

STRENGTHENING OF THE ELECTION PROCESS IN INDIA : PROBLEMS AND ISSUES

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I. INTRODUCTION

For building the confidence and to institutionalize the sense of democracy in the people, an independent body to monitor the election process of a country is very much anticipated. The democratic set up of our country has a variety of cultures, religions, clans, missionary sects, etc. which have emotionally percolated to the root of our civilization to influence, to any extent, the election process of our nation. The election process, for better management of a democratic set up in a civilized way, needs discernible co-operation from all corners of the society. There is separation of powers under the Constitution of India so that each and every organ could operate in its own domain with competence and independence, but the organs of the Constitution time and again attempt to encroach upon the autonomy of other organs and hence the courts have to intervene for maintaining the confidence of the people in the democratic set up. To monitor the holding of free and fair election in our country, the Constitution provides for constitution of an autonomous Election Commission¹.

Since long, the Election Commission has been in controversy for determining its significant role in giving more responsible government to the people of India. The democratic process, in India, is getting institutionalized because of the progress in all sectors and the initiatives advanced by academicians, jurists and political leaders have also enthused the common people to assert their right in the governance of the country. The Election Commission of India has been tasked to monitor the democratic process of India with an enliven role of sensitizing the people about their constitutional rights for strengthening the governance of the country. But the over-ambitiousness of the civil servants to assert their constitutional position time and again has raised the issues of abuse of the autonomy by the Commission. These issues are getting recognition from various corners of vested interests

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¹ Constitution of India, 1950, Article 324.

and the matter of autonomy is getting complicated and thought provoking for the jurists. In this article, an attempt has been made to discuss various aspects for strengthening the autonomy of Election Commission in particular and democracy of our country in general.

II. COMPOSITION OF THE ELECTION COMMISSION

Article 324, clause (2) provides that the Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix. Until Parliament makes any law in that behalf, the Chief Election Commissioner and other Election Commissioners are appointed by the President. When any other Election Commissioner is so appointed, the Chief Election Commissioner shall act as the Chairman of the Election Commission.² The President may also appoint, after consultation with the Election Commission, such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of its functions.³ The conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine. These rules, however, are subject to any law made by Parliament in this respect.⁴ The Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment.⁵ The Election Commissioners and Regional Commissioners cannot be removed from office before the expiry of their term except upon the recommendations of Chief Election Commissioner.

Initially the Election Commission was a single member body. However, the observation of the Supreme Court of India in case of *S.S. Dhanoa v. Union of India*⁶ and certain controversial decisions taken by the Chief Election Commission resulting in various confrontation between the Commission and the Government of India, gave an adventure to the

² Article 324 (3).

³ Article 324 (4).

⁴ Article 324 (5).

⁵ *Ibid.*

⁶ AIR 1991 SC 1745.

Government of India to provide for a multi-member Election Commission. The President of India promulgated the Chief Election Commissioner and Election Commissioners (Conditions of Service) Amendment Ordinance 1993, to amend the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991. Later on, the Ordinance was replaced by the Act passed by Parliament in 1994, which came into force on January 1, 1994. The Ordinance made Chief Election Commissioner on a par with other Election Commissioners and provided that business of the Commission would be transacted on the basis of unanimous decision and in case of difference of opinion, on the basis of opinion of the majority. The Supreme Court, in the case of *T.N. Seshan v. Union of India*⁷, unanimously upheld the constitutionality of the Act equating the status, powers and authority of the two Election Commissioners with that of the Chief Election Commissioner. The Court further held that the Chief Election Commissioner did not enjoy a status superior to other Election Commissioners even though there were differences between the service conditions of both of the occupants. The scheme of Article 324, it was held, clearly provided for a multi-member body comprising of the Chief Election Commissioner and other Election Commissioners.

III. CHIEF ELECTION COMMISSIONER: EQUAL OR SUPERIOR

The Chief Election Commissioner has hit the headlines recently⁸. Therefore it may be apposite to find out the actual legal position of the Chief Election Commissioner in relation to Election Commissioners.

By a reading of Article 324(2), it is clear that the Chief Election Commissioner is a must. However, the number of other Election Commissioners may be optional. Presently, the Election Commission consists of the Chief Election Commissioner and two other members. In view of Article 324(3), the CEC shall be the Chairman. The correct legal position as laid down by the Supreme Court in *T.N. Seshan v. Union of India*⁹ is as follows:

The provision that the ECs and the Regional Commissioners once

⁷ (1995) 4 SCC 611.

⁸ Justice S. Mohan, April 10, 2009, THE HINDU, New Delhi.

⁹ *Supra* n. 7.

appointed cannot be removed from office before the expiry of their tenure except on the recommendations of the Chief Election Commissioner *ensures their independence*. Of course, the recommendation for removal must be based on intelligible, and cogent considerations, which would have relation to efficient functioning of the Election Commission. That is so because this privilege has been conferred on the Chief Election Commissioner to ensure that the Election Commissioners as well as the Regional Commissioners are not at the mercy of political or executive bosses of the day. This check on the executive's power to remove is built into the second proviso to clause (5) to safeguard the independence of not only these functionaries but the Election Commission as a body.

The second proviso to Article 324(5) states categorically that the Election Commissioners shall not be removed from office except on the recommendation of the Chief Election Commissioner. At this juncture, the question may arise whether the Chief Election Commissioner can assume a superior status to Election Commissioners, or is equal with them. In first of the cases that arose, *S.S. Dhanoa v. Union of India*¹⁰ the Supreme Court held:

It is necessary to bear these features in mind because although clause (2) of the article states that the Commission will consist of both the Chief Election Commissioner and the Election Commissioner if and when appointed, it does not appear that the framers of the Constitution desired to give the same status to the Election Commissioners as that of the Chief Election Commissioner. The Chief Election Commissioner does not, therefore, appear to be *primus inter pares*, i.e. first among the equals, but is intended to be placed in a distinctly higher position.

Had the law rested there, the Chief Election Commissioner could of course claim to enjoy a superior status. But later, in the case of *T.N. Seshan v. Union of India*¹¹, this view was not accepted. In this case, the Supreme

¹⁰ *Supra* n. 6.

¹¹ *Supra* n. 7.

Court held:

While it is true that under the scheme of Article 324, the conditions of service and tenure of office of all the functionaries of the Election Commission have to be determined by the President unless determined by law made by parliament, it is only in the case of the Chief Election Commissioner that the first proviso to clause (5) lays down that they cannot be varied to the disadvantage of the Chief Election Commissioner after his appointment. Such a protection is not extended to the Election Commissioners. But it must be remembered that by virtue of the Ordinance the Chief Election Commissioner and the Election Commissioners are placed on a par in the matter of salary etc. Does the absence of such provision for Election Commissioners make the Chief Election Commissioner superior to the Election Commissioners?

In the case of the Chief Election Commissioner he can be removed from office in like manner and on the like ground as a Judge of the Supreme Court whereas the Election Commissioners can be removed on the recommendation of the Chief Election Commissioner. That, however, is not for an idea for conferring a higher status on the CEC. To so hold is to overlook the scheme of Article 324 of the Constitution. It must be remembered that the Chief Election Commissioner is intended to be a permanent incumbent and, therefore, in order to preserve and safeguard his independence, he had to be treated differently. That is because there cannot be an Election Commission without a Chief Election Commissioner. That is not the case with other Election Commissioners. They are not intended to be permanent incumbents, Clause (2) of Article 324 itself suggests that the number of Election Commissioners can vary from time to time. In the very nature of things, therefore, they could not be conferred the type of irrevocability that is bestowed on the Chief Election Commissioner. If that were to be done, the entire scheme of Article 324 would have to undergo a change. In the scheme of things, therefore, the power to remove in certain cases had to be retained.¹²

¹² *Supra* n. 8.

Having insulated the Chief Election Commissioner from external political or executive pressures, confidence was reposed in this independent functionary to safeguard the independence of his Election Commissioners and even Regional Commissioners by enjoining that they cannot be removed except on the recommendation of the Chief Election Commissioner. This is evident from the following statement found in the speech of Sri K.M. Munshi in the Constituent Assembly when he supported the amended draft submitted by Dr. Ambedkar:

We cannot have an Election Commission sitting all the time during those five years doing nothing. The Chief Election Commissioner will continue to be a whole time officer performing the duties of his office and looking after the work from day to day but when major elections take place in the country, either provincial or Central, the Commission must be enlarged to cope with the work. More members therefore have to be added to the Commission. They are, no doubt, to be appointed by the President. Therefore, to that extent their independence is ensured. So there is no believed that these temporary Election Commissioners will not have the necessary measure of independence¹³.

Since the Election Commissioners were not intended to be permanent appointees, they could not be granted the irrevocability protection of the Chief Election Commissioner, a permanent incumbent, and, therefore, they were placed under the protective umbrella of an independent Chief Election Commissioner. This aspect of the matter escaped the attention of the learned Judges who decided the *Dhanoa case*¹⁴.

Merely because the Chief Election Commissioner is obliged to act as a chairman, could it be said that he is a superior? That question is answered in the negative by the Supreme Court in *Seshan case*.¹⁵ This leads us to the conclusion that Chief Election Commissioner and the Election Commissioners enjoy equal status. The object of clause (5) is that Election Commissioners cannot be removed from office except on the recommendation of the Chief Election Commissioner.

¹³ Constituent Assembly Debates.

¹⁴ *Supra* n. 6.

¹⁵ *Supra* n. 7.

The scheme of article 324 of the Constitution shows that it provides for the setting up of an independent body or commission which would be permanently in session with at least one officer, namely, the Chief Election Commissioner, and left it to the President to further add to the Commission such number of Election Commissioners as he may consider appropriate from time to time. Clause (3) of article 324 makes it clear that when the Election Commission is a multi member body, the Chief Election Commissioner shall act as its Chairman. What will be his role as a Chairman has not been specifically spelt out by the said article. Clause (4) of this article further provides for the appointment of Regional Commissioners to assist the Election Commission in the performance of its functions set out in clause (1).

By the first proviso to clause (5) of article 324, the Election Commissioners and the Regional Commissioners have been assured independence of functioning by providing that they cannot be removed except on the recommendation of the Chief Election Commissioner. Of course, the recommendation for removal must be based on intelligible, and cogent considerations which would have relation to efficient functioning of the Election Commission. That is so because this privilege has been conferred on the Chief Election Commissioner to ensure that the Election Commissioners as well as the Regional Commissioners are not at the mercy of political or executive bosses of the day. It is necessary to realize that this check on the executive's power to remove is built into the second proviso to clause (5) to safeguard the independence of not only these functionaries but the Election Commission as a body. If, therefore, the power were to be exercisable by the Chief Election Commissioner as per his whim and caprice, the Chief Election Commissioner himself would become an instrument of oppression and would destroy the independence of the Election Commissioners and the Regional Commissioners if they are required to function under the threat of the Chief Election Commissioner recommending their removal. The Chief Election Commissioner must exercise this power only when *forced by unavoidable* reasons, which are conducive to efficient functioning of the Election Commission.

The Chief Election Commissioner cannot exercise his power *suo motu* because the members of the Commission are of equal status. If *suo motu* power is conferred on the Chief Election Commissioner, it will amount to

an assumption of superiority, which is not warranted and will obliterate the equality. However, it is logical to conclude that if the Election Commission is to function as a body, such *suo motu* recommendation by the Chief Election Commissioner would nullify the function of the Commission. The Election Commissioners will be more interested in dancing to the tune of Chief Election Commissioner and try to be in his good books. This cannot be the intent of the Constitution under Article 324(5). Such a situation will never be conducive to an effective functioning of the Commission. The conclusion, therefore, is inescapable that the power of recommendation cannot be exercised *suo motu*.¹⁶

IV. STRENGTHENING OF ELECTORAL SYSTEM

There are many pillars of democracy, including an independent judiciary, a free press, and free and fair elections. In our country, the first two are intact to a great extent, but not the third. It is open secret that most reprehensible efforts are made by the political parties to acquire the support of criminals to win elections. In the 14th Lok Sabha, as many as 93 MPs had criminal charges pending against them. Their trial proceedings have not attained finality.¹⁷

Many a times, the initiatives have been advanced to cleanse the election process from various illegal *modus operandi*. But the decisive resistance of the political parties to obstruct the building of consensus on decriminalizing the elections, restrictions on the role of money power in elections have deprived the democratic process of our country to govern the people to the extent which was dreamt of by the framers of the Constitution of India. Some facts which halt our democratic process to be sound and healthy are :-

A. Elections Criminalized

Section 8 of the Representation of the Peoples Act, 1951 requires a conviction for a period of two years to disqualify a candidate from contesting. If one is found guilty of offences under special laws, one would

¹⁶ *Supra* n. 8.

¹⁷ K.K. Venugopal, *Re-democratising the electoral system*, THE HINDU, April 9, 2009, p. 8.

stand disqualified irrespective of the period of sentence. The principle that is relied upon to protect the candidate from disqualification when serious charges are pending is that of criminal jurisprudence – that a person is presumed innocent unless found guilty. However, this is only for the purpose of preventing punishment by way of incarceration or fine. There is no fundamental right to contest an election to Parliament or Legislative Assembly¹⁸. A statute can take away the right of such a person to contest, on the basis of the higher principle of maintaining the purity of elections. Under criminal law, there are at least three stages at which an accused can be relieved of charges. A magistrate trying an offence has first to take cognizance of the charge-sheet and then satisfy himself that prima facie an offence has been made out, after applying his mind to the statements and the documents annexed to the Police Report. The case could be closed at this stage. Thereafter, the accused has an opportunity at the time of framing of charges to show that no prima facie case is made out or that no reasonable grounds exist to suspect him of the commission of the offence. He would then be discharged. Lastly, an accused could seek quashing of charges under Section 482 of the Criminal Procedure Code. It would, therefore, be incorrect to apply the presumption of innocence, in a wooden fashion, to the issue of disqualification of a candidate contesting elections without taking note of the damage that otherwise would be caused to the democratic process. Section 8 of the Representation of Peoples Act will have to be amended so that a person against whom charges have been framed by a court for an offence mentioned in Section 8(1), or a person who is charged with an offence which carries a sentence of imprisonment of more than two years, would stand disqualified. However, it is only in a case where the charge-sheet has been filed a year prior to the notification of elections that disqualification should apply. Otherwise a rival could easily file a false case and have a charge-sheet framed, leaving no time for the accused to get a discharge or have the charge-sheet set aside.

In the absence of such an amendment to Section 8 of the Representation of People Act, the Supreme Court in 2002 delivered a

¹⁸ *K. Prabhakaran v. P. Jayarajan*, AIR 2005 SC 688; *Kuldip Nayar v. Union of India* (2006)7SCC1.

judgment in *Union of India v. Association of Democratic Reforms*¹⁹, requiring every candidate to disclose, at the time of filing of nomination, any charges pending against him for offences that may involve punishment for a period above two years or otherwise. It will be a great day for India if, instead of an amendment to the Representation of Peoples Act, 1951, every party obtains from prospective candidates a statement of the pending criminal cases against them and allots the ticket only to such among them who possess a clean record. Perhaps Section 29-A²⁰ should be amended to incorporate in the Constitution and objectives of all parties that no candidate with criminal charges pending against him would be allotted the ticket.

B. Funding of Elections

We notice that the money power has been stultifying the roots of democracy of our country. The courts have pointed out the consequences of permitting wealth and affluence to dominate the electoral process. Vast contributions by corporations and companies continued to flow into the coffers of political parties until 1969, when a total ban was imposed through Section 293-A of the Company Act²¹. The statement of objects and reasons of the Amendment said : "A view has been expressed that such contributions have a tendency to corrupt political life and to adversely affect the healthy growth of democracy in the country. It is, therefore, proposed to ban such contributions. In 1985, there was a sea change in the thinking when, through a further amendment to Section 293-A²², the ban was lifted with a view to permitting the corporate sector to play a legitimate role within the defined norms in the functioning of our democracy. The ban, however, continued in respect of government companies. Companies in the private sector could donate upto five per cent of their average profit for the previous three years to a party.

When the 1969 amendment banning contributions to parties was passed, it was said that such contributions have a tendency to corrupt political life and to adversely affect the health of democracy in the country. Time cannot neutralize the effect of these words. The real solution is to snap

¹⁹ (2002)5SCC 294.

²⁰ The Representation of Peoples Act, 1951.

²¹ The Company Act, 1956.

²² *Ibid.*

the link between donor and political party so that parties do not offer promises and favours in return for money. Corporate contributions should be put in an election fund maintained by the government, from which money will be distributed on the basis of guidelines to parties. The alternative is the levy of a surcharge on income tax paid by corporations so that they fulfill their role in a democracy.

As in many countries of the world, the ideal situation is state funding of elections. It is partly to achieve the objective of state funding that Sections 39-A, 78-A, and 78-B were added to the Representation of People Act, 1951. Section 39-A provides for equitable sharing of time on cable TV networks and other electronic media by recognized parties. Section 78-A provides for free supply of electoral rolls to recognized parties, and Section 78-B for the supply of certain items to candidates. No provision is made to implement Section 78-B.

C. Effect of the Model Code of Conduct

The Election Commission has been responsible for bringing about order and discipline in elections. The model code of conduct has evolved over time into a stringent deterrent against malpractices and deviations. The regulation and control of the poll throughout the country is an exercise that cannot be replicated by any country, however advanced the technology. The fact that all the votes are counted in a day, and the results announced, is itself amazing. The independence and integrity of the Election Commission and of its machinery bode well for Indian democracy. It is an unhappy part of history that morality in the public life has been declining and one of the pillars of democracy is likely to be eroded.

V. CONCLUSION

The common people are under illusion that the democratic initiatives have been destined to improve their lot but in reality the developers of the democratic incentives are concentrating upon the grabbing and smuggling the public wealth. The media, jurists and spirited NGOs can sensitize the people to instill recognition for their votes so that they could serve as a spark plug to give robust start boost to the democratic process.

For stabilizing the democracy of India, a decisive step on the part of the common people to make accountable the political leaders is a minimal

standard in this high speed age of scientific temperament. To facilitate a quicker response to the problem of electoral system, the public through a concerted opinion should pressurize the government to legislate the provisions for cleansing the electoral system so that the criminals could be debarred, the money could not play a decisive role, the election commission could also monitor the democratic process with an autonomous sense thereby giving a strong and stable government to the people of India.