free and fair elections, which is a basic feature of the Constitution. Thus, a provision made in the election law to promote the object of free and fair elections and facilitate maintenance of law and order, which are the essence of democracy, must, therefore, be so viewed*".(The 244th Report of the Law Commission records that eminent jurist Fali Nariman "*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 democratic process.") ***Second:*** Criminals should not be allowed to become law-makers. In ADR Case this Hon'ble Court also held that " ... *voters may not elect law-breakers as law-makers and some flowers of democracy may blossom."* [*Prabhakaran*, para. 54] ***Third:*** Candidates with criminal antecedents also interfere with the purity of the electoral process through coercion and intimidation of voters and rival candidates, which is a violation of the freedom of expression of the voter under Article 19(1)(a). This Court in *Prabhakaran* (para 54) gave judicial recognition to the fact that "...*persons with criminal background do pollute the process of election as they do not have many a hold barred and have no reservation from indulging in criminality to win success at an election.*" In PUCL [(2013) 10 SCC 1, para 28], this Court recognized that "...*casting of the vote is a facet of the right of expression of an individual and the said right is provided under Article 19(1).* [(ADR (2002) 5 SCC 294, PUCL, (2003) 4 SCC 399)]. ***Fourth:*** Permitting criminals to become legislators' results in the breakdown of the rule of law both in terms of the government machinery as well as in terms of the system of administration of

justice. Therefore, this Hon'ble Court must take steps to not only deter criminals from becoming legislators but also to uphold the rule of law inherent in Article 14. The Court in *Manoj Narula* held: *"A democratic polity, as understood in its quintessential purity, is conceptually abhorrent to corruption and, especially corruption at high places, and repulsive to the idea of criminalization of politics as it corrodes the legitimacy of the collective ethos, frustrates the hopes and aspirations of the citizens and has potentiality to obstruct if not derail rule of law".* In this background, it is submitted that the Court should direct the ECI to insert in Paragraph 6A *"Conditions for recognition as State Party"* and Paragraph 6B *"Conditions for recognition as National Party"* of the Election Symbols Order, 1968, the condition – *"No candidate with criminal antecedents shall be set up by the Political Party".* In accordance with the recommendations in the 244th Report of Law Commission on the disqualification proposed therein, a definition should also be introduced in paragraph 2: *"candidate with criminal antecedents" means a person against whom charges have been framed at least one year before the date of scrutiny of nominations for an offence with a maximum punishment of five years or more.*

21. If the proposed direction is given, there would be no need even for an enquiry by the Election Commission because candidates are required by Section 33A of the RPA read with Rule 4A of the Conduct of Election Rules, 1961 and Form 26 to file along with their nomination papers an affidavit containing detailed information relating to framing of charges against them for offences punishable with imprisonment of more than two years. This would include the Sections under which they are charged, the Court that did so and the date on which charges were framed. There are many precedents for this Hon'ble Court to give directions to the ECI to preserve the purity of elections and protect fundamental rights of voters.

22. In ADR Case, this Hon'ble Court directed the ECI to call for information on affidavit from each candidate, *inter alia*, listing the offences with which he is charged and the assets of himself and his family by issuing necessary orders in exercise of its power under Article 324. The Court held: *"**48.** Finally, in our view this Court would have ample power to direct the ECI to fill the void, in absence of suitable legislation covering the field and the voters are required to be well informed and educated about contesting candidates so that they can elect a proper candidate by their own assessment. It is the*

duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets —immovable, movable and valuable articles — it would have its own effect...."

23. In *S. Subramaniam Balaji v. State of T.N.*, [(2013) 9 SCC 659], this Hon'ble Court directed the ECI in exercise of its powers under Article 324 to frame guidelines governing the contents of an election manifesto to be included in the Model Code of Conduct. This Hon'ble Court justified the need for such a direction by holding that:

"87. Therefore, considering that there is no enactment that directly governs the contents of the election manifesto, we hereby direct the Election Commission to frame guidelines for the same in consultation with all the recognised political parties as when it had acted while framing guidelines for general conduct of the candidates,

meetings, processions, polling day, party in power, etc. .... We are mindful of the fact that generally political parties release their election manifesto before the announcement of election date, in that scenario, strictly speaking, the Election Commission will not have the authority to regulate any act which is done before the announcement of the date. Nevertheless, an exception can be made in this regard as the purpose of the election manifesto is directly associated with the election process."

24. In *People's Union for Civil Liberties* [(2013) 10 SCC 1], this Hon'ble Court directed the Election Commission to give voters the option to choose "None of The Above" in every election and held: *"53....Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate. This situation palpably tells us the dire need of the negative voting. 63.... In view of our conclusion, we direct the Election Commission to provide necessary provision in the ballot papers/EVMs and another button called "None of the Above" (NOTA) may be provided in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their*

right not to vote while maintaining their right of secrecy. Inasmuch as the Election Commission itself is in favour of the provision for NOTA in EVMs, we direct the Election Commission to implement the same either in a phased manner or at a time with the assistance of the Government of India...."

25. In any case, the proposed direction does not constitute a disqualification in violation of Articles 102(1)(e) or 191(1)(e) of the Constitution because the affected candidate can always stand for election as an independent. Any such direction by this Hon'ble Court also would not breach the principle of the separation of powers because there is a legislative vacuum insofar as Parliament has not enacted any legislation in the field covered by the Symbols Order, which has been issued by the Election Commission in exercise solely of its powers under Article 324. This follows because: (i) The power of the Election Commission under Article 324 of the Constitution operates in areas left unoccupied by legislation and is plenary in character. *[Kanhiya Lal Omar v. R.K. Trivedi, (1985) 4 SCC 628 (para. 16).]* The power of "superintendence, direction and control" of the conduct of elections vested in the Election Commission is executive in character. *[A.C. Jose v. Sivan Pillai, (1984) 2 SCC 656*

(para. 22).] (ii) The Symbols Order is traceable to the power of the Election Commission under Article 324. *[Kanhiya Lal Omar (para. 16).]* (iii) The power to amend, vary or rescind an order which is administrative in character under Section 21 of the General Clauses Act, specifically referred to in paragraph 2(2) of the Symbols Order, would permit the Election Commission to withdraw recognition to a political party. *[Janata Dal v. Election Commission, (1996) 1 SCC 235 (para. 6).]* Accordingly, it is clear that the proposed direction to the Election Commission of India to amend the Election Symbols Order 1968 would operate in a field where there is a legislative vacuum, which can be filled by ECI under Article 324.

26. The proposed direction is vital because the functions performed by legislators are vital to democracy and there is no reason why they should be held to lower standards than Judges or Indian Administrative Service officers. Candidates for judgeship of the superior courts or for Indian Administrative Service certainly would not be considered at all if there were criminal cases pending against them, let alone if charges had been framed in respect of serious offences. In fact, Legislators are not only public servant but also law makers hence must comport higher ethics and morality.

27. There are very few constitutional offices as important as that of the MPs-MLAs. In *PV Narasimha Rao case [(1998) 4 SCC 626 para 162]*, this Hon'ble Court while holding that MPs & MLAs are public servant for purposes of the Prevention of Corruption Act, 1988 held: *"In a democratic form of government, it is the MP or a MLA who represents the people of his constituency in the highest law-making bodies at the Centre and State respectively. He is representative of the people in the process of making the laws that will regulate their society, he is their representative in deciding how the funds of the Centre and the States shall be spent and in exercising control over the executive. It is difficult to conceive of a duty more public than this or of a duty in which the State, the public and the community at large would have greater interest."* Of course, the refusal to consider candidates for judgeship/IAS may be on touchstone of suitability and not eligibility. It is worth noting, however, that the proposed direction is not an eligibility condition for legislators but rather merely imposes a condition on political parties. Moreover, in context of institutional integrity of office of the CVC, this Court has held that the pendency of criminal cases may be considered a bar on appointment to important offices such as the CVC. *[(2011) 4 SCC 1.]*

28. The effect of proposed direction would only be to impose an additional condition on political party for obtaining and retaining the status of the *"recognized national party" or " recognized state party"*, which would entitle it to a reserved the symbol under the the Election Symbols Order. The statutory right to register political party would not be affected in any way. Moreover, political parties are exempted from paying income tax on contributions received by them. Therefore imposing condition during elections and preventing them from fielding candidates with criminal antecedents in election, is a reasonable restriction keeping in mind the concessions and privileges enjoyed by them. From the standpoint of the candidate against whom charges have been framed for a serious offence, the settled legal position is that he has only a statutory right to contest the elections and nothing more. *(Krishnamoorthy, paras 59-60)* Further, even assuming that he is innocent, it would have the indirect impact of possibly preventing him *for a limited period of time until his trial is over* from obtaining a ticket from a recognized political party that values its reserved symbol. Such a measure would be in the larger public interest of ensuring that our polity remains free of criminal and corrupted elements.

29. The test for determining whether such a direction would violate the fundamental rights should be whether this Hon'ble Court would uphold a law imposing a disqualification of a similar nature considering presumption of constitutionality keeping in mind the larger public interest referred to above._The proposed direction cannot result in a violation of the fundamental right under Article 19(1) to form an association. A candidate with criminal antecedents can become or continue to be a member of the political party. The condition that the political party not give him a ticket as a condition for recognition as a State or National party to guarantee continued usage of the reserved symbol does not impinge on the freedom of association of either the candidate or political party. Further, even assuming that it could be characterized as falling within the scope of Article 19(1), proposed direction arguably is a reasonable restriction and can be justified on the ground of public order and morality in Article 19(4). Such a law would also pass rational classification test under Article 14 because the class of candidates who have serious criminal charges framed against them is clearly distinct from the class that does not and the classification has a rational nexus with the larger objective of stopping criminalization of polity.

30. The objections may be that (a) it would violate presumption of innocence and that the class of affected persons would include persons against whom false or frivolous cases have been filed; and (b) this Hon'ble Court cannot do indirectly what it may not do directly. The contention based on presumption of innocence is without merit. The presumption of innocence is defined as "*the fundamental principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence.*" [BLACK'S LAW DICTIONARY, 10th Ed. (2014), p. 1378.] In fact, the proposed direction does not operate in the field of criminal law at all insofar as it only imposes an additional condition on a political party that it may not set up a candidate with criminal antecedents and failure to abide by the condition will only impact its ability to retain its reserved symbol. In *Prabhakaran*, (para 55) this Hon'ble Court held that " *...contesting an election is a statutory right and qualifications and disqualifications for holding the office can be statutorily prescribed. A provision for disqualification cannot be termed a penal provision and certainly cannot be equated with a penal provision contained in a criminal law...*".

31. Proposed direction doesn't impinge upon presumption of innocence.

First, the proposed direction does not have effect of convicting the candidate or subjecting him to imprisonment. ***Second***, it does not impose a serious disability on the candidate to the extent that he can always stand as an independent. The alleged deprivation of having to make do without party financing is not empirically well founded. As noted above, persons with criminal antecedents are chosen by political parties in large part because they can pump large amounts of illegal funds into their elections. ***Third***, the proposed direction would operate even against an innocent candidate only for a short period of time until his trial is over. This situation is analogous to a case where the conviction of a candidate is overturned on appeal. Even in the latter case, the Constitution Bench in *Prabhakaran* (para. 61), held that the judgment reversing the conviction would not have the effect of wiping out disqualification on date of scrutiny of nominations while conviction was still subsisting. Moreover, even in the field of criminal law, the presumption of innocence is not absolute. In India, it is notorious that persons under trial for criminal offences spend years, even decades sometimes, in jail, often beyond the sentence that they would suffer if convicted.

32. By raising the threshold to the stage, where charges have already been framed before the restriction will operate, the chances are considerably reduced of false cases being maliciously foisted on the candidate or that there is no substance in the case against him: ***First,*** the police have investigated the charges against the candidate and found sufficient evidence to prosecute the accused and have filed final report under Section 173 of CrPC. ***Second,*** the Court has applied its mind to the police report under Section 173, taken cognizance on the basis after applying its mind to the final report and the materials therein and issued process to the accused. ***Third,*** the Court has framed charges under Section 228 after hearing the parties and considering all the evidence and the plea of the accused for discharge under Section 227. The standard of proof for framing charges under Section 228 is "... *there is ground for presuming that the accused has committed an offence ...*". Of course, by this, the presumption of innocence of accused is not nullified to the extent that the burden continues to be on the prosecution until the end of trial and pronouncement of verdict. However, by stage of framing of charges, at least, the judge should have more than satisfied himself that there is a *prima facie* case against the accused.

33. The additional protection envisaged by the Law Commission of India in its 244th Report is that charges should have been framed at least one year before the scrutiny of nominations. During this period, candidate could also apply to the High Court under Section 482 of the CrPC or under Article 226 for quashing of the charges against him. The contention may be that the proposed direction would amount to doing indirectly what cannot be done directly is also without merit because the proposed direction neither adds an eligibility condition in violation of Articles 84 or 173 nor imposes a disqualification in violation of the provisions of Article 102(1)(e) or 191(1)(e) of the Constitution. It would only deter political parties from giving tickets to criminals. This Hon'ble Court in catena of decisions had held that right to contest is only a statutory right. *Jawed v. State of Haryana [(2003) 8 SCC 369], NP Ponnuswami v. Returning Officer [1952 SCR 218] Jamuna Prasad Mukhariya v. Lacchi Ram [AIR 1954 SC 686] Jyoti Basu v. Debi Ghosal [(1982) 1 SCC 691 (Para 8)] Kuldip Nayyar v. UOI [(2006) 7 SCC 1 (Paras 299-300 Page 107)] K. Krishnmurthy v. UOI [(2010) 7 SCC 202 (Para 78)] PUCL v. UOI [(2013) 10 SCC 1 (Para 25)] Krishnamoorthy v. Sivakumar & others [(2015) 3 SCC 467]*

34. In catena of decisions, this Hon'ble Court had held that Constituent Assembly debates through light on the intention of the framers: *TMA Pai Foundation [(2002) 8 SCC 481 (Paras 203-208, pg. 604)] S.R.Chaudhari v. State of Punjab [(2001) 7 SCC 126 (Para 33)] A.K. Roy v. Union of India [(1982) 1 SCC 271 (Page 288)] Indra Sawhney v. UOI [(1992) Supp (3) SCC 217 at Page 710]* Similarly, in a catena of decisions, this Hon'ble Court has repeatedly held that Statement of objects and reasons show intention of the legislator. *Bakhtawar Trust v. M.D.Narayan (2003) 5 SCC 298 (Page 313); RIB Tapes Pvt. Ltd v. UOI (1986) 4 SCC 185 (Para 8, Page 189); State of TN v. K Shyam Sunder (2011) 8 SCC 737 (Para 66-68)*

35. The separation of power cannot prevent this Hon'ble Court from passing directions necessary to address the systemic problem of the growing criminalization of politics and the political system *without breaching the principle of separation of powers.* It is necessary to state that many laws have been enacted in last two years but Centre did nothing to amend the RPA in spirit of the recommendations of the Law Commission and the judgment dated 25.9.2018. Therefore, being Custodian of the Constitution and protector of fundamental right, this Hon'ble Court cannot be a mute spectator.

36. Petitioner's name is Ashwini Kumar Upadhyay. Residence at: G-284, Govindpuram, Ghaziabad-201013, Ph. 08800278866, E-mail: aku.adv@gmail.com, PAN: AAVPU7330G, AADHAAR-659982174779 Income is 10 LPA. Petitioner is an Advocate & social-political activist and striving for gender justice, gender equality & dignity of women; unity & national integration and transparency & good governance.

37. The Law Commission Report No-244 is **Annexure P-1.** (37-94)

38. SC Judgment in WP(C)536/2011,25.9.2018 is **Annexure P-2**(95-130)

39. Representation to the ECI dated 21.1.2019 is **Annexure P-3**(131-134)

40. Petitioner hasn't filed same/similar petition except WP(C)1011/2019 seeking same or similar directions. Order is **Annexure-4** (pg. 135)

41. There is no civil, criminal or revenue litigation, involving petitioner, which has/could have legal nexus, with the issue involved in this PIL

42. Petitioner has no personal interests, individual gain, private motive or oblique reasons in filing this PIL. This is purely in public interest.

43. Petitioner has submitted representation to the ECI on 21.1.2019 but it has not taken apt steps by using its plenary power under Article 324.

44. There is no need to approach respondents because despite repeated observations, they did nothing to debar chargesheeted person from contesting. There is no remedy except approaching this Court again.

PRAYER

Keeping in view the above facts, Hon'ble Court may be pleased to issue writ/order/direction or a writ in the nature of mandamus to:

a) direct the Union of India to take appropriate steps to debar the person from contesting election, against whom charges have been framed in serious offences, in spirit of the recommendations of the Law Commission Report No-244 and Judgment dated 25.9.2018;

b) In the alternative, direct the Election Commission of India to use its plenary power conferred under Article 324, to amend the Election Symbols (Reservation & Allotment) Order 1968, to insert additional conditions for recognition and continuance as a State or National Party, in order to debar the person from contesting election, against whom charges have been framed in serious offences;

c) In the alternative, being custodian of the Constitution and protector of fundamental rights; direct and declare that the person against whom charges have been framed in serious offences, cannot contest election for the Parliament and State Legislature;

d) issue other directions as the Court deem fit for decriminalization of politics and ensure free and fair election.

28.09.2020 (Ashwani Kumar Dubey)

New Delhi Advocate for the Petitioner

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO ..... OF 2020

IN THE MATTER OF:

Ashwini Kumar Upadhyay ...Petitioner

Verses

Union of India & others ...Respondents

AFFIDAVIT

1. I, Ashwini Kumar Upadhyay aged 45 years, son of Sh. Suresh Upadhyay, Office at: 15, New Lawyers Chambers, Supreme Court, New Delhi-110001, Residence at: G-284, Govindpuram, Ghaziabad-201013, at present at New Delhi, do hereby solemnly affirm and declare as under:
2. I am the sole petitioner above named and well acquainted with facts and circumstances of the case and as such competent to swear this affidavit.
3. I have read and understood contents of accompanying synopsis and list of dates pages (B -G) writ petition paras (1 - 44) pages (1 - 31) and total pages (1 - 138) which are true and correct to my knowledge and belief.
4. Annexures filed with the petition are true copy of the respective originals.
5. I have not filed any other petition either in this Hon'ble Court or in any other Court seeking same or similar directions as prayed.
6. I have no personal interests, individual gain, private motive or oblique reasons in filing this petition. It is not guided for gain of any other individual person, institution or body. The only motive is public interest.
7. There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus, with issue involved in this petition.
8. There is no requirement to move concerned government authority for relief sought in this petition. There is no other remedy except filing this PIL.
9. I have gone through the Article 32 and the Supreme Court Rules and do hereby affirm that the present petition is in conformity thereof.
10. I have done whatsoever enquiry/investigation, which was in my power to do, to collect the data or material, which was available; and which was relevant for this Hon'ble Court to entertain the present petition.
11. I've not concealed any data/material/information in this petition; which may have enabled this Hon'ble Court to form an opinion, whether to entertain this petition or not and/or whether to grant any relief or not.
12. The averments made in this affidavit are true and correct to my personal knowledge and belief. No part of this Affidavit is false or fabricated, nor has anything material been concealed there from.

(Ashwini Kumar Upadhyay)
DEPONENT

VERIFICATION: I, Deponent do hereby verify that contents of above affidavit are true and correct to my personal knowledge and belief. No part of this affidavit is false nor has anything material been concealed there from. I hereby solemnly affirm and declare it today i.e. 20th day of September 2020 at Delhi.

(Ashwini Kumar Upadhyay)
DEPONENT

APPENDIX

THE ELECTION SYMBOLS (RESERVATION & ALLOTMENT) ORDER, 1968

An order to provide for specification, reservation, choice and allotment of symbols at elections in Parliamentary and Assembly Constituencies, for the recognition of political parties in relation thereto and for matters connected therewith.

S.O. 2959, dated the 31st August, 1968.— Whereas, the superintendence, direction and control of all elections to Parliament and to the Legislature of every State are vested by the Constitution of India in the Election Commission of India.

AND WHEREAS, it is necessary and expedient to provide in the interest of purity of elections to the House of the People and the Legislative Assembly of every State and in the interest of the conduct of such elections in a fair and efficient manner, for the specification, reservation, choice and allotment of symbols for the recognition of political parties in relation thereto and for matters connected therewith.

NOW, THEREFORE, in exercise of the powers conferred by article 324 of the Constitution [read with section 29A of the Representation of the People Act, 1951 and rules 5 and 10] of the Conduct of Elections Rules, 1961, and all other powers enabling it in this behalf, the Election Commission of India hereby makes the following Order:—

1. Short title, extent, application and commencement.—**(1)** This Order may be called the Election Symbol (Reservation-Allotment) Order, 1968.

(2) It extends to the whole of India and applies in relation to election in all Parliamentary and Assembly Constituencies other than Assembly Constituencies in the State of Jammu and Kashmir.

(3) It shall come into force on the date of its publication in the Gazette of India which date is hereinafter referred to as the commencement of this Order.

2. Definitions and interpretation..—**(1)** In this Order, unless the context otherwise requires, —

(a) "clause" means a clause of the paragraph or sub-paragraph in which the word occurs;

(b) "Commission", means the Election Commission of India constituted under article 324 of the Constitution;

(c) "constituency" means a parliamentary constituency or an assembly constituency;

(d) "contested election" means an election in a parliamentary or an assembly constituency where a poll is taken;

(e) "election" means an election to which this Order applies;

[(ee) "form" means a Form appended to this Order;]

(f) "general election" means any general election held after the commencement of this Order for the purposes of constituting the House of the People or the Legislative Assembly of a State and includes a general election whereby the House of the People or the Legislative Assembly of a State in existence and functioning at such commencement, has been constituted;

(g) "paragraph" means a paragraph of this Order;

[(h) "political party" means an association or body of individual citizens of India registered with the Commission as a political party under section 29A of the Representation of the People Act, 1951 (43 of 1951);]

[(i) "State" includes the National Capital Territory of Delhi and the Union territory of Pondicherry;]

(j) "Sub-paragraph" means a sub-paragraph of the paragraph in which the word occurs;

[(jj) "Union territory" means Union territory other than the National Capital Territory of Delhi and the Union territory of Pondicherry; and]

(k) words and expressions used but not defined in this Order but defined in the Representation of the People Act, 1950 (43 of 1950), or the rules made thereunder or in the Representation of the People Act, 1951 (43 of 1951), or the rules made thereunder shall have the meanings respectively assigned to them in those Acts and rules.

(2) The General Clauses Act, 1897 (10 of 1897) shall, as far as may be, apply in relation to interpretation of this Order as it applies in relation to the interpretation of a Central Act.

4. Allotment of symbols.—In every contested election a symbol shall be allotted to a contesting candidate in accordance with the provisions of this Order and different symbols shall be allotted to different contesting candidates at an election in the same constituency. **5. Classification of symbols.—(1)** For the purpose of this Order symbols are either reserved or free.

(2) Save as otherwise provided in this Order, a reserved symbol is a symbol which is reserved for a recognised political party for exclusive allotment to contesting candidates set up by that party.

(3) A free symbol is a symbol other than a reserved symbol.

[**6. Classification of political parties.—(1)** For the purposes of this Order and for such other purposes as the Commission may specify as and when necessity therefor arises, political parties are either recognised political parties or unrecognised political parties.

(2) A recognised political party shall either be a National party or a State party.

[**6A. Conditions for recognition as a State party.**—A political party shall be eligible for recognition as a State party in a State, only if, any of the following conditions is fulfilled:--

(i) At the last general election to the Legislative Assembly of the State, the candidates set up by the party have secured not less than six per. Cent. of the total valid votes in the State; and, in addition, the party has returned at least two members to Legislative Assembly of that State at such general election; or

(ii) At the last general election to the House of the People from that State, the candidates set up by the party have secured not less than six per. Cent. of the total valid votes polled in the State; and, in addition, the party has returned at least one member to the House of the People from that State at such general election; or

(iii) At the last general election to the Legislative Assembly of the State, the party has won at least three per. Cent. of the total number of seats in the Legislative Assembly, (any fraction exceeding half being counted as one), or at least three seats in the Assembly, whichever is more; or

(iv) At the last general election to the House of the People from the State, the party has returned at least one member to the House of the People for every 25 members or any fraction thereof allotted to that State.]

6B. Conditions for recognition as a State party.—A political party, other than a National party, shall be treated as a recognised State party in a State or States, if, and only if,— either **(A)(i)** the candidates set up by it, at the last general election to the House of the People, or to the Legislative Assembly of the State concerned, have secured not less than six per cent. of the total valid votes polled in that State at that general election; and **(ii)** in addition, it has returned at least two members to the Legislative Assembly of the State at the last general election to that Assembly;

or **(B)** it wins at least three per cent. of the total number of seats in the Legislative Assembly of the State (any fraction exceeding one-half being counted as one), or at least three seats in the Assembly, whichever is more, at the aforesaid general election.

6C. Conditions for continued recognition as a National or State party.—If a political party is recognised as a National party under paragraph 6A, or as a State party under paragraph **6B,** the question whether it shall continue to be so recognized after any subsequent general election to the House of the People or, as the case may be, to the Legislative Assembly of the State concerned, shall be dependent upon the fulfilment by it of the conditions specified in the said paragraphs on the results of that general election.]

ARTICLE 14 OF THE CONSTITUTION OF INDIA

Equality before law The State shall not deny to any person equality before law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

ARTICLE 324 IN THE CONSTITUTION OF INDIA

"**324.** Superintendence, direction and control of elections to be vested in an Election Commission

(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1)

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine; Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)

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Annex P-1

GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

ELECTORAL DISQUALIFICATIONS

Report No. 244

February, 2014

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

The Law Commission consists of a full time Chairman, four full-time Members (including Member-Secretary), two Ex-officio Members and five part-time Members.

Chairman
Hon'ble Justice A.P. Shah

Full-time Members
Justice S.N. Kapoor
Prof. (Dr.) Moolchand Sharma
Justice Usha Mehra
Mr. N.L. Meena, Member-Secretary

Ex-officio Member
Mr. P.K. Malhotra, Secretary (Legislative Department and Department of Legal Affairs)

Part-time Members
Prof. (Dr.) G. Mohan Gopal
Shri R. Venkataramani
Prof. (Dr.) Yogesh Tyagi
Dr. Bijai Narain Mani
Prof.(Dr.) Gurjeet Singh

The Law Commission is located in
14th Floor, Hindustan Times House,
K.G. Marg,
New Delhi-110 001

Member Secretary
Mr. N.L. Meena

Research Staff

Dr. (Smt.) Pawan Sharma	: Additional Law Officer
Shri A.K. Upadhyay	: Additional Law Officer
Shri S.C. Mishra	: Deputy Law Officer
Dr. V.K. Singh	: Deputy Legal Adviser

The text of this Report is available on the Internet at :
http://www.lawcommissionofindia.nic.in

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न्यायमूर्ति अजित प्रकाश शहा
भूतपूर्व मुख्य न्यायाधीश, दिल्ली उच्च न्यायालय
अध्यक्ष
भारत का विधि आयोग
भारत सरकार
हिन्दुस्तान टाइम्स हाउस
कस्तूरबा गान्धी मार्ग, नई दिल्ली - 110 001
दूरभाष : 23736758, फैक्स/ Fax:23355741

सत्यमेव जयते

Justice Ajit Prakash Shah
Former Chief Justice of Delhi High Court
Chairman
Law Commission of India
Government of India
Hindustan Times House
K.G. Marg, New Delhi - 110 001
Telephone : 23736758, Fax : 23355741

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

Dated, the 24th 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 21st 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 244th 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 Commssion of India.

Regards and Wishes

Yours Sincerely,

(Ajit Prakash Shah)

Shri Kapil Sibal
Hon'ble Minister for Law and Justice,
Shastri Bhawan,
New Delhi – 110 001

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LAW COMMISSION REPORT ON ELECTORAL DISQUALIFICATIONS

I. INITIATION OF THE PROCESS

The Ministry of Law and Justice, Government of India had addressed a letter dated 16th 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 16th 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 16th 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 tepidwith 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 debarring 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 1st 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 RegionalParties 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 170th 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.PinakiMisra,, 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. ShiromaniAkali 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, 26th 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." [1]

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

[1] *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,*[2]

> *"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*[3]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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[2](1978) 1 SCC 405, 424 at para 23.
[3] (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."[4]

A three Judge Bench of the Supreme Court in *Centre for Public Interest Litigation v. Union of India*[5](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 theMembers 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 fiveyears 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..."*[6]

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.[7] 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.[8] A Consultation Paper published by the NCRWC in 2002 went further to say that criminals

[4] Vol. XI, C.A.D. (November 26th, 1949).
[5] (2011) 4 SCC 1.
[6] Per C Rajagopalachari in Kishor Gandhi, *India's Date with Destiny: Ranbir Singh Chowdhary Felicitation Volume*, 1st Ed. (Allied Publishers, 2006) 133.
[7] 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.
[8] 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.[9]

Since the judgment of the Supreme Court in *Union of India v. Association for Democratic Reforms*,[10] 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.[11]

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.[12]

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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[9] 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.

[10] (2002) 5 SCC 294.

[11] 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> accessed 14 January, 2014
TrilochanSastry, 'Towards Decriminalisation of Elections and Politics', *Economic & Political Weekly, 4 January, 2014.*

[12] 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.[13]

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.[14] Some states have a much higher percentage of MLAs with criminal records: in Uttar Pradesh, 47% of MLAs have criminal cases pending.[15] 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.[16]

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.[17] 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.[18] Not only do political parties select candidates with criminal backgrounds, there is evidence to suggest that untainted representatives later become involved in criminal activities.[19]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.*"[20]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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[13] 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> accessed 13 January, 2014.

[14] ADR,(n.11).

[15] 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

[16] *Id*

[17] Vaishnav, (n.7), 10

[18] Sastry(n.12), 3

[19] Christophe Jaffrelot, 'Indian Democracy: The Rule of Law on Trial'(2002) 1(1) *India Review* 77

[20] *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> 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.[21] 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.[22] Huge election expenses have also resulted into large-scale pervasiveness of so-called 'black money'.[23] The Law Commission has earlier also expressed the concern of election expenses being far greater than legal limits.[24] 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.[25] 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'.[26] Many studies have consequently highlighted the direct relationship between the membership of local criminals and inflow of money intothe coffers of political parties.[27]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.[28]

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[21]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)

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

[23]*Background Report on Electoral Reforms*, Ministry of Law and Justice (2010).

[24]Background Report (n.23)

[25] Dutta & Gupta, (n.21).

[26]Dutta & Gupta, (n.21).

[27]Vaishnav, (n.7).

[28]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 170th report quoted in *Subhash Chandra Agarwal,*[29]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".*[30]

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.[31] 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.[32] 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.[33] 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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[29]*Subhash Chandra Agarwal* (n. 20).
[30] "Reform of Electoral Laws", 170thReport of the Law Commission of India, 1999.
[31]Sec. 29A(5), The Representation of People Act, 1951.
[32]Schedule X, The Constitution of India, 1951.
[33]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.[34] 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.

[34]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* [35](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*[36](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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[35] (2002) 5 SCC 294.
[36](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*[37] 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*[38](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 *VineetNarain v. Union of India*[39] 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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[37] (2013) 7 SCC 653.
[38](2013) 10 SCC 1.
[39] (1998) 1 SCC 226.

Addressing the problem of delays in obtaining sanctions for prosecuting public servants in corruption cases, *VineetNarain*also set down a time limit of three months for grant of such sanction. This directive was endorsed by the Supreme Court in *SubramaniumSwamy*v. *Manmohan Singh,*[40]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,[41] 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 170th 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

[40](2012) 3 SCC 65.

[41]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.[42]

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[43] 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

[42] 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.

[43] *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.[44]

The issue of delays in trials of influential public personalities have been recognized and tackled by the Law Commission in its 239th report submitted to the Supreme Court in the case of *Virender Kumar Ohriv. Union of India*[45]. The Supreme Court has also remarked on this issue in *Ganesh Narayan* v. *Bangarappa*[46], 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.[47]

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.[48] 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.[49]

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.[50] While an average legislator's wealth stands at Rs. 3.83 crores, it rises to Rs. 4.30 crores for

[44] Law Commission of India, Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities, Report No.239 (2012) <http://lawcommissionofindia.nic.in/reports/report239.pdf> accessed February 2nd, 2014.
[45] Writ Petition (Civil) No. 341 of 2004.
[46] (1995) 4 SCC 41.
[47] Law Commission of India, Links to Candidate Affidavits, <http://eci.nic.in/eci_main1/LinktoAffidavits.aspx> accessed February 19th, 2014
[48] Milan Vaishnav, (n.7).
[49] Association for Democratic Reforms (n.11).
[50] Milan Vaishnav, (n.7).

candidates with criminal backgrounds and to Rs. 4.38 crores for candidates with serious criminal backgrounds.[51] 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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[51] 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.[52]The charges should contain all particular details with respect to the manner, time, place, and persons against whom it was committed etc.[53]

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 *primafacie* 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.[54]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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[52] *VC Shukla* v. *State through CBI,* 1980 Cri LJ 690, 732.

[53] Sections211, 212, and 213, Code of Criminal Procedure, 1973.

[54]*RajnikantaMeheta* 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.[55] 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.[56]

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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[55] *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.
[56] *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.[57]

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."*[58]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."*[59] Further, the charges should also contain all particular details with respect to the manner, time, place, persons against whom it was committed etc.[60] Therefore, the sections construed together prove that the "framing of charges" is a 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"*.[61]Additionally, the Supreme Court has also recognized that since framing of the

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[57]For a distinction between the procedures for framing of charges and discharge of an accused under each of these categories, see *R S Nayakv A R Antulay,* (1986) 1 SCC 716.
[58]Sec. 211 (5), Code of Criminal Procedure, 1973.
[59]Sec. 214, Code of Criminal Procedure, 1973.
[60] Sec. 211, 212, 213, Code of Criminal Procedure, 1973.
[61]*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.[62]

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

In *A.R. Antulay*[63]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.[64]

The words "not sufficient ground for proceeding against the accused" show that the Judge is not a mere "post office"[65] or "recording machine"[66] 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.[67]

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."*[68]

c. The Burden on Prosecution at the charging stage

The Supreme Court, in *DebendraNathPadhi*[69], overruling *Satish Mehra*[70] , 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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[62]*State of Maharashtra* v. *SomNathThapa*, (1996) 4 SCC 659.
[63]*R.S. Nayak* v. *A.R. Antulay*, (1986) 1 SCC 716.
[64]*R.S. Nayak* v. *A.R. Antulay*, (1986) 1 SCC 716.
[65]*Union of India* v.*Prafulla Kumar Samal*, (1979) 3 SCC 4.
[66]*Almohan Das* v. *State of West Bengal*, (1969) 2 SCR 520.
[67]*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.
[68]*Union of India* v.*Prafulla Kumar Samal*, (1979) 3 SCC 4, 8 para 8.
[69]*State of Orissa v. DebendraNathPadhi*(2005) 1 SCC 568.
[70]*Satish Mehrav.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*".[71](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."*[72]This also provides a certain degree of protection for the accused.

Finally, in order to establish a *prime facie* case, the evidence on record should raise not merely some suspicion with regard to the possibility of conviction, but a "grave" suspicion[73]:

> "*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.*"[74] (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.[75] 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'.[76] Together, these tests offer protection against false charges being imposed.

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[71]*State of Bihar* v. *Ramesh Singh*, (1977) 4 SCC 39, 42 para 4.
[72]*State of Maharashtra* v. *SomNathThapa*(1996) 4 SCC 659.
[73]*DilawarBaluKurane* v. *State of Maharashtra*,(2002) 2 SCC 135; *Sajjan Kumar* v. *Central Bureau of Investigation*, (2010) 9 SCC 368.
[74]*Prafulla Kumar Samal*, (n 65), 9, para 10.
[75]*K.P. Raghavan* v. *M.H. Abbas*AIR 1967 SC 740.
[76]*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,[77] 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.[78] It is a special right created by the statute and can only be exercised on the conditions laid down by the statute.[79]Therefore, it is not subject to the Fundamental Rights chapter of the constitution.[80]

(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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[77]*Natasha Singh* v. *CBI Crl*, Appeal No. 709 of 2013 Supreme Court of India
[78]*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.
[79]*Jumuna Prasad Mukhariya* v. *Lachhi Ram AIR* 1954 SC 686.
[80]*Jagdev Singh Sidhanti* v.*Pratap Singh Daulta*, AIR 1965 SC 183; *Smt. Indira Nehru Gandhi* v. *Shri Raj Narain*, AIR 1975 SC 2299; *EbrahimSulaimanSait* 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.[81] 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

[81] *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 checkany 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 disincentivisethe 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 atime 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 170th 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 170th 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 charged framed against him six months before an election, then he will not 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 ofdisqualification 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 sucha 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.*[82]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

[82](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.[83] 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.

[83] 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 170th 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.[84]

In 2002, the Association of Democratic Reforms petitioned the Court to have the above recommendation implemented, among others.[85] 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

[84] Law Commission of India, 'One Hundred Seventieth Report on Reform of the Electoral Laws', (1999).
[85] *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.[86]

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.*[87]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.

[86] Election Commission of India, Order dated 28th June, 2002, No. 3/ER/2002/JS-II/Vol-III, <http://eci.nic.in/archive/press/current/PN_28062002.htm> accessed January 29th, 2014.
[87](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.[88] In 2012, the format of Form 26 was revised to include both sets on information.[89]

(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.[90] 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 *ArunDattaraySawant*v. *Kishan Shankar Rathore*[91]in an Election Petition involving false declaration regarding assets in a candidate affidavit. The

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[88] Election Commission Of India- Proposed Electoral Reforms (2004).

[89] Election Commission of India, Instruction Dated 24th August, 2012, http://eci.nic.in/eci_main/CurrentElections/ECI_Instructions/AFFI29082012.pdf accessed January 27th, 2014.

[90] Election Commission's letter No. 3/ER/2004-JS-II, dated 02.06.2004.

[91] El. Pet 10/2004, (Bom. HC) (16th 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."[92] 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'.[93] 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*[94]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*[95] 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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[92] Per Khanwilkar J. (as he then was), Para 138, *ArunDattaraySawant* v. *Kishan Shankar Rathore*, El. Pet 10/2004, (Bom. HC) (16th Aug, 2007) (Unreported).
[93](2013) 200 DLT 402.
[94](2009) 3 CTC 446.
[95] WP No. 121 of 2008, (SC) (13th 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.[96] 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.[97]

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.[98] 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

[96] *Mani C. Kappan* v *K.M. Mani*, 2007 (1) KLT 228; *Narayan GunajiSawant* v. *Deepak VasantKesarkar*, 2011 (3) Bom CR 754.
[97] Election Commission of India – Proposed Electoral Reforms (2004).
[98] *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.[99]

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

[99] Election Commission of India, 'Important Electoral Reforms proposed by the Election Commission' <http://eci.nic.in/eci_main/electoral_ref.pdf> accessed February 3rd, 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 16th 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 disqualifiedat the expiry of the one-year period;OR

- The MP/ MLA'sright 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)...
*

*
*

(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;

*
*
*"

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)...
*
*
*

(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 the 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

(N.L. Meena)
Member-Secretary

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Annex P-2

Writ Petition (Civil) No. 536 of 2011

Public Interest Foundation v. Union of India

2018 SCC OnLine SC 1617

In the Supreme Court of India

(BEFORE DIPAK MISRA, C.J. AND ROHINTON FALI NARIMAN, A.M. KHANWILKAR, D.Y. CHANDRACHUD AND INDU MALHOTRA, JJ.)

Writ Petition (Civil) No. 536 of 2011

Public Interest Foundation ..... Petitioner(s);

v.

Union of India ..... Respondent(s).

With

Criminal Appeal Nos. 1714-1715 of 2007

Writ Petition (Criminal) No. 208 of 2011

And

Writ Petition (Civil) No. 800 of 2015

Decided on September 25, 2018

The Judgment of the Court was delivered by

DIPAK MISRA, C.J.:— In *Yogendra Kumar Jaiswal* v. *State of Bihar*[1], the Court opined:—

> "Corruption, a 'noun' when assumes all the characteristics of a Verb', becomes self-infective and also develops resistance to antibiotics. In such a situation the disguised protagonist never puts a Hamletian question-"to be or not to be"-but marches ahead with perverted proclivity-sans concern, sans care for collective interest, and irrefragably without conscience. In a way, corruption becomes a national economic terror."

2. The constitutional functionaries, who have taken the pledge to uphold the constitutional principles, are charged with the responsibility to ensure that the existing political framework does not get tainted with the evil of corruption. However, despite this heavy mandate prescribed by our Constitution, our Indian democracy, which is the world's largest democracy, has seen a steady increase in the level of criminalization that has been creeping into the Indian polity. This unsettlingly increasing trend of criminalization of politics, to which our country has been a witness, tends to disrupt the constitutional ethos and strikes at the very root of our democratic form of government by making our citizenry suffer at the hands of those who are nothing but a liability to our country.

3. The issue that emerges for consideration before this Bench is whether disqualification for membership can be laid down by the Court beyond Article 102(a) to (d) and the law made by the Parliament under Article 102(e). A three-Judge Bench hearing the matter was of the view that this question is required to be addressed by the Constitution Bench under Article 145(3) of the Constitution. Be it stated, a submission was advanced before the three-Judge Bench that the controversy was covered by the decision in *Manoj Narula* v. *Union of India*[2]. The said submission was not accepted because of the view expressed by Madan B. Lokur, J. in his separate judgment.

4. In the course of hearing, the contour of the question was expanded with

enormous concern to curb criminalization of politics in a democratic body polity. The learned counsel for the petitioners submitted that having regard to the rise of persons with criminal antecedents, the fundamental concept of decriminalization of politics should be viewed from a wider spectrum and this Court, taking into consideration the facet of interpretation, should assume the role of judicial statesmanship. Mr. K.K. Venugopal, learned Attorney General for India and other learned counsel, per contra, would submit that there can be no denial that this Court is the final arbiter of the Constitution and the Constitution empowers this wing of the State to lay down the norms of interpretation and show judicial statesmanship but the said judicial statesmanship should not ignore the fundamental law relating to separation of powers, primary responsibility conferred on the authorities under the respective powers and the fact that no authority should do anything for which the power does not flow from the Constitution. In essence, the submission of Mr. Venugopal is that the Court should not cross the 'Lakshman Rekha'. Resting on the fulcrum of constitutional foundation and on the fundamental principle that if the Court comes to hold that it cannot legislate but only recommend for bringing in a legislation, as envisaged under Article 102(1)(e) of the Constitution, it would not be appropriate to take recourse to any other method for the simon pure reason that what cannot be done directly, should not be done indirectly. We shall advert to the said submission at a later stage.

5. Article 102 reads as follows:—

"102. **Disqualifications for membership**—(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation. —For the purposes of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule."

6. In this context, we may also refer to Article 191 of the Constitution that deals with disqualifications for membership. It is as follows:—

"191. **Disqualifications for membership**—(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation. —For the purposes of this clause, a person shall not be deemed to

hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule."

7. On a perusal of both the Articles, it is clear as crystal that as regards disqualification for being chosen as a member of either House of Parliament and similarly disqualification for being chosen or for being a member of the Legislative Assembly or Legislative Council of a State, the law has to be made by the Parliament. In *Lily Thomas* v. *Union of India*[3], it has been held:—

"26. Articles 102(1)(*e*) and 191(1)(*e*) of the Constitution, on the other hand, have conferred specific powers on Parliament to make law providing disqualifications for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State other than those specified in sub-clauses (*a*), (*b*), (*c*) and (*d*) of clause (1) of Articles 102 and 191 of the Constitution. We may note that no power is vested in the State Legislature to make law laying down disqualifications of membership of the Legislative Assembly or Legislative Council of the State and power is vested in Parliament to make law laying down disqualifications also in respect of Members of the Legislative Assembly or Legislative Council of the State. For these reasons, we are of the considered opinion that the legislative power of Parliament to enact any law relating to disqualification for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State can be located only in Articles 102(1)(*e*) and 191(1)(*e*) of the Constitution and not in Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution. We do not, therefore, accept the contention of Mr. Luthra that the power to enact sub-section (4) of Section 8 of the Act is vested in Parliament under Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution, if not in Articles 102(1)(*e*) and 191(1)(*e*) of the Constitution."

8. We have no hesitation in saying that the view expressed above in *Lily Thomas* (supra) is correct, for the Parliament has the exclusive legislative power to lay down disqualification for membership.

9. In *Manoj Narula* (supra), the question centered around the interpretation of Article 75 of the Constitution. The core issue pertained to the legality of persons with criminal background and/or charged with offences involving moral turpitude to be appointed as ministers in the Central and the State Governments. The majority referred to the constitutional provisions, namely, Articles 74, 75, 163 and 164, adverted to the doctrine of implied limitation and, in that context, opined thus:—

"64. On a studied scrutiny of the ratio of the aforesaid decisions, we are of the convinced opinion that when there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election, by interpretative process, it is difficult to read the prohibition into Article 75(1) or, for that matter, into Article 164(1) to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. In the absence of any constitutional prohibition or statutory embargo, such disqualification, in our considered opinion, cannot be read into Article 75(1) or Article 164(1) of the Constitution."

10. There has been advertence to the principle of constitutional silence or abeyance and, in that context, it has been ruled that it is not possible to accept that while interpreting the words "advice of the Prime Minister", it can legitimately be inferred

that there is a prohibition to think of a person as a minister if charges have been framed against him in respect of heinous and serious offences including corruption cases under the criminal law. Thereafter, the majority addressed the concepts of 'constitutional morality', 'constitutional governance' and 'constitutional trust' and analysed the term 'advice' employed under Article 75(1) and stated that formation of an opinion by the Prime Minister in the context of Article 75(1) is expressed by the use of the said word because of the trust reposed in the Prime Minister under the Constitution and the said advice, to put it differently, is a constitutional advice. Reference was made to the debate in the Constituent Assembly which had left it to the wisdom of the Prime Minister because of the intrinsic faith in him. Discussing further, it has been stated:—

"At the time of framing of the Constitution, the debate pertained to conviction. With the change of time, the entire complexion in the political arena as well as in other areas has changed. This Court, on number of occasions, as pointed out hereinbefore, has taken note of the prevalence and continuous growth of criminalisation in politics and the entrenchment of corruption at many a level. In a democracy, the people never intend to be governed by persons who have criminal antecedents. This is not merely a hope and aspiration of citizenry but the idea is also engrained in apposite executive governance."

11. And again:—

"That the Prime Minister would be giving apposite advice to the President is a legitimate constitutional expectation, for it is a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The Framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance."

12. Lokur, J. opined:—

"132. While it may be necessary, due to the criminalisation of our polity and consequently of our politics, to ensure that certain persons do not become Ministers, this is not possible through guidelines issued by this Court. It is for the electorate to ensure that suitable (not merely eligible) persons are elected to the legislature and it is for the legislature to enact or not enact a more restrictive law."

13. Proceeding further, the learned Judge stated:—

"137. In this respect, the Prime Minister is, of course, answerable to Parliament and is under the gaze of the watchful eye of the people of the country. Despite the fact that certain limitations can be read into the Constitution and have been read in the past, the issue of the appointment of a suitable person as a Minister is not one which enables this Court to read implied limitations in the Constitution."

14. He had also, in his opinion, reproduced the words of Dr. B.R. Ambedkar in the Constituent Assembly on 25.11.1949 and the sentiments echoed by Dr. Rajendra Prasad on 26.11.1949. Dr. Ambedkar had said:—

"As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr T.T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the

Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play."

15. The learned Judge reproduced the words of Dr. Rajendra Prasad, which ring till today, are:—

"Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has provisions in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, 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."

16. Kurian Joseph, J., concurring with the opinion, has stated:—

"152. No doubt, it is not for the Court to issue any direction to the Prime Minister or the Chief Minister, as the case may be, as to the manner in which they should exercise their power while selecting the colleagues in the Council of Ministers. That is the constitutional prerogative of those functionaries who are called upon to preserve, protect and defend the Constitution. But it is the prophetic duty of this Court to remind the key duty holders about their role in working the Constitution. Hence, I am of the firm view, that the Prime Minister and the Chief Minister of the State, who themselves have taken oath to bear true faith and allegiance to the Constitution of India and to discharge their duties faithfully and conscientiously, will be well advised to consider avoiding any person in the Council of Ministers, against whom charges have been framed by a criminal court in respect of offences involving moral turpitude and also offences specifically referred to in Chapter III of the Representation of the People Act, 1951."

17. The thrust of the matter is whether any disqualification can be read as regards disqualification for membership into the constitutional provisions. Article 102(1) specifies certain grounds and further provides that any disqualification can be added by or under any law made by the Parliament. Article 191 has the same character.

18. Chapter III of the Representation of the People Act, 1951 (for brevity, 'the Act') deals with disqualification for membership of the Parliament and the State Legislatures. Section 7 deals with Definitions. It is as follows:—

"7. Definitions.—In this Chapter,—

(a) "appropriate Government" means in relation to any disqualification for being chosen as or for being a member of either House of Parliament, the Central Government, and in relation to any disqualification for being chosen as or for being a member of the Legislative Assembly or Legislative Council of a State, the State Government;

(b) "disqualified" means disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council

of a State. under the provisions of this Chapter, and on no other ground."

[Emphasis is ours]

19. The word 'disqualified' clearly states that a person be disqualified from being a member under the provisions of the said Chapter and/or on no other ground. The words 'no other ground' are of immense significance. Apart from the grounds mentioned under Article 102(1)(a) to 102(1)(d) and Article 191(1)(a) to 191(1)(d), the other grounds are provided by the Parliament and the Parliament has provided under Sections 8, 8A, 9, 9A, 10 and 10A which read thus:

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

(a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 17IE (offence of bribery) or section 17IF (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or subsection (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) section 125 (offence of promoting enmity between classes in connect ion with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) or clause (a) of sub - section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; or

(j) section 6 (offence of conversion of a place or worship) of the Places of Worship (Special Provisions) Act 1991, or

(k) section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971); or

(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002),

shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, [1961 (28 of 1961)

and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(4) Notwithstanding anything in sub-section (1), subsection (2) and sub-section (3) a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation.—In this section—

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be brought or sold;

(iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodities Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

8A. Disqualification on ground of corrupt practices.—(1) The case of every person found guilty of a corrupt practice by an order under section 99 shall be submitted, as soon as may be within a period of three months from the date such order takes effect, by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period:

Provided that the period for which any person may be disqualified under this sub-section shall in no case exceed six years from the date on which the order made in relation to him under section 99 takes effect.

(2) Any person who stands disqualified under section 8A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the

unexpired portion of the said period.

(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion.

9. Disqualification for dismissal for corruption or disloyalty.—(1) A person who having held an office under the Government of India or under the Government of any State has been dismissed for corruption or for disloyalty to the State shall be disqualified for a period of five years from the date of such dismissal.

(2) For the purposes of sub-section (1), a certificate issued by the Election Commission to the effect that a person having held office under the Government of India or under the Government of a State, has or has not been dismissed for corruption or for disloyalty to the State shall be conclusive proof of that fact:

Provided that no certificate to the effect that a person has been dismissed for corruption or for disloyalty to the State shall be issued unless an opportunity of being heard has been given to the said person.

9A. Disqualification for Government contracts, etc.—A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government.

Explanation.—For the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part.

10. Disqualification for office under Government company.—A person shall be disqualified if, and for so long as, he is a managing agent, manager or secretary of any company or corporation (other than a co-operative society) in the capital of which the appropriate Government has not less than twenty-five per cent share.

10A. Disqualification for failure to lodge account of election expenses.—If the Election Commission is satisfied that a person—

(a) has failed to lodge an account of election expenses, within the time and in the manner required by or under this Act; and

(b) has no good reason or justification for the failure,

the Election Commission shall, by order published in the Official Gazette, declare him to be disqualified and any such person shall be disqualified for a period of three years from the date of the order."

20. From the aforesaid, it is decipherable that Section 8 deals with disqualification on conviction for certain offences. Section 8A provides for disqualification on ground of corrupt practices. Section 9 provides for the disqualification for dismissal for corruption or disloyalty. Section 9A deals with the situation where there is subsisting contract between the person and the appropriate Government. Section 10 lays down disqualification for office under Government company and Section 10A deals with disqualification for failure to lodge account of election expenses. Apart from these disqualifications, there are no other disqualifications and, as is noticeable, there can be no other ground. Thus, disqualifications are provided on certain and specific grounds by the legislature. In such a state, the legislature is absolutely specific.

21. The submission of the learned counsel appearing for the petitioners is that the law breakers should not become law makers and there cannot be a paradise for people with criminal antecedents in the Parliament or the State Legislatures. Reference has been made to the recommendations of the Law Commission which has seriously

commented on the prevalent political atmosphere being dominated by people with criminal records.

22. It has also been highlighted by the petitioners that criminalization in politics is on the rise and the same is a documented fact and recorded by various committee reports. The petitioners also highlight that the doctrine of fiduciary relationship has been extended to several constitutional posts and that if members of Public Service Commission, Chief Vigilance Commissioner and the Chief Secretary can undergo the test of integrity check and if "framing of charge" has been recognized as a disqualification for such posts, then there is no reason to not extend the said test of "framing of charge" to the posts of Members of Parliament and State Legislatures as well. To further accentuate this stand, the petitioners point out that such persons hold the posts in constitutional trust and can be made subject to rigours and fetters as the right to contest elections is not a fundamental right but a statutory right or a right which must confirm to the constitutional ethos and principles.

23. The petitioners are attuned to the principle of "presumption of innocence" under our criminal law. But they are of the opinion that the said principle is confined to criminal law and that any proceeding prior to conviction, such as framing of charge for instance, can become the basis to entail civil liability of penalty. The petitioners, therefore, take the stand that debarring a person facing charges of serious nature from contesting an election does not lead to creation of an offence and it is merely a restriction which is distinctively civil in nature.

24. The intervenor organization has also made submissions on a similar note as that of the petitioners to the effect that persons charged for an offence punishable with imprisonment for five years or more are liable to be declared as disqualified for being elected or for being a Member of the Parliament as a person chargesheeted in a crime involving moral turpitude is undesirable for a job under the government and it is rather incongruous that such a person can become a law maker who then control civil servants and other government machinery and, thus, treating legislators on a different footing amounts to a violation of Article 14 of the Constitution.

25. Mr. Venugopal, learned Attorney General for India, refuting the aforesaid submission, would urge that the Parliament may make law on the basis of the recommendations of the Law Commission but this Court, as a settled principle of law, should not issue a mandamus to the Parliament to pass a legislation and can only recommend. That apart, submits Mr. Venugopal, that when there are specific constitutional provisions and the statutory law, the Court should leave it to the Parliament.

26. It is well settled in law that the Court cannot legislate. Emphasis is laid on the issuance of guidelines and directions for rigorous implementation. With immense anxiety, it is canvassed that when a perilous condition emerges, the treatment has to be aggressive. The petitioners have suggested another path. But, as far as adding a disqualification is concerned, the constitutional provision states the disqualification, confers the power on the legislature, which has, in turn, legislated in the imperative.

27. Thus, the prescription as regards disqualification is complete is in view of the language employed in Section 7(b) read with Sections 8 to 10A of the Act. It is clear as noon day and there is no ambiguity. The legislature has very clearly enumerated the grounds for disqualification and the language of the said provision leaves no room for any new ground to be added or introduced.

Criminalization of politics

28. Though we have analyzed the aforesaid aspect, yet we cannot close the issue, for the learned counsel for the petitioners and some of the intervenors have argued with immense anguish that there is a need for rectification of the system failing which there will be progressive malady in constitutional governance and gradually, the

governance would be controlled by criminals. The submission has been advanced with sanguine sincerity and genuine agony. There have been suggestions as well as arguments with the purpose of saving the sanctity of democracy and to advance its enduring continuance. To appreciate the same, we will focus on the criminalization of politics.

29. In the beginning of the era of constitutional democracy, serious concerns were expressed with regard to the people who are going to be elected. Dr Rajendra Prasad on the Floor of the Constituent Assembly, before putting the motion for passing of the Constitution, had observed:—

> "...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."[4]

30. An essential component of a constitutional democracy is its ability to give and secure for its citizenry a representative form of government, elected freely and fairly, and comprising of a polity whose members are men and women of high integrity and morality. This could be said to be the hallmark of any free and fair democracy.

31. The *Goswami Committee on Electoral Reforms* (1990) had addressed the need to curb the growing criminal forces in politics in order to protect the democratic foundation of our country. The Committee stated that:—

> "The role of money and muscle powers at elections deflecting seriously the well accepted democratic values and ethos and corrupting the process; rapid criminalisation of politics greatly encouraging evils of booth capturing, rigging, violence etc.; misuse of official machinery, i.e. official media and ministerial; increasing menace of participation of non-serious candidates; form the core of our electoral problems. Urgent corrective measures are the need of the hour lest the system itself should collapse."

32. Criminalization of politics was never an unknown phenomenon in the Indian political system, but its presence was seemingly felt in its strongest form during the 1993 Mumbai bomb blasts which was the result of a collaboration of a diffused network of criminal gangs, police and customs officials and their political patrons. The tremors of the said attacks shook the entire Nation and as a result of the outcry, a Commission was constituted to study the problem of criminalization of politics and the nexus among criminals, politicians and bureaucrats in India. The report of the Committee, Vohra (Committee) Report, submitted by Union Home Secretary, N.N. Vohra, in October 1993, referred to several observations made by official agencies, including the CBI, IB, R&AW, who unanimously expressed their opinion on the criminal network which was virtually running a parallel government. The Committee also took note of the criminal gangs who carried out their activities under the aegis of various political parties and government functionaries. The Committee further expressed great concern regarding the fact that over the past few years, several criminals had been elected to local bodies, State Assemblies and the Parliament. The Report observed:—

> "In the bigger cities, the main source of income relates to real estate - forcibly occupying lands/buildings, procuring such properties at cheap rates by forcing out the existing occupants/tenants etc. Over time, the money power thus acquired is used for building up contacts with bureaucrats and politicians and expansion of activities with impunity. The money power is used to develop a network of muscle-power which is also used by the politicians during elections."

33. And again:—

> "The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country. The existing criminal justice system, which was essentially designed to deal with the individual offences/crimes, is unable to deal with the activities of the Mafia; the provisions of law in regard

economic offences are weak"

34. The Election Commission has also remained alive to the issue of criminalization of politics since 1998. While proposing reforms to tackle the menace of criminalization of politics, the Former Chief Election Commissioner, Mr. T.S. Krishna Murthy, highlighted the said issue by writing thus:—

> "There have been several instances of persons charged with serious and heinous crimes like murder, rape, dacoity, etc. contesting election, pending their trial, and even getting elected in a large number of cases. This leads to a very undesirable and embarrassing situation of lawbreakers becoming lawmakers and moving around under police protection. The Commission had proposed that the law should be amended to provide that any person for five years or more should be disqualified from contesting election even when trial is pending, provided charges have been framed against him by the competent court. Such a step would go a long way in cleansing the political establishment from the influence of criminal elements and protecting the sanctity of the Legislative Houses"[5]

35. In the case of *Dinesh Trivedi, M.P.* v. *Union of India*[6] the court lamented the faults and imperfections which have impeded the country in reaching the expectations which heralded its conception. While identifying one of the primary causes, the Court referred to the report of N.N. Vohra Committee that was submitted on 5.10.1993. The Court noted that the growth and spread of crime syndicates in Indian society has been pervasive and the criminal elements have developed an extensive network of contacts at many a sphere. The Court, further referring to the report, found that the Report reveals several alarming and deeply disturbing trends that are prevalent in our present society. The Court also noticed that the nexus between politicians, bureaucrats and criminal elements in our society has been on the rise, the adverse effects of which are increasingly being felt on various aspects of social life in India.

36. In *Anukul Chandra Pradhan, Advocate Supreme Court* v. *Union of India*[7], the Court, in the context of the provisions made in the election law, observed that they have been made to exclude persons with criminal background, of the kind specified therein, from the election scene as candidates and voters with the object to prevent criminalization of politics and maintain propriety in elections. Thereafter, the three-Judge Bench opined that any provision enacted with a view to promote the said object must be welcomed and upheld as subserving the constitutional purpose.

37. In *K. Prabhakaran* v. *P. Jayarajan*[8], in the context of enacting disqualification under Section 8(3) of the Act, the Court observed that persons with criminal background pollute the process of election as they have no inhibition in indulging in criminality to gain success in an election. Further, the Court observed:—

> "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."

38. The Court in *Manoj Narula* (supra), while observing that criminalization of politics is an anathema to the sacredness of democracy, stated thus:—

> "A democratic polity, as understood in its quintessential purity, is conceptually abhorrent to corruption and, especially corruption at high places, and repulsive to the idea of criminalization of politics as it corrodes the legitimacy of the collective ethos, frustrates the hopes and aspirations of the citizens and has the potentiality to obstruct, if not derail, the rule of law. Democracy, which has been best defined as the Government of the People, by the People and for the People, expects

prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance.

39. And again:—

"...systemic corruption and sponsored criminalization can corrode the fundamental core of elective democracy and, consequently, the constitutional governance. The agonized concern expressed by this Court on being moved by the conscious citizens, as is perceptible from the authorities referred to hereinabove, clearly shows that a democratic republic polity hopes and aspires to be governed by a Government which is run by the elected representatives who do not have any involvement in serious criminal offences or offences relating to corruption, casteism, societal problems, affecting the sovereignty of the nation and many other offences."

40. The 18th Report presented to the Rajya Sabha on 15th March, 2007 by the Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on Electoral Reforms (Disqualification of Persons from Contesting Elections on Framing of Charges Against Them for Certain Offences) acknowledged the existence of criminal elements in the Indian polity which hit the roots of democracy. The Committee observed thus:—

"...the Committee is deeply conscious of the criminalization of our polity and the fast erosion of confidence of the people at large in our political process of the day. This will certainly weaken our democracy and will render the democratic institutions sterile. The Committee therefore feels that politics should be cleansed of persons with established criminal background. The objective is to prevent criminalisation of politics and maintain probity in elections. Criminalization of politics is the bane of society and negation of democracy."

41. The Chairman of the Law Commission, in the covering letter of the 244th Law Commission Report titled "Electoral Disqualifications", wrote to the then Minister of Law and Justice stating thus:—

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* v. *Union of India*, vide D.O. No. 4604/2011/SC/PIL(W] dated 21st 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 decriminalization 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]"

42. Thereafter, the 244th Law Commission, while accentuating the need for electoral reforms, observed that a representative government, sourcing its legitimacy from the People, who were the ultimate sovereign, was the kernel of the democratic system envisaged by the Constitution. Over the 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 that 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 the Constitution, it is that India is a Sovereign Democratic Republic.

43. The Commission laid stress on the model of representative government based on popular sovereignty which gives rise to its 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 persons who will govern the people, and intrinsically, as being a legitimate expression of popular will. Emphasizing on the importance of free and fair elections in a democratic polity, reference was made to the decision in *Mohinder Singh Gill* v. *Chief Election Commissioner*[9] wherein the Court had ruled:—

> "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."

44. The Commission addressed the issue pertaining to the extent of criminalization in politics and took note of the observations made by Mr. C. Rajagopalachari who, as back as in 1922, 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..."

45. The Commission also observed that the nature of nexus changed in the 1970s and 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 and this fact 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 Commission referred to the judgment of this Court in *Union of India* v. *Association for Democratic Reforms*[10] which had made an analysis of the criminal records of candidates possible by requiring such records to be disclosed by way of affidavit and this, as per the Commission, had given a chance to the public to quantitatively assess the validity of such observations made in the previous report.

46. As per the extent of criminalization that has pervaded Indian Politics, the Commission observed that in the ten years since 2004, 18% of the 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. Further, the Commission observed that the 5,253 candidates with serious cases together had 13,984 serious charges against them and 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. The Commission was of the further view that criminal backgrounds are not limited to contesting candidates, but are found among winners as well, for, of the 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 and overall, including both serious and non-serious charges, 2,497 (28.4% of the winners) had 9,993 pending criminal cases against them.

47. Elaborating further, the Commission took note of the fact that 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 and further, the prevalence of MPs with criminal cases pending has increased over time as statistics reveal that in 2004, 24% of Lok Sabha MPs had criminal cases pending which increased to 30% in the 2009 elections and this 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. Not only this, the Commission also observed that some States have a much higher percentage of MLAs with criminal records: in Uttar Pradesh, 47% of MLAs have criminal cases pending and a number of these MPs and MLAs have been accused of multiple counts of criminal charges, for example, in a constituency of Uttar Pradesh, the MLA has 36 criminal cases pending including 14 cases relating to murder. As per the Commission, it is clear from this data that about one-third of the elected candidates at the Parliament and State Assembly levels in India have some form of criminal taint and also that the 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. What the Commission found to be more disturbing was the fact that the percentage of winners with criminal cases pending is higher than the percentage of candidates without such backgrounds, as the data reveals that while only 12% of candidates with a "clean" record win on an average, 23% of candidates with some kind of criminal record win which implies that candidates charged with a crime actually fare better in elections than 'clean' candidates. This, as per the Commission, has resulted in the tendency for candidates with criminal cases to be given tickets a second time and not only do political parties select candidates with criminal backgrounds, but there is also evidence to suggest that untainted representatives later become involved in criminal activities and, thus, the incidence of criminalisation of politics is pervasive thereby making its remediation an urgent need.

48. The pervasive contact, in many a way, disturbed the political parties and this compelled the Law Commission to describe the role of political parties. It said:—

> "Political parties are a central institution of our democracy; "the life blood of the entire constitutional scheme." 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 in the interface between private citizens and public life, they have also been chiefly responsible for the growing criminalisation of politics."

49. Thereafter, reference was made to the observations of the 170th report which was also quoted in *Subhash Chandra Agarwal* v. *Indian National Congress*[11] by the Central Information Commission ("CIC"). The said observations are very pertinent to describe 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.
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> x x x

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 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.

....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."

50. Commenting on the existing legal framework, it opined that legally, the prevention of entry of criminals into politics is accomplished by prescribing certain disqualifications that will prevent a person from contesting elections or occupying a seat in the Parliament or an Assembly and presently, the qualifications of Members of Parliament are listed in Article 84 of the Constitution, while the disqualifications can be found under Article 102. The corresponding provisions for Members of the State Legislative Assemblies are found in Articles 173 and 191.

51. The Law Commission noted the decisions in *Association for Democratic Reforms* (supra), *Lily Thomas* (supra) and *People's Union for Civil Liberties* v. *Union of India*[12] and, after referring to the previous Reports recommending reforms, recommended:—

"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."

52. Further, the Commission took note of the observations made by the Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013) which proposed insertion of Schedule I to the Representation of the People Act, 1951 enumerating offences under IPC befitting the category of 'heinous' offences and it was also recommended in the said report that Section 8(1) of the RP Act be amended to cover, inter alia, the offences listed in the proposed Schedule 1, and this, in turn, would 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 Cr.PC. 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. The Commission also referred to the proposal made in the said Report which was to the effect 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.

53. The rationale given by the Commission for introducing a disqualification at the stage of framing of charges was to the following effect:—

"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."

54. Thereafter, the Commission went on to observe in its Reform Proposal as to why the stage of framing of charge sheet would not be an appropriate stage for disqualification. The Commission observed thus:—

"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. 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.

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."

55. The Commission then felt that it was worthwhile to discuss why the stage of taking of cognizance would be an inappropriate stage for disqualification and in this regard, the Commission observed that the taking of cognizance simply means taking judicial notice of an offence with a view to initiate proceedings in respect of such offence alleged to have been committed by someone and that it is an entirely different matter from initiation of proceedings against someone; rather, it is a precondition to the initiation of proceedings. The Commission took the view that while taking cognizance, the Court has to consider only the material put forward in the charge-sheet and 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. Further, at the stage of taking cognizance, the accused has no right to present any evidence or make any submissions and even though the accused may provide exculpatory evidence to the police, the latter is under no obligation to include such evidence as part of the charge-sheet. The Commission went on to conclude that the stages of filing of charge sheet or taking cognizance would be inappropriate and observed thus:—

"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..."

56. Thereafter, the Commission proceeded to examine why the framing of charges is an appropriate stage for disqualification. It went on to make the following observations on this aspect:—

"The Supreme Court, in *Debendra Nath Padhi*, overruling *Satish Mehra*, 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 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."

57. The Commission was of the view that additionally, the burden on the prosecution at the stage of framing of charges also involves proving a prima facie case and as per the decision in *State of Maharashtra* v. *Som Nath Thapa*[13], a prima facie case is said to be in existence "if there is ground for presuming that the accused has committed the offence." Further, the Commission observed that in order to establish a prime facie case, the evidence on record should raise not merely some suspicion with regard to the possibility of conviction, but a "grave" suspicion and to corroborate its view, the Commission referred to the observations in *Union of India* v. *Prafulla Kumar Samal*[14] which were to the following effect:—

"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."

58. After so analysing, the Commission concluded that since the stage of framing of charges is based on substantial level of judicial scrutiny, a totally frivolous charge will not stand such scrutiny and therefore, given the concern of criminalisation of politics in India, disqualification at the stage of framing of charges is justified having substantial attendant legal safeguards to prevent misuse. The Commission buttressed the said view on the following grounds:—

"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. 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'. Together, these tests offer protection against false charges being imposed.

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, 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. It is a special right created by the statute and can only be exercised on the conditions laid down by the statute. Therefore, it is not subject to the Fundamental Rights chapter of the constitution."

59. While addressing the three concerns, namely, misuse, lack of remedy for the accused and the sanctity of criminal jurisprudence, the Commission stated that none of these concerns possess sufficient argumentative weight to displace the arguments in the previous section as although misuse is certainly a possibility, yet the same does not render a proposal to reform the law flawed in limine. Further, 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 to strike down such provision. It observed:—

"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... 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 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."

60. However, the Commission proposed certain safeguards in the form of limiting the disqualification to operate only in certain cases, defining cut-off period and period

of applicability. The reasons for ensuring such safeguards as laid out in the report as are follows:

> "....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.....
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> ...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."

61. With regard to laying down the safeguard of defining a cut-off period, the Commission observed thus:—

> "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.
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> ....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."

62. Another safeguard in the form of period of applicability was also proposed by the Commission which prescribes a time period or duration for which the said disqualification applies. It provides as follows:—

> "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...."

63. The rationale provided for fixing the time period as above was given in the following terms:—

"...170th Law Commission under the Chairmanship of Justice BP 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 charged framed against him six months before an election, then he will not 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."

64. The eventual recommendations and proposed Sections by the Law Commission read as follows:—

"1. x x x x x

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

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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.

x x x

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."

65. The aforesaid recommendations for proposed amendment never saw the light of the day in the form of a law enacted by a competent legislature but it vividly exhibits the concern of the society about the progressing trend of criminalization in politics that has the proclivity and the propensity to send shivers down the spine of a constitutional democracy.

66. Having stated about the relevant aspects of the Law Commission Report and the indifference shown to it, the learned counsel for the petitioners and intervenors have submitted that certain directions can be issued to the Election Commission so that the purity of democracy is strengthened. It is urged by them that when the Election Commission has been conferred the power to supervise elections, it can control party discipline of a political party by not encouraging candidates with criminal antecedents.

Role of Election Commission

67. Article 324 of the Constitution lays down the power of the Election Commission with respect to superintendence, direction and control of elections and reads thus:—

"**324. Superintendence, direction and control of elections to be vested in an Election Commission:**—(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament

and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine; Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by Clause (1)."

68. This Court in a catena of judgments has elucidated upon the role of the Election Commission and the extent to which it can exercise its power under the constitutional framework.

69. In *Election Commission of India* v. *Dr. Subramaniam Swamy*[15], this Court ruled that the opinion of the Election Commission is a sine qua non for the Governor or the President, as the case may be, to give a decision on the question whether or not the concerned member of the House of the Legislature of the State or either House of Parliament has incurred a disqualification. The Court observed:—

"Then we turn to Clause (2) of Article 192 which reads as under:

192(2) - Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

It is clear from the use of the words 'shall obtain' the opinion of the Election Commission, that it is obligatory to obtain the opinion of the Election Commission and the further stipulation that the Governor "shall act" according to such opinion leaves no room for doubt that the Governor is bound to act according to that opinion. The position in law is well settled by this Court's decision in *Brundaban* v. *Election Commission*, [1965] 3 SCR 53 wherein this Court held that it is the obligation of the Governor to take a decision in accordance with the opinion of the Election Commission. It is thus clear on a conjoint reading of the two clauses of Article 192 that once a question of the type mentioned in the first clause is referred to the Governor, meaning thereby is raised before the Governor, the Governor and

the Governor alone must decide it but this decision must be taken after obtaining the opinion of the Election Commission and the decision which is made final is that decision which the Governor has taken in accordance with the opinion of the Election Commission. In effect and substance the decision of the Governor must depend on the opinion of the Election Commission and none else, not even the Council of Ministers. Thus the opinion of the Election Commission is decisive since the final order would be based solely on that opinion.

8. The same view came to be expressed in the case of *Election Commission of India* v. *N.G. Ranga*, (1978) 4 SCC 181 : [1979] 1 SCR 210, while interpreting Article 103(2) of the Constitution, the language thereof is verbatim except that instead of the Governor in Article 192(2), here the decision has to be made by the President. So also the language of Articles 192(1) and 103(1) is identical except for the same change. The Constitution Bench of this Court reiterated that the President was bound to seek and obtain the opinion of the Election Commission and only thereafter decide the issue in accordance therewith. It other words, it is the Election Commission's opinion which is decisive."

70. In *Mohinder Singh Gill* (supra), Krishna Iyer J. opined:—

"12. The scheme is this. The President of India (Under Section 14) ignites the general elections across the nation by calling upon the People, divided into several constituencies and registered in the electoral rolls, to choose their representatives to the Lok Sabha. The constitutionally appointed authority, the Election Commission, takes over the whole conduct and supervision of the mammoth enterprise involving a plethora of details and variety of activities, and starts off with the notification of the time table for the several stages of the election (Section 30).' The assembly line operations then begin. An administrative machinery and technology to execute these enormous and diverse jobs is fabricated by the Act, creating officers, powers and duties, delegation of functions and location of polling stations. The precise exercise following upon the calendar for the poll, commencing from presentation of nomination papers, polling drill and telling of votes, culminating in the declaration and report of results are covered by specific prescriptions in the Act and the rules. The secrecy of the ballot, the authenticity of the voting paper and its' later identifiability with reference to particular polling stations, have been thoughtfully provided for. Myriad other matters necessary for smooth elections have been taken care of by several provisions of the Act."

71. Further, the Court observed in *Mohinder Singh Gill* (supra) that a re-poll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Article 324 provided it is bona fide and necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal. The Court ruled that even Article 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of a particular order. Having said that, the Court passed the following directions:—

"2(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This, responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission shall act in conformity with, not in violation of such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from pushing

forward a free and fair election with expedition-Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplayin-action in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt natural justice enlivens and applies to the specific case of order for total repoll although not in full panoply but inflexible practicability. Whether it has been complied with is left open for the Tribunal adjudication."

72. In the concurring judgment in *Mohinder Gill* (supra), Goswami, J., with regard to Article 324, observed thus in para 113:—

"...Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324(1) in the Election Commission, the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules..."

73. In *A.C. Jose* v. *Sivan Pillai*[16], this Court held that:—

"It is true that Article 324 does authorise the Commission to exercise powers of superintendence, direction and control of preparation of electoral rolls and the conduct of elections to Parliament and State legislatures but then the Article has to be read harmoniously with the Articles that follow and the powers that are given to the Legislatures under entry No. 72 in the Union List and entry No. 37 of the State List of the Seventh Schedule to the Constitution. The Commission in the garb of passing orders for regulating the conduct of elections cannot take upon itself a purely legislative activity which has been reserved under the scheme of the Constitution only to Parliament and the State legislatures. By no standards can it be said that the Commission is a third Chamber in the legislative be process within the scheme of the Constitution. merely being a creature of the Constitution will not give it plenary and absolute power to legislate as it likes without reference to the law enacted by the legislatures."

[Emphasis added]

74. In *Association for Democratic Reforms* (supra), the Court opined:—

"Under Article 324, the superintendence, direction and control of the 'conduct of all elections' to Parliament and to the Legislature of every State vests in Election Commission. The phrase 'conduct of elections' is held to be of wide amplitude which would include power to make all necessary provisions for conducting free and fair elections."

75. In *Kuldip Nayar* v. *Union of India*[17], this Court has observed:—

"181. It has been argued by the petitioners that the Election Commission of India, which under the Constitution has been given the plenary powers to supervise the elections freely and fairly, had opposed the impugned amendment of changing the secret ballot system. Its view has, therefore, to be given proper weightage.

In this context, we would say that where the law on the subject is silent, Article 324 is a reservoir of power for the Election Commission to act for the avowed purpose of pursuing the goal of a free and fair election, and in this view it also assumes the role of an adviser. But the power to make law under Article 327 vests in the Parliament, which is supreme and so, not bound by such advice. We would

reject the argument by referring to what this Court has already said in *Mohinder Singh Gill* (supra) and what bears reiteration here is that the limitations on the exercise of "plenary character" of the Election Commission include one to the effect that "when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions."

76. The aforesaid decisions are to be appositely appreciated. There is no denial of the fact that the Election Commission has the plenary power and its view has to be given weightage. That apart, it has power to supervise the conduct of free and fair election. However, the said power has its limitations. The Election Commission has to act in conformity with the law made by the Parliament and it cannot transgress the same.

77. It is submitted by Mr. Krishnan Venugopal, learned senior counsel appearing for the petitioner in Writ Petition (Civil) No. 800 of 2015 that traditionally, the Court would not breach the principle of separation of powers, however, this cannot prevent this Court from passing necessary directions to address the systemic growth of the problem of criminalization of politics and the political system without breaching the principle of separation of powers and this Court, in order to discharge its constitutional function, can give directions to the Election Commission to exercise its powers under Article 324 of the Constitution to redress violation of the fundamental rights and to protect the purity of the electoral process. Mr. Venugopal contends that in the past too, this Court, on several instances, had given directions to the Election Commission. He has also pointed out that the reason behind the urgent need for this Court to intervene to tackle the growing menace of criminalization of politics is that several law commission reports and other papers have unanimously concluded that there is widespread criminalization of politics and this Court has also taken cognizance of this fact in several of its judgments, but despite the said reports and the efforts of this Court, neither the Parliament nor the Government of India has taken serious actions to tackle the problem.

78. Further, Mr. Venugopal has drawn the attention of this Court to the findings in the Report titled 'Milan Vaishnav, When crime pays: Money and Muscle in Indian Politics'[18] to highlight that there is an alarming increase in the number of candidates with criminal antecedents and their chances of winning have actually increased steadily over the years and there is ample evidence in the form of statistical data which reinstates this fact.

79. On that basis, it is contended that the empirical evidence supports the view that the current legislative framework permits criminals to enter the electoral arena and become legislators which interferes with the purity and integrity of the electoral process, violates the right to choose freely the candidate of the voter's choice thereby violating the freedom of expression of a voter and amounts to a subversion of democracy which is a part of the basic structure and is, thus, antithetical to the Rule of Law.

80. Mr. Venugopal's submission has been supported by Mr. Dinesh Dwivedi, learned senior counsel appearing for the petitioners in Writ Petition (Civil) No. 536 of 2011 and Mr. Sidharth Luthra, learned Amicus Curiae, to the effect that if the Court does not intend to incorporate a prior stage in criminal trial, it can definitely direct the Election Commission to save democracy by including some conditions in the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as 'the Symbols Order'). The submission is that a candidate against whom criminal charges have been framed in respect of heinous and grievous offences should not be allowed to contest with the symbol of the party. It is urged that the direction would not amount to adding a disqualification beyond what has been provided by the legislature but would

only deprive a candidate from contesting with the symbol of the political party.

81. The aforesaid submission is seriously opposed by the learned Attorney General. It is the case of the first respondent that Section 29A of the Act does not permit the Election Commission of India to deregister a political party. To advance this view, the Union of India has relied upon the decision of this Court in *Indian National Congress (I)* v. *Institute of Social Welfare*[19].

82. It is also the asseveration of the first respondent that the power of this Court to issue directions to the Election Commission of India have been elaborately dealt with in *Association for Democratic Reforms* (supra) wherein this Court held that Article 32 of the Constitution of India only operates in areas left unoccupied by legislation and in the case at hand, the Constitution of India and the Representation of the People Act, 1951 already contain provisions for disqualification of Members of Parliament. Therefore, directing the Election Commission to (a) deregister a political party, (b) refuse renewal of a political party or (c) to not register a political party if they associate themselves with persons who are merely charged with offences would amount to adopting a colourable route, that is, doing indirectly what is clearly prohibited under the Constitution of India and the Representation of the People Act.

83. It is also contended on behalf of the Union of India that adding a condition to the recognition of a political party under the Symbols Order would also result in doing indirectly what is clearly prohibited. To buttress this stand, the Union of India has cited the decisions in *Jagir Singh* v. *Ranbir Singh*[20] and *M.C. Mehta* v. *Kamal Nath*[21].

84. Further, it has been submitted by the first respondent that Section 29A(5) of the Act is a complete, comprehensive and unambiguous provision of law and any direction to the Election Commission of India to deregister or refuse registration to political parties who associate themselves with persons merely charged with offences would result in violation of the doctrine of separation of powers as that would tantamount to making addition to a statute which is clear and unambiguous.

85. As per the first respondent, 'pure law' in the nature of constitutional provisions and the provisions of the Act cannot be substituted or replaced by judge made law. To advance the said stand, the first respondent has cited the judgments of this Court in *State of Himachal Pradesh* v. *Satpal Saini*[22] and *Kesavananda Bharati* v. *State of Kerala*[23] wherein the doctrine of separation of powers was concretised by this Court. It is the contention of the first respondent that answering the present reference in the affirmative would result in violation of the doctrine of separation of powers.

86. The first respondent has also contended that the presumption of innocence until proven guilty is one of the hallmarks of Indian democracy and the said presumption attaches to every person who has been charged of any offence and it continues until the person has been convicted after a full-fledged trial where evidence is led. Penal consequences cannot ensue merely on the basis of charge.

87. Drawing support from the judgment of this Court in *Amit Kapoor* v. *Ramesh Chander*[24], it is averred by the first respondent that the standard of charging a person is always less than a *prima facie* case, i.e., a person can be charged if the facts emerging from the record disclose the existence of all the ingredients constituting the alleged offence and, therefore, the consequences of holding that a person who is merely charged is not entitled to membership of a political party would be grave as it would have the effect of taking away a very valuable advantage of the symbol of the political party.

88. It has been further contended by the first respondent that every citizen has a right under Article 19(l)(c) to form associations which includes the right to be associated with persons who are otherwise qualified to be Members of Parliament under the Constitution of India and under the law made by the Parliament. Further,

this right can only be restricted by law made by the Parliament and any direction issued by the Election Commission of India under Article 324 is not law for the purpose of Article 19(l)(c).

89. The first respondent also submits that the Act already contains detailed provisions for disclosure of information by a candidate in the form of Section 33A which requires every candidate to disclose information pertaining to offences that he or she is accused of. This information is put on the website of the Election Commission of India and requiring every member of a political party to disclose such information irrespective of whether he/she is contesting election will have serious impact on the privacy of the said member.

90. Relying upon the decisions in *Union of India* v. *Deoki Nandan Aggarwal*[25] and *Supreme Court Bar Association* v. *Union of India*[26], the first respondent has submitted that Article 142 of the Constitution of India does not empower this Court to add words to a statute or read words into it which are not there and Article 142 does not confer the power upon this Court to make law.

91. As regards the issue that there is a vacuum which necessitates interference of this Court, the first respondent has contended that this argument is untenable as the provisions of the Constitution and the Act are clear and unambiguous and, therefore, answering the question referred to in the affirmative would be in the teeth of the doctrine of separation of powers and would be contrary to the provisions of the Constitution and to the law enacted by the Parliament.

Analysis of the Election Symbols Order

92. In the adverting situation and keeping in view the submissions on the behalf of the petitioners, it is pertinent to scan and analyse the relevant provisions of the Symbols Order which deals with allotment, classification, choice of symbols by candidates and restriction on the allotment of symbols. Clause (4) of the Symbols Order reads:—

> "4. **Allotment of symbols** — In every contested election a symbol shall be allotted to a contesting candidate in accordance with the provisions of this Order and different symbols shall be allotted to different contesting candidates at an election in the same constituency."

93. Clause (4) of the Symbols Order makes it clear that in each and every contested election, a symbol, to each and every contesting candidate, shall be allotted in accordance with the provisions of this Symbols Order and in case of an election in the same constituency, different symbols shall be allotted to different contesting candidates. Now, we must also dissect clause (5) of the Symbols Order which reads:—

> "**5. Classification of symbols** — (1) For the purpose of this Order symbols are either reserved or free.
>
> (2) Save as otherwise provided in this Order, a reserved symbol is a symbol which is reserved for a recognised political party for exclusive allotment to contesting candidates set up by that party.
>
> (3) A free symbol is a symbol other than a reserved symbol."

94. Sub-clause (1) of clause (5) of the Symbols Order, a priori, segregates the symbols for the purposes of this Symbols Order into two simon pure categories, i.e., 'Reserved' or 'Free'. Therefore, a symbol under the Symbols Order can either be reserved or it can be free. Before decoding sub-clause (2) of clause (5), we may first decipher sub-clause (3) which gives a negative definition to a free symbol. As per sub-clause (3) of clause (5), a symbol is free if is not reserved under the Symbols Order. Sub-clause (2) of clause (5) which defines a reserved symbol stipulates that except as otherwise provided in the Symbols Order, a reserved symbol is one which is reserved for a recognised political party for exclusive allotment to the contesting candidates set

up by such political party.

95. Thereafter, clause (6) classifies political parties into state parties and national parties. Clauses (6A) and (6B) stipulate the conditions for recognition of state and national parties, respectively. Under clause (17) of the Symbols Order the Election Commission publishes, by notification in the Official Gazette of India, the national parties, State parties and the symbols reserved for them. Clause (17) reads as under: —

> **"17. Notification containing lists of political parties and symbols —**
>
> (1) The Commission shall by one or more notifications in the Gazette of India publish lists specifying-
>
> (a) the National Parties and the symbols respectively reserved for them;
>
> (b) the State Parties, the State or States in which they are State Parties and the symbols respectively reserved for them in such State or States;
>
> x x x"

96. Another important provision in the matter of choice of symbols by candidates and restriction on the allotment thereof is clause (8) of the Symbols Order which reads thus:—

> **"8. Choice of symbols by candidates of National and State Parties and allotment thereof —**
>
> (1) A candidate set up by a National Party at any election in any constituency in India shall choose, and shall be allotted, the symbol reserved for that party and no other symbol.
>
> (2) A candidate set up by a State Party at an election in any constituency in a State in which such party is a State Party, shall choose, and shall be allotted the symbol reserved for that Party in that State and no other symbol.
>
> (3) A reserved symbol shall not be chosen by, or allotted to, any candidate in any constituency other than a candidate set up by a National Party for whom such symbol has been reserved or a candidate set up by a State Party for whom such symbol has been reserved in the State in which it is a State Party even if no candidate has been set up by such National or State Party in that constituency."

97. For exegesis of clause (8) of the Symbols Order, it is apt that we refer to clause (13) which provides as to when a candidate is deemed to be set up by a political party. Clause (13) reads as under:—

> **"13. When a candidate shall be deemed to be set up by a political party.—** For the purposes of an election from any parliamentary or assembly constituency to which this Order applies, a candidate shall be deemed to be set up by a political party in any such parliamentary or assembly constituency, if, and only if,-
>
> (a) the candidate has made the prescribed declaration to this effect in his nomination paper;
>
> (aa) the candidate is a member of that political party and his name is borne on the rolls of members of the party;
>
> (b) a notice by the political party in writing, in Form B, to that effect has, not later than 3 p.m. on the last date for making nominations, been delivered to the Returning Officer of the constituency;
>
> (c) the said notice in Form B is signed by the President, the Secretary or any other office bearer of the party, and the President, Secretary or such other office bearer sending the notice has been authorised by the party to send such notice;
>
> (d) the name and specimen signature of such authorised person are communicated by the party, in Form A, to the Returning Officer of the

constituency and to the Chief Electoral Officer of the State or Union Territory concerned, not later than 3 p.m. on the last date for making nominations; and

(e) Forms A and B are signed, in ink only, by the said office bearer or person authorised by the party:

Provided that no facsimile signature or signature by means of rubber stamp, etc., of any such office bearer or authorised person shall be accepted and no form transmitted by fax shall be accepted."

98. Clause (13) lays down an elaborate procedure in order for a candidate to be set up by a political party in both the elections to the Parliament as well as the Assembly constituencies.

99. Coming back to clause (8) of the Symbols Order, as per sub-clause (1) of clause (8), a candidate set up by a national party in terms of clause (13) in any constituency in India shall choose the symbol reserved for such national party and no other symbol. By using the word 'shall', sub-clause (1) of clause (8) makes it mandatory for a candidate set up by a national party to choose the symbol reserved for such national party. Further, sub-clause (1), again on a second instance, by using the word 'shall' in the context of the Election Commission, makes it obligatory for the Election Commission to allot to a candidate set up by a national party the symbol reserved for such national party. Therefore, sub-clause (1) by casting this duty on the Election Commission, as a natural corollary, gives birth to a right to the candidate set up by a national party to contest elections under the symbol reserved for such national party.

100. That apart, the first part of sub-clause (3) of clause (8) stipulates that a symbol reserved, in terms of clause (5) read with clause (17) of the Symbols Order, shall neither be chosen by nor allotted by the Election Commission to any candidate in any constituency other than a candidate set up by a national party.

101. Sub-clause (2) of clause (8) and the latter part of clause (3) are corresponding provisions for choice of symbol by candidates of State parties which, for the sake of brevity, we need not delve into. Coming to the last clause of the Symbols Order, clause (18) reads thus:—

"**18. Power of Commission to issue instructions and directions:**—The Commission may issue instructions and directions-

x x x

x x x

(c) in relation to any matter with respect to the reservation and allotment of symbols and recognition of political parties, for which this Order makes no provision or makes insufficient provision, and provision is in the opinion of the Commission necessary for the smooth and orderly conduct of elections."

102. In terms of sub-clause (c) of clause 18, the power to issue instructions and directions, in matters relating to reservation and allotment of symbols, has been reserved by the Election Commission itself.

103. What comes to the fore is that when a candidate has been set up in an election by a particular political party, then such a candidate has a right under sub-clause (3) of clause (8) to choose the symbol reserved for the respective political party by which he/she has been set up. An analogous duty has also been placed upon the Election Commission to allot to such a candidate the symbol reserved for the political party by which he/she has been set up and to no other candidate.

104. Assuming a hypothetical situation, where a particular symbol is reserved for a particular political party and such a political party sets up a candidate in elections against whom charges have been framed for heinous and/or grievous offences and if we were to accept the alternative proposal put forth by the petitioners to direct the

Election Commission that such a candidate cannot be allowed to contest with the reserved symbol for the political party, it would tantamount to adding a new ground for disqualification which is beyond the pale of the judicial arm of the State. Any attempt to the contrary will be a colourable exercise of judicial power for it is axiomatic that "what cannot be done directly ought not to be done indirectly" which is a well-accepted principle in the Indian judiciary.

105. Here we may profit to refer to some authorities wherein the said principle has been discussed elaborately.

106. In *Allied Motors Limited* v. *Bharat Petroleum Corporation Limited*[27], reference was made to the celebrated judgment of the Privy Council in *Nazir Ahmad* v. *King Emperor*[28] wherein the principle has been enunciated "*that where a power is given to do a certain thing in a certain way, the thing must be done in that way, or not at all.*" Other methods of performance are necessarily forbidden. This principle has been reiterated and expanded by the Supreme Court in several decisions.

107. In *D.R. Venkatachalam* v. *Dy. Transport Commissioner*[29], it was observed:—

> "In ultimate analysis, the rule of construction relied upon by Mr. Chitaley to make the last-mentioned submission is: "Expression unius est exclusio alterius." This maxim, which has been described as "a valuable servant but a dangerous master" (per Lopes J., in Court of Appeal in *Colquhoun* v. *Brooks*, (1888) 21 QBD 52 finds expression also in a rule formulated in *Taylor* v. *Taylor*, (1875) 1 Ch D 426 applied by the Privy Council in *Nazir Ahmad* v. *King Emperor* which has been repeatedly adopted by this Court. That rule says that an expressly laid down mode of doing something necessarily implies a prohibition of doing it in any other way."

108. Similarly, in *State through. P.S. Lodhi Colony New Delhi* v. *Sanjeev Nanda*[30], this Court observed thus:—

> "It is a settled principle of law that if something is required to be done in a particular manner, then that has to be done only in that way or not, at all. In AIR 1936 PC 253 (2) *Nazir Ahmad* v. *King Emperor*, it has been held as follows:
>
> ".... The rule which applies is a different and not less well recognized rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all...."

109. Another judgment where this principle has been reiterated is *Rashmi Rekha Thatoi* v. *State of Orissa*[31] wherein it was observed thus:—

> "In this regard it is to be borne in mind that a court of law has to act within the statutory command and not deviate from it. It is a well-settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review."

110. That apart, any direction to the Election Commission in the nature as sought by the petitioners may lead to an anomalous situation and has the effect potentiality to do something indirectly which is not permissible to do directly. A candidate bereft of party symbol is, in a way, disqualified from contesting under the banner of a political party. It is contended that the person concerned can contest the election as an independent candidate but, as we perceive, the impact would be the same. That apart, without a legislation, it may be difficult to proscribe the same. Additionally, democracy that is based on multi-party system is likely to be dented. In *Shailesh Manubhai Parmar* v. *Election Commission of India*[32], while dealing with the issue of introduction of NOTA to the election process for electing members of the Council of States, this Court observed thus:—

> "...introduction of NOTA to the election process for electing members of the

Council of States will be an anathema to the fundamental criterion of democracy which is a basic feature of the Constitution. It can be stated without any fear of contradiction that the provisions for introduction of NOTA as conceived by the Election Commission, the first respondent herein, on the basis of the PUCL judgment is absolutely erroneous, for the said judgment does not say so. We are disposed to think that the decision could not have also said so having regard to the constitutional provisions contained in Article 80 and the stipulations provided under the Tenth Schedule to the Constitution. The introduction of NOTA in such an election will not only run counter to the discipline that is expected from an elector under the Tenth Schedule to the Constitution but also be counterproductive to the basic grammar of the law of disqualification of a member on the ground of defection. It is a well settled principle that what cannot be done directly, cannot be done indirectly. To elaborate, if NOTA is allowed in the election of the members to the Council of States, the prohibited aspect of defection would indirectly usher in with immense vigour.

(Emphasis is ours)

111. Here it is apt to note that this Court refused to allow the introduction of NOTA for election of members of the Council of States, for the Court was of the view that if the availibilty of NOTA option in elections for Rajya Sabha would be allowed, the same would amount to colourable exercise of power by attempting to introduce or modify a disqualification for being or becoming a member, which power falls completely within the domain of the legislature. Ruling so, the Court further observed:—

"The introduction of NOTA in indirect elections may on a first glance tempt the intellect but on a keen scrutiny, it falls to the ground, for it completely ignores the role of an elector in such an election and fully destroys the democratic value. It may be stated with profit that the idea may look attractive but its practical application defeats the fairness ingrained in an indirect election. More so where the elector's vote has value and the value of the vote is transferrable. It is an abstraction which does not withstand the scrutiny of, to borrow an expression from Krishna Iyer, J., the "cosmos of concreteness. We may immediately add that the option of NOTA may serve as an elixir in direct elections but in respect of the election to the Council of States which is a different one as discussed above, it would not only undermine the purity of democracy but also serve the Satan of defection and corruption."

112. Thus analyzed, the directions to the Election Commission as sought by the petitioners runs counter to what has been stated hereinabove. Though criminalization in politics is a bitter manifest truth, which is a termite to the citadel of democracy, be that as it may, the Court cannot make the law.

113. Directions to the Election Commission, of the nature as sought in the case at hand, may in an idealist world seem to be, at a cursory glance, an antidote to the malignancy of criminalization in politics but such directions, on a closer scrutiny, clearly reveal that it is not constitutionally permissible. The judicial arm of the State being laden with the duty of being the final arbiter of the Constitution and protector of constitutional ethos cannot usurp the power which it does not have.

114. In a multi-party democracy, where members are elected on party lines and are subject to party discipline, we recommend to the Parliament to bring out a strong law whereby it is mandatory for the political parties to revoke membership of persons against whom charges are framed in heinous and grievous offences and not to set up such persons in elections, both for the Parliament and the State Assemblies. This, in our attentive and plausible view, would go a long way in achieving decriminalisation of politics and usher in an era of immaculate, spotless, unsullied and virtuous constitutional democracy.

115. In spite of what we have stated above, we do not intend to remain oblivious to

the issue of criminalization of politics. This Court has focused on various aspects of the said criminalization and given directions from time to time which are meant to make the voters aware about the antecedents of the candidates who contest in the election. In *Association for Democratic Reforms* (supra), this Court held:—

> "38. If right to telecast and right to view sport games and the right to impart such information is considered to be part and parcel of Article 19(1)(*a*), we fail to understand why the right of a citizen/voter — a little man — to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(*a*). In our view, democracy cannot survive without free and fair election, without free and fairly informed voters. Votes cast by uninformed voters in favour of *X* or *Y* candidate would be meaningless. As stated in the aforesaid passage, one-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce. Therefore, casting of a vote by a misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions. Entertainment is implied in freedom of 'speech and expression' and there is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy."

116. After the said judgment was delivered, the Representation of the People (Amendment) Ordinance, 2002 (4 of 2002) was promulgated and the validity of the same was called in question under Article 32 of the Constitution of India. The three Judge Bench in *People's Union for Civil Liberties (PUCL)* (supra) held that Section 33-B which provided the candidate to furnish information only under the Act and the rules is unconstitutional. The said provision read as follows:—

> "**33-B. Candidate to furnish information only under the Act and the rules.** —Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."

117. P. Venkata Reddy, J. expressed his view as follows:—

> "(1) Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19 (1)(*a*). This right to information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though, to a certain extent, there may be overlapping.
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> * * *
>
> (3) The directives given by this Court in *Union of India* v. *Assn. for Democratic Reforms* were intended to operate only till the law was made by the legislature and in that sense 'pro tempore' in nature. Once legislation is made, the Court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right of information available to the voter/citizen. In embarking on this exercise, the points of disclosure indicated by this Court, even if they be tentative or ad hoc in nature, should be given due weight and substantial departure therefrom cannot be countenanced.
>
> * * *
>
> (5) Section 33-B inserted by the Representation of the People (Third Amendment) Act, 2002 does not pass the test of constitutionality, firstly, for the

reason that it imposes a blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients and secondly, for the reason that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate.

(6) The right to information provided for by Parliament under Section 33-A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the Court from the ambit of disclosure."

118. Dharmadhikari, J., in his supplementing opinion, held thus:—

"127. The reports of the advisory commissions set up one after the other by the Government to which a reference has been made by Brother Shah, J., highlight the present political scenario where money power and muscle power have substantially polluted and perverted the democratic processes in India. To control the ill-effects of money power and muscle power the commissions recommend that election system should be overhauled and drastically changed lest democracy would become a teasing illusion to common citizens of this country. Not only a half-hearted attempt in the direction of reform of the election system is to be taken, as has been done by the present legislation by amending some provisions of the Act here and there, but a much improved election system is required to be evolved to make the election process both transparent and accountable so that influence of tainted money and physical force of criminals do not make democracy a farce — the citizen's fundamental 'right to information' should be recognised and fully effectuated. This freedom of a citizen to participate and choose a candidate at an election is distinct from exercise of his right as a voter which is to be regulated by statutory law on the election like the RP Act."

119. In *Resurgence India* v. *Election Commission of India*[33], referring to the precedents, this Court ruled thus:—

"20. Thus, this Court held that a voter has the elementary right to know full particulars of a candidate who is to represent him in Parliament and such right to get information is universally recognised natural right flowing from the concept of democracy and is an integral part of Article 19(1)(*a*) of the Constitution. It was further held that the voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Thus, in unequivocal terms, it is recognised that the citizen's right to know of the candidate who represents him in Parliament will constitute an integral part of Article 19(1)(*a*) of the Constitution of India and any act, which is derogative of the fundamental rights is at the very outset ultra vires."

120. And again:—

"27. If we accept the contention raised by the Union of India viz. the candidate who has filed an affidavit with false information as well as the candidate who has filed an affidavit with particulars left blank should be treated on a par, it will result in breach of fundamental right guaranteed under Article 19(1)(*a*) of the Constitution viz. 'right to know', which is inclusive of freedom of speech and expression as interpreted in *Assn. for Democratic Reforms*."

121. The Court summarized the directions as under:—

"29.1. The voter has the elementary right to know full particulars of a candidate who is to represent him in Parliament/Assemblies and such right to get information is universally recognised. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article

19(1)(*a*) of the Constitution.

29.2. The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(*a*) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filing of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.

29.3. Filing of affidavit with blank particulars will render the affidavit nugatory.

29.4. It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filing of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that justice itself is prejudiced.

29.5. We clarify to the extent that para 73 of *People's Union for Civil Liberties case* will not come in the way of the Returning Officer to reject the nomination paper when affidavit is filed with blank particulars.

29.6. The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank.

29.7. Filing of affidavit with blanks will be directly hit by Section 125-A(*i*) of the RP Act. However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalised for the same act by prosecuting him/her."

122. In *People's Union for Civil Liberties* v. *Union of India*[34], the Court held that the universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual voters to go to the polls and thereby participate in the governance of our country. It has been further ruled that for democracy to survive, it is essential that the best available men should be chosen as the people's representatives for the proper governance of the country. The best available people, as is expected by the democratic system, should not have criminal antecedents and the voters have a right to know about their antecedents, assets and other aspects. We are inclined to say so, for in a constitutional democracy, criminalization of politics is an extremely disastrous and lamentable situation. The citizens in a democracy cannot be compelled to stand as silent, deaf and mute spectators to corruption by projecting themselves as helpless. The voters cannot be allowed to resign to their fate. The information given by a candidate must express everything that is warranted by the Election Commission as per law. Disclosure of antecedents makes the election a fair one and the exercise of the right of voting by the electorate also gets sanctified. It has to be remembered that such a right is paramount for a democracy. A voter is entitled to have an informed choice. If his right to get proper information is scuttled, in the ultimate eventuate, it may lead to destruction of democracy because he will not be an informed voter having been kept in the dark about the candidates who are accused of heinous offences. In the present scenario, the information given by the candidates is not widely known in the constituency and the multitude of voters really do not come to know about the antecedents. Their right to have information suffers.

123. Keeping the aforesaid in view, we think it appropriate to issue the following directions which are in accord with the decisions of this Court:—

(i) Each contesting candidate shall fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein.

(ii) It shall state, in bold letters, with regard to the criminal cases pending against the candidate.

(iii) If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her.

(iv) The concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents.

(v) The candidate as well as the concerned political party shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that the same shall be done at least thrice after filing of the nomination papers.

124. These directions ought to be implemented in true spirit and right earnestness in a bid to strengthen the democratic set-up. There may be certain gaps or lacunae in a law or legislative enactment which can definitely be addressed by the legislature if it is backed by the proper intent, strong resolve and determined will of right-thinking minds to ameliorate the situation. It must also be borne in mind that the law cannot always be found fault with for the lack of its stringent implementation by the concerned authorities. Therefore, it is the solemn responsibility of all concerned to enforce the law as well as the directions laid down by this Court from time to time in order to infuse the culture of purity in politics and in democracy and foster and nurture an informed citizenry, for ultimately it is the citizenry which decides the fate and course of politics in a nation and thereby ensures that "we shall be governed no better than we deserve", and thus, complete information about the criminal antecedents of the candidates forms the bedrock of wise decision-making and informed choice by the citizenry. Be it clearly stated that informed choice is the cornerstone to have a pure and strong democracy.

125. We have issued the aforesaid directions with immense anguish, for the Election Commission cannot deny a candidate to contest on the symbol of a party. A time has come that the Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. It is one thing to take cover under the presumption of innocence of the accused but it is equally imperative that persons who enter public life and participate in law making should be above any kind of serious criminal allegation. It is true that false cases are foisted on prospective candidates, but the same can be addressed by the Parliament through appropriate legislation. The nation eagerly waits for such legislation, for the society has a legitimate expectation to be governed by proper constitutional governance. The voters cry for systematic sustenance of constitutionalism. The country feels agonized when money and muscle power become the supreme power. Substantial efforts have to be undertaken to cleanse the polluted stream of politics by prohibiting people with criminal antecedents so that they do not even conceive of the idea of entering into politics. They should be kept at bay.

126. We are sure, the law making wing of the democracy of this country will take it upon itself to cure the malignancy. We say so as such a malignancy is not incurable. It only depends upon the time and stage when one starts treating it; the sooner the better, before it becomes fatal to democracy. Thus, we part.

127. The writ petitions and the criminal appeals are disposed of accordingly.

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[1] (2016) 3 SCC 183

[2] (2014) 9 SCC 1

[3] (2013) 7 SCC 653

[4] Dr Rajendra Prasad, President, Constituent Assembly of India, 26th November, 1949

[5] https://eci.nicJn/eci_main/PROPOSED_ELECTORAL_REFORMS.pdf

[6] (1997) 4 SCC 306

[7] (1997) 6 SCC 1

[8] (2005) 1 SCC 754 : AIR 2005 SC 688

[9] (1978) 1 SCC 405 : AIR 1978 SC 851

[10] (2002) 5 SCC 294

[11] (2013) CIC 8047

[12] (2003) 4 SCC 399

[13] (1996) 4 SCC 659

[14] (1979) 3 SCC 4

[15] (1996) 4 SCC 104

[16] (1984) 2 SCC 656 : AIR 1984 SC 921

[17] (2006) 7 SCC 1

[18] Milan Vaishnav, When crime pays: Money and Muscle in Indian Politics, Yale Press University, New Haven (2017)

[19] (2002) 5 SCC 685

[20] (1979) 1 SCC 560

[21] (2000) 6 SCC 213

[22] (2017) 11 SCC 42

[23] (1973) 4 SCC 225

[24] (2012) 9 SCC 460

[25] (1992) Supp (1) 323

[26] (1998) 4 SCC 409

[27] (2012) 2 SCC 1

[28] AIR 1936 PC 253

[29] (1977) 2 SCC 273 : AIR 1977 SC 842

[30] (2012) 8 SCC 450 : AIR 2012 SC 3104

[31] (2012) 5 SCC 690

[32] 2018 (10) SCALE 52

[33] (2014) 14 SCC 189

[34] (2013) 10 SCC 1

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Annex P-3

To,

22.01.2019

The Chief Election Commissioner

Election Commission of India,

Nirvachan Sadan, Ashoka Road, New Delhi-110001

Restrict political parties to setup candidates charged with serious cases

Sir,

(1) Criminalization of politics is rapidly growing. What is alarming is that the percentage of candidates with criminal antecedents and their chances of winning election have increased steadily over the years. In fact, empirical analysis shows that, where the charges against a candidate are serious, it increases the statistical probability of his winning the election. Criminals who earlier used to help politicians win elections in the hope of getting favours have cut out the middle-man for entering politics themselves. Political parties in turn have become steadily more reliant on the criminals as candidates not only because they "self-finance" their own elections in an era where election contests have become phenomenally expensive but also because candidates with criminal antecedents are more likely to win than "clean" candidates. Political parties are competing with each other in a race to the bottom because they cannot afford to leave their competitors free to recruit criminals.

(2) Therefore, by using the plenary power conferred under Article 324 of the Constitution, the Election Commission of India should insert an additional condition- *"political party shall not setup candidate with criminal antecedents"* in Paragraph 6A *"Conditions for recognition as a State Party"*, Paragraph 6B *"Conditions for recognition as a National Party" and Paragraph 6C "Conditions for continued recognition as a National or State Party"* of the Election Symbols Order, 1968. The Election Commission of India should also introduce a definition in paragraph 2 of the Order as thus: *"candidate with criminal antecedents means a person against whom charges have been framed at least one year before the date of scrutiny of nominations for an offence with a maximum punishment of five years or more".*

(3) There would be no need even for enquiry because candidates are required by Section 33A of the RPA 1951, read with Rule 4A of the Conduct of Election Rules, 1961 and Form 26, to file along with their nomination papers an affidavit containing detailed information relating to the framing of charges against them for offences punishable with imprisonment of 2 years or more. It includes the Sections under which they are charged, the Court that did so and the date on which charges were framed. It is necessary to state that the proposed directions does not constitute a disqualification in violation of the Articles 102 or 191 because the affected candidates can always stand for election as an Independent. It would not breach the principle of separation of powers because there is a legislative vacuum insofar as the Parliament has not enacted any legislation in the field covered by the Election Symbols Order, 1968, which has been issued by the ECI in exercise of its plenary powers under Article 324.

(4) The Apex Court has held that Powers of the ECI under Article 324 operates in areas left unoccupied by legislation and is plenary in character. *[Kanhiya Lal Omar v. R.K. Trivedi, (1985) 4 SCC 628, Para 16]* The power of *"superintendence, direction and control"* of the conduct of elections, vested in the ECI, is executive in character. *[A.C. Jose v. Sivan Pillai, (1984) 2 SCC 656, p. 22]* The Symbols Order is traceable to the power of the Election Commission under Article 324. *[Kanhiya Lal Omar, para 16]* The power to amend, vary or rescind an order which is administrative in character under Section 21 of the General Clauses Act, specifically referred to in paragraph 2(2) of the Symbols Order, would permit the Election Commission to withdraw recognition of a political party. *[Janata Dal v. Election Commission, (1996) 1 SCC 235]*

(5) Accordingly, it is clear that the proposed amendment in the Symbols Order would operate in a field where there is a vacuum. In fact, proposed amendment is vital because the functions performed by legislators are vital to democracy and there is no reason why they should be held to lower standards than Judges or IAS officers. Candidates for judgeship or for the IAS would not be considered at all if there were criminal cases pending against them, let alone if charges had been framed in respect of serious offences. Of course, the refusal to consider

candidates for judgeship or the IAS may be on the touchstone of suitability and not eligibility but the proposed amendment is not an eligibility condition for legislators but merely imposes a condition on parties. Moreover, in the context of "institutional integrity" of office of the CVC, the Apex Court has held that the pendency of criminal cases may be considered a bar on appointment to important offices such as the CVC. *[CPIL v. Union of India, (2011) 4 SCC 1]*

(6) The effect of proposed direction would only be to impose an additional condition on a political party for obtaining and retaining the status of a *"recognized national party" or "state party"*, which would entitle it to a reserved symbol under the Symbols Order. The statutory right to register a political party would not be affected in any way. Moreover, under Section 13A of the Income Tax Act, political parties are exempt from paying income tax on contributions received by them. Therefore, preventing them from fielding candidates with criminal antecedents in election is a reasonable restriction, keeping in mind the concessions and privileges enjoyed by them.

(7) From the standpoint of the candidate against whom charges have been framed for a serious offence, settled legal position is that he has only a statutory right to contest elections. *[Krishnamoorthy, 59-60]* Further, even assuming that he is innocent, it would have indirect impact of possibly preventing him *for limited period of time until his trial is over* from obtaining a ticket from a recognized political party but such a measure would be in the larger public interest of ensuring that our polity remains free of criminal. The proposed amendment cannot result in violation of Article 19(1)(c) to form association. A candidate with criminal antecedents can become/continue to be a member of the party.

(8) The condition that political party not give him a ticket as a condition for recognition as a State/National party to guarantee continued usage of reserved symbol does not impinge on freedom of association of candidate/party. Further, even assuming that it could be characterized as falling within the scope of Article 19(1)(c), proposed amendment is a reasonable restriction that is narrowly tailored and can be justified on the ground of public order and morality in Article 19(4) of the Constitution.

Sir, 134

Keeping in view the impending elections, the growing menace of criminalization of politics and to secure fundamental right of voters, guaranteed under Articles 14 and 19(1) of the Constitution of India, please take appropriate steps to:

(a) insert an additional condition: *"political party shall not setup candidate with criminal antecedents"* in Paragraph 6A *"Conditions for recognition as a State Party"*, Paragraph 6B *"Conditions for recognition as a National Party" and Paragraph 6C "Conditions for continued recognition as a National or State Party"* of the Election Symbols (Reservation & Allotment) Order, 1968, by using the plenary power under Article 324 of the Constitution;

(b) introduce a definition: *"candidate with criminal antecedents means a person against whom charges have been framed at least one year before the date of scrutiny of nominations for an offence with a maximum punishment of five years or more"* in paragraph 2 of the Election Symbols (Reservation and Allotment) Order, 1968 by using the plenary power under Article 324 of the Constitution of India;

(c) issue such other order(s) or direction(s) as the Election Commission of India deems fit to ensure free and fair election and decriminalize the electoral system.

Thanks and Warm Regards.

Ashwini Kumar Upadhyay

15, M.C.Setalvad Chambers

Supreme Court, New Delhi-110001

G-284, Govindpuram, Ghaziabad-201013

Phone: 8800278866, aku.adv@gmail.com

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ITEM NO.15 COURT NO.1 SECTION PIL-W

Annex P-4

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(Civil) No. 1011/2019

ASHWINI KUMAR UPADHYAY Petitioner(s)

VERSUS

UNION OF INDIA & ANR. Respondent(s)

(FOR ADMISSION)

Date :25-11-2019 This petition was called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE B.R. GAVAI

For Petitioner(s) Mr. Basava PrabhuPatil, Sr. Adv.
Mr. Ashwani Kumar Dubey, AOR

UPON hearing the counsel the Court made the following
O R D E R

The petitioner's representation dated 22.01.2019 (Annexure P-2) shall be decided and the order shall be communicated to the petitioner within period of three months from the date this order is produced before concerned authority.

The writ petition is disposed of accordingly.

[CHARANJEET KAUR]
A.R.-CUM-P.S.

[INDU KUMARI POKHRIYAL]
ASSTT. REGISTRAR

SUPREME COURT OF INDIA

W.P.(C) No. 001142 of 2020

Listed On 28-09-2022
Court No. 05
Item No. 09

Process Id-20/2022

ASHWINI KUMAR UPADHYAY
Vs
UNION OF INDIA and others

Office Report of Fresh Cases

1. The limitation period of the appeal(s)/special leave petition(s) is as follows.

S.No.	Court	State	Bench	Case No.	Order Date	Petition in Time	Delay Days Filing	Delay Days Re-filing
No Information Available								

2. The advocate has filed Document(s)/Interlocutory Application(s) as follows:-

S.No.	Document No.	Name of Document	Filing date	Verification Status	Page No.
No Information Available					

3. Similarity found in the present case is based on:

S.No.	Diary No.	Case No.	Petitioner/Respondent	Remarks	Status
1.	27801/2019	W.P.(C) No. 001011 / 2019	ASHWINI KUMAR UPADHYAY vs. UNION OF INDIA AND ANR	-	Disposed of on 25-11-2019 (R/p enclosed)
2.	36674/2011	W.P.(C) No. 000536 / 2011	PUBLIC INTEREST FOUNDATION AND ORS vs. UNION OF INDIA AND ANR	-	Disposed of on 25-09-2018 (Citation(s) 2018 AIR 4550 2018 (10) SCR 141 2018 (3) SCC 224 2018(9) JT 344 2018(11) SCALE 414

4. It is submitted that, in terms of Order XV Rule 2, the status of proof of service upon the respondent(s)/caveator(s) is as follows:-

S.No.	Respondent(s)/Caveator(s)	Status of proof of service	Date of Service
No Information Available			

Note:-

ASSISTANT REGISTRAR