

**RESEARCH ON CASES AND MATERIALS ON POWERS OF ELECTORAL BODIES TO VET PERSONS  
FACING CRIMINAL CHARGES BEFORE RUNNING FOR PUBLIC OFFICE**

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## A. Brief Background

The pre-trial judges at the International Criminal Court confirmed on 23 January 2012 the charges against four of the six Kenyan suspects claimed to have played a major role in the 2007/2008 post-election violence that had taken the country to the precipice of civil war.<sup>1</sup> After having thoroughly examined and analyzed all the evidence presented, the Chamber, by majority, decided to confirm the charges against four of the six suspects. The judges confirmed charges against, Deputy Prime Minister Uhuru Kenyatta, Eldoret North MP William Ruto, Head of Civil Service Francis Muthaura and journalist Joshua arap Sang.

In both cases one of the judges, Judge Kaul, disagreed, saying the ICC is not competent because the crimes committed on the territory of the Republic of Kenya during the post-election violence of 2007-2008 **might have been serious common crimes under Kenyan criminal law, but not crimes against humanity as codified in Article 7 of the Rome Statute.**<sup>2</sup>

For the criminal responsibility of Mr. Ruto and Mr. Sang, the Chamber found, on the basis of the evidence presented, that they are responsible for the charges brought against them. The pre-trial Chamber II confirmed the charges against Mr. Ruto as an indirect co- perpetrator with others,<sup>3</sup> while it found that Mr. Sang contributed to the crimes against humanity. The Chamber was satisfied that the evidence also established substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta are criminally responsible for the alleged crimes having gained control over the Mungiki gangs and directed them to commit the crimes.<sup>4</sup>

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<sup>1</sup> See, the Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute: SITUATION IN THE REPUBLIC OF KENYA IN THE CASE OF THE PROSECUTOR V. UHURU MUIGAI KENYATTA ET. AL. AND IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO ET. AL. delivered on 23<sup>rd</sup> January 2012.

<sup>2</sup> Ibid, Dissenting Opinion by Judge Hans-Peter Kaul, P. 156.

<sup>3</sup> See, the Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute: SITUATION IN THE REPUBLIC OF KENYA IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO ET. AL. delivered on 23<sup>rd</sup> January 2012. Par. 349 "For these reasons, the Chamber finds sufficient evidence to establish substantial grounds to believe that: (a). On 31 December 2007 Mr. Ruto jointly with other members of the organization committed through other persons, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder, deportation or forcible transfer of population and persecution in Turbo town, pursuant to articles 7(l)(a), (d) and (h) of the Statute;.."

<sup>4</sup> Ibid, par. 428, "In sum, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that Mr. Muthaura and Mr. Kenyatta are individually criminally responsible as indirect co-perpetrators under article 25(3)(a) of the Statute..."

Mr. Uhuru and Mr. Ruto, despite the confirmation of charges against them for committing crimes against humanity by an international court, are intending and actually campaigning as presidential candidates in the forthcoming general elections due to be held on March 2013. This raises the question about their integrity to run for public office. Are they eligible being suspects and in reality facing charges at the ICC?

This research seeks to provide for materials and cases on the position on Kenyan law, International law and comparative jurisprudence on the same.

In brief, the research will tackle the following fundamental issues;

- a. Previous court cases and journal articles from any jurisdiction that focuses on powers of electoral bodies (equivalent of IEBC) for audit candidates where the law is not explicit.
- b. Limitations of electoral bodies do audit vis-a-vis individual human rights to participate in elections.
- c. The right to information and full disclosure of voters on candidates vying for various positions including the presidency. What amounts to sufficient disclosure of criminal and civil cases including corruption related cases? How can it be enforced and does it affect eligibility?
- d. How different societies have enforced value systems enshrined in chapter six to clean there politics especially where the laws may be silent on its impact on electoral systems.
- e. Any other related piece that will be helpful in shaping the case regardless of whether it supports or opposes the position ICPC has taken.

## **B. Reference from the Constitution of Kenya**

**Chapter 6 of the Constitution** is unequivocal on public leadership and integrity, and it clearly demands that a public officer must bring honor and excite public confidence in the office that they hold in trust for the people of Kenya. Kenyan laws demand that State officers must behave in a manner that does not demean the public offices.

**Article 73 (1) of the Constitution** provides in categorical terms that state officers hold power in trust for the citizens and that power shall be exercised in a manner that promotes integrity and public confidence in that office. Additionally, such public power must be exercised in a manner that brings honour and dignity to the office in question.<sup>5</sup>

Furthermore, **Article 73 (2)** provides for the guiding principles of leadership and integrity to include “(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections...”

Secondly, the Kenya National Dialogue and Reconciliation agreement that was signed by President Mwai Kibaki and Prime Minister Raila Odinga following post election violence, Article 4 on Public Officers and Offices, clearly provides that the heads of coalition government are bound to ensure that any person holding public office or any public servant charged with a criminal offense related to the 2008 post-election violence shall be suspended from duty until the matter is fully adjudicated upon.

### **C. International Framework**

A candidate vetting system involves, as a possible consequence, the denial of someone’s right and opportunity to be elected. A country’s constitution and laws regulate its national elections, but international law sets a number of standards that national legislations are expected to meet. The first of those standards was issued by the 1948 Universal Declaration of Human Rights (UDHR) that stipulates that “the will of the people shall be the basis of the authority of government.”<sup>6</sup> Since then, the derived principle of representative democracy has increasingly been seen as an essential element of legitimacy of governments among the community of nations.<sup>7</sup> The same article provides for “periodic and genuine elections that shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” A number of other UDHR provisions are also relevant to elections, in particular to ensure a conducive environment for free expression including the principle of non-discrimination,<sup>8</sup> and the

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<sup>5</sup>The Constitution of Kenya 2010, Article 73. (1) Authority assigned to a State officer— (a) is a public trust to be exercised in a manner that— (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and...

<sup>6</sup> UDHR, Art. 21 (3), The Constitution of Kenya, Art. 2 (5), pledges compliance with the UDHR.

<sup>7</sup> Guy S. Goodwin-Gill, *Free and Fair Elections*, 2nd ed.; Geneva, Inter-Parliamentary Union, 2006, 93.

<sup>8</sup> UDHR Art. 2

rights to freedom and security;<sup>9</sup> freedom of thought;<sup>10</sup> freedom of opinion and expression;<sup>11</sup> and freedom of assembly and association.<sup>12</sup>

Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR) establishes the electoral rights that its state parties are obligated to ensure their citizens.<sup>13</sup> The covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, to vote and to be elected.<sup>14</sup>

Article 25 of the ICCPR also introduces the possibility of restrictions to political rights, but it clarifies that they cannot be “unreasonable.” According to the General Comment 25, any restriction applied to the exercise of those rights should be based on objective, reasonable criteria, and the states should regulate all exclusions of groups or individuals from them.<sup>15</sup> A minimum age limit and mental incapacity are considered reasonable restrictions of electoral rights in the General Comment. Restricting the right to vote on the grounds of physical disability or by imposing literacy, educational or property requirements is deemed unreasonable, however, and so is restricting the right to stand for elections on the grounds of education, residence, descent, or by reason of political affiliation. The conviction for an offense is only mentioned as

a basis for suspending the right to vote, and it is clarified that the period of suspension must be proportionate to the offense and the sentence. Deprivation of liberty without a conviction should not represent a cause of exclusion from the exercise of the right to vote, with an implicit reference to the principle of presumption of innocence. Additionally the issue of incompatibility, or conflict of interest, between elected offices and the tenure of specific positions (e.g., the judiciary, high-ranking military office, or public service) should be regulated in a way that does not limit electoral rights. Similarly, conditions on nomination dates, fees, or minimum number of supporters should be reasonable, nondiscriminatory and not act as barrier to candidacy.

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<sup>9</sup> Ibid, Art 3

<sup>10</sup> Ibid, Art. 18

<sup>11</sup> Ibid, Art. 19

<sup>12</sup> Ibid, Art. 20

<sup>13</sup> ICCPR, art. 25, states that “Every citizen shall have the right and the opportunity without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”

<sup>14</sup> The right to vote is discussed in this section because registering as a voter in many countries, including Afghanistan, is one of the requisites to run for office. Therefore, the deprivation of the right to vote becomes a deprivation of the right to be elected.

<sup>15</sup> The Human Rights Committee adopted the General Comment at its 1,510th meeting (57th session) on July 12, 1996.

General Comment 25 also indicates that an independent electoral authority should be established to supervise the electoral process and ensure that it is conducted in a free, fair manner, in accordance with the national laws and the ICCPR. It also stipulates that: [I]n order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.<sup>16</sup>

Several regional instruments reaffirmed those principles,<sup>17</sup> which were further developed thanks to the growing involvement of the UN and other institutions in electoral observation.<sup>18</sup>

Countries have regulated the restrictions on the right to be a candidate and to be elected through their constitutions and laws. The most common restrictions, which may be divided into three categories, are the following: (1) requirements based on age, citizenship, residence, registration as voter, or in some cases literacy or a minimum level of education; (2) disqualification criteria based on criminal conviction, mental incapacity, or in some cases bankruptcy; and (3) conflict of interest criteria based on holding a military or government office. Disqualifying candidates on the grounds of criminal conviction for serious offense is widely accepted. In fact, in many countries people convicted of serious crimes lose the right to vote and consequently to be elected. However, according to the prevalent doctrine this criterion finds a limit, although not an absolute one, in the principle of the presumption of innocence, as defined by a number of international instruments,<sup>19</sup> as well as in the principle of proportionality, according to which the period of suspension from electoral rights must be proportionate to the offense and the sentence. The presumption of innocence, however, only extends to criminal proceedings, not administrative ones.

#### **D. Powers of Electoral Bodies (equivalent to IEBC) to audit candidates where the law is not explicit**

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<sup>16</sup> HRC General Comment 25 & 26

<sup>17</sup> African Charter on Human and Peoples' Rights, art. 13; American Convention on Human Rights, art. 23; and European Convention on Human Rights, in particular its First Protocol, art. 3. None of the regional instruments are directly applicable in Kenya, but they will inform the conduct of international electoral support missions.

<sup>18</sup> For example, the Conference on Security and Cooperation in Europe (CSCE) adopted an extensive set of electoral standards during its Meeting on Human Dimension, held in Copenhagen in 1990. An even more detailed and inclusive instrument is the Declaration on Criteria for Free and Fair Elections, unanimously adopted by the Inter-parliamentary Council at its 154th session in Paris on March 26, 1994. The declaration looks at the protection of electoral rights by developing the concept of "reasonable restriction." It also stresses the need for a free media. Such standards are further defined by the Code of Good Practice in Electoral Matters, adopted by the Venice Commission of the Council of Europe at its 52nd session held in Venice between Oct. 18 and 19, 2002.

<sup>19</sup> UDHR, art. 11; ICCPR, art. 14; and Rome Statute on the ICC, art. 66. The conviction must respect the due process rights of the defendant, including the right to appeal to a higher court, according to the law.

## **i) Powers of the independent Electoral and Boundaries Commission (IEBC)**

The Constitution of Kenya establishes institutions and mechanisms to ensure that individuals intending to vie for public office are vetted and principles of integrity and good governance are promoted and adhered to. In this regard, the Constitution establishes the IEBC (Article 188 [4])<sup>20</sup> and the Political Parties Act has been passed to ensure that effective vetting is realized. This is just one of the institution and legislation that will provide guidance in ensuring that individuals that accused of impunity are barred from holding or running for public office.<sup>21</sup>

**Article 88(4) (d) of the Constitution of Kenya** gives the IEBC the responsibility of regulating the process by which parties nominate candidates for elections.

The Elections Act accords the IEBC express powers to formulate regulations that will guide proper nominations and elections. The Act in this regard mandates the IEBC to make regulations that will guide the process by which parties nominate parties for elections.

**Section 109 (3)** provides that the IEBC shall formulate regulations that will guide political parties in undertaking nominations as well see potential candidates mandatorily declare their criminal background and financial probity including filling a sworn affidavit while presenting nomination papers to the Commission.<sup>22(23)</sup>

## **ii) The Electoral Commission of India**

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<sup>20</sup> Ibid, Article 88 (d) provides "(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for— (d) the regulation of the process by which parties nominate candidates for elections; (f) the registration of candidates for election; (h) the facilitation of the observation, monitoring and evaluation of elections; (j) the development of a code of conduct for candidates and parties contesting elections; and (k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

<sup>21</sup> See, The Star Newspaper, Ndung'u W. IEBC Must Vet All 2012 Candidates, at <http://www.the-star.co.ke/opinions/others/47747-iebc-must-vet-all-2012-candidates> accessed on 17/4/2012.

<sup>22</sup> Ibid

<sup>23</sup> *The Elections Act, No. 24 of 2011*, Section 109 provides that (1) The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to— "... (c) to provide for the regulation of the process by which parties nominate candidates for elections;..."



Article 324 of the Constitution of India gives the Election Commission of India the duty of the superintendence, direction and control of elections in India.<sup>24</sup> Both of the provisions that establish both the IEBC and the Electoral Commission of India are not explicit on the powers of electoral bodies to audit and vet candidates before elections. However for the case of the Electoral Commission of India, the Supreme Court in the case of ***Election Commission of India v. Ashok Kumar***<sup>25</sup> observed that, 'superintendence, direction and control' these words are enough to include all powers necessary for smooth and effective working and conduct of elections so that the will of the people may be expressed.

In India the candidates wishing to stand for elections are obliged to submit an affidavit in a prescribed form declaring their criminal records, including convictions, acquittals and charge pending cases. The information so furnished by the candidates is then to be disseminated to the public, and to the print and electronic media. This was the decree of the court in the case of ***Union of India v. Association for Democratic Reforms***<sup>26</sup>. In this case Ho. Supreme Court agreed with Delhi High Court and in judgment directed the Election Commission to take necessary information on affidavit from candidates as it is part of his/her nomination paper. The Supreme Court thus stated that the Election Commission must take such information which is mandatory including;

- a) The aspiring candidate's criminal antecedents, whether convicted or acquitted? Whether punishable with imprisonment or fine?
- b) Whether prior to 6 months of filing the nomination paper he is accused of any offence punishable with imprisonment of 2 years? Whether the Court has taken cognizance of the offence and if so details thereof?
- c) The assets (movable, immovable, bank balance) of a candidate and his or her spouse and dependants.
- d) Liabilities, if any, particularly over dues of any public financial institutions or government.

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<sup>24</sup> The Constitution of India, Part XV, Article 324 provides (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 \_272\*\*\* shall be vested in a Commission (referred to in this Constitution as the Election Commission).

<sup>25</sup> AIR 2000 SC 2979.

<sup>26</sup> (2002) 5 SCC 294

e) Educational qualification of the candidate.

Failure to furnish required information on nomination papers is liable to a rejection of the nomination papers by the Returning Officer. On the other hand, furnishing wrong and incomplete information is also liable for penal action. The information thus collected is available to the general public, and to the print and electronic media, free of cost.

In ***Union of India v. Association for Democratic Reforms***,<sup>27</sup> it was also stated that in a case where the Act or Rules are silent on a particular subject and the Authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

**iii) Report Prepared by the Core-Committee on Electoral Reforms in India (attached in the appendix)**

India stands as a model for many emerging democracies around the world. The Core-Committee on Electoral Reforms in India recently developed the a report on electoral reforms to provide background information on issues in India's electoral process and outline some electoral reform options that have been considered in the past (by the Election Commission of India), in order to serve as a platform for a renewed national dialogue on electoral reforms.

The reforms made by the above core-committee are a fundamental point of reference to reform Kenya's electoral system and specifically on determining eligibility of electoral candidates accused of committing crimes to vie for public office.

Under Part IV of the report in Article 4.2, the following recommendations are made;

- The Election Commission proposed in its 2004 report that Section 8 of the Representation of the People Act, 1951 should be amended to disqualify candidates accused of an offence punishable by imprisonment of 5 years or more even when trial is pending, given that the Court has framed charges against the person. In the report the Commission addresses the possibility that such a provision could be misused in the form of motivated cases by the ruling party. To prevent such

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<sup>27</sup> *ibid*

misuse, the Commission suggested a compromise whereas only cases filed prior to six months before an election would lead to disqualification of a candidate. In addition, the Commission proposed that Candidates found guilty by a Commission of Enquiry should stand disqualified.

- The report “Ethics in Governance” of the Second Administrative Reforms concurred with the recommendation of the Election Commission.
- In Chapter 4 of its report, the National Commission to Review the Working of the Constitution proposed several measures. Firstly, it proposed that Section 8 of the Representation of the People Act, 1951, be amended such that a candidate accused of an offence punishable by imprisonment of 5 years or more be disqualified on the expiry of a period of one year from the date the charges were framed against him, and unless cleared during that one year period, he shall remain disqualified until the conclusion of his trial. It also recommended that in case a candidate is convicted by a court of law and sentenced to imprisonment of six months or more, he shall be disqualified during the period of the sentence and for six additional years after his release. Candidates violating this provision should be disqualified and political parties putting up such a candidate with knowledge of his antecedents should be derecognised and deregistered. Thirdly, the Commission has stated that any person convicted for any heinous crime such as murder, rape, smuggling, dacoity, etc., should be permanently barred from contesting political office. Finally, the Commission proposes the establishment of Special Courts to decide cases against candidates within a period of six months or less. Potential candidates against whom charges are pending may take the matter to the Special Court, which can decide if there is indeed a prima facie case justifying the framing of the charges. Special Courts would be constituted at the level of High Courts and decisions would be appealable only to the Supreme Court.
- The 1999 Law Commission of India Report takes a separate stand, suggesting that Section 8 remain unchanged. It suggests, however, the addition of a new section – Section 8B, which would provide a separate set of penalties for electoral offences and offences having a bearing upon the conduct of elections under sections 153A and 505 IPC and serious offences punishable with death or life imprisonment. The proposed Section 8B would provide that framing of charges shall be a ground of disqualification but this disqualification shall last only for a period of five years or till

the acquittal of the person of those charges, whichever event happens earlier. If a candidate is found guilty they would automatically be disqualified under Section 8.

**iv) The Independent Electoral commission of Afghanistan (For full report)**

[http://reliefweb.int/sites/reliefweb.int/files/resources/D6EAB212011938EF49257696001E2076-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/D6EAB212011938EF49257696001E2076-Full_Report.pdf)

**a. Registration and Vetting of Candidates**

The Constitution and the Electoral Law establish formal and substantive requirements for those running for Presidential and Provincial Council office which are generally nondiscriminatory and in line with international practice. A candidate for the presidency must be at least 40 years old while candidates for Provincial Council elections must be at least 25. All candidates must be Afghan citizens who have not been legally deprived of their civil rights. All candidates must be registered as voters with the Independent Electoral Commission (IEC), and presidential candidates may not hold citizenship from another country. Candidates for the Provincial Councils must reside in the province in which they wish to stand. Prior to the submission of their nomination papers, candidates must resign from any positions they hold in the government, electoral administration or judiciary, as listed in Article 15(1) of the Electoral Law. Nomination papers must be supported by the names and signatures of 10,000 citizens, in the case of presidential candidates, and 200 provincial residents for Provincial Council candidates. Candidates for the presidency must each file a deposit of 50,000 Afghanis (appr. 690 euro), while Provincial Council candidates must file a deposit of 4,000 Afghanis (appr. 55 euro). These deposits are refunded if the candidate is elected or if they reach or exceed a set percentage of the valid vote – 15 per cent for presidential candidates, 2 per cent for provincial council candidates. Nomination period for presidential and provincial council candidates were between 25 April to 12 June 2009, which allowed time for a challenges period between 16 and 21 May 2009 in accordance with the calendar adopted by the IEC.

The Constitution and the Electoral Law provide a legal basis for the vetting of candidates. The Electoral Law disqualifies nominees with close links to Illegal Armed Groups (IAG), while the Constitution excludes candidates who have been convicted of crimes. In a context of general impunity for past crimes, however, the number of individuals affected by these provisions was extremely low, even

where past abuses were documented by the United Nations, civil society groups and national and international human rights groups. Voters generally expected that individuals notorious for carrying out serious crimes should be excluded from the elections, regardless of whether they had first been convicted by a judicial decision. Such exclusions were, however, not foreseen in the law and might conflict with the principle that individuals are entitled to due process in establishing their personal liability for crimes.

In countries marred by recent conflict or by an ongoing succession of conflicts, the judiciary is often weak. In such situations transitional justice measures are often considered as part of the effort to restore the rule of law and to address past crimes, while at the same time pursuing the broader objectives of reconciliation and peace. The desirability of vetting and if necessary excluding candidates appears particularly relevant to the establishment of democratic institutions in the Afghan context. Public dissatisfaction with the limitations of the vetting process illustrated, to some extent, popular support for it, and the hope amongst voters that elections could lead to more accountable governance. Vetting falls into a broader set of transitional justice measures of agreed by the government in a 2006 Action Plan for Peace, Justice and Reconciliation. The plan's impact have been limited to the dismissal of a handful of government officials on the basis of their links to Illegal Armed Groups and to the creation of a museum demonstrating the country's violent past. A truth-telling mechanism has also been created, principally by the Afghan Independent Human Rights Commission, which previously issued the Call for Justice report in 2004.

The IEC did not participate in the vetting process, as it did not establish a procedure for verification of the validity of applications for candidatures and instead merely required candidates to sign a sworn statement stating that they met all the requirements to stand for the relevant election. While this saved the IEC from criticism regarding decisions which could have been seen as political, the decision placed a considerable burden on the Electoral Complaints Commission (ECC), which became the only body directly responsible for checking for failures to comply with the legal requirements for nomination, including responsibility for the vetting of candidates for links to Illegal Armed Groups.

The ECC decided to rely on the decisions of the Disarmament and Rehabilitation Commission (DRC) as to whether a nominee for elections was linked to an Illegal Armed Group. This commission collated information through a long process involving its Joint Secretariat, composed of five organisations - the

Ministry of Interior, Ministry of Defence, National Security Directorate and the UN SRSG and ISAF Commander - in the framework of the Disbandment of Illegal Armed Group Program (DIAG). Excluded candidates could either disarm or contest their alleged links to Illegal Armed Groups in order for their status to be reconsidered. However, the timeframe for appealing against decisions or for opting to disarm was too narrow, and damaged the vetting procedure's compliance with the principle of due process. It also limited the impact of the vetting procedure as an incentive for prospective candidates to disarm.

The ECC received 302 challenges to nominations, 50 of which related to presidential and vice-presidential candidates and 252 to provincial council candidates. After adjudication of the challenges, the final number of candidates was 41 for the Presidential Election (with 82 vice-presidential candidates) and 3,195 candidates for the provincial council elections. The ECC excluded 56 nominations (two presidential, one vice presidential and 53 provincial council) for non-compliance with legal provisions. A total of 54 candidates were excluded because of their links to Illegal Armed Groups, one for being convicted of crimes listed in Articles 62 and 85 of the Constitution, and one for having dual nationality.

The ECC's decision to rely on DRC data to determine vetting challenges was partly due to the late establishment of the ECC and the need for in-depth investigations, which the provincial offices of the ECC in particular were not in a position to conduct. The decision also enabled the ECC to distance itself from potential accusations of partiality and to rely on the most objective data available. However, the vetting was still criticised in some quarters, since the DRC 's data is itself seen as flawed by some political stakeholders and by many in Afghan civil society.

The vetting process suffered greatly from a lack of political will and support, with international parties to the Joint Secretariat failing to provide information on the links of individuals to Illegal Armed Groups. The data employed in the process emanated principally from the government, which failed to pass on information on notorious warlords. The process also suffered from interference from local authorities and local leaders seeking to influence DIAG offices in at least five provinces. The mechanism used for its implementation was neither sufficiently transparent, nor inclusive and objective. Importantly, it lacked a legal definition of what constitutes an Illegal Armed Group. The DRC also faced serious pressure from several quarters, with reports that excluded candidates visited the DRC to complain

about its decisions, and of other more serious pressures exerted by the executive. While the DRC took some courageous decisions to exclude influential candidates, a substantial number of candidates who were widely believed to be linked to armed groups stayed in the running, and the vetting process lost credibility with the public as a result. Among the individuals who were candidates despite strong allegations of their involvement with Illegal Armed Groups were the two elected Vice Presidents and some provincial council members who, according to preliminary results, appear to have subsequently been elected.

All of the EU EOM's interlocutors have stressed the importance and sensitivity of vetting process in view of 2010 legislative elections. The race for the Wolesi Jirga is expected to be very competitive with a large number of candidates running and it will require a remapping exercise to update data on Illegal Armed Groups.

v) Ghana

Komla Agbeli Gbedemah (June 17, 1912 - ca. September 8, 1998) was a Ghanaian politician. He was also the Minister for Finance in the Nkrumah government from 1954 to 1961.

Gbedemah formed and led the National Alliance of Liberals (NLC) into the 1969 general election. After the election, Gbedemah was barred from taking his seat in parliament. This followed a Supreme Court ruling, upholding the NLC barring members of the convention People's Party (CPP) accused of financial crimes from holding public office for ten years. This decision led him to retire from active involvement in politics.<sup>28</sup>

**E. The right to information and full disclosure of voters on candidates vying for various positions including the presidency. What amounts to sufficient disclosure of criminal and civil cases including corruption related cases? How can it be enforced and does it affect eligibility?**

Vetting or auditing aspiring political candidates is an important fulfillment of the voter's rights to have adequate information about someone requesting for their consent to represent them on matters affecting their lives and the lives of future generations to enable them to make an informed choice. Article 38 of the Constitution provides that every citizen is free to make political choices. The spirit of the Constitution is thus

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<sup>28</sup> "The National Liberation Council and the Busia Years". Ghana Home Page.  
<http://www.ghanaweb.com/GhanaHomePage/history/1966-71.php>. Retrieved 18/4/2011.

that the citizen must have adequate information to be able to make the political choices and that is why as a prerequisite to that right, Article 35 of the Constitution states that every citizen has the right to the access of information held by the State or by another person and required for the exercise or protection any right or fundamental freedom.

In order to make democracy healthy and unpolluted, citizens have the right to know about candidates to whom they prefer as their representatives. To stop criminalization and in the public interest the past of a candidate should not be kept in the dark. In the case of **Union of India v. Association for Democratic Reforms the Supreme Court** in its judgment directed the Election Commission of India to take necessary information on affidavit from candidates as it is part of his/her nomination paper. This means the control of which information is to be disclosed or not lies with the IEBC as the election management body and not at the disposal of the aspiring candidates themselves or their political parties.

In Kenya, the NSIS is assigned to collect, compile and submit background information to the relevant authorities on any individual about to be nominated or appointed by the government to a senior public office. This as a form of vetting that checks several areas including past political activities, alignments, associations and criminal records if any and currently the check also extends to tax compliance.

Section 5 of the 1982 New Zealand Official Information Act provides that under the Principle of availability the question whether any official information is to be made available shall be determined, except where the Act otherwise expressly requires, in accordance with the principle that the information shall be made available unless there is good reason for withholding

#### **F. How different societies have enforced value systems enshrined in chapter six to clean their politics especially where the laws may be silent on its impact on electoral systems**

Article 73(2) of the Constitution provides that the guiding principles for leadership and integrity include: selection on the basis of personal integrity, competence and suitability; objectivity and impartiality in decision-making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; selfless service based solely on the public interest, demonstrated by honesty in the extension of public duties and the declaration of any personal interest that may conflict with public duties; accountability to the public for decisions and actions; and discipline and commitment in service to the people.



These are requirements to be fulfilled in a person inching closer to State office either through election or appointment and can only be done through vetting. Since vetting and auditing are high level technical undertakings and would never be for witch-hunting, fault-finding or malicious intent not everyone can be involved in the exercise. The credibility of the exercise depends on its being conducted by people with the requisite technical competence and who are of good standing in the society and non-partisan in politics. Article 88(2) and (3) of the Constitution give the criteria for the eligibility of members to the IEBC, qualities which are requisite for them to conduct the vetting and auditing of aspiring political candidates for the presidency and the three houses.

The United Nations General Assembly by its Resolution 58/4 of 31st October, 2003, adopted the United Nations Convention against Corruption. Article 8 of the Resolution states:

"Codes of conduct for public officials

- 1) In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.
- 2) In particular, each State Party shall endeavor to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honorable and proper performance of public functions.
- 3) For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.
- 4) Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

- 5) Each State Party shall endeavor, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.
  
- 6) Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article."

**APPENDIX**

**SUPREME COURT OF INDIA**

Civil Appeal No. 7178 of 2001

**Union of India..... Appellant**

Versus

**Association for Democratic Reforms & Another..... Respondents**

With

Writ Petition (C) No. 294 of 2001

**People's Union for Civil Liberties (PUCI) & Another..... Petitioners**

Versus

**Union of India & Another..... Respondents**

Date of Order: 02.05.2002

SUMMARY OF THE CASE

The Association for Democratic Reforms had filed a writ petition No. 7257 of 1994 before High Court of Delhi for direction to implement the recommendations made by Law Commission in its 170th report and to make necessary changes under Rule 4 of Conduct of Elections Rules, 1961 regarding debarring a candidate from contesting election if charges have been framed against him/her by a Court in respect of certain offences and necessity for candidate to furnish details of criminal cases, if any, pending against him. It also suggested that true and correct statement of assets owned by the candidate should also be disclosed. The petitioners pointed out nexus between criminals and candidates as highlighted in Vohra Committee report. The petitioners sought direction from High Court to Election Commission to seek above information amending Forms 2A & 2E required at the time of filing nomination by candidates.

The High Court observed that it is for Parliament to amend R. P. Act, 1951 but Election Commission should secure above said information for voters. The High Court's order was challenged by Union of India with a plea that High Court should have directed petitioner to approach Parliament for necessary changes. The PUCL also filed petition No. 294/2001 under article 32 of Constitution of India for above mentioned guidelines under Article 141 of Constitution of India.

The issue before Hon'ble Supreme Court was whether Election Commission is empowered to issue directions as ordered by High Court and whether a citizen has right to get relevant information about prospective candidates. The Supreme Court held that High Court has ample jurisdiction under Article 32 read with Articles 141 and 142 of Constitution of India to issue necessary direction to executive to subserve public interest, to fill the void in absence of suitable legislation. The Supreme Court relied upon Vineet Narain and Others Vs. Union of India and Another (1998, SCC 226).

## JUDGEMENT

Shah, J.

Short but important question involved in these matters is - in a nation wedded to republican and democratic form of government, where election as a Member of Parliament or as a Member of Legislative Assembly is of utmost importance for governance of the country, whether, before casting votes, voters have a right to know relevant particulars of their candidates? Further connected question is — whether the High Court had jurisdiction to issue directions, as stated below, in a writ petition filed under Article 226 of the Constitution of India? Before dealing with the aforesaid questions, we would refer to the brief facts as alleged by the Petitioner-Association for Democratic Reforms in Writ Petition No. 7257 of 1999 filed before the High Court of Delhi for direction to implement the recommendations made by the Law Commission in its 170th Report and to make necessary changes under Rule 4 of the Conduct of Election Rules, 1961.

It has been pointed out that Law Commission of India had, at the request of Government of India, undertaken comprehensive study of the measures required to expedite hearing of election petitions and to have a thorough review of the Representation of the People Act, 1951 (hereinafter referred to as “the Act”) so as to make the electoral process more fair, transparent and equitable and to reduce the distortions and evils that have crept into the Indian electoral system and to identify the areas where the legal provisions required strengthening and improvement. It is pointed out that Law Commission has made recommendation for debarring a candidate from contesting an election if charges have been framed against him by a Court in respect of certain offences and necessity for a candidate seeking to contest election to furnish details regarding criminal cases, if any, pending against him. It has also suggested that true and correct statement of assets owned by the candidate, his/her spouse and dependant relations should also be disclosed. Petitioner has also referred Para 6.2 of the report of the Vohra Committee of the Government of India, Ministry of Home Affairs, which reads as follows :-

“6.2 Like the Director CBI, the DIB has also stated that there has been a rapid spread and growth of criminal gangs, armed senas, drug Mafias, smuggling gang drug peddlers and economic lobbies in the country which have, over the years, developed an extensive network of contacts with the bureaucrats/Government functionaries at the local levels, politicians, media persons and strategically located individuals in the non-State sector. Some of these Syndicates also have

international linkages, including the foreign intelligence agencies. In this context the DIB has given the following examples :-

- (i) In certain States like Bihar, Haryana and UP, these gangs enjoy the patronage of local level politicians, cutting across party line and the protection of Governmental functionaries. Some political leaders become the leaders of these gangs, armed senas and over the years get themselves elected to local bodies, State Assemblies and the national Parliament. Resultantly, such elements have acquired considerable political clout seriously jeopardizing the smooth functioning of the administration and the safety of life and property of the common man causing a sense of despair and alienation among the people;
- (ii) The big smuggling Syndicates having international linkages have spread into and infected the various economic and financial activities, including havala transactions, circulation of black money and operations of a vicious parallel economy causing serious damage to the economic fibre of the country. These syndicates have acquired substantial financial and muscle power and social respectability and have successfully corrupted the Government machinery at all levels and yield enough influence to make the task of Investigating and Prosecuting agencies extremely difficult, even the members of the Judicial system have not escaped the embrace of the Mafia;
- (iii) Certain elements of the Mafia have shifted to narcotics, drugs and weapon smuggling and established narco-terrorism networks specially in the States of J&K, Punjab, Gujarat and Maharashtra. The cost of contesting elections has thrown the politician into the lap of these elements and led to a grave compromise by officials of the preventive/detective systems. The virus has spread to almost all the centres in the country, the coastal and the border States have been particularly affected;
- (iv) The Bombay bomb blast case and the communal riots in Surat and Ahmedabad have demonstrated how the India underworld has been exploited by the Pak ISI and the latter's network in UAE to cause sabotage subversion and communal tension in various parts of the country. The investigations into the Bombay Bomb blast cases have revealed expensive linkages of the underworld in the various governmental agencies, political circles, business sector and the film world."

It is also contended that despite the Reports of the Law Commission and Vohra Committee, successive governments have failed to take any action and — therefore, petition was filed for implementation of the aid reports and for a direction to the Election Commission to make mandatory for every candidate to provide information by amending Form 2-A to 2-E prescribed under the Conduct of Election Rules, 1961. After hearing the parties, the High Court by judgement and order dated 2nd November, 2000, held that it is the function of the Parliament to make necessary amendments in the Representation of the People Act, 1951 or the Election Rules and, therefore, Court cannot pass any order, as prayed, for amending the Act or the Rules.

***However, the Court considered - whether or not an elector, a citizen of the country has a fundamental right to receive the information regarding the criminal activities of a candidate to the Lok Sabha or Legislative Assembly for making an estimate for himself - as to whether the person who is contesting the election has a background making him worthy of his vote, by peeping into the past of the candidate. After considering the relevant submissions and the reports as well as the say of Election Commission, the High Court held that for making a right choice, it is essential that the past of the candidate should not be kept in the dark as it is not in the interest of the democracy and well being of the country. The Court directed the Election Commission to secure to voters the following information pertaining to each of the candidates contesting election to the Parliament and to the State Legislature and the parties they represent:-***

- (1) Whether the candidate is accused of any offence(s) punishable with imprisonment? If so, the details thereof.
- (2) Assets possessed by a candidate, his or her spouse and dependant relations?
- (3) Facts giving insight to candidate's competence, capacity and suitability for acting as parliamentarian or legislator including details of his/her educational qualifications.
- (4) Information which the election commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.

That order is challenged by Union of India by filing the present appeal. On behalf of Indian National Congress I.A. No. 2 of 2001 is also filed for impleadment/intervention in the appeal filed by the Union of

India by inter alia contending that the High Court ought to have directed the writ petitioners to approach the Parliament for appropriate amendments to the Act instead of directing the Election Commission of India to implement the same. I.A. for intervention is granted.

Further, People's Union for Civil Liberties (PUCL) has filed Writ Petition No. 294 of 2001 under Article 32 of the Constitution praying that writ, order or direction be issued to the respondents - **(a)** to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as MP/MLA; **(b)** to bring in such measures which provide for declaration by the candidate contesting election whether any charge in respect of any offence has been framed against him/her; and **(c)** to frame such guidelines under Article 141 of the Constitution – by taking into consideration 170th Report of Law Commission of India.

### **SUBMISSIONS:**

We have heard the learned counsel for the parties at length, Mr. Harish N. Salve, learned Solicitor General appearing for Union of India submitted that till suitable amendments are made in the Act and Rules thereunder, the High Court should not have given any direction to the Election Commission. He referred to various Sections of the Act and submitted that Section 8 provides for disqualification on conviction for certain offences and Section 8A provides for disqualification on ground of corrupt practices. Section 32 provides nomination of candidate for election if he is qualified to be chosen to fill that seat under the provisions of the Constitution and the Act or under the provisions of the Government of Union Territories Act, 1963. Thereafter, elaborate procedure is prescribed for presentation of nomination paper and requirements for a valid nomination. Finally, Section 36 provides for scrutiny of nominations and empowers the returning officer to reject any nomination on the following grounds :

- (a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely -

Articles 84, 102, 173 and 191.

Part II of this Act and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or

- (b) that there has been a failure to comply with any of the provisions of Section 33 or Section 34;  
or
- (c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

It is his submission that it is for the political parties to decide whether such amendments should be brought and carried out in the Act and the Rules. He further submitted that as the Act or the Rules nowhere disqualify a candidate for nondisclosure of the assets or pending charge in a criminal case and, therefore, directions given by the High Court would be of no consequence and such directions ought not to have been issued.

Supplementing the aforesaid submission, Mr. Ashwini Kumar, learned senior counsel appearing on behalf of intervenor - Indian National Congress submitted that the Constituent Assembly had discussed and negated requirement of educational qualification and possession of the assets to contest election. For that purpose, he referred to the Debates in the Constituent Assembly. He submitted that 3/4th of the population is illiterate and providing education as a qualification for contesting election was not accepted by the Constituent Assembly. Similarly, prescribing of property qualification for the candidates to contest election was also negated by the Constituent Assembly. He, therefore, submitted that furnishing of information regarding assets and educational qualification of a candidate is not at all relevant for contesting election and even for casting votes. Voters are not influenced by the educational qualification or by possession of wealth by a contesting candidate. It is his say that the party whom he represents is interested in purity of election and wants to stop entry of criminals in politics or its criminalisation but it is for the Parliament to decide the said question. It is submitted that the delicate balance is required to be maintained with regard to the jurisdiction of the Parliament and that of Courts and once the Parliament has not amended the Act or the Rules despite the recommendation made by the Law Commission or the report submitted by the Vohra Committee, there was no question of giving any direction by the High Court to the Election Commission.

Mr. K.K. Venugopal, learned senior counsel appearing on behalf of Election Commission exhaustively referred to the counter affidavit filed on behalf of Election Commission. At this stage, we would refer to some part from the said affidavit. It is stated that issue of 'persons with criminal background' contesting election has been engaging the attention of the Election Commission of India for quite some time; even Parliament in the debates on 50 years of independence and the resolution passed in its Special Session in August, 1997 had shown a great concern about the increasing criminalisation of politics; it is widely



believed that there is criminal nexus between the political parties and anti-social elements which is leading to criminalisation of politics; the criminals themselves are now joining election fray and often even getting elected in the process. Some of them have even adorned ministerial berths, and, thus, law breakers have become law makers. The Commission has suggested that candidate should be required to furnish information in respect of —

- (a) all cases in which he has been convicted of any offence and punished with any kind of imprisonment or amount of fine, and whether any appeal or application for review is pending in respect of any such cases of conviction, and
- (b) all pending cases in which he is involved before any court of law in any offence, punishable with imprisonment for two years or more, and where the appropriate court has on prima facie satisfaction framed the charges against him for proceeding with the trial.

For declaration of assets, it has been suggested by the Election Commission that candidate should be asked to disclose his assets, all immovable and movable properties which would include cash, bank balances, fixed deposits and other savings such as shares, stocks, debentures etc. Candidate also should be directed to disclose for voters' information, not only his assets but his liabilities like overdues to public financial institutions and government dues and charges on his/ her properties.

For other directions issued by the High Court, it has been pointed out that it is for the political parties to project the capacity and capability of a candidate and that directions issued by the High Court are required to be set aside. Finally, the Election Commission has suggested as under :-

"1. Each candidate for election to Parliament or a State Legislature should submit, along with his nomination paper, a duly sworn affidavit, for the truth of which he is liable, as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his candidature :—

- (i) whether the candidate is convicted of any offence in any case in the past, and punished with imprisonment or fine; if so, the details thereof, together with the details of any pending appeals or applications for revision in any such cases of conviction;

- (ii) whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charges have been framed against him by the competent court of law, if so, the details thereof, together with the details of any pending appeals or applications for revision in respect of the charges framed in any such cases;
- (iii) whether the candidate is an income tax and/or wealth tax assessee and has been paying his tax(es) and filing his return regularly, wherever he is liable, and if so, the financial year for which the last income tax/wealth tax return has been filed;
- (iv) the liabilities of the candidate, his/her spouse and minor children; that is to say, over-dues to any public financial institutions, any government dues, and charges on his/her properties;
- (v) the educational qualifications of the candidate.

**II.** The information by each candidate in respect of all the foregoing aspects shall be furnished by the candidate in a format to be prescribed by the Election Commission and shall be supported by a duly sworn affidavit, making him responsible for the correctness of the information so furnished and liable for any false statement.

**III.** The information so furnished by each candidate in the prescribed format and supported by a duly sworn affidavit shall be disseminated by the Election Commission, through the respective Returning Officers, by displaying the same on the notice board of the Returning Officer and making the copies thereof available freely and liberally to all other contesting candidates and the representatives of the print and electronic media.

If any rival candidate furnishes information to the contrary, by means of a duly sworn affidavit, then such affidavit of the rival candidate may also be disseminated alongwith the affidavit of the candidate concerned.

The court may lawn down that it would be mandatory for each candidate for election to Parliament or State Legislature, to file along with his nomination paper, the aforesaid duly sworn affidavit, furnishing therein the information on the aspects detailed above and that the nomination paper of such a candidate who fails or refuses to file the required affidavit or files an incomplete affidavit shall be deemed to be an incomplete

nomination paper within the meaning of section 33(1) of the Representation of the People Act, 1951 and shall suffer consequences according to law.

The aforesaid suggestions made by the Election Commission would certainly mean that except certain modifications, Election Commission virtually supports the directions issued by the High Court and that candidates must be directed to furnish necessary information with regard to pending criminal cases as well as assets and educational qualification.

Mr. Rajinder Sachhar, learned senior counsel appearing on behalf of the petitioners relied upon the decision rendered by this Court in *Vineet Narain and Others v. Union of India and Another* [(1998) 1 SCC 226] and submitted that considering the widespread illiteracy of the voters, and at the same time their overall culture and character, if they are well-informed about the candidates contesting election as M.P. or M.L.A., they would be in a position to decide independently to cast their votes in favour of a candidate, who, according to them, is much more efficient to discharge his functions as M.P. or M.L.A. He, therefore, submitted that presuming that the High Court has no jurisdiction to pass orders to fill in the gaps, this Court can do so by exercising its powers under Article 142 which have the effect of law.

In *Vineet Narain's case* (Supra), this Court dealt with the writ petitions under Article 32 of the Constitution of India brought in public interest wherein allegation was against the Central Bureau of Investigation (CBI) of inertia in matters where accusation made was against high dignitaries. Primary question considered was - whether it was within the domain of judicial review and it could be an effective instrument for activating the investigating process which is under the control of the executive? While discussing the powers of this Court, it was observed :

“The powers conferred on this Court by the Constitution are ample to remedy this defect and to ensure enforcement of the concept of equality. There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role.”  
[Emphasis supplied]

In paragraph 51, the Court pointed out previous precedents for exercise of such power :

"In exercise of the powers of this Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number of cases and a brief reference to a few of them is sufficient. In Erach Sam Kanga v. Union of India [W.P. No. 2632 of 1978 decided on 20.3.1979] the Constitution Bench laid down certain guidelines relating to the Emigration Act. In Lakshmi Kant Pandey v. Union of India [(1984) 2 SCC 244] (In re. Foreign Adoption), guidelines for adoption of minor children by foreigners were laid down. Similarly in State of W.B. v. Sampat Lal [(1985) 1 SCC 317], K. Veeraswami v. Union of India [(1991) 3 SCC 655] Union Carbide Corporation v. Union of India [(1991) 4 SCC 584, Delhi Judicial Service Association v. State of Gujarat (Nadiad Case) [(1991) 4 SCC 406], Delhi Development Authority v. Skipper Construction Co. (P) Ltd. [(1996) 4 SCC 622] and Dinesh Trivedi, M.P. v. Union of India [(1997) 4 SCC 306] guidelines were laid down having the effect of law, requiring rigid compliance. In Supreme Court Advocates-on-Record Association v. Union of India (Ind Judges case [(1993) 4 SCC 441], a nine-Judge Bench laid down guidelines and norms for the appointment and transfer of Judges which are being rigidly followed in the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges. More recently in Vishaka v. State of Rajasthan [(1997) 6 SCC 241] elaborate guidelines have been laid down for observance in workplaces relating to sexual harassment of working women. In Vishaka (supra) it was said (SCC pp. 249-50), para 11).

"11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 (As amended at Manila, 28th August, 1997) as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are :

"Objective of the Judiciary:

10. The objectives and functions of the Judiciary include the following:

(a) to ensure that all persons are able to live securely under the rule of law;

- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- (c) to administer the law impartially among persons and between persons and the State."

Thus, an exercise of this kind by the court is now a well-settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field."

Ms. Kamini Jaiswal, learned counsel appearing on behalf of respondents in support of the decision rendered by the High Court referred to the decision in *Kihoto Hollohan v. Zachillhu and Others* [1992 Supp (2) SCC 651] wherein while considering the validity of the Tenth Schedule of the Constitution, the Court observed "democracy is a part of the basic structure of our Constitution; and rule of law, and free and fair elections are basic features of democracy. One of the postulates of free and fair elections is provisions for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority". She, therefore, contended that for free and fair elections and for survival of democracy, entire history, background and the antecedents of the candidate are required to be disclosed to the voters so that they can judiciously decide in whose favour they should vote; otherwise, there would not be true reflection of electoral mandate. For interpreting Article 324, she submitted that this provision outlines broad and general principles giving power to the Election Commission and it should be interpreted in a broad perspective as held by this Court in various decisions.

In these matters, questions requiring consideration are -

1. Whether Election Commission is empowered to issue directions as ordered by the High Court?
2. Whether a voter - a citizen of this country - has right to get relevant information, such as, assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA?

For deciding the aforesaid questions, we would proceed on the following accepted legal position.

At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for the Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the Authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

Further, it is to be stated that - (a) one of the basic structure of our Constitution is 'republican and democratic form of government'; (b) the election to the House of People and the Legislative Assembly is on the basis of adults suffrage, that is to say, every person who is citizen of India and who is not less than 18 years of age on such date as may be fixed in that behalf by or under any Law made by the appropriate Legislature and is not otherwise disqualified under the Constitution or any law on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election (Article 326) and (c) holding of any asset (immovable or movable) or any educational qualification is not the eligibility criteria to contest election; and (d) 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.

### **Question No. 1**

#### **Whether Election Commission is empowered to issue directions as ordered by the High Court?**

For health of democracy and fair election, whether the disclosure of assets by a candidate, his/her qualification and particulars regarding involvement in criminal cases are necessary for informing voters, may be illiterate, so that they can decide intelligently, whom to vote? In our opinion, the decision of even illiterate voter, if properly educated and informed about the contesting candidate, would be based on his own relevant criteria of selecting a candidate. In democracy, periodical elections are conducted for having efficient governance for the country and for the benefit of citizens - voters. In a democratic form of government, voters are of utmost importance. They have right to elect or re-elect on the basis of the

antecedents and past performance of the candidate. He has choice of deciding whether holding of educational qualification or holding of property is relevant for electing or re-electing a person to be his representative. Voters has to decide whether he should cast vote in favour of a candidate who is involved in criminal case. For maintaining purity of elections and healthy democracy, voters are required to be educated and well informed about the contesting candidates. Such information would include assets held by the candidate, his qualification including educational qualification and antecedents of his life including whether he was involved in a criminal case and if the case is decided - its result, if pending - whether charge is framed or cognizance is taken by the Court? **There is no necessity of suppressing the relevant facts from the voters.**

The Constitution Bench of this Court in *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi* [(1978) 1 SCC 405] while dealing with a contention that Election Commission has no power to cancel the election and direct re-poll, referred to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless word :-

“At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper - no amount of rhetoric of voluminous discussion can possibly diminish the overwhelming importance of the point.

If we may add, the little large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods or subtle perversion of discretion by men ‘dressed in little, brief authority’. For ‘be you ever so high, the law is above you’.

The moral may be stated with telling terseness in the words of William Pitt: ‘Where laws end, tyranny begins’. Embracing both these mandates and emphasizing their combined effect is the elemental law and politics of Power best expressed by Benjamin Disraeli [Vivian Grey, BK VI Ch. 7].

I repeat . . . that all power is a trust that we are accountable for its exercise - that, from the people and for the people, all springs, and all must exist.”

Further, the Court in (para 23) observed thus :-

"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. The right of election is the very essence of the constitution' (Janius). 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."

Thereafter, the Court dealt with the scope of Article 324 and observed (in para 39) thus :-

"... Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control, as well as 'conduct of all elections', are the broadest terms ..."

The Court further held:

"Our conclusion on this limb of the contention is that Article 324 is wide enough to supplement the powers under the Act, as here, but subject to the several conditions on its exercise we have set out."

The Court also held (in para 77) thus :-

"We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specified it is otiose. There is no such sequitur. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Article 324 vests a wide power and where some direct consequence on candidate emanates from its exercise we must read this functional obligation."

In concluding portion of paragraph 92, the Court inter alia observed thus:-

"1(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.



- 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..."

In concurring judgement, Goswami, J. with regard to Article 324 observed (in para 113) thus :-

"...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."

[Emphasis supplied]

The aforesaid decision of the Constitution Bench unreservedly lays down that in democracy the little man - voter has overwhelming importance on the point and the little-large Indian (voter) should not be hijacked from the course of free and fair elections by subtle perversion of discretion of casting votes. In a continual participative operation of periodical election, the voter does a social audit of his candidate and for such audit he must be well informed about the past of his candidate. Further, Article 324 operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. The silence of statute has no exclusionary effect except where it flows from necessary implication. Therefore, in our view, it would be difficult to accept the contention raised by Mr. Salve, learned Solicitor General and Mr. Ashwini Kumar, learned senior counsel appearing on behalf of

Intervenor that if there is no provision in the Act or the Rules, the High Court ought not to have issued such directions to the Election Commission. It is settled that the power of the Commission is plenary in character in exercise thereof. In a statutory provisions or rules, it is known that every contingency could not be foreseen or anticipated with precision, therefore, Commission can cope with situation where the field is unoccupied by issuing necessary orders.

Further, this Court in *Kanhiya Lal Omar v. R.K. Trivedi and others* [(1985) 4 SCC 628] dealt with the Constitutional validity of the Election Symbols (Reservation and Allotment) Order, 1968 which was issued by the Election Commission in its plenary exercise of power under Article 324 of the Constitution read with Rules 5 and 10 of the Conduct of Election Rules, 1961. The challenge was on the ground that Symbols Order which is legislative in character could not be issued by the Commission because the Commission is not entrusted by law the power to issue such an order regarding the specification, reservation and allotment of symbol that may be chosen by the candidates at elections in parliamentary and Assembly constituencies. It was urged that Article 324 of the Constitution which vests the power of superintendence, direction and control of all elections to Parliament and to the Legislature of a State in the Commission cannot be construed as conferring the power on the Commission to issue the Symbols. The Court negated the said contention and pertinently observed that "the word 'elections' in Article 324 is used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. India is a country which consists of millions of voters. Although they are quite conscious of their duties politically, unfortunately, a large percentage of them are still illiterate." The Court in paragraph 16 held :-

**"16.** Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions. Article 324 of the Constitution operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as "conduct of all elections" are the broadest terms which would include the power to make all such provisions. {See *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi* [(1978) 1 SCC 405] and *A.C. Jose v. Sivan Pillai* [(1984) 2 SCC 656]}.

The Court further observed :-

“ . . . While construing the expression “superintendence, direction and control” in Article 324 (1), one has to remember that every norm which lays down a rule of conduct cannot possibly be elevated to the position of legislation or delegated legislation. There are some authorities or persons in certain grey areas who may be sources of rules of conduct and who at the same time cannot be equated to authorities or persons who can make law, in the strict sense in which it is understood in jurisprudence. A direction may mean an order issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order. One has also to remember that the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved. Viewed from this angle it cannot be said that any of the provisions of the Symbols Order suffers from want of authority on the part of the Commission, which has issued it.”

Thereafter, this Court in *Common Cause (A registered society) v. Union of India and Others* [(1996) 2 SCC 752] dealt with election expenses incurred by political parties and submission of return and the scope of Article 324 of the Constitution, where it was contended that cumulative effect of the three statutory provisions, namely, Section 293-A of the Companies Act, 1956, Section 13-A of the Income Tax Act, 1961 and Section 77 of the Representation of the People Act, 1951, is to bring transparency in the election funding and people of India must know the source of expenditure incurred by the political parties and by the candidates in the process of election. It was contended that election in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election and that this vicious circle has totally polluted the basic democracy in the country. The Court held that purity of election is fundamental to democracy and the Commission can ask the candidates about the expenditure incurred by the candidates and by a political party and for this purpose.

The Court also held :-

“ . . . The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent and there is no accountability anywhere. Nobody discloses the source of the money.

There are no proper accounts and no audit. From where does the money come nobody knows. In a democracy where rule of law prevails this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted.”

Thereafter, the Court observed that under Article 324, the Commission can issue suitable directions to maintain the purity of election and in particular to bring transparency in the process of election. The Court also held (paragraph 26) thus:-

“Superintendence and control over the conduct of election by the Election Commission include the scrutiny of all expenses incurred by a political party, a candidate or any other association or body of persons or by any individual in the course of the election. The expression “Conduct of election” is wide enough to include in its sweep, the power to issue directions – in the process of the conduct of an election – to the effect that the political parties shall submit to the Election Commission, for its scrutiny, the details of the expenditure incurred or authorized by the parties in connection with the election of their respective candidates.”

The Court further observed that Constitution has made comprehensive provision under Article 324 to take care of surprise situations and it operates in areas left unoccupied by legislation.

## **Question No. 2**

### **Right to know about the candidates contesting elections**

Now we would refer to various decisions of this Court dealing with citizens' right to know which is derived from the concept of 'freedom of speech and expression'. The people of the country have a right to know every public act, everything that is done in a public way by the public functionaries. MPs or MLAs are undoubtedly public functionaries. Public education is essential for functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in decision making process. The decision making process of a voter would include his right to know about public functionaries who are required to be elected by him.

In *State of Uttar Pradesh v. Raj Narain and Others* [(1975) 4 SCC 428], the Constitution Bench considered a question - whether privilege can be claimed by the Government of Uttar Pradesh under Section 123 of the Evidence Act in respect of what has been described for the sake of brevity to be the Blue Book

summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police, Rae Bareilly, Uttar Pradesh? The Court observed that "the right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security". The Court pertinently observed as under: -

"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing . . . "

In *Indian Express Newspapers (Bombay) Private Ltd. and Others etc. v. Union of India and others* [(1985) 1 SCC 641], this Court dealt with the validity of customs duty on the newsprint in context of Article 19(1)(a). The Court observed (in para 32) thus:

"The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic country cannot make responsible judgments....."

The Court further referred (in para 35) the following observations made by this Court in *Romesh Thappar v. State of Madras* (1950 SCR 594) :-

"... (The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse ... (But) "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".

Again in paragraph 68, the Court observed:-

"...The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves." (Per Lord Simon of Glaisdale in *Attorney-General v. Times Newspapers Ltd.* (1973) 3 All ER 54). Freedom of expression, as learned writers have observed, has four broad social purposes to serve:

(i) It helps an individual to attain self-fulfillment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration ...."

From the afore-quoted paragraph, it can be deduced that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular candidate. If there is a disclosure by a candidate as sought for then it would strengthen the voters in taking appropriate decision of casting their votes.

In ***Secretary, Ministry of Information and Broadcasting, Government of India and Others. Cricket Association of Bengal and Others*** [(1995) 2 SCC 161], this Court considered the question of right to telecast sports event and after considering various decisions, the Court referred to Article 10 of the European Convention on Human Rights which inter alia states as follows (para 36):

"10.1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Thereafter, the Court summarised the law on the freedom of speech and expression under Article 19(1)(a) as restricted by Article 19(2) thus :-

"The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-fulfillment. It enables people to contribute to debate on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts....."

The Court dealt with the right of telecast and [in paragraph 75] held thus :-

"In a team event such as cricket, football, hockey etc. there is both individual and collective expression. It may be true that what is protected by Article 19(1)(a) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self-expression. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right."

The Court thereafter (in paragraph 82) held :-

"True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and noninformation all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1-1/2 percent of the population has an access to the print media which is not subject to precensorship."

**The Court also observed - "a successful democracy posits an 'aware' citizenry."**

If right to telecast and right to view to sport games and 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

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.

In ***Dinesh Trivedi, M.P. and Others v. Union of India and Others*** [(1997) 4 SCC 306], the Court dealt with a petition for disclosure of a report submitted by a Committee established by the Union of India on 9th July 1993 which was chaired by erstwhile Home Secretary Shri N.N. Vohra which subsequently came to be popularly known as Vohra Committee. During July 1995, a known political activist Naina Sahni was murdered and one of the persons arrested happened to be an active politician who had held important political posts and newspaper report published a series of articles on the criminalisation of politics within the country and the growing links between political leaders and mafia members. The attention of the masses was drawn towards the existence of the Vohra Committee Report. It was suspected that the contents of the Report were such that the Union Government was reluctant to make it public.

In the said case, the Court dealt with citizen's rights to freedom of information and observed "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare". The Court also observed "democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant".

Mr. Ashwini Kumar, learned senior counsel appearing on behalf of the intervenor submitted that the aforesaid observations are with regard to citizen's right to know about the affairs of the Government but this would not mean that citizens have a right to know the personal affairs of MPs or MLAs. In our view, this submission is totally misconceived. There is no question of knowing personal affairs of MPs or MLAs. The limited information is - whether the person who is contesting election is involved in any criminal case and if involved what is the result? Further there are widespread allegations of corruption against the persons holding post and power. In such a situation, question is not of knowing personal affairs but to have openness in democracy for attempting to cure cancerous growth of corruption by few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not misconducted himself



in collecting wealth after being elected. This information could be easily gathered only if prior to election, the assets of such person are disclosed. For this purpose, learned counsel Mr. Murlidhar referred to the practice followed in the United States and the form which is required to be filled in by a candidate for Senate which provides that such candidate is required to disclose all his assets and that of his spouse and dependants. The form is required to be re-filled every year. Penalties are also prescribed which include removal from ballot.

Learned counsel Mrs. Kamini Jaiswal referred to All India Service (Conduct) Rules, 1968 and pointed out that a member of All India Service is required to disclose his/her assets including that of spouse and the dependant children. She referred to Rule 16 of the said Rules, which provides for declaration of movable, immovable and valuable property by a person who becomes Member of the Service. Relevant part of Rule 16 is as under :-

"16. (1) Every person shall, where such person is a member of the Service at the commencement of these rules, before such date after such commencement as may be specified by the Government in this behalf, or, where such person becomes a member of the Service after commencement, on his first appointment to the Service submits a return of his assets and liabilities in such form as may be prescribed by the Government giving the full particulars regarding :-

- (a) the immovable property owned by him, or inherited or acquired by him or held by him on lease or mortgage, either in his own name or in the name of any member of his family or in the name of any other person,
- (b) shares, debentures, postal Cumulative Time Deposits and cash including bank deposits inherited by him or similarly owned, acquired or held by him;
- (c) other movable property inherited by him or similarly owned, acquired or held by him; and
- (d) debts and other liabilities incurred by him directly or indirectly".

Such officer is also required to submit an annual return giving full particulars regarding the immovable and movable property inherited by him or owned or acquired or held by him on lease or mortgage either in his own name or in the name of any member of his family or in the name of any other person.

It is also submitted that even the Gazetted Officers in all government services are required to disclose their assets and thereafter to furnish details of any acquisition of property annually. In our view, it is rightly submitted that in a democratic form of government, MP or MLA is having higher status and duty to the public. In *P.V. Narasimha Rao v. State (CBI/SPE)* [(1998) 4 SCC 626], the Court inter alia considered whether Member of Parliament is a public servant? The Court [in para 162] held thus :-

“A public servant is “any person who holds an office by virtue of which he is authorised or required to perform any public duty”. Not only, therefore, must the person hold an office but he must be authorised or required by virtue of that office to perform a public duty. Public duty is defined by Section 2(b) of the said Act to mean “a duty in the discharge of which the State, the public or that community at large has an interest”. In a democratic form of government it is the Member of Parliament or a State Legislature who represents the people of his constituency in the highest lawmaking bodies at the Centre and the State respectively. Not only is he the 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 State 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.....”

The aforesaid underlined portion highlights the important status of MP or State Legislature.

Finally, in our view this Court would have ample power to direct the Commission 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 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. This Court in *Vishaka v. State of Rajasthan* [(1997) 6 SCC 241] dealt with incident of sexual harassment of a woman at work place which resulted in violation of fundamental right of gender equality and the right to life and liberty and laid down that in absence of legislation, it must be viewed along with the role of judiciary envisaged in

the Beijing Statement of Principles of independence of Judiciary in the LAWASIA region. The decision has laid down the guidelines and prescribed the norms to be strictly observed in all work places until suitable legislation is enacted to occupy the field. In the present case also, there is no legislation or rules providing for giving necessary information to the voters. As stated earlier, this case was relied upon in Vineet Narain's case (supra) where the Court has issued necessary guidelines to the CBI and the Central Vigilance Commission (CVC) as there was no legislation covering the said field to ensure proper implementation of rule of law.

To sum up the legal and constitutional position which emerges from the aforesaid discussion, it can be stated that :-

1. The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word 'elections' is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps.
2. The limitation on plenary character of power is when the Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. Constitution has taken care of 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 a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, Commission can fill the vacuum till there is legislation on the subject. In Kanhiya Lal Omar's case, the Court construed the expressions "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which may have to follow and it may be a specific or a general order and such phrase should be construed liberally empowering the election commission to issue such orders.
3. The word "elections" includes the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the

process of choosing a candidate. Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the candidate according to his thinking and opinion. As stated earlier, in Common Cause case (supra), the Court dealt with a contention that elections in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election. If on affidavit a candidate is required to disclose the assets held by him at the time of election, voter can decide whether he could be re-elected even in case where he has collected tons of money.

Presuming, as contended by the learned senior counsel Mr. Ashwini Kumar, that this condition may not be much effective for breaking a vicious circle which has polluted the basic democracy in the country as the amount would be unaccounted. May be true, still this would have its own effect as a step-in-aid and voters may not elect law-breakers as law-makers and some flowers of democracy may blossom.

4. To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The little man of this country would have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.
5. The right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant of Civil and Political Rights which is as under:-
  - “(1) Everyone shall have the right to hold opinions without interference.
  - (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

6. Cumulative reading of plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the Executive to subserve public interest.
7. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters' 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 must. Voter's (little man - citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law breakers as law makers.

In this view of the matter, it cannot be said that the directions issued by the High Court are unjustified or beyond its jurisdiction. However, considering the submissions made by the learned counsel for the parties at the time of hearing of this matter, the said directions are modified as stated below.

The Election Commission is directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature :-

- (1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past - if any, whether he is punished with imprisonment or fine?
- (2) Prior to six months of filing of nomination, whether 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 the Court of Law. If so, the details thereof.
- (3) The assets (immovable, movable, bank balances etc.) of a candidate and of his/her spouse and that of dependants.

- (4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.
- (5) The educational qualifications of the candidate.

It is to be stated that the Election Commission has from time to time issued instructions/orders to meet with the situation where the field is unoccupied by the legislation. Hence, the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible and in any case within two months.

In the result, Civil Appeal No. 7178 of 2001 is partly allowed and the directions issued by the High Court are modified as stated above. Appeal stands disposed of accordingly.

Writ Petition (C) No. 294 of 2001 is allowed to the aforesaid extent.

There shall be no order as to costs.

Sd/-

..... J.

(M.B. SHAH)

Sd/-

..... J.

(BISHESHWAR PRASAD SINGH)

Sd/-

..... J.

New Delhi (H. K. SEMA)

May 2, 2002

**APPENDIX 2**

**BACKGROUND**

**PAPER ON**

**ELECTORAL REFORMS**

**(PREPARED BY THE CORE-COMMITTEE ON ELECTORAL REFORMS)**

**LEGISLATIVE DEPARTMENT**

**MINISTRY OF LAW AND JUSTICE**

**GOVERNMENT OF INDIA**

**CO-SPONSORED**

**BY**

**THE ELECTION COMMISSION OF INDIA**

**December, 2010**

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## **I. Executive Summary**

India stands as a model for many emerging democracies around the world. Free and fair elections are the hallmark of a well functioning democracy. While we are justifiably proud of our democracy, there are a number of areas which need to be strengthened for us to realise the true potential of a well functioning democracy. Our election system, from the selection of candidates, to the manner in which funds are raised and spent in election campaigns, are in dire need of significant changes.

There has been a growing concern over the years in India about several aspects of our electoral system. The Election Commission has made changes in several areas to respond to some of the concerns. There

have also been a number of committees which have examined the major issues pertaining to our electoral system and made a number of recommendations. But there remain some critical issues that might need legislative action to bring about the required changes.

The criminalisation of our political system has been observed almost unanimously by all recent committees on politics and electoral reform. Criminalisation of politics has many forms, but perhaps the most alarming among them is the significant number of elected representatives with criminal charges pending against them. Two measures recommended by previous committees are discussed in this paper: enforcement of the disclosure of criminal antecedents of candidates, and eligibility restrictions for candidates with criminal cases pending against them.

The financing of elections has become a major issue in the past few decades. It is widely believed that the cost of fighting elections has climbed far above the legal spending limits. This has resulted in lack of transparency, widespread corruption, and the pervasiveness of so-called 'black money'. This paper summarises proposals made on the following issues: limits on campaign expenditure, disclosure and audit of assets and liabilities of candidates and parties, methods of reducing the cost of political campaigns, as well as state funding of elections.

The conduct of elections also has a number of issues that need to be addressed. While the massive size of the electorate makes holding elections a daunting task, it should not serve as a justification for the presence of issues such as booth capturing, intimidation of voters, tampered electoral rolls, large-scale rigging of elections and other polling irregularities; the proliferation of non-serious candidates; and the abuse of religion and caste in the mobilization of voters. Potential solutions to these problems are outlined in this paper.

This paper also takes consideration of major issues dealing with the role of political parties in the electoral system: proliferation of non-serious parties; process of recognition and de-recognition of political parties; disclosure of assets and liabilities of parties; and audit and publishing of assets and liabilities.

Resolution of election petitions and disputes, as well as rulings on defections, are two important processes seen to be operating in a slow and inefficient manner by many previous committees. This paper reviews recommendations made to mitigate these problems.

The Ministry of Law and Justice, Government of India, has constituted a Committee on Electoral Reforms. The main purpose of the Committee is to recommend to the government concrete ways in which our electoral system can be strengthened. The Committee will take into account the opinions of political leaders, Government servants, legal experts, NGOs, scholars, academics, journalists, and other stakeholders.

The purpose of this background paper is to recap some of the key issues with our electoral system, and to briefly examine the recommendations made by some recent committees in this regard. It is hoped that this background paper will be a starting point to renew a national dialogue on the important changes that need to be brought about to strengthen our electoral system.

## II. **Approach to Background Paper**

The purpose of this paper is to provide background information on issues in our electoral process and outline some electoral reform options that have been considered in the past, in order to serve as a platform for a renewed national dialogue on electoral reforms.

2.1 In this background paper, the Committee on Electoral Reforms does not endeavour to make any recommendations of its own; rather it presents the recommendations made by various committees to date in order to fulfil its purpose of providing background information for substantive dialogue in regional and national consultations.

2.2 The topic of electoral reforms has been taken up by numerous government committees in the recent past, including but not limited to:

- Goswami Committee on Electoral Reforms (1990)
- Vohra Committee Report (1993)
- Indrajit Gupta Committee on State Funding of Elections (1998)
- Law Commission Report on Reform of the Electoral Laws (1999)
- National Commission to Review the Working of the Constitution (2001)
- Election Commission of India – Proposed Electoral Reforms (2004)

## □ The Second Administrative Reforms Commission (2008)

2.3 There has also been a great deal of substantive work on the topic of Electoral Reforms undertaken by various civil society groups, which have contributed significantly to the public discourse on the subject. While acknowledging the contribution of these groups, the Committee limits its discussion of reform recommendations in this paper to those published by the committees mentioned above.

2.4 A number of committees have discussed major structural reforms of the electoral system, such as a shift away from the First Past the Post (FPTP) system of representation. We will explore options for electoral reform within the framework of the current system and will not address these larger structural issues in this paper.

2.5 This background paper is also being made available on the website of the Law Ministry. It is hoped that many more stakeholders will be able to provide inputs either online or by post to the Ministry of Law and Justice, Government of India. The work of this Committee will be enriched by such inputs, and the Committee looks forward to wide participation in the weeks ahead from experts and ordinary citizens.

## III. Introduction

3.1 The founding fathers of India opted for a Parliamentary democracy as the appropriate model for a large and diverse country like ours. The general elections in India are a mammoth exercise, with over 700 million voters, and about one million polling booths in the country. This awe inspiring effort is widely hailed as a model for the conduct of free and fair elections.

3.2 In our experience of holding elections for six decades, a number of issues have come to the fore from time to time. Legislative changes were made, the Election Commission developed a Code of Conduct, and passed several strictures with a view to conducting elections in a smooth manner. But in recent years, there have been some alarming trends that have been noticed which can potentially jeopardise the democratic freedoms we enjoy in India today.

3.3 At a more fundamental level, if citizens do not have faith in the way our elected representatives are chosen, there is danger to the very idea of democracy itself. Widely held views among the public with regard to criminalisation of politics, the use of money power in securing votes, the paid-news disease are some of the issues that are enlarging the trust deficit with regard to our elections. This needs to be

stemmed at the earliest and in a clear and transparent manner to regain the trust of the citizens in our democratic process.

3.4 Civil society groups, journalists, and other observers of the process have been playing an important role in identifying a number of the weaknesses of our existing system. There have been efforts to use the courts to seek to push reform on this important issue. The widely known practice of every candidate having to declare their assets, liabilities and pending criminal cases came about as a result of a landmark court judgement.

3.5 The Election Commission has been at the forefront of initiating efforts to strengthen the electoral system. But its own mandate can sometimes be a limiting factor. In this context it would be necessary to examine the issue with regard to the legislative and other changes that will be required to make the electoral system work better for all our citizens.

3.6 In recent years a number of committees have examined several aspects of our electoral process and have recommended important changes to the system. Some of these recommendations have been implemented and yet there is much more to be done.

3.7 In order to take the agenda forward, the Ministry of Law and Justice, Government of India has constituted a Committee on Electoral Reforms. This Committee seeks to hold regional consultations followed by a national consultation in order to develop a set of actionable recommendations. Every effort would be made by this Committee to reach out to a wide set of experts and stakeholders and to benefit from the insights and experience of all concerned. The objective of these recommendations would be to provide the basis of developing legislative and other proposals which can then be taken forward.

#### IV. Criminalisation of Politics

Most recent Committee reports on electoral reforms have almost universally acknowledged the criminalisation of our political system at both national and state levels and across party lines.

The criminalisation of our political system has been observed almost unanimously by all recent committees on politics and electoral reform. Criminalisation of politics has many forms, but perhaps the most alarming among them is the significant number of elected representatives with criminal charges pending against them. Two measures recommended by previous committees are discussed in this paper: enforcement of

the disclosure of criminal antecedents of candidates, and eligibility restrictions for candidates with criminal cases pending against them.

The Vohra Committee Report on Criminalisation of Politics was constituted to identify the extent of the politician-criminal nexus and recommend ways in which the menace can be combated. In Chapter 4 of the report of the National Commission to Review the Working of the Constitution, cites the Vohra report as follows: "The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country" and that "some political leaders become the leaders of these gangs/armed senas and over the years get themselves elected to local bodies, State assemblies, and national parliament." This point becomes self evident when one looks at the number of elected representatives with pending criminal cases against them at all levels in our federal system. A number of remedies have been proposed by the various committees on the criminalization of politics in the country.

#### **4.1 Disclosure of criminal antecedents of candidates**

Currently, Rule 4A of the Conduct of Election Rules, 1961, prescribes that each candidate must file an affidavit (Form 26 appended to Conduct of Election Rules, 1961) regarding (i) cases, if any, 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, and (ii) cases of conviction for an offence other than any of the offences mentioned in Section 8 of Representation of the People Act, 1951, and sentenced to imprisonment for one year or more. In addition to this, pursuant to the order of the Supreme

Court the Election Commission on March 27, 2003, has issued an order that candidates must file an additional affidavit stating (i) information relating to all pending cases in which cognizance has been taken by a Court, (ii) assets and liabilities, and (iii) educational qualifications. The affidavit is given in a form prescribed by the Election Commission of India.

Section 125A of the R.P. Act, 1951 prescribes penalties for withholding or providing incorrect information on Form 26, which amount to imprisonment of up to six months, or fine, or both.

In its report entitled Proposed Electoral Reforms, 2004 the Election Commission of India notes that "in some cases, the candidates leave some of the columns blank...there have been cases where candidates are alleged to have given grossly undervalued information."

## ▮ **Recommendations**

In its report on Proposed Election Reforms, 2004, the Election Commission of India recommended that an amendment should be made to Section 125A of the R.P. Act, 1951 to provide for more stringent punishment for concealing or providing wrong information on Form 26 of Conduct of Election Rules, 1961 to minimum two years imprisonment and removing the alternative punishment of assessing a fine upon the candidate. It also recommended that Form 26 be amended to include all items from the additional affidavit prescribed by the Election Commission, add a column requiring candidates to disclose their annual declared income for tax purpose as well as their profession.

The Law Commission of India Report on Reform of the Electoral Laws, 1999, suggested that an amendment be made to the Representation of the People Act, 1951, to insert a new section 4A after section 4 to make declaration of assets and criminal cases pending against the candidate part of the qualifications necessary for membership to the House of the People.

### 4.2 **Eligibility of candidates with criminal cases pending against them**

Section 8 of the Representation of the People Act, 1951, provides for disqualification of candidates from contesting an election on conviction by a Court of Law. In subsection (1), it lists certain crimes and stipulates a disqualification period of six years from the date of conviction. In subsection (2) it lists a different set of crimes and provides for the candidate to be disqualified from the date of conviction and for a period of six years since his release. In subsection (3), it provides that any candidate convicted for a crime for which the minimum imprisonment is two years shall also be disqualified from the date of conviction and will continue to be disqualified for six additional years after his release.

## ▮ **Recommendations**

The Election Commission proposed in its 2004 report that Section 8 of the Representation of the People Act, 1951 should be amended to disqualify candidates accused of an offence punishable by imprisonment of 5 years or more even when trial is pending, given that the Court has framed charges against the person. In the report the Commission addresses the possibility that such a provision could be misused in the form of motivated cases by the ruling party. To prevent such misuse, the Commission suggested a compromise whereas only cases filed prior to six months before an election would lead to disqualification of a candidate.

In addition, the Commission proposed that Candidates found guilty by a Commission of Enquiry should stand disqualified.

The report "Ethics in Governance" of the Second Administrative Reforms concurred with the recommendation of the Election Commission.

In Chapter 4 of its report, the National Commission to Review the Working of the Constitution proposed several measures. Firstly, it proposed that Section 8 of the Representation of the People Act, 1951, be amended such that a candidate accused of an offence punishable by imprisonment of 5 years or more be disqualified on the expiry of a period of one year from the date the charges were framed against him, and unless cleared during that one year period, he shall remain disqualified until the conclusion of his trial. It also recommended that in case a candidate is convicted by a court of law and sentenced to imprisonment of six months or more, he shall be disqualified during the period of the sentence and for six additional years after his release. Candidates violating this provision should be disqualified and political parties putting up such a candidate with knowledge of his antecedents should be derecognised and deregistered. Thirdly, the Commission has stated that any person convicted for any heinous crime such as murder, rape, smuggling, dacoity, etc., should be permanently barred from contesting political office. Finally, the Commission proposes the establishment of Special Courts to decide cases against candidates within a period of six months or less. Potential candidates against whom charges are pending may take the matter to the Special Court, which can decide if there is indeed a prima facie case justifying the framing of the charges. Special Courts would be constituted at the level of High Courts and decisions would be appealable only to the Supreme Court.

The 1999 Law Commission of India Report takes a separate stand, suggesting that Section 8 remain unchanged. It suggests, however, the addition of a new section – Section 8B, which would provide a separate set of penalties for electoral offences and offences having a bearing upon the conduct of elections under sections 153A and 505 IPC and serious offences punishable with death or life imprisonment. The proposed Section 8B would provide that framing of charges shall be a ground of disqualification but this disqualification shall last only for a period of five years or till the acquittal of the person of those charges, whichever event happens earlier. If a candidate is found guilty they would automatically be disqualified under Section 8.

#### **4.3 Negative or Neutral Voting**



The criminalisation of politics, widespread corruption in the system, and use of violence, voter intimidation, etc may result in there being no desirable candidates within those contesting elections in a particular constituency. Currently there is no way for voters to express their dislike for all candidates. The lack of such a provision may further contribute to the decay in the system in such cases by encouraging only those voters who support such compromised candidates to vote, returning those same leaders to power again and again.

### **Recommendations**

Both the Election Commission and Law Commission of India recommend that a negative or neutral voting option be created. Negative/ neutral voting means allowing voters to reject all of the candidates on the ballot by selection of a “none of the above” option instead of the name of a candidate on the ballot. In such a system there could be a provision whereas if a certain percentage of the vote is negative/neutral, then the election results could be nullified and a new election conducted.

## **V. Financing of Elections**

It is widely believed that in many cases successfully contesting an election costs a significant amount of money that is often much greater than the prescribed limits.

A Consultation Paper to the National Commission to Review the Working of the Constitution, 2001, noted that “the campaign expenditure by candidates is in the range of about twenty to thirty times the legal limits”.

There are many negative social impacts of this high cost. Chapter 4 of the Report of the National Commission to Review the Working of the Constitution, 2001, notes that the high cost of elections “creates a high degree of compulsion for corruption in the public arena” and that “the sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts, etc.” It also states that “Electoral compulsions for funds become the foundation of the whole super structure of corruption”.

A number of remedies have been recommended by previous committees for curbing the negative impact of the high cost of elections:

### **5.1 Official limits on campaign expenditure**

Currently, limits on campaign expenditure are fixed at certain amounts depending on the nature of the election. However, it is believed that these limits are violated with audacity. This is mainly attributed to the fact that the actual cost of running an election campaign is often much greater than the prescribed spending limit.

## □ **Recommendations**

The National Commission to Review the Working of the Constitution, 2001, recommended that the existing ceiling on election expenses for the various legislative bodies should be suitably raised to a reasonable level reflecting increasing costs. The ceiling is currently Ra 25 lakhs for a Lok Sabha seat and Rs 10 lakh for an Assembly seat. In order to cope with rising expenditures over time, this ceiling should be fixed by the Election Commission from time to time and should include all the expenses by the candidate as well as by his political party or his friends and well-wishers and any other expenses incurred in any political activity on behalf of the candidate by an individual or corporate entity.

A Consultation Paper to the National Commission to Review the Working of the Constitution, 2001, entitled "Review of the Working of Political Parties Specially in Relation to Elections and Reform Options" largely concurred with the above opinion but also suggested a much bolder one: (a) either the statutory limit should be scrapped altogether and replaced by a selective ban on certain kinds of expenditure. Or the existing provisions should be amended to provide for: (i) much higher ceiling than what currently exists; (ii) regular revision of the ceiling before every general election; (iii) all the expenditure, irrespective of who paid for it, to be brought within the purview of this provision; (iv) mechanism for routine verification /auditing of the return of the expenditure; and (v) publicity of the returns filed by the candidate in the local press.

The Election Commission of India recommends that the ceiling on election expenditure be rationalized from time to time.

## 5.2 **Disclosure audit of assets and liabilities of candidates**

In an order dated March 27, 2003, the Election Commission of India issued an order, in pursuance of the Supreme Court judgment dated March 13, 2003 in the Peoples Union for Civil Liberties & Another Vs. Union of India case, that candidates for electoral office must submit an affidavit disclosing his assets and liabilities.

It has been noted by the Election Commission of India in its report Proposed Electoral Reforms, 2004, that “there have been many cases where the candidates are alleged to have given grossly undervalued information, mainly about their assets.”

#### □ **Recommendations**

The National Commission to Review the Working of the Constitution recommended a follow-up action to the declaration of assets and liabilities by candidates - that the particulars of the assets and liabilities of both candidates and political parties should be audited by a special authority created specifically under law for this purpose. Accounts of candidates and parties should be monitored through a system of checking and cross-checking through the income tax returns filed by candidates, parties, and their well wishers. At the end of the election each candidate should submit an audited statement of expenses under specific heads.

In 2004 the Election Commission recommended that an amendment be made to Form 26 of Conduct of Election Rules, 1961, to include disclosure of assets and liabilities by candidates. To enforce complete compliance by candidates on Form 26, the Commission recommended that Section 125A be amended such that there is more stringent punishment for concealing or providing wrong information on the form. The amendment would provide for minimum two years imprisonment and removal of the alternative punishment of assessing a fine upon the candidate.

### **5.3 Curbing the cost of campaigning**

It has been noted by previous committees that in order to remedy the negative impact of the excessive cost of elections, the first step should be to reduce the cost of elections themselves.

#### □ **Recommendations**

It was observed by both the Indrajit Gupta Committee on State Funding of Elections, 1999, and the National Commission to Review the Working of the Constitution, 2001, that many of the tools used for campaigning – such as wall writings, rallies on public property, using loudspeakers for campaigning – are not only costly, but are also a public nuisance. Curbing these activities can both reduce the public nuisance caused by them and also reduce the amount of money needed to fight elections. For this purpose the

Committees suggested that a suitable law should be enacted providing penalties or reasonable restrictions against damaging or desecrating public or private property by candidates, political parties, or the agents, through painting of slogans or erecting cut-outs and hoarding or putting up banners and buntings, wall writings, hoisting of flags (except at party offices, party offices, public meetings and other specified places), etc.

In addition, the National Commission to Review the Working of the Constitution, 2001, suggested the following measures: (i) State and Parliamentary level elections, to the extent possible, should be held at the same time; (ii) the campaign period should be reduced considerably, and (iii) candidates should not be allowed to contest election simultaneously for the same office from more than one constituency.

#### 5.4 **State Funding of Elections**

A major concern associated with the high cost of elections is that it prevents parties and candidates with modest financial resources from being competitive in elections. It is also feared that if candidates need to raise funds from a variety of sources, then their policy decisions after being elected as policy makers may be somewhat biased in favour of groups that fund them. State funding of elections (in various forms) has been proposed as a potential solution to this problem.

#### ▮ **Recommendations**

The Indrajit Gupta Committee on State Funding of Elections, 1998, backed the idea of state funding of elections on principle, stating that “The Committee see full justification constitutional, legal as well as on ground of public interest, for grant of State subvention to political parties, so as to establish such conditions where even the parties with modest financial resources may be able to compete with those who have superior financial resources.” It added two limitations, namely (i) such funds could not be doled out to independent candidates, and only to national and state parties having granted a symbol and proven their popularity among the electorate, and (ii) in the short-term, State funding may be given only in kind, in the form of certain facilities to the recognised political parties and their candidates. However, despite strongly backing full State funding of elections principle, it stated that only partial State funding would be possible in the short-term given the prevailing economic condition of the country.

The 1999 report of the Law Commission of India concurred with the Indrajit Gupta Commission, stating that "it is desirable that total state funding be introduced, but on the condition that political parties are barred from raising funds from any other source". It also agreed with the Indrajit Gupta Commission that only partial state funding was possible at the present time given the economic conditions of the country. Additionally, it strongly recommended that the appropriate regulatory framework be put in place with regard to political parties (provisions ensuring internal democracy, internal structures and maintenance of accounts, their auditing and submission to Election Commission) before state funding of elections is attempted.

The Report "Ethics in Governance" of the Second Administrative Reforms Commission also recommended that "a system for partial state funding should be introduced to reduce the scope of illegitimate and unnecessary funding of expenditure for elections."

The National Commission to Review the Working of the Constitution, 2001, did not comment on the desirability of State funding of elections but reiterated the point of the Law Commission that the appropriate framework for regulation of political parties would need to be implemented before proposals for State funding are considered. The Election Commission is not in favour of state funding as it will not be possible to prohibit or check candidate's own expenditure or expenditure by others over and above that which is provided by the State. The Election Commission's view is that for addressing the real issues, there have to be radical changes in the provisions regarding receipts of funds by political parties and the manner in which such funds are spent by them so as to provide for complete transparency in the matter.

## VI. Conduct and Better Management of Elections

The massive size of the Indian electorate makes general elections an enormous and daunting exercise. But this should not prevent us from finding more ways of making the election process free and fair.

According to the Election Commission of India, the size of the electorate for the 2009 elections to the 15th Lok Sabha was more than 714 million. The National Commission to Review the Working of the Constitution, 2001, noted in its report that "the holding of general elections in India is equal to holding them for Europe, the United States, Canada, and Australia all put together." Successful administration of the electoral process requires more than 50 lakh personnel and almost 1 million (10 lakh) polling booths. Millions of security personnel are required to promote a peaceful and incident-free voting experience.

Previous committees have recommended several changes in the conduct of the electoral process to properly address the challenges mentioned above. Major problems in the conduct of elections and proposed solutions are outlined below.

## 6.1 Irregularities in polling

Irregularities in polling procedure have been identified as important issues that need to be addressed in our electoral system. Rigging of elections have become common facets of our electoral system.

### 6.1.1 Importance of electoral rolls

The National Commission to Review the Working of the Constitution, 2001, rightly noted that “The electoral process begins with the preparation of electoral rolls. If the rolls are incomplete or defective, the whole process is vitiated.” A Consultation Paper to the National Commission to Review the Working of the Constitution noted that “political parties and influential persons manage large-scale registration of bogus voters, or large-scale deletion of names of “unfriendly” voters.” The Goswami Committee on Electoral Reforms stated that irregularities in electoral rolls are exacerbated by purposeful tampering done by election officials who are bought by vested interests or have partisan attitudes.

Aside from intentional tampering, the structure of the system set up to create electoral rolls may contribute significantly to the widespread inaccuracies. In the current system, the Election Commission prepares electoral roles for Parliamentary and Assembly constituencies, and the State Election Commissions prepare electoral rolls for local elections. While some states have coordinated their electoral rolls with those prepared by the Election Commission, there are still some states that significantly modify them. Some states even have different qualifying dates for the State rolls from the Election Commission rolls, which is inefficient for both the Commissions involved and confusing for the voter. The duplication of essentially the same task between two different agencies is also an unnecessarily costly affair.

## □ **Recommendations**

The National Commission to Review the Working of the Constitution recommended in its 2001 report that an automated online database should be created by the Election Commission. In such a system, each voter would be provided with a unique bar-coded ID number, assigned for life. This bar-coded ID card and number could be verified at the polling booth by a hand held device. The electoral rolls in this system could

be prepared at the panchayat or district level. Along with this, the Commission also recommended that the task of electoral roll preparation should not be duplicated as it is now, possibly by entrusting it to an outside agency under the supervision of the Election Commission. A centralized, computerized system could provide for the easy public availability of the electoral rolls as well.

The 2004 report on Proposed Electoral Reforms, the Election Commission concurred with the National Commission to Review the Working of the Constitution that there should be common rolls for all elections, with the Parliamentary and Assembly rolls adapted to suit the needs of local bodies elections. This is primarily recommended by the Commission for the purpose of saving on expenditure and to make the process more efficient.

The Goswami Committee of 1990 recommended that Post Offices should be the agencies for preparation and maintenance of electoral rolls. This solution may well be outdated in today's society where efficient computerized systems can be created. The Committee, did however, recommend a multi-purpose ID somewhat along the same lines as that proposed by the National Commission to Review the Working of the Constitution.

#### 6.1.2 Rigging through muscle power and intimidation

Rigging of elections is possible not just through tampering of booths, ballots, and electoral roles, but also out of sheer 'muscle power' and intimidation of voters.

#### □ Recommendations

The Goswami Committee Report of 1990 recommended that the Election Commission should be empowered to take strong action on the report of returning officers, election observers, or civil society in regards to booth capture or the intimidation of voters. The National Commission to Review the Working of the Constitution recommends that the Election Commission should have the power under Section 58A of the Representation of the People Act, 1951, to order a fresh election, void the election results, or order a re-poll in such cases. It further recommended that the Election Commission should make use of electronic surveillance equipment as a deterrent to booth capture or intimidation of voters.

#### 6.2 Proliferation of candidates

There is a proliferation of candidates in Indian elections. According to the Election Commission of India, "too many candidates in the election fray puts unnecessary and avoidable stress on the management of elections and increases expenditure on account of security, maintenance of law and order, and requires extra number of balloting units of voting machines, etc". It has been observed that a large number of candidates in the fray are non-serious candidates, which according to the Law Commission of India, makes elections "cumbersome, expensive and unmanageable – indeed farcical in some cases." The National Commission to Review the Working of the Constitution notes that out of the 1900 independent candidates who contested the general election of 1998, only six actually won.

#### □ Recommendations

The Election Commission of India, Law Commission of India, and National Commission to Review the Working of the Constitution all recommend measures to check the proliferation of non-serious candidates. In their reports, all the Committees mentioned recommended increasing the security deposit of candidates. The recommendations of these Committees were enacted through the Representation of the People (Amendment) Act, 2009, which increased the amount. The Election Commission further recommends that it be given the power to prescribe deposit amounts prior to each election so that repeated amendments to the Representation of the People Act are not necessary.

The Law Commission of India Report on Reform of the Electoral Laws goes even further and declares that independent candidates should be debarred from contesting elections to the Lok Sabha.

The National Commission to Review the Working of the Constitution proposed a system of discouraging independent candidates from running for office, by implementing the following measures: (i) the existing security deposits for independent candidates should be doubled, (ii) the deposit should be doubled every year for those independents who fail to win and still keep contesting elections, (iii) if any independent candidate fails to win five percent of the vote or more, he should be debarred from contesting as an independent for the same office for six years, (iv) an independent candidate who loses election three times consecutively for the same office as an independent should be permanently debarred from contesting election to that office.

#### 6.3 Measures for Election Commission



The Election Commission of India has recommended a number of improvements in electoral law to allow it to continue functioning in an effective and independent manner.

#### □ Recommendations

Clause (5) of Article 324 of the Constitution, *inter alia*, provides that the Chief Election Commissioner shall not be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court. However, Clause (5) of Article 324 does not provide similar protection to the Election Commissioners and it only says that they cannot be removed from office except on the recommendation of the Chief Election Commissioner. The provision, in the opinion of the Election Commission, is inadequate and requires an amendment to provide the very same protection and safeguard in the matter of removability of Election Commissioners from office as is provided to the Chief Election Commissioner. The Election Commission recommends that constitutional protection be extended to all members of the Election Commission.

The Election Commission also recommends that the Secretariat of the Election Commission, consisting of officers and staff at various levels is also insulated from the interference of the Executive in the matter of their appointments, promotions, etc., and all such functions are exclusively vested in the Election Commission on the lines of the Secretariats of the Lok Sabha, and Rajya Sabha, Registries of the Supreme Court and High Courts etc.

The third recommendation of the Election Commission is that its budget be treated as “Charged” on the Consolidated Fund of India.

#### 6.4 Restrictions on Government sponsored advertisements

It has been noted by the Election Commission that on the eve of election, the Central and various State Governments are able to advertise for the purpose of influencing elections, justifying it by providing information to the public. The expenditure on such advertisements is likely incurred from the public exchequer. The Election Commission feels this practice allows the misuse of public funds and provides the ruling party an undue advantage over other parties and candidates.

#### □ Recommendations

The Election Commission proposes that where any general election is due on the expiration of the term of the House, advertisements of achievements of the governments, either Central or State, in any manner, should be prohibited for a period of six months prior to the date of expiry of the term of the House, and in case of premature dissolution, from the date of dissolution of the House. Here, advertisements / dissemination of information on poverty alleviation and health related schemes could be exempted from the purview of such a ban. The Commission also recommends that there should be specific provisions that name or symbol of any political party or photograph of any of the leaders of the party should not appear on such hoardings/banners.

#### 6.5 Restriction on the number of seats which one may contest

Section 33 of the Representation of the People Act, 1951, a person can contest a general election or a group of bye-elections or biennial elections from a maximum of two constituencies. There have been several cases where a person contests election from two constituencies, and wins from both. In such a situation he vacates the seat in one of the two constituencies. The consequence is that a bye-election would be required from one constituency which apart from involving avoidable labour and expenditure on the conduct of that bye-election.

#### ▮ Recommendations

The Election Commission is of the view that the law should be amended to provide that a person cannot contest from more than one constituency at a time.

#### 6.6 Amendment of law to provide for filing of election petition even against defeated candidates on the ground of corrupt practice

As per the existing law, election petition can be filed only for challenging the election of a returned candidate. If a defeated candidate has indulged in corrupt practice, there is no provision for election petition or a declaration against such candidate.

#### ▮ Recommendations

The Election Commission has recommended in its letter dated 24th April 2009 that the law should be amended to provide for filing election petitions in cases of commission of corrupt practice by a losing candidate. In the same letter, it was also suggested that the period by which the candidates are required to

file their account of election expenses should be reduced to 20 days from the present 30 days, so that more time is available for others to scrutinize the accounts and to take the matter to the Court in Election Petitions in cases of spending in excess of the ceiling. Alternatively, the period for filing Election Petition may be increased to 60 days.

## 6.7 Restrictions on opinion polls

Previous committees on electoral law have debated the possibility of whether opinion polls are misused to manipulate voters on the eve of elections.

### □ Recommendations

The Election Commission had recommended that there should be provision in the law putting restrictions on publishing the results of opinion polls and exit polls for a specified period during the election process. By the recent amendment of the Representation of the People Act, 1951, a new Section 126A has been inserted in the Act prohibiting conducting of exit polls and publishing results in any manner, during the period starting from 48 hours before the close of poll in an election. In a multi-phased election, the prohibition will last till the close of poll in the last phase.

However, the amendment does not cover opinion polls. Thus, results of opinion poll can be published even on the day of election polling. Although dissemination of results of opinion polls would be prohibited during the 48 hours period before the conclusion of poll by virtue of Section-126 (1) (b) on electronic media, there is no provision of law to restrict dissemination through print media (since 126 (1) (b) does not apply to print media).

## 6.8 Prohibition of Campaign during the Last 48 Hours

Section 126 of the Representation of the People Act, 1951, prohibits electioneering activities by way of public meetings, public performance, processions, advertisements through cinematograph, television or similar apparatus during the period of 48 hours before the time fixed for conclusion of poll. Thus, political advertisements in TV and Radio are prohibited during these 48 hours. However, since this Section does not refer to print media, the political parties and candidates issue advertisements in newspapers during this period including on the day of poll. They also undertake house-to-house visits. The logic behind the

restriction on campaigning during the 48 is to allow citizens to decide their option without being prejudiced by any last moment appeals.

#### □ Recommendations

The Election Commission recommends that Section 126 should apply to print media as well. Furthermore, it recommends that house to house visits by candidates/supporters should be specifically prohibited during the said 48 hour period. It is the opinion of the Commission that the house-to-house visit/ contact in the last hours provides that opportunity for indulging in malpractices such as trying to bribe electors with cash.

#### 6.9 Ban on transfer of officers likely to serve elections

It is the opinion of the Election Commission that such transfers, often made on grounds other than administrative exigencies, disrupt the arrangements then underway for conducting smooth and peaceful elections.

#### □ Recommendations

The Election Commission had recommended in 1998 that Section 13 CC of the Representation of the People Act, 1950, and Section 28A of the Representation of the People Act, 1951 should be amended to provide that no transfer shall be made, without the concurrence of the Commission, of any officer referred to therein, as soon as a general election/bye-election becomes due in any Parliamentary or Assembly Constituencies. The Commission has suggested that in the case of a general election either to the House of the People or to State Legislative Assembly, the ban may come into operation for the period of six months prior to the date of expiry of the term of the House concerned, and in case of premature dissolution, from the date of dissolution of the House.

#### 6.10 False declaration in connection with elections to be an offence

Section 31 of the Representation of the People Act, 1950, contains a provision providing for punishment with imprisonment up to one year for making a false declaration in connection with preparation/revision of electoral roll. There is no such provision in the Representation of the People Act, 1951, in relation to conduct of elections. During the course of an election, the Election Commission has observed several

cases of such false statements/declarations before the election authorities such as by candidates, representatives of political parties etc. A provision for punishment for false statement / declaration would be a deterrent against frivolous complaints and petitions.

#### □ Recommendations

The Election Commission recommends that there should be a provision for penal action against those making any false declarations in connection with an election. Such a provision would provide for a similar punishment for false declarations in connection with conduct of elections, such as false complaints of booth capturing or false complaints about the conduct of election officials.

#### 6.11 Punishment for electoral offences to be enhanced

Undue influence and bribery at elections are electoral offences under Sections 171B and 171C, respectively, of the IPC. These offences are non-cognizable offences, with punishment provision of one year's imprisonment, or fine, or both. Under Section 171G, publishing a false statement in connection with an election with intent to affect the result of the election is only punishable with a fine. Section 171H provides that incurring or authorizing expenditure for promoting the election prospects of a candidate is an offence. However, punishment for an offence under this Section is a small fine of Rs 500.

#### □ Recommendations

The Election Commission feels that considering the gravity of the offences under the aforesaid sections in the context of free and fair elections, the punishments under all the four sections should be enhanced. This was recommended by the Commission in 1992.

#### 6.12 Restoring the cycle of biennial retirement in the Rajya Sabha/Legislative Councils

A petition was submitted in the Patna High Court last year on the topic of restoring the cycle of biennial retirement in the Rajya Sabha and Legislative Councils. The High Court, in its order, observed that the Government and the Election Commission may consider the matter for a solution.

#### □ Recommendations

In its December 2004 the Election Commission reiterated the earlier proposal for amending the law so as to ensure retirement of 1/3rd of the members in the Rajya Sabha and State legislative councils after every two years.

#### 6.13 Expenditure ceiling for election to Council Constituencies

Presently the expenditure ceiling for candidates applies only for the Lok Sabha and Assembly elections.

##### □ Recommendations

The Commission has in its letter dated 30th May 2007 proposed that this should also be applicable in the case of legislative council elections from the Council Constituencies. The candidate should also be required to submit the account of election expenses.

#### 6.14 Misuse of religion for electoral gain by political parties

The Liberhan Ayodhya Commission of Inquiry recommended, inter alia, that complaints of misuse of religion for electoral gain should be speedily investigated into by the Election Commission. The Election Commission informed the government (Letter dated January 29, 2010) that such investigations should be carried out by the investigating agencies of the state. However, the Election Commission invited the attention of the government to the Representation of the People (Second Amendment) Bill, 1994, whereby an amendment was proposed providing for provision to question acts of misuse of religion by political parties before a High Court. Similar recommendations made by the Goswami Committee were included in a Bill introduced in the Rajya Sabha in May 1990. The Government withdrew this Bill in 1993, stating that a revised Bill would be introduced. However, these provisions have never been considered since then.

##### □ Recommendations

The Goswami Committee on Electoral Reforms, in its report in 1990, made the following recommendations: "Election Commission shall have the power to make recommendations to the appropriate authority (a) to refer any matter for investigation to any agency specified by the Commission (b) Prosecute any person who has committed an electoral offence under this Act or (c) appoint any special court for the trial of any offence or offences under this Act (RP Act 1951)."

The Election Commission recommends that abovementioned provisions should be reconsidered.

#### 6.15 Totalizer for counting of votes

Currently votes are tallied by individual EVMs at individual polling stations. This exposes the trend of voting in a particular voting station, making the electorate of that area vulnerable to backlash by candidates or elected officials in retribution.

##### ▮ Recommendations

The Election Commission recommends an amendment be made to the Conduct of Elections Rules to provide for the use of 'totalizer' for counting of votes cast at more than one polling station where EVMs are used, so that the trend of voting in individual polling station areas does not get divulged and the electors may not be subjected to any harassment or victimization on that account.

#### 6.16 Re-examination of the provision of Teachers' and Graduates' Constituencies

Under Article 171 (3) (b) & (c) of the Constitution, one-twelfth of the seats in the Legislative Councils are to be filled up by graduates and another one-twelfth by teachers who have been engaged in teaching in educational institutions not lower in standard than that of a secondary school. As per the provisions of this Article, a teacher teaching in the lower primary section in a secondary school is eligible to be enrolled as an elector for the Teachers' constituency, whereas a teacher teaching in the middle school in a middle/primary school will not be eligible to be an elector.

##### ▮ Recommendations

The Election Commission recommends that the provisions of Article 171 (3) (c) should be amended so as to provide that all teachers of specified institutions irrespective of the level of the school would be eligible to be electors for the Teachers' constituency. Furthermore, the Commission is of the view that the concept of special representation for graduates and teachers should itself be reconsidered.

#### 6.17 Victimization of officers drafted for election duties

The Election Commission utilizes the services of a large number of government officers for election duties, who perform important statutory functions in connection with preparation of electoral rolls and conduct of

elections. The Election Commission has observed many of these officers are later subjected to humiliation and even vindictive disciplinary action by the government.

#### □ Recommendations

The Election Commission recommends that in the case of the government officers performing statutory functions in connection with preparation of electoral rolls, or in the conduct of elections, consultation with the Election Commission and its concurrence should be made compulsory before initiating any disciplinary/legal proceedings by the government. In the case of those officers who have ceased to hold election related positions, consultation with the Commission should be mandatory for initiating any disciplinary/legal proceedings for a period of one year from the date on which the officer ceased to hold election related position.

#### 6.18 Disqualification for failure to lodge election expenses

Under Section 10A of the Representation of the People Act, 1951, the Election Commission may disqualify a candidate for three years for failure to lodge the account of election expenses as per the requirement of the law. Thus, the period of disqualification may end by the time of the next general election to that House. Therefore, no effective purpose is served by the disqualification (except that the person cannot contest in the odd bye-election that may be held during the 3 year period).

#### □ Recommendations

The Election Commission recommends that the period of disqualification under Section 10A should be increased to 5 years, so that the disqualified person does not become a candidate at the next general election to the House concerned.

## VII. Regulating Political Parties



Proliferation of political parties is stated as a major concern by many previous committees. Section 29A of the Representation of the People Act, 1951, allows for small groups of people to form political parties by making only a simple declaration.

In its 2001 report, the National Committee to Review the Working of the Constitution states that “it is a desirable objective to promote the progressive polarisation of political ideologies and to reduce less serious political activity.”

According to the Election Commission, a large number of non-serious parties create excessive load on the electoral system. Of the more than 1100 parties registered with the Election Commission in 2009, only about 360 actually contested the general election that year. The Commission also states that part of the problem is that there is no specific provision to de-register a party.

The National Commission to Review the Working of the Constitution adds that while proliferation of smaller parties creates “confusion”, any tightening of regulation on the subject must also take into account “the need to reflect the aspirations of a plural society.”

## □ Recommendations

The Election Commission proposes that an amendment be made to Section 29A of the Representation of the People Act, 1951, adding a clause “authorising the Election Commission to issue necessary orders regulating registration and de-registration of political parties.”

The National Commission to Review the Working of the Constitution, 2001, recommended that “the Election Commission should progressively increase the threshold criterion for eligibility for recognition so that the proliferation of smaller parties is discouraged. Only parties or a pre-poll alliance of political parties registered as national parties or alliances with the Election Commission be allotted a common symbol to contest elections for the Lok Sabha. State parties may be allotted symbols to contest elections for State Legislatures and the Council of States (Rajya Sabha).”

Furthermore, the above Commission recommended that “the rules and by-laws of the parties seeking registration should include provisions for:

- (a) A declaration of adherence to democratic values and norms of the Constitution in their inner party organisations,
- (b) A declaration to shun violence for political gains.
- (c) A declaration not to resort to casteism and communalism for political mobilisation, but to adhere to the principles of secularism in the achievement of their objectives,
- (d) A provision for party conventions to nominate and select candidates for political offices at the grass root and State levels
- (e) A code of conduct (which each political party should evolve for itself),
- (f) Some institutional mechanism for planning, thinking, and research on crucial socio-economic issues facing the nation and educational cells for socialising their party cadres and preparing them for responsibilities of governance,
- (g) Implementation of legal provisions regarding representation to women and weaker sections of society in party offices and in candidacy for elections to Houses of Legislatures”

#### VIII. Auditing of Finances of Political Parties

As mentioned previously in this report, the high cost of elections provides a logic for corruption in the public arena. This affects not only candidates, but parties as well.

In an order dated March 27, 2003, the Election Commission of India issued an order, in pursuance of the Supreme Court judgment dated March 13, 2003 in the Peoples Union for Civil Liberties & Another Vs. Union of India case, that candidates for electoral office must submit an affidavit disclosing his assets and liabilities. This order, however, does not apply to political parties.

#### □ Recommendations

The 2004 report of the Election Commission declared that political parties should be required to publish their accounts (or at least an abridged version) annually for information and scrutiny of the general public and all concerned, for which purpose the maintenance of such accounts and their auditing to ensure their accuracy is a pre-requisite. The auditing may be done by any firm of auditors approved by the Comptroller and Auditor General. The audited accounts should then be made public.

The Election and Other Related Laws (Amendment) Bill, 2002 (introduced in Lok Sabha on 19th March, 2002) sought to introduce section 29D in the Representation of the People Act, 1951 in this regard. The Department-Related Parliamentary Standing Committee on Home Affairs while examining the matter desired that the audit of accounts of donation received by the political party may be done through Chartered Accountants appointed by it as at present, as per the provisions of the Income-tax Act (section 13A). In view thereof the Committee recommended deletion of entire section 29D in Clause 2 of the Bill.

In 2001 the National Commission to Review the Working of the Constitution recommended that "audited political party accounts like the accounts of a public limited company should be published yearly with full disclosures under predetermined account heads".

The Law Commission, in its 1999 report, recommended steps be taken to amend the Representation of the People Act, 1951, to insert a new section 78A requiring the maintenance, audit and publication of accounts by political parties. To enforce compliance, Section 78A would prescribe the following penalties: (i) a political party which does not comply shall be liable to pay a penalty of Rs. 10,000/- for each day of non-compliance and so long as the non-compliance continues; (ii) If such default continues beyond the period of 60 days, the Election Commission may de-recognise the political party after affording a reasonable opportunity to show cause; (iii) If the Election Commission finds on verification, undertaken whether suo motu or on information received, that the statement of accounts filed is false in any particular, the Election Commission shall levy such penalty upon the political party, as it may deem appropriate besides initiating criminal prosecution as provided under law.

In order to further transparency in the funding of political parties, the Election Commission recommends the following measures: (i) any receipt by a political party either directly or through the executives or the party functionaries should be deposited in the Bank Accounts of such parties, (ii) all payments by the political party exceeding Rs.20,000/- to a person should be made by crossed account payee cheque and (iii) all contributions or donations or gifts by any person to a party functionary other than those by his/her relative(s) shall be deemed as receipts of the political party and it will be accounted for by the political party.

#### IX. Adjudication of Election Disputes

Disputes relating to elections of the State Legislature and Union Legislature are adjudicated upon exclusively by the High Courts before whom election petitions under Section 80 and 80-A of the Representation of Peoples Act, 1951, are filed.

Sections 86(6) and 86(7) of the Representation of the People Act, 1951, provide that the High Court shall make an endeavour to dispose of an election petition within six months from its presentation and also as far as practicably possible conduct proceedings of an election petition on a day to day basis.

In practice, however, cases involving election petitions are rarely resolved in a timely manner. According to the report "Ethics in Governance" of the Second Administrative Reforms Commission, "such petitions remain pending for years and in the meanwhile, even the full term of the house expires thus rendering the election petition infructuous.

#### □ Recommendations

The National Commission to Review the Working of the Constitution, recommended that special election benches designated for election petitions only should be formed in the High Court.

The Election Commission has also made a similar recommendation.

The Second Administrative Reforms Commission, in its report "Ethics in Governance", recommended in detail that:

"Special Election Tribunals should be constituted at the regional level under article 329B of the Constitution to ensure speedy disposal of election petitions and disputes within a stipulated period of six months. Each tribunal should comprise a High Court judge and a senior civil servant with at least 5 years experience in the conduct of elections (not below the rank of an Additional Secretary to the Government of India/Principal Secretary of a State Government). Its mandate should be to ensure that all election petitions are decided within a period of six months as provided by law. The Tribunals should normally be set up for a term of one year only, extendable for a period of 6 months in exceptional circumstances.'

#### X. Review of Anti-Defection Law

In the report "Ethics in Governance" of the Second Administrative Reforms Commission, it is noted that "Defection has long been a malaise of Indian political life. It represents manipulation of the political system for furthering private interests, and has been a potent source of political corruption." The report further notes that "there is no doubt that permitting defection in any form or context is a travesty of ethics in politics."

The Anti-Defection provisions of the Tenth Schedule of the Constitution, enacted in 1985, fixed a certain number above which group defections were permitted. The National Committee to Review the Working of the Constitution noted that although individual defections became rare after this, group defection were "permitted, promoted and amply rewarded."

The 91st Amendment to the Constitution, 2003, changed this by making it mandatory for defectors to resign their positions regardless of whether they defected as an individual or as part of a group.

Currently the issue of disqualification of members of Parliament or a State Legislature is decided by the Speaker or Chairman of the concerned House. Aside from those concerning the Tenth Schedule all other

matters of post-election disqualification are decided by the President/Governor, on the advice of the Election Commission.

The Election Commission, in its 2004 report, noted that “all political parties are aware of some of the decisions of the Hon’ble Speakers, leading to controversies and further litigation in courts of law.” The National Committee to Review the Working of the Constitution noted that “some of the Speakers have tended to act in a partisan manner and without a proper appreciation – deliberate or otherwise – of the provisions of the Tenth Schedule.”

#### □ Recommendations

The National Commission to Review the Working of the Constitution recommend that “the power to decide on questions as to disqualification on ground of defection should vest in the Election Commission instead of in the Chairman or Speaker of the House concerned.”

The Election Commission and “Ethics in Governance” report of the Second Administrative Reforms Commission also both recommended that the issue of disqualification on grounds of defection should be decided by the President/Governor concerned under the advice of the Election Commission, instead of relying on the objectivity of the decision from the Speaker.

#### XI. Annexure: Update on Election Commission Recommendations

The Ministry of Law and Justice has prepared a table reviewing progress made on the recommendations suggested by the Election Commission in 2004.

In July, 2004, the Election Commission has sent a set of 22 proposals on Electoral Reforms. Further, the entire matter of electoral reforms was referred to the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination by the Chairman, Rajya Sabha in the year, 2005.

Out of 22 proposals the Hon'ble Standing Committee gave its recommendations on six proposals including criminalization of politics. The Department has taken initiative and relevant provisions of the Representation of the People Act, 1950 and Representation of the People Act, 1951 have been amended to provide for (1) Appointment of Appellate Authority in districts against orders of Electoral Registration Officers; (2) to increase the security deposit of candidates; (3) Exit Polls; (4) All officials appointed in connection with conduct of elections to be included in clause (7) of section 123; and (5) Simplification of procedure for disqualification of a person found guilty of corrupt practice. The Hon'ble Standing Committee did not favour the proposal on carrying out any amendment relating to the Criminalisation of politics.

Brief details of each of the proposal and remarks thereon are as under:-

Sl. No. Proposal of the Election Commission Status/Remarks.

1. Affidavits to be Filed by Candidates on Criminal Antecedents, Assets, etc.

This relates to the merger of two affidavits filed by a candidate one in terms of section 33A of the Representation of the People Act, 1951, read with rule 4A of the Conduct of Election Rules, 1961 (in Form 26) and another in the format prescribed by the Commission vide its order dated 27.3.2003, in pursuance of the Hon'ble Supreme Court's judgment dated 13.3.2003 in Civil Appeal No. 490 of 2002 (Peoples Union for Civil Liberties & Another Vs. Union of India).

2. Need to Increase the Security Deposit of Candidates Enacted vide Representation of the People (Amendment) Act, 2009 (Act 41 of 2009).

3. Criminalisation of Politics

This proposal relates to disqualify any persons accused of an offence punishable by imprisonment for five years or more, from contesting elections even when trial is pending, provided charges have been framed against him by a competent court. The Government had requested the Parliamentary Standing Committee to give its recommendations on the proposal of the Election Commission of India. The Committee in its Eighteenth Report on the subject inter alia disagreed with the aforesaid proposal as it is a major departure from the law of the land that a person is not guilty until he is convicted by the highest court of the land. The Committee, however, recommended that proclaimed absconders under section 82 of the Criminal Procedure Code be disqualified from contesting polls.

4. Restriction on the Number of Seats from which One May Contest

This proposal is to amend the law to provide that a person cannot contest from more than one constituency at a time or if the present provision is retained then there should be a provision which would mandate to deposit a definite sum in case a person get elected from both seats. In the all party meeting held on 22.5.1998, it was decided to retain the present provision of allowing a person to contest from two constituencies of same nature.

5. Exit Polls and Opinion Polls Enacted vide Representation of the People (Amendment) Act, 2009 (Act 41 of 2009) putting a restriction on publication and dissemination of results of exit polls. Restriction of opinion polls needs to be examined.

6. Prohibition of Surrogate Advertisements in Print Media.

Section 127A of the Representation of the People Act, 1951 may be suitably amended, adding a new sub-section (2A) to the effect that in the case of any advertisements / election matter for or against any political party or candidate in print media, during the election period, the name and address of the publisher should be given along with the matter / advertisement. Sub-section (4) should also be suitably amended to include in its ambit the new proposed sub-section. Section 127A deals only with publication of pamphlets, posters, etc., but does not include advertisement in newspapers. The said section can be amended so as to include advertisement in print media also. However, the matter of regulating advertisements in the print media pertains to the Ministry of Information and Broadcasting and Press Council of India and the proposal can be considered on the basis of inputs from them.

7. Negative / Neutral Voting The Committee on Electoral Reforms (Dinesh Goswami Committee) did not favour it and was of the view that it does not serve any purpose.

8. Appointment of Appellate Authority in Districts against Orders of Electoral Registration Officers Enacted vide Representation of the People (Amendment) Act, 2009 (Act 41 of 2009).

9. Compulsory Maintenance of Accounts by Political Parties and Audit thereof. The Election and Other Related Laws (Amendment) Bill, 2002 (introduced in Lok Sabha on 19th March, 2002) sought to introduce section 29D in the Representation of the People Act, 1951 in this regard. The Department-Related Parliamentary Standing Committee on Home Affairs while examining the matter desired that the audit of accounts of donation received by the political party may be done through Chartered Accountants



appointed by it as at present, as per the provisions of the Income-tax Act (section 13A). In view thereof the Committee recommended deletion of entire section 29D in clause 2 of the Bill.

#### 10. Government Sponsored Advertisements.

The Commission proposes that where any general election is due on the expiration of the term of the House, advertisements of achievements of the governments, either Central or State, in any manner, should be prohibited for a period of six months prior to the date of expiry of the term of the House. The proposal requires further examination. Advertisements on poverty alleviation and health related schemes could be exempted. Advertisements revealing information on matters of urgent public interest could also be exempted. Further, since advertisements could be prohibited from carrying the name of any political party or photographs of leaders and Ministers.

#### 11. Political Advertisements on Television and Cable Network.

This relates to consider amending the relevant provisions of the Cable Television Network (Regulation) Rules, 1994 to provide for suitable advertisement code and monitoring mechanism.

The issue of advertisements on television and cable networks, led to a lot of confusion during the recent general election. The Cable Television Network (Regulation) Rules, 1994, prohibit advertisements of political nature.

The matter pertains to the Ministry of Information and Broadcasting and that Ministry is able to judge the feasibility of evolving a suitable advertisement code and monitoring mechanism for advertisement on television and cable networks in consultation of the Election Commission and Legislative Department.

12. Composition of Election Commission and Constitutional Protection of all Members of the Commission and Independent Secretariat for the Commission. It was decided to include it as a proposal for regional and national consultation.

13. Expenses of Election Commission to be Treated as Charged. The proposal to make the expenses of the Election Commission of India 'charged' was considered by the Dinesh Goswami Committee but was not favoured. In 1994, the Government, however, introduced the Election Commission (Charging of Expenses on the Consolidated Fund of India) Bill, 1994 in Lok Sabha on 16.12.94 which lapsed on the dissolution of the Tenth Lok Sabha. The Department-Related Parliamentary Standing

Committee on Home Affairs in its 24th Report on the said Bill presented to Rajya Sabha on 28.11.1995 and was of the considered view that there is no need of passing the proposed Bill and recommends that the Bill be dropped

The Election Commission of India again made a similar proposal in 1997 which was placed before political parties in the all party meeting held on 22.5.1998 but no view was taken. Again, the Election Commission of India made the same proposal in May, 2003 and on the direction of the then Hon'ble Prime Minister the same was placed before the political parties in the all party meeting held on 29.10.2003. The debate on the proposal remained inconclusive.

14. Ban on Transfers of Election Officers on the Eve of Elections This is to amend section 13CC of the Representation of the People Act, 1950, and section 28A of the Representation of the People Act, 1951 to provide that no transfer shall be made, without the concurrence of the Commission, of any officer referred to therein, as soon as a general election/bye-election becomes due in any Parliamentary or Assembly Constituencies.

15. All Officials Appointed in Connection with Conduct of Elections to be included in Clause (7) of Section 123. Enacted vide Representation of the People (Amendment) Act, 2009 (Act 41 of 2009).

16. Anti-Defection Law

The question of disqualification of members on the grounds of defection should also be decided by the President and Governors, on the opinion of the Election Commission. No view has been taken.

17. Use of Common Electoral Rolls at Elections Conducted by the Election Commission and the State Election Commissions The matter has been examined and decided to await the outcome of the discussion between the Election Commission and State Election Commissions to sort out the modalities in this regard.

18. Simplification of Procedure for Disqualification of a Person Found Guilty of Corrupt Practice. Enacted vide Representation of the People (Amendment) Act, 2009 (Act 41 of 2009).

19. Same Number of Proposers for all Contesting Candidates -Amendment of Section 33 of the Representation of the People Act, 1951 It was decided to include it as a proposal for regional and national consultation.

20. Making of False Declaration in Connection with Election to be an Offence.

Making of any false statement or declaration before the Election Commission, Chief Electoral Officer, District Election Officer, Presiding Officer or any authority appointed under the Representation of the People Act, 1951, in connection with any electoral matter should be made an electoral offence under the said Act. The various legal provisions required to curb the willful furnishing of incorrect information in electoral procedures to ensure the free and fair election are already there in the Election Laws. Further, keeping in view a large population of this country being illiterate, there would be frequent instances of furnishing incorrect information inadvertently or without any malafide intention by the common man while the process of preparation of electoral rolls, etc. and hence, the proposal may create the fear in the minds of people abstaining themselves from the democratic process of the country.

#### 21. Rule Making Authority to be Vested in Election Commission

Making authority under the Representation of the People Act, 1950 and Representation of the People Act, 1951, should be conferred on the Election Commission, instead of on the Central Government, who should, however, be consulted by the Election Commission while framing any rule. Rule making power has to be vested only with the Government since rules are in the nature of subordinate legislation, the making of it shall be only with the Government which is answerable to Parliament. Rules are required to be laid before Parliament and can be modified and nullified if the Houses of Parliament resolve to do so. If rules were to be made by the Election Commission then amendment or modification by Parliament may lead to controversy.

#### 22. Registration and De-registration of Political Parties - Strengthening of Existing Provisions

Under the existing section 29A of the Representation of the People Act, 1951, another clause may be introduced authorising the Election Commission to issue necessary orders regulating registration and de-registration of political parties. In view the growing number of political parties registered with the Election Commission for perpetuity availing all the facilities like, tax exemption, political fund contributions, whereas the number of political parties regularly contest elections being limited to certain number of registered political parties, it is worthwhile to consider the proposal of the Election Commission.

In addition to the aforesaid 22 proposals the Election Commission of India has made, the Ministry of Law has a certain other proposals on electoral reforms, which are as under:-

(1) Election Expenditure in respect of the Teachers and Graduates constituencies:-

Under section 77 and 78 of the R.P. Act, 1951 every candidate in the election to the Lok Sabha and the Legislative Assemblies of State/UTs is required to maintain correct account of expenditure incurred/authorized in connection with his election and to lodge it with the DEO within the 30 days of election, whereas rule 90 of the Conduct of Elections Rules 1961 has prescribed a ceiling for expenditure that can be incurred in connection with these elections. However, there is no such provision under election laws requiring maintaining or lodging the account of election expenses or prescribing any ceiling of expenditure in the case of elections to the Council of States and the State Legislative Council.

The Election Commission is of the view that in the interest of free and fair election, there is urgent need to bring the elections to the Legislative Councils from the Teachers and Graduates' constituencies within the ambit of section 77 and 78 of the RP Act, 1951 and also prescribing a ceiling of expenditure that can be incurred/ authorized in these elections.

(2)Amendment to the Conduct of Election Rules, 1961 to provide for use of Totaliser for counting of Votes recorded in EVMs. No view has been taken.

(3) Restoration of Cycle of Rajya Sabha and Legislative Council:- Under article 80 and 171 of the Constitution every second year as nearly as possible one-third member of the Council of State and Legislative Council shall retire every second year. Due to non availability of the Legislative Assembly in certain States/Union Territory for continuous years, the cycle of the Rajya Sabha could not be maintained and eventually all the Members of the Council of States from that States get elected for a period of Six years. A similar situation is being faced in the case of Legislative Council in respect of the States of Bihar, U.P., Karnataka etc., due to non availability of Local Bodies, Assemblies for longer periods.

In this regard it may be submitted that the Election Commission has suggested some methods to be adopted to sort out these eventualities in future.

The Ld. Attorney General for India is of the view that the sanctity of the provisions of the Constitution may be maintained and the cycle of retirement of the Members of Rajya Sabha and Legislative Council should be restored.

(4) Appointment of Chief Election Commissioner (CEC) and other Election Commissioners (EC) and consequential matter:-

One of the Chief Election Commissioners has requested the Government to have a collegium consisting of the Prime Minister and Leader of Opposition etc. who is empowered to make

recommendations for appointments of the CEC and ECs. Further, it has also been suggested that there should be complete ban for ten years after retirement from the post of CEC to any **political post**.

## **BIBLIOGRAPHY**