

DISCOURSE WITH THE LAW COMMISSION OF INDIA ON THE PROPOSED ELECTORAL REFORMS

The present concern of this submission is focused primarily on two major issues:

- A) Disqualification of the candidates/members against whom charges have been framed in the Court of Law.
- B) Consequence in a situation of filing a false affidavit/ mis-information/non- information.

CHAPTER 1

INTRODUCTION:

The opening lines of this submission are based on the principle that democracy is a public good and therefore it has to be preserved, protected and promoted. For a Democracy to survive and “live to tell the tale”, we need to have an unsoiled electoral process. Parliamentary Democracy is not just an expression but rather an undisputed legal fact.

As Gladstone so aptly said once, “The purpose of a government is to make it easy for people to do good and difficult to do evil”.

It is a stark reality that in a democracy the Nation cannot afford to have Legislators held in contempt, or fear by the people. The leading principle for every democracy is “Free and Fair elections”. Sovereignty is vested in the People; the ultimate right is imbibed amongst them. It is us, who have to participate in this most imperative role- to proceed, perform and present our ultimate choice among the elected representatives. But at present, there is a widespread apprehension among the electorate. There is no predilection on the part of our politicians to take appropriate steps in order to achieve laudable governance. **The nexus between the criminals, politicians and bureaucrats has become so strong that the true letter and spirit of “Parliamentary Democracy” has gone astray. Politicization of crime and criminals has negated the very intent of democracy; it has dented the basic purpose of governance.**

It is imperative that our members ought to be of impeccable credentials and there should not be any blot against their names. Union Parliament and the State Legislatures are the supreme law making bodies in the country. Laws framed by them lay the foundation of the ‘Rule of law’. Unfortunately, it has been seen that a large number of people with zero integrity are inflowing in the electoral arena and even manage to enter the sanctified portals of our Parliament and State Legislatures. The present uncontrolled and unchecked system has as a matter of fact, only aggravated the problem by giving legitimacy to politicians and political parties. It has also down - graded politicians as a menace so much so that the Former Chief Election Commissioner Sri. J.M. Lingdoh once rightly referred to' them as cancer in the Society.

“A society that acquire habitual contempt for politics and politicians is not a society on the road to mold enlightenment - it is a Society opening itself to despotism.”

-Vide the Article by Pratap Bhanu Mehta in .Hindu dated, 27, December, 2003 -Chennai

The need for probity in public life was also emphasized by the “Ethics in governance report: **Second Administrative Reforms Commission, 2007**”. It was stated;

“We need to reverse the slide by prescribing stringent standards of probity in public life instead of providing shelter to public figures of suspect integrity behind the argument of their not having been convicted in a court. The standard should be one of not only the conduct of Caesar’s wife but of Caesar himself.”

1.1) Why it is necessary to inculcate such reforms in the electoral process of our country?

- **Public figures:**

A candidate who gets selected for Parliament or State Legislative Assembly is by virtue of his role a public servant. He has a duty to perform; an obligation to fulfill towards the electorate. Consequently, if such a member or likewise a tainted candidate gets into the political arena, he will not realize his duties as he will lack a basic credibility as well as sincerity. The mafia - politician-bureaucrat- stranglehold is so strong these politicians are merely posing as public servants.

- **Institutional Integrity:**

An election in India is a huge process and as a result politics as an institution is not a place for all and sundry. Running a country is a serious job that comes with a great responsibility and realization. The candidates contesting elections are the ones who will have to consolidate the views and beliefs of all. . Their job is to integrate various interests into a general political project and transform it into a political programme, for which they campaign to receive the consent and support of a majority. But a Parliamentarian who already has a compulsion of clearing his image instead of focusing on the public grievances is hardly acceptable

- **Genuine fear is not there:**

These candidates as well as the representatives who have criminal cases pending against them take shelter on the ground that they have not been convicted, even though in most cases, criminal cases have been registered against them many years ago, at times during the first term or even earlier and whereas now they are in the sixth or seventh term of the Parliament. A wrong message is conveyed to the electorate in particular and the country at large by their being part of the law making process, therefore it is imperative that they must clear their name first.

- **Winnability factor:**

The influence of muscle power in Indian politics has been a fact of life for a long time. It is not difficult to see why political parties put up criminals as candidates. Given a situation in which ‘Winnability’ is the sole criterion for selection of candidates and those with deep pockets alone can hope to win elections, a criminal who has amassed money and influence through a ‘mix of terror and patronage’, has greater chances of winning than a clean and decent individual without such ‘capabilities’. And most often criminals do win, which is why they are increasingly

present in the country's representative institutions. The consequences of the trend, if allowed to continue unchecked, hardly deserve an elaboration. This increasing trend in the process of governance with ministers, legislators, bureaucrats, mafia and unscrupulous businessmen combining together to plunder with the public funds and prey on the public sensitivity is definitely going to wear down the faith of the "People of India" in "Democracy"

- **There is no law regulating political parties:**

In order to bring a sense of discipline and order into the working of our political system and in the conduct of elections, it is necessary to provide by law for the formation, functioning, income and expenditure and the internal working of the recognized political parties both at the national and State level. As a matter of fact, at present we do not have a law, not even a rule, notification, bye-law, order to regulate the functioning of the political parties. Therefore, it becomes even more important to inculcate such reforms into the electoral and political arena.

The 170th Law Commission Report has also observed in Para 3.1.2 ;

"With a view to introduce and ensure internal democracy in the functioning of political parties, to make their working transparent and open and to ensure that the political parties become effective instruments of achieving the constitutional goals set out in the Preamble and Parts III and IV of the Constitution of India, it is necessary to regulate by law their formation and functioning."

- **Larger Public Interest:**

The elected members of Parliament and State legislatures are the custodians of public welfare. They play a pivotal role in shaping the policies and programmes for the welfare of the people through appropriate legislation. Hence the paramount importance is attached to the candidates aspiring to become members as well as the elected representatives. It is important for citizens to keep a check on their activities outside and on the floors of Parliament and State legislatures.

- **Balance of convenience and Equal harm doctrine:**

Indian Democracy which is consciously carrying out reforms for poverty alleviation, employment, social reforms and building up of infrastructure is desperately in need of innovative ideas for smooth and purposive elections along with an effective democratic governance. Considering that it is political parties which is the dominant partner in any election, therefore, it is essential that such provisions should be made so that they are forced to introduce clean candidates during elections. They only way of doing so is by regulating the present system and by following the proper "Rule of Law" which is "Equal for all in Equal circumstances" .Therefore, the onus should be on the person to prove that he/she is worthy of being a "Representative of the People". Benefit of doubt in this scenario can't be given because of "Equal harm doctrine" and Balance of convenience".

According to the Justice J.S Verma Committee Report;

“30...There is a distinct conflict of interest and we do hope that those Members of Parliament who have been charge sheeted of criminal offences specified in the proposed section 8(1) and where cognizance has been taken, will, as a mark of respect for the Parliament and the history of the Indian people, demit their offices as a leading and shining example of transformation. We can do no more than appeal.”

- **Ascertainment of a vigilant structure:**

By making the provisions even more strict and tight, it will help in making the institutions even more observant. Courts will be more careful during proceedings; police will be heedful and vigorous in their working.

- **A confidence motion between a common man and a representative:**

There is a growing cynicism about politicians as a group and political parties as entities. Criminal elements occupying the Parliament and the State Legislatures with impunity has led to the weakening of the socio-political fabric. **A representative needs to connect** with society if he has to perform his democratic function properly and if he has to gain the respect of the people. Both the executive branch and the legislative branch of the government are run by the representatives of the political parties who have been elected through the elections. Through the electoral process, the people of India choose which representative and which political party should run the government.

CHAPTER 2

Proposed electoral reforms in the present submission:

A) Disqualification on Framing of charges:

Law is a command backed by sanctions. But, as far as the electoral and political structure of our country is concerned, it has always been witnessed that this explicit sorority lack such sanctions or more to say they always manage to get away. Therefore, the standard for probity in public life should be not only conviction in a criminal court but propriety as determined by suitable independent institutions specifically constituted for the purpose. Over the time, a criminalized intermediate stratum has emerged that is now largely above the law. Its most prominent members have entered in the Parliament and the State Assemblies who have made themselves totally immune to prosecution.

- **Rationale behind the issue in question:**

1. First and foremost elections should be free and fair.
2. Presence of such large number of Legislatures with criminal backgrounds in the highest forum of democracy is reflective of a swelling nexus between politicians, bureaucrats, police and criminals elements.
3. Elections should be completely free from every conceivable influence and pressure.
4. Little has been done to weed out the criminal elements and their influence in national politics. Their influence has grown manifold over the years and their participation has become more and more active. From having a nexus with the politicians, criminals today have themselves taken on the role of becoming politicians themselves.
5. The dynamics of politics and elections has taken a serious and dangerous turn where the law-breakers are now becoming law makers and there is absolutely nothing that the Parliament has done to stop this disquieting trend.
6. In today's times of coalition governments where every vote in the Legislature counts, criminal elements pervade every political party and exercise enough influence to ensure that no effective steps are taken by the law makers to bar their entry into the Legislature.
7. The common man today is unable to exercise his right to vote based on adult suffrage freely and without fear or favour. This right is enshrined in Article 325 and 326 of the Constitution of India as well as under Article 14.
8. The expression "Freedom of speech and expression" enshrined under Article 19 of the Constitution also gets ruined by the presence of these criminal elements in our political arena as in that way a voter is not able to express his choice freely and valiantly.
9. The Preamble of the Indian Constitution also gives an absolute power to the "People of India" in terms of Political justice, equality of status and Parliamentary sovereignty and democracy.
10. Principle of "**One man One Vote**" forms is the key establishment of Parliamentary democracy. It is the key to secure to the citizens equality of the most basic status as voters and further securing political justice to them.
11. Every citizen must have a complete freedom to vote or participate in elections. The freedom can be exercised only if there are free and fair elections where each voter gets to choose their own representative as per his choice fearlessly.
12. Candidates charged with the heinous crimes like rape, murder, dacoity etc would not understand the sensitivity of a common man nor can people approach such representatives whose character is tainted.

B) Disqualification on filing of false affidavits and cross-verification of the affidavits by the Election Commission

A sense of right and wrong is intrinsic to our culture and civilization. But values need to be sustained by durable institutions. Values without institutional support will soon be weakened

and dissipated. Integrity is much more than honesty. We need a robust culture of integrity. Clearly, in the present issue the absence of rules is not the problem. One cannot mandate honesty. In the submission, the present concern is to deal with such an issue where the candidates have negated the very intent behind disclosure. Mere disclosure of information is not sufficient. The information furnished also needs to be correct. True and complete information fulfills the only logic behind disclosure.

Rationale behind disqualification:

- 1) False information, mis-information is no information at all.
- 2) The basic intention behind every disclosure is to form an informed opinion.
- 3) Mis-information, false information defeats the very purpose of disclosure.
- 4) By not providing the true information with the electorate, politicians and political parties have made a mockery out of the 2003 Supreme Court judgment in Association for Democratic Reforms and others vs. Union of India and others WP(C) 515 OF 2002.
- 5) This behavior of the politicians at large amounts to a contempt of the Constitution with respect to Article 19(1)(a).
- 6) Larger public interest is at stake.

CHAPTER 3

Responses given by ADR to the concerns raised before the Law Commission during the Round-table:

A) With respect to the charges framed by the Court:

Question 1: If framing of charge is the ground for disqualification, then what would happen if it happens with a sitting member?

Answer: The disqualification in case of a sitting MP or MLA should also be automatic. The reason for the same would be that Parliamentary representatives should be the members of utmost integrity and reliability. Such an esteemed position should be respected beyond any question. Therefore, any person with a tainted background should not be endured and also can't be tolerated.

According to the 170th Law Commission Report, Para 5.1;

"5.1..... The Law Commission had proposed that in respect of offences provided in sub-section (1)(except the offence mentioned in clause (b) of sub-section (1), a mere framing of charge should serve as a disqualification. This provision was sought to be made in addition to existing provision which provides for disqualification arising on account of conviction. The reason for this proposal was that most of the offences mentioned in sub-section (1) are either election offences

or serious offences affecting the society and that the persons committing these offences are mostly persons having political clout and influence.”

Further it was stated in , Para 5.1.1;

“5.1.1 Very often these elements are supported by unsocial persons or groups of persons, with the result that no independent witness is prepared to come forward to depose against such persons. In such a situation, it is providing extremely difficult to obtain conviction of these persons. It was suggested that inasmuch as charge were framed by a court on the basis of the material placed before it by the prosecution including the material disclosed by the charge-sheet, providing for disqualification on the ground of framing of the charge-sheet would be neither unjust nor unreasonable or arbitrary.”

Question 2: What would be the situation in a case where a person is disqualified after the framing of charges and the case is not decided even after 5/10/15 years?

Answer: He will continue to be disqualified. Probity in public life is essential and consequently our representatives being public offices can't escape this responsibility. There is a relationship between electorate and an elector. There is an unsaid promise, a mutual brief and consensus. They need to be accountable in their every single public dealing. A representative is an aspiration which he has to fulfill, a hope for millions of people. People choose him because they believe in him. There is a trust factor. But at the time if such a person comes in the electoral arena where his name is already involved in serious crimes, there will be a trust deficit. People will lose faith in the governance. The whole idea of democracy would vanish. It will be the fall of democracy; it will be the trounce on “The people”. Because when such candidates come in the electoral arena, it is not because they were freely and fairly chosen but because they forcefully made themselves winners.

Question 3: Should such candidates/ members be permanently debarred?

Answer: Yes, such member should be permanently debarred. Such a rationale is based on the concept of “Rule of law” in the “Administration of justice”.

Question 4:Should we have same provisions for disqualification for a charge-sheeted candidate/ member and a convicted candidate/member?

This concern has been answered in Justice J.S Verma Committee Report in Para 5;

“5.....However, we would like to recommend an amendment to the Representation of People Act, 1951 by which the spirit of the Election Commission's suggestion is carried out. We are also of the opinion that arguments on framing of charge themselves take a long time in Court. For us, it is sufficient if a charge sheet has been filed and cognizance has been taken by a Court for the person concerned to be disqualified from contesting elections to either House of Parliament or to the Legislature of a State. Accordingly, we suggest that in Section 8(1) of the Representation of People Act, 1951 may be amended as follows:-

"8. Disqualification on cognizance or conviction for certain offences.

(1) 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 Code of Criminal Procedure, 1973 (Act 2 of 1974) or, has been convicted by a court of competent jurisdiction, with respect to an offence punishable under—

- (a) the Indian Penal Code, 1860 (Act 45 of 1860) which are listed in Schedule I ; or*
- (b) the Protection of Civil Rights Act, 1955 which provides for punishment for the preaching and practice of untouchability", and for the enforcement of any disability arising therefrom; or*
- (c) section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or*
- (d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or*
- (e) the Foreign Exchange (Regulation) Act, 1973 (76 of 1973); or*
- (f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or*
- (g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or*
- (h) section 3 (declaration of an association as unlawful) or any offence enumerated in Chapter IV of the (punishment for terrorist activities) of the Unlawful Activities (Prevention) Act, 1967; or*
- (i) any provision of the Prevention of Terrorism Act, 2002; or*
- (j) any offences enumerated in chapter III of the Prevention of Corruption Act, 1988; or*
- (j) 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*
- (k) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub- section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act;[or]*
- (l) section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991 , or*
- (m) 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*
- (n) any law providing for the prevention of hoarding or profiteering; or*
- (o) any law relating to the adulteration of food or drugs; or*
- (p) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); or*
- (q) any provisions of the Commission of Sati (Prevention) Act. 1987 (3 of 1988),*

shall be disqualified from the date of such taking of cognizance under section 190(1)(a),(b) or (c) of the Code of Criminal Procedure, 1973 (Act 2 of 1974) or conviction, as the case may be, and shall continue to be disqualified for a further period of six years from the date of his release upon conviction. It is clarified that, in the event of acquittal of the candidate, disqualification shall continue to operate from the date of taking cognizance under section 190(1)(a),(b) or (c) of the Code of Criminal Procedure, 1973 (Act 2 of 1974) till the date of acquittal."

Question 5: What should be the period of disqualification in case of a charge-sheeted candidate?

Answer: The period of disqualification should be a minimum of 2 years.

Question 6: How can we deal with the issue of political vendetta?

Answer: With law comes sanctions and with sanctions come remedies. In this question we need to understand the interest of the public versus the interest of a politician. Moreover, under the eyes of law everyone is and should be treated equally. At the very first instance, it is a known fact that it is not easy to frame charges against a politician. Giving such a relaxation to a candidate or a member will not amount to his right but rather a privilege which as in a normal course of life is not available to a common man. Also, it should be the responsibility of that politician or that political party to take care of that evil. In nutshell, this country and largely a common man should not suffer.

According to Justice J.S Verma Committee Report, Para 29;

"29. In fact, the Commission itself on 15.6.1998 has noted that:

"The whole country is now expressing serious concern over the anti-social and criminal elements entering the electoral arena. Even Parliament in the debates in 50 years of independence and the resolution passed in special session in August, 1997 had shown a great deal of concern about the increasing criminalization of politics. It is widely believed that there is a growing nexus between the political parties and anti-social elements which is leading to criminalization of politics where the criminals themselves are now joining the election fray and often even getting elected in the process. Some of them have even adorned ministerial berths and thus law breakers have become lawmakers...."

Also, as per the National Commission to review the working of Constitution Report:

"4.12.2 The Commission recommends that the Representation of the People Act be amended to provide that any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as, or for being, a member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence and unless cleared during that one year period, he shall continue to remain so disqualified till the conclusion of the trial for that offence. In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. If any candidate violates this provision, he should be disqualified. Also, if a party puts up such a candidate with knowledge of his antecedents, it should be de-recognised and deregistered."

Further in Para 4.12.3, the Commission went on to say;

“4.12.3 Any person convicted for any heinous crime like murder, rape, smuggling, dacoity, etc. should be permanently debarred from contesting for any political office.”

B) With respect to the issue of False affidavits:

Question 1: Apart from the 2003 Supreme Court guidelines in Association for Democratic Reforms vs. Union of India, whether any further information is required in the affidavits?

Answer: Yes, because of the escalating corruption and crime, certain other provisions should also be made available in the affidavits. This is because of the fact that the present system of disclosure is not sufficient to curb such grave evils and a stern yardstick is required to combat such evils. These provisions are:

- a) Sources of Income
- b) Value of the property on date of purchase.
- c) Present market value of the property.
- d) Date on which the property was acquired.
- e) Mode of acquisition of the property
- f) Description of the property.

Question 2 :What should be the consequence in case of filing of a false affidavit or wrong information or misinformation?

Answer: They should be unseated and it should be a penal offence. It is already a penal offence under Section 177 of the Indian Penal Code.

According to Justice J.S Verma Committee Report, Para 23;

23....Further, it may be pointed out that a penalty for filing a false affidavit is liable to imprisonment for a term which may extend to six months. In other words, it is punishable as an offence. If it is punishable as an offence, then in that event upon the conviction of that offence, the candidate ought to be liable to be disqualified. In our view, a disqualification on such conviction must definitely ensue. Thus, it is utterly improper that a legislator can file a false affidavit under Section 33A, thus denying the Election Commission the powers of any inquiry, for which he can only be prosecuted for an offence under Section 125A and/or Section 177 IPC which does not lead automatically to disqualification. This, in our opinion, makes a mockery of the entire provision contained in Section 33A. We think that if an affidavit filed by a candidate is not verified, the mere putting up of that affidavit in the public domain is hardly of any consequence....”

Further it was observed in Para 24;

“24. We are therefore of the opinion that there needs to be an amendment by which there is compulsion on the candidates to disclose truthfully under Section 33A the true facts failing which disqualification will issue. In our opinion, Section 8(1) of the Representation of People Act, 1951 must contain a provision for disqualification in respect of every case where a person has been accused of the offences listed therein where a the court has taken cognizance.”

Question3: Who should take up the onus of cross-verification/ scrutiny of affidavits of the candidates?

Answer: ECI should take this responsibility. Even if they are not equipped, they should equip themselves and they should be taking up this responsibility of getting such verification done by the existing agencies.

“32. We request the Election Commission to take corrective measures so that in the future there is an accurate database which is publicly available detailing the candidates in respect of whose offences cognizance has been taken by a court of competent jurisdiction. Indeed, in a democracy where preambular values of justice, equality and liberty have to be upheld, if candidates have been accused of criminal cases of which cognizance has taken by Courts, we surely believe this constitutes a ground for disqualification.”

“10. We are also of the opinion that by not compiling information from the affidavits about cases where candidates were facing charges, the Election Commission has not been able to acquire a suitable database to look at the profile of the candidates who have contested elections. After all in a democratic country where free and fair elections have to take place, the character of the candidate is relevant. We, therefore, request the Election Commission to compile information from such affidavits in the future and keep it readily available for public access. In fact, we would like the Election Commission to know that certain other non-governmental agencies have collected information and have made available relevant data to the Committee.”