



# LAW COMMISSION OF INDIA

255th report on **Electoral Reforms**

March, 2015



**GOVERNMENT OF INDIA**

**LAW COMMISSION  
OF  
INDIA**

**Report No.255**

# **Electoral Reforms**

**March 2015**

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

12 March, 2015

Dear Shri Sadananda Gowda ji,

The Ministry of Law and Justice, in January 2013, requested the Twentieth Law Commission of India to consider the issue of "Electoral Reforms" in its entirety and suggest comprehensive measures for changes in the law. While working on the subject, the Supreme Court of India, in the matter of "Public Interest Foundation & Others V. Union of India & Anr - Writ Petition (Civil) No. 536 of 2011, directed the Law Commission of India to make its suggestions on two specific issues, viz., (i) 'curbing criminalization of politics and needed law reforms'; and (ii) 'impact and consequences of candidates filing false affidavits and needed law reforms to check such practice'. In the light of this judgment, the Commission worked specifically on these two areas and, after series of discussions, followed by a National Consultation held on 1<sup>st</sup> February 2014, submitted its 244<sup>th</sup> Report titled "Electoral Disqualifications" on 24<sup>th</sup> February 2014 to the Government of India.

After the submission of Report No.244, the Commission circulated another questionnaire to all registered national and State political parties seeking their views on ten points, the response received was not very encouraging, though. However, the Commission undertook an extensive study to suggest electoral reforms, held various rounds of discussions with the stakeholders and analysed in-depth the issues involved. After detailed deliberations, the Commission has now come up with its recommendations which are put in the form its final Report, **Report No.255**, titled "**Electoral Reforms**", which is sent herewith for consideration by the Government.

*With warm regards,*

*Yours sincerely,*

Sd/-

**[Ajit Prakash Shah]**

**Shri D.V. Sadananda Gowda**  
**Hon'ble Minister for Law and Justice**  
**Government of India**  
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## CHAPTER I

### BACKGROUND TO THE REPORT

#### A. History of Electoral Reform in India

*"I mean to diminish no individual, institution or phase in our history when I say that India is valued the world over for a great many things, but for three over all others : The Taj Mahal; Mahatma Gandhi; and India's electoral democracy."*

– Gopalkrishna Gandhi (2013)<sup>1</sup>

*"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."*

– Supreme Court of India (1978)<sup>2</sup>

1.1 These two quotes, although more than three decades apart, speak to the same message of the importance of democracy, and hence, purity in the election process. It is trite to say but important to note that a fair and unbiased electoral process, with greater citizen participation is fundamental to safeguarding the values of democracy.

1.2 Maintaining the purity of the electoral process however, requires a multi-pronged approach, which includes removing the influence of money and criminal elements in politics, expediting the disposal of election petitions, introducing internal democracy and financial transparency in the functioning of the political parties, strengthening the Election Commission of India (*hereinafter* "ECI"), and regulating opinion polls and paid news.

1.3 Unfortunately, these are some of the issues, which have plagued the Indian electoral system over the decades and have eroded the trust of many people in the country. Consequently, over the years, a number of committees have examined some of the major challenges and issues affecting India's electoral system and have made suggestions accordingly. Both the Law Commission in its 170<sup>th</sup> Report on "*Reform of the Electoral Laws*" in 1999 and the ECI in its seminal 2004 "*Proposed Electoral Reforms*" report have addressed some of these challenges. Other Committees and Commissions, which have examined these issues, are:

- The Goswami Committee on Electoral Reforms (1990)
- The Vohra Committee Report (1993)

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<sup>1</sup> In the foreword to Mr. S.Y. Qureshi's book, *AN UNDOCUMENTED WONDER: THE MAKING OF THE GREAT INDIAN ELECTION* ix (2014).

<sup>2</sup> *Mohinder Singh Gill v. Chief Election Commissioner*, (1978) 1 SCC 405, 424, at para 23.

- The Indrajit Gupta Committee on State Funding of Elections (1998)
- The Law Commission Report on Reform of the Electoral Laws (1999)
- The National Commission to Review the Working of the Constitution (2001)
- The ECI – Proposed Electoral Reforms (2004)
- The Second Administrative Reforms Commission (2008) (*hereinafter* (“**ARC**”))

Unfortunately, their recommendations were not followed by legislative action, required for the enhancement of the quality of democracy, by reducing the influence of money and media in politics and ensuring free and fair elections.

## **B. Consultation Paper Issued by the Law Commission**

1.4 In January 2013, the Ministry of Law and Justice, Government of India requested the Twentieth Law Commission to consider the issue of “Electoral Reforms” in its entirety and suggest comprehensive measures for changes in the law. Accordingly, the Commission, under the guidance of the then Chairman, Justice (Retd.) D. K. Jain, former Judge of the Supreme Court of India, prepared and circulated a Consultation Paper in this regard.

1.5 The Consultation Paper listed eight major issues for consideration, including, de-criminalisation of politics and disqualification of candidates; need to strengthen provisions relating to the period of disqualification; false affidavits; state funding of election expenses and donations to political parties; regulation of the conduct of political parties; adjudication of election disputes and enhancement of punishment for electoral offences; issues pertaining to the role of the electronic and print media, and various other issues.

1.6 The Consultation Paper was widely circulated amongst – political parties and elected representatives, Houses of Parliament and State Legislatures, High Court Bar Associations, the ECI, heads of other important National Commissions and institutions, civil society organisations, jurists and academics and other eminent and public spirited persons – in a bid to get diverse and comprehensive feedback from all these stakeholders.

1.7 The Commission received over 157 responses, with the largest number of responses being received from individuals, followed by civil society organisations. The ECI was the only Commission that sent its response, and former Chief Election Commissioners (*hereinafter* “**CEC**”) were also consulted. However, the response from the political class was discouraging, with only one national party, being the Indian National Congress, and one registered party, being the Welfare Party of India sending in their views.

Further, only eight Members of Parliament, four each from the Lok Sabha and Rajya Sabha, responded.

### **C. The 244th Report of the Law Commission**

1.8 While the Commission was working towards preparing a Report to submit to the Government, the Hon'ble Supreme Court passed an order on 16<sup>th</sup> December 2013 in *Public Interest Foundation v. Union of India*, W.P. (Civil) 536 of 2011, *vide* D.O. No. 4604/2011/SC/PIL(W) dated 21st December, 2013 requesting the Law Commission to “expedite consideration” for giving a report on the two issues of (a) de-criminalisation of politics and (b) disqualification for filing false affidavits by the end of February 2014.

1.9 Subsequently, a National Consultation on these two issues was organised by the Commission on 1<sup>st</sup> February 2014, and various political parties<sup>3</sup> were represented. Apart from the parties, a cross-section of stakeholders from all parts of society – such as a retired Supreme Court judge and former Chairman of the Law Commission; various senior advocates, a former CEC, members of the ECI; a Member of Parliament; and various representatives from the Bar and the Bench, from academia, and from civil society organisations – were also present.

1.10 This culminated in the submission of the first part of the Commission's work on decriminalisation of politics and disqualification for filing false affidavits in the form of the 244<sup>th</sup> Report titled “*Electoral Disqualifications*” on 24<sup>th</sup> February 2014. The Commission's recommendations were subsequently forwarded to the Hon'ble Supreme Court.

### **D. The Present Report**

1.11 After submitting the 244<sup>th</sup> Report, the Commission circulated another questionnaire to all the registered national and State political parties requesting their views on issues such as possible amendments to the Tenth Schedule of the Constitution to do away with the concept of ‘merger’ and ‘split’; expediting the disposal of election petitions; giving statutory status to the Model Code of Conduct; incorporating the right to recall in the Representation of People Act, 1951 (*hereinafter* “**RPA**”); the right to reject principle and the None of the Above Option (*hereinafter* “**NOTA**”); the status of independent candidates; whether candidates should be allowed to contest elections from more than one constituency; making ‘paid news’ an electoral

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<sup>3</sup> These included the All India NR Congress (Pondicherry), All Jharkhand Students Union Party (Jharkhand), Biju Janata Dal, Communist Party of India, Communist Party of India (Marxist), Nationalist Congress Party, J & K National Panthers Party, Rashtriya Lok Dal, and Telangana Rashtra Samithi.

offence/corrupt practice; and regulating opinion polls during the election period. The Present Report, forming the second part of the Commission's work, seeks to examine these issues; the issues raised in the earlier consultation paper; and other related issues; to suggest amendments to the Constitution, the RPA, 1951 and other laws to strengthen our electoral system further.

1.12 While the Commission was preparing the second part of its Report dealing with the aforementioned issues, the Supreme Court, in its latest order dated 16<sup>th</sup> January 2015, in a PIL in *Yogesh Gupta v ECI*,<sup>4</sup> recorded the government's submission that it would seek the views of the Law Commission, and the submission of an interim report, on the issue of totaliser for counting votes. Hence, the Commission has given its recommendations on the same.

1.13 The Commission hoped to receive constructive suggestions from the political parties to assist it in the submission of the second part of its Report, dealing with the issues in the questionnaire. However, once again, the Commission received very few responses from the various political parties, with only two national parties (being the Indian National Congress and the Communist Party of India (Marxist)) and three registered state parties (being the Shiv Sena, the Zoram Nationalist Party, the People's Party of Arunachal) sending in their views. This was very discouraging given that political parties are one of the most important stakeholders in the electoral process.

1.14 In order to undertake a study for suggesting amendments to the various laws and the Constitution, the Commission formed a sub-committee comprising of the Chairman, Justice S.N. Kapoor, Professor (Dr.) Mool Chand Sharma, Mr. Arghya Sengupta, Ms. Chinmayee Arun, Ms. Srijoni Sen, Ms. Ujjwala Uppaluri, Ms. Vrinda Bhandari, and Ms. Ritwika Sharma. The Commission then consulted with three former CEC's, namely Mr. T.S. Krishnamurthy, Mr. N. Gopalaswamy and Mr. S.Y. Qureshi, and Mr. S.K. Mendiratta, Legal Advisor to the ECI. In its deliberations, Mr. Gautam Bhatia, Mr. Sameer Rohatagi and Mr. Pranay Lekhi also assisted the Commission.

1.15 The Commission would also like to place on record its special appreciation for Ms. Srijoni Sen, Ms. Vrinda Bhandari, and Ms. Ritwika Sharma, Consultants to the Commission, whose inputs were incisive, vital and require special mention. They played a key role in drafting the Report.

1.16 Thereafter, upon extensive deliberations, discussions and in-depth study, the Commission has given shape to the present Report.

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<sup>4</sup> WP (Civil) No. 422/2014 order of the Supreme Court on 08.09.2014.

## **CHAPTER II**

### **ELECTION FINANCE REFORM**

2.1 Electoral reforms often contain proposals for reforming election funding, and candidate and party expenditure. This Chapter discusses the issue under three broad sub-groups: limits on political contributions and party and candidate expenditure; disclosure norms and requirements; and State funding of elections. These issues are governed by the provisions of the RPA, the Conduct of Election Rules, 1961 (*hereinafter* “**Election Rules**”), the Companies Act, 2013, and the Income Tax Act, 1961 (*hereinafter* “**IT Act**”).

2.2 Part A of this Section provides a brief summary snapshot of the relevant laws governing each of the three aspects, while Part B discusses the need for election finance reform. Part C analyses the laws regulating election expenditure, contributions, and disclosure and Part D provides the comparative perspective. Part E then describes the legal lacunae causing the under-reporting of election spending while Part F examines the case for State funding of elections. Part G concludes with a summary of recommendations.

#### **A. The Current Law: A Summary Snapshot**

2.3 The law regulating election finance in India has to be ascertained after examining the provisions of the RPA and Election Rules, the Companies Act, the IT Act, and the Foreign Contribution (Regulation) Act. This section briefly summarises the law in a tabular form.<sup>5</sup>

	<b>Existing Regulation</b>	<b>Applicable Law</b>
<b>Limits on Expenditure</b>	<p>Yes</p> <ul style="list-style-type: none"><li>• Between Rs. 54-70 lakhs for Parliamentary constituencies and Rs. 20-28 lakhs for Assembly constituencies</li><li>• Includes party and supporter spending towards a candidate’s campaign</li><li>• Excludes expenditure incurred by “leaders of a political party” for travel for propagating the party’s program</li><li>• Excludes expenditure by parties or their supporters incurred for generally propagating the party’s program as long as no specific candidate is mentioned (given s. 77’s focus is on “candidate” and not party)</li></ul>	<ul style="list-style-type: none"><li>• S. 77, RPA</li><li>• Rule 90, Election Rules, 1961 as amended by Conduct of Elections (Amendment) Rules, 2014 dated 28<sup>th</sup> February, 2014</li></ul>

<sup>5</sup> The table is a modification of Table 3, in PRS Legislative Research, *Financing of Election Campaigns*, 18<sup>th</sup> November 2008 at <http://www.prsindia.org/administrator/uploads/general/1370582100~~Financing%20of%20Election%20Campaigns.pdf>.

<b>Disclosure of Expenditure</b>	True copy of account of election expenses of every contesting candidate lodged with the District Election Commissioner within thirty days of election of returned candidate	<ul style="list-style-type: none"> <li>• S. 77, 78, RPA</li> <li>• Part VIIA, VIII, Election Rules, 1961</li> </ul>
<b>Limits on Contribution</b>	<p>None</p> <ul style="list-style-type: none"> <li>• No limits on individual contributions</li> <li>• Corporate contributions to political parties are allowed as long as the (non-government) company is three years old; its aggregate contribution in every financial year is below 7.5% of its average net profits during the three immediately preceding financial years; and it is authorized by a Board of Directors' resolution</li> <li>• Corporate contributions to parties or electoral trusts entitled to deduction from total income</li> <li>• Ban on foreign contribution to candidate or political party</li> <li>• No limits on political party accepting contribution</li> </ul>	<ul style="list-style-type: none"> <li>• S. 29B, RPA</li> <li>• S. 182(1), Companies Act</li> <li>• S. 3 and 4, Foreign Contribution (Regulation) Act, 2010</li> </ul>
<b>Disclosure of Contribution</b>	<ul style="list-style-type: none"> <li>• By party: Report detailing all contributions above Rs. 20,000 received from any person or company submitted in each financial year to the Election Commission</li> <li>• By company: Profit and Loss account will detail the total amount contributed and the name of the party to which contribution made in every financial year</li> </ul>	<ul style="list-style-type: none"> <li>• S. 29C, RPA</li> <li>• S. 182(3), Companies Act</li> <li>• S. 13A, S. 80GGB and 80GGC, IT Act</li> </ul>
<b>Public Funding of Election Campaigns</b>	<p>Partial</p> <ul style="list-style-type: none"> <li>• No direct State subsidy</li> <li>• Partial in kind subsidy in the form of free allocated air time on state owned electronic media (since 1996) to parties based on their past performance</li> <li>• Free supply of copies of electoral rolls and identity slips of electors to candidates</li> </ul>	<ul style="list-style-type: none"> <li>• S. 39A, 78A and 78B, RPA (introduced by the 2003 amendment)</li> </ul>
<b>Penalties</b>	<p>Both civil and criminal in nature and affect</p> <ul style="list-style-type: none"> <li>• The candidate: disqualification from being a voter or standing in elections if convicted of corrupt practices or failure to lodge election expenses (3 years)</li> <li>• The party: loses IT exemptions</li> <li>• Company: Fines and imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>• S. 8A, 10A, 11A, 123(6), RPA</li> <li>• S. 182(4), Companies Act</li> <li>• S. 13A, IT Act</li> </ul>

## B. Need for Election Finance Reform

2.4 It is now well established that money plays a big role in politics, whether in the conduct, or campaigning, for elections. The Election Commission of India (*hereinafter* "ECI"), in its guidelines issued on 29<sup>th</sup> August 2014, recognised that "*concerns have been expressed in various quarters that money power is disturbing the level playing field and vitiating the purity of elections.*"<sup>6</sup> What gives rise to these concerns about the role of big money in politics? These are not mere theoretical debates but are actual problems afflicting the electoral process in India. Money, often from illegitimate sources, results in "undisguised bullying" when it is used (both authorised and unauthorised) to buy muscle power, weapons, or to unduly influence voters through liquor, cash, gifts. Currency notes come first in containers, then in truckloads, moving to wholesale/small retail forms, and finally to suitcases and in people's pockets. Mr. Qureshi, in his book, documents instances of Returning Officers and Chief Electoral Officers in Tamil Nadu seizing crores of rupees in cash, bundles of saris and dhotis and hundreds of gas stoves.<sup>7</sup> It is evident that money is used in myriad of forms in today's election process, but what are its consequences? Why is there a need for election finance reform? The answers to these questions are articulated below.

2.5 **First**, is the undeniable fact that financial superiority translates into electoral advantage, and so richer candidates and parties have a greater chance of winning elections. This is best articulated by the Supreme Court in *Kanwar Lal Gupta v Amar Nath Chawla* (*hereinafter* "**Kanwar Lal Gupta**"),<sup>8</sup> when it explained the influence of money as follows:

*"...money is bound to play an important part in the successful prosecution of an election campaign. Money supplies "assets for advertising and other forms of political solicitation that increases the candidate's exposure to the public." Not only can money buy advertising and canvassing facilities such as hoardings, posters, handbills, brochures etc. and all the other paraphernalia of an election campaign, but it can also provide the means for quick and speedy communications and movements and sophisticated campaign techniques and is also "a substitute for energy" in that paid workers can be employed where volunteers are found to be insufficient. The availability of large funds does ordinarily tend to increase the number of votes a candidate will receive. If, therefore, one political party or individual has larger resources available to it than another individual or political party, the former would certainly, under the present system of*

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<sup>6</sup> ECI, *Guidelines on Transparency and Accountability in Party Funds and Election Expenditure*, No. 76/PPEMS/Transparency/2013, 29<sup>th</sup> August 2014, at < [http://eci.nic.in/eci\\_main1/PolPar/Transparency/Guidelines\\_29082014.pdf](http://eci.nic.in/eci_main1/PolPar/Transparency/Guidelines_29082014.pdf)>.

<sup>7</sup> Qureshi, *supra* note 1, at x, xii, 259.

<sup>8</sup> (1975) 3 SCC 646.



*conducting elections, have an advantage over the latter in the electoral process”. [Emphasis supplied]*

2.6 The Supreme Court, in its 2014 decision in *Ashok Shankarrao Chavan v Madhavrao Kinhalkar* (hereinafter “**Ashok Shankarrao Chavan**”),<sup>9</sup> repeated this line of reasoning, where it highlighted how money was used to buy votes:

*“55. In recent times, when elections are being held it is widely reported in the Press and Media that money power plays a very vital role. Going by such reports and if it is true then it is highly unfortunate that many of the voters are prepared to sell their votes for a few hundred rupees. .... This view of ours is more so apt in the present day context, wherein money power virtually controls the whole field of election and that people are taken for a ride by such unscrupulous elements who want to gain the status of a Member of Parliament or the State Legislature by hook or crook.” [Emphasis supplied]*

2.7 **Second**, and connected to the above point is the issue of equality and equal footing between richer and poorer candidates. This can be explained with the help of the Court’s observations in *Kanwar Lal Gupta* on the rationale behind expenditure limits:

*“...it should be open to individual or any political party, howsoever small, to be able to contest an election on a footing of equality with any other individual or political party, howsoever rich and well financed it may be, and no individual or political party should be able to secure an advantage over others by reason of its superior financial strength.”<sup>10</sup>*

2.8 Similarly, in *Ashok Shankarrao Chavan*,<sup>11</sup> the Supreme Court noted that:

*“...it is a hard reality that if one is prepared to expend money to unimaginable limits only then can he be preferred to be nominated as a candidate for such membership, as against the credentials of genuine and deserving candidates.”*

2.9 The Court’s observations are not made in vacuum. A simple perusal of the Lok Sabha 2014 candidates reveals that 27% (or 2208 candidates) of all the candidates were “crorepati candidates,” and the average asset of each of the 8163 candidates was Rs. 3.16 crores. The percentage of crorepati candidates increased from 16% in 2009 Lok Sabha elections.<sup>12</sup>

2.10 **Third**, in complete contravention to the various laws and ECI notifications, there is widespread prevalence of black money, bribery, and

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<sup>9</sup> (2014) 7 SCC 99.

<sup>10</sup> (1975) 3 SCC 646.

<sup>11</sup> (2014) 7 SCC 99.

<sup>12</sup> Association of Democratic Reforms, *Lok Sabha Elections 2014: Analysis of Criminal Background, Financial, Education, Gender and Other Details of Candidates*, 9<sup>th</sup> May 2014.

*quid pro quo* corruption; this helps candidates fund their campaigns. The Supreme Court, affirming the conclusions of the 2002 report of the National Commission to Review the Working of the Constitution (*hereinafter* “NCRWC”),<sup>13</sup> recognized this reality in *PUCL v Union of India*<sup>14</sup> and stated:

*“One of the most critical problems in the matter of electoral reforms is the hard reality that for contesting an election one needs large amounts of money. The limits of expenditure prescribed are meaningless and almost never adhered to. As a result, it becomes difficult for the good and the honest to enter legislatures. It also creates a high degree of compulsion for corruption in the political arena. This has progressively polluted the entire system. Corruption, because it erodes performance, becomes one of the leading reasons for non-performance and compromised governance in the country. 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.” [Emphasis supplied]*

2.11 Likewise, in *Ashok Shankarrao Chavan*,<sup>15</sup> the Court observed:

*“48. It is common knowledge as is widely published in the Press and Media that nowadays in public elections payment of cash to the electorate is rampant and the Election Commission finds it extremely difficult to control such a menace. There is no truthfulness in the attitude and actions of the contesting candidates in sticking to the requirement of law, in particular to Section 77 and there is every attempt being made to violate the restrictions imposed in the matter of incurring election expenses with a view to woo the electorate concerned and thereby, gaining their votes in their favour by corrupt means viz by purchasing the votes.....*

*56. It is unfortunate that those who are really interested in the welfare of society and who are incapable of indulging in any such corrupt practices are virtually sidelined and are treated as totally ineligible for contesting the elections.” [Emphasis supplied]*

2.12 Candidates and political parties have devised ingenious ways to disguise the illegitimate sources and expenditure of money by holding community feasts, organising birthday parties and marriages, giving costly gifts, or topping up mobile phones. Money is sometimes transferred through cash packets slipped in newspapers, through rural moneylenders and

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<sup>13</sup> See Chapter 4, *Electoral Processes and Political Parties*, para 4.14 on “High Cost of Elections and Abuse of Money Power” in Ministry of Law and Justice, REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION (*hereinafter* “NCRWC Report”) at < <http://lawmin.nic.in/ncrwc/finalreport/v1ch4.htm>>.

<sup>14</sup> (2003) 4 SCC 399.

<sup>15</sup> (2014) 7 SCC 99.

pawnbrokers or by organising ‘fake aartis’.<sup>16</sup> In fact, Tamil Nadu gained notoriety for the “Thirumangalam formula”, when Rs. 5000 was paid per voter in Thirumangalam in Madurai in the 2009 bye-elections and other methods were used to distribute money and earn votes.<sup>17</sup>

2.13 **Fourth**, the current system tolerates, or at least does not prevent, lobbying and capture, where a sort of *quid pro quo* transpires between big donors and political parties/candidates. While the problem of bribery, corrupt practices and black money are important, to some extent, they have distracted from the larger problem of election finance and the capture of government by private individuals and interest groups. The Supreme Court, citing a note from Harvard Law Review on campaign finance regulation, articulated this concern in *Kanwar Lal Gupta* observing:

*“A less debatable objective of regulating campaign funds is the elimination of dangerous financial pressures on elected officials. Even if contributions are not motivated by an expected return in political favours, the legislator cannot overlook the effects of his decisions on the sources of campaign funds.”*<sup>18</sup>

2.14 Similarly, Justice Kennedy in *McConnell v Federal Election Commission* very well, when recognising the problem of solicitation as a corruption, said:

*“The making of a solicited gift is a quid both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates’ or officeholders’ solicitation of contributions are, therefore, regulations governing their receipt of quids.”*<sup>19</sup>

2.15 Unregulated, or under-regulated, election financing leads to two types of capture: the first involves cases where the industry / private entities use money to ensure less stringent regulation, and the money used to finance elections eventually leads to favourable policies.<sup>20</sup> The second involves cases of “deeper capture”, where through their disproportionate and self-serving

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<sup>16</sup> Qureshi, *supra* note 1, at 263-267.

<sup>17</sup> K. Raju, Dravidian Parties Trying to Thirumangalam Formula, THE HINDU, 25<sup>th</sup> January 2015; L. Srikrishna, AIDMK, DMK Retry Thirumangalam Formula, THE HINDU, 19<sup>th</sup> April 2014; Sarah Hiddleston, Cash for Votes, a Way of Political Life in South India, THE HINDU, 16<sup>th</sup> March 2011; Qureshi, *supra* note 1, at 245-267.

<sup>18</sup> Note, *Statutory Regulation of Political Campaign Funds*, 66 HARV L. REV. 1259, 1260 (1953).

<sup>19</sup> 540 US 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

<sup>20</sup> Teigler, *Theory of Economic Regulation*, 2(1) THE BELL J. OF ECON. & MANAGEMENT SC. 3, 11 (1971).

influence, corporations capture not just regulators, but also the views of ordinary citizens and what they think of as “public interest.”<sup>21</sup>

2.16 Thus, lobbying and capture give undue importance to big donors and certain interest groups, at the expense of the ordinary citizen and violates what the Indian Supreme Court terms, “*the right of equal participation [of each citizen in the polity]*.”<sup>22</sup> In *Kanwar Lal Gupta*, the Supreme Court expressed its views on this issue when it stated:

*“The other objective of limiting expenditure is to eliminate, as far as possible, the influence of big money in electoral process. If there were no limit on expenditure political parties would go all out for collecting contributions and obviously the largest contributions would be from the rich and the affluent who constitute but a fraction of the electorate. It is likely that some elected representatives would tend to share the views of the wealthy supporters of their political party, either because of shared background and association, increased access or subtle influences which condition their thinking.”*<sup>23</sup>

2.17 **Finally**, the argument for election finance reform is premised on a more philosophical argument that large campaign donations, even when legal, amount to what Lessig terms “institutional corruption”,<sup>24</sup> which compromise the political morality norms of a republican democracy. Here, instead of direct exchange of money or favours, candidates alter their views and convictions in a way that attracts the most funding. This change of perception leads to an erosion of public trust, which in turn affects the quality of democratic engagement.<sup>25</sup>

2.18 Having touched upon the need for election finance reform, it is useful to examine the laws regulating election expenditure, disclosure and contribution next.

## **C. Laws Regulating Election Expenditure, Contributions, and Disclosure**

### **(i) Laws regulating election expenditure for candidates**

2.19.1 Limits on electoral expenditure for contesting candidates have been set out in Section 77 of the RPA and the Election Rules, 1961, reproduced below:

**“Section 77: Account of election expenses and maximum thereof—**

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<sup>21</sup> Jon Hanson and David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 202-206 (2003)

<sup>22</sup> R.C. Poudyal v. Union of India, (1994) Supp 1 SCC 1267.

<sup>23</sup> Kanwar Lal Gupta v. Amar Nath Chawla, (1975) 3 SCC 646.

<sup>24</sup> Lawrence Lessig, REPUBLIC LOST 16, 107-114 (2011).

<sup>25</sup> *Ibid.*, at 28, 36.

- (1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between [the date on which he has been nominated] and the date of declaration of the result thereof, both dates inclusive.

*Explanation 1- For the removal of doubts, it is hereby declared that-*

- a) the expenditure incurred by leaders of a political party on account of travel by air or by any other means of transport for propagating programme of the political party shall not be deemed to be the expenditure in connection with the election incurred or authorised by a candidate of that political party or his election agent for the purposes of this sub-section.
- b) any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing done by any person in the service of the Government and belonging to any of the classes mentioned in clause (7) of section 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause shall not be deemed to be expenditure in connection with the election incurred or authorised by a candidate or by his election agent for the purposes of this sub-section.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.”

2.19.2 Section 77(3) of the RPA limits the electoral spending by candidates within the limits prescribed by Rule 90 of the Rules, stipulating the maximum election expenditure that can be incurred by a candidate in a parliamentary or assembly election. By the recent Conduct of Elections (Amendment) Rules, 2014, notified on 28<sup>th</sup> February 2014, the limit for candidate expenditure is between Rs. 54-70 lakhs for parliamentary constituencies, and between Rs. 20-28 lakhs for assembly constituencies.<sup>26</sup> The incurring or authorising expenditure in violation of Section 77 amounts to a corrupt practice under Section 123(6) of the RPA and can result in disqualification for a maximum period of six years, both as a candidate and a voter, under Sections 8A and 11A. Section 10A additionally provides for disqualification for failure to lodge accounts of election expenses.

**(ii) Laws regulating election expenditure for political parties: Third party expenditure**

2.20.1 Section 77 of the RPA does not directly limit the election expenditure of political parties, and this has given rise to the contested question of third party expenditure, namely the financing of a candidate's campaign by political parties, corporate donors, or well wishers.

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<sup>26</sup> ECI, *Conduct of Election (Amendment) Rules 2014*, No. 3/1/2014/SDR-Vol.-III, 5<sup>th</sup> March 2014, <[http://eci.nic.in/eci\\_main1/current/ImpIns1\\_06032014.pdf](http://eci.nic.in/eci_main1/current/ImpIns1_06032014.pdf)>.

2.20.2 Till 1975, the Supreme Court refused to regard third party expenditure as electoral expenditure within the meaning of Section 77 of the RPA.<sup>27</sup> This changed with *Kanwar Lal Gupta*, where the Supreme Court relied on the “authorisation” of expenditure by a candidate in excess of the election expenditure limits to note:

*“When a political party sponsoring a candidate incurs expenditure specifically in connection with his election, as distinguished from expenditure on general party propaganda, and the candidate knowingly takes advantage of it or participates in the programme or activity or consents to it or acquiesces in it, it would be reasonable to infer, save in special circumstances, that he impliedly authorised the political party to incur such expenditure; and he cannot escape the rigors of the ceiling by saying that he has not incurred expenditure but big political party has done so.”*<sup>28</sup>

2.20.3 Thus, the Court believed that the object of imposing individual expenditure limits would be frustrated if parties or other supporters were free to spend without any limits. Nevertheless, the RPA was amended in 1974 to nullify the effect of the above judgment by inserting an explanation to Section 77(1) to the effect that any third party expenditure in connection with a candidate’s election shall not be deemed to be expenditure incurred or authorised by a candidate.<sup>29</sup>

2.20.4 The constitutionality of the 1974 amendment was challenged in *P. Nalla Thampy Terah v Union of India*<sup>30</sup> on the grounds that it sanctioned discrimination between candidates and parties based on money power, and hence contravened Article 14. Rejecting this contention, albeit reluctantly, the Supreme Court held that it was not for the court to lay down policies in matters pertaining to elections and that:

*“Election laws are not designed to produce economic equality amongst citizens. They can, at best, provide an equal opportunity to all sections of society to project their respective points of view on the occasion of elections. The method, somewhat unfortunate, by which law has achieved that purpose, is by freeing all others except the candidate and*

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<sup>27</sup> *Karimji Rehmanji Chipa v. Abdurahim Tajuji*, 36 ELR 283; *Rananjaya Singh v. Baijnath Singh*, (1955) 1 SCR 671; *Magraj Patodia v. R. K. Birla* (1970) 2 SCC 888.

<sup>28</sup> *Kanwar Lal Gupta v. Amar Nath Chawla*, (1975) 3 SCC 646.

<sup>29</sup> Explanation 1, inserted vide the Representation of People (Amendment) Act, 1974 read as follows: “*Explanation 1. - Notwithstanding any judgment, order or decision of any court to the contrary, any expenditure incurred or authorized in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been, expenditure in connection with the election incurred or authorized by the candidate or by his election agent for the purposes of this sub-section.*”

<sup>30</sup> (1985) Supp. SCC 189, at paras 13-15.

*his election agent from the restriction on spending, so long as the expenditure is incurred or authorised by those others.”*

2.20.5 Subsequently, later benches criticised this decision and the position of law laid out in the 1974 amendment, noting that Section 123(6) of the RPA had become “nugatory and redundant”,<sup>31</sup> and that the practice of parties in not maintaining accounts of donations and expenses incurred in regard a candidate’s election made it difficult to determine “*whose money was actually spent through the hands of the party*”.<sup>32</sup> Eventually in the seminal case of *Common Cause, a Registered Society v. Union of India*,<sup>33</sup> the Supreme Court reversed the burden of proof on the candidate claiming the benefit of the exception created by the Explanation to Section 77, holding that even when expenses are claimed by a party, the (rebuttable) presumption shall be that they have been incurred or authorised by the candidate. The Court noted:

*“The expenditure (including that for which the candidate is seeking protection under Explanation I to Section 77 of R.P. Act) in connection with the election of a candidate - to the knowledge of the candidate or his election agent - shall be presumed to have been authorised by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption in accordance with law.....”*<sup>34</sup>

2.20.6 Finally, owing to much criticism of the Explanation appended to Section 77(1) by the 1974 Amendment Act, the said Explanation was deleted by the Election and Other Related Laws (Amendment) Act 2003 and replaced with the current Explanation, referred to above. Outside spending by parties and independent supporters must now be reported by the candidate, and counted towards the expenditure ceiling.

2.20.7 Thus, the current position is that the expenditure incurred by (a) the leaders of political party on account of travel by air or by any other means of transport for propagating the party’s programme and (b) the political parties or their supporters for generally propagating the party’s programme shall not be deemed to be expenditure in connection with the election incurred or authorised by a candidate of that political party under Section 77, RPA.

**(iii) Laws regulating disclosure of election expenditure for candidates and parties**

2.21.1 Pursuant to Sections 77(1) and 78 of the RPA read with Rule 86 of the Rules, all contesting candidates are also required to maintain a correct

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<sup>31</sup> C Narayanaswamy v C.K. Jaffar Sharief, 1994 Supp. (3) SCC 170.

<sup>32</sup> Gajanan Bapat v Dattaji Meghe, (1995) 5 SCC 437.

<sup>33</sup> (1996) 2 SCC 752.

<sup>34</sup> *Id*, at 764, para 23.

account of their election expenses and lodge a true copy of the same with the district election officer within thirty days from the date of election of the returning candidate. Contravention of the above provisions can be the basis for disqualification up to a period of three years under Section 10A of the RPA. It is important to note, as several Supreme Court decisions have done,<sup>35</sup> that a mere failure to maintain correct accounts is not in and of itself a corrupt practice under Section 123(6), provided the prescribed limit of expenditure is not exceeded. While discussing the relevance of these provisions in maintaining “absolute purity in elections”, the Supreme Court in *Ashok Shankarrao Chavan* noted as follows:

*“...Even the explanation to Sub-section (1) to Section 123 makes it clear that incurring of election expenses and the maintenance of account of those expenses are not an empty formality but the very purpose of stipulating such restrictions and directions under Section 77(1) and (3) read along with Section 78 explains the mandate to maintain absolute purity in elections by the contesting candidates. This is required in order to ensure that the process of the election is not sullied by resorting to unethical means while incurring election expenses.”*<sup>36</sup>

2.21.2 Further, the Supreme Court in *PUCL v Union of India*<sup>37</sup> endorsed the recommendations of the NCRWC’s Report,<sup>38</sup> which had highlighted the need for stronger disclosure and auditing norms observing:

*“4.14.3. ....The Commission recommends that the political parties as well as individual candidates be made subject to a proper statutory audit of the amounts they spend.... At the end of the election each candidate should submit an audited statement of expenses under specific heads. EC should devise specific formats for filing such statements so that fudging of accounts becomes difficult. Also, the audit should not only be mandatory but it should be enforced by the Election Commission.”*

2.21.3 The ECI issued transparency guidelines under Article 324 of the Constitution bearing No. 76/PPEMS/Transparency/2013 dated 29<sup>th</sup> August, 2014 w.e.f. 1<sup>st</sup> October 2014 after consultation with all the recognised political parties, and including the following:

- **On election expenses by parties:** the payment of any election expenditure over Rs. 20,000 should be made by the political parties via cheque or draft, and not by cash, unless there are no banking facilities

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<sup>35</sup> *Dalchand Jain v Narayan Shankar Trivedi*, (1969) 3 SCC 685; *L.R. Shivaramagowda v T.M. Chandrashekar* (1999) 1 SCC 666.

<sup>36</sup> (2014) 7 SCC 99

<sup>37</sup> (2003) 4 SCC 399.

<sup>38</sup> NCRWC Report, *supra* note 13, at para 4.14.3.



or the payment is made to a party functionary in lieu of salary or reimbursement.

- **On election expenses by unrecognised parties:** although not required by law to submit their election expenditures to the ECI, unrecognised parties are required under these guidelines to file their expenditure statements with the Chief Electoral Officer of the State in which the party headquarters are located.
- **On giving money to candidates:** although there is no cap on expenditure by political parties for propagating their program, parties are required to adhere to the cap prescribed in section 77(3), RPA and Rule 90, Election Rules while providing “financial assistance” to candidates in their election campaigns. These amounts should be paid only by a crossed account payee cheque or draft or bank transfer, and not by cash.
- **On accounts and audit:** all parties are required to maintain books of accounts (under s. 13A, IT Act) based on the guidance note issued by the Institute of Chartered Accountants of India to enable the calculation of their party income. These books need to be audited and certified by qualified, practicing Chartered Accountants, and are to be submitted annually (as audited annual accounts) to the ECI by 31<sup>st</sup> October, with a copy of the Auditor’s Report.

2.21.4 The ECI in a clarification bearing No. 76/PPEMS/Transparency/2013 dated 19<sup>th</sup> November, 2014 stated that its “lawful instructions” were issued to fill the legal vacuum in the area, pursuant to the Supreme Court’s order in *Mohinder Singh Gill v CEC*<sup>39</sup> and Article 324; and are binding on all parties.<sup>40</sup>

#### **(iv) Laws regulating contribution to political parties**

2.22.1 Section 29B of the RPA makes it very clear that there is no limit on political parties accepting contributions from individuals or corporations, so long as the donor is not a government company, or the donation is not a foreign contribution (since it is prohibited under Section 3 of the Foreign Contribution (Regulation) Act, 2010).

2.22.2 A significant source of political donations is through corporate funding, which is explicitly permitted under Section 182(1) of the Companies Act of 2013, dealing with prohibitions and restrictions regarding political contributions to political parties, and reproduced below:

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<sup>39</sup> AIR 1978 SC 851.

<sup>40</sup>ECI, *Clarification of Transparency Guidelines for the Political Parties issued by the ECI*, No. 76/contribution/Transparency/2013, 19<sup>th</sup> November 2014  
<[http://eci.nic.in/eci\\_main1/PolPar/Transparency/Clarification%20of%20Transparency%20guideline%20for%20political%20parties.pdf](http://eci.nic.in/eci_main1/PolPar/Transparency/Clarification%20of%20Transparency%20guideline%20for%20political%20parties.pdf)>.

*“182. (1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:*

*Provided that the amount referred to in sub-section (1) or, as the case may be, the aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years:*

*Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.”*

2.22.3 Pertinently, the contribution limit of 7.5% of the company's average net profits during the three immediately preceding financial years is an increase from the previous stipulation of 5% profit in Section 293A of the Companies Act of 1956. Additionally, as per Rule 4(7) of the Companies (Corporate Social Responsibility Policy) Rules, 2014 notified on 27<sup>th</sup> February 2014, direct or indirect contribution to any political party under Section 182 of the Companies Act shall not be considered as a corporate social responsibility activity.<sup>41</sup>

2.22.4 Section 182(4) of the Companies Act, 2013 provides for penalties for corporate contributions in contravention with the provisions of Section 182 in the form of fines levied on the company up to five times the amount so contributed, or imprisonment up to six months along with a similar fine for any company officer who is in default.

**(v) Laws regulating disclosure of political contribution by parties and companies**

2.23.1 Section 29C of the RPA regulates the disclosure of donations received by political parties and requires every party to prepare an annual report in respect of all contributions exceeding Rs. 20,000, received from any person or (non-government) company, and submit the report to the Election Commission. If this is not complied with, the party is not entitled to any tax relief under Section 29C(4) read with Section 13A of the IT Act. Commenting on the need to disclose the source of funding, the Supreme Court has observed as follows:

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<sup>41</sup> Ministry of Corporate Affairs, *Companies (Corporate Social Responsibility Policy) Rules, 2014* 27<sup>th</sup> February 2014, <[http://www.mca.gov.in/Ministry/pdf/CompaniesActNotification2\\_2014.pdf](http://www.mca.gov.in/Ministry/pdf/CompaniesActNotification2_2014.pdf)>.

*“We wish, however, to point out that though the practice followed by political parties in not maintaining accounts of receipts of the sale of coupons and donations as well as the expenditure incurred in connection with the election of its candidate appears to be a reality but it certainly is not a good practice. It leaves a lot of scope for soiling the purity of election by money influence.”<sup>42</sup>*

2.23.2 Section 13A of the IT Act further provides that income of political parties will be exempt from tax only if they maintain a record of the sources of funding, i.e. the names and addresses of the contributors, when the amount donated exceeds Rs. 20,000.<sup>43</sup> Section 80GGB of the IT Act provides that all corporate contributions to political parties and electoral trusts are entitled to income tax deduction, while Section 80GGC of the IT Act has similar provisions with respect to contributions made by individual persons to political parties or electoral trusts.

2.23.3 Section 182(3) of the Companies Act, 2013 regulates the disclosure of donations made by companies, requiring every company to disclose the total amount of its contribution, and the name of the party receiving the said contribution, in every financial year in its profit and loss account. Failure to comply with this provision will result in a fine and/or imprisonment provided under Section 182(4) referred above.

2.23.4 In exercise of its plenary powers under Article 324 of the Constitution, the ECI issued a scheme relating to “Electoral Trust Companies” on 10<sup>th</sup> December 2013 to fill in the vacuum in respect of disclosure requirements of contributions by electoral trusts in 2014. Although companies contributing to Electoral Trust Companies (for further contribution to political parties) are not required to make any disclosures pursuant to Section 182(3) of the Companies Act, 2013, they are required to disclose the amount released to an Electoral Trust Company. In turn, the Electoral Trust Company is required to disclose all amounts received from other companies or sources in its books of account and the amount contributed by it to a party pursuant to Section 182(3).<sup>44</sup> Further, Electoral Trusts are required to submit Annual Reports of contributions to the ECI containing details of the name and

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<sup>42</sup> Gajanan Krishnaji Bapat v Dattaji Raghobaji Meghe, (1995) 5 SCC 347.

<sup>43</sup> Section 29C, RPA; Section 13A, Income Tax Act, 1961.

<sup>44</sup> Ministry of Corporate Affairs, *Clarification with regard to Applicability of Section 182(3) of the Companies Act, 2013*, Circular No. 17/27/2013-CL-V, 10<sup>th</sup> December 2013, <[http://www.mca.gov.in/Ministry/pdf/General\\_Circular\\_19\\_2013.pdf](http://www.mca.gov.in/Ministry/pdf/General_Circular_19_2013.pdf)>.

addresses of the donors and the amount of donation given to each political party.<sup>45</sup> The ECI has released a list of approved Electoral Trusts.

2.23.5 Finally, Section 75A of the RPA requires every elected candidate in a parliamentary constituency to furnish information relating to their assets and liabilities to the Lok Sabha Speaker or the Rajya Sabha Chairperson within ninety days of taking the oath for their seat in Parliament.

2.23.6 Having examined the law in India, it is worthwhile to examine the law in different countries around the world in the next section.

## **D. Electoral Expenditure, Disclosure, and Contribution: A Comparative Analysis**

### **(i) United Kingdom**

#### **Expenses**

2.24.1 In the UK, there are limits on party and candidate expenditure, and these limits differ depending on the type of election (parliamentary or local body).

2.24.2 Section 76(2) of the Representation of the People Act, 1983 (*hereinafter* “**RPA, 1983**”) along with the Representation of the People (Variation of Limits of Candidates’ Election Expenses) Order 2014 sets the limits on candidate expenditure or “election expenditure”. For county constituencies in a parliamentary general election, this is £8,700 with an additional 9 pence for every entry in the register of electors. The amount is higher under section 76ZA if Parliament has not been dissolved within 55 months (or has sat for more than 55 months) and covers pre-candidacy election expenses. These amounts do not cover the candidates’ personal expenses.

2.24.3 “Campaign expenditure”, incurred to promote a party or its policies in general, is limited under the Political Parties, Elections and Referendums Act (*hereinafter* “**PPERA**”) 2000. Schedule 9 of the Act limits campaign expenditure by parties up to £30,000 per constituency or a total of £810,000 for England; £120,000 for Scotland and £60,000 for Wales.<sup>46</sup> Campaign expenditure is defined with reference to a list of specified expenses in Schedule 8 of the PERA, which includes party political broadcasts, advertising, unsolicited material to electors, manifesto or other policy

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<sup>45</sup> ECI, *Guidelines for Submission of Contribution Reports of Electoral Trust*, No. 56/ElectoralTrust/2014/PPEMS, 6<sup>th</sup> June 2014, <[http://eci.nic.in/eci\\_main1/PolPar/ElectoralTrust\\_06062014.pdf](http://eci.nic.in/eci_main1/PolPar/ElectoralTrust_06062014.pdf)>.

<sup>46</sup> Schedule 9 of the PERA Act, 2000 makes party spending limits depend on, and increase with, the number of constituencies that it contests.

documents, market research and canvassing, media/publicity, transport, rallies or other events.

2.24.4 Notional campaign expenditure or “third party/controlled” expenditure, that is “*incurred by or on behalf of the third party in connection with the production or publication of election material which is made available to the public at large or any section of the public (in whatever form and by whatever means)*”, is also limited under section 85, PPERA and section 75, RPA 1983. This expenditure includes money spent on holding public meetings or organizing public displays, or by issuing advertisements, circulars, or publications praising or disparaging candidates. It can independently be incurred only up to a limit of £500 for parliamentary expenses, although “recognised third parties” can incur greater expenditure.

2.24.5 Of particular interest is the regulation where expenditure limits have been introduced for periods both, before nomination (“pre-candidacy”) and after nomination as a candidate. For instance, the 2015 general elections has been divided into a “long campaign” – which is pre-candidacy; and a “short campaign” – which is from the time of becoming candidate to polling day; and each has its own spending limit with fixed and variable amounts.<sup>47</sup> The fixed amount for the long campaign is £30,700 and for the short campaign is £8,700 for 2015.<sup>48</sup>

### Contributions

2.24.6 In the UK, there are no caps on individual or corporate contributions to parties or candidates [under Section 54(2)(b), PPERA r/w Schedule 2A of RPA, 1983], although foreign donors are banned. In fact, there is no specific provision prohibiting corporations with partial government ownership or government contracts from donating as well.<sup>49</sup> However, donations above £200 may only be received by parties only from ‘permissible donors’.<sup>50</sup> With respect to corporate contributions, it is important to note that they require prior shareholder approval.<sup>51</sup>

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<sup>47</sup> Electoral Commission, *UK Parliamentary Guidance Candidates and Agents: Parliamentary Elections* 2015, at <[http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf)>.

<sup>48</sup> Electoral Commission, *Third Parties*, <<http://www.electoralcommission.org.uk/?a=29607>>.

<sup>49</sup> IDEA, *Political Finance Data for United Kingdom*, <<http://www.idea.int/political-finance/country.cfm?id=77>>.

<sup>50</sup> Permissible donors *vide* section 54, PPERA include “an individual registered on a UK electoral register; a UK registered political party; a UK registered company; a UK registered trade union; a UK registered building society; a UK registered limited liability partnership; a UK registered friendly/building society; or a UK based unincorporated association”.

<sup>51</sup> Samya Chatterji and Niranjana Sahoo, *Corporate Funding of Elections: Strengths and Flaws*, OBSERVER RESEARCH FOUNDATION ISSUE BRIEF #69, February 2014,

2.24.7 Section 52(2) of the PPERA prohibits all anonymous donations to parties, unless it is under £500; while Schedule 2A of the RPA, 1983 disregards all donations under £50.

### Disclosure

2.24.8 All registered parties must maintain accounting records, which show all the money received and expended by the party. These include an annual statement of accounts; quarterly donation reports *vide* Section 62 of PPERA; and weekly reports during general election periods *vide* Section 63. Both the quarterly and weekly reports must list the names and addresses of donors for donations over £7,500 along with other relevant transactions” such as loans and sponsorships.<sup>52</sup> Schedule 6 of the PPERA lists the details to be given in donation reports in detail. Further, Section 43 provides that a qualified auditor must audit parties’ accounts, if their gross income or total expenditure in any financial year exceeds £250,000 or if the Commission considers it desirable to do so.

2.24.9 Under section 81, RPA 1983 and Schedule 2A, candidates are also required to submit a return detailing their campaign expenses incurred by or on behalf of the candidate, or by their agents, to the Electoral Commission, within thirty-five days of the declaration of result. Donations of more than £50 to the candidate and impermissible donations must all be included in their returns.

2.24.10 On disclosure, the UK repealed Section 68 of the PPERA Act 2000, requiring donors making multiple small donations annually up to £5000 to report the same to the Electoral Commission, *vide* the Electoral Administration Act 2006 because “in practice” it had been “of little use”.<sup>53</sup>

2.24.11 All reported financial information of political parties, namely their donation/loan reports, campaign expenditure returns (including pdfs of invoices and receipts) and statement of accounts are made available on the website of the Electoral Commission of the UK.<sup>54</sup> Information about regulated donees including MPs and members of political parties, along with third parties are also available online.

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<[http://www.orfonline.org/cms/export/orfonline/modules/issuebrief/attachments/issuebrief69\\_1394871243494.pdf](http://www.orfonline.org/cms/export/orfonline/modules/issuebrief/attachments/issuebrief69_1394871243494.pdf)>, at 7.

<sup>52</sup> Sections 62, 63, 71M, 71Q of the PPERA, 2000; S. 20, Political Parties and Election Act 2009.

<sup>53</sup> UK Parliament, *Electoral Administration Bill: Part 7*, <<http://www.publications.parliament.uk/pa/cm200506/cmbills/050/en/06050x-c.htm>>; US Library of Congress, *Campaign Finance: UK*, <[http://www.loc.gov/law/help/campaign-finance/uk.php#\\_ftnref8](http://www.loc.gov/law/help/campaign-finance/uk.php#_ftnref8)>.

<sup>54</sup> IDEA, United Kingdom, *supra* note 49.

## Penalties

2.24.12 The Electoral Commission has certain supervisory, enforcement and investigatory powers under the PPERA that allows it to check that funding is derived from permissible sources; to issue notice to a person/organisation to produce any books, documents or records for its inspection.

2.24.13 Schedule 20 of the PPERA lists the various penalties, which provides for instance a fine or one year imprisonment for being indicted for making false statements to auditor; or a level 5 fine (maximum £5,000) for summary conviction for failing to deliver proper statements of account, or within time. The Electoral Commission's *Enforcement Policy* prescribes the varying nature of penalties in detail providing for fines ranging from £250-£5,000 for prescribed contraventions and £250-£20,000 for certain offences triable by a Magistrate or in a Crown's Court. Apart from this, it can issue a compliance notice, a restoration notice, a stop notice, or an enforcement undertaking.<sup>55</sup>

2.24.14 Courts can also order forfeiture, if the Commission applies for the same in a civil process. The forfeited amount will be equal to the donation value that was accepted impermissibly or from an unidentifiable source or was concealed in a statutory report. The Commission will request a court-ordered forfeiture in these cases if it cannot agree on a voluntary settlement and it believes it is in public interest to do so.<sup>56</sup>

2.24.15 Finally, the Commission lacks the power to impose criminal sanctions, although it may refer a breach for criminal investigation and prosecution under certain circumstances.

## **(ii) Germany**

### Expenses

2.25.1 There are no limits on political parties' campaign expenditure – whether the total amount, or expenditure on specific items for the campaign, or routine spending, although Section 1(4) of the Political Parties Act, 1967 stipulates that parties shall “*use their funds exclusively for performing the functions incumbent on them under the Basic Law and the Act*”. Thus, there are no qualitative or quantitative restrictions on party spending on elections or

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<sup>55</sup> The Electoral Commission, *Enforcement Policy* December 2010. <[http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0003/106743/Enforcement-Policy-30March11.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0003/106743/Enforcement-Policy-30March11.pdf)>, at 10.

<sup>56</sup> *Ibid.*

daily business.<sup>57</sup> Consequently, there does not seem to be any limits on how much candidates can spend.

### Contributions

2.25.2 Section 25 of the Political Parties Act makes it clear that there are no limits on the amount of contributions to political parties and that donations up to €1000 can be made in cash. While small donations and party membership dues are tax deductible since 1967, pursuant to a Supreme Court order in 1994, corporate donations are not deductible.<sup>58</sup> Further, section 25 prohibits corporate donations to political parties if the State's direct participation in the company is more than 25%.

2.25.3 However, under section 25, donations from charitable organisations, trade unions, professional associations, and industrial or commercial associations are prohibited. Further, anonymous donations of more than €500 to political parties are also prohibited.

2.25.4 The law is silent on donations to individual candidates, although it seems permissible (even foreign donations to candidates do not seem to be prohibited). In any event, while there are parliamentary rules governing disclosure in such cases, donations to individual candidates does not seem as important given that section 25(1) requires candidates to turn over the donations to the Executive Committee member of the party "immediately".<sup>59</sup>

### Disclosure

2.25.5 Article 21(1) of the Basic Law requires parties to "*publicly account for their assets and for the sources and use of their funds*". Disclosure is regulated under Section V of the Political Parties Act, 1967, which requires an annual reporting of origin of funds, statement of income and expenditure, and party assets and liabilities, along with a list of big donors to the President of the German *Bundestag*. These annual reports are audited/verified by chartered accountants and under Section 22(4) published as legislative documents (after being presented before the German Parliament).

2.25.6 Thus, public disclosure (names and addresses) in the annual party financial statement under Section 25 of the Act is limited to big donors,

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<sup>57</sup> IDEA, *Political Finance Data for Germany*, <<http://www.idea.int/political-finance/country.cfm?id=61>>.

<sup>58</sup> US Library of Congress, *Campaign Finance: Germany*, <<http://www.loc.gov/law/help/campaign-finance/germany.php#t39>>.

<sup>59</sup> *Id.*; IDEA Germany, *supra* note 57.



with donations exceeding €10,000 per year. Private donations greater than €50,000 are required to be disclosed immediately under section 25 to the President of the German *Bundestag*. This has led to a move towards grass root financing and party membership donations towards a party's private income.

2.25.7 The party's annual report thus contains information under the following categories *vide* section 24(4) of the Act – membership dues; mandatory contributions of officials; individual donations; corporate donations; receipts from commercial activities and participation; receipts from other assets and from events, publications; and public funds.

2.25.8 Under sections 23 and 23a of the Political Parties Act, the *Bundestag*, who receives and publishes these annual financial statements also evaluates these statements to check for compliance with the provisions of the Act. Germany's Supreme Audit Institution, the BRH, further verifies under section 21, whether the procedures under section 23a have been complied with properly.

### Penalties

2.25.9 Part VI of the Political Parties Act deals with procedures in case of inaccurate statements of accounts and other penal provisions and provides for fiscal and criminal sanctions for serious violations. Section 31b provides that in cases of inaccuracies in financial statements detected by the President of the German *Bundestag* (causing a party to obtain more public funds than due), the President makes the appropriate adjustment and fines the party twice the amount of the wrongly stated sum or 10% of the value of its assets/participating interests, if the inaccuracy arose from there.

2.25.10 Section 31c provides that in cases where the party either (a) fails to disclose a donation in its statement of accounts or (b) retains/has illegally obtained donations, without remitting them to the *Bundestag*, it will be liable to a penalty of two times the undisclosed amount or three times the illegally obtained amount respectively.

2.25.11 Section 31d provides for three years' imprisonment or a fine for intentional concealment of the "*origin or the use of the party's funds or assets or [for] evading the obligation to render public account*". Offences under this section are committed by the inclusion of inaccurate data in the party's financial statement; the incorrect breaking of big donations into smaller ones to avoid disclosure; or failure to remit the donation properly (to prevent

unlisted slush funds from being created).<sup>60</sup> Section 31d(2) also penalises an auditor or their assistants for falsifying an audit report/statement of accounts or for failure to disclose relevant facts with maximum three-year imprisonment or a fine.

### (iii) United States of America

2.25.12 Campaign finance laws in the US are different at the federal, state, and local levels. At the federal level, the Federal Election Commission (*hereinafter* “**FEC**”), an independent federal agency, enforces these laws.

#### Expenses

2.25.13 There are no limits on election expenses by candidates or political parties. In *Buckley v Valeo*,<sup>61</sup> the Supreme Court struck down the Federal Election Campaign Act’s (*hereinafter* “**FECA**”) individual expenditure limit on the grounds that it curtailed the quantum of free speech, and hence violated the First Amendment rights of the candidates. As the Court noted:

*“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money”.*

It must be noted, however, that when Presidential candidates are publicly funded, an upper limit to that expenditure is constitutional.

2.25.14 Independent third party expenditures in the US are not subject to any limit – corporations and unions may incur such expenditure. These refer to any communications that expressly advocate the winning or defeat of any party, without being requested or suggested to do so by any party or agents or political committee to do so.<sup>62</sup>

#### Contribution

2.25.15 In 2010, in *Citizens United v FEC*,<sup>63</sup> the Court continued the line of reasoning followed in *Buckley* and proceeded to strike down any limit on independent expenditures by corporations, associations, and labour unions in

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<sup>60</sup> LOC Germany, *supra* note 58.

<sup>61</sup> 424 US 1 (1976).

<sup>62</sup> FECA, *How General Election Funding Works*, < <http://www.fec.gov/info/chtwo.htm>>.

<sup>63</sup> 553 US 310 (2010). As per the ruling, corporations and unions can now spend money, for instance via advertisements, supporting or denouncing individual candidates, even though the ban on direct corporate contributions remained.

federal elections citing the free speech clause. However, the ban on direct corporate contributions remained unaffected. Justice Stevens who delivered the dissenting opinion in this case made the observation that the bench in *Buckley* had recognised the possibility of its judgement being misused and had left open a window to impose regulations on the grounds of curbing corruption. This ruling has been criticised for allowing special interest groups to influence the election campaigns through unbridled spending, while undermining the efforts of ordinary citizens making modest contributions to support the candidates of their choice.

2.25.16 After *Buckley*, a distinction was drawn between election contribution and election spending. In other words, the different limits that are imposed in each state on the amount of contribution that an individual, company, union etc. can make, stood intact after this decision. However, with the 2014 decision in *McCutcheon v. FEC*,<sup>64</sup> this distinction between contribution and spending was blurred, and the Supreme Court struck down the biennial upper limit to the total amount any individual could contribute to federal candidates and national parties. According to the Court, these aggregate limits restricting how much money a donor may contribute to candidates for federal office, political parties, and PACs do not further the government's interest in preventing *quid pro quo* corruption, although they seriously restrict participation in the democratic process. Hence, the First Amendment was said to have been violated, with the Court noting that, "*Any regulation must instead target what we have called 'quid pro quo' corruption or its appearance.*"<sup>65</sup>

2.25.17 Thus, after *McCutcheon*, there are no overall limits on aggregate contributions by an individual to candidates and political parties. Apart from this, the ban on direct corporate contribution stands and there are limits on individual contributions to a single candidate or a Political Action Committee ("PACs").

### Disclosure

2.25.18 The FECA mandates the disclosure of all sources and spending of funding for candidate, party committees and PACs.<sup>66</sup> Under Section 432 of the Act, a treasurer is mandatorily appointed for every party, and all

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<sup>64</sup> 134 S. Ct. 1434 (2014).

<sup>65</sup> The Supreme Court's rationale in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) was that aggregate limits restricting how much money a donor may contribute to candidates for federal office, political parties, and PACs do not further the government's interest in preventing *quid pro quo* corruption, although they seriously restrict participation in the democratic process. Hence, the First Amendment was said to have been violated, with the Court noting that, "*Any regulation must instead target what we have called 'quid pro quo' corruption or its appearance.*"

<sup>66</sup> FEC, *Citizens' Guide*, April 2014, <<http://www.fec.gov/pages/brochures/citizens.shtml>>.

contributions must be forwarded to this person within a specific time (10 days for contributions over \$50 and 30 days for contributions less than \$50). The treasurer is obliged to maintain records of all contributions and transactions and file a report with the FEC.

2.25.19 There are also disclosure norms in place even for independent expenditures – a disclaimer is required to identify who paid for communication and financing must be disclosed to the public. The reports must be quarterly when aggregate is greater than \$250 per election, 48-hour reports between the beginning of the year and twenty days prior to the election when the aggregate is greater than or equal to \$10,000. Within 20 days before the election, 24 hours reports must be given when the aggregate is greater than or equal to \$1000. Electioneering communications are also subject to disclosure norms if the costs of disbursement exceed \$10,000.<sup>67</sup>

2.25.20 Disclosure norms are different for different categories of ‘political committees’, which play a supremely important role in US elections. The terms refers to any committee or association of people who receive total contributions or makes net expenditure in excess of \$10,000 during a calendar year or any local committee of a political party which makes certain kinds of expenditure and receives contributions in aggregate excess of \$5,000 in a year. Section 434 of the FECA lays down the reporting requirements for various such committees, such as the authorized political party committees, unauthorized committees, personal contributions of the candidate etc., each being required to be filed under different norms.

2.25.21 When reports are filed with the FEC, however, they must contain the following details:

- (a) The amount of cash on hand at the beginning of the reporting period.
- (b) The total amount of all receipts in the reporting period.
- (c) The identification of each person who makes a contribution or provides any dividend, interest or other receipt exceeding \$200 in the calendar year or cycle, or any lesser amount if the reporting committee should so select, as well as the date and amount of their contribution.
- (d) The identification of political committees and other affiliated committees making contributions or loans.
- (e) Numerous other heads such as rebates, refunds, dividends, interests, other forms of receipts etc.

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<sup>67</sup> IDEA, *Campaign Finance for United States*, <<http://www.idea.int/political-finance/country.cfm?id=231>>.

- (f) The total amount of all disbursements and all disbursements in specified categories like expenditures made to meet committee or candidate expenses, transfers, repayment or loans, etc.<sup>68</sup>

2.25.22 All candidates and party committees and PACs are required to file regular reports with the FEC, which maintains a public database.<sup>69</sup> Campaign finance reports are placed in the public record within 48 hours of receipt at the FEC.<sup>70</sup> Further, any amount of contribution more than \$1000 received on behalf of a candidate by an authorized party within the last 20 days of an election will be notified to the Commission within 48 hours of receipt of the same.<sup>71</sup>

### Penalties

2.25.23 The FECA has the power to conduct audits and field investigations of any political committee filing a report under Section 434 and its powers (including enforcement) are delineated in greater detail in Section 437d and g.

2.25.24 Instances of noncompliance with the provisions of the FECA may lead to an FEC enforcement case, or Matter Under Review (“**MUR**”). The Office of Complaints Examination and Legal Administration and the Enforcement Division of the Office of General Counsel usually deal with these MURs through the FEC’s traditional enforcement program, based on procedures detailed in the Act. In some less complex cases, the candidates or political committees may also be permitted to participate in the FEC’s ADR program for a swift resolution through settlements. Further, failure to or late submissions of FEC reports or any other violations of such nature are subject to the FECA’s Administrative Fine Program.<sup>72</sup>

## **(iv) Australia**

### Expenses

2.26.1 There are no limits on expenditure by political parties or candidates.<sup>73</sup>

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<sup>68</sup> S. 304, FECA (2 USC 434).

<sup>69</sup> FEC, *Campaign Finance Reports and Data*, <<http://www.fec.gov/disclosure.shtml>>.

<sup>70</sup> 2 USC § 438(a)(4); FEC, *Freedom of Information Act*, <<http://www.fec.gov/press/foia.shtml>>.

<sup>71</sup> FEC, *Candidate Committee*, <<http://www.fec.gov/rad/candidates/FEC-ReportsAnalysisDivision-CandidateCommittees.shtml>>.

<sup>72</sup> FEC, *FY 2014-2019 Strategic Plan*, <[http://www.fec.gov/pages/strategic\\_plan/FECStrategicPlan2014-2019.pdf](http://www.fec.gov/pages/strategic_plan/FECStrategicPlan2014-2019.pdf)>.

<sup>73</sup> IDEA, *Political Finance Data for Australia*, <<http://www.idea.int/political-finance/country.cfm?id=15>>.

### Contribution

2.26.2 There are no contribution limits, and no ceiling on how much a donor can contribute, or a party can raise. Further, there is no ban on donations from foreigners, trade unions or government contractors.<sup>74</sup>

2.26.3 Section 306 of the Commonwealth Electoral Act, 1918 makes it unlawful for any political party or candidate or their representatives to receive a gift greater than the disclosure threshold, unless the name and address of the donor or giver of the gift are provided to the donee. Thus, anonymous donations in such cases are barred.

2.26.4 Finally, section 327(2) prohibits and criminalises the discrimination of a donor by a person of the opposite party by denying such donor work, access to membership of some trade union/club/other body, intimidating or coercing them, or subjecting them to other detriment.

### Disclosure

2.26.5 Both parties and candidates are required to publicly disclose their expenditure; and both donors and parties have to disclose the contributions over a “disclosure threshold”, currently at AUD 12,800.<sup>75</sup> Pertinently, the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, which has now lapsed, provided for reducing the disclosure threshold to AUD 1,000 and permitting anonymous donations below AUD 50 when they were received at a general public activity or private event.<sup>76</sup>

2.26.6 Returns filed by individual candidates to the Electoral Commission must include:

- (a) the total amount of the donations received;
  - (b) the total number of donors;
  - (c) all the individual donations received above the disclosure threshold
  - (d) the details of donations (such as date of receipt, amount, and name and address of donor) for donations above the disclosure threshold;
- and,

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<sup>74</sup> *Ibid.*

<sup>75</sup> Australian Electoral Commission, *Disclosure Threshold*, <[http://www.aec.gov.au/Parties\\_and\\_Representatives/public\\_funding/threshold.htm](http://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm)>.

<sup>76</sup> Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, <<http://www.comlaw.gov.au/Details/C2010B00247>>.

- (e) electoral expenditures, primarily advertising, printing and direct mail costs incurred between the issue of the writ and polling day.<sup>77</sup> From 2006-07, third party expenditure above the disclosure threshold is also required to be filed in an annual return.<sup>78</sup>

2.26.7 Political parties must file annual returns with the Commission including:

- (a) the total values of their receipts;
- (b) the details, including names and addresses, of the donors and the donations above the disclosure threshold;
- (c) the total value of payments; and
- (d) the total amount of debt as on 30<sup>th</sup> June of that particular year.<sup>79</sup>

2.26.8 Further, *vide* Sections 304, 305A and 305B, Commonwealth Electoral Act, 1918, all in kind donations must be disclosed to the Australian Electoral Commission by the donors and agents of candidates within 15 weeks of the date of polling; and by parties, within 20 weeks after the financial year. This includes the total value of the gifts and the relevant details, if the value is greater than the disclosure threshold.

2.26.9 Interestingly, section 311 provides that even Commonwealth Departments have to furnish statements with complete particulars and details of the amounts paid to

- (a) advertising agencies;
- (b) market research organisations;
- (c) polling organisations;
- (d) direct mail organisations; and
- (e) media advertising organisations; and others.

2.26.10 Thus, to conclude associated entities, donors to political parties, and 'third parties' that incur political expenditure also have annual disclosure obligations; while candidates are required to file election returns.<sup>80</sup>

2.26.11 Moving from the disclosure of donations to the disclosure of expenditure, section 309 provides that an agent of a candidate shall furnish

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<sup>77</sup> Commonwealth Electoral Act 1918 (Cth), sections 303-309, 313-314, 314AA-314AEC.

<sup>78</sup> Australian Electoral Commission, *Financial Disclosure Overview*, <[http://www.aec.gov.au/Parties\\_and\\_Representatives/financial\\_disclosure/Overview.htm](http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/Overview.htm)>.

<sup>79</sup> *Id.*

<sup>80</sup> Australian Electoral Commission, *Financial Disclosure Guide for Political Parties: 2013-2014 Financial Year*, <[http://www.aec.gov.au/Parties\\_and\\_Representatives/financial\\_disclosure/guides/political-parties/files/political-parties-2013-14.pdf](http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/political-parties/files/political-parties-2013-14.pdf)>.

the details of all its electoral expenditure, in relation to the election incurred by or with the authority of the candidate, within 15 weeks from the date of polling.

2.26.12 On public inspection, section 320 provides that election disclosure returns (of both donations and expenditure) shall be made available for public inspection on the expiry of 24 weeks after the date of polling and on the website.<sup>81</sup> Similarly, annual disclosure returns are made available for public inspection until the first working day of the February of the calendar year after the return is furnished.

### Penalties

2.26.13 Section 315 of the Act deals with offences and sub-section (1) provides that failure to file a return, by a person required to do so under Divisions 4, 5, or 5A of Part XX of the Act, will result in a fine payable by such guilty person – of AUD 5,000 in case of an agent of a party; or AUD 1,000 in other cases. Similarly, section 315(2) criminalises furnishing an incomplete return or failing to retain records for three years (under section 317) by a fine up to AUD 1,000. In both sub-sections, the offence is a strict liability offence.

2.26.14 Section 315(3)-(4) criminalises the furnishing of false or misleading information in a claim or return “to the knowledge of the agent” of the party with a fine up to AUD 10,000 payable by such agent of a political party; and AUD 5,000 payable by any other person if the offence is committed by them.

2.26.15 Similarly, Section 316 deals with the Commission’s powers of investigation into compliance with disclosure obligations and the consequent power to issue notice for the production of documents, which has to be statutorily complied with. Sub-section (2D) makes it mandatory for the Australian Electoral Commission to investigate a gift or the disposition of property of AUD 25,000 or more to a registered political party or candidate. Further, the section stipulates providing false or misleading information during a compliance investigation results in a fine up to AUD 1,000 or/and imprisonment up to six months.<sup>82</sup>

2.26.16 At the conclusion of an investigation, the Commission is empowered to refer the evidence and its opinion to the Commonwealth Director of Public Prosecutions, if it considers that the particular party acted unreasonably in its non-compliance with Part XX of the Act.

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<sup>81</sup> AEC, Financial Disclosure Overview, *supra* note 78.

<sup>82</sup> AEC, Financial Disclosure Guide, *supra* note 80.



(v) Japan

Expenses

2.26.17 Articles 127 and 194 of the Public Office Election Act, 1950 (*hereinafter* “POEA”) limit election expenses of candidates based on the type of elections and the number of voters in the constituency. For instance, in an election to the House of Representatives, candidates can spend 15 yen x the number of registered voters in the constituency + 19.1 million yen. The POEA aims to place a ceiling on campaign expenses to ensure the elimination of inequalities in the campaign, achieved through prohibiting door to door campaigning; restricting internet usage; regulating (print and electronic) advertising and the size and number of placards and posters; and shortening the campaign period to between 12-17 days depending on the type of elections.<sup>83</sup>

2.26.18 However, there does not seem to be any article in the PFCA limiting the expenditure by political parties.<sup>84</sup>

Contribution

2.26.19 Article 22.5 of the PFCA prohibits donations by foreign interests to parties or candidates. Further, Article 22.6 prohibits anonymous donations, in relation to elections or other political activities, to political parties. However, this prohibition does not apply to streets or meeting collections if the donation amount is under 1,000 yen. There is a complete ban on anonymous donations to individual candidate.<sup>85</sup>

2.26.20 Corporate donations are prohibited to individual candidates under Article 21.3 of the Political Fund Control Act, 1948 (*hereinafter* “PFCA”), although this ban does not apply to fundraisers, where candidates can charge 1.5 million yen per ticket per seat.

2.26.21 In the case of political parties, corporate (and labour union and other organisations’) donations are limited under Article 21.3 and Article 22.4 of the PFCA to 7.5 million to 30 million yen, and cannot be made by corporations that have incurred deficit in the last years. Further, there are specific ceilings for organisations based on their capital amount, number of

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<sup>83</sup> Matthew Wilson, *E-Elections: Time for Japan to Embrace Online Campaigning*, 2011 STAN. TECH. L.R. 4,9; *Government of Japan: Japan Electoral Laws*, COLUMBIA UNIVERSITY <[http://afe.easia.columbia.edu/at/jp\\_elect/govjel01.html](http://afe.easia.columbia.edu/at/jp_elect/govjel01.html)>.

<sup>84</sup> IDEA, *Political Finance Data for Japan*, <<http://www.idea.int/political-finance/country.cfm?id=114>>.

<sup>85</sup> *Id.*

union members and other factors.<sup>86</sup> Corporates with government contracts or partial government ownership cannot donate money to parties (or candidates).

2.26.22 Individuals can donate up to 20 million yen per year to political parties/organisations under Article 21.3 and 1.5 million yen per year to “persons other than political parties or political organisations” under Article 22 of the PFCA.<sup>87</sup>

### Disclosure

2.26.23 Article 12 of the PFCA requires political parties to disclose their incomes and expenses annually, along with their internal audit, and present their reports to the Minister of General Affairs or the Election Control Commission. These reports are made available for public inspection for three years (at no cost) and are uploaded online.

2.26.24 Campaign finances of candidates are also internally audited. Articles 189 and 192 deal with disclosure obligations for candidates, whose campaign accountants must maintain records of revenue and expenditure reports and present them to the Local Election Management Council (“LEMC”). A summary of these reports are made public on LEMC’s website and should be maintained for three years to allow for public inspection.<sup>88</sup>

2.26.25 Article 12 of the PFCA further provides that the identities of donors must be disclosed if they contribute more than 50,000 yen.

### Penalties

2.26.26 If a candidate is found to have spent more than the stipulated campaign expense, their election will be nullified. Further, under the PFCA, filing financial reports in contravention with the Act can result in a penalty of up to three years imprisonment or a fine of up to 500,000 yen. Article 31 empowers the Minister for Internal Affairs and Communications or the Electoral Commission to order the person who has filed a deficient or incomplete report to explain the same and file a corrected report. Articles 22 and 28 of the PFCA provide for forfeiture options as well.

2.26.27 Conversely, violations under the POEA by the candidate or their campaign accountants/general managers/relatives/secretaries such as bribing voters, disturbing elections, door to door canvassing, and other such violations result in an investigation by the police and if necessary, prosecution as criminal offences. Candidates found to have committed an election crime

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

are disqualified under Article 251-252 of the POEA, along with being disqualified from voting or standing for elections in the future. Further, candidates found to be engaging in unauthorised campaign activities during the 'black out' period are subject to two years imprisonment and a fine up to 500,00 yen.<sup>89</sup>

## **(vi) Philippines**

### **Expenses**

2.26.28 The Philippines Omnibus Election Code of 1985 regulates the expenditure by parties and candidates. Section 1 of the Code sets the ceiling for political parties at 5 pesos per voter in each constituency where the party is fielding a candidate. Further candidate expenditure is also limited, with presidential and vice-presidential candidates being permitted to spend 10 pesos per registered voter; and for other candidates, the limit is 3 pesos, with an additional 5 pesos per voter for independent candidates.<sup>90</sup>

### **Contribution**

2.26.29 Political parties or candidates cannot accept donations from corporates; foreign interests; anonymous donors and other financial institutions, educational institutions receiving state support and officials/employees of the Civil Service or Armed Forces.<sup>91</sup>

### **Disclosure**

2.26.30 Section 15 of the Manila Resolution and sections 106-107 of the Omnibus Code requires the candidates or the treasurers of the political parties to submit a statement setting out in detail the amounts of contribution received, the date of receipt, the name and address of the donors and a record of their expenses and obligations. Records of contributions are to be kept for three years, failing which it will be considered *prima facie* evidence of violation of the provisions of the law. The identity of donors is required to be reported *vide* section 109 of the Code.

### **Penalties**<sup>92</sup>

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<sup>89</sup> Wilson, *supra* note 83.

<sup>90</sup> IDEA, *Political Finance Data for Philippines*, <<http://www.idea.int/political-finance/country.cfm?id=177>>; Article 13, Section 7 Republic of the Philippines, Commission On Elections. *Manila Resolution No. 9087*; and Article 13, Republic Act No. 7166.

<sup>91</sup> Section 4, Manila Resolution; Sections 94(a), 95, 96 of the Batas Pambansa Bilang 881 Omnibus Election Code Of The Philippines, 1985; Article 36.9, Corporation Code of Philippines.

<sup>92</sup> IDEA Philippines, *supra* note 90.

2.26.31 The Commission on Elections is empowered under Section 57.3 of the Omnibus Code of 1985 to inquire into the financial reports of candidates, *suo motu* or based on written representation by other candidates or voters, and issue due notice and conduct a hearing. The failure to file written statements or reports in connection with electoral donations and expenditures is classified as an administrative offence, with a fine payable of 1,000 pesos to 30,000 pesos under Section 17 of the Manila Resolution. Failure to pay the fine within 30 days will allow the COMELEC to issue a writ of execution against the properties of the offender. Subsequent offences under the section shall result in fines levied by the Commission ranging from 2,000 pesos to 60,000 pesos, with possible perpetual disqualification to hold office.

2.26.32 Section 111 of the Omnibus Code of 1985 stipulates that, “*no person elected to any public office shall enter upon the duties of his office until he has filed the statement of contributions and expenditures herein required.*” Section 264 sentences a person guilty of an electoral offence under the Code to a term of imprisonment between one to six years, with disqualification from the public office and the deprivation of the right to vote. Political parties guilty under the Code will have to pay a fine of minimum 10,000 pesos, along with criminal action being instituted against the concerned party official.

2.26.33 Till now, this report has examined the law in India and other parts of the world. This gives us a better understanding of the loopholes of the laws in India and how they can be improved. The next section deals with this.

## **E. Legal Lacunae and the Under-reporting of Election Spending**

### **(i) Understanding the reality of election financing today**

2.27.1 Although there are legal provisions limiting election expenditure for candidates and governing the disclosure of contributions by companies to political parties, the same is not properly regulated, either due to loopholes in the law, or improper enforcement.

2.27.2 This is evident from the 2001 Consultation Paper of the NCRWC on Electoral Reforms, which estimates that actual campaign expenditure by candidates is “*in the range of about twenty to thirty times the said limits.*”<sup>93</sup> In fact, one of the major concerns regarding expenditure and contribution regulation is that the apparently low ceiling of candidate expenditure increases the demand for black money cash contributions and drives

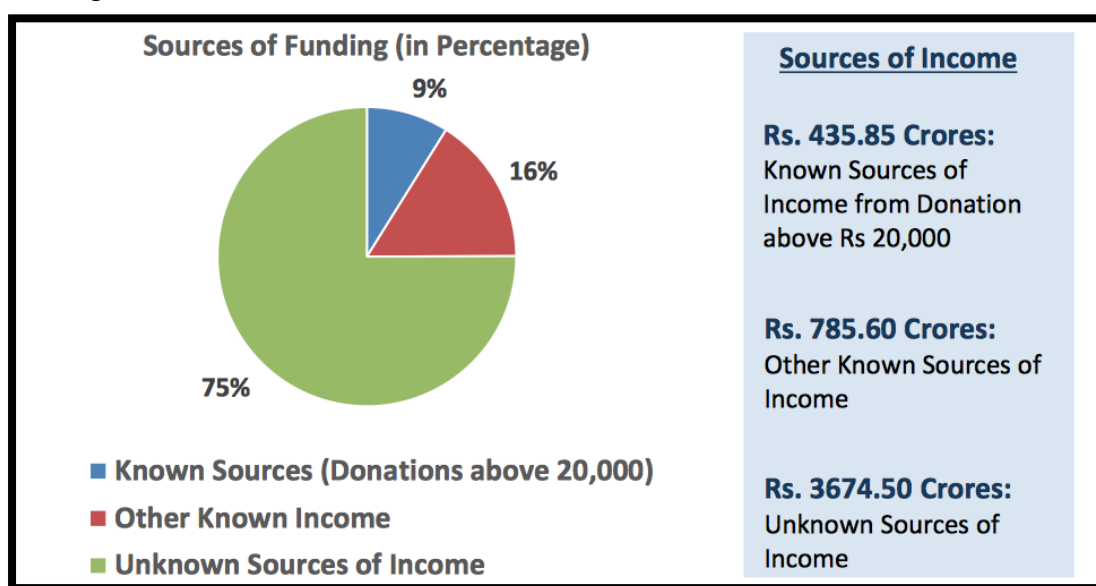
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<sup>93</sup> NCRWC, *A Consultation Paper on Review of Election Law, Processes, and Reform Options*, January 2001, <<http://lawmin.nic.in/ncrwc/finalreport/v2b1-9.htm>> at para 14.1 (“NCRWC Consultation Paper”).

campaign expenditure underground, causing parties to conceal their actual source of funds and expenditure.<sup>94</sup>

2.27.3 Interestingly however, the Association of Democratic Reforms (*hereinafter* “ADR”) in its election expenses analysis for the Lok Sabha 2009 elections found that on average, the Members of Parliament declared election expenditures of 59% of the total expenses limit.<sup>95</sup> Of the 6753 candidates (of a total of 8028 candidates) whose summary statements of expenses were available, only four candidates exceeded the ceiling and only 30 spent up to 90% of the expenditure limit.<sup>96</sup> On the other hand, 1066 candidates declared election expenses of less than Rs. 20,000 and 197 declared expenses less than Rs. 10,000.<sup>97</sup> Given the distortion between the reported and estimated candidate expenditure, increasing the expenditure limits further (from the 2014 increase) might not necessarily provide an answer.

2.27.4 Additionally, in their analysis on the sources of funding for political parties, ADR found that more than 75% of parties’ sources are unknown, while donations over Rs. 20,000 comprise only 9% of parties’ funding.<sup>98</sup>



<sup>94</sup> *Ibid.*, at para 14; M.V. Rajeev Gowda and E. Sridharan, *Reforming India’s Party Financing and Election Expenditure Laws*, 11(2) ELECTION L.J. 226, 232-235 (2012).

<sup>95</sup> ADR, 129 (30%) MPs declared Election Expenses of less than 50% during Lok Sabha, 2009, <<http://www.adrindia.org/content/129-30-mps-declared-election-expenses-less-50-during-lok-sabha-2009>>.

<sup>96</sup> ADR, *Lok Sabha 2009 Election Expense Analysis: A Report*, <[http://adrindia.org/sites/default/files/ls09\\_electionexpense.pdf](http://adrindia.org/sites/default/files/ls09_electionexpense.pdf)>, at 4.

<sup>97</sup> *Ibid.*, at 3.

<sup>98</sup> ADR, *Electoral and Political Reforms*, <<http://adrindia.org/sites/default/files/Electoral,%20Political%20Reforms%20and%20ADR.pdf>>.

2.27.5 To try and remedy the situation, the ECI's transparency guidelines, effective from 1<sup>st</sup> October, 2014 state that no income tax deductions are permissible for cash contributions to political parties by an individual or a company under s. 80GGB and 80GGC, IT Act and that all cash donations should be duly accounted in the account books. Further, parties are stipulated to maintain names and addresses of all donors, specifically those donating during public rallies (except petty sums and hundi/bucket collections).<sup>99</sup>

2.27.6 Therefore, there is clearly under reporting of election expenditure and opacity of political contribution. Part of the explanation lies in the lacunae in the law, and part in black money and poor enforcement. To this, we now turn.

## (ii) Legal lacunae

2.27.7 There are various loopholes in the laws regarding election expenditure, contribution and disclosure. *First*, and most importantly, despite the Election and Other Related Laws (Amendment) Act 2003, the subject of regulation under Section 77 of the RPA only covers individual "candidates", and not on political parties. This is evident from the stipulation requiring "every candidate" (or his electoral agent) to keep a separate account of the expenditure which has been "incurred or authorized by him" between the date of nomination and declaration. Consequently, political parties and candidate supporters are allowed unlimited expenditure in propagating the party program, as long as no specific candidate is favoured.<sup>100</sup>

2.27.8 The implications of the wording of Section 77(1) are evident in the ECI guidelines on expenditure allocation in the General Observers Handbook. The ECI has categorised the advertisements published by political parties in the following three categories:

- (i) *"Expenditure on general party propaganda seeking support for the party and its candidates in general, but, without any reference to any particular candidate or any particular class/group of candidates.*
- (ii) *Expenditure incurred by the party, in advertisements etc., directly seeking support and / or vote for any particular candidate or group of candidates.*
- (iii) *Expenditure incurred by the party, which can be related to the expenditure for promoting the prospects of any particular candidate or group of candidates."*

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<sup>99</sup> ECI Transparency Guidelines and Clarifications, *supra* note 6 and *supra* note 40.

<sup>100</sup> Gowda, *supra* note 94, at 230.

2.27.9 According to the ECI, the first case will not be included in the candidate's expenditure limits under Section 77(1) of the RPA, while the second and third cases shall be included in the expenditure incurred or authorised by the candidates or their election agents.<sup>101</sup>

2.27.10 *Second*, clever accounting can allow parties to attribute large amounts of expenditure to their "leaders" and hence, avail of the exception under the Explanation to Section 77. For instance, the ECI states that when leaders of a political party travel to and from their constituency to other constituencies as star campaigners, the expenditure on their travel would fall within the exempted category.<sup>102</sup> As the above break down of expenditures for the 2009 Lok Sabha Elections reveal, expenditure incurred on vehicle usage and transport comprise the largest proportion of a candidate's declared expenses.

2.27.11 *Third*, the scope of Section 77(1) is very narrow and applies only from the date of nomination to the date of declaration and thus any expenditure incurred in the remaining period is exempt from any limit or regulation.

2.27.12 *Fourth*, regarding political contribution, the Rs. 20,000 disclosure limit can be easily evaded by writing multiple cheques below Rs. 20,000 each, or giving the money in cash. Nor is the profit-linked contribution limit of 7.5% a significant restriction for large companies. As per Gowda and Sridharan while the law creates incentives for disclosure vide tax exemptions, it can be outweighed by the disincentive created by the loss of anonymity, especially given that in many instances big donors support multiple parties, or change their support, and do not want this information to be disclosed for fear of reprisal.<sup>103</sup>

2.27.13 *Fifth*, the authorisation of corporate contribution requires a resolution to be passed to such effect at the meeting of the Board of Directors under Section 182(1) of the Companies Act, 2013. The empowerment of a small group to decide how to use the funds of a company for political purposes, instead of involving the vast numbers of shareholders (being the actual owners of the company) has also been criticised.<sup>104</sup> Britain follows such

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<sup>101</sup> ECI, *Instructions on Expenditure Monitoring in Elections*, <[http://eci.nic.in/eci\\_main/recent/Instruction\\_expenditure.pdf](http://eci.nic.in/eci_main/recent/Instruction_expenditure.pdf)>, at paras 10.2-10.3. See also ECI, *General Observers Hand Book 2014*, <[http://eci.nic.in/eci\\_main/ElectoralLaws/HandBooks/Observers\\_hand\\_book\\_2014.pdf](http://eci.nic.in/eci_main/ElectoralLaws/HandBooks/Observers_hand_book_2014.pdf)>.

<sup>102</sup> ECI, *Instructions on Expenditure*, *supra* note 101, at para 10.4.

<sup>103</sup> Gowda, *supra* note 94, at 230, 236.

<sup>104</sup> Samya Chatterjee, *Campaign Finance Reforms in India: Issues and Challenges*, ORF ISSUE BRIEF #47, December 2012,

a shareholder approach where British companies require shareholder approval before they can make any political contribution or incur any political expenditure.<sup>105</sup>

2.27.14 *Finally*, disclosure norms need to be strengthened. As we have seen, the ECI's transparency guidelines do not have statutory authority and there is no legal consequence for non-compliance. Further, unlike many of the countries discussed in the previous section, political parties and candidates file their returns with the ECI, without putting up the information online (on the ECI's website) or making it easily available for public inspection (barring an RTI). This is essential to bring about transparency in the public domain and to let the voters know the donors, contributions and expenditures of the parties and candidates. Moreover, in many cases such as compliance with section 29C of the RPA (regulating political party disclosure) the only penalty for non-compliance is losing the income tax exemption. This is not a significant enough deterrent to parties.

2.27.15 Despite the various legal lacunae, electoral reform is possible and will not be impeded by free speech claims as in the United States, evident in the *Citizens United* and *McCutcheon* decisions. In India, Article 19(1) of the Constitution only extends to citizens and natural persons, and corporations have not been considered citizens with free speech rights,<sup>106</sup> which can only be exercised by shareholders.<sup>107</sup> Thus, corporations do not have a right to make a political contribution as part of their exercise of free speech rights, especially given the non-involvement of shareholders in this decision making process. Apart from that, countervailing interests of equality, anti-corruption, and public morality will provide a constitutional basis for any election finance reform.

### **(iii) Recommendations**

#### **(a) On Expenses and Contribution**

2.28.1 Section 77 of the RPA imposes a ceiling on the election expenses of a candidate from the date of nomination to the date of declaration of results and hence does not cover any period before the nomination, even though it constitutes a major part of candidates' expenses. This form of

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<[http://orfonline.org/cms/export/orfonline/modules/issuebrief/attachments/Issue\\_47\\_1360754379618.pdf](http://orfonline.org/cms/export/orfonline/modules/issuebrief/attachments/Issue_47_1360754379618.pdf) at 8>.

<sup>105</sup> ICSA Guidance on Political Donations, REFERENCE NUMBER 081110, <<https://www.icsa.org.uk/assets/files/pdfs/081110%20-%20Political%20Donations.pdf>>.

<sup>106</sup> State Trading Corporation v. CTO, AIR 1963 SC 1811; Barium Chemicals v. Company Law Board, AIR 1967 SC 295; Municipality v. State of Punjab, AIR 1969 SC 1100; TELCO v. State of Bihar, (1964) 6 SCR 885.

<sup>107</sup> Divisional Forest Officer v Bishwanath Tea Company, AIR 1981 SC 1368; Bennett Coleman v Union of India, AIR 1973 SC 106.



regulation on election expenditure should be amended to extend from the date of notification of the elections to the date of declaration of results, given that many candidates file their nominations only on the last date of filing, to prevent the application of section 77 limiting their expenses. Campaigning commences before or at least once the ECI announces the date of elections, and the filing of nominations is often viewed only as a formality.

2.28.2 Although the UK system of covering both the pre-candidacy long-campaign period, namely a certain specified time, such as a year, before the date of nomination; and the short-campaign period, namely from the date of nomination to the declaration of results is desirable, it may not be feasible in India. Unlike the UK, India is a much larger and more diverse country, which would make the task of determining what constitutes election expenses in the pre-candidacy period, and then regulating it, difficult. Instead, an amendment to section 77 extending its scope as suggested above, may be a better mid-way solution and a more practical alternative.

2.28.3 Furthermore, Section 77 of the RPA only regulates the election expenses of candidates. Political parties are free to spend any amount as long as it is for the general party propaganda, and not towards an independent candidate. Thus, there is no ceiling on party expenditure. It is recommended that the law on this point does not change, namely that there are no caps on party expenditure under the RPA given that it would be very difficult to fix an actual, viable limit of such a cap and then implement such a cap. In any event, as the experience with section 77(1) discussed above reveals, in the 2009 Lok Sabha elections, on average candidates showed election expenditures of 59% of the total expenses limit. There is no reason why the same phenomenon of under-reporting will not transpire amongst parties.

2.28.4 Placing legislative ceilings on party expenditure or contributions will not automatically solve the problem, especially without putting in place a viable alternative of complete state funding of elections (which in itself is next to impossible right now). Our previous experience in prohibiting corporate donations in 1969 did not lead to a reduction in corporate donations. Instead, in the absence of any alternative model for raising funds, it greatly increased illegal, under the table and black money donations.

2.28.5 Although the problem of black money and under-reporting will remain under the existing regime of no caps on individual contribution and party expenses, it has to be tackled through a stricter implementation of the anti-corruption laws and RTI and improved disclosure norms. It might be desirable to regularly re-examine the 7.5% profit cap on company's

contributions in light of the intended rationale, since the former can become a meaningless limit in the context of big companies.

2.28.6 On a separate note, the authorisation of corporate contribution through a resolution passed at the meeting of the Board of Directors under Section 182(1) of the Companies Act, 2013 should be amended to empower a larger group of people, such as the company's shareholders, in deciding how to use the funds of a company for political purposes. This has been done in the United Kingdom as well. Section 182(1) should be amended to this effect.

(b) On Disclosure

2.28.7 Disclosure is at the heart of public supervision of political finance and requires strict implementation of the provisions of the RPA, the IT Act, the Company Act, and the ECI transparency guidelines, effective from 1<sup>st</sup> October 2014, bearing No. 76/PPEMS/Transparency/2013 dated 29<sup>th</sup> August, 2014 and 19<sup>th</sup> November 2014, which need to be given statutory backing. This is especially important given the Commission's recommendations that the current absence of expenditure caps for parties and contributions remain unchanged.

2.28.8 The primary provision governing disclosure of election expenses for candidates in the RPA is Section 78 and Rules 86-90 of the Election Rules. A new section, section 77A needs to be inserted (similar to the comparative practices referred above) to provide for candidates disclosing (a) any individual contributions received by them and (b) any contribution by the political party from the date of notification of elections, regardless of whether the donation is in cash, cheque, or in kind.

2.28.9 Similarly, Section 78 should also be amended in light of the proposed amendment to section 77A above, and the reference to more than one returned candidate should be removed.

2.28.10 The primary provision governing disclosure for political parties in the RPA is Section 29C and Rule 85B, which requires political parties to report contributions only in excess of Rs. 20,000 and the ECI's transparency guidelines which stipulate that all cash contributions be duly accounted for. As the abovementioned analysis by ADR on the sources of political funding for parties reveals, more than 75% of parties sources of funds are unknown while only 9% of their funding is said to comprise donations over Rs. 20,000.

2.28.11 Evidently, writing multiple cheques below Rs. 20,000 each can easily evade this Rs. 20,000 disclosure limit (and even otherwise, the non-deductibility of income tax does not serve as a sufficient deterrent). Even

otherwise, donor incentives created by tax exemptions do not always outweigh the disincentive caused by the loss of anonymity, especially in a situation where donors or companies or trusts donate to multiple parties. Hence, it is imperative to require the disclosure of all contribution amounts, subject to a cap of Rs. 20 crore or 20 per cent of the total contribution, whichever is lesser as discussed below, whether in cash or cheque or kind. Further, the limit should apply to contributions given cumulatively by a person or company throughout the year. Even if these measures are unable to stem the flow of black money, it is hoped they will improve transparency and make the process of evasion more difficult.

2.28.12 Further, parties claim that part of this 75% unaccounted funding comes from small donors contributing amounts such as Rs. 50 or Rs. 100, making it difficult to keep account of the same. Similarly, *hundi* or bucket collections at public rallies are also said to form part of parties' funding corpus, and are also not disclosed on grounds of practical difficulty. However, such levels of anonymity are used as means of avoiding disclosure.

2.28.13 While the Commission agrees that there are undoubtedly cases where parties collect a part of their funding from anonymous small donors and *hundi*/bucket collections at public rallies, the anonymity should be limited. The Commission suggests that *only* up to Rs. twenty crore or twenty per cent of the total contribution of a political party's entire collection (whether cash/cheque), whichever is lesser, can be anonymous. Apart from this, the details and amounts of all donations and donors (including PAN cards, wherever applicable) need to be disclosed by political parties, regardless of their source or amount.

2.28.14 Additionally, the auditing provisions should be enforced across all the levels of political parties, including the national, regional, local, and sub-local levels. It is pertinent to note that the Law Commission had recommended the insertion of a new Section 78A in its 170<sup>th</sup> Report in 1999 on the "Maintenance, audit, publication of accounts by political parties". As per the proposed Section 78A(1):

*"Each recognised political party shall maintain accounts clearly and fully disclosing the sources of all amounts received by it and clearly and fully disclosing the expenditure incurred by it. The accounts shall be maintained according to the financial year. Within nine months of each financial year, each recognised political party shall submit its accounts, duly audited by an accountant (as defined in the Explanation below sub-section (2) of section 288 of the Income-tax Act, 1961), to the Election Commission. The Election Commission shall publish the said accounts in accordance with such general directions as may be issued by the Election Commission in this*

*behalf. The accounts shall also be open for inspection by the members of the public in the office of the Election Commission and they shall also be entitled to obtain copies of such accounts or any part thereof in accordance with such instructions as the Election Commission may issue in that behalf.*"<sup>108</sup>

2.28.15 This is similar to ECI's auditing and accounting guidelines stating that all books of accounts need to be audited and certified by qualified, practicing Chartered Accountants annually, with a copy of the Auditor's Report. The Commission recommends inserting a new section 29C (replacing the current provision), along these lines, to require parties to maintain and submit audited accounts annually.

2.28.16 Finally, separate provisions should be inserted, along the lines of the comparative practice discussed above, requiring:

- (a) All parties to submit the names and addresses of all their donors (regardless of the amounts or source of funding) for contributions greater than Rs. 20,000 through a new section 29D, RPA. A maximum of up to Rs. 20 crore or 20% of the party's entire collection, whichever is lower, can be anonymous;
- (b) The ECI to upload all the annual returns of the parties (under section 29E) and the district election officer to upload the election and contribution expenses of candidates (under section 78A) and keep the same on record for public inspection for three years.
- (c) Parties to submit election expense accounts within a specified period after every Parliamentary or State election, pursuant to the Supreme Court's judgment in *Common Cause vs Union of India*,<sup>109</sup> and the ECI's notifications on election expenses and transparency guidelines through a new section 29F.

### (c) On Penalties

2.28.17 Currently, penal provisions for candidates are governed by section 10A, RPA which provides for disqualification, up to a period of three years, for failure to lodge accounts of election expenses. The period of disqualification should be increased up to five years, and should apply to contribution reports under section 77A as well, so that a defaulting candidate may be ineligible to contest at least the next general elections normally held after five years.

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<sup>108</sup> Law Commission of India, *Reform of Electoral Laws*, Report No. 170, May 1999 ("LCI, 170<sup>th</sup> Report"), <<http://www.lawcommissionofindia.nic.in/lc170.htm>>, at para 4.2.6.

<sup>109</sup> AIR 1996 SC 3081.

2.28.18 With respect to political parties, the ECI's transparency guidelines only stipulate that the penalty for cash contributions to political parties by an individual or a company is that such contribution will not be deductible under section 80GGB and 80GGC, IT Act. Given the prevalence of black money, this does not serve as a true deterrent and the penalty needs to include more than just non-deductibility of tax.

2.28.19 Similarly, the penalty of non-deductibility of tax under section 29C of the RPA r/w section 13A of the IT Act for parties which do not maintain the names and addresses of all donors (donating above Rs. 20,000) as per Form 24A of the Election Rules is not stringent enough and may be flouted. While Section 10A of the RPA disqualifies candidates for a failure to lodge an account of election expenses, similar strict provisions are not applicable to parties. The Law Commission had recommended the insertion of a new Section 78A(2) in its 170<sup>th</sup> Report on penalties for non-compliance:

*“(2) A political party which does not comply with any of the requirements of sub-section (1) 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.*

*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.*

*(3) If the Election Commission finds on verification, undertaken whether suo motu or on information received, that the statement of accounts filed under sub-section (1) 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.”*

2.28.20 The Commission endorses these proposed sub-sections with certain modifications: *first*, the penalty for non-compliance should be increased from Rs. 10,000 daily to Rs. 25,000 daily; *secondly*, the default period before the ECI may de-recognise the party be extended to 90 days; *third*, the penalty for filing false information should be stipulated up to a maximum of fifty-lakh rupees. This can be inserted *vide* a new section 29G to the RPA.

2.28.21 Section 29B of the RPA and section 182 of the Companies Act prohibits political parties from receiving funds from foreign sources, government companies and loss making companies, but there is no penalty against the parties which contravene the above provisions. The law may be amended to provide for suitable remedy. A new section 29H should be

inserted levying a penalty of five times the amount of such contribution accepted.

(d) On electoral trusts

2.28.22 The IT Act has been amended to provide for tax relief on donations to the electoral trusts, setup for the sole purpose of making donations to political parties and as discussed above, the ECI regulates electoral trusts as well through its “Electoral Trust Companies” scheme notified on 10<sup>th</sup> December 2013. However, there is no disclosure provision under the RPA corresponding to the changes in the income tax laws. Additionally, the only penalty prescribed non-submission of an annual report of contributions to the ECI as per the prescribed format (detailing the names and addresses of donors and donations given to parties), before the due date of filing of tax returns is that “adverse notice shall be taken” of the failure to comply with the instructions.<sup>110</sup> Thus, a new Chapter IVB pertaining to the ‘Regulation of Electoral Trusts’ should be introduced, to provide for the regulation of electoral trusts with appropriate penal provisions for enforcement in case of default, along the lines of the proposed amendments above.

2.28.23 A list of recommendations is given below:

**On Expenses and Contribution**

1. Section 77(1) of the RPA should be amended to extend the starting time period of the regulation of the election expenditure from the current date of nomination to the date of notification of elections, extending to the date of declaration of results.
  - Thus, the words “on which he has been nominated” in sub-section (1) of section 77 should be deleted and instead, the words “of notification of such election” should be inserted in its place.
2. Section 182(1) of the Companies Act, 2013 should be amended to require the passing of the resolution authorising the contribution of the company’s funds at the company’s Annual General Meeting (AGM) instead of its Board of Directors.
  - Thus, the words “a meeting of the Board of Directors” in sub-clause (1) of section 182 should be deleted and in its place, the words “the annual general meeting” should be inserted.

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<sup>110</sup> ECI, *Guidelines for submission of contribution reports to electoral trusts*, No. 56/Electoral Trust/2014/PPEMS, 6<sup>th</sup> June 2014, available at <[http://eci.nic.in/eci\\_main1/PolPar/ElectoralTrust\\_06062014.pdf](http://eci.nic.in/eci_main1/PolPar/ElectoralTrust_06062014.pdf)>.

## On Disclosure

### Relating to individual candidates

3. A new section 77A of the RPA has to be inserted requiring the candidates, or their election agents to maintain an account of the contributions received by them from their political party (not in cash) or any other permissible donor. The new section 77A reads as follows:

**“77A. Account of contributions received.—**Every candidate at an election shall, either by himself or by his election agent, also keep an account of the following particulars in respect of the donations or contributions received by the candidate after the date of notification of election, namely: —

- (a) the amount of contribution received by the candidate from his party for the election;
- (b) the amount of contribution received by the candidate from—
  - (i) any person;
  - (ii) any company, not being a government company
- (c) the name, address and PAN card details, if applicable, of the donor in sub-clause (b) above;
- (d) the nature of each contribution, in particular, whether it is:
  - (i) cash;
  - (ii) cheque; or
  - (iii) gifts in kind;
- (e) the date on which the contribution was received.

*Explanation:* All contributions by a political party to its candidate shall be made by a crossed account payee cheque or draft or bank transfer.”

4. A new section 78A to be inserted in the RPA requiring the ECI to make publicly available, on its website, all the expenditure reports submitted by every contesting candidate under section 78. Section 78A shall read as:

**“78A. Disclosure of account submitted by contesting candidates.—**

(1) The district election officer shall make publicly available, on his website, the accounts of election expenses and contribution reports submitted by every contesting candidate or their election agent under section 78.

(2) The district election officer shall also keep these reports on file for three years after their submission and shall make them available for public

inspection on the payment of a prescribed fee under Rule 88 of the Conduct of Election Rules, 1961.”

Relating to political parties

5. Section 29C of the RPA has to be deleted. In its place, a new section 29C has to be inserted mandating political parties to maintain audited accounts, along the line of the 170<sup>th</sup> Report’s recommended section 78A:

**“29C. Maintenance, audit, publication of accounts by political parties**

(1) Each recognised political party shall maintain accounts clearly and fully disclosing all the amounts received by it and clearly and fully disclosing the expenditure incurred by it. The account shall be maintained according to the financial year. Within six months of the close of each financial year, each recognised political party shall submit to the Election Commission, its accounts, duly audited by a qualified and practicing chartered accountant from a panel of such accountants maintained for the purpose by the Comptroller and Auditor General.

(2) The Election Commission shall make publicly available, on its website, the audited accounts submitted by all political parties under sub-section (1).

(3) The Election Commission shall also keep these accounts on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.”

6. The existing section 29C of the RPA has to be modified and recast as section 29D to *first*, include aggregate contributions from a single donor amounting to Rs. 20,000 within its scope; *second*, require parties to disclose the names, addresses and PAN card numbers (if applicable) of donors along with the amount of each donations; *third*, require parties to disclose such particulars even for contributions less than Rs. 20,000 if such contributions exceed Rs. 20 crore of the party’s total contributions or twenty per cent of total contributions, whichever is lesser. Consequential amendments will need to be made to the Election Rules and the IT Act. The proposed section 29D reads as:

**“29D. Declaration of contribution received by the political parties.—**

(1) The treasurer of a political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely: —



(a) the contribution in excess of twenty thousand rupees, including an aggregate of contributions in excess of twenty thousand rupees, received by such political party from any person in that financial year;

(b) the contribution in excess of twenty thousand rupees, including an aggregate of contributions in excess of twenty thousand rupees received by such political party from any company, other than a Government company, in that financial year.

(2) Notwithstanding anything contained in sub-section (1), the treasurer of a political party or any other person authorised by the political party in this behalf shall, in the report referred to in sub-section (1), disclose the particulars of such contributions received from a person or company, other than a Government company, even if the contributions are below twenty thousand rupees, in case such contributions exceeds twenty crore rupees, or twenty per cent of total contributions, whichever is lesser, as received by the political party in that financial year.

*Illustration:* A political party, 'P', receives a total of hundred crore rupees, in cash or cheque, in a financial year. Out of this amount, fifty crore rupees are received from undisclosed sources, by way of contributions less than twenty thousand rupees (in cash or multiple cheques). P shall be liable to disclose the particulars of all donors beyond twenty crores, even if they have contributed less than twenty thousand rupees each.

(3) The report under sub-section (1) shall be in such form as may be prescribed.

(4) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other person authorised by the political party in this behalf before the due date for furnishing a return of its income of that financial year under section 139 of the Income-tax Act, 1961 (43 of 1961), to the Election Commission.

*Explanation:* For the avoidance of doubt, it is hereby clarified that the term "particulars" mentioned in this section shall include the amount donated; the names and addresses, and PAN card number if applicable, of such person or company referred to in this section."

7. A new section 29E to be inserted in the RPA requiring the ECI to make publicly available, on its website, all the contribution reports submitted by all political parties under section 29D. Section 29E shall read as:

**"29E. Disclosure of contribution reports submitted by political parties.–** (1) The Election Commission shall make publicly available, on

its website, the contribution reports submitted by all political parties under section 29D.

(2) The Election Commission shall also keep these reports on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.”

8. The Commission recommends giving statutory basis to the ECI’s ‘statement of election expenditure’ requirement introduced pursuant to the Supreme Court’s judgment in *Common Cause v UOI*, AIR 1996 SC 3081, and its transparency guidelines pertaining to election expenses by political parties through a new section 29F, which states as follows:

**“29F. Election expenses by political parties. —** (1) Every political party contesting an election shall, within seventy five days of the date of an election to a Legislative Assembly of a State or ninety days of the date of an election to the House of the People, lodge with the Election Commission a statement of election expenditure, which shall be a true copy of such statement maintained by the party in consonance with the directions of the Election Commission.

(2) The payment of any election expenditure over twenty thousand rupees should be made by the political parties via cheque or draft, and not by cash, unless there are no banking facilities or the payment is made to a party functionary in lieu of salary or reimbursement.”

## **On Penalties**

### *Relating to individual candidates*

9. The disqualification of a candidate for a failure to lodge an account of election expenses and contribution reports should be increased and should extend from the current three period up to a five year period, so that a defaulting candidate may be ineligible to contest at least the next elections.
  - Thus, in the title and sub-clause (a), after the words “account of election expenses”, add the words “and contribution reports”.
  - After the words “period of three years” and before the words “from the date of” in section 10A, add the words “up to a period of five years”.

### *Relating to political parties*

10. Express penalties, apart from losing tax benefits under section 13A of the IT Act, should be imposed on political parties for the non-compliance with

the provisions of section 29D of the RPA. This should include a daily fine for each day of non-compliance, with the possibility of de-recognition in extreme cases, along the lines of proposed section 78A in the 170<sup>th</sup> Report. This new section 29G reads as follows:

**“29G. Penalty.—**(1) Where the treasurer of any political party or any other person authorised by the political party in this behalf fails to submit a report in the prescribed form within the time specified under sub-section (4) of section 29D then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such political party:

- (a) shall not be entitled to any tax relief for such financial year under the Income-tax Act, 1961; and
- (b) shall be liable to a penalty of twenty five thousand rupees for each day of non-compliance and so long as the non-compliance continues.

*Provided that* If such default continues beyond the period of ninety days, the Election Commission may de-register the political party after giving a reasonable opportunity to show cause.

(2) If the Election Commission finds on verification, undertaken whether suo motu or on information received, that the report submitted under sub-section (4) of section 29D is false in any particular, the Election Commission shall levy a fine up to a maximum of fifty lakh rupees on such political party.”

11. A new section 29H should be inserting penalising parties that contravene the stipulations of section 29B, RPA and section 182 of the Companies Act in terms of accepting contributions from impermissible donors, by levying a penalty of five times the amount so accepted:

**“29H. Penalty for political parties accepting contributions from an impermissible donor. –** If a political party accepts any contribution offered to it from an impermissible donor, it shall be liable to pay a penalty that is five times the amount so accepted from such donor.

*Explanation.—* For the purpose of this section, “impermissible donor” refers to:

- (a) a government company, as defined in section 29B;
- (b) a company that does not comply with the requirements of sub-section (1) section 182 of the Companies Act, 2013; or
- (c) any foreign source defined under clause (e) of section 2 of the Foreign Contribution (Regulation) Act, 1976.”

## On Electoral Trusts

12. A new Part IVB should be inserted to the RPA dealing with the “Regulation of Electoral Trusts”, and detailing provisions pertaining to their entitlement to accept contributions, disclosure obligations, and penal provisions so that the RPA can be amended in line with the changes already made to the IT Act and the ECI guidelines. The new part IVB, section 29I reads as:

Part IVB: Regulation of Electoral Trusts.

**29I. Electoral Trusts entitled to accept contribution.** (1) Subject to the provision of the Companies Act, 2013 and the Income Tax Act, 1961, an Electoral Trust approved by the Central Board of Direct Taxes under the Electoral Trusts Scheme, 2013 may accept any amount of contribution voluntarily offered to it by any person or company other than a Government Company:

Provided that no Electoral Trust shall be eligible to accept any contribution from any foreign source defined under clause (e) of section (2) of Foreign Contribution (Regulation) Act, 1976.

Provided further that all words and phrases used in this Part, shall have the same meaning as assigned to them in section 29B.

**2. Maintenance, audit, publication of accounts by electoral trusts** (a) Each Electoral Trust shall maintain accounts clearly and fully disclosing all the amounts received by it and clearly and fully disclosing the expenditure incurred by it. The account shall be maintained according to the financial year. Within six months of the close of each financial year, each Electoral Trust shall submit its accounts, duly audited by a qualified and practicing chartered accountant from panel of Chartered Accountants, selected by the Comptroller and Auditor General to the Election Commission.

(b) The Election Commission shall make publicly available, on its website, the audited accounts submitted by all electoral trusts under sub-section (1).

(c) The Election Commission shall also keep these accounts on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.

**3. Declaration of contribution received by the Electoral Trusts —** (a) The treasurer of an Electoral Trust or any other person authorised by the trust in this behalf shall, in each financial year, prepare a report in respect of the following, namely: —

(i) the contribution received by such electoral trust from any person in that financial year, with name, address, PAN of such persons.

*Provided that the Electoral Trust or any other person authorised by the Trust in this behalf shall not receive any donation in cash and without the name, address and PAN (if any);*

(ii) the contribution to political parties from electoral trusts in that financial year with date amount, mode of payment and name of political party.

*Provided that the electoral trusts shall not make any contribution to political parties in cash other than by bank account transfer.*

(b) The report under this sub-section 2 shall be in such form as may be prescribed.

(c) The report for a financial year under sub-section (1) shall be submitted by the treasurer of an Electoral Trust or any other person authorised by the Trust within six months of the close of each financial year to the Election Commission.

**4. Disclosure of contribution reports submitted by Electoral Trusts by Election Commission –** (a) The Election Commission shall make publicly available, on its website, the contribution reports, submitted by all Electoral Trusts under sub-sections (2) and (3) of this section.

(b) The Election Commission shall also keep these reports on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.

**5. Penalty.—**(1) Where the Electoral Trust fails to submit a report in the prescribed form within the time specified under sub-sections (2) or (3) of this section then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such Electoral Trust:

(a) shall not be entitled to any tax relief for such financial year under the Income-tax Act, 1961; and

(b) shall be liable to a penalty of twenty five thousand rupees for each day of non-compliance and so long as the non-compliance continues.

*Provided that* If such default continues beyond the period of ninety days, the Election Commission may ban the electoral trust from receiving any donations in future, after giving a reasonable opportunity.

(2) If the Election Commission finds on verification, undertaken whether suo motu or on information received, that the statement of accounts filed

under this section is false in any particular, the Election Commission shall impose a fine up to a maximum of fifty lakh rupees on such Electoral trust.

(3) If the Electoral Trust has received funds from an impermissible donor, it shall be liable to penalty that is five times the amount so accepted by the Trust.

*Explanation.*— For the purpose of this section, “impermissible donor” refers to:

- (a) a government company, as defined in section 29B;
- (b) a company that does not comply with the requirements of sub-section (1) section 182 of the Companies Act, 2013; or
- (c) any foreign source defined under clause (e) of section 2 of the Foreign Contribution (Regulation) Act, 1976.”

## **F. State Funding of Elections**

2.29.1 In many countries around the world, the role of big money in elections (and the associated charges of bribing, capture, lobbying, and institutional corruption) has sought to be reduced through public funding of elections. In India too, the idea of state funding has been proposed to reduce the unending increase in the cost of elections (and create a more level playing field) and to curb corruption and the influence of black money. Nevertheless, despite similar proposals in India, there is currently no direct public funding of elections.

2.29.2 However, the 2003 Amendment to the RPA introduced Sections 39A of the RPA to provide for partial in-kind subsidy in the form of allocation of equitable sharing of airtime on cable television networks and other electronic media (based on past performance); and Sections 78A, and 78B for the free supply of copies of electoral rolls and certain other items. It is pertinent to note that no rules for operationalization for the sharing of airtime on private media have been finalised under Section 39A.<sup>111</sup> On 14<sup>th</sup> March 2014, the ECI issued an order bearing No. 437/TVs/2014(LS) to extend the scheme of equitable time sharing through the Prasar Bharti Corporation, namely Doordarshan and All India Radio for the forthcoming General Elections to the recognised six National parties and 47 State parties and not to independent candidates.<sup>112</sup>

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<sup>111</sup> Gowda, *supra* note 94, at 230.

<sup>112</sup> ECI, *Telecast/Broadcast Facility to Political Parties During Elections*, No. 437/TVs/2014(LS), 14<sup>th</sup> March 2014, <<http://pib.nic.in/archieve/others/2014/mar/d2014031502.pdf>>.

2.29.3 Such legislative provisions are a consequence of our history of reform proposals on state funding of elections, which are described in the section below.

**(i) History of reform proposals**

2.29.4 The first committee to deal with the issue of public funding was the Dinesh Goswami Committee on Electoral Reforms in 1990, which advocated for partial state funding of elections in the form of limited in-kind support for vehicle fuel (which is a primary campaign expense); rental charges for microphones; issuance of voter identity slips; and additional copies of electoral rolls.<sup>113</sup>

2.29.5 In 1993, the Confederation of Indian Industries constituted a Task Force that recommended that elections be funded in effect, through a tax on the industry. This would involve the funds to be raised either through a cess on excise duty, or through corporate contributions to an election fund pool managed by the State, which would then be distributed via a pre-decided formula based on vote and seat share.<sup>114</sup>

2.29.6 The 1998 Indrajit Gupta Committee Report on State Funding of Elections endorsed state funding of elections, seeing “*full justification constitutional, legal as well as on ground of public interest*” in order to establish a fair playing field for parties with less money power. The Committee envisaged a phased introduction of public funding, given the economic conditions of the country in 1998, beginning with in-kind state subsidies (and no cash) such as rent-free office space, free telephone facilities, electoral rolls’ copies, loudspeakers, specified quantities of fuel, food packets, and airtime (both on state and private media). Gradually, the Committee envisioned a transition to full state funding, along with monetary provision via the creation of a central-governed Election Fund, whose funding would be provided by the Centre and the states together. However, the Committee excluded independent candidates from the benefits of state funding and required parties to submit audited accounts and tax returns to avail the benefits.<sup>115</sup>

2.29.7 This was followed soon after by the Report of the Law Commission in 1999 on the Reform of Electoral Laws, which endorsed the

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<sup>113</sup> Government of India, REPORT OF THE COMMITTEE ON ELECTORAL REFORMS, May 1990 (*hereinafter* “Dinesh Goswami Report”), <<http://lawmin.nic.in/ld/erreports/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf>>; Gowda, *supra* note 94, at 228.

<sup>114</sup> ORF, *supra* note 51.

<sup>115</sup> Government of India, COMMITTEE ON THE STATE FUNDING OF ELECTIONS, December 1998, at 11-45, 55-56, <<http://lawmin.nic.in/ld/erreports/Indrajit%20Gupta%20Committee%20Report.pdf>>.

ideas of the Indrajit Gupta Committee Report on partial state funding, as a first step towards total funding given that the latter was not “feasible” in light of the “prevailing economic conditions”. However, the Commission clarified that given that the underlying premise of state funding was the elimination of the influence of money power, corporate funding and black money support, it was:

*“... absolutely essential before the idea of state funding (whether partial or total) is resorted, the provisions suggested in this report relating to political parties (including the provisions ensuring internal democracy, internal structures) and maintenance of accounts, their auditing and submission to Election Commission are implemented.....The state funding, without the aforesaid pre-conditions, would merely become another source of funds for the political parties and candidates at the cost of public exchequer.”<sup>116</sup>*

2.29.8 In 2001, the NCRWC concurred with the 1999 Law Commission report that the question of permitting state funding “should not even arise” without:

*“an effective systemic acceptance of full audit of party funds including a full audit of campaign funds, deletion of explanation 1 to section 77(1) of the Representation of People Act 1951, a fool proof mechanism to deter expenditure violations, and until the government is convinced that these improvements have been institutionalised and are no longer being breached.”<sup>117</sup>*

2.29.9 To do so otherwise, would simply add to the burden on the Exchequer and taxpayers without any public or systematic benefit. The NCRWC’s views were premised on the failure of the existing mechanisms of partial or indirect state funding in reducing campaign expenditure and the need to bring in transparency mechanisms first.<sup>118</sup>

2.29.10 Similarly, the ARC’s 2007 Report on “Ethics in Governance” also recommended partial state funding of elections to reduce the scope of “illegitimate and unnecessary funding” of elections expenses.<sup>119</sup>

## **(ii) Comparative provisions governing public funding of elections**

Country	Public Funding of Election Campaigns
India	Partial state funding through in kind subsidies such as free air time on state owned electronic media, free supply of electoral rolls and identity slips, and tax deductions for donations

<sup>116</sup> LCI, 170<sup>th</sup> Report, *supra* note 108, at para 4.3.4.

<sup>117</sup> NCRWC, *supra* note 93, at para 14.7.

<sup>118</sup> *Ibid*, at paras 14.9, 14.10.

<sup>119</sup> Fourth Report of the Second Administrative Reforms Commission, *Ethics in Governance*, (2007) <<http://arc.gov.in/4threport.pdf>> at para 2.1.3.1.6 (*hereinafter* “ARC Report”).



<b>U.S.A.</b> <sup>120</sup>	<ul style="list-style-type: none"> <li>• No direct or indirect public funding for political parties</li> <li>• No public subsidy for congressional elections</li> <li>• Partial public funding available for Presidential primary candidates in the form of primary matching grants (up to \$250 by an individual) and general elections grants (to the individual candidates) – this results in a ceiling on expenditure</li> <li>• On 3<sup>rd</sup> April 2014, Present Obama signed a law (Public Law No. 113-94) to end public funding of national nominating conventions to eliminate taxpayer financing of political party conventions<sup>121</sup></li> </ul>
<b>U.K.</b> <sup>122</sup>	<ul style="list-style-type: none"> <li>• Modest public funding of political parties</li> <li>• Political parties receive direct public funding over each financial year for policy development purposes up to a total of £2mn on the basis of current legislative representation</li> <li>• Indirect support is provided to parties based on the number of candidates put forward in the election, which includes free broadcasting time for party political broadcasts, free postage, meeting rooms, and mail shot to electors</li> </ul>
<b>Germany</b> <sup>123</sup>	<ul style="list-style-type: none"> <li>• Public funding to national political parties with tax credits, matching grants (of the amount earned by parties from transparent, private sources), and flat grants to parties based on their past performance</li> <li>• Absolute ceiling of public subsidy to all parties, with no subsidy for local party organisations or individual candidates</li> <li>• The state “request[s] partial approval” of public subsidy from the tax payers or party supporters, although threshold for access to public funding is “lower than anywhere else in the world”</li> <li>• Public subsidies not earmarked for any specific purpose</li> <li>• Indirect support in the form of free media access based on the duration and continuity of electoral participation; exemption from income, inheritance, and property tax; and caucus subsidies</li> </ul>
<b>Italy</b> <sup>124</sup>	<ul style="list-style-type: none"> <li>• Public subsidies are a “major source” of funding elections, although have been restricted to election campaign activities since 1993</li> <li>• Funding is distributed according to the votes polled and is given to candidates</li> <li>• The state “request[s] partial approval” of public subsidy from the tax payers or party supporters</li> <li>• Indirect, in-kind subsidy in the form of free media access and state aid for radio and newspapers, and reduced rates for sending electoral propaganda material by post to voters</li> </ul>

<sup>120</sup> IDEA, *Funding of Political Parties and Election Campaigns*, HANDBOOK SERIES (2003), <[http://www.idea.int/publications/funding\\_parties/funding\\_of\\_pp.pdf](http://www.idea.int/publications/funding_parties/funding_of_pp.pdf)>, at 41-42 (hereinafter “IDEA Report”); FEC, *Public Funding of Presidential Elections*, <<http://www.fec.gov/pages/brochures/pubfund.shtml#anchor684182>>

<sup>121</sup> Gabriella Miller Kids First Research Act, <<http://www.gpo.gov/fdsys/pkg/PLAW-113publ94/pdf/PLAW-113publ94.pdf>>.

<sup>122</sup> IDEA Report, *supra* note 120, at 40, 42, 213, 218, 219, 223.

<sup>123</sup> *Ibid.*, at 123, 124, 210, 216, 223.

<sup>124</sup> IDEA Report, *supra* note 120, at 118, 123, 211, 223.

<b>Sweden</b> 125	<ul style="list-style-type: none"> <li>• “High level” of public subsidies exist for parties at various levels, with each party being given a base amount at the sub-national level, along with additional state aid to party sub-organisations and to party media based on part performance and current representation</li> <li>• General subsidy is given to parties, their secretariat and party groups in Parliament alongside regional and local subsidies</li> <li>• Public subsidies are given for general party administration and are not earmarked for any specific purpose</li> <li>• Indirect subsidies include media access and the party affiliated press receive public support</li> </ul>
<b>Australia</b> a <sup>126</sup>	<ul style="list-style-type: none"> <li>• Political parties receive direct public funding during the election period and between elections</li> <li>• Funding is not ear-marked for a specific purpose and depends on the performance of the party at the previous election</li> </ul>

### (iii) **Recommendations**

2.30.1 A quick perusal of the recommendations of various committees on state funding of elections and comparative provisions makes it clear that complete public funding of elections or political parties in India is not a practical option; instead, indirect state subsidy is a better alternative for various reasons provided below.

2.30.2 *First*, prevailing economic conditions make it impossible for complete state funding of elections. Full funding should prohibit candidates and parties from accessing alternative sources of money both during election campaigns and in the inter-election period. If full funding is seen as a replacement for the pervasiveness of big money in elections, then it will have to be substantial enough to stop the prevalence of black money. Given the amount being spent on elections today, and the alternative use of money on poverty reduction, health, education, food etc.; it seems highly unlikely that the centre can provide such money.

2.30.3 *Second*, for similar reasons of financial burdens, monetary constraints, and weak enforcement, a system of matching grants as in Germany and the United Kingdom are not possible. Corporate grants are often enormous and hence will be difficult to match, while a lot of big donors give money in black, and hence will only serve to increase the amount of total funding available with parties.

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<sup>125</sup> *Ibid.*, at 118, 123.

<sup>126</sup> *Ibid.*, at 209.

2.30.4 *Third*, currently, there is no clear picture on the cost of financing elections given the weak disclosure of expenditure by political parties and contributions by corporates and big donors. A system of complete monetary state support will work only if it replaces the actual demand for money in election campaigns and day-to-day administration of political parties. Hence any state support has to be in kind support, and not in cash because unless the current system satisfies the total requirement of parties, monetary support will only serve to increase party spending and invite uninterested or opportunistic candidates and parties.

2.30.5 *Fourth*, as the Law Commission Report in 1999 and the NCRWC Report in 2001 acknowledge, reforms on state funding of election have to be preceded by campaign finance reform; improvement in transparency, disclosure and audit provisions; decriminalisation of politics; and the introduction of inner party democracy. Funding parties (instead of candidates) with little internal democracy will only strengthen the power of the leadership and the benefits of public funding might not extend to the rank and file of the party.<sup>127</sup>

2.30.6 *Fifth*, there are various associated problems with state funding such as the possible undermining of the independence of the parties due to their financial reliance on the exchequer, and can be especially problematic for new parties.<sup>128</sup> Even otherwise, the distribution of public money may reduce party incentives to maintain their social base and generate funds through political mobilisation.<sup>129</sup> Moreover, as the comparative table shows, in most countries subsidies are determined on the basis of past performance or current representation, and thus automatically discourage new (and weaker) parties. In case of current representation, money will have to be given upfront and subsequently, overpaid parties will have to reimburse the State, while underpaid parties will be reimbursed by the state after the results.<sup>130</sup>

2.30.7 *Finally*, public funding of elections, including existing provisions on partial in-kind funding only extends to registered parties and hence excludes independent candidates, whilst simultaneously encouraging frivolous candidatures, with the sole intention of gaining access to public funds.

2.30.8 Instead, as the Indrajit Gupta Committee noted in its 1998 report, efforts should be made to curb the costs of campaigning by limiting or regulating the use and location of cut outs and banners; hoardings and posters; the number of public meetings; the use of vehicles during campaigns,

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<sup>127</sup> Gowda, *supra* note 94, at 245.

<sup>128</sup> IDEA Report, *supra* note 120, at 8.

<sup>129</sup> ORF, *supra* note 104.

<sup>130</sup> Gowda, *supra* note 94, at 246.

and the publicity from moving vehicles. This will help reduce the cost of elections, although it may not reduce the incentives to raise election funds and abuse power.<sup>131</sup>

2.30.9 With respect to indirect in-kind subsidy, reference should be made to the British practice to increase the quantum of such subsidies to include free broadcasting time on private channels, free postage and meeting rooms, access to public town halls, the cost of printing, and even provision of specified quantities of fuel and food packets. Thus, by providing a “financial floor” to parties and candidates,<sup>132</sup> it reduces the cost of elections, without providing parties with liquid cash to spend in addition to their resources.

2.30.10 On the basis of the above, the following recommendations are suggested:

1. Currently, a system of complete state funding of elections or of matching grants, wherein the government matches the private funding (by donors or corporates) raised by political parties, are not feasible given the economic conditions and developmental problems of the country.
2. Given the high cost of elections and the improbability of being able to replace the actual demand for money, the existing system of giving indirect in-kind subsidies instead of giving money via a National Election Fund, should continue.
3. The wording of Section 78B of the RPA permits the Central Government, in consultation with the ECI, to supply certain items to the electors or the candidates and this provision can be used to expand the in-kind subsidy to include free public meeting rooms, certain printing costs, free postage etc.
4. Any reform in state funding should be preceded by reforms such as the decriminalisation of politics, the introduction of inner party democracy, electoral finance reform, transparency and audit mechanisms, and stricter implementation of anti-corruption laws so as to reduce the incentive to raise money and abuse power.

## **G. Recommendations**

2.31 A combined list of recommendations is reproduced below:

### **a) On Expenses and Contribution**

1. Section 77(1) of the RPA should be amended to extend the starting time period of the regulation of the election expenditure from the current date of

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<sup>131</sup> Gowda, *supra* note 94, at 241.

<sup>132</sup> *Ibid.*, at 242.

nomination to the date of notification of elections, extending to the date of declaration of results.

- Thus, the words “on which he has been nominated” in sub-section (1) of section 77 should be deleted and instead, the words “of notification of such election” should be inserted in its place.
2. Section 182(1) of the Companies Act, 2013 should be amended to require the passing of the resolution authorising the contribution of the company’s funds at the company’s Annual General Meeting (AGM) instead of its Board of Directors.
- Thus, the words “a meeting of the Board of Directors” in sub-clause (1) of section 182 should be deleted and in its place, the words “the annual general meeting” should be inserted.

## **b) On Disclosure**

### *Relating to individual candidates*

3. A new section 77A of the RPA has to be inserted requiring the candidates, or their election agents to maintain an account of the contributions received by them from their political party (not in cash) or any other permissible donor. The new section 77A reads as follows:

**“77A. Account of contributions received.—**Every candidate at an election shall, either by himself or by his election agent, also keep an account of the following particulars in respect of the donations or contributions received by the candidate after the date of notification of election, namely: —

- (f) the amount of contribution received by the candidate from his party for the election;
- (g) the amount of contribution received by the candidate from—
  - (i) any person;
  - (ii) any company, not being a government company
- (h) the name, address and PAN card details, if applicable, of the donor in sub-clause (b) above;
- (i) the nature of each contribution, in particular, whether it is:
  - (j) cash;
  - (iv) cheque; or
  - (v) gifts in kind;
- (j) the date on which the contribution was received.

*Explanation:* All contributions by a political party to its candidate shall be made by a crossed account payee cheque or draft or bank transfer.”

4. Section 78 should also be amended in light of the proposed amendment to section 77A above, and the reference to more than one returned candidate should be removed. It should read as follows:

**“78. Lodging of account with the district election officer.—** (1) Every contesting candidate at an election shall, within thirty days from the date of election of the returned candidate lodge with the district election officer an account of his election expenses and contribution reports which shall be a true copy of the account kept by him or by his election agent under section 77 and section 77A respectively.”

5. A new section 78A to be inserted in the RPA requiring the district election officer to make publicly available, on its website, all the expenditure and contribution reports submitted by every contesting candidate under section 78. Section 78A shall read as:

**“78A. Disclosure of account submitted by contesting candidates.–**

(1) The district election officer shall make publicly available, on his website, the accounts of election expenses and contribution reports submitted by every contesting candidate or their election agent under section 78.

(2) The district election officer shall also keep these reports on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee under Rule 88 of the Conduct of Election Rules, 1961.”

*Relating to political parties*

6. Section 29C of the RPA has to be deleted. In its place, a new section 29C has to be inserted mandating political parties to maintain audited accounts, along the line of the 170<sup>th</sup> Report’s recommended section 78A:

**“29C. Maintenance, audit, publication of accounts by political parties**

(1) Each recognised political party shall maintain accounts clearly and fully disclosing all the amounts received by it and clearly and fully disclosing the expenditure incurred by it. The account shall be maintained according to the financial year. Within six months of the close of each financial year, each recognised political party shall submit to the Election Commission, its accounts, duly audited by a qualified and practicing chartered accountant from a panel of such accountants maintained for the purpose by the Comptroller and Auditor General.

(2) The Election Commission shall make publicly available, on its website, the audited accounts submitted by all political parties under sub-section (1).

(3) The Election Commission shall also keep these accounts on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.”

7. The existing section 29C of the RPA has to be modified and recast as section 29D to *first*, include aggregate contributions from a single donor amounting to Rs. 20,000 within its scope; *second*, require parties to disclose the names, addresses and PAN card numbers (if applicable) of donors along with the amount of each donations; *third*, require parties to disclose such particulars even for contributions less than Rs.20,000 if such contributions exceed Rs. 20 crore or twenty per cent of party’s total contribution, whichever is less.. Consequential amendments will need to be made to the Election Rules and the IT Act. The proposed section 29D reads as:

**“29D. Declaration of contribution received by the political parties.—**

(1) The treasurer of a political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely: —

(a) the contribution in excess of twenty thousand rupees, including an aggregate of contributions in excess of twenty thousand rupees, received by such political party from any person in that financial year;

(b) the contribution in excess of twenty thousand rupees, including an aggregate of contributions in excess of twenty thousand rupees received by such political party from any company, other than a Government company, in that financial year.

(2) Notwithstanding anything contained in sub-section (1), the treasurer of a political party or any other person authorised by the political party in this behalf shall, in the report referred to in sub-section (1), disclose the particulars of such contributions received from a person or company, other than a Government company, even if the contributions are below twenty thousand rupees, in case such contributions exceeds twenty crore rupees, or twenty per cent of total contributions, whichever is less, as received by the political party in that financial year.

*Illustration:* A political party, ‘P’, receives a total of hundred crore rupees, in cash or cheque, in a financial year. Out of this amount, fifty crore rupees are received from undisclosed sources, by way of contributions less than

twenty thousand rupees (in cash or multiple cheques). P shall be liable to disclose the particulars of all donors beyond twenty crores, even if they have contributed less than twenty thousand rupees each.

(3) The report under sub-section (1) shall be in such form as may be prescribed.

(4) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other person authorised by the political party in this behalf before the due date for furnishing a return of its income of that financial year under section 139 of the Income-tax Act, 1961 (43 of 1961), to the Election Commission.

*Explanation:* For the avoidance of doubt, it is hereby clarified that the term “particulars” mentioned in this section shall include the amount donated; the names and addresses, and PAN card number if applicable, of such person or company referred to in this section.”

8. A new section 29E to be inserted in the RPA requiring the ECI to make publicly available, on its website, all the contribution reports submitted by all political parties under section 29D. Section 29E shall read as:

**“29E. Disclosure of contribution reports submitted by political parties.—** (1) The Election Commission shall make publicly available, on its website, the contribution reports submitted by all political parties under section 29D.

(2) The Election Commission shall also keep these reports on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.”

9. The Commission recommends giving statutory basis to the ECI’s ‘statement of election expenditure’ requirement introduced pursuant to the Supreme Court’s judgment in *Common Cause v UOI*, AIR 1996 SC 3081, and its transparency guidelines pertaining to election expenses by political parties through a new section 29F, which states as follows:

**“29F. Election expenses by political parties. —** (1) Every political party contesting an election shall, within seventy five days of the date of an election to a Legislative Assembly of a State or ninety days of the date of an election to the House of the People, lodge with the Election Commission a statement of election expenditure, which shall be a true copy of such statement maintained by the party in consonance with the directions of the Election Commission.



(2) The payment of any election expenditure over twenty thousand rupees should be made by the political parties via cheque or draft, and not by cash, unless there are no banking facilities or the payment is made to a party functionary in lieu of salary or reimbursement.”

### **c) On Penalties**

#### Relating to individual candidates

10. The disqualification of a candidate for a failure to lodge an account of election expenses and contribution reports should be increased and should extend from the current three period up to a five year period, so that a defaulting candidate may be ineligible to contest at least the next elections.

- Thus, in the title and sub-clause (a), after the words “account of election expenses”, add the words “and contribution reports”.
- After the words “period of three years” and before the words “from the date of” in section 10A, add the words “up to a period of five years”.

#### Relating to political parties

11. Express penalties, apart from losing tax benefits under section 13A of the IT Act, should be imposed on political parties for the non-compliance with the provisions of section 29D of the RPA. This should include a daily fine for each day of non-compliance, with the possibility of de-recognition in extreme cases, along the lines of proposed section 78A in the 170<sup>th</sup> Report. This new section 29G reads as follows:

**“29G. Penalty.—**(1) Where the treasurer of any political party or any other person authorised by the political party in this behalf fails to submit a report in the prescribed form within the time specified under sub-section (4) of section 29D then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such political party:

- (a) shall not be entitled to any tax relief for such financial year under the Income-tax Act, 1961; and
- (b) shall be liable to a penalty of twenty five thousand rupees for each day of non-compliance and so long as the non-compliance continues.

*Provided that* If such default continues beyond the period of ninety days, the Election Commission may de-register the political party after giving a reasonable opportunity to show cause.

(2) If the Election Commission finds on verification, undertaken whether suo motu or on information received, that the report submitted under sub-section (4) of section 29D is false in any particular, the Election Commission shall levy a fine up to a maximum of fifty lakh rupees on such political party.”

12. A new section 29H should be inserting penalising parties that contravene the stipulations of section 29B, RPA and section 182 of the Companies Act in terms of accepting contributions from impermissible donors, by levying a penalty of five times the amount so accepted:

**“29H. Penalty for political parties accepting contributions from an impermissible donor. –** If a political party accepts any contribution offered to it from an impermissible donor, it shall be liable to pay a penalty that is five times the amount so accepted from such donor.

*Explanation.*– For the purpose of this section, “impermissible donor” refers to:

- (a) a government company, as defined in section 29B;
- (b) a company that does not comply with the requirements of sub-section (1) section 182 of the Companies Act, 2013; or
- (c) any foreign source defined under clause (e) of section 2 of the Foreign Contribution (Regulation) Act, 1976.”

13. A new Part IVB should be inserted to the RPA dealing with the “Regulation of Electoral Trusts”, and detailing provisions pertaining to their entitlement to accept contributions, disclosure obligations, and penal provisions so that the RPA can be amended in line with the changes already made to the IT Act and the ECI guidelines. The new part IVB, section 29I reads as:

Part IVB: Regulation of Electoral Trusts.

**29I. Electoral Trusts entitled to accept contribution.** (1) Subject to the provision of the Companies Act, 2013 and the Income Tax Act, 1961, an Electoral Trust approved by the Central Board of Direct Taxes under the Electoral Trusts Scheme, 2013 may accept any amount of contribution voluntarily offered to it by any person or company other than a Government Company:

Provided that no Electoral Trust shall be eligible to accept any contribution from any foreign source defined under clause (e) of section (2) of Foreign Contribution (Regulation) Act, 1976.

Provided further that all words and phrases used in this Part, shall have the same meaning as assigned to them in section 29B.

**2. Maintenance, audit, publication of accounts by electoral trusts (a)**

Each Electoral Trust shall maintain accounts clearly and fully disclosing all the amounts received by it and clearly and fully disclosing the expenditure incurred by it. The account shall be maintained according to the financial year. Within six months of the close of each financial year, each Electoral Trust shall submit its accounts, duly audited by a qualified and practicing chartered accountant from panel of Chartered Accountants, selected by the Comptroller and Auditor General to the Election Commission.

(b) The Election Commission shall make publicly available, on its website, the audited accounts submitted by all electoral trusts under sub-section (1).

(c) The Election Commission shall also keep these accounts on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.

**3. Declaration of contribution received by the Electoral Trusts — (a)**

The treasurer of an Electoral Trust or any other person authorised by the trust in this behalf shall, in each financial year, prepare a report in respect of the following, namely: —

(i) the contribution received by such electoral trust from any person in that financial year, with name, address, PAN of such persons.

*Provided* that the Electoral Trust or any other person authorised by the Trust in this behalf shall not receive any donation in cash and without the name, address and PAN (if any);

(ii) the contribution to political parties from electoral trusts in that financial year with date amount, mode of payment and name of political party.

*Provided* that the electoral trusts shall not make any contribution to political parties in cash other than by bank account transfer.

(b) The report under this sub-section 2 shall be in such form as may be prescribed.

(c) The report for a financial year under sub-section (1) shall be submitted by the treasurer of an Electoral Trust or any other person authorised by the Trust within six months of the close of each financial year to the Election Commission.

**4. Disclosure of contribution reports submitted by Electoral Trusts by Election Commission –** (a) The Election Commission shall make publicly available, on its website, the contribution reports, submitted by all Electoral Trusts under sub-sections (2) and (3) of this section.

(b) The Election Commission shall also keep these reports on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.

**5. Penalty.—**(1) Where the Electoral Trust fails to submit a report in the prescribed form within the time specified under sub-sections (2) or (3) of this section then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such Electoral Trust:

- (a) shall not be entitled to any tax relief for such financial year under the Income-tax Act, 1961; and
- (b) shall be liable to a penalty of twenty five thousand rupees for each day of non-compliance and so long as the non-compliance continues.

*Provided that* If such default continues beyond the period of ninety days, the Election Commission may ban the electoral trust from receiving any donations in future, after giving a reasonable opportunity.

(2) If the Election Commission finds on verification, undertaken whether suo motu or on information received, that the statement of accounts filed under this section is false in any particular, the Election Commission shall impose a fine up to a maximum of fifty lakh rupees on such Electoral trust.

(3) If the Electoral Trust has received funds from an impermissible donor, it shall be liable to penalty that is five times the amount so accepted by the Trust.

*Explanation.—* For the purpose of this section, “impermissible donor” refers to:

- (a) a government company, as defined in section 29B;
- (b) a company that does not comply with the requirements of sub-section (1) section 182 of the Companies Act, 2013; or
- (c) any foreign source defined under clause (e) of section 2 of the Foreign Contribution (Regulation) Act, 1976”

**d) On State Funding of Elections**

1. Currently, a system of complete state funding of elections or of matching grants, wherein the government matches the private funding (by donors or corporates) raised by political parties, are not feasible given the economic conditions and developmental problems of the country.
2. Given the high cost of elections and the improbability of being able to replace the actual demand for money, the existing system of giving indirect in-kind subsidies instead of giving money via a National Election Fund, should continue.
3. The wording of Section 78B of the RPA permits the Central Government, in consultation with the ECI, to supply certain items to the electors or the candidates and this provision can be used to expand the in-kind subsidy to include free public meeting rooms, certain printing costs, free postage etc.
4. Any reform in state funding should be preceded by reforms such as the decriminalisation of politics, the introduction of inner party democracy, electoral finance reform, transparency and audit mechanisms, and stricter implementation of anti-corruption laws so as to reduce the incentive to raise money and abuse power.

## CHAPTER III

### **REGULATION OF POLITICAL PARTIES AND INNER PARTY DEMOCRACY**

3.1 Democratic theory can be thought of to include accounts of both procedural and substantive democracy. Procedural democracy can be said to refer to the practice of universal adult franchise, periodic elections, secret ballot, while substantive democracy can be said to refer to the internal democratic functioning of the parties, which purportedly represent the people. This section deals with the internal democratic functioning of parties, and the question of how parties should function and regulate themselves.

3.2 The NCRWC in its Report on Electoral Processes and Political Parties appropriately recognised that “*no electoral reforms can be effective without reforms in the political party system*” and it recognised the following areas of immediate concern here:

1. “*Structural and organisational reforms – party organisations - National, State and local levels - inner party democracy - regular party elections, recruitment of party cadres, socialization, development and training, research, thinking and policy planning activities of the party.*”
2. *Party system and governance – Mechanisms to make parties viable instruments of good governance*
3. *Institutionalization of political parties – need for a comprehensive legislation to regulate party activities, criteria for registration as a national or State party - de-recognition of parties*”.<sup>133</sup>

3.3 Of primary relevance in this chapter, is the first concern regarding the regulation of the *practice* of political parties in terms of internal elections, recruitment of party cadres, and development and training activities. At the very outset, it is important to note the distinction between the regulation of party *practice* and party *ideology* as components of internal and inner party democracy. The section begins with reviewing the history of various committee reports.

#### **A. History of Reform Proposals**

3.4 The 1999 Law Commission Report strongly recommended the introduction of a regulatory framework governing the internal structures and inner democracy of parties, financial transparency, and accountability before attempting state funding of elections. The 170<sup>th</sup> Report recommended the insertion of Sections 11A-I in the RPA dealing with the “*Organisation of*

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<sup>133</sup> NCRWC Report, *supra* note 13.

*Political Parties and matters incidental thereto*” on the premise that a political party “cannot be a dictatorship internally, and democratic in its functioning outside.”<sup>134</sup>

3.5 Apart from the concerns articulated earlier, the NCRWC recommended:

*“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,”*<sup>135</sup>

3.6 The ARC’s 2008 Ethics and Governance report also alluded to the importance of inner party democracy when it noted that corruption is caused by over-centralisation since *“the more remotely power is exercised from the people, the greater is the distance between authority and accountability.”*<sup>136</sup>

3.7 In 2011, a draft Political Parties (Registration and Regulation of Affairs, etc.) Act, 2011 was prepared under the guidance of Justice Venkatachalaiah and submitted to the Law Ministry. Section 6 of the draft Act envisaged the creation of an Executive Committees for every political party, whose members would be elected by members of the local committees of the State units of the party, and who themselves would elect the office-bearers of the party from amongst themselves (without accepting any nominations). The Executive Committee was also empowered to elect candidates for contesting Parliamentary and State, having due regard to the recommendations made by the State and District units of the constituency. The Act further provided for all decisions of the Executive and local committees to be taken on the basis of a simple majority vote with secret ballots.<sup>137</sup>

3.8 Thus, a perusal of the above reports makes clear that internal democracy includes provisions governing internal elections, candidate selection, secret ballots, and registration and deregistration of parties.

## **B. Laws Regulating Internal Democracy**

3.9 Currently, there is no express provision for internal democratic regulation of political parties in India and the only governing law is provided by Section 29A of the RP Act, which provides for registration of political parties

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<sup>134</sup>LCI, 170<sup>th</sup> Report, *supra* note 108, at paras 3.1.2.1, 4.3.4.

<sup>135</sup> NCRWC Report, *supra* note 13, at para 4.32.

<sup>136</sup> ARC Report, *supra* note 119, at para 1.9.

<sup>137</sup> ADR/NEW, *Recommendations for Electoral Reforms*, April 2011, <<http://adrindia.org/files/ADR-NEW%20Recomendations-April20%202011-Final.pdf>> at 75.

with the ECI. Section 29A(5) provides for every application to the ECI to be accompanied by a copy of the party memorandum or regulations, with a specific provision *“that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, and would uphold the sovereignty, unity and integrity of India.”*

3.10 The ECI in its “Guidelines and Application Format for the Registration of Political Parties under Section 29A”, states that the party application should be accompanied, *inter alia*, by the following documents/information:

*“(i) Party Constitution drawn on following lines:*

*Article IV: Organs of the Party (Organizational Structure): Powers and Functions of each of these organs (Decision making power should reflect democratic spirit – no veto power)*

*Method of appointment (and terms) of members to each of these organs (Not more than 1/3rd members can be nominated; Tenure should be fixed not exceeding 5 years; Periodic elections within 5 years maximum)*

*Article V: Office-bearers of the Party: Powers and functions of each of these office-bearers (Decision making power should reflect democratic spirit – no veto power)*

*Method of appointment (and terms) of each of these office-bearers (Should be elected; Not more than 1/3rd can be nominated; Fixed tenure not exceeding 5 years for everyone; Periodic elections within 5 years maximum)*

*(v) There should be a specific provision in the rules/Constitution of the party regarding internal democracy in the party, organisational elections at different levels, mode of such elections and the periodicity of such elections, term of office of the office-bearers and powers and duties of the office-bearers of the party, and the various representative bodies of the party (such as Executive Committee, Council etc.)*

*(xxi) The applicant party must ensure in its constitution itself vide a specific clause in the party constitution that party will hold periodic (Period to be specified in constitution but at least once in 4 years) and regular election to all positions of office-bearers and organs of the party.” [Emphasis supplied]<sup>138</sup>*

3.11 Unfortunately, the aforesaid guidelines are silent on candidate selection, apply only to the registration of new parties, and do not regulate the internal functioning of already registered parties. Moreover, the ECI’s power to

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<sup>138</sup> ECI, Guidelines and Application Format for Registration of Political Parties under Section 29A, <[http://eci.nic.in/eci\\_main/ElectoralLaws/guidelinesandformat.pdf](http://eci.nic.in/eci_main/ElectoralLaws/guidelinesandformat.pdf)>.



require parties to hold regular internal elections for office bearers, and candidate selection is compromised in the absence of any penal provisions. The Supreme Court in *Indian National Congress (I) v Institute of Social Welfare*<sup>139</sup> made it clear that neither Section 29A of the RP Act, nor the provisions of the Election Symbols (Reservation and Allotment) Order, 1968 empowered the ECI to de-register parties on the grounds of violating the Constitution or breaching the undertaking given to it at the time of registration.

3.12 Consequently, there is no mechanism to review a party's practice against the principles enshrined in the Constitution or against the requirements of the ECI's Guidelines and Application Format for the Registration of Political Parties under Section 29A. A party can only be de-registered if its registration was obtained by fraud; if it is declared illegal by the Central Government; or if a party amends its internal Constitution and notified the ECI that it can no longer abide by the Indian Constitution.<sup>140</sup> Moreover, there is no power of de-registration if parties having registered under section 29A of the RPA continue to avail of tax benefits under section 13A of the IT Act, without contesting elections. The RPA thus needs to be amended to empower the ECI to act.

3.13 Even otherwise, these situations only deal with cases of de-registration, and not disbarment of any party from contesting elections. It is clear that any party can contest elections, even if their Constitution contravenes the provisions and ideals of the Constitution or does not provide for internal elections. The need for reform is thus evident, and it is useful at this stage to briefly examine the law and practice in countries in Western Europe, which have tried to regulate practice and/or ideology.

### **C. Internal Democracy: A Comparative Perspective**

#### **(i) Germany**

3.14.1 With the adoption of the German Constitution (the Basic Law) in 1949, Germany became the first European country with a Constitution that regulated its political parties in order to safeguard democracy. Article 21 of the Basic Law facilitates the regulation of the ideology and activities of political parties, in their adherence to democratic principles and states:

*“(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.*

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<sup>139</sup> (2002) 5 SCC 685.

<sup>140</sup> ECI Guidelines, *supra* note 138.

*(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.*

*(3) Details shall be regulated by federal laws.”<sup>141</sup>*

3.14.2 Pursuant to Article 21(3), the *Gesetz über die politischen Parteien* or the Political Party Act was enacted in 1967 to regulate all aspects of political parties such as their internal organisation, candidate nomination, accounts, and banning unconstitutional parties.

3.14.3 The wording of Article 21(2) (“aims or behaviour”) lends credibility to the claim that Germany regulates parties both for its unconstitutional actions, and unconstitutional aims, which have not yet been put to action. This power to declare parties unconstitutional has been exercised twice by the Constitutional court to ban the neo-Nazi Socialist Imperial Party (SRP) in 1952 and the German Communist Party (KPD) in 1956. In the *SRP decision*, the Court rejected the parties’ defence that its proposed form of government was compatible with liberal democratic order, noting that there was not even passive assent to democratic principles. Further, the finding of unconstitutionality implied that sitting party members would lose their seat as:

*“[W]hen by a judgment of the Constitutional Court a political party's ideas are found to fall short of the prerequisites for participation in the formation of the popular political will, the mere dissolution of the party's organizational apparatus, which was meant to further these goals, cannot truly implement the court's judgment. Rather, it is the intent of the Court's sentence to exclude the ideas themselves from the process of the formation of the political will.” [Emphasis supplied]<sup>142</sup>*

3.14.4 In the *KPD decision*, the party defended its constitutionality by arguing that Article 21(2) was unconstitutional for violating free speech and association recognised in the Basic Law and that the party’s ideology could not be properly subject to a court’s review. However, the Constitutional Court reiterated its reasoning from the *SRP decision*, that it could constitutionally deny the advancement of an idea that violate the principle of individual dignity, even if such an idea had popular support. It stated:

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<sup>141</sup> Basic Law for the Federal Republic of Germany, <<http://www.iuscomp.org/gla/statutes/GG.htm#21>>.

<sup>142</sup> *The SRP Decision*, Decision of Oct. 23, 1952, 2 BVerfG I cited from Paul Franz, *Unconstitutional and Outlawed Political Parties: A German-American Comparison*, 5 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 51, 57 (1982).

*“[A]t the very least, those who are called upon to participate in the formation of this [political] will must be unanimous in their affirmation of the basic values of the constitution. It is conceivable that a political party that renounced and opposed these basic values could exist and be active as a sociopolitical group, but it is unthinkable that its lawful, responsible participation in the formation of the political will could be constitutionally guaranteed.”*<sup>143</sup>

3.14.5 Thus, there appears to be pervasive state control on the internal regulation of political parties, for fear that the parties could “*turn the ‘popular will’ away from inviolable constitutional values*”.<sup>144</sup> However, the same has been exercised infrequently (only in two cases), although there are current efforts to ban the country’s largest far right party, the National Democratic Party (NDP).<sup>145</sup>

## **(ii) Portugal**

3.15.1 Like Germany, Portugal too regulates the ideology of parties through Article 51 of its Constitution, prohibiting regional or religious objectives and requiring internal democracy. Article 51(3)-(5) state:

3. Without prejudice to the philosophy or ideology that underlies their manifestoes, political parties may not employ names that contain expressions which are directly related to any religion or church, or emblems that can be confused with national or religious symbols.

4. No party may be formed with a name or manifesto objectives that show it has a regional nature or scope.

5. Political parties must be governed by the principles of democratic transparency, organisation and management, and participation by all their members.

3.15.2 The governing law regulating these features is the Organisational Law no. 2/2003 (or the Law governing Political Parties). Through Article 2, it regulates, and lays down eight purposes of political parties, requiring them for instance to contribute to the promotion of the fundamental rights and freedoms. Articles 5 and 6 state that political parties must be internally governed by principles of democracy and transparency. Nevertheless, Article 18 permits the “judicial abolition” of party at the request

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<sup>143</sup> *The KPD Decision*, Decision of Aug. 17, 1956, 5 BVerfG at 137 cited from Franz, *supra* note 142, at 62.

<sup>144</sup> Franz, *supra* note 142, at 89.

<sup>145</sup> *German States Repeat Efforts to Ban Far Right Parties*, DW, 3<sup>rd</sup> December 2003, <<http://www.dw.de/german-states-repeat-effort-to-ban-far-right-npd/a-17266103>>.

of the Public Prosecutor's Office if it is deemed to be "an organisation that is racist or displays a fascist ideology".<sup>146</sup>

### (iii) Spain

3.16.1 Unlike Germany and Portugal, Spain only regulates the actions of its political parties, not their aims or intentions. The enabling provision of the Constitution states as follows:

*"Section 6: Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people and are an essential instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and their functioning must be democratic."*

3.16.2 The substantive law containing provisions related to the internal regulation and banning of political parties is the Institutional Law No. 6/2002 on Political Parties or the Organic Law (*Ley Orgánica 6/2002 de Partidos Políticos*).<sup>147</sup> Article 6 of the Law requires the organisation, operation, and activity of political parties to adhere to democratic principles. Article 7 stipulates that the internal structure and functioning of political parties must be democratic; elections to governing bodies be provided by secret ballot; and all elected leaders be democratically controlled. Article 8 provides that members of parties are entitled by right to be voters and candidates for the offices thereof.

3.16.3 In contradistinction to the German position, Article 9 of the Spanish law regulates activity, and not ideology of political parties. It states that political parties may freely engage in activities, as long as they respect constitutional values of democratic principles and human rights, and as long as they perform their functions democratically. However, parties can be declared illegal if their activities violate democratic principles by:

- Systematically violating fundamental freedoms and rights, by attacks on the life and integrity of persons.
- Fomenting violence to achieve political ends such by legitimising the use of terrorist actions for political ends or creating conditions of coercion.

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<sup>146</sup> Organisational Law No. 2/2008, *The Law Governing Political Parties*, <[http://www.parlamento.pt/Legislacao/Documents/LawgoverningPoliticalParties\\_EN.pdf](http://www.parlamento.pt/Legislacao/Documents/LawgoverningPoliticalParties_EN.pdf)>.

<sup>147</sup> Organic Law No. 6/2002, of 27 June, Political Parties, <<http://legislationline.org/documents/action/popup/id/6888>>.

- Providing assistance and political support to the actions of terrorist organisations to undermine peace such as by including the names of convicted terrorists in party directing bodies or candidate lists.<sup>148</sup>

3.16.4 Article 10 further provides for a court-ordered dissolution of a political party, when it repeatedly and seriously infringes the requirement of Articles 7 and 8 to have a democratic internal structure operate democratically. Pursuant to a judicial order, the party, vide Article 12, cease all its activities and liquidates its assets, which are then transferred to the Treasury to be used for social and humanitarian purposes.

3.16.5 Clearly, unlike India, countries in Western Europe regulate either the ideologies or the practice of political parties.

## **D. Recommendations**

3.17.1 Introducing internal democracy and transparency within political parties is important to promote financial and electoral accountability, reduce corruption, and improve democratic functioning of the country as a whole. As the Law Commission in its 170<sup>th</sup> report recognised, “*whether by design or by omission, our Constitution does not provide for the constitution and working of the political parties, though they are at the heart of a parliamentary democracy.*”

3.17.2 While the RP Act does not permit the regulation of the functioning or ideology of the parties, the ECI’s Guidelines and Application Format for the Registration of Political Parties under Section 29A only prescribe provisions for internal accountability and not candidate selection. Even so, these provisions do not expressly apply to existing parties, are not backed by penal provisions, and cannot bar parties from contesting elections. Furthermore, the Supreme Court in *Indian National Congress (I) v Institute of Social Welfare* has made it clear that the ECI currently lacks the power to de-register a party under Section 29A of the RP Act. Thus any changes need to be introduced legislatively. The power of de-registration should also extend to cases where registered parties avail the benefits of income tax exemption under section 13A, IT Act, but have not contested any Parliamentary or State elections in ten years consecutive years.

3.17.3 Although it is open for India to follow Germany/Portugal or Spain’s example, it is recommended that any powers to the ECI should extend to the regulation of action and not ideology, given the complex socio-religious-political fabric of the country, its diversity, and secular principles. The

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<sup>148</sup> *Id.*; *Herri Batasuna and Batasuna v Spain*, Applications nos. 25803/04 and 25817/04, Fifth Section of the ECHR decided on 6<sup>th</sup> November 2009.

German example has to be viewed in the context of its violent Nazi history and cannot immediately be transplanted to India.

3.17.4 Keeping this in mind, the following recommendations are proposed:

1. Section 29A(5) of the RPA should be amended in accordance with the draft Political Parties (Registration and Regulation of Affairs) Act to require parties to insert a specific provision in their memorandum to “shun violence for political gains, and avoid discrimination or distinction based on race, caste, creed, language or place of residence”. Thus, the amended section 29A(5) reads as follows:

“29A.—(5) The application under sub-section (1) shall be accompanied by a copy of the memorandum or rules and regulations of the association or body, by whatever name called, and such memorandum or rules and regulations shall contain a specific provision that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, would uphold the sovereignty, unity and integrity of India, shun violence for political gains, and avoid discrimination or distinction based on race, caste, creed, language or place of residence.”

2. The proposed Sections 11A-I of the RPA finding place in the 170<sup>th</sup> Report of the Law Commission in 1990, should be introduced with certain modifications, through a legislative amendment as a new Part IVB titled “Regulation of Political Parties”, starting from section 29J. A provision should also be inserted empowering the ECI to de-register a party for failing to contest any Parliamentary or Legislative Assembly elections for ten consecutive years. The new Part reads as follows:

#### **PART IVC — REGULATION OF POLITICAL PARTIES**

**29J. Formation of political parties—** (1) Political parties can be freely formed by the citizens of this country. The political parties shall form a constitutionally integral part of free and democratic system of Government.

(2) Each political party shall frame its constitution defining its aims and objects and providing for matters specified in this Part. The aims and objects of a political party shall not be inconsistent with any of the provisions of the Constitution of India.

(3) A political party shall strive towards, and utilize its funds exclusively for, the fulfilment of its aims and objects and the goals and ideals set out in the Constitution of India.

**29K. Name of political parties and power to sue—** (1) A political party may sue and may be sued in its own name. A political party shall be competent to hold and dispose of properties.

(2) The name of a political party must be clearly distinguishable from that of any existing political party and shall be subject to approval by the Election Commission. In election campaigns and in elections, only the registered name or its acronym, as may have been approved by the Election Commission, alone shall be used.

**29L. Constitution of a political party—** The Constitution of a political party shall provide for the following matters:-

- (a) name of the political party and acronym (if used) and the aims and objectives of the party;
- (b) procedure for admission, expulsion and resignation by the members;
- (c) rights, duties and obligations of the members;
- (d) grounds on which and the procedure according to which disciplinary action can be taken against the members;
- (e) the general organisation of the party including the formation of State, regional, district, block and village level units;
- (f) composition and powers of the executive committee (by whatever name it is called) and other organs of the party;
- (g) the manner in which the general body meetings can be requisitioned and conducted and the procedure for requisitioning and holding conventions to decide questions of continuance, merger and other such fundamental organisational matters;
- (h) the form and content of the financial structure of the party consistent with the provisions of this part.

**29M. Executive committees—** The executive committee of a political party shall be elected. Its term shall not exceed years. Well before the expiry of the term, steps shall be taken for electing a new executive committee. It shall be open to the executive committee to constitute a sub-committee (by whatever name called) to carry out the business of the executive committee and to carry on regular and urgent executive committee business. The members of the sub-committee shall be elected by the members of the executive committee.

**29N. Voting procedures—** A political party and its organs shall adopt their resolutions on the basis of a simple majority vote. The voting shall be by secret ballot.

**29O. Candidate selection—** The candidates for contesting elections to the Parliament or the Legislative Assembly of the States shall be selected by the executive committee of the political party having due regard for the recommendations and resolutions passed by the concerned local party units.

**29P. Regular elections—** It shall be the duty of the executive committee to take appropriate steps to ensure compliance with the provisions of this chapter including holding of elections at all levels. The executive committee of a political party shall hold elections of national and State levels in the presence of the observers to be nominated by the Election Commission of India. Where considered necessary, the Election Commission may also send its observers at elections to be held at other national and state levels.

**29Q. Penalties for non compliance—** The Election Commission shall be competent to inquire, either suo motu or on information received into allegation of non-compliance of any of the provisions of this Part. If on due inquiry, the Election Commission is satisfied that there has been non-compliance of any of the provisions of this chapter by any political party, the Commission shall call upon the party to rectify the non-compliance within the period prescribed by the Election Commission. In case, the non-compliance continues even after the period so prescribed, it shall be open to the Election Commission to impose such fine on the political party as it may deem appropriate in circumstances of the case including imposition of a penalty of Rs. 25,000/- per day for each day of non-compliance and withdrawal of registration of the party.

**29R. Penalty for failure to contest elections for ten years consecutively—** (1) If any political party registered under section 29A of this Act does not contest any election to the House of the People or the Legislative Assembly of a State for ten consecutive years, its registration shall be liable to be cancelled by the Election Commission.

(2) The Election Commission shall scrutinise the registrations of all the political parties under section 29A, and if it finds that any registered party has not contested any election to the House of the People or the Legislative Assembly of a State for ten consecutive years, it shall cancel such registration.”



## **CHAPTER IV**

### **FROM FIRST PAST THE POST TO PROPORTIONAL REPRESENTATION**

#### **A. The Current System and Its Alternatives**

4.1 While multiple electoral systems exist across the world, traditionally, the debate has centred around the merits of the 'first-past-the-post-system' (*hereinafter* "FPTP") vis-à-vis variants of the proportional representation system.<sup>149</sup>

4.2 The FPTP system, followed in Lok Sabha elections, is regarded as one of the simplest forms of electoral systems, where each voter has a single vote, and where a candidate wins if he receives the highest number of votes in a constituency.<sup>150</sup>

4.3 The system of proportional representation has many variants, one of the most common being the list system. In the list system, political parties present lists of candidates in advance, who are awarded seats in proportion to their party's vote share, usually with some minimum prescribed thresholds.

4.4 Another variant, the method of the single transferable vote, is followed for elections to the Rajya Sabha. In this system, the electoral college, comprising of MPs and MLAs, rank candidates in order of preference. Their vote is allotted to their first preference, and if no one emerges with a majority, the least voted candidate is removed from consideration and the second choices of those who voted for him are taken into consideration. This process continues till a winner with a majority emerges.<sup>151</sup>

4.5 During the drafting of the Constitution, various systems of proportional representation were considered, but the FPTP system was eventually adopted to avoid fragmented legislatures and to facilitate the formation of stable governments.<sup>152</sup> In the years since, certain criticisms have consistently arisen regarding the working of the FPTP system, which has led to a re-evaluation of the merits of the proportional representation system. This

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<sup>149</sup> Andrew Reeve and Alan Ware, *ELECTORAL SYSTEMS: A COMPARATIVE AND THEORETICAL INTRODUCTION* 6 (2001).

<sup>150</sup> Mahesh Rangarajan and Vijay Patidar, *India: First Past the Post on a Grand Scale*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, <<http://www.idea.int/esd/upload/india.pdf>>

<sup>151</sup> Reeve, *supra* note 149, at 150-151.

<sup>152</sup> Constituent Assembly Debates (Proceedings), Vol. VII dated 4<sup>th</sup> January, 1949 <<http://164.100.47.132/LssNew/constituent/vol7p32.html>>.

section will look at the arguments advanced for and against the alteration of the electoral system in India.

## **B. The Merits and Demerits of the FPTP System**

### **(i) Simplicity**

4.6.1 The most significant advantage of the FPTP system is its uncomplicated nature. The FPTP is the simplest form of the plurality/majority system, using single-member districts and candidate-centred voting.<sup>153</sup> Moreover, the FPTP system allows voters to choose between people as well as parties, with voters having the opportunity to assess the performance of a candidate rather than having to accept a list of candidates presented by a party, as under the list system.<sup>154</sup>

4.6.2 This system, however, is thought to result in an increase in election expenditure, since every candidate is required to reach out to the electors on an individual as well as a party basis.<sup>155</sup>

### **(ii) Stability**

4.7.1 The FPTP system has been the hallmark of stability in the electoral system of India. The Supreme Court in *RC Poudyal v. Union of India*<sup>156</sup> had categorised the FPTP system as possessing 'the merit of preponderance of decisiveness over representativeness'. The FPTP system presents the advantage of producing a majority government at a general election by being decisive, simple and familiar to the electorate.<sup>157</sup> This, at least in theory, assures stable terms for the party in power, with the requisite numbers in the House to ensure implementation of its policies. This also means better accountability for decision-making in the Parliament, since this system makes it easier for voters to identify whom to vote or not vote for in future.<sup>158</sup>

4.7.2 In practice, India has seen both stable majority and unstable coalition governments under the FPTP system, indicating that it is not this factor alone that assures the stability of the electoral system in India.

### **(iii) Representativeness**

4.8.1 The principal criticism levelled against the FPTP system is that it leads to the exclusion of small or regional parties from the Parliament. There

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<sup>153</sup> Constituent Assembly Debates (Proceedings), Vol. VII, Chapter 3, p. 35.

<sup>154</sup> Constituent Assembly Debates (Proceedings), Vol. VII, Chapter 3, p. 37.

<sup>155</sup> Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 Hous. L. Rev. 1119.

<sup>156</sup> 1994 Supp (1) SCC 325.

<sup>157</sup> 1994 Supp (1) SCC 325, para 72.

<sup>158</sup> See Justice Breyer's opinion in *Vieth v. Robert*, 541 U.S. 267.

is commonly a discrepancy in the vote share and seat share in results, where votes given to smaller parties are 'wasted' since they do not gain a voice in the legislature. What this often translates into is that the FPTP system, which boasts of the fact that it provides a majoritarian (and hence more democratic) government, is itself not able to adequately uphold majoritarianism in a multi-party system, since the winning candidate wins only about 20-30% of the votes.<sup>159</sup>

4.8.2 Examples abound from Lok Sabha and State Assembly elections, where parties enjoying significant vote shares have failed to translate the same into seats.<sup>160</sup> For example, the Indian National Congress won only about 49.10% of the total vote share in the 1984 General Elections to the Lok Sabha, but had a sweeping majority of 405 out of 515 seats in the House. In the elections to the Tamil Nadu Legislative Assembly in 1996, the AIADMK polled 21.47% votes, but could secure only four (1.71%) seats in the Assembly.<sup>161</sup>

4.8.3 Smaller parties, when they have a broad base across constituencies, rather than a concentrated following in a few constituencies, may fail to win even a single seat even if their vote share is significant.

4.8.4 This also means that slight changes in the vote share cause dramatic changes in the number of parliamentary seats won, causing the Indian electorate to be characterised as one that decisively swings in one direction or the other.

4.8.5 On the other hand, while representativeness of political parties is not ensured in the FPTP system, it does encourage political parties themselves to have more broad-based participation. Moreover, it ensures that there is a link between a constituency and its representative in the legislature, and incentivises representatives to serve their constituents well. Further, smaller districts are more likely to comprise of common interests, and the small size also facilitates better delineation of these regional interests through increased movements at the grass-root level, which ensure that representatives interact more closely with the constituents, at least in theory.<sup>162</sup> This might, however, not hold true for districts with large

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<sup>159</sup> Madhav Godbole, Editorial, *Reform of the Political System*, *Economic and Political Weekly*, 39 (28) ECONOMIC AND POLITICAL WEEKLY (2004).

<sup>160</sup> Editorial, *A case for proportional representation?*, 47(11) ECONOMIC AND POLITICAL WEEKLY, (2012); Arvind Sivaramakrishnan, Editorial, *Between Formal and Substantive Legitimacy*, 49(19) ECONOMIC AND POLITICAL WEEKLY (2014).

<sup>161</sup> V.S. Rama Devi and S.K. Mendiratta, *HOW INDIA VOTES: ELECTION LAWS, PRACTICE AND PROCEDURE*, 1167 (3rd edn., 2014). (*hereinafter* "Mendiratta")

<sup>162</sup> McKaskle, *supra* note 155.

populations,<sup>163</sup> such as Thane and Pune, which hold over 11 crore and 9 crore persons respectively.<sup>164</sup>

## **C. Merits and Demerits of Proportional Representation**

### **(i) Simplicity**

4.9 Proportional representation undoubtedly falls second in competition with the FPTP system in terms of simplicity in voting, but it scores higher in terms of convenience during campaign. Candidates can simply focus pointed attention on defined groups to appeal to, and consequently, the problems of campaign financing do not feature as prominently in the process.<sup>165</sup>

### **(ii) Stability**

4.10 Because parties are granted seats in accordance with their vote share, numerous parties get seats in the legislature in the proportional representation system, without any party gaining a majority. This detracts from the stability of the system. Coalition government becomes inevitable, with challenges to such governments also becoming frequent. This is also why the Constituent Assembly decided that proportional representation would not be suited to the Parliamentary form of government that our Constitution lays down. In the Constituent Assembly Debate on 4<sup>th</sup> January 1949, Dr. BR Ambedkar noted that:<sup>166</sup>

*“Proportional representation is not suited to the form of government which this Constitution lays down....in the House where there is a Parliamentary system of government, you must necessarily have a party which is in majority and which is prepared to support the government. One of the disadvantages of proportional representation is the fragmentation of the legislature into a number of small groups. Proportional representation would not permit a stable government to remain in office, because Parliament would be so divided into so many small groups that every time anything happened which displeased certain groups in Parliament, they would, on that occasion, withdraw their support from the Government, with the result that the Government losing the support of certain groups and units, would fall to pieces. Our future government must do one thing, namely, it must maintain a stable government and maintain law and order.”*

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<sup>163</sup> *Id*

<sup>164</sup> District Census 2011, <<http://www.census2011.co.in/district.php>>.

<sup>165</sup> McKaskle, *supra* note 155.

<sup>166</sup> Constituent assembly Debates (Proceedings) Vol. VII dated 4<sup>th</sup> January, 1949, <<http://164.100.47.132/LssNew/constituent/vol7p32.html>>.

Challenges of this sort are likely to become even more prominent in cases of legislative actions that require more than a mere simple majority to be carried out, such as constitutional amendments.<sup>167</sup>

### **(iii) Representativeness**

4.11.1 Proportional representation, as the name suggests, tries to ensure that the election results are as proportional as possible, by curbing the inconsistency between the share of seats and votes. It ensures that smaller parties get representation in the legislature, particularly when they have a broad base across constituencies. It also encourages new parties to emerge and more women and minorities to contest for political power.<sup>168</sup>

4.11.2 Proportional representation, particularly the single transferable vote variant of it, also ensures that voters do not feel encumbered by tactical voting strategies in the worry that their vote might go 'waste'. In that sense, proportional representation ensures honesty in the election process both from the side of the candidate, who can choose their ideological commitments freely, and from that of the voter, who can vote freely.<sup>169</sup>

4.11.3 One potential drawback of this system is that the relationship between a voter and the candidate may dilute, for the candidate may now be seen as representing the party and not the constituency. The other way of looking at this is that a constituent could approach any representative of their choice in case of a grievance, which plays out as an advantage of this system.<sup>170</sup>

4.11.4 Detractors of the list system of proportional representation point out, however, that while the method ensures that more political parties are represented, it concentrates power *within* a political party, in the hands of the leaders who decide on the list of candidates.

## **D. The List System in Germany**

4.12 After the Second World War, Germany adopted a new electoral system, which has been characterised as a 'personalised proportional system'. In this, the German parliament (Bundestag) has a minimum of 598 seats. Each voter has two votes, the first being given to a particular candidate in one of the 299 single-member constituencies. The second vote is a party vote, given to a party list at the federal state level. Candidates are allowed to compete in single-member districts as well as simultaneously for the party list.

4.13 The candidates who achieve a majority in the single-member

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<sup>167</sup> McKaskle, *supra* note 155.

<sup>168</sup> Approximating Democracy: A Proposal for Proportional Representation in the California Legislature', 44 LOY. L.A. L. REV. 437.

<sup>169</sup> McKaskle, *supra* note 155.

<sup>170</sup> *Supra* note 168.

districts are elected directly. The second vote determines how many representatives will be sent from each party to the Bundestag, in proportion to the share of votes.<sup>171</sup>

4.14 Only parties obtaining more than 5% of the votes at the national level or, alternatively, having three members elected directly in the single-member constituencies, are considered in the national allocation of list proportional representation seats.<sup>172</sup>

4.15 This ensures both a close relationship between voters and their representatives through the direct election route, while ensuring representation of smaller parties. The hybrid model also helps ensure stability, even in a coalition government.<sup>173</sup> While Germany enjoys a stable model of proportional representation, other countries following the system, such as Italy have experienced turbulent and unstable coalition governments with frequent dissolutions of its Parliament resulting in more than 28 governments in the past four decades.<sup>174</sup>

## **E. Recommendations of Past Reports**

### **(i) Report of the ECJ on the fifth General Elections in India (1971-72)**

4.16 The 1972 Report of the Election Commission also considered the merits of the proportional representation system, particularly by taking a look at how it operates in other countries. It took note of the fact that few populous countries have adopted a pure version of the proportional representation system – at best, a hybrid version of FPTP and proportional representation was followed, such as in Germany. It listed the many disadvantages of the proportional representation system – that it led to a multiplicity of political parties, increase in the power of the bureaucracy and the party leaders, and its complexity. It therefore came to the conclusion that neither the list system nor any other version of proportional representation was suitable for India.

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<sup>171</sup> German Bundestag, '*Election of Members and the allocation of seats*, <[http://www.bundestag.de/htdocs\\_e/bundestag/elections/arithmetic](http://www.bundestag.de/htdocs_e/bundestag/elections/arithmetic)>

<sup>172</sup> Michael Krennerich, Germany: The Original Mixed Member Proportional System, International Institute for Democracy and Electoral Assistance, <<http://www.idea.int/esd/upload/germany.pdf>>

<sup>173</sup> Thomas Stratman, Martin Baur, '*Plurality Rule, Proportional Representation and the German Bundestag*', CESIFO WORKING PAPER NO. 650(2), January 2002, <[http://www.cesifo-group.de/portal/page/portal/DocBase\\_Content/WP/WP-CESifo\\_Working\\_Papers/wp-cesifo-2002/wp-cesifo-2002-01/650.PDF](http://www.cesifo-group.de/portal/page/portal/DocBase_Content/WP/WP-CESifo_Working_Papers/wp-cesifo-2002/wp-cesifo-2002-01/650.PDF)>.

<sup>174</sup> Tobias Jones, *In favour of a hung Parliament?* <<http://www.dailymail.co.uk/debate/article-1269043/In-favour-hung-parliament-Read-damning-account-Italian-politics.html>>

## **(ii) Chief Election Commissioner Shakhder's proposal**

4.17 In 1977, however, the proposal to introduce the proportional representation system to Lok Sabha elections in some form was reconsidered by then Chief Election Commissioner SL Shakhder who suggested that a hybrid system be adopted, whereby half the seats in the Lok Sabha would be filled by direct elections under the FPTP system, while the other half be filled by political parties in proportion to their vote share.<sup>175</sup> This proposal did not outline the method of determination of seats which would not be represented through direct elections, and how the disparity between the two types of seats would be addressed.

## **(iii) 170<sup>th</sup> Report of the Law Commission**

4.18.1 This issue was next discussed at length in the Law Commission's 170<sup>th</sup> Report on the Reform of Electoral Laws (May 1999). It considered the list system of proportional representation, as prevalent in Germany, as a possible alternative to the FPTP system. The conclusion that it reached was that while the FPTP system could not be abandoned outright, it could be combined with a proportional representation system.

4.18.2 Specifically, the 170<sup>th</sup> Report recommended that while the existing 543 seats of the Lok Sabha continue to be filled through direct elections, the number of seats in the Lok Sabha be increased by an additional 25%, or 136 seats, which are filled by proportional representation following the list system. A similar expansion should take place in the State Assemblies as well. This was essentially a modification of the Shakhder proposal.

4.18.3 However, if no minimum thresholds are prescribed to filter the parties that can nominate members to the list (under the list system), numerous small parties and fringe groups would eventually gain entry into the Parliament. To address concerns regarding the proliferation of political parties, the 170<sup>th</sup> Report additionally recommended that a new provision should be made in the RPA to the effect that any political party which obtains less than 5% of the total valid votes cast in the country (in the case of Parliament) and in the concerned State (in the case of a Legislative Assembly) shall not be allowed any representation in the Lok Sabha or in the concerned Legislative Assembly, as the case may be, either through the direct election or the proportional representation system. This means that even if a candidate wins a seat from that political party, that candidate will not be entitled to that seat. Thresholds such as these are commonly prescribed in countries following the hybrid FPTP and proportional representation system, such as Germany. However, the 170<sup>th</sup> Report does not detail the consequences of this rule – whether it would necessitate re-election or

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<sup>175</sup> Mendiratta, *supra* note 161, at 1187.

whether such seats would be automatically redistributed to parties with more than 5% vote share.

4.18.4 Further, while the provision seems well intentioned, the imposition of a quota can have the effect of creating more problems than it would solve. If a 5% quota is prescribed, only a few parties would fulfil the criteria, undoing the purpose of introducing the proportional representation system. Imposition of such a quota would result in the list system falling in favour of the larger national parties. The voting patterns in India have been such that the larger national parties receive a substantial proportion of the votes (especially during the Lok Sabha elections). Hence, it would be relatively easier for them to cross the 5% mark while the same may not be true for the smaller/regional political parties.

4.18.5 This is evident from an analysis of the results of the 2009 Lok Sabha elections. Only the four major national parties, viz., the Indian National Congress (INC), the Bharatiya Janata Party (BJP), the Bahujan Samaj Party (BSP) and the Communist Party of India (Marxist) (CPM), would have crossed the quota of 5%. This became even more pronounced in the 2014 Lok Sabha elections, where only the BJP and the INC crossed the 5% mark, at 31% and 19.3% respectively, with the third being the BSP at 4.1%.<sup>176</sup> Hence, it is not sufficient to argue that the list system would ensure representation from regional parties by ensuring their presence in Parliament till the specifics of the list system are clarified.

4.18.6 To tackle this, state-wise quotas can be imposed but that would complicate the system to a large extent. This raises questions of the viability of introducing an inherently complicated system in place of the FPTP system which, despite its many criticisms, is currently a fairly stable process. Hence, simply a list system envisaging the imposition of arbitrary quotas cannot be adopted for the entire strength of the Parliament/Assembly. This needs to be done in parallel to the existing FPTP system.

## **F. Recommendations**

4.19.1 As the discussion above has demonstrated, both electoral systems come with their own merits and demerits – proportional representation theoretically being more representative, while the FPTP system being more stable. It is also clear, from the experience of other countries that any changes in India's electoral system will have to follow a hybrid pattern combining elements of both direct and indirect elections. This, in turn will necessitate an increase in the number of seats in the Lok Sabha, which raises concerns regarding its effective functioning.

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<sup>176</sup> Election Commission of India, *Statistical Reportage 2014*, <[http://eci.nic.in/eci\\_main1/statistical\\_reportge2014.aspx](http://eci.nic.in/eci_main1/statistical_reportge2014.aspx)>



4.19.2 As a result, the Law Commission recommends that the findings of the 170<sup>th</sup> Law Commission Report on the proportional system may be examined by the Government to determine whether its proposals can be made workable in India at present.

## **CHAPTER V**

### **ANTI DEFECTION LAW IN INDIA**

#### **A. Introduction**

5.1 Originally, the Constitution of India carried no reference to political parties and their existence. However, the existence of political parties is explicit in the nature of the democratic form of Government that our country has adopted.<sup>177</sup> India is now a federalised multi-party system.

5.2 The emergence of a large number of political parties within the Indian electoral landscape was accompanied by increasing defections. In fact, nearly 438 defections occurred within the period between March 1967 and February 1968.<sup>178</sup> The malaise of defection resulted in an increase in political corruption and instability of governments. Principally, frequent defections made a mockery of the party system and made the electoral system vulnerable to frequent and unnecessary elections which inevitably would cost a significant amount to the exchequer. Defections revealed the inner state of party politics which was fraught with division, fragmentation and factionalism.<sup>179</sup>

5.3 The increase in the number of defecting legislators between 1967 and 1969 necessitated the framing of an adequate anti-defection law. The mid-sixties witnessed numerous instances of elected representatives leaving the parties on whose ticket they were elected, to join the opposition parties. Hence, the need for an anti-defection law became increasingly urgent. The Committee on Defections, under the Chairmanship of then Home Minister, Mr. YB Chavan submitted its report in January 1969 where it noted that there were multiple acts of defections by the same person(s) and also, indifference on the part of defectors to political proprieties, constituency preference and public opinion.<sup>180</sup> Even though the Committee could not reach an agreed conclusion in the matter of disqualifying a defector from continuing to be a Member of Parliament/State Legislature, legislative proposals to usher in an anti-defection law soon followed. Based on the recommendations of the Committee, the Constitution (Thirty-second Amendment) Bill, 1973 and the Constitution (Forty-eighth Amendment) Bill, 1979 were introduced in the Lok Sabha. These legislative attempts towards framing an anti-defection law

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<sup>177</sup> Kanhaiya Lal Omar v. RK Trivedi, AIR 1986 SC 111, para 10.

<sup>178</sup> Subhash C. Kashyap, PARLIAMENTARY PROCEDURE: LAW, PRIVILEGES, PRACTICE AND PRECEDENTS 779 (3<sup>rd</sup> edn., 2014).

<sup>179</sup> Vandana Mishra, *Crisis of Indian Parties*, MAINSTREAM WEEKLY, Vol. XLVII, No. 13, March 14, 2009, <<http://www.mainstreamweekly.net/article1230.html>>

<sup>180</sup> Arvind P. Datar, *Commentary on the Constitution of India*, Vol. 2, 2<sup>nd</sup> edn. (2010), at 2253.

contemplated an amendment to the Constitution with a view to disqualifying a defector from his continued membership of the legislature.<sup>181</sup> However, while the former Bill lapsed due to dissolution of the Lok Sabha, the latter was opposed at the stage of introduction itself and was withdrawn by the leave of the House.

5.4 Finally, after the general elections in December 1984, the Constitution (Fifty-second Amendment) Bill was introduced in the Lok Sabha in January 1985. The object of this anti-defection law was to curb the evil of political defections motivated by the lure of office or other similar considerations that endanger the foundations of our democracy.<sup>182</sup> Pursuant to this ideal, the amendment inserted the Tenth Schedule into the Constitution in order to curb the evil of political defections. The 52<sup>nd</sup> Amendment Act, 1985 also amended Articles 101, 102, 190 and 191 of the Constitution regarding vacation of seats and disqualification from membership of Parliament and the State Legislatures.

5.5 The purpose of the Tenth Schedule is to prevent the breach of faith of the electorate. Where a constituency returns a candidate to the Legislature, it does so on considerations based on the ideologies of the political party he represents and it is only logical that where the candidate, after being elected, leaves that party or acts contrary to its policies, he should be recalled for betrayal of the faith of the electorate.<sup>183</sup> Essentially, the provisions in the Tenth Schedule give recognition to the role of political parties in the political process.<sup>184</sup>

5.6 Paragraph 2(1) of the Tenth Schedule provides that a member of Parliament or State Legislature belonging to any political party shall be disqualified for continuing as such member, if he:

- (i) has voluntarily given up his membership of such political party; or
- (ii) votes or abstains from voting in the House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by him in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within 15 days from the date of such voting or abstention.

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<sup>181</sup> Constitution (Thirty-second Amendment) Bill, 1973, Statement of Objects and Reasons.

<sup>182</sup> *Kihota Hollohon v. Zachilhu*, AIR 1993 SC 412.

<sup>183</sup> Datar, *supra* note 180, at 2253.

<sup>184</sup> *Kihota Hollohon v. Zachilhu*, AIR 1993 SC 412.

5.7 Further, Paragraph 2(2) provides that if a member elected as an independent candidate joins any political party after his election, he shall also stand so disqualified. Paragraph 2(3) provides that a nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat upon taking an oath or affirmation as a member of either House of Parliament, or of the Legislative Assembly or the Legislative Council of the State.

## **B. Exceptions to the Law on Defection**

5.8 Mere insertion of the Tenth Schedule did not mark an end to the problems arising out of defection. One of the primary reasons for the ineffectiveness of the Tenth Schedule was the provision on 'split'. The 170<sup>th</sup> Report of the Law Commission made the following observation about the Tenth Schedule:

*"The experience of the country with the Tenth Schedule since its introduction has not been happy. It has led to innumerable abuses and undesirable practices. While the idea of disqualifications on the basis of defection was a right one, the provision relating to 'split' has been abused beyond recall."*

5.9 Paragraph 3 of the Tenth Schedule originally contained an exception for disqualification on the ground of defection of members in the case of split in the party to which they belonged, provided their strength was not less than one-third of the members of their legislature party in the House. The intention behind inserting this provision in the Tenth Schedule was the need to provide for such floor-crossing on the basis of honest dissent.<sup>185</sup> However, it was noticed that splits were being engineered for the purpose of Paragraph 3 by indulging in the kind of practices which the Tenth Schedule sought to prevent. The Tenth Schedule was criticised for effectively allowing bulk defections while declaring individual defections as illegal.<sup>186</sup>

5.10 The Supreme Court tried to impose strict standards for proving a split for the purpose of Paragraph 3 by saying that mere making of a claim would be insufficient, *prima facie* proof of a split in a political party is necessary to be produced before the Speaker.<sup>187</sup> The case of *Jagjit Singh v. State of Haryana*<sup>188</sup> was one such instance where the Supreme Court found that no split had occurred in the Haryana unit of the Republican Party of India

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<sup>185</sup> Kihota Hollohon v. Zachilhu AIR 1993 SC 412.

<sup>186</sup> Mendiratta, *supra* note 161, at 448.

<sup>187</sup> Jagjit Singh v. State of Haryana, (2006) 11 SCC 1.

<sup>188</sup> (2006) 11 SCC 1.

but the claim of split was only made as an afterthought to escape defection under Paragraph 2(1)(a) of the Tenth Schedule.

5.11 The most scathing indictment of the anti-defection law came across during the open hearings conducted by former Speaker Mr. Shivraj Patil in his decision delivered on June 1, 1993 in the case of a split in the Janata Dal. The Speaker criticised the Tenth Schedule for having been drafted in haste, because of which it is defective and full of lacunae.<sup>189</sup> The Speaker also noted that splits were basically unprincipled defections which were allowed to go unchecked, and which would cause the entire electoral system to lose its legitimacy and become dysfunctional.<sup>190</sup>

5.12 Against this background, the Goswami Committee Report in May 1990, the 170<sup>th</sup> Report of the Law Commission in May 1999 as well as the NCRWC in April 2002 recommended omission of Paragraph 3 of the Tenth Schedule.<sup>191</sup> The need to strengthen the law in this regard led to the Constitution (Ninety-first Amendment) Act, 2003, which omitted Paragraph 3 altogether from the Tenth Schedule.

5.13 Pursuant to this Amendment, the Fourth Report of the Second ARC on Ethics in Governance noted that:

*“The 91<sup>st</sup> Amendment to the Constitution was enacted in 2003 to tighten the anti-defection provisions of the Tenth Schedule, enacted earlier in 1985. The Amendment makes it mandatory for all those switching political sides – whether singly or in groups – to resign their legislative membership. They now have to seek re-election if they defect and cannot continue in office by engineering a ‘split’ of one-third of members, or in the guise of a ‘continuing split of a party’.”*

5.14 The Supreme Court, in *Rameshwar Prasad v. Union of India and Anr.*<sup>192</sup> also remarked:

*“By the 91<sup>st</sup> Amendment, defection was made more difficult by deleting the provision which did not treat mass shifting of loyalty by one-third members as defection and by making defection altogether impermissible and only permitting merger of the parties in the manner provided in the Tenth Schedule.”*

5.15 While Paragraph 3 with the exception on split has been deleted, another exception to disqualification of the ground of defection exists in the

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<sup>189</sup> Kashyap, *supra* note 178, at 791.

<sup>190</sup> *Ibid.*, at 791.

<sup>191</sup> Constitution (Ninety-first Amendment) Act, 2003, Statement of Objects and Reasons.

<sup>192</sup> (2006) 2 SCC 1.

case of merger of a political party with another political party, as provided under Paragraph 4 of the Tenth Schedule. A party shall be deemed to have merged with another party if not less than two-thirds of the members of the legislature party concerned have agreed to such merger. If such merger takes place, those who do not agree to such merger and opt to function as a separate group in the House are also saved from disqualification, irrespective of their numerical strength.

5.16 The 170<sup>th</sup> Report of the Law Commission had recommended deletion of Paragraph 4 as well (along with Paragraph 3) in the 'interest of maintenance of proper political standards in the House and also to minimise the complications arising on that account.'<sup>193</sup> However, the 91<sup>st</sup> Amendment (or any other) did not delete the provision on merger and it continues as an exception to the law on disqualification upon defection.

5.17 As opposed to instances of split, various mergers of political parties have been legitimately recognised by the Speakers in recent years.<sup>194</sup> The requirement that two-thirds of the members of the legislature party need to consent to a merger for it to be considered legitimate is a sufficient safeguard which has prevented the misuse of Paragraph 4. Hence, in the present Report, the Law Commission does not make any recommendation with regard to amendments to Paragraph 4.

## **C. Procedure under Paragraph 6 of the Tenth Schedule**

### **i) The role of the Speaker in deciding petitions under the Tenth Schedule**

5.18.1 It is necessary that the decisions taken by the deciding authority under the Tenth Schedule are viewed as impartial and untainted by political considerations. Currently, under Paragraph 6 of the Tenth Schedule, any question as to whether a member of a House has become subject to disqualification under the Tenth Schedule is referred to the Chairman/Speaker of the House. While the decision of the Chairman/Speaker can be judicially reviewed on various grounds, the presence of Paragraph 6 has generated widespread controversy.

5.18.2 In *Kihota Hollohon v. Zachilhu*,<sup>195</sup> the constitutionality of the Tenth Schedule was challenged on the ground that the investiture of adjudicatory functions in the Chairman/Speakers creates the apprehension of political bias. It was contended that an independent, fair and impartial

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<sup>193</sup> LCI, 170<sup>th</sup> Report, *supra* note 108, at Chapter IV.

<sup>194</sup> Kashyap, *supra* note 178, at 798.

<sup>195</sup>(1992) 1 SCC 309.

machinery for resolution of electoral disputes is an essential and important aspect of democracy and that the same would be vitiated by vesting the adjudicatory function in the Speaker. In response to this contention, the Supreme Court held that the Chairman/Speakers hold a pivotal position in the scheme of Parliamentary democracy and it would be inappropriate to express distrust in the high office of the Speaker, merely because some of the Speakers are alleged to have discharged their functions in a manner not befitting the great traditions of their high office. Hence, immense confidence was invested in the high position that the Speaker enjoys within the constitutional scheme. Regardless of this, Courts have imposed safeguards to ensure that the Speaker/Chairman does not act in an arbitrary manner. As a necessary safeguard, the decision of the Speaker is subject to review on the grounds of *mala fides*, non-compliance with the rules of natural justice and perversity, among others.

5.18.3 However, due regard should be had to the minority view expressed in *Kihota Hollohan*. The minority held that the Speaker being dependent on continuous support of the majority in the House, he does not satisfy the requirement of an independent adjudicating authority and his choice as the sole arbitrator in the matter violates an essential attribute of the basic feature.<sup>196</sup> Not surprisingly, decisions of Speakers with regard to disqualification on the ground of defection have been challenged in various instances for being biased and partial. For instance, in *Mayawati v. Markandeya Chand and Ors.*<sup>197</sup> the Speaker's decision was challenged as being perverse because the Speaker unduly delayed the proceedings under the disqualification petition. While the Court refused to set aside the order of the Speaker in this case, legal challenges like these erode the confidence posed in the office of the Speaker. In *D. Sudhakar v. DN Jeevaraju and Ors.*<sup>198</sup>, the impugned order of the Speaker was held to be vitiated by *mala fides* because the disqualification petition was decided by him in haste and revealed a partisan attitude in his approach. The Court observed that the Speaker's decision is subject to judicial review under Articles 32, 226 and 136 as the Speaker discharges quasi-judicial functions when acting under Paragraph 6 of the Tenth Schedule.

5.18.4 The Supreme Court in *Balchandra L. Jarkiholi and Ors. v. BS Yeddyurappa*<sup>199</sup> also affirmed that the Speaker functions in a quasi-judicial capacity, which makes orders passed by him subject to judicial review. In this case, the Speaker was held to have not taken into consideration rules of evidence while acting on the disqualification petition, and to have acted in

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<sup>196</sup> *Kihota Hollohan v. Zachilhu*, AIR 1993 SC 412, at 449, 451.

<sup>197</sup> AIR 1998 SC 3340.

<sup>198</sup> 2012 (1) SCALE 704.

<sup>199</sup> (2011) 7 SCC 1.

haste and in violation of the principles of natural justice. The Court said that the Speaker acted in 'hot haste' while disposing off the disqualification petition, even though there was no conceivable reason for the Speaker to have taken up the matter in such hurry.

5.18.5 These instances show that even though Paragraph 6 gives finality to the Chairman/Speaker's decision, there is ample scope for his decision to be reviewed. The decision of the Speaker is not immune from challenge before the High Court under Articles 226 and 227 of the Constitution.<sup>200</sup>

## ii) History of reform proposals

5.19.1 Without disregard to the high office of the Speaker, apprehensions regarding the partisan nature of the Speakers' decisions have been a cause for concern. Former Speaker Mr. Shivraj Patil himself in his decision of June 1, 1993 (referred above) duly noted:

*"Since Speakers in India are, after all, party members, they should not be burdened with the job of pronouncing on the membership of their fellow members. Whatever they decide, motives would be imputed to them."*

5.19.2 It would be unrealistic to expect a Speaker to completely abjure all party considerations while deciding on matters under the Tenth Schedule.<sup>201</sup> The Dinesh Goswami Committee Report recommended that the anti-defection law should be changed insofar as

*"the power of deciding the legal issue of disqualification should not be left to the Speaker or Chairman of the House, but to the President or the Governor, as the case maybe who shall act on the advice of the Election Commission, to whom the question should be referred for determination as in the case of any other post-election disqualification of a Member."*<sup>202</sup>

5.19.3 The 170<sup>th</sup> Report of the Law Commission also recommended that the decision on the question of disqualification on the ground of defection should be entrusted to the President and the Governor, as the case may be, who shall render their decision in accordance with the opinion of the Election Commission. Furthermore, the Election Commission, in its Report on Proposed Electoral Reforms (2004) also observed:

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<sup>200</sup> Rajendra Singh Rana v. Swami Prasad Maurya (2007) 4 SCC 270.

<sup>201</sup> Kashyap, *supra* note 178, at 801.

<sup>202</sup> Dinesh Goswami Committee, *supra* note 113, at 60.



*“All political parties are aware of some of the decisions of the Hon’ble Speakers, leading to controversies and further litigations in courts of law. The Commission sees substance in the (above) suggestion that the legal issues of disqualifications under the Tenth Schedule should also be left to the President and the Governors of the States concerned, as in the case of all other post-election disqualifications of sitting MPs, MLAs and MLCs, under Articles 103 and 192 of the Constitution. In the case of disqualifications under the Tenth Schedule also, the President or the Governor may act on the opinion given by the Election Commission.”*<sup>203</sup>

5.19.4 Consequently, the Election Commission proposed that in a manner similar to other cases of post-election disqualification of sitting MPs, MLAs, and MLCs under Articles 103 and 192 of the Constitution, disqualification on the ground of defection should also be left to the President and Governors of States. The President or the Governor may act on the opinion furnished by the Election Commission.

5.19.5 The Election Commission recommended that it would give its opinion to the President/Governor in the matters of post-election disqualification after giving full opportunity of being heard to the parties concerned. One of the grounds for the Election Commission to have made such recommendation was that if decisions are rendered by the President/Governor, on the opinion of the Commission, it would receive more respect and acceptability from the common people.<sup>204</sup>

5.19.6 The Election Commission’s recommendation was also endorsed by the Ethics in Governance Report.<sup>205</sup> The NCRWC also recommended that the power to decide on questions as to disqualification on the ground of defection should vest in the Election Commission instead of the Chairman or the Speaker of the House concerned.<sup>206</sup> The NCRWC made this recommendation for the reason that

*“Some Speakers have tended to act in a partisan manner and without proper appreciation – deliberate or otherwise – of the provisions of the Tenth Schedule.”*<sup>207</sup>

5.19.7 The proposal to vest the power to decide on disqualification petitions on the ground of defection assume importance for the office of the

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<sup>203</sup>ECI, *Proposed Electoral Reforms*, D.O. No. 3/ER/2004 (2004) (hereinafter “ECI 2004 Reforms”).

<sup>204</sup>*Ibid.*, at 19.

<sup>205</sup>ARC Report, *supra* note 119, at Chapter 2, Part 1.3.

<sup>206</sup>NCRWC Report, *supra* note 13, at para 4.18.

<sup>207</sup>*Ibid.*, at para 4.18.

Speaker as well, as is evident from the view taken by the Supreme Court in *Jagjit Singh v. State of Haryana*:<sup>208</sup>

*“Undoubtedly, in our constitutional scheme, the Speaker enjoys a pivotal position. The position of the Speaker is and has been held by people of outstanding ability and impartiality. Without meaning any disrespect for any particular Speaker in the country, but only going by some events of the recent past, certain questions have been raised about the confidence in the matter of impartiality on some issues having political overtones which are decided by the Speaker in his capacity as a Tribunal.”*

5.19.8 This can be understood to mean that if the power to decide disqualification petitions made under the Tenth Schedule is vested with the President/Governor, the Speaker’s office would be insulated from the reach of constitutional challenges of the kind put forth in *Kihota Hollohan*.

#### **D. Recommendation**

5.20 The Law Commission recommends a suitable amendment to the Tenth Schedule of the Constitution which shall have the effect of vesting the power to decide on questions of disqualification on the ground of defection, with the President or the Governor (as the case may be) who shall act on the advice of the Election Commission.

5.21 A constitutional amendment vesting the power to decide matters relating to disqualification on the ground of defection with the President/Governor acting on the advice of the Election Commission would also help in preserving the integrity of the Speaker’s office.

5.22 Hence, Paragraph 6 of the Tenth Schedule should be amended to read as under:

**“6. Decision on questions as to disqualification on ground of defection.—**(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the:

- (a) President, in case of disqualification of a member of either House of Parliament;
- (b) Governor, in case of disqualification of a member of a House of the Legislature of a State.

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<sup>208</sup> (2006) 11 SCC 1.

Provided that the decision of the President or the Governor as to whether a member of a House has become subject to disqualification under this Schedule shall be final.

(2) Before giving any decision on any such question, the President or the Governor, as the case may be, shall obtain the opinion of the Election Commission and shall act according to such opinion.

Provided that no member of a House shall be disqualified under this Schedule, unless he has been given a reasonable opportunity of being heard by the Commission in the matter.”

## **CHAPTER VI**

### **STRENGTHENING THE OFFICE OF THE ELECTION COMMISSION OF INDIA**

#### **A. Constitutional Protection of all the Members of the ECI**

6.1 The ECI is an independent, constitutional body, which has been vested with the powers of superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all Parliamentary and State elections and elections to the office of the President and Vice President *vide* Article 324(1) of the Constitution.

6.2 Article 324(2) stipulates that the ECI shall comprise of the CEC and “*such number of other Election Commissioners, if any, as the President may from time to time fix.*” By an order dated 1<sup>st</sup> October 1993, the President has fixed the number of Election Commissioners as two, until further orders. There is all round consensus, evident from the Goswami Committee’s Report in 1990;<sup>209</sup> the ECI’s 1998 letter;<sup>210</sup> and its 2004 proposed reforms that the number of Election Commissioners should remain at two to ensure the “smooth and effective functioning” of the ECI. Their stated rationale is that:

*“The three-member body is very effective in dealing with the complex situations that arise in the course of superintending, directing and controlling the electoral process, and allows for quick responses to developments in the field that arise from time to time and require immediate solution. Increasing the size of this body beyond the existing three-member body would, in the considered opinion of the Commission, hamper the expeditious manner in which it has necessarily to act for conducting the elections peacefully and in a free and fair manner.”*<sup>211</sup>

6.3 Article 324(5) of the Constitution is intended to ensure the independence of the ECI and free it from external, political interference and thus expressly provides that the removal of the CEC from office shall be on “*like manner and on the like grounds as a Judge of the Supreme Court*”. Nevertheless, a similar impeachment procedure is not prescribed for the other Election Commissioners under Article 324(5), and they are treated on par with the Regional Commissioners. Instead Article 324(5) stipulates that subject to any Parliamentary law, the office tenure of the Election and Regional Commissioners shall be determined by the President and that they cannot be removed except on the CEC’s recommendation.

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<sup>209</sup> Goswami Committee Report, *supra* note 113, at para 1.1.

<sup>210</sup> Mendiratta, *supra* note 161, at 186.

<sup>211</sup> ECI 2004 Reforms, *supra* note 203, at 14.

6.4 The ECI in its 2004 Report expressly opined that the current wording of Article 324(5) was “inadequate” and required an amendment to bring the removal procedures of Election Commissioners on par with the CEC, and thus to provide them with the “same protection and safeguard[s]” as the CEC.<sup>212</sup> The proposed amendment by the Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010 is along the same lines.

6.5 Equating the removal procedures of the two Election Commissioners with that of the CEC is also in line with the legislative intent of the Parliament. In 1991, the Parliament enacted the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act whereby the retirement age of the CEC was fixed at 65 years, with a salary and other perquisites equal to that of a Supreme Court judge; whereas that of the other Election Commissioners was fixed at 62 years with benefits equivalent to a High Court judge. However, in 1993, the above Act was amended and the CEC and other Election Commissioners were placed on par on matters of retirement age, salaries and other benefits.<sup>213</sup> Section 10 of the Act also provided for all three members to have an equal say in the decision making process, with any difference in opinion being resolved “according to the opinion of the majority.”

6.6 Commenting on this Act, the Supreme Court in *T.N. Seshan, CEC v Union of India*<sup>214</sup> held that the CEC was not superior to the Election Commissioners stating:

*“As pointed out earlier, the scheme of Article 324 clearly envisages a multi-member body comprising the CEC and the ECs. The RCs may be appointed to assist the Commission. If that be so the ECs cannot be put on par with the RCs. As already pointed out, ECs form part of the Election Commission unlike the RCs. Their role is, therefore, higher than that of RCs. If they form part of the Commission it stands to reason to hold that they must have a say in decision-making. If the CEC is considered to be a superior in the sense that his word is final, he would render the ECs non-functional or ornamental. Such an intention is difficult to cull out from Article 324 nor can we attribute it to the Constitution-makers. We must reject the argument that the ECs’ function is only to tender advise to the CEC.” [Emphasis supplied]*

6.7 It is thus clear that the CEC is at the same position as the other Election Commissioners and only functions as a first amongst equals.

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<sup>212</sup> ECI 2004 Reforms, *supra* note 203, at 14.

<sup>213</sup> Mendiratta, *supra* note 161, at 181.

<sup>214</sup> (1995) 4 SCC 611.

Moreover, the Election Commissioners are clearly superior to the Regional Commissioners and Article 324(5) should be amended to reflect that. Given that the removal (impeachment) procedure of the judges of the High Court and Supreme Court is also the same, the benefit of the CEC's removal procedures under Article 324(5) should also be extended to the other Election Commissioners.

6.8 The Law Commission thus, relying on the Court's observations in the *Seshan's* judgment, and for the reasons aforementioned reiterates and endorses the ECI's proposal to extend the same protection under the Constitution in the matter of removability from office to the Election Commissioners as is available to the CEC. Thus, the second proviso in Article 324(5) after the words "Chief Election Commissioner", the words "and any other Election Commissioner" should be added. In the third proviso, the words "and any other Election Commissioner" should be deleted.

### **Recommendation**

6.9 The following change should be made in Article 324:

- In sub-section (5), delete the words "the Election Commissioners and" appearing after the words "tenure of office of".
- In the first proviso to sub-section (5), after the words "Chief Election Commissioner" appearing before "shall not be removed", add the following words, "and any other Election Commissioner"; also, after the words "conditions of service of the Chief Election Commissioner", add the following words, "and any other Election Commissioner".
- In the second proviso to sub-section (5), after the words "provided further that", delete the words "any other Election Commissioner or" occurring before "a Regional Commissioner".

## **B. Appointment of the Election Commissioners and the CEC**

### **(i) Appointment process**

6.10.1 The power to appointment the CEC and the Election Commissioners lies with the President *vide* Article 324(2) of the Constitution, which states 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 and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President."*

6.10.2 Although the issue of appointments was discussed in the Constituent Assembly and a suggestion was floated to make the appointments subject to confirmation by a two-thirds majority, in a joint session of the Parliament, it was rejected.<sup>215</sup> Consequently, Article 324(2) left it open for the Parliament to legislate on the issue.

6.10.3 The Goswami Committee in 1990 recommended a change to the appointment process, suggesting that the CEC should be appointed by the President in consultation with the Chief Justice of India and the Leader of the Opposition in the Lok Sabha. In turn, the CEC should be additionally consulted on the question of appointment of the other Election Commissioners and the entire consultation process should have statutory backing.<sup>216</sup>

6.10.4 This was followed by the introduction of the Constitution (Seventieth Amendment) Bill 1990, which was introduced in the Rajya Sabha on 30<sup>th</sup> May 1990 providing that the CEC would be appointed by the President after consultation with the Chairman of the Rajya Sabha, the Speaker of the Lok Sabha, and the Leader of the Opposition (or the leader of the largest party) in the Lok Sabha. The CEC was further made a part of the consultative process in the appointment of the Election Commissioners. However, on 13<sup>th</sup> June 1994, the Government moved a motion to withdraw the Bill, which was finally withdrawn with the leave of the Rajya Sabha on the same day.<sup>217</sup>

6.10.5 Consequently, in the absence of any Parliamentary law governing the appointment issue, the Election Commissioners are appointed by the government of the day, without pursuing any consultation process. This practice has been described as requiring the Law Ministry to get the file approved by the Prime Minister, who then recommends a name to the President.<sup>218</sup> Thus, there is no concept of collegium and no involvement of the opposition.

6.10.6 The Commissioners are appointed for a six year period, or up to the age of 65 years, whichever is earlier. Further, there are no prescribed qualifications for their appointment, although convention dictates that only senior (serving or retired) civil servants, of the rank of the Cabinet Secretary or Secretary to the Government of India or an equivalent rank, will be appointed. The Supreme Court in *Bhagwati Prashad Dixit Ghorewala v Rajiv Gandhi*<sup>219</sup> rejected the contention that the CEC should possess qualifications

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<sup>215</sup> Mendiratta, *supra* note 161, at 179.

<sup>216</sup> Goswami Committee Report, *supra* note 113, at 9.

<sup>217</sup> Rajya Sabha debates, 13<sup>th</sup> June 1994, at 600 and 637. See also Mendiratta, *supra* note 161, at 179.

<sup>218</sup> Qureshi, *supra* note 1, at 39-40.

<sup>219</sup> AIR 1986 SC 1534.

similar to that of a Supreme Court judge, despite being placed on par with them in terms of the removal process.

## **(ii) Comparative practices**

6.11.1 An examination of comparative practices is instructive. In South Africa, the Independent Electoral Commission comprises of five members, including one judge. They are appointed by the President on the recommendations of the National Assembly, following nominations by a National Assembly inter-party committee, which receives a list of at least eight candidates. This list of (at least) eight nominees is recommended by the Selection Committee, which has four members being, the President of the Constitutional Court; a representative of the Human Rights Commission and the Commission on Gender Equality each; and the Public Prosecutor.<sup>220</sup>

6.11.2 In Ghana too, the seven member Election Commission is appointed by the President on the advice of the Council of State, with the Chairman and two Deputy Chairmen having permanent tenure.<sup>221</sup>

6.11.3 In Canada, the Chief Electoral Officer of “Elections Canada” is appointed by a House of Commons resolution for a non-renewable ten-year term, and to protect their independence from the government, he/she reports directly to Parliament.<sup>222</sup> In the United States, the six Federal Election Commissioners are appointed by the President with the advise and consent of the Senate. The Commissioners can be members of a political party, although not more than three Commissioners can be members of the same party.<sup>223</sup>

6.11.4 In all these cases thus, it is clear that the appointment of the Election Commissioners or the electoral officers is a consultative process involving the Executive/Legislature/other independent bodies.

## **(iii) Recommendations**

6.12.1 Given the importance of maintaining the neutrality of the ECI and to shield the CEC and Election Commissioners from executive interference, it is imperative that the appointment of Election Commissioners becomes a consultative process.

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<sup>220</sup> Electoral Institute for Sustainable Democracy in Africa, *South Africa: Independent Electoral Commission*, <<http://www.content.eisa.org.za/old-page/south-africa-independent-electoral-commission>>.

<sup>221</sup> Section 4, The Electoral Commission Act, 1993; See also Establishment of Electoral Commission, <[http://www.ec.gov.gh/assets/file/establishment\\_of\\_electoral\\_commission.pdf](http://www.ec.gov.gh/assets/file/establishment_of_electoral_commission.pdf)>

<sup>222</sup> Elections Canada, *Appointment of the Chief Electoral Officer*, <<http://www.elections.ca/content.aspx?section=abo&dir=ceo/app&document=index&lang=e>>.

<sup>223</sup> Qureshi, *supra* note 1.



6.12.2 To this end, the Commission adapts the Goswami Committee's proposal with certain modifications. *First*, the appointment of all the Election Commissioners (including the CEC) should be made by the President in consultation with a three-member collegium or selection committee, consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha (or the leader of the largest opposition party in the Lok Sabha in terms of numerical strength) and the Chief Justice of India. The Commission considers the inclusion of the Prime Minister is important as a representative of the current government.

6.12.3 *Second*, the elevation of an Election Commissioner should be on the basis of seniority, unless the three member collegium/committee, for reasons to be recorded in writing, finds such Commissioner unfit.

6.12.4 Such amendments are in consonance with the appointment process in Lokpal and Lokayuktas Act, 2013, the Right to Information Act, 2005 and the Central Vigilance Commission Act, 2003.

6.12.5 Pursuant to Article 324(2), an amendment can be brought to the existing Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 to amend the title and insert a new Chapter 1A on the appointment of Election Commissioners and the CEC as follows:

- Act and Short Title: The Act should be renamed the "Election Commission (Appointment and Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991".
- The short title should state, "An Act to determine the appointment and conditions of service of the Chief Election Commissioner and other Election Commissioners and to provide for the procedure for transaction of business by the Election Commission and for matters connected therewith or incidental thereto."
- Chapter I-A – Appointment of Chief Election Commissioner and Election Commissioners.

2A. Appointment of Chief Election Commissioner and Election Commissioners – (1) The Election Commissioners, including the Chief Election Commissioners, shall be appointed by the President by warrant under his hand and seal after obtaining the recommendations of a Committee consisting of:

(a) the Prime Minister of India – Chairperson

- (b) the Leader of the Opposition in the House of the People – Member
- (c) the Chief Justice of India – Member

*Provided* that after the Chief Election Commissioner ceases to hold office, the senior-most Election Commissioner shall be appointed as the Chief Election Commissioner, unless the Committee mentioned in sub-section (1) above, for reasons to be recorded in writing, finds such Election Commissioner to be unfit.

*Explanation:* For the purposes of this sub-section, “the Leader of the Opposition in the House of the People” shall, when no such Leader has been so recognised, include the Leader of the single largest group in opposition of the Government in the House of the People.

### **C. Permanent, Independent Secretariat of the ECI**

6.13 Currently the ECI has a separate secretariat of its own, with the service conditions of its officers and staff being regulated by the rules made by the President under Article 309 of the Constitution, similar to other departments and ministries of the Government of India in connection with union matters. Officers at the higher level, such as the level of deputy election commissioner are normally appointed on a tenure basis on deputation from the national civil services. Lower level officers are permanent officers in the ECI’s secretariat, from its own ranks.<sup>224</sup>

6.14 To further strengthen the independence of the secretariat, consonant with the intention of the framers of the Constitution, the Goswami Committee in 1990 recommended that the ECI should have an independent secretariat, along the lines of the Lok Sabha/Rajya Sabha secretariats provided in Article 98(2), which permits the Parliament to regulate the recruitment and service conditions of persons appointed to the secretarial staff in either House of Parliament.<sup>225</sup>

6.15 To give effect to the Goswami Committee’s recommendation, the government introduced the Constitution (Seventieth Amendment) Bill, 1990 in the Rajya Sabha on 30<sup>th</sup> May, 1990. However, the government subsequently withdrew the Bill in 1993 in view of the changed composition of the ECI on having become a multi-member body (pursuant to the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991) and their belief that the Constitution

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<sup>224</sup> Mendiratta, *supra* note 161, at 187.

<sup>225</sup> Goswami Committee Report, *supra* note 113, at para 3.

Amendment Bill needed some amendments to reflect this change.<sup>226</sup> The Bill was never re-introduced.

6.16 The ECI relied on these two developments in 2004 to recommend the introduction of an independent Secretariat, which would be “vital” to the ECI’s functioning, noting that its independence would be further strengthened if its Secretariat was insulated from Executive interference on the issues of appointments, promotions etc., along the lines of the Secretariats of the Lok Sabha, and Rajya Sabha, Registries of the Supreme Court and High Courts, etc.<sup>227</sup>

6.17 The Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010 reiterated these recommendations.

6.18 It is of paramount importance to ensure that the ECI, entrusted with the task of conducting elections throughout the country, be “fully insulated”<sup>228</sup> from political pressure or Executive interference to maintain the purity of elections, inherent in a democratic process. The ECI, the Goswami Committee and others are unanimous in their view that the ECI should have a permanent, independent secretariat to ensure its continued functioning as an independent, constitutional authority. The government too, has signified its in-principle approval with the introduction of the Constitution (Seventieth Amendment) Bill, 1990, which was withdrawn *only* with a view to re-introduce a more comprehensive Bill.

### **Recommendation**

6.19 Thus, the Law Commission recommends the insertion of Article 324(2A) of the Constitution along the following lines:

After sub-section (2), add the following words:

“(2A)(1): The Election Commission shall have a separate independent and permanent secretarial staff.

(2) The Election Commission may, by rules prescribed by it, regulate the recruitment, and the conditions of service of persons appointed, to its permanent secretarial staff.”

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<sup>226</sup> Mendiratta, *supra* note 161, at 187-188.

<sup>227</sup> ECI 2004 Reforms, *supra* note 203, at 15.

<sup>228</sup> T.N. Seshan, CEC v Union of India, (1995) 4 SCC 611.

6.20            Thus, the amended Article 324 of the Constitution reads as under:

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

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

(2A)(1): The Election Commission shall have a separate independent and permanent secretarial staff.

(2) The Election Commission may, by rules prescribed by it, regulate the recruitment, and the conditions of service of persons appointed, to its permanent secretarial staff.

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

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

(5): Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Regional Commissioners shall be such as the President may by rule determine;

*Provided* that the Chief Election Commissioner and any other 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 and any other Election Commissioner shall not be varied to his disadvantage after his appointment:

*Provided further* that a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

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

## **CHAPTER VII**

### **PAID NEWS AND POLITICAL ADVERTISING**

#### **A. Introduction**

7.1 Paid news, both generally and during election campaigns, is a widespread and pervasive phenomenon today. The scale of the problem is demonstrated by the fact that, according to the ECI, in the assembly elections held in the period 2011-2013 alone, there have been 1987 cases where a notice for paid news has been issued to the candidates and 1727 cases where the practice of paid news has been confirmed.<sup>229</sup>

7.2 The phenomena of paid news and its cognate, political advertising being presented as news, cannot be seen in isolation. They are integral to the ways in which the news industry, both print and electronic, has developed over last few decades. There has been a significant shift in the way media business is carried out. Media is growingly seen as a revenue generation model by almost all leading media houses. Traditionally, the two pillars of media, namely advertisements and editorial content, have been handled separately. The sustenance of any media house was dependent on the credibility of information circulated through news. Revenue driven news or editorial content was traditionally seen as damaging credibility of media houses. Therefore, though revenue generation through advertisements remained important, it certainly was not the priority of media houses. However, in recent times, the compulsions of revenue generation to run the newspapers and other media, have led to the growing importance of advertisements in the running of media houses.<sup>230</sup>

7.3 Another important development has been the internal change in the relation between advertisements and editorial wings of media. Mr. P. Sainath (former Rural Affairs Editor, The Hindu) suggests that the spread of the phenomenon of paid news can be attributed to the change in the employment model of journalists.<sup>231</sup> This new model of employment applied by several media conglomerates curtailed the collective bargaining position of journalists. This led to the concentration of power in the management wing of

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<sup>229</sup> Election Commission of India, *Handbook for Media, General Election to the 16<sup>th</sup> Lok Sabha*, 2014, para 3.5, <[http://eci.nic.in/eci\\_main/ElectoralLaws/HandBooks/Handbook%20for%20Media%202014.pdf](http://eci.nic.in/eci_main/ElectoralLaws/HandBooks/Handbook%20for%20Media%202014.pdf)>.

<sup>230</sup> Anuradha Sharma, *India Needs its Own Leveson? Journalism in India during the time of paid news and private treaties*, REUTERS INSTITUTE FELLOWSHIP PAPER (2013).

<sup>231</sup> Submissions made by Rural Affairs Editor, The Hindu (P. Sainath) to the Standing Committee.

media houses and significantly curtailed the independence of journalists.<sup>232</sup> Further, it also weakened the editorial wing of the media as journalists were now controlled by management instead of editors.<sup>233</sup> Therefore, the needs of commercialisation and the requirement of revenue bolstered the advertisement/management wing of media houses over the editorial wing.<sup>234</sup> With managers becoming more influential in the selection and presentation of news, the importance of news started getting determined by the revenues that would be generated.<sup>235</sup>

7.4 It must also be noted that while – as the above arguments suggest – paid news is widespread through the Indian media, it is by no means suggested that every newspaper or media entity is involved in the dissemination of paid news. In fact, journalists and newspapers have themselves, at times, strongly criticised the practice of paid news. However it is a fact that news driven by consideration, or advertisements thinly disguised in the form of news, have grown exponentially over last few decades in the arena of electoral politics. This part looks at the issues of paid news and political advertising specifically in this context. It does not suggest systemic reforms for media regulation in general, as that issue is being examined separately by the Law Commission and will form part of a distinct and holistic report on the subject.

7.5 At a Consultation on Media Law, held by the Law Commission, which sought responses from media entities, journalists and Law School, there was a detailed examination of the issues. Respondents included the Press Council of India, the News Broadcasters Association, the Delhi Union of Journalists, Times Internet Limited, Mr. Paranjay Guha Thakurta, National Law School of India University, National University of Juridical Sciences, and so on. Eleven Respondents out of fifteen suggested making paid news an offence under the Representation of the People Act. There were numerous suggestions pertaining to defining the offence, the nature of the offence, standards and burdens of proof, and so on. From the basis of wide consultations held by the Law Commission, it is clear that there is a general consensus, among the relevant stakeholders, in regulating the phenomenon of paid news.

7.6 In a speech during a public consultation organised by the Law Commission on the 27<sup>th</sup> and 28<sup>th</sup> of September, 2014, the CEC, Mr. V.S.

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<sup>232</sup> Submissions made by President, Indian Journalists Union (Mr. S.B. Sinha) to the standing Committee.

<sup>233</sup> APUWJ submissions to the Press Council of India (2010).

<sup>234</sup> Speech by Justice G.N. Ray, 'The Changing Face of India' <<http://presscouncil.nic.in/OldWebsite/speechpdf/November%2016%202009%20Hyderabad.pdf>>

<sup>235</sup> Ministry of Information and Broadcasting, *Issues Related To Paid News*, 47<sup>TH</sup> REPORT OF STANDING COMMITTEE ON INFORMATION TECHNOLOGY, Fifteenth Lok Sabha, (2012-2013), at 17.

Sampath, highlighted the problem of paid news. According to him, the problem had become particularly acute during the 2009 elections, when several prominent journalists approached the EC about paid news. Mr. Sampath further noted that the present legal framework did not deem paid news to be an offence, and that therefore, it was inadequate to deal with the problem. Consequently, the only option before the EC was to treat paid news as part of undisclosed expenditures, which it was doing. Naturally, this was a round-about and unnecessary procedure, and ought to be changed.

7.7 Consequently, this Part is divided into seven section. *First*, it looks at the definitional aspects of paid news and political advertisements. *Second*, it describes the ways in which the practices of paid news and disguised political advertising are prevalent in electoral coverage by the print and electronic media. *Third*, it analyses the current legal regime regulating such practices including seminal judicial decisions. *Fourth*, it considers recommendations made by previous committees and commissions on the subject of paid news. *Fifth*, it highlights the key constitutional issues surrounding regulation of paid news. *Sixth*, it describes the way paid news is being regulated in other jurisdictions. *Finally*, it suggests legal reform to gradually weed out the scourge of paid news from the electoral system.

## **B. Paid News and Political Advertising: Defining The Phenomena**

7.8 Political advertising is constituted by activities, which relate to promoting an electoral candidate or a political party or a policy proposed by a particular party, in order to appeal to the public. At its core, political advertising does not exclusively relate to elections, political parties or candidates. Advertising on other issues, which reflect important societal debates, such as human rights, environmental issues, welfare schemes etc., and is generally in the nature of political propaganda or pursues political ends, may be construed as political advertising.<sup>236</sup>

7.9 Legitimate political advertisements indicate the identity of the sender or the speaker of the communication. This confirms that the communicated piece is an advertisement. Such speech is not sought to be constrained excessively since it promotes political ideas and reflects the ideologies and policy goals of a party, while ensuring that the viewers are aware that the content is not merely informational but also promotional. Under the Indian Constitution, speech of this kind is admittedly within the protection of Article 19(1)(a) of the Constitution.<sup>237</sup>

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<sup>236</sup> EPRA Secretariat, Plenary Political Advertising: Case Studies and Monitoring, EPRA/2006/02, 17-19 May 2006.

<sup>237</sup> Tata Press v MTNL, AIR 1995 SC 2438.



7.10 On the other hand, there is no categorical legal definition of paid news. Paid news has been defined by the Sub-committee of the Press Council of India (*hereinafter* “**PCI report**”) as “*any news or analysis appearing in any media (Print & Electronic) for a price in cash or kind as consideration.*” The definition given by PCI report was also adopted by the 47<sup>th</sup> report of Standing Committee on Information and Technology of the Ministry of Information and Broadcasting (*hereinafter* “**SCIT report**”). The ECI Handbook distinguishes between paid news and paid content and suggests that the latter must be unambiguously marked as ‘paid advertisement’. Therefore, political advertisement will be one which is not presented in the garb of news or editorial content, but is clearly discernible as an advertisement.

7.11 Paid News therefore, is a *promotional* feature in the guise of an informative and meritorious piece of *news*. Further, paid news is communicated as any regular news content which is based on the labour invested in news finding and the merit of the author/speaker.

7.12 This demarcation between paid news and political advertising is significant. News reporting is supposed to be objective and neutral. Print and electronic media controls information dissemination which also affects the voters’ decision. It is very important that the neutrality of the news object is not distorted by monetary considerations. Therefore, it is crucial that the distinction between advertisement and news is easily discernible to the reader. If paid content is presented as news, it harms the election structure at multiple levels. Apart from the deception of voters, the funds paid by candidates for paid news also help them hide the expenditure incurred by them, unlike in advertising, which can be publicly scrutinised.

### **C. Issues and Problems with Paid News and Political Advertising**

7.13 A free and fair election is the cornerstone of any democracy. While free elections are determined by the absence of intimidation and coercion, a functioning secret ballot, and an enforceable right of universal adult suffrage, the concept of a “fair election” – while equally important – is more difficult to capture. Democracies the world over have recognised that “fairness” requires, in some sense, a level playing field. This means that the influence of money in corrupting the electoral process ought to be mitigated. In India, this is achieved by statutory norms governing election expenditures. In this context, it is important to note that in recent times, political advertising has also witnessed the involvement of several Public Relations firms. The expenses incurred for hiring these firms are likely to go much beyond the statutory expenditure limits. This makes elections very uneven towards those

who can get extensive funding and can incur the costs of political advertising, and adversely impacts the fairness of elections.

7.14 Political advertising raises several serious issues with respect to expenditure limits, truth or falsity of the claims, and the possible defamatory effects of advertisements. Some of the legal challenges posed by paid news and political advertising were manifest in the case of *Ashok Chavan v. Madhavrao Kinhalkar*<sup>238</sup> where Ashok Chavan did not include the expenditure on paid news and advertisement in his election expenses. Due to the absence of a legal regime regulating these practices, the legitimacy of paid news itself was not under contention. Instead, the contention was that he did not include the expenses on paid news in his lodged account of expenditure.

7.15 Political advertising serves a very important function of informing public. However, it increases the role of financial assistance in election campaigning and also incentivises the candidates to distort their election expenditure details. Furthermore, the problem is not just with respect to the information which is expressly shown as advertisement. The nexus between money and political journalism is manifest not only in the form of expensive advertisements but also in the form of paid editorial or news content.

7.16 In India, the most visible manifestation of the phenomenon of paid news in the electoral scene is in the form of several “packages” offered by the media houses to the candidates. Packages comprise exclusive stories, front page, negative coverage for opponent etc. Several media organisations have accepted money from politicians to provide favourable coverage. The ECI’s estimation of the worth of paid news market is Rs. 500 Crore.<sup>239</sup> However, the phenomenon is widespread and takes various forms of undesirable nexus of candidates and media. In 2014 Lok Sabha Elections itself, around 700 cases of paid news were detected.<sup>240</sup> This section explores some of the ways in which paid news is being practiced.

7.17 The coverage is sold in the name of a “package” which is offered in proportion to the money the interested party is willing to pay.<sup>241</sup> On an average, each candidate hires two employees to write news stories about him which are printed without editing and sought to be passed off as independent editorial content.<sup>242</sup> The newspapers exaggerate the winning

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<sup>238</sup> SLP (C) NO.29882 OF 2011.

<sup>239</sup> Vidhi Choudhary and Utpal Bhaskar, *Election Commission Pegs Paid News Market at Rs. 500 Crore*, LIVE MINT, 2<sup>nd</sup> February 2013, <<http://www.livemint.com/Politics/vELIACftlZbKXmzTzpGbFP/Election-Commission-pegs-paid-news-market-at-500-crore.html>>

<sup>240</sup> <http://www.dnaindia.com/india/report-almost-700-paid-news-cases-detected-in-2014-lok-sabha-elections-1989485>

<sup>241</sup> Press Council of India, *Sub-Committee Report on Paid News*, at 25, <<http://presscouncil.nic.in/OldWebsite/Sub-CommitteeReport.pdf>>.

<sup>242</sup> *Ibid.*, at 22.

chances of the candidates and the support they are getting from the public. However, there is no credit line to these news items and the font used is often different from the other news items.<sup>243</sup>

7.18 Candidates pay huge amounts of money in a 'package' deal for cooked up favourable information to create a false atmosphere for influencing electorate.<sup>244</sup> A package generally comprises rate cards for coverage of specific political activities during the campaign. For example, there are different rate cards for covering campaign speeches, covering door to door campaign, showing skewed survey results etc.<sup>245</sup> Channels and newspapers have stated that they were not willing to provide air-time to a candidate's campaign unless he is willing to pay the amount the channel demands.<sup>246</sup> The phenomenon of paid news not just involves the printing of news, but also rejecting or delaying coverage.<sup>247</sup> The impact of this is twofold: *first*, as discussed above, it affects the fairness of elections by tying a candidate's prospects to his financial ability to remunerate the media for coverage. And *second*, it affects the public's right to know, which is an aspect of their constitutional right under Article 19(1)(a).

7.19 The right to know – and, by extension, the right to accurate information on the basis of which to make an informed political choice – is severely undermined by the phenomenon of paid news and undisclosed political advertisement. In some instances, for example, newspapers have published conflicting news items on the same page showing the lack of editorial consistency or control over the news items. In one such case, a news paper published a news item in favour of one of the candidates with the headline that a candidate is "getting the support of each and every section of the society". On the same page, there was another news item arguing that there will be a triangular fight in that constituency. Both these reports appeared on the same page and were credited to a reporter of the newspaper.<sup>248</sup> Furthermore, in many assembly elections, the same newspaper has predicted the win of two opposing parties in a single state in two different editions. For instance, the Panipat edition of *Dainik Jagran* published a news item on page 9 of its edition dated October 8, 2009, that

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<sup>243</sup>Press Council of India, "*Paid News*": *How Corruption In The Indian Media Undermines Democracy*, Paranjay Guha Thakurta and Kalimekolan Sreenivas Reddy, (1<sup>st</sup> April, 2010), at 25, <<http://presscouncil.nic.in/OldWebsite/Sub-CommitteeReport.pdf>>.

<sup>244</sup>Dr. Madabhushi Sridhar, *Tyranny Over The Mind: Paid News As Electoral Crime*, 7 NALSAR L.R. (2013).

<sup>245</sup>PCI Sub-committee Report, *supra* note 241, at 26.

<sup>246</sup>Maseeh Rahman, '*Paid News*' *Scandal Hits Major Newspapers*, THE GUARDIAN, 4<sup>th</sup> Jan, 2010 <<http://www.theguardian.com/media/2010/jan/04/india-paid-news-scandal>>.

<sup>247</sup>Paranjay Guha Thakurta and K. Srinivas Reddy, *Blurring Boundaries Between News and Advertisement*, 2 NALSAR MEDIA L.R. 153 (2011).

<sup>248</sup>Mrinal Pandey, *Editorial Department Bypassed*, 2 NALSAR MEDIA L.R. 169 (2011). See also Excerpts from PCI Report on Paid News, <<http://presscouncil.nic.in/OldWebsite/CouncilReport.pdf>>.

was in favour of the electoral prospects of the Congress. This news item criticised leaders of non-Congress parties, and stated that they would not be able to make a mark in the elections because the Congress had done very good work for every section of society. This news item added that candidates of the Haryana Janhit Congress (HJC) would not be able to harm. The Ludhiana edition of the same newspaper, on the other hand, published a news item in favour of the HJC on October 11, 2009, with a headline that stated that the HJC would play the role of king or king-maker after the elections.<sup>249</sup>

7.20 Lastly, the seriousness of these issues is exacerbated by the magnitude to which they have become a systemic feature of elections. The entrenched nature of such practices is demonstrated by the fact that some candidates, in fact, thought it to be legitimate political expenditure and included in their official expenses for the election. For instance, a candidate had formally represented to the ECI that he had paid a newspaper to publish favourable “news” about himself and had included the payment in his official expenditure statement.<sup>250</sup> The systemic and structural aspects of paid news and political advertising are also revealed by the fact that news items have even begun to carry names of advertising agencies. For example, the *Prabhat Khabar*, a newspaper published from Ranchi, published articles praising various candidates before the Parliamentary elections but placed the following line on top of each such item “PK Media Marketing Initiative”.<sup>251</sup>

7.21 Instances of paid news and political advertising have been prominent enough to have attracted the attention of legal authorities, as well as the ECI. For example, when one legislator failed to include spending on paid news in her official poll accounts ( involving favourable coverage which was dressed up as news in two Hindi dailies, *Dainik Jaagran* and *Amar Ujala*, during her 2007 election), she was penalised for not reflecting it in the expenditure.<sup>252</sup> The ECI also saw an involvement in these issues when, following complaints from Prafulla Mahanta and Nagaon Nagarik Forum, a Nagaon based NGO, The ECI officials sealed Nagaon Talks Channel, as it was owned by Congress MLA Rockybul Hussain who was contesting from Samguri constituency.<sup>253</sup> The Guwahati High Court later ordered the EC to

<sup>249</sup>Thakurta, *supra* note 247, at 172.

<sup>250</sup> Survey Andhra Pradesh Union of Working Journalists, Submissions made to the PCI.

<sup>251</sup> Selling News- Selected Anecdotes, Hindi Press, 2 NALSAR MEDIA L.R. 169 (2011).

<sup>252</sup> Nalsar, Paid News as Electoral Crime, at 13

<sup>253</sup> Anindita Banerjee and Nisha Gigani, *Paid News- Economics Rules*, STUDENT’S RESEARCH GLOBAL MEDIA JOURNAL – Indian Edition/ Summer Issue / June 2011, at 3 <[http://www.caluniv.ac.in/global-mdia-journal/student\\_research/SR%203%20%20%20ANINDITA%20&%20NISHA.pdf](http://www.caluniv.ac.in/global-mdia-journal/student_research/SR%203%20%20%20ANINDITA%20&%20NISHA.pdf)>.

reopen the news channel.<sup>254</sup> On April 30, 2009, the Varanasi edition of the Hindi-language *Hindustan*, published by HT Media, published a front page story with a headline that suggested there was a wave in favour of the Congress party on the day of elections. On the following day, the paper issued an apology and clarified to the readers that it was paid content.<sup>255</sup>

7.22 These instances highlight the ways in which paid news and disguised political advertisements are growing deep into the process of democratic elections in India. The amount of money being spent on these practices has risen at exponential levels. Appendix I mentions the number of identified instances of paid news over last few assembly and general election. The unethical practices of paid news and disguised political advertising have reached the alarming level not just in a few cases of national media, but also in the regional media.

## **D. Legal Framework**

7.23 Currently the problems of paid content identified above are tackled in a piecemeal manner. Neither is there a blanket prohibition on paid news, nor is there a provision exclusively dealing with political advertisement or paid news. However, several aspects of the current statutory regime regulating elections in India have impact on political advertisement and paid news.

### **(i) Restrictions on election expenses**

#### **Mandatory lodging of accounts**

7.24.1 Section 77 of the RPA requires every candidate to keep account of expenses in connection with elections. If a candidate has failed to lodge an account of election expenses within the time and in the manner required by or under this Act and has no good reason or justification for the failure, the candidate shall be declared disqualified *vide* section 10A, RPA.

7.24.2 In *LR Shivaramagowda v. TM Chandrasekhar*<sup>256</sup>, the Supreme Court held that mere lodging of accounts is not sufficient. The accounts should also be correct and true. In the *Ashok Chavan* case of false accounts, the ECI held that it could go into the correctness or falsity of the account of

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<sup>254</sup> *Guwahati High Court Ordered Reopening of Nagaon Talks*, 3<sup>rd</sup> April 2011 <[http://twocircles.net/2011apr03/guwahati\\_high\\_court\\_ordered\\_reopening\\_nagaon\\_talks\\_tv.html#.VJEsaNKUfOU](http://twocircles.net/2011apr03/guwahati_high_court_ordered_reopening_nagaon_talks_tv.html#.VJEsaNKUfOU)>

<sup>255</sup> PCI Report, *supra* note 241, at 43.

<sup>256</sup> AIR 1999 SC 252.

election expenses filed by Ashok Chavan.<sup>257</sup> Both the Delhi High Court and the Supreme Court<sup>258</sup> upheld the decision of the ECI. In September 2014, however, through a judgment of Kait J., the Delhi High Court set aside the ECI's Order regarding Ashok Chavan's failure to lodge his accounts, on the ground that the Rules had not been complied with, as well as the fact that the Commission did not frame an issue regarding the knowledge and consent of the candidate.<sup>259</sup> These proceedings reveal a loophole in the legal system. Although the case involved paid news and political advertising, the only section that the ECI could proceed under was the section dealing with disclosure of accounts.

7.24.3 The Supreme Court in *Common Cause v. Union of India*<sup>260</sup> exempted the expenses incurred by political parties or any other association or body of persons apart from the candidate or his/her election agent. The court further issued directions to political parties to submit a statement of expenditure of elections to the ECI. Such statements are required to be submitted within 75 days of assembly elections and 90 days of Lok Sabha elections.<sup>261</sup>

7.24.4 After going through multiple amendments and judicial interpretations, section 77 was amended again in 2003. By this amendment, all expenditure incurred by *supporters and workers* of a candidate is deemed to be expenditure incurred or authorised by the candidate and subject to the overall ceiling fixed on his election expenses under the law. The section as it stands now excludes only the expenditure incurred on the travel of leaders of the political party for general party propaganda. This means that paid news – or political advertisements – that are paid for not by a candidate himself, but on his behalf, will also fall within the expenditure ceiling.

### Disqualification

7.24.5 Section 10A of the RPA: Disqualification for failure to lodge account of election expenses:

*“If the Election Commission is satisfied that a person:*

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

*(b) has no good reason or justification for the failure, the Election Commission shall, by order published in the Official Gazette, declare him*

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<sup>257</sup> ECI Order on *Account of Election Expenses of Shri Ashok Chavan*, 13<sup>th</sup> July 2014, <[http://eci.nic.in/eci\\_main1/current/Ashok\\_Chavan\\_order\\_13072014.pdf](http://eci.nic.in/eci_main1/current/Ashok_Chavan_order_13072014.pdf)>.

<sup>258</sup> SLP (C) NO.29882 OF 2011.

<sup>259</sup> *Ashok Chavan vs Election Commission of India*, W.P. (C) No. 459/2014.

<sup>260</sup> AIR 1996 SC 3081.

<sup>261</sup> Writ (Civ) No. 13 of 2003.

*to be disqualified and any such person shall be disqualified for a period of three years from the date of the order.”*

The requirement of lodging such accounts subjects the candidates to disclose the advertisement expenditure. The provision does not directly deal with political advertising or paid news. However, placing restrictions on election expenses contributes in checking excessive political advertising.

#### Illegal payments in connection with an election

##### 7.24.6 Section 171H: Illegal Payments in Connection with an Election

*“Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees:*

*Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.”*

This restriction on election expenses without the authority of the candidate also involves “advertisement”. Therefore, advertisements have to be routed through the candidate. This is to ensure that any expenses on political advertisements are directly counted as candidate’s election expenses.

7.24.7 These provisions have been used by the courts frequently, including in *Ashok Chavan’s*<sup>262</sup> case to target the paid news phenomenon. Though these provisions oversee expenditure incurred in such practices, they are not sufficient for tackling the problems of paid news and political advertising. For instance, if a candidate includes expenses of paid news, the paid news will still not be subjected to disqualification. It only controls excessive expenditure, not the practices of paid news and disguised political advertisements.

#### **(ii) Disclosure provisions**

7.25.1 Section 127A of the RPA imposes certain disclosure requirements on printing pamphlets, posters etc. These should bear names and addresses of the printer and the publisher. In order to enforce the requirement, it also mandates a declaration as to the identity of the publisher thereof, signed by him and attested by two persons to whom he is personally

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<sup>262</sup>SLP (C) NO.29882 OF 2011.

known. Furthermore, the printer is also obligated to send one copy of the document along with one copy of the declaration to the mentioned authorities.

7.25.2 Section 127A defines “Election pamphlet or poster” as “*any printed pamphlet, hand-bill or other document distributed for the purpose of promoting or prejudicing the election of a candidate or group of candidates or any placard or poster having reference to an election, but does not include any hand-bill, placard or poster merely announcing the date, time, place and other particulars of an election meeting or routine instructions to election agents or workers*”

7.25.3 The section imposes duties of disclosure on both candidates/agents and printers/publishers. It does not expressly mention newspapers and only mentions specific stationery that the candidates use for election campaign. However, as per the instructions of the Commission issued on 08.06.2010<sup>263</sup> and 16.10.2007<sup>264</sup>, printing “other documents” for the purpose of section 127A<sup>265</sup> includes any paid content published. Failure on part of any party to make such disclosures invites punishment with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both. However, it does not qualify as a ground for disqualification.

7.25.4 The disclosure provisions are not sufficient to tackle the practices of paid news and disguised political advertising. This is because the provision itself is not sufficient to cover advertisements in newspapers or electronic media. Such practices have only been targeted through *ad-hoc* instructions of ECI. Specific disclosure norms with respect to advertisements in newspaper and electronic media are required for clarity and certainty.

### **(iii) Pre-certification of political advertisements**

7.26.1 The Supreme Court, in *Ministry of Broadcasting v. Gemini TV Pvt. Ltd.*<sup>266</sup> passed an Order stating all the political advertisements proposed to be issued on TV Channels and Cable Networks by any registered political party/any group or organization/ association/ individual candidate shall be pre-certified by the designated certification committee at various levels to be constituted by the ECI

7.26.2 The ECI, in consonance with the Supreme Court’s Order<sup>267</sup>, issued instructions on the requirement of pre-certification of political advertisements by a Committee before being telecast on television channels

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<sup>263</sup> Vide No. 491/Media/2012 dated 08.06.2010.

<sup>264</sup> Vide No. 3/09/207/JS-I dated 16.10.2007.

<sup>265</sup> These include restrictions on the printing of pamphlets, posters, etc.

<sup>266</sup> N. SLP (Civil) N. 679/204, dated 13 April, 2004.

<sup>267</sup> *Id.*



and cable networks by any political party contesting during elections.<sup>268</sup> The District MCMC entertains applications for certification of advertisement proposed to be issued on cable network or television channel by the candidate contesting from the Parliamentary Constituency or an Assembly Constituency of that district.

7.26.3 The Chief Election Officer is also empowered to accept and pre-certify the advertisements from any political party, irrespective of the location of the headquarters of the party.<sup>269</sup> The ECI has clarified that persons other than the candidates are not specifically prohibited from issuing advertisements. However, they are not permitted to issue ads in favour of or for the benefit of or against any political party or candidate.<sup>270</sup>

**(iv) Requirement of maintaining distinction between news and advertisement**

**Advertisement code**

7.27.1 With respect to electronic media, Rule 7(10) under Advertisement Code of Cable Television Networks (Regulation) Rules, 1994 formulated under Cable Television Networks (Regulation) Act, 1995 states “*All advertisements should be clearly distinguishable from the programme and should not in any manner interfere with the programme viz., use of lower part of screen to carry captions, static or moving alongside the programme.*”

7.27.2 The ‘Norms & Guidelines’ issued by the NBSA in 2011 provides that:

“Every news broadcasting organisation shall disclose conspicuously, in an appropriate manner during broadcast of a program, on their television channel/s and on their website/s, including during a news, current affairs, sports, entertainment or promotional broadcast, as to whether the content of such broadcast has been paid for by or on behalf of the entity that is subject matter of such broadcast in any manner whatsoever; and whether such broadcast is an “advertorial” or other media marketing initiative.”<sup>271</sup>

7.27.3 By way of the same guideline, it has been recommended that where any footage/ segment/ programme carried on a news channel has

<sup>268</sup> ECI, *Certification of Political Advertising*, 25<sup>th</sup> April 2014, <[http://eci.nic.in/eci\\_main1/current/Implns25042014.pdf](http://eci.nic.in/eci_main1/current/Implns25042014.pdf)>.

<sup>269</sup> ECI, *Certification of Political Advertising*, 11<sup>th</sup> April 2014, <[http://eci.nic.in/eci\\_main1/current/Implns11.4.2014\\_15042014\\_2.pdf](http://eci.nic.in/eci_main1/current/Implns11.4.2014_15042014_2.pdf)>.

<sup>270</sup> ECI, Guidelines regarding applications received from individuals pre-certification of ads of political nature on TV Channels/Cable Network/Radio- clarification, 12<sup>th</sup> April, 2014, <[http://eci.nic.in/eci\\_main1/current/Implns12.4.2014\\_15042014\\_1.pdf](http://eci.nic.in/eci_main1/current/Implns12.4.2014_15042014_1.pdf)>.

<sup>271</sup> *Ibid.*, at 6; News Broadcasting Standing Authority, *Norms & Guidelines On Paid News*, (2011) <<http://www.nbanewdelhi.com/pdf/norms-guidelines-paid-news.pdf>>.

been “paid-for” whether as an advertisement or advertorial or other promotion, this aspect is required to be disclosed conspicuously during the broadcast, with the aim and intent that viewers are not misled into believing that such content is part of news reportage. Further, according to other guidelines issued by the National Broadcasting Standards Authority<sup>272</sup>, the news channels are required to disclose any political affiliations, either towards a candidate or a party. Further, unless they publicly endorse or support a particular party or candidate, news broadcasters have a duty to be impartial. However, these guidelines are not adequate solutions as they are mere guidelines and not binding in nature.

**(v) Media Certification and Monitoring Committee (“MCMC”)**

7.28.1 Due to the existence of multiple bodies like Ministry of Information and Broadcasting, PCI, ECI, various self regulatory bodies, etc., there is lack of clarity with regard to specific authority which would be the final authority in deciding a case of irregularity in this regard. Therefore, the PCI Report suggested a separate body to be set-up for monitoring paid news.

7.28.2 The ECI also adopted the recommendation given by the PCI Report to establish district level committees for monitoring paid news.<sup>273</sup> The MCMC has officers from the Ministry of I&B and State Department of Personal Relations. The Expenditure Observer is duty-bound to inform to the MCMC of all instances of suspected Paid News on the same day as brought to his notice independently by any source. The political party or candidate shall have to submit the details of expenditure on the telecast or broadcast in electronic media and print media. If the MCMC finds that any advertisement has been made in TV, Radio, Cable Network, FM Channel, in favour of any candidate without proper permission, they shall inform the Returning Officer (RO) immediately. The RO accordingly shall serve a notice upon the defaulting candidate. If the impugned paid news has not been accounted for in the election expense account, the RO will issue notice to the candidate with regard to the incidents of paid news in consultation with the Expenditure Observer for not showing the expenditure on such publication.<sup>274</sup>

7.28.3 The ECI, in the Compendium of Instructions on Election Expenditure Monitoring issued in January, 2014 provides for the establishment of an efficient election expenditure monitoring mechanism by appointment of Expenditure Observers, Assistant Expenditure Observers,

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<sup>272</sup> Norms and Guidelines issued by NBSA on 3<sup>rd</sup> March, 2014 & 24<sup>th</sup> March, 2014.

<sup>273</sup> No. 491/Paid News/2012/Media, 27<sup>th</sup> August, 2012, <[http://eci.nic.in/eci\\_main/CurrentElections/ECI\\_Instructions/PaidNewsGuidelines27082012.pdf](http://eci.nic.in/eci_main/CurrentElections/ECI_Instructions/PaidNewsGuidelines27082012.pdf)>

<sup>274</sup> Compendium of Instructions on Election Expenditure Monitoring, (January, 2014), <[http://eci.nic.in/eci\\_main/ElectoralLaws/compendium/compendium2014\\_03022014.pdf](http://eci.nic.in/eci_main/ElectoralLaws/compendium/compendium2014_03022014.pdf)>, at para 4.2.1.

Video Surveillance Team, Video Viewing Teams, Institution of Expenditure Monitoring Cells, an MCMC in every district.<sup>275</sup>

**(vi) Inclusion of notional expenditure of paid news into the election expenses**

7.29 The Commission also passed a direction that six months before the due date of expiry of Lok Sabha or the State/UT Legislative Assembly, as the case may be, a list of television channels/radio channels/newspapers, and their standard rate cards shall be obtained by the CEOs and forwarded to the Commission for inclusion of notional expenditure based on standard rate cards in their election expenses account, in case the candidate has not submitted the documents of actual expenses. However, the implementation of this directive is very difficult given the scale of newspapers published throughout India and the varying rates of advertisements of the newspapers. Even if the Commission obtains the rate cards, it will be difficult to identify the instances of paid news or disguised political advertising.

**(vii) Is paid news “undue influence”?**

**Undue influence as an electoral offence**

Section 171C (a):

*“Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.”*

7.30.1 “Electoral right”, as per section 171A of the IPC, *“means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at any election.”* Therefore, interference with the free exercise of electoral right would involve the right of the other candidates to stand and right of the voters to vote. In *Ram Dial v. Sant Lal*<sup>276</sup>, the Supreme Court held that to determine ‘undue influence’, actual effect produced is not material. Furthermore, in *Baburao Patel v. Dr. Zakir Hussain*<sup>277</sup>, the court further laid down a list of activities that will be excluded from the purview of ‘undue influence’ including canvassing by ministers for their party candidates, issuing a party whip to vote for certain candidate in Rajya Sabha, Presidential or Vice Presidential elections.

7.30.2 In *Shiv Kirpal Singh v. VV Giri*<sup>278</sup>, the court held that undue influence can be present at any stage of elections. It can be present at the

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<sup>275</sup> *Ibid.* at para 3.

<sup>276</sup> AIR 1959 SC 855.

<sup>277</sup> AIR 1968 SC 904.

<sup>278</sup> AIR 1970 SC 2097.

stage when a voter goes through a mental process deciding which candidate to vote for. Further, it also involves “*mental process of weighing the merits and demerits of the candidates to make his choice*”<sup>279</sup>. The act need not be authorized by any candidate. The undue influence can be practiced even by a third party completely unconnected with the candidate.

7.30.3 Arguably, paid news might come within the meaning of section 171(c)(a). This is because, by masquerading as objective analysis or reporting, paid news might well provide a wrong impression to voters, who will be wrongly influenced by content that they mistakenly believe to be objective and neutral. However, because the provision is open-ended, and not confined to specific practices, its applicability to paid news is doubtful, and depends upon the interpretation courts might place upon it. In any event, it will not cover political advertisements marked as such, because any influence they might exercise, will not be “undue”.

#### Undue influence as corrupt practice

7.30.4 Section 123 of the Representation of the People Act, 1951 states:

Section 123(2): “*Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agents, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right.*”

7.30.5 The only difference between this provision and in section 171C of the IPC is that of consequence. While conviction under section 171C leads to punishment or fine, the consequence of section 123(2) is disqualification. Though undue influence may cover some instances of paid news and disguised political advertising, it is a determination contingent on proof adduced which might be difficult to obtain. Thus the provision does not provide a direct solution to prohibit and regulate paid news and disguised political advertising respectively.

### **E. Recommendations by Other Studies on Paid News**

#### **(i) Mandatory disclaimer and separation of editorial and management**

7.31.1 The report on paid news prepared by a Sub-Committee of two members of the Press Council of India attempted to separate the blurring boundaries between news and advertisements.<sup>280</sup> A significant recommendation made by the sub-committee was that of mandating a disclaimer by the hosting medium. The editor or editor-in-chief of a publication

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<sup>279</sup>AIR 1970 SC 2097.

<sup>280</sup>Press Council Sub-Committee Report, *Paid News”: How Corruption In The Indian Media Undermines Democracy*, <<http://presscouncil.nic.in/OldWebsite/Sub-CommitteeReport.pdf>>.

should print a declaration in his or her newspaper stating that the news that is published has not been paid for by any political party or individual.

7.31.2 Further, there should be a clear distinction between the management and the editorial staff in media companies. The independence of the editor should be maintained and safeguarded. It also seeks to provide right of reply to the candidates: *“Press is not expected to indulge in canvassing of a particular candidate/party. If it does, it shall allow the right of reply to the other candidate/party.”* In order to operationalise these reform suggestions, the committee also recommended the constitution of district level committees for scrutiny of Paid News during the periods of election.

## **(ii) Amendment to the RPA**

7.32.1 The Sub-committee has recommended an amendment to the RPA, to provide therein that publishing and abetting the publishing of paid news for furthering the prospect of election of any candidate or for prejudicially affecting the prospect of election of any candidate be made an electoral offence under chapter-III of Part-VII of the RP Act with punishment of a minimum of two years imprisonment. The issue is pending with the Government of India.<sup>281</sup>

7.32.2 It also suggested that the act of publishing a news item in exchange for consideration should be included as a ‘corrupt practice’ under Section 123 of the RPA. Further, it should be made an electoral offence separately, so that it not only disqualifies the candidates, but also subjects them, the journalists and media-houses to penal consequences.

7.32.3 Furthermore, Section 127A of the RPA may be suitably amended, adding a new sub-section 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.

## **(iii) Guidelines for determining paid news**

### **Election Commission of Guidelines**

7.33.1 The ECI issued a circular dated August 27, 2012 that comprised a comprehensive set of guidelines on paid news. They were further incorporated in the Handbook for Media for the Lok Sabha General Elections, 2014. The ECI proposed an amendment to the RP Act to provide that publishing and abetting the publication of ‘paid news’ for furthering the

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<sup>281</sup> Sub-Committee's letter No. 3/ 1/2011/SDR dated 3rd February 2011 40-43 regarding proposals for amendment of the R.P. Act and Conduct of Election Rules 1961

prospect of election of any candidate or for prejudicially affecting the prospect of election of any candidate be made an electoral offence under Chapter III of Part VII of the Act with a punishment of a minimum of two years imprisonment.<sup>282</sup> In order to determine what constitutes paid news, the following guidelines ought to be kept in mind:

1. Identical articles with photographs and headlines appearing in competing publications carrying by-lines of different authors around the same time;
2. On the same page of specific newspapers, articles praising competing candidates, claiming that both are likely to win the same elections;
3. News item stating that one candidate is getting the support of each and every section of the society and that he would win elections from the constituency;
4. News items favouring a candidate and not carrying any by-line;
5. Newspaper publishing a banner headline stating that a party/candidate is ready to create history in the state/constituency but not carrying any news item related to this headline;
6. News item saying the good work done by a Party/Candidate had marginalized the electoral prospects of the other party/candidate in the state with each and every sentence of the news item in favour of the party/candidate;
7. There are instances of fixed size news items, each say a length of 125-150 words with a double column photo. News items are seldom written in such a rigid format and size whereas more often advertisements are;
8. In specific newspapers, multiple font types and multiple drop case styles are noticed within the same page of a single newspaper. This happens because, from the layouts to the fonts and photographs, everything is provided by the candidate who has paid for the slots in the newspaper;
9. Besides these, the cases decided as Paid News by the ECI and also by the PCI can provide guidance to District Complaint Monitoring Centre to decide future cases.

#### Standing Committee on Information Technology (2012-13)

7.33.2 The Parliamentary Standing Committee acknowledged that the issue of paid news is a product of foul play between the electoral candidates and the media houses.<sup>283</sup> The Committee has, *inter alia*, found the existing regulatory set-up dealing with paid news inadequate. Describing the voluntary

<sup>282</sup> *Handbook for Media*, General Election to the 16<sup>th</sup> Lok Sabha, 2014, Election Commission of India, para 3.5 <[http://eci.nic.in/eci\\_main/ElectoralLaws/HandBooks/Handbook%20for%20Media%202014.pdf](http://eci.nic.in/eci_main/ElectoralLaws/HandBooks/Handbook%20for%20Media%202014.pdf)>.

<sup>283</sup> Standing Committee Report, *supra* note 235.

self-regulatory bodies like the News Broadcasting Standards Authority (NBSA) and Broadcasting Content Complaints Council (BCCC) as an 'eye wash', the Committee also found the punitive powers of statutory regulators like the PCI and Electronic Media Monitoring Centre (EMMC) to be inadequate. Expressing concern that the lack of restriction on ownership across media segments (print, radio, TV or internet) or between content and distribution could give rise to monopolistic practices, the Committee has urged the Authority to present its recommendations and the Ministry to take conclusive action on those recommendations on a priority basis.

7.33.3 The Standing Committee also noted that unlike in print media, in case of electronic media, there is no regulatory body. It suggested coordination with News Broadcaster Association to develop a mechanism to keep a check on Paid News in electronic media. The committee also affirmed some of the suggestions already made by the PCI Report.

#### Recommendations by TRAI

7.33.4 TRAI, in August 2014, provided a set of recommendations pertaining to media ownership wherein it emphasized that paid news should be defined comprehensively and a framework should be established for examining complaints and taking punitive action against the defaulting media entities. It noted that there is little doubt that an institutional response addressing both substantive and procedural issues including evidentiary rules is needed to curb the menace.<sup>284</sup>

7.33.5 It strongly recommended that entities related to political bodies, religious bodies, urban local governing bodies, Panchayati Raj, other publicly funded bodies, and Central and State Government ministries, departments, companies, undertakings, joint ventures, and government-funded entities and affiliates be barred from entering into broadcasting and TV channel distribution sectors.<sup>285</sup> Further, it also suggested that the Press Council of India must be fully empowered to adjudicate the complaints of "paid news" and give final judgments in the matter.

## **F. Constitutional Issues: Article 19(1)(a) and Article 19(2)**

7.34 This Part proposes a two-pronged approach to tackling paid news and political advertising. *First*, it suggests a prohibition on paid news by creating a penal provision and *second*, it suggests mandatory disclosures for

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<sup>284</sup> Recommendations on Issues Relating to Media Ownership, August 12, 2014, <<http://www.trai.gov.in/WriteReadData/Recommendation/Documents/Recommendations%20on%20Media%20Ownership.pdf>>, at para 5.68.

<sup>285</sup> *Id.*, at para 5.74.

political advertisements. The possible constitutional issues are discussed below.

7.35 Three questions need to be asked in order to ascertain if Right to Freedom of Speech and Expression is violated:

(i) Whether paid news and political advertising are protected under Article 19(1)(a)?

(ii) Whether the restriction is in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence?

(iii) Whether the restriction imposed is reasonable?

### **Right to Freedom of Speech and Expression [Art. 19(1)(a)]**

7.36 In *Jununa Prasad Mukhariya v Lacchi Ram*,<sup>286</sup> the Supreme Court held that regulation of election speech does not raise any Article 19(1)(a) concerns. Rejecting a challenge to speech-restricting provisions of the RPA (Sections 123(5) and 124(5)), the Court held:

*“The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute. The appellants have no fundamental right to be elected members of Parliament. If they want that they must observe the rules. If they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them.”*

7.37 Although the Court has, in subsequent cases, subjected provisions of the RP Act to Article 19(1)(a) scrutiny, it has done so while affirming the core holding of *Jumuna Prasad*.<sup>287</sup> Therefore, insofar as prohibition of paid news and regulation of political advertising is accomplished through the RP Act, in the form of prescriptions upon the conduct of candidates, it will not raise any constitutional concerns.

7.38 Assuming that Article 19(1)(a) is *prima facie* applicable to the regulation of paid news and political advertising, the following two questions arise: do paid news and political advertising fall within the constitutional protection of Article 19(1)(a)? And if so, is legal regulation justified under Article 19(2)?

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<sup>286</sup> AIR 1954 SC 686.

<sup>287</sup> See, e.g., *Dr. Yeshwant Prabhoo vs Prabhakar Kashinath Kunte*, AIR 1996 SC 1113.



7.39 One way of understanding political advertisement is as a form of commercial speech. Since the issuer pays for newspaper space, in order to extol his product, there is little to separate political advertising from commercial advertising *simpliciter*. The constitution on commercial speech is very clear. Although, in *Hamdard Dawakhana v Union of India*<sup>288</sup>, the Court excluded commercial speech from the protection of Article 19(1)(a), this general position was overturned in *Tata Press v MTNL*.<sup>289</sup> However, while holding that commercial speech was protected by Article 19(1)(a), the Court also held that “commercial speech” which is deceptive, unfair, misleading and untruthful would be hit by Article 19(2) of the Constitution and can be regulated/prohibited by the State.” This makes it clear that disclosure requirements for political advertisements, which are designed to ensure that the advertisements are *not* deceptive, misleading or untruthful, would pass constitutional muster.

7.40 What of the prohibition of paid news altogether? It is important to note that in *Secretary, Ministry of Information and Broadcasting, Government of India. v. Cricket Association of Bengal*<sup>290</sup>, the Supreme Court of India observed, “one-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry”. The significance of free and fair information specially for the electoral process was also observed in *PUCL* by the Supreme Court. The availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information.<sup>291</sup> Lastly, in *Union of India v. Motion Picture Association*<sup>292</sup>, the Supreme Court held that a requirement compelling cinemas to showcase short documentaries before the start of films was justified, since it furthered the democratic purpose of Article 19(1)(a), i.e., spreading information and awareness. The conclusion that flows from these cases is that the central meaning of Article 19(1)(a) is the connection between the freedom of speech and the democratic process, which is to be achieved by using the freedom of speech as a method of spreading awareness and information among the electorate. Paid news quintessentially distorts this process. Consequently, the prohibition of paid news is unlikely to run into any Article 19(1)(a) hurdles, because it does not fall within the protection of the constitutional right to freedom of speech and expression (Article 19(1)(a)).

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<sup>288</sup> [1960] SCR 2 617.

<sup>289</sup> AIR 1995 SC 2438.

<sup>290</sup>(1995) 2 SCC 161.

<sup>291</sup>PUCL v. UOI, Writ Petition (Civil) 490 of 2002, 509 of 2002, 515 of 2002, decided on 13<sup>th</sup> March, 2003

<sup>292</sup> AIR 1999 SC 2334.

## G. A Comparative Perspective

7.41 The international practices regulating political advertisements mainly involve several measures like banning all political advertisements (U.K.), duty of media to give reasonable opportunity to publish to all political parties, mandatory disclosure requirements etc. This section elaborates on the modalities and validity of such restrictions in various jurisdictions.

### (i) The United Kingdom

7.42 In the UK, all paid political advertising is banned from television and radio. The ECHR held that the ban imposed by the UK was compatible with the Convention.<sup>293</sup> This prohibition extends not only to political candidates and parties, but also to any advertisement which aims to influence public opinion on a matter of public controversy.<sup>294</sup> It also maintains strict restrictions on printing and publishing by third parties during campaigns. Prior to the Political Parties, Elections and Referendums Act, 2000 (PPERA), no political party could accept more than £5 as they were regarded as election expense. In *Bowman v. United Kingdom*<sup>295</sup> the ECHR decided that the limit of £5 was contrary to the right of freedom of expression contained in Article 10 of the European Convention on Human Rights. As of now, Section 79 and Schedule 9 of PERPA allow every national party a spending limit of £30,000 per constituency in a general election for the House of Commons. The Broadcasting Act, 1990 incorporated the practice of broadcasters letting out airtime for party political broadcasts.<sup>296</sup> Sections 36 and 107 of the Act provides for procurement of licenses to carry political broadcasts from the ITC and the rules to carry out the broadcasts within permissible limits.<sup>297</sup>

### (ii) Australia

7.43 The Commonwealth Electoral Act, 1918 of Australia mandates disclosure provisions for any “electoral advertisement, handbill, pamphlet, poster or notice” containing “electoral matter”.<sup>298</sup> The Australian law also prescribes a ‘Blackout Period’ during which broadcasters must not display any material containing electoral matter which is intended or is likely to affect the

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<sup>293</sup>*X and the Association of Z v. United Kingdom*, App. No. 4515/70, 38 Eur. Comm’n H.R. Dec. & Rep. 86 (1971).

<sup>294</sup> Michael Karanickolas, *Regulation of Paid Political Advertising: A Survey*, CENTRE FOR LAW AND DEMOCRACY, March, 2012.

<sup>295</sup>App. No. 24839/94, 26 Eur. H.R. Rep. 1 (1998).

<sup>296</sup>Bernd-Peter Lange, David Ward, *The Media and Elections: A Handbook and Comparative Study*, at 149

<sup>297</sup>Section 36, Broadcasting Act, 1990,  
<<http://www.legislation.gov.uk/ukpga/1990/42/section/36>>.

<sup>298</sup>Section 328, Commonwealth Electoral Act, 1918

voters.<sup>299</sup> The Broadcasters Services Act, 1992 provides that where any election matter is broadcasted during an election period by a broadcaster, that broadcaster must give all the parties contesting the election a reasonable opportunity to have election matter broadcasted during the election period.<sup>300</sup> It further provides that for ensuring equal access, free broadcasting is not required.<sup>301</sup> However, it treats the editorial content and advertisement at the same footing. Therefore, there is no separate regulation on Paid News in Australia.

### **(iii) Canada**

7.44 In Canada, while election advertising is permitted, the regulations are laid down with respect to adequate disclosure. Section 320 of Canada Election Act, 2000 provides that the material must be authorized by the candidate or his official agent and the same must be mentioned in the material being transmitted.<sup>302</sup> Sections 6 and 8 of the Radio Regulations, 1986 and Television Broadcasting Regulations, 1987 respectively provide that during an election period, a licensee shall be allocated time for the broadcasting of programs, advertisements or announcements of a partisan political character on an equitable basis to all accredited political parties and rival candidates represented in the election or referendum.

### **(iv) ECHR standards on permissibility of such restrictions**

7.45.1 Political advertising is the exercise of freedom of speech expression. Restrictions on paid political advertising limit such freedom.<sup>303</sup> In *VgT v. Switzerland*,<sup>304</sup> the ECHR held that the ban on political broadcasts infringed the right to freedom of expression, but did concede that a prohibition could be compatible with such freedom in some circumstances if it met a '*pressing social need*'.<sup>305</sup>

7.45.2 The Human Rights Council in its 26<sup>th</sup> session<sup>306</sup> reaffirmed the view held by the Institute for Democracy and Electoral Assistance suggesting that while paid political advertising is permissible, private media outlets should be required to charge the same rates to all the parties and candidates without

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<sup>299</sup>Schedule 2, clause 3A, Commonwealth Electoral Act, 1918

<sup>300</sup>Schedule 2, clause 3(2), Equal Access

<sup>301</sup>Schedule 2, clause 3(3) of the Act.

<sup>302</sup>Section 320, Canada Election Act, 2000.

<sup>303</sup>*Animal Defenders International v. the United Kingdom* ECHR (124) 2013.

<sup>304</sup>App. No. 24699/94, 34 Eur. H.R. Rep. 159 (2001).

<sup>305</sup>*Sunday Times v United Kingdom* (1979) 2 EHRR 229.

<sup>306</sup>A/HRC/26/30 Human Rights Council Twenty sixth session Agenda item 3, 30<sup>th</sup> May 2014

any discrimination.<sup>307</sup> The Pensioner's Party in Norway was fined for carrying out advertisements which read: "*We need your vote on 15<sup>th</sup> September! Vote for the Pensioners Party.*" However, the ECHR in 1995 held that there was a lack of reasonable nexus between the restriction and the object sought from the regulation.<sup>308</sup>

7.45.3 Political advertisement denies equal or fair access to direct broadcasting as every candidate should have fair access regardless of the state of their campaign finance.<sup>309</sup> The ECHR in *Murphy* has held "*no advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute.*"<sup>310</sup>

7.45.4 In *Animal Defenders International v. the United Kingdom*,<sup>311</sup> the ECHR, upheld the validity of a ban imposed by the BACC (Broadcast Advertising Clearance Centre) on broadcasting appellant's piece and drew attention to the political nature of ADI's objectives, which as such prohibited the broadcasting of the advertisement under Section 321(2) which disqualifies advertisement remotely promoting any political objective. It further stated that the ban imposed was not in contravention to Article 10 of the European Convention on Human Rights. The ECHR upheld the validity of the ban on two grounds: (i) the aim of preventing distortion of public debate by the highest spender is legitimate, and (ii) there is a reasonable nexus between the object sought and the measure employed.

#### **(v) US standards on permissibility of restrictions**

7.46.1 In *Buckley v. Valeo*, the Supreme Court of the U.S., invalidated the provisions of Federal Campaign Act which dealt with ceiling limits on electoral expenditures and deemed it unconstitutional.<sup>312</sup> The *Buckley* ruling settled that expenditures by a non-candidate that are "controlled by or coordinated with the candidate and his campaign" may be treated as indirect contributions subject to Federal Election Campaign Act's source and amount limitations.<sup>313</sup> Section 214 of the Bipartisan Campaign Reform Act (BCRA) of

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<sup>307</sup>International Electoral Standards *Guidelines for reviewing the legal framework of elections*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 2002 <<http://www.idea.int/publications/ies/upload/10.%20Media%20access%20and%20freedom%20of%20expression.pdf>>.

<sup>308</sup> (1 Of 1) Case of TV Vest As And Rogaland Pensjonistparti V. Norway, Application no. 21132/05, <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90235#{\"itemid\":\[\"001-90235\"\]}>](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90235#{\)

<sup>309</sup>*Media and Elections*, 2013, Ace Network, <<http://aceproject.org/ace-en/pdf/me/view>>

<sup>310</sup>*Murphy v. Ireland*, No.44179/98, ECHR 2003-IX.

<sup>311</sup>ECHR (124) 2013.

<sup>312</sup>424 U.S. 1 (1976)

<sup>313</sup> *Guidelines On Media Analysis During Election Observation Missions*, European Commission For Democracy Through Law (Venice Commission), 27<sup>th</sup> October, 2005, at 54,

2002 extends the same rule to expenditures coordinated with a national, State, or local committee of a political party. In 2007, the Supreme Court of the United States held that an advertisement included express advocacy or its functional equivalent “*if the ad is susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate.*”<sup>314</sup>

7.46.2 Section 201 of the BCRA provides for a mandatory disclosure of electioneering communications.<sup>315</sup> It carves out an exception for independent expenditures and communications which solely promotes a debate or forum. The Supreme Court has time and again upheld the validity of this provision and in *Citizens United*, the Court held that disclosure is the least restrictive means.<sup>316</sup>

## H. Recommendations

7.47 The recommendations pertain to three aspects: *first*, introducing definitions of paid news and political advertising; *second*, laying down the consequences attached to those indulging in such practices, and *third*, the institution that should exercise the powers of imposing such consequences.

### (i) Definitions:

7.48.1 Two definitions need to be introduced: ‘paying for news’ and ‘political advertisement’.

#### ‘Paying for news’

7.48.2 A vast majority of surveyed suggestions have agreed with the definition of ‘paid news’ provided by the PCI Report, i.e. paid news is “*any news or analysis appearing in any media (Print & Electronic) for a price in cash or kind as consideration.*”

7.48.3 While this definition strikes an optimal balance between wide coverage and particular targeting, we believe that four changes are necessary:

- a. Since an offence is sought to be created, the definition should be modified such that it defines the transitive verb ‘paying for news’ rather than the adjective-noun ‘paid news’.

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<<http://www.gpb.ge/uploads/documents/bea833c7-2a31-4eb3-9518-6ed509639532Guidelines%20on%20Media%20Monitoring.pdf>>.

<sup>314</sup> FEC v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652 (2007).

<sup>315</sup>Section 201 of BCRA, 2002,

<[http://www.law.cornell.edu/background/campaign\\_finance/bcra\\_txt.pdf](http://www.law.cornell.edu/background/campaign_finance/bcra_txt.pdf)>.

<sup>316</sup>No. 08-205, 558 U.S.310 (2010).

- b. It should be made clear that for the definition to be met, the payment is made to the media house by the person seeking publication or telecast of a particular piece of news or analysis relating to elections and not vice-versa. This is because media houses often pay opinion columnists, talk show guests and other occasional contributors, remuneration in cash or kind for sharing their opinions. Payments such as these should not be covered by the definition of 'paying for news'.
- c. By way of abundant caution, advertisements that follow all disclosure requirements and other legal preconditions should be specifically excluded from this definition since they would not fall within the ambit of 'news or analysis'.
- d. The offence should exclude official publications by registered or recognised political parties or any news or electronic media house owned by a political party and disclosed as such. This is because of two reasons: *First*, in such cases, political parties may themselves be funding the salaries of journalists working for these media publications and that is not the key target of the offence of paying for news; *Second*, the key issue in such cases is disclosure as the public must have a right to know who the owners of the said publication are. To avail of this exclusion, political parties must themselves own the said media house. [This exclusion will appear in the section creating the substantive offence and not the definition section.]

7.48.4 Accordingly, a new Section 2(ea) should be introduced. Section 2(ea) will read as follows:

“(ea) “paying for news” means directly or indirectly paying for any news or analysis relating to any election under this Act appearing in electronic media or print media (print, radio, television and all other electronic) for a price in cash or kind as consideration to any such media, entity, person employed therein or connected thereto in any manner, but not including political advertisements as defined under this law;

EXPLANATION:- for the purpose of this clause the expression “electronic media” and “print media” shall have the meanings assigned in clauses (b) and (c) of section 126(a);”

7.48.5 At the same time, an analogous definition should be introduced for 'receiving payment for news'. Thus a new section, Section 2(ha) should be introduced, which will read as follows:

“2(ha). “receiving payment for news” means any media entity, person employed therein or connected thereto in any manner, directly or indirectly receiving payment for any news or analysis relating to any election under this Act, not including political advertisements as defined under this Act.”

‘Political advertisement’

7.48.6 Given that the constitutional rationale of prohibiting paid news is to preserve the right to know of electors, it is pursuant to the same rationale that political advertisements should be regulated. The purpose of such regulation is so that political advertisements are clearly understood as paid-for publications and cannot successfully be disguised as objective, accurate news. Such advertisement should not qualify as ‘paid news’ as long as it is properly disclosed as a political advertisement. To this end, what counts as a ‘political advertisement’ must be defined. The general definition of ‘advertisement’ is found in the Code of Self-Regulation for Advertising published by the Advertising Standards Council of India.<sup>317</sup> This needs to be built upon in the context of political advertisements.

7.48.7 Thus, a new section 2(eb) will be introduced which will read as follows:

“2(eb). “political advertisement” means any advertisement paid for by any political party, candidate of a political party, any other person contesting an election, or any other person connected therewith or associated thereto, carrying necessary disclosures as notified by the Election Commission in this regard.”

**(ii) Electoral offence**

7.49.1 Paying for news is a practice that affects free and fair elections. It affects the electors’ right to know and also skews elections in favour of those who possess economic wherewithal. There are also several attendant negative consequences in terms of vitiating the atmosphere in which elections are conducted. It is thus imperative that paying for news be made an electoral offence as well as receiving payment for it. Consequently, we recommend the introduction of a new Section 127B for this purpose. Section 127 B will read as follows:

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<sup>317</sup> ‘Advertisement’ is defined as ‘a paid-for communication, addressed to the public or a section of it, the purpose of which is to influence the opinions or behaviour of those to whom it is addressed...’

### **“127B. Paying for, and receiving payment for news**

- (1) Any person who is found paying for news, or receiving payment for news shall be punished with imprisonment for a term which may extend to three years, and with fine, which may extend to twenty-five lakh rupees.
- (2) Nothing contained in sub-section (1) shall apply to payments made by registered political parties for the management of official publications (print, radio, television and all other electronic) owned or controlled by them.
- (3) To avail of the exemption under sub-section (2) all registered political parties must disclose their interests in any publication in the form and manner notified by the ECI in this regard.
- (4) An attempt to commit an act punishable under sub-section (1) shall be punished with imprisonment for a term, which may extend to two years, or with fine, which may extend to ten lakh rupees, or with both.
- (5) No court shall take cognisance of any offence punishable under this section unless there is a complaint made by order of, or under authority from, the ECI or the Chief Electoral Officer of the State concerned.”

7.49.2 Not only will the incorporation of this electoral offence make paying for news penal, the stringent punishment will ensure that if the candidate himself is found guilty, then, in all likelihood, he will be disqualified pursuant to Section 8(3) of the RPA. A provision similar to the suggested Section 126-D should also be incorporated in the event that it is an offence committed by a company.

### **(iii) Corrupt practice**

7.50 It is also essential that an election be liable to be declared void by the High Court if it is found that paid news has vitiated it. For this purpose, in accordance with Section 100 of the RP Act, it is necessary to make paying for news a ‘corrupt practice’ under Section 123 of the RP Act. As demonstrated above, there is an arguable case that paying for news constitutes ‘undue influence’ for the purpose of Section 123(2) of the RP Act. However it requires evidence to be adduced which might be difficult to obtain. To remove any difficulty in this regard, a presumption must be established by law that paying for news would constitute ‘undue influence’. Thus we recommend the introduction of Section 123(2)(a)(iii) which will read as follows:

**“(iii) pays for news”**



This is an addition to a provision which already deems certain acts to constitute 'undue influence' and achieves the object with minimum legislative amendment.

**(iv) Disclosure for political advertisements**

7.51.1 As demonstrated above, currently guidelines for disclosure of political advertisements are scattered and non-uniform. In order to curb the practice of disguised political advertisement, disclosure provisions should be made mandatory for all forms of media. The purpose of disclosure is two fold: (a) to help the public identify the nature of the content (paid content or editorial content), and (b) to keep the track of transactions between the candidates and the media. Therefore, the extent to which the disclosure is being sought should serve these purposes. For example, the content should carry in bold letters "This content is sponsored" or "This is an advertisement". Further, it should use style including fonts etc. in a way that it can be clearly distinguished from news. This form should contain the details of the sponsor of the content. This should be made applicable to all political advertising. A failure to adhere to this requirement should be considered an electoral offence.

7.51.2 However, much of the disclosure requirement is a question of detail that is best left to the discretion of the ECI. It would be unwise for a law to lay down the specifics of disclosure which might need to evolve over time and be dynamic across different media. Accordingly, the Commission recommends the introduction of Section 127C in the RPA which will read as follows:

**"127C. Non-disclosure of interest in political advertising**

- (1) Any political advertisement in any media shall carry a disclosure to this effect in the form and manner notified by the ECI in this regard.
- (2) Any person who contravenes the provision of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to five lakh rupees, or both."

7.51.3 A provision similar to the suggested Section 126D discussed in the next chapter should also be incorporated as section 127D in the event that it is an offence committed by a company.

**"127D. Offences by companies.—** (1) Where an offence under sub-section (1) of Section 127B has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed

to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

*Provided* that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.*—For the purpose of this section,—

(a) “company” means any body corporate, and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.”

## **CHAPTER VIII**

### **OPINION POLLS**

#### **A. Regulation of Opinion Polls in India – A Background**

##### **(i) Development of opinion polls in India**

8.1 Pre-election opinion polls and exit polls have become a regular feature in the last one and half decades within the Indian electoral landscape. Opinion polls are conducted by polling agencies and disseminated widely by the electronic and print media.<sup>318</sup> With the advent of a large number of television channels and newspapers, the race to conduct election surveys and publishing them as quickly as possible has become the norm.<sup>319</sup> Opinion polls of large scale samples conducted during the 1980s became important indicators of overall popular issues and sentiments.<sup>320</sup> The significance of opinion polls has continued through the 1990s and thereafter. The increase in the number of opinion polls was accompanied by attempts at regulation, which will be looked at in this section.

##### **(ii) 1998 opinion poll guidelines**

8.2.1 The earliest attempt to regulate opinion polls was made in 1998 when the ECI took an overall view of the situation and issued an order on 11<sup>th</sup> January 1998 laying down “Guidelines for Publication and Dissemination of Results of Opinion Polls/Exit Polls”, including government-controlled electronic media, in connection with the conduct of opinion polls and exit polls by them. This was done in the wake of impending general elections to the House of the People and to the Legislative Assemblies of Gujarat, Himachal Pradesh, Meghalaya, Nagaland and Tripura.<sup>321</sup>

8.2.2 The said guidelines prohibited publication or dissemination, in any manner whatsoever, of the result of any opinion poll conducted at any time, in or by any print or electronic media, after 5:00 p.m., forty-eight hours before the commencement of the first day of poll for the aforesaid elections, till the closing of poll in all States and Union territories. More specifically, the concerned guideline mandated that:

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<sup>318</sup> Law Commission of India, *Consultation Paper on Media Law* May 2014, at 11, <<http://www.lawcommissionofindia.nic.in/views/Consultation%20paper%20on%20media%20law.doc>>.

<sup>319</sup> Praveen Rai, ‘Status of Opinion Polls: Media Gimmick and Political Communication in India’, 49(16) ECONOMIC AND POLITICAL WEEKLY (2014).

<sup>320</sup> Noro Kondo, *Election Studies in India*, INSTITUTE OF DEVELOPING ECONOMIES, March 2007, Discussion Paper No. 98 <<http://www.ide.go.jp/English/Publish/Download/Dp/pdf/098.pdf>>.

<sup>321</sup> Mendiratta, *supra* note 161, at 715.

*“No result of any opinion poll conducted at any time shall be published, publicised or disseminated, in any manner whatsoever, in or by any print or electronic media, after 1700 hours on February 14, 1998 (February 16, 1998 being the first day of poll for the aforesaid general elections) and till after the closing of poll in all States and Union territories, i.e., 1700 hours on March 7, 1998.”*<sup>322</sup>

8.2.3 Almost simultaneously, the Press Council of India (‘PCI’) also examined the issue of dissemination of results of opinion polls and exit polls and formulated certain guidelines for the press and the print media. The crux of the PCI recommendations was that newspapers should not allow their forum to be used for distortions and manipulations of the elections and should not allow themselves to be exploited at the hands of interested parties.<sup>323</sup>

8.2.4 Consequently, the PCI mandated that:

*“No newspaper shall publish exit-poll surveys, however genuine they may be, till the last of the poll is over.”*<sup>324</sup>

The PCI issued such a guideline primarily because poll dates during an election are staggered. Hence, the media may end up carrying exit-poll surveys of the polls already held which would be likely to influence the voters where the polling is yet to commence.

### **(iii) Challenge to the guidelines of the ECI**

8.3.1 However, the guidelines issued by the ECI witnessed a vehement protest from the electronic and print media. Media houses primarily contended that these guidelines infringed their fundamental right of speech and expression and also, their right of information under Article 19(1)(a).<sup>325</sup> Constitutionally, this right could only be curtailed by a law which was within the purview of Article 19(2). The guidelines of the EC were not law made by Parliament but only an executive instruction which could not curtail anyone’s right under Article 19(1)(a). In *R Rajagopal v. Union of India*,<sup>326</sup> the guidelines of the EC were formally challenged before the Supreme Court. The guidelines were also challenged before the High Courts of Delhi<sup>327</sup> and Rajasthan<sup>328</sup>. As

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<sup>322</sup>Election Commission of India, ‘Guidelines for Publication and Dissemination of Results of Opinion Polls/Exit Polls’, Order No. ECI/MCS/98/01, 20<sup>th</sup> January 1998 <[http://eci.nic.in/archive/instruction/recent/media/pnxitpoll\\_FINAL.html](http://eci.nic.in/archive/instruction/recent/media/pnxitpoll_FINAL.html)>.

<sup>323</sup> Press Council of India, ‘Guidelines on Pre-polls and Exit Polls Survey’, <<http://presscouncil.nic.in/OldWebsite/history.htm>>

<sup>324</sup>Id.

<sup>325</sup>Mendiratta, *supra* note 161, at 717.

<sup>326</sup>WP No 80 of 1998.

<sup>327</sup>Frontline v. Election Commission, WP No 449 of 1998.

<sup>328</sup>SN Tiwari v. Election Commission, WP No 355 of 1998.

common questions of law were involved in all these three petitions, the ECI sought transfer of the writ petitions to the Supreme Court for disposal under Article 139A. Upon hearing this batch of petitions in *Election Commission of India v. Union of India*,<sup>329</sup> the Supreme Court did not stay the operation of the impugned guidelines which is why they were duly observed by all electronic and print media at the time of the general elections in February-March 1998.

8.3.2 However, the issue regarding the validity of the ECI guidelines arose again during the elections to the House of the People and to the Legislative Assemblies of Andhra Pradesh, Arunachal Pradesh, Karnataka, Maharashtra and Sikkim held in September-October 1999. The Times of India Group of Newspapers, as well as certain other newspapers refused to observe the guidelines issued by the ECI.<sup>330</sup> Consequently, the ECI approached the Supreme Court for a direction against the Times of India Group to abide by the Commission's guidelines. Owing to the important constitutional issues involved in this matter, the Supreme Court referred this matter to a Constitution bench. The said bench expressed serious doubts about the constitutional validity of the impugned guidelines infringing the fundamental rights of the media houses. The Supreme Court also expressed surprise at how such guidelines could be enforced by the EC in the absence of any statutory sanction.<sup>331</sup> Consequently, the approach of the Supreme Court prompted the EC to withdraw its guidelines on 14<sup>th</sup> September 1999.<sup>332</sup> Such withdrawal meant that there were no restrictions on the conduct of opinion polls and exit polls or on the dissemination of results of these polls during the general elections to the House of the People and certain legislative assemblies held in September-October 1999.

#### **(iv) Important developments in 2004**

8.4.1 The vacuum with regard to guidelines on the publication and dissemination of results of opinion polls persisted till 2004. To arrive at a decision by consensus prior to the general elections to the House of the People that year, the EC convened a meeting of all political parties on 6<sup>th</sup> April 2004, to deliberate on the issue of opinion polls and exit polls. The view of the majority of the political parties was that conducting opinion polls and publishing the results thereof should not be allowed from the date of issue of statutory notification calling the election till the completion of the poll. The suggestion that emerged out of the all-party meet was that in a multi-phased

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<sup>329</sup> WP No 407 of 1999.

<sup>330</sup> Sukumar Muralidharan and V. Venkatesan, 'Polls and Opinions', 16(20) FRONTLINE, (Sept. 25-Oct. 8, 1999), <<http://www.frontline.in/static/html/fl1620/16200320.htm>>.

<sup>331</sup> Mendiratta, *supra* note 161, at 718.

<sup>332</sup> Election Commission of India, 'Guidelines for Publication and Dissemination of Results of Opinion Polls/Exit Polls – Withdrawal thereof', Order No. ECI/MCS/OP-EP/99, 14<sup>th</sup> September 1999 <<http://eci.nic.in/archive/press/current/PN140999ORDER.htm>>.

election where poll is taken on different dates, such prohibition in conducting and publishing the results of opinion polls should be for the entire period starting from the date of notification of the first phase of election and until the completion of the poll in the last phase.<sup>333</sup> A similar view was also voiced for exit polls, and all parties were of the view that in a multi-phased election, results of exit polls should not be allowed to be published until the completion of the poll in the last phase. The EC thereafter recommended to the Ministry of Law and Justice that there should be a specific provision in the Representation of the People Act, 1951 ('RP Act, 1951'), prohibiting publication and dissemination of the results of exit polls and opinion polls during the period mentioned above.

8.4.2 Upon receiving the aforesaid recommendation from the EC, the Ministry of Law and Justice sought the opinion of the then Attorney General of India, Mr. Soli Sorabjee in this regard. Mr. Sorabjee was of the view that prohibiting the publication of opinion polls and exit polls would constitute a breach of Article 19(1)(a) of the Constitution. Mr. Sorabjee opined that such prohibition would specifically violate the public's right to know, which has been held by the Supreme Court to be part of the freedom of speech<sup>334</sup>. He suggested that certain guidelines could be laid down to provide that while disseminating results of poll surveys, the agency concerned should provide the public with sufficient information, such as the:

- (a) Name of the political party or organisation which commissioned the survey;
- (b) Identity of the organisation conducting the survey and the methodology employed;
- (c) Sample chosen and the margin of error.

8.4.3 Most importantly, Mr. Sorabjee pointed out that the EC, in exercise of its plenary powers under Article 324 of the Constitution, can issue directions requiring the media to comply with the guidelines. One of the significant takeaways from Mr. Sorabjee's opinion was that it did not contemplate an outright ban on the publication and dissemination of opinion polls, but regulation by means of guidelines issued by the EC in this regard.

#### **(v) Amendments to RPA, 1951 – Insertion of Sections 126A and 126B**

8.5.1 While duly considering the opinion of the Attorney General, the ECI pointed out that guidelines issued by it in 1998 regulating the publication and dissemination of opinion polls had to be withdrawn after the Supreme Court's observation that the ECI could not enforce them in law against the

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<sup>333</sup> ECI 2004 Reforms, *supra* note 203.

<sup>334</sup> Indian Express v Union of India, (1981) Supp SCC 87.

media. Consequently, the ECI in its 2004 Proposed Reforms Report reiterated its view that there should be some statutory restriction on publishing the results of opinion polls and exit polls.<sup>335</sup>

8.5.2 This recommendation of the ECI was partially accepted by the Parliament in 2009 when Section 126A was inserted into the RPA.<sup>336</sup> The said provision places certain restrictions on the conduct of exit polls and dissemination of their results. Under Section 126A of the RPA, the conduct of exit polls and publishing or publicising by means of print or electronic media or dissemination in any other manner whatsoever, the result of any exit poll has been prohibited during such period as the EC may, by a general order notify in this regard. Significantly, the prohibition on publication of exit polls under Section 126A extends to both print as well as electronic media.

8.5.3 Contravention of Section 126A has been made punishable under Section 126A(3) with imprisonment for a term which may extend to two years or with fine or with both. Additionally, Section 126B has also been inserted to the RP Act, 1951 for punishment to companies who commit any offence under Section 126A. If the said offence is committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence. However, opinion polls have been kept outside the purview of Sections 126A and 126B.

#### **(vi) Opinion polls and self-regulatory standards**

8.6.1 While statutory standards for regulation of opinion polls are lacking, due regard should be had to the self-regulatory standards laid down by the PCI as well the News Broadcasting Standards Authority ('NBSA') for the media.

8.6.2 The PCI in its "Guidelines on 'Pre-Poll' and 'Exit-Polls' Survey" has mandated that opinion polls cannot be conducted 48 hours before the first phase of polling in a multi-phase election. Further, details of the methodology, sample size, margin for error and background of the organisation conducting the poll would have to be indicated whenever such polls are published.

8.6.3 The NBSA has also issued "Guidelines for Election Broadcasts", which specifically state that:

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<sup>335</sup>ECI 2004 Reforms, *supra* note 203.

<sup>336</sup>Representation of the People (Amendment) Act, 2009.

*“Special care must be taken to report opinion polls accurately and fairly, by disclosing to viewers as to who is commissioned, conducted and paid for the conduct of the opinion polls and its broadcast. If a news broadcaster carries the results of an opinion poll or other election projection, it must also explain the context, and the scope and the limits of such polls and their limitations. Broadcast of opinion polls should be accompanied by information to assist viewers to understand the poll’s significance, such as the methodology used, the sample size, the margin of error, the fieldwork dates, and data used. Broadcasters should also disclose how vote shares are converted to seat shares.”<sup>337</sup>*

**(vii) Current law and late Mr. Goolam E. Vahanvati’s view on opinion polls**

8.7.1 Currently, opinion polls are barred from being published in electronic media for 48 hours prior to an election in that polling area under Section 126(1)(b) of the RP Act, 1951.

*“Section 126(1)(b) – No person shall display to the public any election matter by means of cinematograph, television or other similar apparatus in any polling area during the period of forty-eight hours ending with the hour fixed for the conclusion of the poll for any election in that polling area”.*<sup>338</sup>

8.7.2 The contravention of Section 126(1)(b) is punishable under Section 126(2) with imprisonment for a term which may extend to two years or with fine, or with both.

8.7.3 The ECI has strongly argued for further restriction on publication of opinion polls. Such restrictions are necessary because Section 126(1)(b) applies only to electronic media. This essentially means that an anomalous situation is created where the publication of the findings of opinion polls in print media remains unregulated.

8.7.4 The constitutionality of a modified version of this provision was endorsed by an opinion of Late Mr. Goolam E. Vahanvati, former Attorney-General of India on 13<sup>th</sup> June 2013. In his opinion, Mr. Vahanvati opined that since there is no real basis for distinguishing between opinion and exit polls, opinion polls could also be prohibited from being published for the entire election phase, analogous to the restriction on exit polls under Section 126A of the RP Act.<sup>339</sup> This opinion was in contradiction with that rendered by Mr.

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<sup>337</sup> News Broadcasting Standards Authority, ‘Guidelines for Election Broadcasts’, 24<sup>th</sup> November 2011, <[http://eci.nic.in/eci\\_main1/current/NBSA\\_07032014.pdf](http://eci.nic.in/eci_main1/current/NBSA_07032014.pdf)>.

<sup>338</sup> ‘Election matter’, for the purpose of this section, has been defined under Section 126(3) as ‘any matter intended or calculated to influence or affect the result of an election.’

<sup>339</sup> Consultation Paper on Media Law, *supra* note 318.



Sorabjee in 2004 and consequently, the Ministry of Law and Justice referred the matter to be decided upon by the EC.

8.7.5 In September 2013, the ECI held fresh consultations with recognised political parties on the issue of banning opinion polls, in furtherance of which the views of these parties were sought.<sup>340</sup> The dominant view that came across from the views put forth by various political parties was that opinion polls should not be published or disseminated during the period starting from the date of notification till the completion of elections.<sup>341</sup> While the EC's attempt in this direction is laudable, it does not address concerns as to how such regulation of opinion polls should be carried out.

## **B. Issues with Current Regulations**

### **(i) Effects on the purity of the electoral process**

8.8 Legitimate apprehensions regarding the effect of opinion polls on the purity of the electoral process justify regulation of the same. Among these are concerns about the accuracy of opinion polls. There are a number of instances where election results predicted by such polls turned out to be incorrect, by a large margin. For instance, poll predictions based on election surveys during the general elections in 2004 went completely haywire for most of the polling agencies.<sup>342</sup> In 2004, almost all the polls conducted by media houses predicted that the National Democratic Alliance (NDA) would be able to retain power at the centre, which eventually did not happen. This raised questions about the polls being biased, or incorrect in some measure. Questions regarding certain specific problems with opinion polls have always existed, some of them being:

### **(ii) Potential of opinion polls to influence voters**

8.9.1 The central justification for the regulation of opinion polls is the preservation of the sanctity and integrity of the electoral process. Concerns on this count arise on the grounds that opinion polls are able to influence electoral behaviour and distort electoral outcomes.

8.9.2 This influence on electoral behaviour can take two forms, assuming that opinion polls are properly conducted.<sup>343</sup> Both are predicated on

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<sup>340</sup> Election Commission of India, 'Proposal to restrict the publication and dissemination of opinion polls conducted during elections to Lok Sabha and Legislative Assemblies, No. 3/1/2012/SDR-Vol IV, 12<sup>th</sup> November 2013.

<sup>341</sup> Id.

<sup>342</sup> Praveen Rai, *supra* note 319.

<sup>343</sup> Herbert A. Simon, *Bandwagon and Underdog Effects and the Possibility of Election Predictions*, 18(3) THE PUBLIC OPINION QUARTERLY 245 (Autumn, 1954).

the understanding that the dissemination of social research will alter the original situation so that it is impossible to accurately predict outcomes. *First*, there is the possibility that a bandwagon or contagion effect could result. This refers to the case where information predicting the victory of a candidate could lead to votes being switched in his or her favour and away from other candidates. *Second*, there is the underdog effect. This refers to voters switching to favour candidates not predicted to win, so that the prediction or appearance of success undermines the actual outcome.

8.9.3 There is no clear empirical evidence to *precisely* demonstrate the degree to which these effects play out among the Indian electorate, or even to establish that such effects do operate. Even in jurisdictions (such as the United States<sup>344</sup>, Canada<sup>345</sup>, Germany<sup>346</sup> and the United Kingdom<sup>347</sup>) where studies have been undertaken, there is no authoritative understanding on how much influence opinion polls have on electoral behaviour.

8.9.4 On the other hand, an argument against opinion polls has been that information from opinion polls confuses voters, or as said by the EC, 'would be a deleterious intrusion into the mind of the voter'<sup>348</sup>. It is also believed that information from opinion polls may affect voters' perceptions of the chances that various parties may have of winning and consequently, by affecting voters' expectations about the outcome of an election, polls may affect the vote.<sup>349</sup> However, certain studies by political scientists suggest that holding a lead in an opinion poll generally earns an electoral candidate no more than a 4%-5% lead among undecided voters.<sup>350</sup> In fact, opinion polls published extremely close to the day of polling do not affect public opinion to a large extent because only a small percentage of voters remain undecided by then.<sup>351</sup> However, this is not to say that opinion polls do not influence the

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<sup>344</sup> See, e.g., Richard Henshel and William Johnston, *The Emergence of Bandwagon Effects: A Theory*, 28 THE SOCIOLOGICAL QUARTERLY, 493 (1987), noting that evidence concerning the existence of a bandwagon effect in US polls has been mixed.

<sup>345</sup> See, e.g., DO POLLS INFLUENCE THE VOTE? IN CAPTURING CAMPAIGN EFFECTS 263–279 (Henry E. Brady and Richard Johnston eds.), finding that polls did influence the vote in the 1988 elections in Canada.

<sup>346</sup> See, e.g., Rüdiger Schmitt-Beck, *Mass Media, The Electorate, And The Bandwagon. A Study Of Communication Effects On Vote Choice In Germany*, 8(3) INT J PUBLIC OPIN RES 266 (1996), finding that opinion polls in Germany do not appear to mislead voters).

<sup>347</sup> Catherine Marsh, *Back on the Bandwagon: The Effect of Opinion Polls on Public Opinion*, 15(1) BRITISH JOURNAL OF POLITICAL SCIENCE 51 (1985).

<sup>348</sup> Election Commission of India, 'Guidelines for Publication and Dissemination of Results of Opinion Polls/Exit Polls', Order No. ECI/MCS/98/01, 20<sup>th</sup> January 1998 <[http://eci.nic.in/archive/instruction/recent/media/pnxitpoll\\_FINAL.html](http://eci.nic.in/archive/instruction/recent/media/pnxitpoll_FINAL.html)>.

<sup>349</sup> Andre Blais, Elisabeth Gidengil and Neil Nevitte, 'Do Polls Influence the Vote?', *Capturing Campaign Effects*, at 263, <<https://www.press.umich.edu/pdf/0472099213-ch11.pdf>>.

<sup>350</sup> Stephen Ansolabehere and Shanto Iyengar, 'Of horseshoes and horse races: Experimental Studies of the impact of poll results on electoral behaviour', 11(4) POLITICAL COMMUNICATION 413, 417 (1994).

<sup>351</sup> Id.

voters at all, only that the margin of voters actually influenced may remain unclear.

### **(iii) Independence of polling agencies**

8.10 The independence of the agencies/organisations is threatened by the possibility of opinion polls being manipulated to favour certain political parties, or through bias in choosing sample sizes. Apprehensions against opinion polls arose, for example, in February 2014, when a sting operation by a Hindi news channel claimed that numerous poll agencies were willing to manipulate their poll projections by increasing their margin of error by a certain percentage of points, in favour of certain specific parties.<sup>352</sup> Notwithstanding the effect such manipulations may have on the voting patterns of citizens, it does shake the confidence of the people in the findings of such opinion polls. More importantly, for a first-past-the-post system like ours, this can spell drastic changes in election results and hence, the need for regulation of opinion polls should be urgently addressed.

### **(iv) Issue of robustness in findings**

8.11.1 Statistically, opinion polls are often presented as point estimation, pinpointing a fixed number of seats won by a party.<sup>353</sup> However, these polls are actually representing estimation with a given degree of error.<sup>354</sup> Essentially, they represent interval estimation, a range of seats for every political party, and not the exact number of seats that a party would win. This important fact is generally not made known to the voters. Having knowledge of the fact of the margin of error in the findings of opinion polls would make for more informed voters. While the findings of opinion polls in India are largely considered to be fallible, psephologists believe that crucial factors such as choosing the optimum sample size, sample design and the representativeness of the sample can ensure some level of accuracy.<sup>355</sup>

8.11.2 It has been argued that a few instances of manipulation, in whatever manner they exist, do not make a case for an outright ban. Instead, they call for better regulation of opinion polls, in a manner that will be recommended in Part 6. As mentioned earlier as well, a total prohibition on publication and dissemination of results of opinion polls may amount to an infringement of the right under Article 19(1)(a) of the Constitution. An analysis

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<sup>352</sup>ET Bureau, '*Sting operation reveals massive manipulation by poll agencies*', THE ECONOMIC TIMES, 26<sup>th</sup> February 2014 <[http://articles.economictimes.indiatimes.com/2014-02-26/news/47705569\\_1\\_opinion-poll-public-opinion-sting-operation](http://articles.economictimes.indiatimes.com/2014-02-26/news/47705569_1_opinion-poll-public-opinion-sting-operation)>.

<sup>353</sup> Bibek Debroy, '*Banning Opinion Polls*', ECONOMIC TIMES, 6<sup>th</sup> November 2013 <<http://blogs.economictimes.indiatimes.com/policy/puzzles/stupidity-of-banning-opinion-polls/>>.

<sup>354</sup>*Id.*

<sup>355</sup>Praveen Rai, *supra* note 319.

of the manner in which opinion polls are statutorily regulated in other jurisdictions can provide some insights into how suitable amendments can be made to the RP Act, 1951 to regulate the same in India.

## C. Regulation in Other Countries

8.12 The ECI's guidelines of 1998 refer to the position in a number of jurisdictions, noting that a number of "advanced democracies" have placed restrictions on the conduct of opinion polls.<sup>356</sup> In particular, the guidelines noted that Canada, France, Italy, Poland, Turkey, Argentina, Brazil and Colombia have imposed certain restrictions.<sup>357</sup> Some jurisdictions do not impose any restrictions on the publication of opinion or exit polls. These states include United States and Australia.

8.13 A number of jurisdictions do, however, regulate opinion polls. The practice of ensuring a cooling off period before voting commences has been a feature of a number of democracies, including Canada, France and Italy.<sup>358</sup> Where such provisions were struck down by courts, an important consideration related to the proportionality of the measure and its compatibility with the freedom of expression. The position in some jurisdictions has been discussed below, which can provide some guidance for regulation of the conduct of opinion polls in India:

### (i) United Kingdom

8.14.1 The United Kingdom presents an important framework demonstrating successful self-regulation. There are currently no statutory restrictions on the publication of pre-election surveys, although the publication of exit polls taken before voting closes is prohibited by the Representation of the People Act, 2000. The Act contemplates a fine or imprisonment of no more than six months for publication of such exit polls.<sup>359</sup> The British media is committed to self-regulation and impartiality. For example, the British Broadcasting Corporation (BBC), for example, has internal guidelines on reporting opinion polls that have reportedly been effective for a number of years:<sup>360</sup>

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<sup>356</sup>Paragraph 6.

<sup>357</sup>*Id.*

<sup>358</sup> Article 19: Global Campaign for Free Expression, *Comparative Study of Laws and Regulations Restricting the Publication of Electoral Opinion Polls*, <<http://www.article19.org/data/files/pdfs/publications/opinion-polls-paper.pdf>>.

<sup>359</sup> Representation of People's Act, 2000 <[http://www.legislation.gov.uk/ukpga/2000/2/pdfs/ukpga\\_20000002\\_en.pdf](http://www.legislation.gov.uk/ukpga/2000/2/pdfs/ukpga_20000002_en.pdf)>.

<sup>360</sup> BBC Draft Election Guidelines for May 2013 <<http://www.bbc.co.uk/editorialguidelines/page/draftelectionguidelines-2013-01-24/#6.Polls%20and%20other%20tests%20of%20opinion>>.

- *“not leading a programme or bulletin with the results of a pre-election poll;*
- *not including the results of an election survey in a headline;*
- *not relying on the interpretation given to a poll’s result by the publication or organization which commissioned it;*
- *always reporting the expected margin of error, and where the gap between the two leading contenders is within the combined margin of error, saying so; and*
- *always reporting the dates of the poll, and who commissioned and carried out the poll.”*

8.14.2 Moreover, the Office of Communications Code, known as the Ofcom Code, states that broadcasters may not publish the results of any opinion poll on polling day itself until the election or referendum poll closes.<sup>361</sup>

## (ii) Canada

8.15.1 The reporting of poll results during federal elections is regulated by the Canada Elections Act, 2000. The Act prohibits the transmission of new election survey results to the public on polling day, before the close of all the polling stations in the electoral district.<sup>362</sup>

8.15.2 Any person transmitting an opinion poll within 24 hours after they are first transmitted to the public must provide the following together with the results:<sup>363</sup>

- *“the name of the sponsor of the survey;*
- *the name of the person or organization that conducted the survey;*
- *the date on which or the period during which the survey was conducted;*
- *the population from which the sample of respondents was drawn;*
- *the number of people who were contacted to participate in the survey; and*
- *if applicable, the margin of error in respect of the data obtained.”*

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<sup>361</sup> Section 6.5 The Ofcom Broadcasting Code  
<<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/elections/>>.

<sup>362</sup> Section 328, Canada Elections Act, 2000 <<http://laws-lois.justice.gc.ca/eng/acts/e-2.01/page-87.html#docCont>>.

<sup>363</sup> Section 326, Canada Elections Act, 2000.

**(iii) France**

8.16 Under Article 11 of the Loi 77-808 du 19 Juillet 1977, the publication and broadcasting of opinion polls was banned for the seven days preceding each of the two rounds of voting in the country's national elections. Exit polls were banned until the close of voting. In a landmark decision in 2011, the French Court of Cassation held that the 1977 law violated Article 10 of the European Convention on Human Rights.<sup>364</sup> A new law was adopted in February 2002 which replaces the week-long prohibition with a 24-hour publication ban. With the exception of internet sites, no person may publish or otherwise transmit the results of any opinion poll on the day before the vote. When opinion poll results are published, the law imposes an obligation on the media to provide details of the poll's methodology and exit polls remain prohibited.<sup>365</sup>

**(iv) Singapore**

8.17 Section 78C of the Parliamentary Elections Act, 2001, restricts the publication of electoral opinion poll results and imposes an outright prohibition on the publication of exit polls. The blackout period for the publication of opinion poll results begins with the issuance of the 'writ of election', at the very beginning of the election campaign, and ends with the close of all polling stations on polling day.<sup>366</sup> Therefore, the publication of poll surveys is prohibited for the entire period of elections. Furthermore, the Act lays down that any violation of the above provision shall be a criminal offence with a fine not exceeding \$1,000 and/or imprisonment for a maximum of 12 months.

**D. Opinion Polls – A Case for Regulation, and Not Outright Ban**

8.18 While regulation of the publication of the results of opinion polls is an urgent necessity, a complete ban on the same would be constitutionally impermissible. Any restrictions, to whatever degree, on the conduct of public opinion polls would necessarily implicate the fundamental right to freedom of speech and expression. At a general level, the idea of deliberative democracy would require that decisions of public importance, including voting, be

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<sup>364</sup>Amelie Blocman, 'Incompatible with Article 10 of the ECHR', IRIS Legal Observation of the European Audiovisual Observatory <<http://merlin.obs.coe.int/iris/2001/9/article36.en.html>>.

<sup>365</sup>Global Campaign for Free Expression, 'Comparative Study of Laws and Regulations Restricting the Publication of Electoral Opinion Polls', January 2003, <<http://www.article19.org/data/files/pdfs/publications/opinion-polls-paper.pdf>>.

<sup>366</sup>Section 78C of the Parliamentary Elections Act, 2001 <<http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=6b3d8695-af98-44ee-a989-3c08f2d6c027;page=0;query=DocId%3A%228cc6883c-c5f5-4e3c-bad4-e3b6992999a5%22%20Status%3Ainforce%20Depth%3A0;rec=0#pr78C-he->>>.

undertaken after frank public discussion of the alternatives. Opinion polls attempt to contribute to this deliberation.

8.19 Outright bans on either the conduct or the publication and dissemination of exit polls would be entirely inconsistent with existing constitutional standards, as Mr. Soli Sorabjee concluded in his opinion in 2004.<sup>367</sup> Wholesale bans on opinion polls would not fall within any of the grounds listed under Article 19(2), or qualify as a reasonable restriction. As a result, while measures to improve the quality of information supplied to voters could be seen as furthering the right under Article 19(1)(a), they must do so while balancing this interest with the right to free expression of those conducting and/or disseminating opinion polls.

8.20 Former Attorney General of India, Mr. Ashok Desai furnished an opinion on 13<sup>th</sup> June 2014 on the proposed amendment of Section 126(1)(b) of the RP Act, 1951. Notably, Mr. Desai acknowledged that in a staggered, multi-phased election, it would not be possible to blank out the electioneering news in a State going to poll when another State is not, nor would it be desirable to do so.<sup>368</sup> Television broadcasts have a national reach and are not contained within the boundaries of a particular constituency. Mr. Desai pointedly mentioned in his opinion that while a direct electoral appeal cannot be made during the proscribed period in the constituency going to poll, there is nothing to prevent the media broadcast elsewhere being received in that very constituency and about the very parties who are contesting in that area.<sup>369</sup> Hence, an outright ban on dissemination of election matter would not be practicable, keeping in view the reach of electronic as well as print media in contemporary times.

8.21 The issue of whether opinion polls require *regulation* engages the right to freedom of speech and expression in two important ways. First, those conducting opinion polls do so in exercise of their rights to free speech under Article 19(1)(a). Any regulation would need to acknowledge this right. Second, the Supreme Court has acknowledged that a general right to know is an element of the right to freedom of speech.<sup>370</sup> Also the Supreme Court has recognized, in *Union of India v. Association for Democratic Reforms*<sup>371</sup>, that voters have a right to information concerning matters that would be relevant to their choices at the ballot. Regulation would have to be targeted at ensuring that a real and effective voters' right to information is secured.

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<sup>367</sup>New Delhi Bureau, *Ban on opinion, exit polls unconstitutional, says Soli Sorabjee*, THE HINDU, 10 April, 2004; Soli Sorabjee, Attorney General of India, *Opinion*, 8<sup>th</sup> April, 2004.

<sup>368</sup> Election Commission of India, 'Amendment of Section 126 of the Representation of the People Act, 1951', 29<sup>th</sup> April 2014.

<sup>369</sup> *Id.*

<sup>370</sup> *Indian Express v. Union of India*, (1981) Supp SCC 87 at 825).

<sup>371</sup> *Union of India v. Association for Democratic Reforms*, 1992 Suppl. (2) SCC 651.

8.22 Regulation of opinion polls also concerns the freedom of the press, which may not be recognised as a separate freedom, but is folded into the freedom of speech and expression.<sup>372</sup> The freedom of the press serves the larger purpose of the right of the people to be informed of a broad spectrum of facts, views and opinions.<sup>373</sup> Opinion polls assist the media in indicating contemporary concerns and attitudes among the public while also giving feedback to the media on the state of public opinion at a given point in time.<sup>374</sup> Some guidelines, such as those issued by the PCI and NBSA, already exist for the regulation of opinion polls. The time is now ripe for statutory regulation of the conduct of opinion polls by means of an amendment to the RP Act, 1951. Significantly, there is no empirical evidence as to how much opinion polls impact the actual voting pattern.<sup>375</sup> Hence, an outright ban on the conduct of opinion polls does not stand justified. Appropriate amendments need to be inserted within the RP Act, 1951, in a manner specified hereinafter.

## **E. Approach to Amendments**

8.23 The Law Commission believes that any amendments to the RP Act, 1951 with respect to opinion polls must ensure adequate regard to the public's right to access all relevant information concerning elections. Certain principles may be duly considered before recommending statutory amendments to regulate opinion polls. Mr. Ashok Desai's main concern in his opinion referred to in Part 4 was that to what extent a television broadcast about the election could be subject to certain prohibition. Mr. Desai's opinion assumes importance for the Law Commission because it examines the contours of Section 126(1)(b), currently the only provision regulating opinion polls, and the duration for which a prohibition can be imposed on display of 'election matter'.<sup>376</sup>

8.24 Mr. Desai opines that in considering Section 126, it is necessary to balance two contending principles – the right to free and fair elections along with the freedom of speech. Since it is a penal provision, it should be strictly construed in light of the reality of elections in India. Mr. Desai concluded his opinion on Section 126 with the view that,

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<sup>372</sup> Sakal Papers (P) Ltd. v. Union of India AIR 1962 SC 305.

<sup>373</sup> Consultation Paper on Media Law, *supra* note 318, at 2.

<sup>374</sup> Howard Kushner, *Election Polls, Freedom of Speech and the Constitution*, 15 OTTAWA L. REV. 515, 517 (1983).

<sup>375</sup> Faizan Mustafa, 'Opinion Polls and Free Speech', THE STATESMAN, 14 November 2013 <<http://www.thestatesman.net/news/24788-opinion-polls-and-free-speech.html>>.

<sup>376</sup> Election Commission of India, 'Amendment of Section 126 of the Representation of the People Act, 1951', 29<sup>th</sup> April 2014.



*“The increasing changes in the technology of communication make it necessary that the Law Commission should have another look at the Section and clarify its limits.”*

8.25 To ensure the independence of the agencies conducting such polls, and to ensure that their findings raise confidence among the voters, their credentials should be known to the public. Following the Canadian example, the organisation conducting or sponsoring the opinion poll/survey should also transmit its own details along with the results of the opinion polls. This would facilitate the public to know the source of such findings and would evoke confidence in the results.

8.26 Apart from the details of the organisation conducting the survey, the results should also include other particulars, such as size of the sample surveyed, sampling method adopted, population from which the sample size was chosen, etc. This will ensure robustness of the findings of the opinion polls. It has been established that opinion polls, irrespective of the manner in which they are conducted, will always have a certain margin of error. This fact should be made known to the public. Whether published in print media or disseminated through electronic media, findings of opinion polls should always carry a disclaimer that such findings are only predictions which would necessarily have a certain margin of error. This would help ensure that the public is not misled by the results of opinion polls.

## **F. Recommendations**

### **(i) Expand scope of Section 126 of the RPA, 1951**

8.27.1 Currently, as discussed above in Part 1 of this Chapter, the ban under Section 126(1)(b) on display of election matter forty-eight hours before polling begins is limited to display by means of ‘cinematograph, television or other similar apparatus’. Since this Section is also used to limit the broadcast of opinion polls and other similar content, the ban applies only to opinion polls in the electronic and not the print media.

8.27.2 This anomaly in the applicability in the law relating to publication of election matter must be rectified, particularly in an age where digital and print media are closely interconnected. Therefore, the Law Commission recommends that Section 126(1)(b) be amended as follows:

126 (1) No person shall...

(a) ...

(b) publish, publicise or disseminate any election matter by means of print or electronic media; or

(c)...

(2)...

(2A) No court shall take cognisance of any offence punishable under sub-section (1) unless there is a complaint made by order of, or under authority from, the Election Commission or the Chief Electoral Officer of the State concerned.

*Explanation.*—For the purposes of this section,—

(a) “election matter” means any matter intended or calculated to influence or affect the result of an election.

(b) “electronic media” includes internet, radio and television including Internet Protocol Television, satellite, terrestrial or cable channels, mobile and such other media either owned by the Government or private person or by both;

(c) “print media” includes any newspaper, magazine or periodical, poster, placard, handbill or any other document;

(d) “disseminate” includes publication in any “print media” or broadcast or display on any electronic media.

## **(ii) Add specific sections on disclosures related to opinion polls**

8.28.1 While the suggested amendments to Section 126(1)(b) expand the current restrictions on opinion polls to include print media, it does not address the concerns expressed in Part 2 of this Chapter regarding the independence and robustness of the opinion polls themselves.

8.28.2 A number of countries have laws to address these issues, as we saw in Part 3. The Law Commission believes that India too is at a juncture where the regulation of opinion polls is necessary to ensure that first, the credentials of the organisations conducting the poll is made known to the public, second, the public has a chance to assess the validity of the methods used in conducting the opinion polls and third, that the public is made adequately aware that opinion polls are in the nature of forecasts or predictions, and as such are liable to error.

8.28.3 Accordingly, we recommend that Sections 126C and 126D addressing opinion polls be added as follows:

**126C. Disclosures relating to opinion polls. —** (1) No person shall publish or broadcast the results of an opinion poll without providing the following together with the results:

(a) the name of the sponsor of the survey;

- (b) the name of the person or organization that conducted the survey;
- (c) the date on which or the period during which the survey was conducted;
- (d) the population from which the sample of respondents was drawn;
- (e) the number of people who were contacted to participate in the survey; and
- (f) if applicable, the margin of error in respect of the data obtained.
- (g) A declaration that the results are in the nature of predictions, to be displayed prominently, in the manner prescribed by the Election Commission
- (h) Any other information as may be notified by the Election Commission

(2) In addition to the information under sub-section (1), the publisher or broadcaster of an opinion poll shall, within a period of twenty-four hours after the publication or broadcast of the opinion poll, publish on its website a copy of a written report on the results of the survey referred to in sub-section (1).

(3) The report referred to in sub-section (2) shall include the following, as applicable:

- (a) the name and address of the sponsor of the survey;
- (b) the name and address of the person or organization that conducted the survey;
- (c) the date on which or the period during which the survey was conducted;
- (d) information about the method used to collect the data from which the survey results are derived, including
  - (i) the sampling method,
  - (ii) the population from which the sample was drawn,
  - (iii) the size of the initial sample,
  - (iv) the number of individuals who were asked to participate in the survey and the numbers and respective percentages of them who participated in the survey, refused to participate in the survey, and were ineligible to participate in the survey,
  - (v) the dates and time of day of the interviews,
  - (vi) the method used to recalculate data to take into account in the survey the results of participants who expressed no opinion, were undecided or failed to respond to any or all of the survey questions, and

- (vii) any weighting factors or normalization procedures used in deriving the results of the survey; and
- (e) the wording of the survey questions and, if applicable, the margins of error in respect of the data obtained.
- (f) a copy of the poll as published along with the copy of the disclosure under sub-section (1).

(4) The Election Commission may issue further notifications regarding the manner in which the disclosures under sub-sections (1) and (2) are to be made.

(5) Any person who contravenes the provisions of this section shall be punished, on first conviction, with fine which may extend to five lakh rupees, and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

(6) No court shall take cognisance of any offence punishable under this section unless there is a complaint made by order of, or under authority from, the Election Commission or the Chief Electoral Officer of the State concerned.

*Explanation.*—For the purposes of this section, “opinion poll” means a survey of how electors will vote at an election or of the preferences of electors respecting any candidate, group of candidates, or political party.

**126D. Offences by companies.**— (1) Where an offence under sub-section (1) of Section 126C has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

*Provided* that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any

director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.*—For the purpose of this section,—

(a) “company” means any body corporate, and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm”.

## **CHAPTER IX**

### **COMPULSORY VOTING**

9.1 Provisions regarding voting have been enshrined in the RP Act and the Indian Constitution, and describe the exercise as a 'right', instead of a 'duty'. Thus, s. 62 of the RP Act expressly talks about the "right to vote" and s. 79(d) clarifies that the "electoral right" of the voter includes the right to "*vote or refrain from voting at an election.*" Furthermore, Article 326 of the Constitution, while specifying that elections to the Parliament and the Legislative Assemblies be conducted on the basis of adult suffrage, states that, "*every person who is a citizen of India... shall be entitled to be registered as a voter at any such election.*" The characterisation of the decision to vote as a right, instead of a duty, has received judicial support.<sup>377</sup> For instance, in *PUCL v Union of India*, the Supreme Court expressly clarified that the right to vote is a "pure and simple statutory right."<sup>378</sup>

9.2 It is thus clear that the decision to vote is considered an exercise of such a *right*, and is not a duty prescribed under Part IVA of the Constitution on Fundamental Duties. However, compulsory voting refers to the practice of making voting a duty – by requiring citizens of a country to partake in the electoral process, whether by obliging them to vote or mark their attendance at the polling place. It has been introduced in some parts of world, both in well established and newly emerging democracies, with a bid to increase participation in the democratic process. Recently, on 9<sup>th</sup> November 2014, Gujarat Governor Sri O.P. Kohli gave his assent to the Gujarat Local Authorities Laws Bill, 2009, thus paving the way for introduction of compulsory voting in India.

#### **A. Compulsory Voting in India: History and Context**

9.3 Compulsory voting was first considered by the Parliament in 1950 during the enactment of the RP Act. Nevertheless, citing practical difficulties in implementation, it was rejected (led by members such as Dr. B.R. Ambedkar).

9.4 Then the Dinesh Goswami Committee in 1990 considered the question of making "voting compulsory" to increase voter turnouts. However,

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<sup>377</sup> In *Lily Thomas v Speaker, Lok Sabha*, (1993) 4 SCC 234, the Supreme Court held that that "right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well." In *PUCL v Union of India*, (2003) 4 SCC 399, the Supreme Court stated, "The right to vote for the candidate of one's choice is of the essence of democratic polity."

<sup>378</sup> *PUCL v Union of India*, (2013) 10 SCC 1, at para 21 (*hereinafter* "PUCL 2013").

the Committee rejected the idea based on “the practical difficulties involved in its implementation”.<sup>379</sup>

9.5 Subsequently, in 2001, the Consultation Paper of the NCRWC on Electoral Reforms again considered, and rejected the proposal for compulsory voting, noting that it would “*not be feasible or advisable at present ... [given that] in our situation, there may be several management and legal enforceability problems and difficult questions of penalty for not voting.*”<sup>380</sup>

9.6 The Tarkunde Committee noted that:

*“We have seriously considered the desirability of making it compulsory for voters to cast their votes in these elections. It appears to us that compulsory voting may be resented by the voters and may on balance prove counter-productive. It is desirable that compliance with the duty to cast one’s vote should be brought about by persuasion and political education, rather than compulsion. Moreover, the implementation of a law of compulsory voting is likely to be very difficult and may lead to abuse.”*<sup>381</sup>

9.7 Pursuant to this, the issue of compulsory voting was discussed in Parliament in 2004 and 2009, when two Private Members Bill introduced a bill to that effect. In 2004, Mr. B.S. Rawat introduced the Compulsory Voting Bill, 2004 “*to provide for compulsory voting by the electorate in the country and for matters connected therewith, be taken into consideration.*”<sup>382</sup> The Bill was defeated by citing various arguments, *inter alia*, the coercive nature of the provision; respecting the active decision of some voters to not engage with the democratic process; the inability to reach the polling booths; personal circumstances; and the difficulty of implementation.<sup>383</sup> In 2009, Mr. J.P. Agarwal tabled another bill on compulsory voting, requiring the State to concomitantly provide polling booths at convenient locations and making special arrangements for elderly, disabled, and pregnant voters.<sup>384</sup> However, the then Law Minister Mr. Moily cautioned against such a move observing that it was coercive; difficult for the government to implement; and ignorant of causes of non-voting such as illness, preoccupation, and use of force by political parties. The Bill was later withdrawn.<sup>385</sup>

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<sup>379</sup> Goswami Committee Report, *supra* note 113, at para 11.4, page 38.

<sup>380</sup> NCRWC Consultation Paper, *supra* note 93, at para 17.1.

<sup>381</sup> Tarkunde Committee, REPORT OF THE COMMITTEE ON ELECTION EXPENSES, para 18, <<http://lawmin.nic.in/ld/erreports/TarkundeCommitteeReport.pdf>>.

<sup>382</sup> *Motion for Consideration of the Compulsory voting Bill*, LOK SABHA DEBATES, <<http://164.100.47.132/LssNew/psearch/result14.aspx?dbsl=2311>>.

<sup>383</sup> *Id.*

<sup>384</sup> *Compulsory voting in India*, SAKAL TIMES, 16<sup>th</sup> November 2014.

<sup>385</sup> *Government Expresses Inability to Enforce Compulsory voting*, THE HINDU, 13<sup>th</sup> August 2010, <<http://www.thehindu.com/news/national/government-expresses-inability-to-enforce-compulsory-voting/article568460.ece>>.

9.8 Finally, Mr. Atul Saronde petitioned the Supreme Court *vide* a PIL, urging it make voting compulsory to counter low voter turnouts and to ensure the ‘representativeness’ of the elected governments. On the question of penalties for failure to vote, Mr. Saronde suggested that the government disconnect electricity and water supplies and levy fines on the defaulting voters. Dismissing the petition in April, 2009, the two-judge bench of Chief Justice Balakrishnan and Justice Sathasivam said, “*We are not agreeable to your suggestion that electricity and water connection should be cut if anyone does not vote. These are inhuman methods to make a voter go to the polling booth.*”<sup>386</sup>

9.9 Recently, the Gujarat Local Authorities Laws (Amendment) Bill, 2009 was introduced and (now) passed introducing compulsory voting at local-level elections such as at the Municipality, Municipal Corporation, and Panchayat level.

9.10 The history of compulsory voting proposals provides an adequate context within which to situate the larger debate about the appropriateness of compulsory voting, with specific reference to India.

## **B. Evaluating the Arguments For and Against Compulsory Voting**

9.11 The arguments surrounding compulsory voting can be broadly divided into concerns of participation, equality, democracy, legitimacy, and other concerns. These will be discussed below.

### **(i) Participation: Does compulsory voting increase voter turnouts and improve the quality of political engagement?**

9.12.1 Arend Lijphart in his influential 1997 essay made two strong arguments in favour of compulsory voting as a response to the “unequal electoral participation” in America. These involved the effect of compulsory voting in countering voter apathy by increasing turnout and in making the electorate more politically aware and engaged.<sup>387</sup> The underlying assumption

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<sup>386</sup>Dhananjaya Mahapatra, *SC Rejects Plea to Make Voting Compulsory*, THE TIMES OF INDIA, 18<sup>th</sup> April 2009, <<http://timesofindia.indiatimes.com/india/Supreme-Court-rejects-plea-to-make-voting-compulsory/articleshow/4415484.cms>>; S.Y. Qureshi, *Compulsion Won't Work: Voter Education Key To Participation*, HINDUSTAN TIMES, 19<sup>th</sup> November 2014, <<http://www.hindustantimes.com/comment/analysis/voter-participation-can-be-achieved-through-systematic-poll-education/article1-1287635.aspx#sthash.3i2OoJZ5.dpuf>>.

<sup>387</sup> Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91(1) THE AMERICAN POLITICAL SCIENCE REVIEW 1 (1997).



here is that compulsory voting will result in increased voting and consequently, more informed political participation and debate.

### Increase in voter turnouts

9.12.2 On the first argument, it is relatively clear that compulsory voting results in an increased turnout, with different studies pointing to an increase between 7 to 17 percentage points.<sup>388</sup> A comprehensive cross-country Institute for Democracy and Electoral Assistance (*hereinafter* “IDEA”) Study reveals that the difference in voter turnouts between the 28 countries with compulsory voting provisions on their statute books (regardless of enforcement levels) and the 171 countries without such provisions is 7.37%.<sup>389</sup>

9.12.3 Nevertheless, an increase in participation is a direct corollary of the severity and strict enforcement of sanctions. Studies have found that levels of abstention in compulsory voting regimes are highest when the quantum/type of penalty and the likelihood of its enforcement are high.<sup>390</sup> There are two major impediments arising from this penalty-enforcement conundrum in the replication of such high levels of turnout in India – the imposition of a heavy penalty, and being likely to enforce it.

9.12.4 The first is concerned with the determining the type of penalty. The current law is silent on the form of sanction, and clearly leaves such determination to the government. Consequently, it is unclear whether the penalty will amount to unnecessary coercion (as the “inhumane” suggestion before the Supreme Court in 2009 to cut off electricity and water supplies) or merely an informal sanction. Examples of the former are found in Peru, where defaulters cannot access certain government goods and services; Bolivia, where they are not entitled to receive their salaries for three months; and Belgium, where non-voters find it difficult to get a job in the public sector.<sup>391</sup>

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<sup>388</sup> Lijphart; L. Baston and K. Ritchie, TURNING OUT OR TURNING OFF? AN ANALYSIS OF POLITICAL DISENGAGEMENT AND WHAT CAN BE DONE ABOUT IT (2004); G.B. Powell, *Voting turnout in thirty democracies: Partisan, legal, and socio-economic influences* in ELECTORAL PARTICIPATION: A COMPARATIVE ANALYSIS (R. Rose eds., 1980); M. Franklin, *Electoral Participation* in CONTROVERSIES IN VOTING BEHAVIOR (R. Niemi and H.F. Weisberg eds., 4<sup>th</sup> edn, 2001); E. Keaney and B. Rogers, A CITIZEN’S DUTY: VOTER INEQUALITY AND THE CASE FOR COMPULSORY TURNOUT, (London: Institute for Public Policy Research, 2006).

<sup>389</sup> IDEA, *Compulsory Voting*, <[http://www.idea.int/vt/compulsory\\_voting.cfm](http://www.idea.int/vt/compulsory_voting.cfm)>. (*hereinafter* “IDEA Compulsory voting”)

<sup>390</sup> Costas Panagopoulos, *The Calculus of Voting in Compulsory Voting Systems*, 30(4) POLITICAL BEHAVIOR 455 (2008); Alistair McMillan, *Force feeding Democracy*, INDIAN EXPRESS, 18<sup>th</sup> November 2014, <<http://indianexpress.com/article/opinion/columns/forcefeeding-democracy/>>.

<sup>391</sup> IDEA Compulsory voting, *supra* note 389.

9.12.5 Although currently unspecified, the penalties under discussion include being disenfranchised; along with the possible denial of BPL cards, driving licenses, passports, and other services.<sup>392</sup> Such measures are extreme and will disproportionately and adversely affect the poor or marginalised in India. The solution to non-voting as McMillan points out “cannot be to remove people from the electoral process.”<sup>393</sup> In fact, an unintended consequence of such a measure is the disincentive on “qualified voters” (which is yet undefined) from registering themselves on the voter registration lists. Moreover, instead of specifying the penalty in the law, the criminalisation of non-voting has been left to delegated legislation. This vests great powers with the State, which can use it as a potential tool for harassment.<sup>394</sup> Conversely, if the penalty amounts to informal sanction – a mere slap on the wrist – then it will not act as a deterrent or have the desired effect.

9.12.6 The second concern deals with the difficulty in implementation – a concern voiced in various committee reports (Dinesh Goswami, National Commission to Review the Working of the Constitution), Parliamentary proceedings and Supreme Court decisions. Implementation (at a subsequent national level) involves the Election Commission making the more than 800 million eligible voters aware of the new law making voting compulsory. The Commission has to then expend time and resources in sending notices to each of the non-voters, conduct hearings, and subsequently impose and implement the stipulated penalties. Former Chief Election Commissioner S.Y. Qureshi, terming the implementation “practically impossible”, cautioned against adding to the caseload of the already overburdened judicial system.<sup>395</sup> There are additional concerns regarding the registration process and faulty electoral rolls – voters lists often have defects and have names missing, a fact mentioned in the Parliamentary debates concerning Mr. J.P. Agarwal’s proposed Bill.<sup>396</sup>

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<sup>392</sup> Pratap Bhanu Mehta, *Acts of Choice*, INDIAN EXPRESS, 22<sup>nd</sup> December 2009, <<http://archive.indianexpress.com/news/acts-of-choice/557550/>>; *Contentious Gujarat Voting Law has RSS Blessing*, BUSINESS STANDARD, 11<sup>th</sup> November 2014, <[http://www.business-standard.com/article/politics/contentious-gujarat-voting-law-has-rss-blessings-114111000942\\_1.html](http://www.business-standard.com/article/politics/contentious-gujarat-voting-law-has-rss-blessings-114111000942_1.html)>.

<sup>393</sup> McMillan, *supra* note 390.

<sup>394</sup> Mehta, *supra* note 392.

<sup>395</sup> S.Y. Qureshi, *Time to take up ‘Right to Reject’ Proposal*, HINDUSTAN TIMES, 30<sup>th</sup> January 2012, <<http://www.thehindu.com/todays-paper/tp-national/time-to-take-up-right-to-reject-proposal-quraishi/article2843742.ece>>.

<sup>396</sup> *Further discussion on the motion for consideration of Compulsory Voting Bill, 2009*, LOK SABHA DEBATES, <<http://164.100.47.132/LssNew/Members/DebateResults.aspx?mpno=2399>>; RFGI, *Analysis of Compulsory voting in Gujarat*, <<http://www.rfgindia.org/publications/Analysis%20of%20Compulsory%20Voting%20in%20Gujarat.pdf>>.

### Improvement in the quality of political participation and debate

9.12.7 As the above section shows, compulsory voting might not have an equivalent increase in voter turnout as much in India as other countries. More importantly however, even guaranteeing higher voter turnout does not guarantee greater voter participation, as understood in its true, substantive sense. Many studies have shown that the “second order” effects of compulsory voting, measured in terms of better civic engagement; increased political knowledge and interest; and improved quality of participation, do not follow the more-evident “first order” effects of greater turnout.<sup>397</sup>

9.12.8 Thus, Engelen and Hooghe in their 2007 analysis of Belgian election data concluded that compulsory voting did not produce any “knowledge effects” amongst those who “voted to avoid sanction.”<sup>398</sup> Similarly, an experiment in the 2007 Quebec provincial elections, where compulsory voting was enforced through financial sanctions saw “little evidence of second order effects”.<sup>399</sup> The researchers concluded, “*though a sufficient motivator for getting an uninformed voter to the polls, avoiding foregoing money cannot be assumed to be a sufficient motivator for getting him or her to learn more about politics*”.<sup>400</sup> Such a conclusion is supported by a 2007 study of British and Australian voters, which found that Australian voters were not better informed than their British counterparts about their political system, despite being required by law to vote.<sup>401</sup>

9.12.9 Interestingly, although the Australian example is widely cited as a successful model of compulsory voting, it has witnessed a high level (to the tune of 1-3%) of “donkey voting”, which occurs when apathetic voters simply choose the first name on a ballot.<sup>402</sup>

9.12.10 Thus, Kelley and McAllister in their 1984 study attributed the donkey effect to giving an advantage of 1.3 percentage points to Australian candidates with a surname in the first third of the alphabet; whereas, such effects were not visible in the British elections, where there was no

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<sup>397</sup>Mcmillan, *supra* note 390.

<sup>398</sup> Bart Engelen and Marc Hooghe, *Compulsory Voting and its Effects on Political Participation, Interest, and Efficiency*, Paper Presented at the ECPR Joint Sessions Workshop, COMPULSORY VOTING: PRINCIPLES AND PRACTICE, Helsinki (2007).

<sup>399</sup> Peter John Loewen et al., Does Compulsory Voting Lead to More Informed and Engaged Citizens? An Experimental Test, 41(3) CANADIAN J. OF POL. SC. 655, 656 (2008).

<sup>400</sup> *Ibid.*, at 666.

<sup>401</sup> Chris Ballinger, *Compulsory Voting: Palliative Care for Democracy in the UK*, Paper Presented at the ECPR Joint Sessions Workshop, COMPULSORY VOTING: PRINCIPLES AND PRACTICE, Helsinki (2007).

<sup>402</sup> Amy King and Andrew Leigh, *Are Ballot Order Effects Heterogeneous*, 90(1) SOCIAL SCIENCE QUARTERLY 71, 73 (2009).

compulsory voting.<sup>403</sup> Concerns about donkey voting led to the introduction of random, instead of alphabetical, ballot ordering from 1984 in the Australian House of Representatives elections.

9.12.11 To conclude, there is no evidence that individuals will seek out more information in a bid to fulfil their voting obligations; and compulsory voting will not necessarily improve the quality of civic engagement.

**(ii) Equality: Does compulsory voting ensure the enfranchisement of the weaker classes?**

9.13 The participation argument for compulsory voting has an associated equality dimension to it. The argument proceeds on the assumption that voter apathy is more prevalent amongst the weaker, marginalised socio-economic class and thus compulsory voting will ensure that their voices get heard. Thus, compulsory voting was justified in Canada “for boosting electoral turnout amongst the weakest in society”;<sup>404</sup> and in Belgium “to avoid upper class citizens putting pressure on uneducated or poor citizens not to vote in the elections”.<sup>405</sup> However, such arguments are not applicable in India, where it is the rich, who often do not exercise their voting rights, and whose turnout is often lower than the poor.<sup>406</sup>

**(iii) Democracy: Does compulsory voting increase the ‘representativeness’ of the government or is it constitutionally untenable?**

9.14.1 The democratic argument is premised on a substantive notion of democracy where the elected government is truly representative of (all) the people, and not just a “self-selecting few”. Thus compulsory voting is seen as increasing the “democratic degree” of elected assemblies.<sup>407</sup>

9.14.2 While democratic representativeness is a laudable goal, compulsory voting is not the appropriate means of achieving it. Very simply,

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<sup>403</sup> Jonathan Kelley, and Ian McAllister. 1984. “Ballot Paper Cues and the Vote in Australia and Britain: Alphabetic Voting, Sex and Title, 48(2) PUBLIC OPINION QUARTERLY 452.

<sup>404</sup> Henry Milner et al., The Paradox of Compulsory voting: Participation does not Equal Knowledge, 8(3) IRPP POLICY MATTERS (2007).

<sup>405</sup> IDEA, *Compulsory voting in Western Europe*, in VOTER TURNOUT IN WESTERN EUROPE, <[http://www.idea.int/publications/voter\\_turnout\\_weurope/upload/chapter%203.pdf](http://www.idea.int/publications/voter_turnout_weurope/upload/chapter%203.pdf)> (hereinafter “IDEA, Europe”)

<sup>406</sup> Amit Ahuja and Pradeep Chibbar, *Why the Poor Vote in India: If I don’t Vote, I am Dead to the State*, <[http://www.polsci.ucsb.edu/faculty/ahuja/aa/Research\\_files/Ahuja%20and%20Chhibber%20-%20Why%20the%20Poor%20Vote%20in%20India%3ASCID%20%282012%29.pdf](http://www.polsci.ucsb.edu/faculty/ahuja/aa/Research_files/Ahuja%20and%20Chhibber%20-%20Why%20the%20Poor%20Vote%20in%20India%3ASCID%20%282012%29.pdf)>.

<sup>407</sup> Jason Briggs and Karen Celis, *For and Against: Compulsory voting in Belgium and Britain*, 4(1) SOCIAL AND PUBLIC POLICY REV. 1, 5 (2010).

the government cannot “force-feed” democracy<sup>408</sup> by compelling people to vote, because doing so violates the cornerstone of democracy and our Constitution, which is freedom and individual choice. First, Article 326 of the Constitution makes it very clear that every citizen “*shall be entitled to be registered as a voter at any such election*”, thereby providing citizens with an option of not registering themselves as voters. This is buttressed by ss. 62 and 79(d) of the RP Act that expressly talk about the “electoral right” of a person as including the right to “*vote or refrain from voting at an election*”. The Supreme Court also talks about the “right” to vote,<sup>409</sup> noting that, “*the right to vote for the candidate of one's choice is of the essence of democratic polity.*”<sup>410</sup>

9.14.3 Secondly, as the absence of the right to vote in the Fundamental Duties prescribed in Part IVA make clear, the Constitution does cast any “duty” on citizens. This is especially important given the government’s failure to act on the recommendations of Justice Verma’s Committee Report of 1998 and the NCRWC’s Report on Fundamental Rights, Directive Principles, and Fundamental Duties to amend Part IVA, Article 51-A to include “*duty to vote at elections, actively participate in the democratic process of governance and to pay taxes.*”<sup>411</sup> At most voting can be considered a civic duty of every citizen; but, to enforce it compulsorily is against the principles of an individual liberty.

9.14.4 Thirdly, compulsory voting violates the freedom of expression guaranteed under Article 19(1) of the Constitution. The Supreme Court has repeatedly recognised that there is a “*fine distinction... between the right to vote and the freedom of voting as a species of freedom of expression.*”<sup>412</sup> Whereas the right to vote is a statutory right conferred *only* on the fulfilment of certain criteria, the actual act of voting (“freedom of voting”) is a manifestation of the freedom of expression.<sup>413</sup> Similarly, the Court in the *NOTA* judgment clarified that, “*a positive ‘right not to vote’ is a part of expression of a voter in a parliamentary democracy and it has to be recognized and given effect to in the same manner as ‘right to vote’.*”<sup>414</sup>

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<sup>408</sup> Mcmillan, *supra* note 390.

<sup>409</sup> In *Lily Thomas v Speaker, Lok Sabha*, (1993) 4 SCC 234, the Supreme Court defined voting as “formal expression of will or opinion by the person entitled to exercise the right on the subject or issue.” [Emphasis supplied]

<sup>410</sup> *PUC v Union of India*, (2003) 4 SCC 399.

<sup>411</sup> Chapter 3, *Fundamental Rights, Directive Principles, and Fundamental Duties*, para 3.40.3 in Ministry of Law and Justice, REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION Report of the NCRWC, <<http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm>>.

<sup>412</sup> *Kuldip Nayar v Union of India*, (2006) 7 SCC 1; *PUC v Union of India*, (2003) 4 SCC 399; *Union of India v Association for Democratic Reforms*, (2002) 5 SCC 294, where the Court said “*a voter ‘speaks out or expresses by casting vote.’*”

<sup>413</sup> The Court in the 2003 *PUC* judgment further states, “freedom of voting as distinct from right to vote is thus a species of freedom of expression.”

<sup>414</sup> *PUC* 2013, at para 37.

9.14.5 The Supreme Court and other government functionaries have recognised that voters' refrain from voting on account of various factors such as the poor quality of candidates in the fray;<sup>415</sup> the opportunity cost of foregoing a daily wage, or the forced homelessness due to riots or natural disasters;<sup>416</sup> the absence of an enabling environment due to problems with electoral identity cards, and the difficulty in reaching the polling stations.<sup>417</sup> In such cases, "*the decision taken by a voter after verifying the credentials of the candidate either to vote or not is his right of expression under Article 19(1)(a) of the Constitution.*"<sup>418</sup> Thus, coercing citizens to be involved in the democratic process contravenes their freedom of expression, while also reeking of "illiberalism".<sup>419</sup>

9.14.6 Finally, political science perspectives on the complexity of democracies argue that democracies need to accommodate dissent and diversity of views. This includes the option of disengagement, namely "*rights to abstain, to withhold assent, to refrain from making a statement or from participating*" if people believe "*voting is mistaken, undesirable, unnecessary or immoral.*"<sup>420</sup>

**(iv) Legitimacy: Does compulsory voting increase the legitimacy of elected governments?**

9.15.1 The legitimacy argument is connected to the democracy argument above and posits that elected governments have a stronger mandate, and hence, greater legitimacy, when more people (or the entire population) comes out to vote. A corollary of greater participation and political engagement is the increased accountability of elected representatives, which only serves to strengthen the government's responsiveness, and thus legitimacy.<sup>421</sup>

<sup>415</sup> PUCL 2013, at para 37 states, "A voter may refrain from voting at an election for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote."

<sup>416</sup> Qureshi, *supra* note 1; Qureshi, *supra* note 367.

<sup>417</sup> *Why ex-Gujarat Gov Kamla Beniwal vehemently opposed compulsory voting?*, BUSINESS STANDARD, 10<sup>th</sup> November 2014, <[http://www.business-standard.com/article/politics/why-ex-gujarat-guv-kamla-beniwal-vehemently-opposed-compulsory-voting-114111000972\\_1.html](http://www.business-standard.com/article/politics/why-ex-gujarat-guv-kamla-beniwal-vehemently-opposed-compulsory-voting-114111000972_1.html)>.

<sup>418</sup> PUCL, 2013, at para 19.

<sup>419</sup> Sanjay Hedge, *Gujarat's Compulsory voting Experiment Smacks of Illiberalism*, ECONOMIC TIMES, 16<sup>th</sup> November 2014, <[http://articles.economictimes.indiatimes.com/2014-11-16/news/56137264\\_1\\_gujarat-local-authorities-laws-compulsory-voting-municipal-elections](http://articles.economictimes.indiatimes.com/2014-11-16/news/56137264_1_gujarat-local-authorities-laws-compulsory-voting-municipal-elections)>. As Hegde notes, American philosopher Harold Stearns wrote, "*The root of liberalism, in a word, is hatred of compulsion, for liberalism has the respect for the individual and his conscience and reason which the employment of coercion necessarily destroys.*" Harold Stearns, *LIBERALISM IN AMERICA: ITS ORIGIN, ITS TEMPORARY COLLAPSE, ITS FUTURE* (1919).

<sup>420</sup> Annabelle Lever, *Compulsory Voting: A Critical Perspective*, 40(4) BR. J. OF POL. SC. 897, 924, 926 (2010)

<sup>421</sup> Briggs, *supra* note 407, at 6-7.

9.15.2 Nevertheless, such an argument (erroneously) assumes that increased participation results in increased political engagement and that voters will responsibly exercise their new duty to vote. As the “donkey voting” phenomenon in Australia illustrates, compulsory voting can mask electoral apathy and create an “illusion of participation”,<sup>422</sup> whereas legitimacy depends on a genuine desire to engage with the system.

**(v) Other arguments for and against compulsory voting**

9.16.1 Some other arguments espousing compulsory voting highlight the improvement in public awareness and financial benefits because resources generally utilised in convincing people to vote are instead focussed on campaigning on substantive issues. Such opinions fail to consider the cost of raising awareness about a change in the law and the heavy cost of implementing (registration, sending notices, conducting show-cause hearings, adjudicating, and appeals) and enforcing (based on the yet-undefined penalty) compulsory voting provisions.

9.16.2 More importantly, however, they fail to consider that compulsory voting hides the problem (and reasons) for voter disengagement, instead of confronting it. Various courts and committees have alluded to the causes for voter disillusionment (discussed above), and the need to focus on education and awareness campaigns that emphasise the importance of voting as a *civic* duty. As the then Law Minister of State, Mr. K. Venkatapathy noted while arguing against Mr. Rawat’s Compulsory Voting Bill in Parliament in 2003:

*“... such a participation [in the democratic process] should better come out from the people voluntarily rather than by coercion or allurements. A sense of duty in this regard should inform the people on their own and it is this sense of duty which should be the motivating factor in impelling people to turn up at the polling stations in larger numbers.”*

9.16.3 Instead of seeking a quick fix, or an ornamental change in the law, politicians should pursue a strong reform agenda focusing on decriminalisation of politics; inner party democracy; campaign finance reform, including the removal of black money; and introducing accountability of elected representatives. Thus, instead of seeking persuasion by compulsion, the government should seek persuasion by education and action.

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<sup>422</sup> *Ibid.*, at 6.

9.16.4 Interestingly, many have suggested incentive schemes such as tax rebates or financial benefits<sup>423</sup> to boost electoral participation as an alternative to criminalising non-voting. Besides being financially burdensome and hard to administer, introducing money in the voting calculus fundamentally changes the nature of the right to vote, and the civic duty of voting. As Michael Sandel persuasively argues money “crowds out” and erodes important non-market norms of democratic participation and common good, which should guide our decision to vote.<sup>424</sup>

9.16.5 This section has analysed the arguments in favour of and against compulsory voting to conclude that the latter outweigh the former. Why then is it common in some parts of the world? The next section analyses compulsory voting from a comparative perspective to conclude that the phenomenon is not as pervasive as it appears and international models will not work in India.

## C. Compulsory Voting: A Comparative Perspective

9.17 Compulsory voting is currently present in the statute books in 28 countries,<sup>425</sup> although such a figure does not give a true picture of the level of enforcement, which is even lower. Thus, most studies estimate that around 14 countries currently enforce compulsory voting provisions. These include many small countries such as Belgium, Liechtenstein, Luxemburg, Nauru, and one canton in Switzerland; and others such as Australia, Brazil, Ecuador, Singapore, Peru, and Uruguay.<sup>426</sup> In fact, Dr. Lisa Hill and Jonathon Louth talk about how the list of countries currently enforcing compulsory voting is reduced to six, if limited to those with a “history of well-established democratic norms”.<sup>427</sup>

9.18 Nor does the 28 countries figure indicate the trend towards which countries globally are moving. For instance, the fact that both Italy (1993) and the Netherlands (1967) have abolished compulsory voting; and others such as Liechtenstein and Greece have moved from a strict to a not-strict or non-enforcement of compulsory voting laws respectively has led IDEA to question:

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<sup>423</sup> RFGI, *supra* note 380; NCRWC Consultation Paper, *supra* note 93, at 17.1. In their consultation paper, NCRWC additionally recommend “small incentives” for non-tax payers in “*in the matter of rations, speed of granting certain licenses, passports, etc.... The revenue lost as a result could be treated as partial state funding of the electoral process. Such policies might help push electoral turnout up.*”

<sup>424</sup> Michael Sandel, WHAT MONEY CAN'T BUY 112-113 (2013).

<sup>425</sup> IDEA Compulsory voting, *supra* note 389.

<sup>426</sup> *Id.*

<sup>427</sup> Dr. Lisa Hill and Jonathon Louth, *Compulsory voting Laws and Turnouts: Efficacy and Appropriateness*, (2004), <[http://www.adelaide.edu.au/apsa/docs\\_papers/Aust%2520Pol/Hill%26Louth.pdf](http://www.adelaide.edu.au/apsa/docs_papers/Aust%2520Pol/Hill%26Louth.pdf)>, at 12.



*“Is compulsory voting a dying phenomenon” in western Europe? Perhaps in a few years it will only be kept as a ‘ghost’ in countries’ constitutions, without any intention to enforce it.”*<sup>428</sup>

9.19 Most recently, Fiji abandoned compulsory voting in 2014, Chile in 2012, and Austria (the last remaining Tyrol district) abolished it in 2004. Others such as Egypt, Greece, Mexico, Paraguay, and Thailand have stopped enforcing it.<sup>429</sup> When Netherlands abolished compulsory voting in 1967, it did so citing three reasons – first, the right to vote was a right, which every citizen could decide whether to exercise or not. Secondly, sanctions against defaulters were hard to effectively enforce in practice; and finally, tasking parties with the responsibility of attracting voters would ensure that the resultant turn out was a better reflection of voters’ interest and engagement with politics.<sup>430</sup>

9.20 Amongst the countries still enforcing compulsory voting provisions, most (excluding Australia where defaulters pay a fine) impose strict penalties. Thus, in Peru, voters must carry their stamped voting card to obtain certain goods and social services from some public offices.<sup>431</sup>

9.21 In Brazil, failure to vote results in the imposition of a fine. Failure to pay the fine however, entitles the State to impose a range of sanctions including being prohibited from applying for any public position; from receiving a salary from a public post; from sitting certain professional exams; and from obtaining a passport, identity card, certain types of loans, and teaching licenses in public educational institutions<sup>432</sup>

9.22 In Belgium, failure to vote in four elections within 15 years results in the disenfranchisement for ten years. But even apart from that, non-voters might find it difficult to get jobs in the public sector; or if they are civil servants, be disentitled to any promotion.<sup>433</sup>

9.23 As discussed above, penalising non-voters by penalising their poverty (such as in Brazil for failure to pay the fine) or restricting their access to government services and benefits (such as in Belgium and Peru) are extremely harsh measures and will not work in the Indian context, with its vast poverty and unemployment. Conversely, if the fine is too low, then it will only affect the poor and not change the behaviour of the rich, who do constitute a

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<sup>428</sup> IDEA, Europe, *supra* note 405, at 30.

<sup>429</sup> IDEA Compulsory voting, *supra* note 389.

<sup>430</sup> IDEA, Europe, *supra* note 405, at 26 and 29.

<sup>431</sup> IDEA Compulsory voting, *supra* note 389.

<sup>432</sup> Leticia Chelius, *Brazil: Compulsory voting and renewed interest amongst external voters*, <[http://www.idea.int/publications/voting\\_from\\_abroad/upload/chap5-brazil.pdf](http://www.idea.int/publications/voting_from_abroad/upload/chap5-brazil.pdf)> at 129.

<sup>433</sup> IDEA, Europe, *supra* note 405, at 28; IDEA Compulsory voting, *supra* note 389.

sizeable mass of the non-voting qualified voter population. In both cases, however, the result will be many court cases and delays in an already creaking judicial system. For all these reasons, comparative examples do not provide any justification for the imposition of compulsory voting in India.

## **D. Recommendation**

9.24            Thus, the Law Commission does not recommend the introduction of compulsory voting in India and in fact, believes it to be highly undesirable for a variety of reasons described above such as being undemocratic, illegitimate, expensive, unable to improve quality political participation and awareness, and difficult to implement.

## CHAPTER X

### ELECTION PETITIONS

#### A. History

10.1 Article 329(b) of the Constitution provides for the election petition to be presented to the authority prescribed by law.

10.2 Initially, Article 324(1) of the Constitution specified that ECI shall be vested with the authority for appointing election tribunals to decide election-related disputes. Consequently, section 81 of the RPA required all election petitions to be presented to the ECI, which had the power under section 86 to appoint election tribunals. In 1956, the composition of these tribunals was changed from three members, comprising sitting or retired district judges or advocates with 10 years standing to a single member, being a sitting or retired district judge. Nevertheless, the ECI found this system ineffective, given the inordinate delay in the trial of election petitions, caused partly due to the regular challenge of the tribunals' interlocutory orders before the High Courts *vide* Articles 226-227, and sometimes even before the Supreme Court.<sup>434</sup>

10.3 This led to the amendment of Article 324(1) and sections 81 and 86, RPA by the Constitution (Nineteenth Amendment) Act, 1966 and the Representation of People (Amendment) Act, 1966 respectively to remove the ECI's jurisdiction to hear election petitions and vest it with (ordinarily) a single judge of the High Court<sup>435</sup> *vide* the newly inserted section 80A, RPA. The aim was to expedite the disposal of election petitions, as is evident from section 86(7), which envisages an endeavour to conclude the trial within six months. Section 86 provides that the Chief Justice will refer the election petition presented before the High Court to the judge or one of the judges assigned by them for the 'trial' of election petitions. Although in 1975 the Constitution was further amended to insert Article 329A to stipulate that election petitions relating to the Prime Minister or the Lok Sabha Speaker would be filed before the ECI and tried by a special authority consisting of a sitting Supreme Court judge, Article 329A was deleted in 1978.<sup>436</sup>

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<sup>434</sup> Mendiratta, *supra* note 161, at 1053-1054. See also Hari Vishnu Kamath v Ahmed Ishaque, 10 ELR 216 on the issue of interlocutory challenge and Article 329(b).

<sup>435</sup> In Krishnan Gopal v Prakash Chandra, AIR 1974 SC 209, the Supreme Court held that a retired High Court judge, requested by the Chief Justice of the High Court to serve as judge under Article 224A, and whose appointment was consented to by the President, could also hear election petitions. However, the Supreme Court expressed a preference for a permanent judge of the High Court.

<sup>436</sup> Mendiratta, *supra* note 161, at 1055.

## **B. Formalistic Nature of the Current Procedure of Filing a Petition**

10.4 Unfortunately, the filing and trial of election petitions remains a very formalistic procedure and moreover, differs amongst High Courts. The matter is made worse because some states, such as Maharashtra and Goa, have a common High Court; whereas some High Courts have different benches in the same State. Additionally, different High Courts have different rules prescribing the bench to which the election petition can be filed – whether the Principal Seat of the High Court, or the bench within whose exclusive jurisdiction the particular contested election was conducted.

10.5 For instance, Mendiratta in his book talks about how an election petition filed before the Lucknow bench of the Allahabad High Court relating to an election in Rae Bareilly (which fell under the principal seat of the High Court's jurisdiction) was dismissed as being non-maintainable because it was not filed in constituency in which the election was conducted, namely Rae Bareilly. Moreover, even the application for transferring the petition to Rae Bareilly was dismissed as non-maintainable because of the exclusive jurisdiction of both benches and the expiry of the limitation period.<sup>437</sup> Conversely, in Madhya Pradesh for instance, all election petitions are to be filed before the principal Bench in Jabalpur. Consequently, the Gwalior Bench of the High Court returned an election petition filed challenging an election in Gwalior; and when the petition was filed the next day before the principal Bench in Jabalpur, it was dismissed as being time-barred. The Supreme Court upheld this decision.<sup>438</sup>

10.6 The time limit within which an election petition has to be presented under section 81(1), RPA is 45 days and the petition need not be presented only to a judge in open court. It can also be presented to the administrative or ministerial staff of the High Court on the same day.<sup>439</sup> Nevertheless, any delay in presenting the petition will result in its summary dismissal *vide* section 86,<sup>440</sup> unless the limitation period expires during the vacation time of the Court.<sup>441</sup> In fact, the High Courts do not have the

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<sup>437</sup> *Ibid*, at 1055.

<sup>438</sup> Devendra Nath Gupta v Returning Officer, Gwalior Parliamentary Constituency, C.A. No. 7480 of 1997 decided by the Supreme Court on 26.11.1999. See also Mendiratta, *supra* note 161, at 1055.

<sup>439</sup> Raj Kumar Yadav v Samir Mahaseth, (2005) 3 SCC 601; Kishore Jha v Mahavir Prasad, AIR 1999 SC 3558.

<sup>440</sup> KV Rao v BN Reddi, AIR 1969 SC 872.

<sup>441</sup> Simhadri Satya Rao v M Budda Prasad, (1994) Supp 1 SCC 449; Hari Tripathi v Shiv Harsh, [1976] 3 SCR 308. However, see Mohd Ali v Azad Mohd, AIR 1999 SC 3429 when the election petition filed on the reopening of the Punjab and Haryana High Court was dismissed as time barred because the limitation period expired in the summer vacation *and* the Court

discretion, ordinarily accorded to them *vide* section 5 of the Limitation Act, to condone the delay in filing the petition. This ruling was premised on the idea that the RPA is a self-contained code to which the provisions of the Limitation Act do not apply.<sup>442</sup>

10.7 Regular rules of impleading proper parties do not apply to election petitions under the RPA. The Supreme Court in *Jyoti Basu v Debi Ghosal*<sup>443</sup> rejected the petitioner's impleadment of Jyoti Basu for his alleged collusion with the returned candidate to commit certain corrupt practices on the ground ss. 82 and 86(4) only permitted candidates as respondents to an election petition. The Court's rationale was that the concept of proper parties "is and must remain alien to an election dispute" under the RPA because such disputes must be confined between the petitioner and candidates of elections. Thus, any person, including the ECI or other election authorities, even if proper parties, cannot be joined as respondents.<sup>444</sup>

10.8 On the other hand, non-joinder of a candidate who is a necessary party to the election petitions will result in its summary dismissal *vide* section 86(1) and the provisions of the CPC, permitting the subsequent impleadment of parties, cannot be used as a curative method. Thus, once there is a non-joinder of a necessary party, the election petition *cannot* be amended in any manner to remedy the defect.<sup>445</sup> This rule applies even when there is an allegation of corrupt practice against a candidate who has not been joined in the petition as required by section 82(b),<sup>446</sup> regardless of whether the respondent(s) have condoned this non-compliance or have failed or been delayed in pointing out this defect.<sup>447</sup>

10.9 Section 86(1), RPA also statutorily obliges the High Court to summarily dismiss an improperly presented election petition (the rules of which vary according to each High Court) under sections 81 or 82. Election petitions *have* to be presented by the petitioner *personally* and cannot be presented by or through their advocates.<sup>448</sup> Furthermore, section 81(3) necessitates each petition to be accompanied by as many copies as there are

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had issued a notification declaring that it would remain open to hear election petitions in the summer.

<sup>442</sup> *Hukumdev Narain v Lalit Narain Mishra*, AIR 1974 SC 480; *KV Rao v BN Reddi*, AIR 1969 SC 872.

<sup>443</sup> AIR 1982 SC 983.

<sup>444</sup> *Michael Fernandes v CK Jaffer Sharief*, AIR 2002 SC 1041 and *B Sundra Reddy v ECI*, (1991) Supp 2 SCC 624 relying on their earlier decision in *Jyoti Basu v Debi Ghosal*, AIR 1982 SC 983.

<sup>445</sup> *Mohan Raj v Surendra Taparia*, AIR 1969 SC 677; *K Kamaraja Nadar v Kunju Thevar*, AIR 1958 SC 687. See also *Mendiratta*, *supra* note 161, at 1070.

<sup>446</sup> *Manohar Joshi v Nitin Patil*, AIR 1996 SC 796; *NE Horo v Jahan Ara Singh*, AIR 1972 SC 1840.

<sup>447</sup> *Udhav Sing v Madhav Rao Scindia*, AIR 1976 SC 744.

<sup>448</sup> *GV Sreerama Reddy v Returning Officer*, (2009) 7 SCJ 432.

respondents, and these 'spare' copies have to be filed at the time of filing the election petition, or at the very least within the stipulated 45 days to avoid summary dismissal under section 86. In *Satya Narain v Dhuja Ram*,<sup>449</sup> the Deputy Registrar of the High Court gave the petitioner certain time, which went beyond the limitation period, to file the required number of copies of his petition. However, despite filing the additional copies within the time limit prescribed by the Deputy Registrar, the High Court, and subsequently the Supreme Court dismissed the election petition *in limine*, ruling that the Deputy Registrar lacked the requisite authority to grant time. In addition, section 81(3) requires the petitioner to attest each copy of the election petition under their own signature as a true copy. Any signature by the petitioner's advocate, instead of the petitioner, results in the *in limine* dismissal of the election petition.<sup>450</sup> Similarly, having served a copy of the election petition to the respondent with one extra page than was presented before the High Court, the same cannot be subsequently rectified and results in the *in limine* dismissal of the petition.<sup>451</sup> Subsequently however, the Supreme Court has relaxed the rigid compliance with section 81(3) noting that some defects in the supply of true copies, such as the absence of stamp/seal/signature or attestation by the notary, are curable.<sup>452</sup>

10.10 Section 86 of the RPA also obliges the High Court to summarily dismiss an election petition for non-compliance with section 117's requirement of a security deposit of Rs. 2000. The High Court is not permitted to reduce or dispense with the amount of the deposit.<sup>453</sup> Nor does section 117 statutorily permit the Court to grant an extension, as it deems reasonable, to give the petitioner enough time to collect the requisite Rs. 2000 as security for costs to ensure compliance.

### C. Appeal Procedure

10.11 Section 116A, RPA expressly provides for the right to appeal, both on a question of law and fact, against the High Court's order disposing an election petition under sections 98-99. This includes an appeal against the High Court's summary dismissal of an election petition under section 86(1), RPA,<sup>454</sup> although no appeal against an interim or final order can be filed before a Division Bench of the High Court.<sup>455</sup> Being the first court of appeal, the Supreme Court may reappraise the evidence or reverse a factual finding if

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<sup>449</sup> AIR 1974 SC 1185.

<sup>450</sup> Sharif ud Din v Abdul Gani Lone, AIR 1980 SC 303.

<sup>451</sup> Rajendra Singh v Usha Rani, AIR 1984 SC 305. See also Mithilesh Pandey v Baidyanath Yadav, AIR 1984 SC 305.

<sup>452</sup> Ram Prasad Sarma v Mani Kumar Subba, AIR 2003 SC 51.

<sup>453</sup> *Charan Lal Sahu v Nandkishore Bhatt*, 53 ELR 284. See also Mendiratta, *supra* note 161, at 1082.

<sup>454</sup> Explanation to Section 86(1), RPA.

<sup>455</sup> Upadhyaya Devshankaran v Dhirendrasinh Solanki, AIR 1988 SC 915.

it finds that the High Court has improperly or (gravely) erroneously appraised or appreciated the evidence,<sup>456</sup> thus requiring the apex Court to correct the injustice.<sup>457</sup>

10.12 The statutory right to appeal was introduced pursuant to the 1966 amendment to the RPA. Before that, the decision of the election tribunal was final and conclusive under s. 105, RPA, although in 1956, section 116A was introduced to allow appeals to High Courts.<sup>458</sup> The position today is that a Special Leave Petition before the Supreme Court can only be filed against the High Court's interlocutory,<sup>459</sup> and not its final order.<sup>460</sup> Additionally, the Supreme Court can summarily dismiss an election appeal, although such powers should only be exercised in exceptional circumstances.<sup>461</sup> Ordinarily though, the appeal is treated as a matter of right. Section 116A(2) also specifies a limitation period of 30 days, although the Supreme Court may condone the delay in filing the appeal if "*if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.*"

10.13 Section 116B of the RPA provides for a stay of the operation of the order of the High Court under appeal. In *Indira Gandhi v Raj Narain*,<sup>462</sup> the Supreme Court clarified the permissible conditions of stay, when it suspended the disqualification imposed upon the appellant as a consequence of the High Court's order *vide* section 8A; and permitted her to sign the Parliamentary Register, and attend the Lok Sabha's sessions on the condition that she would not participate in the House's proceedings nor vote nor draw remuneration in her capacity as MP. However, for all other purposes, the appellant was to remain an MP.<sup>463</sup>

## **D. Drawbacks in the Present System**

10.14 There are three primary drawbacks in the current system of filing election petitions, namely the non-uniform and formalistic procedure for presenting the petition, the inordinate delay in the trial of the election petition,

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<sup>456</sup> Pradip Buragohain v Pranati Phukan, (2010) 5 SCJ 815; Gajanan Bapat v Dattaji Meghe, AIR 1995 SC 2284

<sup>457</sup> Surinder Singh v Hardial Singh, (1985) 1 SCC 961.

<sup>458</sup> Mendiratta, *supra* note 161, at 1149.

<sup>459</sup> *Ibid.*, at 1149-1150.

<sup>460</sup> Dipak Ruhidas v Chandan Sarkar, AIR 2003 SC 3701.

<sup>461</sup> Bolin Chetia v Jogadish Bhuyan, AIR 3005 SC 1872.

<sup>462</sup> (1975) 2 SCC 159.

<sup>463</sup> Additionally, given that the appellant was the Prime Minister, the Supreme Court also said, "Independently of the restrictions under para III on her Membership of the Lok Sabha, her rights as Prime Minister or Minister, so long as she fills that office, to speak in and otherwise to take part in the proceedings of either House of Parliament or a joint sitting of the Houses (without right to vote) and to discharge other functions such as are laid down in Articles 74, 75, 78, 88 etc., or under any other law, and to draw her salary as Prime Minister, shall not be affected or detracted from on account of the conditions contained in this stay order."

and the system of appeals on any question of law or fact that renders an appeal almost automatic.

10.15        *First*, the current procedure of filing election petitions differs amongst various High Courts – it varies from requiring the petitioner to file the petition before the Principal Seat of the High Court or the bench within whose exclusive jurisdiction the particular contested election was conducted. This issue is particular to those states, which share a common High Court (such as Maharashtra and Goa) and those Courts that have different benches, such as Tamil Nadu. The difference in procedures was brought out above, by citing the examples of the Allahabad and Madhya Pradesh High Courts from Mendiratta's book. This is sought to be remedied by amending s. 80A, RPA to provide that in such instances, the election petition shall be filed before the Principal Seat of the relevant High Court, while retaining the High Courts' existing discretion to decide to shift the hearing to another bench in the interests of justice or convenience.

10.16        *Secondly*, on the parties to the petition, s. 82 currently requires a petitioner, who is claiming a declaration that they or any other candidate had been duly elected, to implead all the contesting candidates in the petition. However, to implead those candidates who had lost their security deposits, and hence, have no chance of being declared duly elected, only constitutes a waste of time and resources of both the petition and these candidates. Hence, section 82 on the parties to the petition should be amended to reflect this concern.

10.17        *Thirdly*, the final formalistic nature in the trial of the election petition is evident in s. 86's mandate to summarily dismiss the election petition for non-compliance with the provisions of s. 117, RPA on the security of costs. The rationale behind summary dismissal for non-compliance with the forty-five day time limit under s. 81 and the requisite number of copies under s. 83 is to ensure speedy trial and disposal of the petition. For instance, until the petitioner does not submit as many copies of the petition as respondents, as required under s. 83, the High Court is unable to issue notice to these respondents and hence trial cannot commence. Similarly, granting unfettered discretion to extend the time period beyond the stipulated the forty-five day time limit to file the election petition under s. 81 can lead to interminable delays. However, unlike these instances, the election trial can continue even if the petitioner delays in filing the security for costs. Therefore, s. 86 should not permit a summary dismissal on those grounds and instead s. 117 should be amended to allow the Court to grant an extension of time, as it deems reasonable, to comply with s. 117 and dismiss the petition *only* on the failure to deposit the security for costs within this extended period. However, it is pertinent to note that currently s. 117 provides only for a deposit of Rs. 2000,



which is too low and has not been amended since 1996. Hence, the deposit amount should also increase to Rs. 10,000 in line with inflation.

10.18 *Fourthly*, currently election petitions are inordinately delayed, a fact recognised by the 4<sup>th</sup> ARC Report on Ethics, which stated that “*such petitions remain pending for years and in the meanwhile, even the full term of the house expires thus rendering the election petition infructuous.*”<sup>464</sup>

10.19 To understand the extent of delay in the conclusion of trial, it is instructive to look at some facts and figures. The dissolution of the 15<sup>th</sup> Lok Sabha in February 2014 rendered infructuous 25 election petitions that were pending before the High Court challenging the poll victories of many MPs.<sup>465</sup> These petitions, required to be filed within 45 days of the election results under s. 81, RPA, and endeavoured to be tried as expeditiously as possible, within six months under s. 86(7), were in fact pending for nearly five years. Nevertheless, based on RTIs filed with the ECI, the Economic Times reported that of the 110 election petitions filed after the 2009 Lok Sabha Elections, *none* had been decided within six months. In at least 21 petitions, the trial was concluded only after three years. The Economic Times also found that in many cases, the appeal was stalled in the Supreme Court, thus denying the petitioner efficacious relief.<sup>466</sup>

10.20 The NCRWC in its 2001 presented the following table regarding the pendency and disposal of election petitions:<sup>467</sup>

Election held	Number of election petitions filed	Number of election petitions pending	Percent pending (in %)
Lok-Sabha 1999	64	62	96.88%
Lok-Sabha 1998	49	13	26.53%
Lok-Sabha 1996	52	13	25%
Lok-Sabha 1991	86	15	17.44%
<b>State Assemblies 2000</b>			
Bihar	12	12	100%
<b>State Assemblies 1999</b>			
Andhra Pradesh	25	25	100%
Karnataka	26	26	100%
Maharashtra	32	32	100%
Arunachal Pradesh	2	2	100%

<sup>464</sup> ARC Report, *supra* note 119, at 16.

<sup>465</sup> Sanjay Patil, *5 petitions challenging election of MPs, including P Chidambaram to stay 'alive'*, ECONOMIC TIMES, 28<sup>th</sup> February 2014, <[http://articles.economictimes.indiatimes.com/2014-02-28/news/47774290\\_1\\_election-petition-election-results-chief-election-commissioner](http://articles.economictimes.indiatimes.com/2014-02-28/news/47774290_1_election-petition-election-results-chief-election-commissioner)>.

<sup>466</sup> *Id.*

<sup>467</sup> NCRWC Consultation Paper, *supra* note 93, at para 15.1.

<b>State Assemblies 1998</b>			
Madhya Pradesh	42	32	76.19%
Rajasthan	11	11	100%
Delhi	4	4	100%
Meghalaya	2	2	100%
Himachal Pradesh	10	5	50%
Gujarat	12	7	58.33%
<b>State Assemblies 1996</b>			
Assam	11	4	36.36%
Haryana	20	5	25%
Kerala	17	11	64.71%
Tamil Nadu	8	6	75%
Pondicherry	3	3	100%
West Bengal	22	17	77.27%

10.21 Part of the problem lies in the continuous adjournments sought (despite the stipulations in section 86(6), RPA), the low priority accorded by the High Court in conducting and concluding the entire trial, and the almost automatic appeal (on both questions of fact and law) and stay application filed against a High Court's interim or final order. This results in cases such as Sushma Swaraj's, whose 2009 Lok Sabha election was challenged by Raj Kumar Patel. Ms. Swaraj subsequently challenged the maintainability of the petition, and it took the High Court approximate four years to reject Ms. Swaraj's application in December 2013. Pursuant to this, she filed an interim application (an SLP) before the Supreme Court,<sup>468</sup> which was finally dismissed as being infructuous because of the dissolution of the Lok Sabha in May 2014.<sup>469</sup> Similarly, Congress MLA, P. Veldurai's election to the Tamil Nadu Assembly (Cheranmahadevi constituency) in 2006 was set aside by the Supreme Court in 2011, five years later when he was campaigning for the next assembly elections in Tamil Nadu.<sup>470</sup>

10.22 These instances and the above facts reveal how inordinate delays defeat the purpose of filing an election petition to challenge the poll victory of the returned candidate. This in turn renders the right to vote illusory when election petitions, the only remedial mechanism provided to the ordinary voter against corrupt practices, are decided or dismissed after a majority or the entire assembly/parliamentary period has passed. Such a delay is detrimental to democracy, undermines the faith of the people in the electoral

<sup>468</sup> SC stays proceedings against Sushma Swaraj on poll petition, ECONOMIC TIMES, 13<sup>th</sup> February 2014, <  
[http://articles.economictimes.indiatimes.com/2014-02-13/news/47305406\\_1\\_poll-petition-election-petition-raj-kumar-patel](http://articles.economictimes.indiatimes.com/2014-02-13/news/47305406_1_poll-petition-election-petition-raj-kumar-patel)>.

<sup>469</sup> Sushma Swaraj v Raj Kumar Patel, SLP (Civil) No. 2951/2014 on 5<sup>th</sup> May 2014.

<sup>470</sup> P.H. Paul Manoj Pandian v Mr. P. Veldurai, Civil Appeal No. 4129/2009 decided by the Supreme Court on 13<sup>th</sup> April 2011. See also *Settle Election Disputes Quickly*, THE HINDU, 8<sup>th</sup> June 2012, <  
<http://www.thehindu.com/opinion/editorial/settle-election-disputes-quickly/article3501800.ece>>.

and judicial process and therefore, requires courts to give election petitions absolute priority. However, the Goswami Committee's proposal for ad hoc judges to clear the backlog does not address the underlying causes for delay and hence is not preferable.

10.23 One method of achieving this could be through an amendment to the law requiring strict abidance with the six-month stipulation in the RPA and to set up a permanent "election bench" to only deal with election petitions, a modification of the British 'election court' system described below. The delay is also partly a result of the overburdening of judges with other work, and the pressure caused by the pendency, which results in High Court judges reducing the priority in conducting election trials, since they take time and effort. Similar recommendations were made to constitute "special courts" or "election benches" designated for election petitions in the High Court by the NCRWC;<sup>471</sup> "special tribunals" under Article 323B comprising a High Court judge and a senior civil servant were recommended by the 4<sup>th</sup> ARC.<sup>472</sup> The Goswami Committee on the other hand endorsed the appointment of ad hoc judges to relieve the regular judges from their normal duty so as to entrust them with the hearing of the election petitions.<sup>473</sup> Moreover, similar to the Law Commission's recommendations to ensure expedited disposal under the Arbitration Act and the Commercial Courts Act in its 246<sup>th</sup> and 253<sup>rd</sup> Report respectively, the RPA should be amended to provide for daily hearings, minimum adjournments, time limits for filing written statements and case management.

10.24 In this context, it may be mentioned here that the Supreme Court of India, in a judgment pronounced on 27 February 2015, in the matter of *Mohd. Akbar vs. Ashok Sahu & Ors* <sup>474</sup> deemed it desirable to have dedicated Benches created by the Chief Justice of each High Court to deal with the election petitions exclusively. As the tenure of the members of the Parliament and Legislative Assemblies are relatively short, the Supreme Court felt it desirable that the disputes relating to election are resolved as early as possible. The Supreme Court attributed various reasons for this, such as:

12. ....

- (i) *"Membership of the Legislative bodies under the scheme of our constitution is a sacred responsibility. The continuance of any member in such bodies who secured his election to such a body by legally impermissible means even for a day is most*

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<sup>471</sup> NCRWC Report, *supra* note 13, at para 4.13.2.

<sup>472</sup> ARC Report, *supra* note 119.

<sup>473</sup> Goswami Committee Report, *supra* note 113, at Chapter IX, para 1.2.

<sup>474</sup> Civil appeal No. 2538-40 of 2015, arising out of SLP(Civil) Nos. 2487-2489 of 2015.

*undesirable. Such continuance affords an opportunity to such a member to take part in the law making process affecting the destinies of the people.*

- (ii) *Even from the point of view of the contesting candidates, unless the rights and the obligations are decided within a reasonable time, the adjudication and the consequences of the adjudication may eventually remain on paper without any tangible effect insofar as the participation of such parties in the legislative process.*

13. *However, we are sad to state that invariably the resolution of election disputes in this country takes unacceptably long periods in most of the cases. Very rarely an election dispute gets resolved during the tenure of the declared candidate reducing the adjudicatory process into a mockery of justice. Such delay coupled with a right of appeal to this Court makes the whole process of adjudication a task in a good number of cases. The reasons are many, we will only mention few:*

- (i) .....
- (ii) .....
- (iii) *The absence of dedicated Benches in the High Court for resolution of the election disputes is another factor which contributes enormously to the delay in the adjudicatory process.”*

10.25 *Fifthly*, on a related note, while efforts at reducing delay focus on expediting trial, there is no regulation of the time limit within which courts have to pass an order after the conclusion of arguments. This is no different in the RPA and thus, for the first time, the Law Commission is recommending such a time limit.

10.26 *Sixthly*, the delay in the conclusion of trial extends to the delay caused by the inevitable filing of appeal in the Supreme Court, both as a regular appeal on fact and law provided under s. 116A and an interlocutory appeal filed as an SLP. The order of the High Court is subsequently stayed, permitting the returned candidate to remain an MP/MLA subject to certain restrictions. In many cases as noticed above, the petition finally becomes infructuous with the dissolution of the Parliament or Legislative Assembly. Hence, s. 116A has to be amended to remove any appeal on fact, and to remove the unfettered discretion of the courts in accepting an appeal filed after limitation.

10.27 *Finally*, it is difficult to reform the current system of election trials unless there is adequate information available on the extent of the problem – the number of trials pending, the average time spent in concluding a trial and in hearing the appeal, any courts with best practices etc.

## E. Comparative Practices

10.28 The IDEA Institute has developed a set of guidelines on the conduct and challenge of elections reproduced below:

- *“The legal framework should provide that every voter, candidate and political party has the right to lodge a complaint with the competent electoral body or court when an infringement of electoral rights is alleged to have occurred.*
- *The law must require that the appropriate electoral body or court render a prompt decision to avoid the aggrieved party losing his or her electoral right.*
- *The law must provide a right of appeal to an appropriate higher level of electoral body or court with authority to review and exercise final jurisdiction in the matter. The decision of the court of last resort must be issued promptly.*
- *The legal framework should provide for timely deadlines for the consideration and determination of a complaint and the communication of the decision to the complainant.”*<sup>475</sup>

10.29 The Venice Commission or the European Commission for Democracy through Law is another international body dealing with constitutional law, including election related procedures. More specifically, it is the independent consultative body of the Commission of Europe with independent experts as members. Item II.3.3 of the *Venice Commission’s Code of Good Practice in Electoral Matters* stipulates the primary principles governing the process for filing an election petition to challenge an election, or for failure to comply with the electoral law. On the question of challenge, the Code states:

*“If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results .... There are two possible solutions:*

- *appeals may be heard by the ordinary courts, a special court or the constitutional court;*
- *appeals may be heard by an electoral commission... the commissions are highly specialised whereas the courts tend to be less experienced with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.”*

10.30 The Code further emphasises the importance of keeping the time limits to lodge appeals and issue rulings as short as possible, keeping the procedure simple, eliminating formalism to “avoid decisions of

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<sup>475</sup> IDEA, *International Electoral Standards: Guidelines for reviewing the legal framework of elections*, <[http://www.idea.int/publications/ies/upload/electoral\\_guidelines-2.pdf](http://www.idea.int/publications/ies/upload/electoral_guidelines-2.pdf)>, at 93-94.

inadmissibility”, granting wide standing, clearly specifying the jurisdiction of different courts/tribunals and the appeal powers.<sup>476</sup>

10.31 Finally, the third international body regulating the resolution of election disputes is the Office for Democratic Institutions and Human Rights (*hereinafter* “ODIHR”), the specialist institution in the Organisation for Security and Cooperation in Europe dealing with election matters and election observations. In its *Resolving Election Disputes* report, the ODIHR makes the following observations with respect to the prompt resolution of disputes:

*“Considering that the conduct of an election requires prompt decisions and actions within a pre-determined timeframe, the procedures governing election disputes should differ from those provided for general civil disputes. This could be reflected in shorter deadlines and a single appeal process, which can be justified so long as sufficient time is provided to file complaints and appeals... For each phase or facet of the electoral process (such as voter registration or the validity of the candidatures), the electoral law should expressly and systematically set deadlines for filing complaints and appeals by which either the courts or the electoral bodies must reach a decision.”*

10.32 ODIHR lays down a time period of two months to determine all complaints and appeals because of its emphasis on ensuring that election outcomes are not delayed and recognises the ability to challenge election outcomes as an arguably integral part of the right to free elections under Article 3 of the First Protocol to the ECHR.<sup>477</sup> The ODIHR in addition delineates certain general principles along the lines articulated above.

10.33 Apart from these international principles, it is instructive to look at the system in a similar parliamentary democracy, namely the United Kingdom. Election disputes in the UK are resolved by an election petition process before an election court, which comprises two judges of the Queen’s Bench Division, who are on rota for the trial of parliamentary election petitions. The election court has the same jurisdiction, power and authority as the High Court; it conducts a full trial, including determining the prevalence of corrupt practices, concluding with a certified determination to the Speaker of the

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<sup>476</sup> European Commission for Democracy through Law, *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, Adopted by the Venice Commission at its 52<sup>nd</sup> Session, October 2002, CDL-AD(2002)023rev-e, at 29-31 <<http://www.venice.coe.int/webforms/documents/CDL-AD%282002%29023rev-e.aspx>>.

<sup>477</sup> ODIHR, *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Monitoring System*, OSCE, (2000), <<http://www.osce.org/odihr/elections/17567?download=true>> at 9-13.

House of Commons.<sup>478</sup> The House of Commons is required to give effect to the election court's decision.

10.34 The procedure for challenging an election in the UK differs from India in the following significant aspects:<sup>479</sup>

- *“The election court is not a “standing” court or a division of the High Court permanently in existence. Instead it is a temporary court (usually) constituted in the constituency where the particular election was conducted,<sup>480</sup> and once it has concluded its task of deciding the petition, the election court cannot revisit or add to its decision subsequently.<sup>481</sup>*
- *The returning officer is deemed to be a respondent to the election petition if the administration of the election is under question, although they are not allowed to bring a petition.<sup>482</sup>*
- *The Senior Master of the Queen’s Bench Division fixes security for costs, although usually the initial cost of bringing a parliamentary election petition is over £5,000.<sup>483</sup>*
- *The election petition must be filed within 21 days of the date of return, although there is “limited power to extend [this] time” period.<sup>484</sup> Similar to India, courts have regarded compliance with time limits, formal requirements and security for costs as “mandatory”, with no discretion to extend time (under the Civil Procedure Rules) or relax the requirements even under exceptional circumstances.<sup>485</sup> Nevertheless, in a case concerning the extension of time under the Election Petition Rules (instead of the 1983 RPA), the High Court granted the same citing the disproportionate relation of mandatory time limits to the legitimate aim of securing speedy redress of election disputes.<sup>486</sup>*

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<sup>478</sup> UK Law Commission, *Electoral Law in the United Kingdom*, SCOPING CONSULTATION PAPER, (June 2012), at para 4.8, (*hereinafter* “LCI UK”), <[http://lawcommission.justice.gov.uk/docs/electoral\\_law\\_scoping\\_consultation.pdf](http://lawcommission.justice.gov.uk/docs/electoral_law_scoping_consultation.pdf)>.

<sup>479</sup> *Ibid.* at chapter 4.

<sup>480</sup> Section 123(3) of the UK Representation of Peoples Act, 1983 (*hereinafter* “UK RPA”).

<sup>481</sup> *R v Cripps ex parte Muldoon*, [1984] QB 686

<sup>482</sup> The Electoral Commission, *Changing Elections in the UK*, September 2012, at 5 (*hereinafter* “EC UK”), <[http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0010/150499/Challenging-elections-in-the-UK.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/150499/Challenging-elections-in-the-UK.pdf)>.

<sup>483</sup> Rule 4 of the Election Petition Rules 1960; Section 136, UK RPA. See also LCI UK, *supra* note 478, at paras 4.32 and 4.33.

<sup>484</sup> Section 122, UK RPA. Also see LCI UK, *supra* note 480, at para 4.33.

<sup>485</sup> *Williams v The Mayor of Tenby*, (1879-80) LR 5 CPD 135; *Absalom v Gillett*, [1995] 1 WLR 128 at p 128; *Ahmed v Kennedy*, [2003] 1 WLR 1820 at [23]. See also LCI UK, *supra* note 478, at para 4.35.

<sup>486</sup> *Miller v Bull*, [2009] EWHC 2640 (QB), [43], [68]-[82], [92]-[94].

- *No appeal can be filed on a question of fact, although questions of law can be appealed via a “special case” to the High Court.<sup>487</sup> A judicial review is also available for any error in law.<sup>488</sup>*
- *The election court has a mixture of inquisitorial (it can call and examine witnesses unilaterally) and quasi-criminal (the role of the Director of Public Prosecutions and the court’s duty to report corrupt or illegal practices) characteristics.”*

10.35 In a bid to simply and expedite the process of challenging the electoral process or alleging that candidates committed electoral offences, which can take up to two years to decide,<sup>489</sup> the UK Election Commission assessed the election challenge procedure on two grounds – accessibility and transparency; and the proceedings – promptness, sanctions, and appeal. Along with the Law Commission, it has made the following recommendations:

*On accessibility and transparency,<sup>490</sup>*

- *Locus standi* should be granted widely to facilitate the challenge of election outcomes and the UK RPA, 1983 should be amended to clarify the grounds of challenge and the scope of the election court’s jurisdiction.<sup>491</sup>
- Challenge procedures should be simplified and a formalistic approach, rendering election petitions inadmissible for procedural errors, should be avoided.
- The cost of challenging an election should be none, or should be kept to a minimum to prevent deterring citizens from filing election petitions.
- A clear, coherent, consistent, and uniform body of law across different elections should govern the resolution of election disputes.
- The challenge process should be transparent and easy to understand.
- Citing the Election Commission’s call for simpler and more accessible process of challenging elections, the Law Commission has criticised the “*strict formality and general complexity of election petitions [that] constitute a high bar to access to the courts.*” It has further suggested that petitions should only be filed if they affect the outcome of the election.<sup>492</sup>

*The proceedings – promptness, sanctions, and appeal<sup>493</sup>*

<sup>487</sup> Sections 144, 146(4), UK RPA.

<sup>488</sup> *R (Woolas) v The Parliamentary Election Court*, [2010] EWHC 3169 (Admin).

<sup>489</sup> EC UK, *supra* note 482, at 5.

<sup>490</sup> *Ibid.*, at 12.

<sup>491</sup> *Ibid.*, at 4,12. See also LCI UK, *supra* note 478, at para 4.30.

<sup>492</sup> *Ibid.*, at para 4.39.

<sup>493</sup> EC UK, *supra* note 482, at 12-13.



- A decision on the challenge should ideally be given within two months, subject to exceptional circumstances.
- In the event of a successful challenge, appropriate sanctions such as annulment of election results and holding fresh elections should be permissibly authorised.
- Instead of the current provision only permitting the filing of a judicial review, the electoral law should provide a statutory right to appeal to a body capable of reviewing and exercising final jurisdiction in the matter. The appeal should be decided promptly.
- There should be a clear demarcation of the jurisdiction of the courts based on the type of case being heard.

10.36 In the United States, the system is vastly different, and contested election and recount rules vary by States, election types, criteria and procedures such as standing, procedures, grounds, and security deposits.<sup>494</sup> Further, Article I, Section 5 of the US Constitution states that that each House shall be the judge of its own elections, returns, and qualifications of members. Thus, the House is entitled to judge contested elections involving its seats, and is not bound by agreement of the parties or decisions of state tribunals, with its determination as to the right to the seat being final and non-justiciable.<sup>495</sup> At the federal level, election disputes are governed by the Federal Contested Elections Act, 1969, 2 USC §§ 381 that lays down the procedure by which defeated candidates may have their claim to the seat be adjudicated by the House.

## **F. Recommendations**

10.37 Based on the aforesaid discussion, the Law Commission proposes the following amendments to the RPA:

### **(i) Section 79**

At the end of sub-clause (e), after the words “has been held;”, add the following words “wherever applicable, a reference to the High Court in this Part shall also be deemed to include a reference to the ‘election bench’ designated by the Chief Justice of the relevant High Court in accordance with the procedure prescribed by this Part;”

<sup>494</sup> National Clearinghouse on Election Administration, *Contested Election and Recounts*, (1990), <<http://www.eac.gov/assets/1/Documents/Contested%20Elections%20&%20Recounts%201.pdf>> at iii, 5.

<sup>495</sup> *Roudebush v Hartke*, 405 US 15 (1972); GPO, *Election Contests and Disputes*, <<http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-104/pdf/GPO-HPRACTICE-104-23.pdf>> at 460.

**(ii) Section 80A**

- In sub-section (2) after the words “single Judge of the High Court”, add the words “, designated as an election bench,”.
- Delete the existing sub-section (3) and replace it with the following sub-section and explanation:

“(3) Where the High Court functions in more than one State, or where the High Court has more than one bench, the election petition shall be filed before the Principal Seat of the relevant High Court.

*Explanation* – The High Court in its discretion may, in the interests of justice or convenience, try an election petition, wholly or partly, at the bench or place other than the Principal Seat of the High Court.”

**(iii) Section 82:**

- Delete the word “and” present after the semi-colon at the end of sub-clause (a).
- After sub-clause (a), insert proviso with the words, “Provided that in cases where the petitioner makes an additional declaration that he himself or any candidate has been duly elected, no contesting candidates who have lost their security deposit shall be joined by the petitioner as respondents to his petition;”
- Add the word “and” at the end of the end of the newly added proviso to sub-clause (a) after the semi-colon.
- In sub-clause (b), at the beginning, before the words “any other candidate”, add the following words, “Notwithstanding anything contained in sub-clause (a),”

**(iv) Section 86**

- In sub-section (1), after the words “section 82”, delete “or section 117”.
- In sub-section (2), delete the word “one of the” appearing after “referred to the judge or”; and delete the word “assigned” appearing after “has or have been” and insert the word “designated” in its place; and after the words “by the Chief Justice”, add the words “as the election bench”.
- After sub-section (2), add sub-section (2A) with the following words:

“(2A)(1) There shall be one or more election benches, comprising of one or more judges, as designated by the Chief Justice of the High Court under Section 80A(2), which shall only be dealing with election petitions presented in accordance with the provisions of this Part.

(2) The trial of an election petition shall be continued from day to day until its conclusion, and the election bench shall not grant any adjournments unless sufficient cause is made out and may impose

costs, including exemplary costs, on the party seeking the adjournment.

(3) Every election petition shall be tried as expeditiously as possible and trial shall be concluded within six months from the date on which the election petition is presented to the High Court for trial.

*Provided* that if the trial is not concluded within six months, the designated election bench shall, for reasons to be recorded in writing, explain the cause for delay in a report to the Chief Justice of the High Court.

(4) The respondent(s) shall file the written statement within forty-five days from the date of service of summons.

*Provided* that if the election bench is satisfied that the respondent(s) were prevented by sufficient cause from filing the written statement within the said period of forty-five days, it may entertain the written statement within a further period of fifteen days, but not thereafter.

*Provided further* that on expiry of such fifteen-day period, the respondent(s) shall forfeit the right to file the written statement and the election bench shall not allow the written statement to be taken on record thereafter.”

- In sub-section (3), delete the words “Judge who” appearing after “referred for trial to the same” and replace it with “election bench that” instead; and delete the word “his” appearing before “discretion” and insert the word “its” in its place.
- Delete entire sub-section (6) since it has already been incorporated in sub-section (2A)(2).
- Delete entire sub-section (7) since it has already been incorporated in sub-section (2A)(3).

**(v) Section 98**

- In the section, before the words “High Court”, add the words “election bench of the”.
- After sub-section (c), insert the following proviso, “Provided that such order of the election bench shall be made within ninety-days from the conclusion of arguments.”

**(vi) Inserting a new Section 98A**

After Section 98 of the RPA, insert a new section, Section 98A titled “Collection and disclosure of data by the High Court” in the following words:

**“98A. Collection and disclosure of data by the High Court:** (1) Complete information regarding the number of election petitions filed and pending, the status of each petition, the names of the parties, and designated election bench shall be maintained and constantly updated by each High Court on its website.

(2) The Election Commission shall prepare an annual report compiling the information mentioned in sub-section (1) from all the High Courts, and shall publish the said information annually on its website.”

**(vii)      Section 99**

- In sub-section (1), before the words “High Court”, insert the words “election bench of the” instead.
- In the proviso to sub-section (1), in sub-clauses (a) and (b) both, before the words “the High Court”, insert the words “the election bench of” instead.

**(viii)     Section 100**

- In sub-section (1), before the words “the High Court is of opinion”, add the words “the election bench of”; and in sub-clause (iv) of sub-clause (d) of sub-section (1) before the words “the High Court shall declare”, add the words “the election bench of”.
- In sub-section (2), after the words, “If in the opinion of”, add the words “the election bench of”; and in sub-clause (d) of sub-section (2) before the words “the High Court may decide that”, add the words “the election bench of”.

**(ix)        Section 102**

In sub-section (b), before the words “the High Court shall decide between”, add the words “the election bench of”.

**(x)         Section 109**

In sub-section (1), after the words “only by leave of”, add the words “the election bench of”.

**(xi)        Section 112**

- In sub-section (2), after the words “under sub-section (1)”, add the following words, “the election bench of”.

- In sub-section (3), after the words, “to continue the proceedings upon such terms as”, add the words “the election bench of”.

**(xii)      Section 116A**

- In sub-section (1), delete the words “(whether of law or fact)” appearing before “from every order” and insert the words “of law” instead; and after the words “from every order made by”, delete “a” and insert the words “the election bench of the” instead.
- In sub-section (2), before the words “the High Court under”, add the words “the election bench of”.
- Delete the entire proviso to sub-section (2), which starts with the words “Provided that the Supreme Court may”. Instead add the following proviso after sub-section (2): “Provided that if the Court is satisfied that the petitioner was prevented by sufficient cause from filing an appeal before the Supreme Court within the said period of thirty days it may entertain the petition within a further period of thirty days, but not thereafter.”
- Add a new sub-section (3) with the following words “Every appeal under this Chapter shall be tried as expeditiously as possible and every endeavour shall be made to conclude the appeal within three` months from the date on which the appeal is presented to the Supreme Court for hearing.”

**(xiii)      Section 116B**

- In sub-section (1), after the words “application may be made to, add the following words, “the election bench of”; and after the words “time allowed for appealing therefrom and”, add the words “the election bench of”; and after the words “application for stay shall be made to”, add “the election bench of”.
- In sub-section (3), after the words, “operation of an order is stayed by”, add the words “the election bench of”.

**(xiv)      Section 117**

- In sub-section (1), delete the words “two thousand” appearing after the words “a sum of” and insert the words “ten thousand” instead.
- After the end of sub-section (1) add the following proviso: “Provided that if the election bench of the High Court is satisfied that the petitioner was prevented by sufficient cause from depositing the said amount of ten thousand rupees, it may grant an extension of such time

as it deems reasonable and dismiss the petition if the amount is not deposited within the specified extended period.”

- In sub-section (2), after the words, “the trial of an election petition,”, add the words “the election bench of”.

**(xv)      Section 119**

After the words, “costs shall be at the discretion of”, add the words “the election bench of”.

## **CHAPTER XI**

### **NOTA AND THE RIGHT TO REJECT**

#### **A. History and Context Leading Up to the Supreme Court's Decision in the *NOTA* Case**

11.1 The proposal to introduce negative voting to reject all the candidates if voters found them unsuitable was first discussed by the Law Commission in its 170<sup>th</sup> Report in 1999, as part of its “alternative method of election” where candidates would only be declared elected if they obtained 50%+1 of all the valid votes cast. Although agreeable with the 50%+1 idea, on which negative voting was predicated,<sup>496</sup> the Commission citing practical difficulties did not issue any final recommendations on the topic of negative voting.

11.2 The ECI supported the similar introduction of a negative vote, first in 2001, under James Lyngdoh as the CEC, and then in 2004 under T.S. Krishnamurthy, in its proposed electoral reforms report. The ECI was concerned that the introduction of EVMs and the implementation of Rule 49O of the Election Rules had made it impossible to protect the secrecy of voting for those who wanted to abstain. Consequently, they proposed a legislative amendment to Rules 22 and 49B of the Election Rules to introduce “NOTA” as an option.<sup>497</sup> The Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010 also favoured the introduction of negative voting, unlike the NCRWC that found it either “impracticable or unnecessary.”<sup>498</sup>

11.3 Given the inaction on the government's part, the People's Union for Civil Liberties filed a PIL on this issue in 2004. In 2013 thereafter, the Supreme Court struck down Rules 41(2) &(3) and 49O of the Election Rules as being *ultra vires* section 128 of the RPA and Article 19(1)(a) of the Constitution to the extent they violated the secrecy of voting.<sup>499</sup> Citing section 128, RPA and Rules 39(1), 41, 49M and 49O of the Election Rules, the Court

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<sup>496</sup> “The requirement of 50%+1 of the vote can be implemented without implementing the idea of negative vote simultaneously, though the idea of negative vote, as explained in the working paper, cannot be implemented without implementing the idea of 50%+1 vote.” LCI, 170<sup>th</sup> Report, *supra* note 108, at para 9.29.

<sup>497</sup> ECI 2004 Reforms, *supra* note 203, at 9; ECI *Important Electoral Reforms Proposed by the ECI*, <[http://eci.nic.in/eci\\_main/electoral\\_ref.pdf](http://eci.nic.in/eci_main/electoral_ref.pdf)>, at 4.

<sup>498</sup> Background paper, *supra* note 230, at para 4.3 NCRWC Report, *supra* note 13, at para 4.7.2.

<sup>499</sup> The Court in *People's Union of Civil Liberties v Union of India*, (2013) 10 SCC 1, [34] observed “Therefore, secrecy is an essential feature of the “free and fair elections” and Rule 49-O undoubtedly violates that requirement”

noted that the “*secrecy of casting vote is duly recognised and is necessary for strengthening democracy*” to maintain the purity of elections.<sup>500</sup> Consequently, given that the right to vote and the right not to vote had been statutorily recognised, the Court held that secrecy had to be maintained regardless of whether voters decide to cast or not cast their votes. The Court also relied on international principles governing the right to secrecy as an integral part of voting and free elections under Article 21(3) of the Universal Declaration of Human Rights and Article 25(b) of the ICCPR. It therefore ruled that voters should have the option of rejecting all candidates who were standing for elections in their constituency and directed the ECI to include the option of NOTA in all Electronic Voting Machines.

11.4 The premise of the Supreme Court’s decision was that secrecy of voting is crucial to maintain the purity of the electoral system. Consequently, introducing NOTA, by guaranteeing the secrecy in casting a negative or neutral vote, would increase public participation in the electoral process, which is fundamental to the “strength of democracy.” Given that democracy is “all about choice” and voting constitutes its very “essence”, non-participation in the election can cause “frustration and disinterest”. Thus, the apex Court opined that NOTA would empower the people, thereby accelerating effective political participation, since people could abstain and register their discontent (with the low quality of candidates) without fear of reprisal; simultaneously, it would foster the purity of the election process by eventually compelling parties to field better candidates, thereby improving the current situation.

11.5 However, as former CEC, S.Y. Qureshi points out, NOTA is not the same as the right to reject. He gives an example where even if there are 99 votes cast in favour of NOTA, out of a total 100, the candidate who got only vote will be declared the winner, for having obtained the most number of valid votes.<sup>501</sup> The ECI issued a similar clarification that no re-elections will be called based on a cumulative reading of Rule 64(a) of the Election Rules and sections 53(2) and 65, RPA.<sup>502</sup> This is because the stated reason for ECI’s demanding the introduction of NOTA was apparently to ensure the secrecy to the voter casting a negative vote and to prevent a bogus vote in their place; the right to reject did not figure in their original demands.<sup>503</sup> This is evident in

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<sup>500</sup> PUCL v Union of India, (2013) 10 SCC 1, [26]. The Court relied on its previous decisions in Kuldeep Nayar v Union of India, (2006) 7 SCC 1 and S. Raghbir Singh Gill v S. Gurcharan Singh Tohra, (1980) Supp SCC 53.

<sup>501</sup> S.Y. Qureshi, *Pressure of a Button*, INDIAN EXPRESS, 3<sup>rd</sup> October 2013, <<http://archive.indianexpress.com/news/pressure-of-a-button/1177434/>>.

<sup>502</sup> ECI, *Supreme Court’s judgment for “None of the Above” option on EVM– clarification*, No. ECI/PN/48/2013 dated 28.10.2013, <[http://eci.nic.in/eci\\_main1/current/PN\\_28102013.pdf](http://eci.nic.in/eci_main1/current/PN_28102013.pdf)>.

<sup>503</sup> See letter of ECI dated 10<sup>th</sup> December 2001 to the Secretary, Minister of Law and Justice; Qureshi, *supra* note 501.



the Court's judgment – in terms of its emphasis on secrecy described above and the lack of any discussion on the right to reject, which was not prayed for by PUCL. Instead, the Court focused on how it hoped that NOTA would eventually pressurise parties to field sound candidates.

11.6 While some such as Mr. KK Venugopal and ADR supported the introduction of NOTA and pushed for extending it to include the right to reject, others such as Mr. Rajeev Dhavan, Mr. SY Qureshi, and Former Secretary-General of the Lok Sabha, Subhash Kashyap believed that the Court was too optimistic in thinking that NOTA would lead to cleaner politics.<sup>504</sup> In any event, in the 2014 Lok Sabha Elections, 1.1% of the total votes polled, or just less than 60 lakh votes were cast in favour of NOTA, although NOTA was not the most favoured option in any constituency.<sup>505</sup>

## B. Comparative Practices

11.7 With the exception of Columbia, very few countries accept the right to reject principle. For instance, Nevada in the US<sup>506</sup> and Manitoba, Ontario, Alberta, Nova Scotia and Yukon in Canada although recognising a NOTA-like option, do not let it influence the election results by counting the votes separately<sup>507</sup> or treating them as spoilt ballots.<sup>508</sup> In fact, in the 2014 gubernatorial elections in Nevada, the Democratic nominee Robert Goodman was elected in his primary, despite polling second after their “none of these candidates” option.<sup>509</sup>

11.8 In Europe, the position is not different. Thus, Spanish law permits voters to validly submit envelopes without ballot papers, which are counted and declared as “blank votes”<sup>510</sup> or “*votos en blanco*”. Although they

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<sup>504</sup> Manjari Katju, *The 'None of the Above' Option*, 48(42) ECONOMIC AND POLITICAL WEEKLY 10, 12 (2013).

<sup>505</sup> Bharti Jain, “*Election Results: NOTA Garner 1.1% of the Country's Vote Share*”, TIMES OF INDIA, 17<sup>th</sup> May 2014, <<http://timesofindia.indiatimes.com/news/Election-results-NOTA-garners-1-1-of-countrys-total-vote-share/articleshow/35222378.cms>>; *Election Results 2014: Close to 60 Lakh Voters Chose 'None of The Above' This Time*, NDTV, 17<sup>th</sup> May 2014, <<http://www.ndtv.com/elections/article/election-2014/election-results-2014-close-to-60-lakh-voters-chose-none-of-the-above-this-time-525984>>.

<sup>506</sup> NRS 293.269(2), Title 24, Chapter 293 of Nevada Revised Statutes titled “Elections” permitting the NOTC option, although only “*votes cast for named candidates shall be counted in determining nomination or election.*”

<sup>507</sup> Section 117(2) of the Elections Act, Manitoba, 2006 allowing voters to secretly write “declined”; Section 53 of the Ontario Elections Act, 1990, Section 107.1(1) of the Election Act, Alberta, 2000 and Sections 232-233, Yukon Elections Act 2002 providing no secrecy while allowing voters to “decline” to vote.

<sup>508</sup> Section 118 of the Nova Scotia Elections Act 2011 treats a declined vote as a cancelled vote.

<sup>509</sup> Sean Sullivan, *Nevada Democrats pick 'None of these candidates' for Governor*, WASHINGTON POST, 11<sup>th</sup> July 2014, <<http://www.washingtonpost.com/blogs/post-politics/wp/2014/06/11/nevada-democrats-pick-none-of-these-candidates-for-governor/>>

<sup>510</sup> Sections 96 and 97 of the Representation of the People Institutional Act, 2011.

are considered valid in the allocation of seats in Spain's proportional representation system, even a majority of blank votes do not necessitate re-elections. Similarly, in France and Italy, a blank vote is recorded separately from a void vote, although there is no official space on the ballot.<sup>511</sup>

11.9 In Sweden, blank ballot papers permit voters to register their protest secretly. Although the votes are considered invalid, they are counted and reported separately from other forms of spoilt or invalid votes. Thus, there is no concept of right to reject. In 2014, Russia re-introduced the "against all" option on the ballot.<sup>512</sup>

11.10 Moving on to South America, Brazil with its compulsory voting provisions recognises both, blank or white votes (*voto em branco*) that are conscious sign of protest, and void or null votes (*voto nulo*) that are spoilt. However, neither is considered valid or counted for election results' purposes.<sup>513</sup> Article 77(2) of the Brazilian Constitution stipulates that only candidates winning a majority of *valid* votes, excluding blank and invalid votes, will be elected. The Superior Electoral Court in Brazil has clarified that, "*despite an ongoing myth, even in the event that half of votes cast are deemed invalid, such circumstances cannot render an election null and void.*"<sup>514</sup>

11.11 Columbia is an exception to the above trend, wherein if the blank vote gets a majority (50%+1), the election needs to be repeated (only once more) and the earlier candidates in the invalidated election cannot stand again.<sup>515</sup>

## C. Recommendations

11.12 Given the underlying premise of the Supreme Court's decision in its 2013 NOTA judgment and the ECI's demand for introducing NOTA<sup>516</sup> was

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<sup>511</sup> Chiara Superti, *Vanguard of the Discontents: Blank and Null Voting as a Sophisticated Protest*, Dissertation Paper at Harvard, <<http://scholar.harvard.edu/files/csuperti/files/supertibnvpaper.pdf>>.

<sup>512</sup> Tatiana Stanovaya, 'Against All' and for the Kremlin?, INSTITUTE OF MODERN RUSSIA, 21<sup>st</sup> January 2014, <<http://imrussia.org/en/analysis/politics/646-against-all-and-for-the-kremlin>>.

<sup>513</sup> Articles 2 and 5 of the Election Law 9504 of 1997; Electoral Code, Law No. 4737 of 1965.

<sup>514</sup> Superior Electoral Court, 2014 Elections: elections not to be declared null and void even if more than 50% of votes cast are deemed invalid, Brazil, 28<sup>th</sup> August 2014, <<http://english.tse.jus.br/noticias-tse-en/2014/Agosto/2014-elections-elections-not-to-be-declared-null-and-void-even-if-more-than-50-of-votes-cast-are-deemed-invalid>>

<sup>515</sup> Article 9 of the of Legislative Act 01 of 2009 states "The voting must be repeated just one more time in order to elect [most democratically elected public officials] when blank votes constitute the majority of all of the valid votes." See also the government's FAQs at <<http://www.registraduria.gov.co/-Voto-en-blanco-.html>>.

<sup>516</sup> As former Chief Election Commissioner S.Y. Qureshi notes, "The EC's reason for demanding the option was not to institute the right to reject. It was to ensure the secrecy of

protecting the secrecy of the voter who wanted to express dissent, the justificatory rationale for introducing the right to reject has not been made out.

11.13 Good governance, which is purportedly the motivating factor behind the right to reject, can be successfully achieved without causing the complications introducing the right to reject will entail. Efforts should instead be made to implement the already existing provisions on decriminalising politics and increasing political awareness; and introduce other provisions such as inner party transparency and election finance reform.

11.14 The preference of other alternatives to improve the quality of elected representatives instead of favouring the right to reject can be seen from the above comparative practices, which show that Colombia is one of the only countries that has such a provision. Most countries with NOTA-like provisions only count and declare the number of such votes, instead of factoring it in the final election results.

11.15 For all these reasons, the Law Commission currently rejects the extension of the NOTA principle to introduce a right to reject the candidate and invalidate the election in cases where a majority of the votes have been polled in favour of the NOTA option. However, the issue might be reconsidered again in the future.

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the voter wanting to make a choice that amounts to abstention, and also to ensure that nobody casts a bogus vote in his place.” Qureshi, *supra* note 501.

## **CHAPTER XII**

### **RIGHT TO RECALL**

#### **A. History and Context**

12.1 The right to recall (*hereinafter* “RTR”) is one of the facets of direct democracy that refers to a process whereby an electorate is able to recall an elected representative for under-performance, corruption, or mismanagement while still in office, by filing a petition that triggers a re-election usually after a particular percentage of people sign the petition.

12.2 Currently, provisions for RTR are prescribed for local elections in Chhattisgarh,<sup>517</sup> Madhya Pradesh, Rajasthan, and Maharashtra and there are demands for introducing this system at the state and parliamentary level. However, proponents of RTR have not detailed the governing procedural framework, namely the percentage of electors needed to sign the petition; the grounds for initiating recall, or indeed whether any grounds are necessary; the minimum period, if any, after which recall can be initiated; nor specified the authority competent to decide whether to commence the recall based on the satisfaction of certain pre-conditions.<sup>518</sup> Other questions such as determining whether voters who did not vote in the original election can initiate a recall, whether there can be repeated recall petitions, and whether the recall representative is disqualified from standing in the bye-elections from that or any constituency also require consensus.<sup>519</sup>

12.3 The NCRWC in its 2001 report did not favour the introduction of RTR finding it either “impracticable or unnecessary.”<sup>520</sup>

#### **B. Analysing the Arguments For and Against the RTR**

12.4 The arguments supporting the RTR primarily emphasise the importance of direct democracy in holding elected representatives to account by requiring them to seek post-election approval of their electorates. By providing a tool to dissatisfied citizens to rectify their mistake through “de-election” of their representatives, RTR serves to deter their under-performance, mis-management, corruption, or apathy. Supporters also point out that currently, electoral sanction in the forthcoming elections (often five

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<sup>517</sup> Section 47 of the Chhattisgarh Nagar Palika Act of 1961 provides for the right to recall of elected presidents for non-performance. The recall process is initiated when  $\frac{3}{4}$  of the total elected representatives within the urban bodies write to the district collector demanding recall.

<sup>518</sup> Mendiratta, *supra* note 161, at 1174.

<sup>519</sup> *Id.*

<sup>520</sup> NCRWC Report, *supra* note 13, at para 4.7.2.

years away) is the only means of registering dissatisfaction, and given the absence of any continuing monitoring or accountability mechanism, RTR is an important step forward. Simply put, the damage to democratic institutions should be curtailed through democratic mechanisms and the RTR provides a “democratic disincentive” for poor performance and abuse of office.<sup>521</sup>

12.5 Another strand of the argument in favour of RTR is the consequent improvement in public trust in governance, insofar as many politicians will deliver good performances and reduce instances of corruption under threat of recall. Introducing the RTR may also deter candidates from spending excess amounts during their campaign, for a fear of being recalled. An incidental benefit is that it will result in voters continually monitoring and assessing political performance in a bid to determine whether they want to exercise their RTR.<sup>522</sup>

12.6 Against these arguments, opponents of RTR refer to various principled and practical objections. First, RTR can lead to an “excess of democracy”,<sup>523</sup> wherein the threat of recall undermines the independence of the elected representatives – they will either pander to the majoritarian preferences and prejudices at the expense of safeguarding minority interests in passing populist measures. Alternatively, they will resort to a “clientelist distribution of patronage”, whereby the elected representatives will use fear or favour to ensure that they are not recalled.<sup>524</sup> In both cases, short-term gains and instant results will be preferred over long-term, unpopular although beneficial policies. The legislative wisdom in enshrining a five-year Lok Sabha or Vidhan Sabha term was premised on the need for time to draft and implement good policies and to ensure stability. RTR threatens to challenge that inasmuch as it incentivises representatives to focus on local, constituency issues instead of larger public interest issues.<sup>525</sup> As former Attorney General of India, Mr. Soli Sorabjee points out, recall “*subjects the elected member to the supervision and control of his constituency. That would impair the free and independent discharge of his function*”<sup>526</sup>

12.7 Relatedly, as former CEC, S.Y. Qureshi notes the RTR can lead to greater instability and chaos, with various attempts being made by vested interests (either other political parties or opponents within the same party) to trigger the RTR on the smallest of issues and as soon as will be

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<sup>521</sup> Vinod Bhanu, *Right to Recall Legislators: The Chhattisgarh Experiment*, 43(4) ECONOMIC AND POLITICAL WEEKLY 15, 16 (2008).

<sup>522</sup> *Ibid.*, at 504.

<sup>523</sup> Sonika Bajpayee, *Right to Recall Elected Representatives*, 6(1) INDIAN L.J. (2013).

<sup>524</sup> Suhas Palshikar, *Why the Right to Recall is Flawed*, INDIAN EXPRESS, 14<sup>th</sup> September 2011, <<http://archive.indianexpress.com/news/why-the-right-to-recall-is-flawed/846143/>>.

<sup>525</sup> *Ibid.*

<sup>526</sup> Soli Sorabjee, *It's a Tightrope Walk*, HINDUSTAN TIMES, 2<sup>nd</sup> September 2011, <<http://www.hindustantimes.com/columnsothers/it-s-a-tightrope-walk/article1-740561.aspx>>

permissible.<sup>527</sup> Given this considerable uncertainty and tool for (mis)use by losing candidates, legislators will shift their focus from policy formulation to saving their constituency seat at all costs.

12.8 Further, as Mr. Sorabjee observes, recall is fraught with serious consequences for the representative being recalled – for instance, will (and should) the MP/MLA be given an opportunity to be heard, in consonance with the principles of natural justice, and to respond to the allegations in the recall petition. Or which body should be empowered to determine whether the alleged grounds in the petition, assuming that the RTR law provides for the specification of such grounds, are justified or not – the civil courts, the ECI or any other authority?<sup>528</sup>

12.9 More importantly, debates on the RTR ignore the larger issues of political reform such as decriminalisation, curtailing money in politics, internal democracy, and increased public awareness necessary to improve the quality of representation. Progress in these areas may eventually make the demand for RTR redundant.

12.10 The biggest practical challenge in implementing RTR has been articulated by the Mr. S.Y. Qureshi who points out that populated state and parliamentary constituencies in India (unlike in Switzerland or even the US) will result in a large number of signatures required to initiate a recall petition, going into lakhs. Not only will the ECI have to verify the authenticity of every single signature to prevent fraud, it will also have to determine whether the signatures are genuine and consensual or obtained via fraud or coercion.<sup>529</sup> Thus, introducing the RTR might have unintended effects in increasing corruption and the use of money and influence if representatives liable to be recalled try and ensure that a recall petition is not initiated against them.

12.11 Moreover, there is still the question of implementation and the expenditure of time and monetary resources cost in conducting regular bye-elections, supplemented by the fear of election fatigue.<sup>530</sup>

12.12 On the possibility of misuse, there is a fear that the RTR will be used by dominant caste members to harass lower caste elected representatives. Thus, Vinod Bhanu points to the Chhattisgarh experience where one of the recalled presidents was an independent candidate, who claimed that the BJP and the Congress councillors allied together to initiate the recall process. Bhanu notes that this has to be seen in the larger context of allegations of political bias and misusing the provisions for recall.<sup>531</sup>

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<sup>527</sup> Qureshi, *supra* note 1.

<sup>528</sup> Sorabjee, *supra* note 526.

<sup>529</sup> Qureshi, *supra* note 1.

<sup>530</sup> Qureshi, *supra* note 1; Sorabjee, *supra* note 526.

<sup>531</sup> Bhanu, *supra* note 521, at 16.

Hindustan Times, after surveying the experience in several states, reported some case studies on the functioning of the RTR. Pertinently, it gave the example of Dewangarh, a hamlet in Patiala in Punjab, which was reserved as a Scheduled Caste constituency in 2008. A brick kiln worker, Jaswinder Singh, was elected as the sarpanch, although the majority of the village's residents, who were members of the affluent Jat-Sikh community, did not welcome this. Consequently, during the first half of his five-year term, his other four colleagues – the panchs – did not attend a single panchayat meeting, and thereafter, exercised the RTR to remove Singh (Section 19 of the Punjab Panchayat Act, 1994 permits the panchs to remove a sarpanch after the completion of half the term, by moving a no-confidence motion against him). This was viewed by many as a tool for the influential against the weak and the poor.<sup>532</sup>

12.13 The RTR, as it is usually applied, is especially dangerous and liable to misuse in India that follows the first past the post system, where most winning candidates do not have the support and trust of 50% of their electorate in the first place. The RTR, which (mostly) requires the support of 50% of the electorate to remove the representative, can thus theoretically be used to recall most elected representatives in India. This is because any recall referendum or vote only consists of two options: 'yes' and 'no', or as in Chhattisgarh an occupied and a vacant seat.

## C. Comparative Practices

12.14 In the U.S., 19 states allow the recall of elected state representatives, although there have only been two successful recall gubernatorial attempts – in North Dakota in 1921 and California in 2003.<sup>533</sup> The process varies across states, but broadly requires an application be filed to circulate a recall petition, following which the petition is circulated. The petition has to be signed by a specific number of people within a specified time and then submitted to the election officials for verification of signatures. After that, recall election is held.

12.15 In 11 of the 19 states, any registered voter (regardless of whether they voted in the original election) can initiate the recall process for any reason and no specific grounds for recall are needed. In fact, the National Conference of State Legislatures in the US notes, "*often, the reasons are political.*"<sup>534</sup>

<sup>532</sup> *Right to Recall?*, HINDUSTAN TIMES, 3<sup>rd</sup> September 2011, <<http://www.hindustantimes.com/newdelhi/right-to-recall/article1-741300.aspx>>.

<sup>533</sup> National Conference of State Legislatures, *Recall of State Officials*, 11<sup>th</sup> September 2013, <<http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx>>.

<sup>534</sup> *Id.*

12.16 Canada provides for the RTR for members of the Legislative Assembly only in British Columbia *vide* the Recall and Initiative Act 1995. Here, the Chief Electoral Officer is mandated to decide the validity of the signed recall petition, which can be submitted on *any* grounds after 18 months. If the petition meets the requirements of the Act, a bye-election is conducted within 90 days. Pertinently, of the 24 recall applications approved since 1995, only one has succeeded in collecting enough signatures, although it had to be stopped because the concerned MLA resigned. Thus, no bye-election has ever been conducted.<sup>535</sup>

12.17 Switzerland recognises the RTR in six of its 26 cantons, although not at the federal level. The required number of signatures in the recall petition does not seem to be based on a percentage of the electorate and is instead a fixed number, example 1000 in Schaffhausen and 15,000 in Ticino. The last successful recall attempt was in November 2003.<sup>536</sup>

12.18 Venezuela is the only country to have a constitutional RTR, since its introduction into Venezuelan law in 1999 under the new Constitution's Article 72. The RTR can also be applied against the Head of State, and was in fact used against President Hugo Chavez, who survived a recall election with 60% of the vote.<sup>537</sup>

12.19 The UK is the latest country to introduce the RTR through its *Recall of MP's Bill 2014-15* introduced in the House of Commons on 11<sup>th</sup> September 2014, three years after its first draft Bill was introduced in December 2011 as a response to the MP's expense crisis in 2009.<sup>538</sup> The Bill outlines two circumstances that trigger the recall – first, a sentence for less than one year of an MP convicted of an offence (given that any sentence over a year leads to disqualification); and second, when the “*House of Commons orders the suspension of the MP for at least 21 sitting days—or at least 28 calendar days if the motion is not expressed in terms of sitting days.*” The recall petition needs to be signed by 10% of the electorate, following which the seat will be vacated and bye-elections held, where the recalled MP can contest again.

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<sup>535</sup> Elections BC, FAQs, <<http://www.elections.bc.ca/index.php/referenda-recall-initiative/recall/faqs/>>. See also Richard Kelly *et al.*, *Recall Elections*, Parliament and Constitution Centre, UK House of Commons Library, SN/PC/05089, 12<sup>th</sup> September 2014, at 8.

<sup>536</sup> Kelly, *supra* note 535, at 7.

<sup>537</sup> *Ibid.*, at 8. See also, *Direct Democracy*, THE ACE PROJECT: THE ELECTORAL KNOWLEDGE NETWORK, <<http://aceproject.org/ace-en/focus/direct-democracy/recall/>>.

<sup>538</sup> Kelly, *supra* note 535, at 4-5.



## **D. Recommendations**

12.20 For all the reasons described above, the Law Commission is not in favour of introducing the RTR in any form.

## **CHAPTER XIII**

### **TOTALISER FOR COUNTING OF VOTES**

13.1 In 2008, the ECI *vide* letter dated 21.11.2008 to the Secretary, Ministry of Law and Justice, recommended amending the Election Rules to provide for the use of a totaliser for the counting of votes recorded in EVMs at elections. As per the ECI's suggestion, the results of votes polled in a group of 14 EVMs (hence, in 14 polling stations) would be calculated and announced together, in a change from the current practice of counting votes by each polling station.<sup>539</sup> This is based on technological constraints.

13.2 The underlying rationale behind the ECI's proposal was that the current system revealed the voting trends in each polling station, thus leaving the voters in that vicinity open to harassment, intimidation and post-election victimisation. Prior to the introduction of EVMs, ballot papers could be mixed, wherever it was considered "absolutely necessary" under Rule 59A of the Election Rules in light of "apprehend[ed] intimidation and victimisation of electors" However, EVMs do not permit this. Using a totaliser would increase the secrecy of votes during counting, thus preventing the disclosure of voting patterns and countering fears of intimidation and victimisation.

13.3 A totaliser would also help in situations such as witnessed in the 2014 Lok Sabha elections in Hoshangabad, where an EVM at the Mokelvada polling station in Sohagpur area malfunctioned just minutes before voting was to conclude at 6 pm. A lone voter, who arrived at the polling station at 5:50 pm then had to cast their vote in a newly installed EVM. The ECI issued a clarification that this single vote had to be counted, even if it compromised on the voter's secrecy and instead stated that one way of dealing with such situations in the future is the introduction of a totaliser machine to count the votes recorded on several EVMs contemporaneously.<sup>540</sup>

13.4 Although the ECI's proposal was referred to a Parliamentary Committee in 2009, no action was taken on it. In August 2014, the ECI moved the Law Ministry on this issue again.<sup>541</sup> Subsequently in September 2014, the Supreme Court in a PIL in *Yogesh Gupta v ECI*<sup>542</sup> issued directions to the government to issue to clarify why no steps were taken pursuant to the ECI's 2008 proposals. Noting that the issue had been referred to the Law

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<sup>539</sup> ECI Important Electoral Reforms, *supra* note 497, at 5.

<sup>540</sup> Raghvendra Rao, *Lone vote in Hoshangabad EVM to be counted, even if it blows voter's cover*, INDIAN EXPRESS, 14<sup>th</sup> May 2012, <<http://indianexpress.com/article/india/india-others/lone-vote-in-hoshangabad-evm-to-be-counted-even-if-it-blows-voters-cover/99/>>.

<sup>541</sup> Election Commission wants to use 'Totaliser' to enhance vote secrecy, ECONOMIC TIMES, 17<sup>th</sup> August 2014, <[http://articles.economictimes.indiatimes.com/2014-08-17/news/52901387\\_1\\_law-ministry-ballot-paper-secrecy/](http://articles.economictimes.indiatimes.com/2014-08-17/news/52901387_1_law-ministry-ballot-paper-secrecy/)>

<sup>542</sup> WP (Civil) No. 422/2014 order of the Supreme Court on 08.09.2014.

Commission for consideration, the three-judge bench of the Court asked the government what concrete steps it had taken on the ECI's suggestions of using a totaliser to prevent (or reduce) instances of intimidation or victimisation.<sup>543</sup> In its latest order on 16<sup>th</sup> January, the Court records the Government's submission that it would seek the views of the Law Commission, and the submission of an interim report on the issue.

13.5 The ECI's proposal has also been supported in the Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010.<sup>544</sup> Moreover, as the ECI has itself clarified, a "totaliser" has already been developed by EVM manufacturers to connect several control units at a time to indicate the total number of votes polled and recorded in the specified number of polling stations.<sup>545</sup> Thus, administratively it is not difficult to collect information about the number of votes polled by each candidate for a whole group of polling stations, thus hiding the pattern of voting in each individual booth.

13.6 For all these reasons, the Law Commission reiterates and endorses the ECI's suggestion for introducing a totaliser for the counting of votes recorded in EVMs. Similar to the existing Rule 59A, the Commission proposes to amend Rule 66A to empower the ECI to decide when, and in which constituency and polling booths, to employ a totaliser, after taking into consideration the context of the elections and any threats of intimidation or victimisation.

### **Recommendation**

13.7 Thus, in Rule 66A of the Election Rules, 1961, in Rule 56C, the Law Commission recommends that:

After sub-section (2), a new sub-section (2A) may be inserted with the following words:

- "(2A) In the appropriate case, where the Election Commission apprehends intimidation and victimisation of electors in any constituency, and it is of the opinion that the votes recorded in the voting machines should be mixed before counting, it may by notification in the Official Gazette, specify such constituency where the returning officer shall use a totaliser for the counting of votes recorded in a group of electronic voting machines."

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<sup>543</sup> *Can totaliser be used for counting votes, asks SC*, THE HINDU, 10<sup>th</sup> September 2014, <<http://www.thehindu.com/news/national/can-totaliser-be-used-for-counting-votes-asks-supreme-court/article6398304.ece>>.

<sup>544</sup> Background paper, *supra* note 230, at para 6.15.

<sup>545</sup> Electronic Voting Machine, <<http://pib.nic.in/elections2009/volume1/Chap-39.pdf>>.

## **CHAPTER XIV**

### **RESTRICTION ON GOVERNMENT SPONSORED ADVERTISEMENTS**

14.1 Item VII(iv) of the Model Code of Conduct for the Guidance of Political Parties and Candidates proscribes the issuance of advertisements at the cost of public exchequer during election period, for the prospects of the party in power. This is to prevent the Union or State Governments from using public funds to release advertisements purportedly for the information of the public, but with a view to influencing the electorate on the eve of elections. However, the Model Code of Conduct only comes into force from the date of announcement of the elections and all public (government) spending on advertisements prior to that is completely unregulated. The operationalisation of the Model Code of Conduct nevertheless, creates a false dichotomy because the actual announcement of a date for the elections is a technical point – political parties are well aware of the impending elections long before the ECI officially notifies the dates. The party in power is thus uniquely positioned to issue government sponsored advertisements that highlights its achievements, giving it an undue advantage over other parties and candidates.

14.2 Keeping this in mind, in 2004, the ECI recommended a ban on advertisements “in any manner” of the achievements of the incumbent government for six months prior to the date of expiry of the term of the House to prevent the misuse of public funds. Moreover, in cases of premature dissolution, the ECI’s scheme would come into place from the date of dissolution of the House. An exception was provided for “*advertisements/dissemination of information on poverty alleviation and health related scheme.*” Apart from this, the ECI recommended that the name or symbol of the political party should not appear in any banners or hoardings in public places depicting the government’s achievements. The ECI’s proposal found support in the Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010.<sup>546</sup>

14.3 The Law Commission supports and reiterates the general thrust of the ECI’s proposal of regulating and restricting government sponsored advertisements prior to elections to maintain the purity of elections, prevent the use of public money for partisan interests, and ensure that no party or candidate gets an undue advantage over another in the spirit of free and fair

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<sup>546</sup> Background paper, *supra* note 230, at para 6.4.

elections. The six-month period for the proposed ban is premised on the ECI's powers under the proviso to ss. 14(2) and 15(2) of the RPA to issue a notification for the conduct of the general elections to the Lok Sabha or the State Legislative Assembly *within* six months prior to the date of expiration of the Lok Sabha or the Assembly. An amendment in the law will reflect the concerns sought to be tackled in the Model Code of Conduct and will ensure regulation in the period prior to the announcement of the elections, thus improving democracy, human rights and good governance.

14.4 Such an amendment is also consonant with the recently released *Guidelines on Content Regulation of Government Advertising* of a three-member committee comprising Professor N.R. Madhav Menon, former Lok Sabha secretary general T.K. Vishwanathan and present Solicitor General Mr. Ranjit Kumar, and appointed by the Supreme Court to examine the misuse of public funds in government advertisements. The Committee sought to prevent the “arbitrary use” of the taxpayers’ money to project political personalities/governments/parties without attendant public interest, and to promote private interests, by banning or severely restricting government advertisements that glorify political personalities or the ruling party, particularly on the eve of elections. Thus, it recommended that government advertisements be politically neutral and avoid photographs of political leaders, and only if it is essential then the photographs of the Prime Minister/Chief Minister or President/Governor be used. It also endorsed the ECI’s suggestions on the “severe” restrictions on government advertisements six months prior to elections.<sup>547</sup> The guidelines are meant to apply till they are superseded by a validly enacted law, and the Law Commission’s recommendations will help achieve that.

14.5 Further, the exception the advertisements regarding poverty alleviation and health related schemes should not carry any names or photographs of the leaders, in line with the Supreme Court-appointed committee’s guidelines. It is imperative that any such legislative amendment should apply to all forms of print and electronic media and to banners and hoardings in public places.

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<sup>547</sup> *Court Guidelines to govern ads*, THE HINDU, 7<sup>th</sup> October 2014, <<http://www.thehindu.com/news/national/court-guidelines-to-govern-govt-ads/article6476557.ece>>; *Government ads should not project political leaders, panel tells SC*, BUSINESS STANDARD, 8<sup>th</sup> January 2015, <[http://www.business-standard.com/article/news-ians/government-ads-should-not-project-political-leaders-panel-tells-sc-115010801351\\_1.html](http://www.business-standard.com/article/news-ians/government-ads-should-not-project-political-leaders-panel-tells-sc-115010801351_1.html)>; *SC Panel Comes out with Guidelines on Government Advertisements*, INDIAN EXPRESS, 6<sup>th</sup> October 2014, <<http://indianexpress.com/article/india/india-others/sc-panel-comes-out-with-guidelines-on-govt-advertisements/>>.

## **Recommendation**

14.6 For these purposes, the Law Commission recommends the insertion of a new Chapter, Chapter VIIB in Part V of the RPA titled “Restriction on Government Sponsored Advertisements”. It will read as follows:

### **“CHAPTER VIIB: RESTRICTION ON GOVERNMENT SPONSORED ADVERTISEMENTS**

**75B. Restriction on Government Sponsored Advertisements.** – No Central or State government, as the case may be, shall, publish any advertisements of achievements of the Central or State government either in the print media, electronic media, or by way of banners or hoardings in public places for a period of six months prior to the date of expiry of the term of the House of the People or the Legislative Assembly of the concerned State.

*Provided* that the restrictions above shall not apply to the advertisements of achievements of the governments relating to their poverty alleviation programmes or any health related schemes; however, such advertisements shall not carry any symbol of a political party or the names or photographs of any Minister or leader of any political party.”

## **CHAPTER XV**

### **RESTRICTION ON THE NUMBER OF SEATS FROM WHICH A CANDIDATE MAY CONTEST**

15.1 Section 33(7) of the RPA permits a candidate to contest any election (parliamentary, assembly, biennial council, or bye-elections) from up to two constituencies, presumably to accord greater flexibility to candidates and increase their chances of winning a seat. Sub-section (7) was introduced through a 1996 amendment, prior to which there was no bar on the number of constituencies from which a candidate could contest; although the amendment did not explain the rationale for restricting the number to two. However, section 70, RPA stipulates that a candidate can hold only one seat at a time, regardless of whether they have been elected to more than one seat. Thus, if a candidate wins from two seats, section 70 necessitates an unnecessary bye-election at the cost of the exchequer, effort of the ECI, and harassment of the electorate that has to vote again (which might reduced turn out due to election fatigue). Moreover, the cost of conducting a bye-election should not be underestimated. In the 2014 Lok Sabha elections, the ECI estimates that approximately Rs. 10 crore will be spent on each constituency, and bye-elections will probably cost more given the absence of any economies of scale.<sup>548</sup>

15.2 Given that a candidate cannot hold two seats at the same time, the Law Commission agrees with the ECI's 2004 proposal that the RPA should be amended to provide that a person cannot contest from more than one seat at a time.<sup>549</sup> This proposal has also been endorsed by the Goswami Committee in 1990, the 170<sup>th</sup> Law Commission Report in 1999, and the Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010.<sup>550</sup>

15.3 However, the Commission does not endorse the ECI's alternate proposal to require winning candidates to deposit an appropriate amount of money (to the tune of Rs. 5 lakhs for Assembly and Rs. 10 lakhs for Parliamentary elections) being the expenditure for conducting the elections. Such a proposal does not correct the peculiarity in the law – the exercise of conducting bye-elections will still consume the ECI's time and effort;

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<sup>548</sup> *Lok Sabha poll cost jumps 80 times from Rs 10 crore to Rs 846 crore since 1952*, ECONOMIC TIMES, 8<sup>th</sup> April 2014, <[http://articles.economictimes.indiatimes.com/2014-04-08/news/48971103\\_1\\_crore-expenditure-sikkim](http://articles.economictimes.indiatimes.com/2014-04-08/news/48971103_1_crore-expenditure-sikkim)>.

<sup>549</sup> ECI 2004 Reforms, *supra* note 203, at 5.

<sup>550</sup> Goswami Committee Report, *supra* note 113, at 21; LCI 170<sup>th</sup> Report, *supra* note 108, at para 6.1.1; Background paper, *supra* note 230, at para 6.5.

inconvenience voters, who have to go to the polling station again; and most importantly, not serve as a deterrent to candidates.

### **Recommendation**

15.4           The Law Commission thus recommends that in sub-section 7 of section 33:

- In sub-clause (a), delete the words “two Parliamentary constituencies” after the words “from more than” and insert the words “one Parliamentary constituency” instead.
- In sub-clause (b), delete the words “two Assembly constituencies” after “from more than” and insert the words “one Assembly constituency” instead.
- In sub-clause (c), delete the words “two Council constituencies” after the words “from more than” and insert the words “one Council constituency” instead.
- At the end of sub-clause (d), delete the words “two such seats” and insert the words “one such seat” instead.
- In sub-clause (e), delete the words “two such Parliamentary constituencies” appearing after “from more than” and insert the words “one such Parliament constituency” in its place.
- In sub-clause (f), delete the words “two such Assembly constituencies” after “from more than”, and insert “one such Assembly constituency” in its place.
- In sub-clause (g), delete the words “two such seats” appearing after “filling more than” and insert the words “one such seat” in its place.
- In sub-clause (h), delete the words “two such Council constituencies” after “from more than” and add the word “one such Council constituency” in its place.



## **CHAPTER XVI**

### **INDEPENDENT CANDIDATES**

#### **A. Previous Suggestions**

16.1 The question of independent candidates is often connected with the issue of fragmented voting and instability in the electoral system. The 170th Law Commission report dealt with the issue and concluded, “*the time is now ripe for debarring independent candidates from contesting Lok Sabha elections.*” Similarly, the NCRWC recommended the “discouragement” of independent candidates, who are often “dummy” candidates or defectors from their party or those denied party tickets.<sup>551</sup> The rationale for permitting only those with “political standing” to contest was premised on the abysmal performance of independents in the 1998 general elections where, as the Indrajit Gupta Committee Report noted, of the 1900 contesting independent candidates, only 6 (0.65%) won while 885 (47%) lost their deposits.<sup>552</sup>

16.2 The underlying basis for such views stems from the perceived “non-seriousness” of “some” of the independent candidates, as can be seen from the example cited in the 170th Law Commission Report.<sup>553</sup> They talk about the case of BJP leader Mr. V.K. Malhotra, against whom quite a few persons, with the same name “V.K. Malhotra”, stood as independent candidates in the Lok Sabha election in a bid to confuse voters and “mislead the masses”. The Commission’s proposed alternative was that any interested potential candidate “can always form a political party” to contest the elections, although such party would be required to poll at least 5% of the total valid votes. This was to ensure that the banning of independents did not contribute to a proliferation of parties.<sup>554</sup> Consequently, the Commission recommended the insertion of a new sub-section (1) to existing sections 4 and 5, RPA to the effect that:

*“Only the political parties registered with the Election Commission under section 11(4) shall be entitled to put forward candidates to fill a seat in the House of the People [or Legislative Assembly]”*

16.3 The NCRWC’s alternative proposal to discourage non-serious or “dummy” candidates is to only permit candidates with a “track record” to contest elections, namely if the candidates had won any local election or had been nominated by at least twenty elected members of Panchayats, Municipalities, or other local bodies. Additionally, independent candidates who fail to garner at least 5% of the total valid votes polled, should not be

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<sup>551</sup> NCRWC Report, *supra* note 13, at para 4.20.3.

<sup>552</sup> LCI, 170th Report, *supra* note 108, at para 3.3.1.

<sup>553</sup> *Ibid.*, at para 3.3.3.

<sup>554</sup> *Ibid.*, at paras 3.2.15.3 and 3.3.6.1.

permitted to contest as independents for the same office for at least six years.  
<sup>555</sup>

16.4 The ECI in a bid to discourage “non-serious candidate who poll a negligible number of votes” requested an amendment to section 34, RPA for (a) increasing the security deposit to Rs. 20,000 for Parliamentary and Rs. 10,000 for Assembly elections; and (b) empowering them to prescribe the security deposit before every general election.

## **B. Comparative Practices**

16.5 In the European countries, independent candidates are allowed to contest in those countries that do not have the party-list system of proportional representation. Thus, thirteen countries allow independents to contests in national Parliamentary elections and include Bulgaria, Cyprus, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Lithuania, Malta, Romania, and the United Kingdom. These countries follow different voting models, which comprise of majority/plurality voting in single-member districts (France, UK); a single transferable vote system (Ireland, Malta); and mixed-member systems, combining single-member districts with multi-member districts (Germany, Greece).

16.6 However, countries such as Belgium, Italy, Portugal and Spain that have closed-list systems, do not allow independent candidates.<sup>556</sup>

16.7 Moreover, the requirements that an independent candidate must fulfil before being eligible to stand do not seem to be very onerous. In countries such as France and the UK, there is no requirement for independent candidates to get signatures endorsing their candidature during nomination; in five countries including Germany and Ireland, independents have to present nomination signatures whereas party candidates do not; and in four countries such as Greece and Hungary, both independents and parties require nomination signatures before they are eligible.<sup>557</sup> In Ireland, a monetary deposit is an alternative to the signature requirement – an independent candidate has to either provide signatures of 30 electors, or deposit €500 with the nomination.

## **C. Recommendations**

16.8 The current Law Commission agrees with its previous views expressed in the 170<sup>th</sup> Report and the NCRWC and ECI’s proposals for a number of reasons.

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<sup>555</sup> NCRWC Report, *supra* note 13, at paras 4.20.3 and 4.20.4.

<sup>556</sup> European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, *Independent Candidates in National and European Elections: Study* (2013), <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493008/IPOL-AFCO\\_ET\(2013\)493008\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493008/IPOL-AFCO_ET(2013)493008_EN.pdf)> at para 3.2 at 19.

<sup>557</sup> *Id.*, at 22.

16.9 *First*, without doubt there is a proliferation of dummy and non-serious candidates in elections. Apart from the figures cited in the 170<sup>th</sup> Report, the success rate of independent candidates remains extremely low – a mere 0.53%.<sup>558</sup> In 2014, 3,182 independent candidates contested the Lok Sabha elections and only 3 won seats.<sup>559</sup>

16.10 *Second*, even the Supreme Court has weighed in on this issue in *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi*<sup>560</sup> and recommended that Parliament devise ways “to meet the onslaught” of such non-serious independent candidates. The court expressed its concerns, saying:

*“Some independent individuals contest election genuinely and some of them have succeeded also but experience has shown that a large number of independent candidates contest the election for the mere sake of contesting, with a view to make out grounds for challenging the election. Presence of a number of independent candidates results in confusion, for the millions of the illiterate and ignorant electors who exercise their electoral right on the basis of ‘symbols’ printed on the ballot papers. The presence of large number of independent candidates makes the ballot paper of unmanageable size and ordinary elector is confused in the election booth while exercising his franchise. This leads to confusion.”*

16.11 *Third*, the Commission agrees with the ECI’s views given in the context of increasing the security deposit, that a proliferation of candidates puts “unnecessary and avoidable stress” in election management and increases security, law and order, and election administration expenditure.<sup>561</sup>

16.12 *Fourth*, proposals to discourage non-serious candidates have envisaged increasing the security deposits required under section 34, RPA. However, even the 2009 amendment to the RPA increased the deposit from Rs. 10,000 in Parliamentary and Rs. 5,000 in Assembly elections to only Rs. 25,000 and Rs. 10,000 respectively (the amount being halved for candidates belonging to SC/ST categories in both cases). Since many independents are defectors from their political parties, such an amount is not substantial enough to dissuade them or serve as an effect deterrent from standing, especially in the Assembly Elections. Moreover, the power to increase in security deposits does not lie with the ECI, and instead vests with the government which has

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<sup>558</sup> *Independents in polls: Success rate a mere 0.53% since 1952*, HINDU BUSINESS LINE, 7<sup>th</sup> April 2014, <<http://www.thehindubusinessline.com/news/politics/independents-in-polls-success-rate-a-mere-053-since-1952/article5882180.ece>>.

<sup>559</sup> *2014 Lok Sabha polls: 3% votes, but only 3 seats for independents*, ZEE NEWS, 17<sup>th</sup> May 2014, <[http://zeenews.india.com/news/general-elections-2014/2014-lok-sabha-polls-3-votes-but-only-3-seats-for-independents\\_932888.html](http://zeenews.india.com/news/general-elections-2014/2014-lok-sabha-polls-3-votes-but-only-3-seats-for-independents_932888.html)>.

<sup>560</sup> *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi*, AIR 1987 SC 1577.

<sup>561</sup> ECI 2004 Reforms, *supra* note 203, at 3.

not used it often – prior to the 2009 amendment, security deposits were increased only in 1996 (before which it was Rs. 500 for Lok Sabha and Rs. 250 for Assembly elections).

16.13 Further, given that the RPA currently does not empower the ECI to frame rules under section 169 or prescribe the cap on election expenditure by an individual candidate under section 77 and Rule 90 of the Election Rules, the Law Commission does not recommend amending section 34 to vest such power with the ECI. As with section 169, RPA, the Central Government should prescribe the security deposit by legislative amendment notification in the official gazette, after consulting with the ECI.

16.14 *Fifth*, there exists a practice of independent candidates standing with the same name as candidates from recognised political parties, and this can cause a real confusion in the minds of the public, which might only look at the name of the candidate instead of the party symbol.

16.15 *Finally*, proposals put forth in its earlier 170<sup>th</sup> Report and in the NCRWC's Final Report that independents can always form a political party to contest elections if they want is correct inasmuch as it is cognizant of the fact that the process of forming a party under the Election Symbols (Reservation and Allotment) Order, 1968 and registering it under section 29A, RPA is not difficult.

16.16 For all these reasons, the Law Commission endorses the debarring of independent candidates, although it does not endorse an amendment of section 34 to empower the ECI to fix the security deposit before every general election. Thus, a proviso should be added after sub-clause (d) of section 4 of the RPA stating:

*“Provided that only the political parties registered with the Election Commission under sub-section (7) of section 29A shall be entitled to put forward candidates to fill a seat in the House of the People.”*

16.17 A similar proviso should be added after the first proviso in section 5, RPA stating:

*“Provided further that only the political parties registered with the Election Commission under sub-section (7) of section 29A shall be entitled to put forward candidates to fill a seat in the Legislative Assembly of a State.”*

## **CHAPTER XVII**

### **PREPARATION AND USE OF COMMON ELECTORAL ROLLS**

17.1 Article 324(1) of the Constitution empowers the ECI to, *inter alia*, supervise, direct, and control the preparation and revision of electoral rolls for all the elections to Parliament and State Legislatures, which it does under the RPA. Similarly, as per Article 243K and 243ZA and the relevant State laws, the State Election Commission supervises, directs, and controls the preparation and revision of electoral rolls for elections to the local bodies. However, the practice between the two is not always coordinated, as per the following observations in the Background Paper on Electoral Reforms prepared by the Legislative Department of the Law Ministry in 2010:

*“...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...”*<sup>562</sup>

17.2 The ECI has adopted a similar stance noting that State laws have dealt with the issue of electoral rolls for local elections in three different ways – (a) the electoral rolls prepared by the ECI are used as the basis for the preparation and revision of rolls for local body elections; (b) the ECI’s electoral rolls are used in toto for the local body elections; and (c) the ECI’s parliamentary and assembly rolls are used as a draft for local elections, and are subject to further changes in the form of inclusions and exclusions. In fact, in some cases, the qualifying dates for the Parliamentary/Assembly rolls and local body rolls also differ.<sup>563</sup>

17.3 As the Background Paper and the ECI’s 2004 reform proposal further note, such non-uniformity of practice amongst States causes duplication of essentially the same task between two different agencies, thereby duplicating the effort and the expenditure. This is especially true inasmuch as in most cases, the preparation and revision of rolls for both types of elections is entrusted to the same machinery at the field level. Further, it increases confusion amongst the voters, since they may find their names present in one roll, but absent in another.

17.4 Consequently, the use of common electoral rolls will save an enormous amount of time and effort, given that the ECI spends considerable money and exercises due care and caution in preparing its electoral rolls for

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<sup>562</sup> Background paper, *supra* note 230, at para 6.1.1.

<sup>563</sup> ECI 2004 Reforms, *supra* note 203, at 20.

the Parliamentary or Assembly election. Common electoral rolls will allow the use of Parliamentary and Assembly rolls to be used in local body elections through a “cut and paste” method,<sup>564</sup> with the requisite modifications based on the wards or polling areas of the local bodies. For instance, s. 7E of the Delhi Municipal Corporation Act, 1957 deals with the preparation and revision of electoral rolls and provides that:

*“(1) The electoral roll for each ward shall be prepared before each general election in such manner as may be prescribed by rules by reference to the qualifying date and shall come into force immediately upon its final publication in accordance with the rules made for the purpose:*

*Provided that if the Election Commission is satisfied that, instead of preparing a fresh electoral roll of a ward before a general election, it would be sufficient to adopt the electoral roll of the assembly constituency for the time being in force as relates to the ward it may, by order, for reasons to be specified therein, direct that the electoral roll of the assembly constituency for the time being in force as relates to the ward shall, subject to any rules made for the purpose, be the electoral roll of the ward for the general election.*

*(2) The electoral roll prepared or adopted, as the case may be, under sub-section (1) shall—*

*(a) unless otherwise directed by the Election Commission for reasons to be recorded in writing, be revised in the manner prescribed by rules by reference to the qualifying date before each by-election to fill a casual vacancy in a seat allotted to the ward; and*

*(b) be revised in any year in the manner prescribed by rules by reference to the qualifying date if such revision has been directed by the Election Commission:*

*Provided that if the electoral roll is not revised as aforesaid, the validity or continued operation of the said electoral roll shall not thereby be affected.”*

17.5 The ECI, in its proposals in 2004 and in the CEC’s letter dated 22.11.1999 to the Prime Minister has argued for the inclusion of common electoral rolls on the grounds of national interest in saving time, effort, and expenditure; reducing duplication of work and confusion amongst voters; and the fact that it would not pose “*any problems to the electoral machinery in the field as it is the same at the ground level.*” The ECI relied on the fact that in an attempt to reduce (conduct of) election expenditure, various common items of polling materials such as ballot boxes were already being used in all three Parliament, Assembly, and local body elections.

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<sup>564</sup> ECI 2004 Reforms, *supra* note 203, at 20.

**Recommendation:**

17.6           The Law Commission fully endorses the above suggestions of the ECI regarding the introduction of common electoral rolls for Parliamentary, Assembly and local body elections. However, given that introducing common electoral rolls will require an amendment in the State laws pertaining to the conduct of local body elections, the Central Government should write to the various States in this regard. We hope that the States will consider amending their laws based on the suggestions of the ECI and the Law Commission.

## **CHAPTER XVIII**

### **SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

Below is a summary of conclusions and recommendations of the Commission on various issues discussed in the report. The amendments to the Constitution, RPA, Election Rules and any other laws have been made in track changes in the **Annexure** appended to this Report.

#### **18.1 Election Finance**

The Law Commission has proposed wide ranging reforms on the issue of candidate expenditure limits; disclosure obligations of individual candidates and political parties; and penalties imposable on political parties; as well as examining the issue of state funding of elections.

- a. Section 77 of the RPA, regulating the election expenses incurred or authorized by candidates or their election agents, currently extends from the date of nomination to the date of declaration of results. This period should be extended by amending section 77(1) to apply from the date of notification of the elections to the date of declaration of results.

*[Para 2.31(a)1]*

- b. Section 182(1) of the Companies Act, 2013 should be amended to require the passing of the resolution authorising the contribution from the company's funds to a political party at the company's Annual General Meeting (AGM) instead of its Board of Directors.

*[Para 2.31(a)2]*

- c. The existing disclosure obligations of individual candidates are limited to maintaining an account of electoral expenses under sections 77 and 78, RPA. This is sought to be amended by inserting a new section 77A to require candidates or their election agents to maintain an account and disclose the particulars (names, addresses and PAN card numbers of donors and amounts contributed) of

- i. any individual contribution received by them from any person or company, not being a Government company and
  - ii. any contribution by the political party from the date of notification of elections, which have to be made by the party by a crossed account payee cheque or draft or bank transfer.

*[Para 2.31(b)3]*



- d. Section 78 should be amended in light of the proposed amendment to section 77A above, and the reference to more than one returned candidate should be removed.

[Para 2.31(b)4]

- e. A new section 78A should be inserted requiring the district election officer to make publicly available, on his website or on file for public inspection on payment of prescribed fee, the expenditure reports submitted by every contesting candidate under section 78.

[Para 2.31(b)5]

- f. Political parties should be required to maintain and submit annual accounts, duly audited by a qualified and practicing chartered accountant from a panel of such accountants maintained for the purpose by the Comptroller and Auditor General, to the ECI every financial year. These accounts will fully and clearly disclose all the amounts received by the party and the expenditure incurred by it. The ECI will then upload these accounts online or keep them on file for public inspection on payment of fee.

[Para 2.31(b)6]

- g. Disclosure provisions governing political parties has been substantially recast, with the existing 29C being deleted and replaced by a new section 29D requiring all parties to:

- i. mandatorily disclose all contributions in excess of Rs. 20,000;
- ii. include aggregate contributions from a single donor amounting to Rs. 20,000 within its scope;
- iii. disclose the names, addresses and PAN card numbers (if applicable) of these donors along with the amount of each donation above Rs. 20,000;
- iv. disclose such particulars even for contributions less than Rs. 20,000 if such contributions exceed Rs. 20 crore or 20 % of the party's total contributions, whichever is less. Consequential amendments will need to be made to the Election Rules and the IT Act.

[Para 2.31(b)7]

- h. A new section 29E to be inserted in the RPA requiring the ECI to make publicly available, on its website or on file for public inspection on payment of prescribed fee, all the contribution reports submitted by all political parties under section 29D.

[Para 2.31(b)8]

- i. ECI's transparency guidelines prescribing, *first*, a "statement of election expenditure" to be filed with it, by every party contesting an election within 75 days of the Assembly elections and 90 days of the General elections election; and *second*, expenses incurred by political parties to be usually in the form of cheque or draft, unless banking facilities are

not easily available or the payment is made to a party functionary in lieu of salary or reimbursement, should be given a statutory basis *vide* a newly inserted section 29F.

[Para 2.31(b)9]

- j. The disqualification of a candidate for a failure to lodge an account of election expenses and contributions reports under section 77 and proposed 77A should be extended from the current three period up to a five year period, so that a defaulting candidate may be ineligible to contest at least the next elections.

[Para 2.31(c)10]

- k. Express penalties, apart from losing tax benefits, should be imposed on political parties *vide* section 29G for the non-compliance with the disclosure provisions of proposed section 29D of the RPA. This should include a daily fine of Rs. 25,000 for each day of non-compliance, with the possibility of de-registration if the default continues beyond 90 days. Further, ECI may levy a fine of up to Rs. 50 lakhs if its finds any particulars in the party's statements as having been falsified.

[Para 2.31(c)11]

- l. A new section 29H should be inserting penalising parties that contravene the stipulations of section 29B, RPA and section 182 of the Companies Act in terms of accepting contributions from impermissible donors, by levying a penalty of five times the amount so accepted.

[Para 2.31(c)12]

- m. A new Part IVB, section 29I should be inserted to the RPA dealing with the "Regulation of Electoral Trusts", and detailing provisions pertaining to their entitlement to accept contributions, disclosure obligations, and penal provisions (apart from losing income tax exemptions) so that the RPA can be amended in line with the changes already made to the IT Act and the ECI guidelines on "Electoral Trust Companies" of 2013.

[Para 2.31(c)13]

- n. The Commission does not consider a system of complete state funding of elections or matching grants to be feasible, given the current conditions of the country. Instead, it supports the existing system of indirect in-kind subsidies, with section 78B of the RPA being possibly amended in the future to expand these subsidies.

[Para 2.31(d)1-4]

## **18.2 Regulation of Political Parties and Inner Party Democracy**

- a. The Commission recommends amending sub-section (5) of section 29A of the RPA requiring that the accompanying memorandum/rules/regulations with the party's application under sub-section (1). This accompanying document, by whatever name it is called, should also contain a specific provision stating that the party would shun violence

for political gains, and would avoid discrimination or distinction based on race, caste, creed, language or place of residence.

*[Para 3.17.4, 1]*

- b. A new Chapter IVC should be inserted dealing with the “Regulation of Political Parties” and incorporating the Commission’s previous recommendations in its 170<sup>th</sup> Report with certain modifications. Thus, sections 29J to 29Q will deal with internal democracy, party Constitutions, party organisation, internal elections, candidate selection, voting procedures, and the ECI’s power to de-register a party in certain cases of non-compliance.
- c. Another section, section 29R should be inserted in the same Part, providing for the de-registration of a political party for failure to contest Parliamentary or State elections for ten consecutive years.

*[Para 3.17.4, 2]*

### **18.3 Proportional Representation**

18.3.1 It is clear that both the electoral systems come with their own merits and demerits – proportional representation theoretically being more representative, while the FPTP system being more stable. It is also clear, from the experience of other countries that any changes in India’s electoral system will have to follow a hybrid pattern combining elements of both direct and indirect elections. This, in turn will necessitate an increase in the number of seats in the Lok Sabha, which raises concerns regarding its effective functioning.

*[Para 4.19.1]*

18.3.2 As a result, the Law Commission recommends that the findings of the 170<sup>th</sup> Law Commission Report on the proportional system may be examined by the Government to determine whether its proposals can be made workable in India at present.

*[Para 4.19.2]*

### **18.4 Anti Defection Law in India**

The Law Commission recommends a suitable amendment to the Tenth Schedule of the Constitution, which shall have the effect of vesting the power to decide on questions of disqualification on the ground of defection with the President or the Governor, as the case may be, (instead of the Speaker or the Chairman), who shall act on the advice of the ECI. This would help preserve the integrity of the Speaker’s office.

*[Para 5.22]*

### **18.5 Strengthening the office of the Election Commission of India**

The ECI should be strengthened by *first*, giving equal constitutional protection to all members of the Commission in matters of removability; *second*, making the appointment process of the Election Commissioners and the CEC consultative; and *third*, creating a permanent, independent Secretariat for the ECI.

- a. Article 324(5) of the Constitution should be amended to equate the removal procedures of the two Election Commissioners with that of the Chief Election Commissioner. Thus, equal constitutional protection should be given to all members of the ECI in matters of removability from office.

[Para 6.9]

- b. The appointment of all the Election Commissioners, including the CEC, should be made by the President in consultation with a three-member collegium or selection committee, consisting of the Prime Minister; the Leader of the Opposition of the Lok Sabha (or the leader of the largest opposition party in the Lok Sabha in terms of numerical strength); and the Chief Justice of India. Elevation of an Election Commissioner should be on the basis of seniority, unless the three member collegium/committee, for reasons to be recorded in writing, finds such Commissioner unfit. Amendments should be made in the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 to reflect this.

[Para 6.12.5]

- c. A new sub-clause (2A) should be added to Article 324 of the Constitution to provide for a separate independent and permanent Secretariat for the ECI along the lines of the Lok Sabha/Rajya Sabha Secretariats under Article 98 of the Constitution. This will further improve the independence of the ECI.

[Para 6.19 & 6.20]

### **18.6 Paid News and Political Advertisements**

The issue of paid news and political advertisements should be regulated in the RPA in the following manner:

- a. The definitions of “paying for news”, “receiving payment for news” and “political advertisement” should be inserted in section 2 of the RPA.

[Para 7.48.4 & 7.48.5]

- b. The consequences attached to those indulging in such practices should be delineated by creating
  - i. an electoral offence of “paying for news” / “receiving payment for news” in a newly inserted section 127B of the RPA - Not only will the incorporation of this electoral offence make paying for news / receiving payment for news penal, the stringent punishment will ensure that if the candidate themselves are found guilty, then, in all likelihood, they will be disqualified pursuant to section 8(3) of the RPA;
 

[Para 7.49.1]
  - ii. a corrupt practice of paying for news under newly inserted sub-clause (iii) in section 123(2)(a) of the RPA.
 

[Para 7.50]
- c. In order to curb the practice of disguised political advertisement, disclosure provisions should be made mandatory for all forms of media. The purpose of disclosure is two fold; *first*, to help the public identify the nature of the content (paid content or editorial content); and *second*, to keep the track of transactions between the candidates and the media. Thus, a new section 127C should be inserted in the RPA to deal with the non-disclosure of interests in political advertising. The ECI can regulate the specifics of the disclosure required.
 

[Para 7.51.2]

## 18.7 Opinion Polls

Section 126(1)(b) of the RPA, which prohibits the display of any election matter forty-eight hours before polling begins, is limited to display by means of “cinematograph, television or other similar apparatus”; and does not deal with the independence and robustness of the opinion polls themselves. Thus:

- a. The ban on opinion polls in the electronic media does not extend to the print media and section 126(1)(b) should be amended to prevent the publication, publicity, or dissemination of any election matter by print or electronic media.
 

[Para 8.27.1]
- b. Section 126(1)(b) should also provide for cognizance being taken only on the basis of a complaint made by order of, or under authority from, the ECI or the Chief Electoral Officer of the State.
 

[Para 8.27.2]
- c. The regulation of opinion polls is necessary to ensure that *first*, the credentials of the organisations conducting the poll is made known to the public; *second*, the public has a chance to assess the validity of the methods used in conducting the opinion polls; and *third*, the public is made adequately aware that opinion polls are in the nature of forecasts

or predictions, and as such are liable to error. Consequently, new sections 126C and 126D should be inserted in the RPA.

[Para 8.28.3]

### **18.8 Compulsory Voting**

The Law Commission does not recommend the introduction of compulsory voting in India and in fact, believes it to be highly undesirable for a variety of reasons described above such as being undemocratic, illegitimate, expensive, unable to improve quality political participation and awareness, and difficult to implement.

[Para 9.24]

### **18.9 Election Petitions**

Wide-ranging reforms have been suggested to Part VI of the RPA dealing with “disputes regarding elections” and the proposed amendments have been drafted in the annexure appended to this Report. These include, *inter alia*:

- a. The introduction of one or more “election benches” in each High Court, designated so by the Chief Justice of the particular High Court, exercising jurisdiction over all election disputes under the RPA. A single Judge shall ordinarily exercise such jurisdiction, although the Chief Justice can assign more judges, if they so desire.
- b. The procedure for presenting election petitions should be made simpler and less formalistic by:
  - i. requiring election petitions to be ordinarily filed in the Principal seat of the relevant High Court, although this can be shifted to another bench or place in the interest of justice;
  - ii. removing requirement of impleading those candidates who have lost their security deposit as respondents to an election petition, if the petitioner makes an additional declaration that he himself or any candidate has been duly elected; and
  - iii. removing non-compliance with section 117’s stipulation of security for costs as a ground for summarily dismissal under section 86.
- c. The trial of election petitions by the election bench of the High Court should be expedited by providing for
  - i. daily trial;
  - ii. minimising adjournments, with the possibility of imposing exemplary costs;
  - iii. a time limit of 45 days to file a written statement, with a further extension of 15 days, after which such right shall be forfeited;

- d. The trial should be concluded within six months from the date of presentation of the petition; otherwise, a report should be sent to the Chief Justice of the High Court explaining the reasons for the delay.
- e. The election bench of the High Court should pass its order under section 98 within ninety days from the conclusion of arguments.
- f. A new provision, section 98A, should be inserted pertaining to the collection of data (such as the number of election petitions filed and pending, the status of each petition, the names of the parties, and designated election bench) by the High Court and uploading it on its website. The ECI has been mandated to prepare an annual report after compiling such data from all the High Courts across the country.
- g. Appeals to the Supreme Court should now only be on the basis of a question of law, instead of the earlier provision permitting questions of fact or law as grounds for appeal. This appeal should be filed within 30 days of the High Court's order, although an extension of a maximum of 30 more days can be granted, with nothing thereafter. The Supreme Court should try and conclude the appeal within three months from the date of appeal.
- h. The security for costs has been increased from the existing Rs. 2000 to Rs. 10,000, although section 117 has been amended to empower the election bench of the High Court to grant an extension of time, as considered reasonable, to deposit this new security amount.

[Para 10.37]

#### **18.10 NOTA and the Right to Reject**

The Law Commission currently rejects the extension of the NOTA principle to introduce a right to reject the candidate and invalidate the election in cases where a majority of the votes have been polled in favour of the NOTA option. This is premised on the fact that, *first*, the underlying premise of the Supreme Court's decision in *NOTA* was the importance of safeguarding the right to secrecy, and this secrecy rationale does not pre-empt the right to reject. *Second*, good governance, the motivating factor behind the right to reject, can be successfully achieved by bringing about changes in political horizontal accountability, inner party democracy, and decriminalisation. However, the issue might be reconsidered again in the future.

[Para 11.15]

#### **18.11 The Right to Recall**

The Law Commission is not in favour of introducing the right to recall in any form because it can lead to an excess of democracy, undermines the independence of the elected candidates, ignores minority interests, increases instability and chaos, increases chances of misuse and abuse, is difficult and

expensive to implement in practice, especially given that India follows the first past the post system.

[Para 12.20]

### **18.12 Totaliser for Counting of Votes**

18.12.1 The Commission reiterates and endorses the ECI's suggestion for introducing a totaliser for the counting of votes recorded in electronic voting machines to prevent the harassment of voters in areas where voting trends in each polling station can be determined. Prior to the introduction of EVMs, ballot papers could be mixed under Rule 59A of the Election Rules, although this was not permitted for EVMs. Using a totaliser would increase the secrecy of votes during counting, thus preventing the disclosure of voting patterns and countering fears of intimidation and victimisation.

18.12.2 Thus, similar to the existing Rule 59A, the Commission proposes to amend Rule 66A to empower the ECI to decide when, and in which constituency and polling booths, to employ a totaliser, after taking into consideration various factors and the overall context of the elections.

[Para 13.7]

### **18.13 Restriction on Government Sponsored Advertisements**

18.13.1 The Commission recommends regulating and restricting government sponsored advertisements six months prior to the date of expiry of the House/Assembly to maintain the purity of elections; prevent the use of public money for partisan interests of, *inter alia*, highlighting the government's achievements; and ensure that the ruling party or candidate does not get an undue advantage over another in the spirit of free and fair elections.

18.13.2 This can be achieved by inserting a new Chapter VIIB in Part V of the RPA prohibiting State/Central government sponsored advertisements in the print or electronic media or by way of banners and hoarders, six months prior to date of expiry of the term of the Lok Sabha/Vidhan Sabha. However, an exception has been carved out for advertisements highlighting the government's poverty alleviation programmes or any health related schemes

[Para 14.6]

### **18.14 Restriction on the Number of Seats from which a Candidate May Contest**

The Commission recommends an amendment of section 33(7) of the RPA, which permits a candidate to contest any election (parliamentary, assembly, biennial council, or bye-elections) from up to two constituencies. In view of the expenditure of time and effort; election fatigue; and the



harassment caused to the voters, section 33(7) should be amended to permit candidates to stand from only one constituency.

[Para 15.4]

### **18.15 Independent Candidates**

The Law Commission recommends that independent candidates be disbarred from contesting elections because the current regime allows a proliferation of independents, who are mostly dummy/non-serious candidates or those who stand (with the same name) only to increase the voters' confusion. Thus, sections 4 and 5 of the RPA should be amended to provide for only political parties registered with the ECI under section 11(4) to contest Lok Sabha or Vidhan Sabha elections.

[Para 16.16&16.17]

### **18.16 Preparation and Use of Common Electoral Rolls**

The Law Commission endorses the ECI's suggestions regarding the introduction of common electoral rolls for Parliamentary, Assembly and local body elections. However, given that introducing common electoral rolls will require an amendment in the State laws pertaining to the conduct of local body elections, the Central Government should write to the various States in this regard. We hope that the States will consider amending their laws based on the suggestions of the ECI and the Law Commission.

[Para 17.6]

Sd/-

**[Justice A.P. Shah]  
Chairman**

Sd/-

**[Justice S.N. Kapoor]  
Member**

Sd/-

**[Prof. (Dr.) Mool Chand Sharma]  
Member**

Sd/-

**[Justice Usha Mehra]  
Member**

Sd/-

**[Dr. S.S. Chahar]  
Member-Secretary**

Sd/-

**[P.K. Malhotra]  
Ex-officio Member**

Sd/-

**[Dr. Sanjay Singh]  
Ex-officio Member**

**AMENDMENTS TO THE REPRESENTATION OF THE PEOPLE**  
**ACT, 1951**

**Part I: PRELIMINARY**

**2. Interpretation.**—(1) In this Act, unless the context otherwise requires,—

(e) “elector” in relation to a constituency means .....

(ea) “paying for news” means directly or indirectly paying for any news or analysis relating to any election under this Act appearing in electronic media or print media (print, radio, television and all other electronic) for a price in cash or kind as consideration to any such media, entity, person employed therein or connected thereto in any manner, but not including political advertisements as defined under this law;

EXPLANATION:- for the purpose of this clause the expression “electronic media” and “print media” shall have the meanings assigned in clauses (b) and (c) of section 126(a);

(eb) “political advertisement” means any advertisement paid for by any political party, candidate of a political party, any other person contesting an election, or any other person connected therewith or associated thereto, carrying necessary disclosures as notified by the Election Commission in this regard;

(f) “political party” means ....

(g) “prescribed” means...

(h) “public holiday” means...

(ha) “receiving payment for news” means any media entity, person employed therein or connected thereto in any manner, directly or indirectly receiving payment for any news or analysis relating to any election under this Act, not including political advertisements as defined under this Act.

**Part II: QUALIFICATIONS AND DISQUALIFICATIONS**

**CHAPTER I: QUALIFICATIONS FOR MEMBERSHIP OF PARLIAMENT**

**4. Qualifications for membership of the House of the People.**—A person shall not be qualified to be chosen to fill a seat in the House of the People 7\* \* \*, unless—

(a) in the case of a seat reserved for the Scheduled Castes in any State, he is a member of any of the Scheduled Castes, whether of that State or of any other State, and is an elector for any Parliamentary constituency;

(b) in the case of a seat reserved for the Scheduled Tribes in any State (other than those in the autonomous districts of Assam), he is a member of any of the Scheduled Tribes, whether of that State or of any other State (excluding the tribal areas of Assam), and is an elector for any Parliamentary constituency;

(c) in the case of a seat reserved for the Scheduled Tribes in the autonomous districts of Assam, he is a member of any of those Scheduled Tribes and is an elector for the Parliamentary constituency in which such seat is reserved or for any other Parliamentary constituency comprising any such autonomous district;

(cc) in the case of the seat reserved for the Scheduled Tribes in the Union territory of Lakshadweep, he is a member of any of those Scheduled Tribes and is an elector for the Parliamentary constituency of that Union territory;

(ccc) in the case of the seat allotted to the State of Sikkim, he is an elector for the Parliamentary constituency for Sikkim;

(d) in the case of any other seat, he is an elector for any Parliamentary constituency.

Provided that only the political parties registered with the Election Commission under sub-section (7) of section 29A shall be entitled to put forward candidates to fill a seat in the House of the People.

**5. Qualifications for membership of a Legislative Assembly.**—A person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of a State unless—

(a) in the case of a seat reserved for the Scheduled Castes or for the Scheduled Tribes of that State, he is a member of any of those castes or of those tribes, as the case may be, and is an elector for any Assembly constituency in that State;

(b) in the case of a seat reserved for an autonomous district of Assam, \* \* \* he is a member of a Scheduled Tribe of any autonomous district and is an elector for the Assembly constituency in which such seat or any other seat is reserved for that district; and

(c) in the case of any other seat, he is an elector for any Assembly constituency in that State:

*Provided* that for the period referred to in clause (2) of article 371A, a person shall not be qualified to be chosen to fill any seat allocated to the Tuensang district in the Legislative Assembly of Nagaland unless he is a member of the regional council referred to in that article.

*Provided further that only the political parties registered with the Election Commission under sub-section (7) of section 29A shall be entitled to put forward candidates to fill a seat in the Legislative Assembly of a State.*

### **CHAPTER III: DISQUALIFICATIONS FOR MEMBERSHIP OF PARLIAMENT AND STATE LEGISLATURES**

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

- (a) has failed to lodge an account of election expenses and contribution reports within the time and in the manner required by or under this Act; and
- (b) has no good reason or justification for the failure,

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

### **Part IVA: REGISTRATION OF POLITICAL PARTIES**

**29A. Registration with the Election Commission of associations and bodies as political parties.**— (1) Any association or body of individual citizens of India calling itself a political party and intending to avail itself of the provisions of this Part shall make an application to the Election Commission for its registration as a political party for the purposes of this Act.

(2) Every such application shall be made,—

- (a) if the association or body is in existence at the commencement of the Representation of the People (Amendment) Act, 1988 (1 of 1989), within sixty days next following such commencement;

(b) if the association or body is formed after such commencement, within thirty days next following the date of its formation.

(3) Every application under sub-section (1) shall be signed by the chief executive officer of the association or body (whether such chief executive officer is known as Secretary or by any other designation) and presented to the Secretary to the Commission or sent to such Secretary by registered post.

(4) Every such application shall contain the following particulars, namely:—

- (a) the name of the association or body;
- (b) the State in which its head office is situate;
- (c) the address to which letters and other communications meant for it should be sent;
- (d) the names of its president, secretary, treasurer and other office-bearers;
- (e) the numerical strength of its members, and if there are categories of its members, the numerical strength in each category;
- (f) whether it has any local units; if so, at what levels;
- (g) whether it is represented by any member or members in either House of Parliament or of any State Legislature; if so, the number of such member or members.

(5) The application under sub-section (1) shall be accompanied by a copy of the memorandum or rules and regulations of the association or body, by whatever name called, and such memorandum or rules and regulations shall contain a specific provision that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, ~~and~~ would uphold the sovereignty, unity and integrity of India, shun violence for political gains, and avoid discrimination or distinction based on race, caste, creed, language or place of residence.

(6) The Commission may call for such other particulars as it may deem fit from the association or body.

(7) After considering all the particulars as aforesaid in its possession and any other necessary and relevant factors and after giving the representatives of the association or body reasonable opportunity of being heard, the Commission shall decide either to register the association or body as a political party for the purposes of this Part, or not so to register it; and the Commission shall communicate its decision to the association or body: *Provided* that no association or body shall be registered as a political party

under this sub—section unless the memorandum or rules and regulations of such association or body conform to the provisions of sub—section (5).

(8) The decision of the Commission shall be final.

(9) After an association or body has been registered as a political party as aforesaid, any change in its name, head office, office-bearers, address or in any other material matters shall be communicated to the Commission without delay.

**29B. Political parties entitled to accept contribution.—** .....

~~**29C. Declaration of donation received by the political parties.—** (1) The treasurer of a political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely:—~~

~~(a) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year;~~

~~(b) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year.~~(2) The report under sub-section (1) shall be in such form as may be prescribed.

~~(3) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other person authorised by the political party in this behalf before the due date for furnishing a return of its income of that financial year under section 139 of the Income-tax Act, 1961 (43 of 1961), to the Election Commission.~~

~~(4) Where the treasurer of any political party or any other person authorised by the political party in this behalf fails to submit a report under sub-section (3) then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such political party shall not be entitled to any tax relief under that Act~~

**29C. Maintenance, audit, publication of accounts by political parties** (1) Each recognised political party shall maintain accounts clearly and fully disclosing all the amounts received by it and clearly and fully disclosing the expenditure incurred by it. The account shall be maintained according to the financial year. Within six months of the close of each financial year, each recognised political party shall submit to the Election Commission, its accounts, duly audited by a qualified and practicing chartered accountant from a panel of such accountants maintained for the purpose by the Comptroller and Auditor General.

(2) The Election Commission shall make publicly available, on its website, the audited accounts submitted by all political parties under sub-section (1).

(3) The Election Commission shall also keep these accounts on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.

**29D. Declaration of contribution received by the political parties.— (1)**  
The treasurer of a political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely: —

(a) the contribution in excess of twenty thousand rupees, including an aggregate of contributions in excess of twenty thousand rupees, received by such political party from any person in that financial year;

(b) the contribution in excess of twenty thousand rupees, including an aggregate of contributions in excess of twenty thousand rupees received by such political party from any company, other than a Government company, in that financial year.

(2) Notwithstanding anything contained in sub-section (1), the treasurer of a political party or any other person authorised by the political party in this behalf shall, in the report referred to in sub-section (1), disclose the particulars of such contributions received from a person or company, other than a Government company, even if the contributions are below twenty thousand rupees, in case such contributions exceeds twenty crore rupees, or twenty per cent of total contributions, whichever is lesser, as received by the political party in that financial year.

*Illustration:* A political party, 'P', receives a total of hundred crore rupees, in cash or cheque, in a financial year. Out of this amount, fifty crore rupees are received from undisclosed sources, by way of contributions less than twenty thousand rupees (in cash or multiple cheques). P shall be liable to disclose the particulars of all donors beyond twenty crores, even if they have contributed less than twenty thousand rupees each.

(3) The report under sub-section (1) shall be in such form as may be prescribed.

(4) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other person authorised by the political party in this behalf before the due date for furnishing a return of its income of that financial year under section 139 of the Income-tax Act, 1961 (43 of 1961), to the Election Commission.

Explanation: For the avoidance of doubt, it is hereby clarified that the term “particulars” mentioned in this section shall include the amount donated; the names and addresses, and PAN card number if applicable, of such person or company referred to in this section.

**29E. Disclosure of contribution reports submitted by political parties.—**

(1) The Election Commission shall make publicly available, on its website, the contribution reports submitted by all political parties under section 29D.

(2) The Election Commission shall also keep these reports on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.

**29F. Election expenses by political parties. —** (1) Every political party contesting an election shall, within seventy five days of the date of an election to a Legislative Assembly of a State or ninety days of the date of an election to the House of the People, lodge with the Election Commission a statement of election expenditure, which shall be a true copy of such statement maintained by the party in consonance with the directions of the Election Commission.

(2) The payment of any election expenditure over twenty thousand rupees should be made by the political parties via cheque or draft, and not by cash, unless there are no banking facilities or the payment is made to a party functionary in lieu of salary or reimbursement.

**29G. Penalty.—**(1) Where the treasurer of any political party or any other person authorised by the political party in this behalf fails to submit a report in the prescribed form within the time specified under sub-section (4) of section 29D then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such political party:

(a) shall not be entitled to any tax relief for such financial year under the Income-tax Act, 1961; and

(b) shall be liable to a penalty of twenty five thousand rupees for each day of non-compliance and so long as the non-compliance continues.

Provided that If such default continues beyond the period of ninety days, the Election Commission may de-register the political party after giving a reasonable opportunity to show cause.

(2) If the Election Commission finds on verification, undertaken whether suo motu or on information received, that the report submitted under sub-section (4) of section 29D is false in any particular, the Election Commission shall levy a fine up to a maximum of fifty lakh rupees on such political party.



**29H. Penalty for political parties accepting contributions from an impermissible donor.** – If a political party accepts any contribution offered to it from an impermissible donor, it shall be liable to pay a penalty that is five times the amount so accepted from such donor.

Explanation.– For the purpose of this section, “impermissible donor” refers to:

(a) a government company, as defined in section 29B;

(b) a company that does not comply with the requirements of sub-section (1) section 182 of the Companies Act, 2013; or

(c) any foreign source defined under clause (e) of section 2 of the Foreign Contribution (Regulation) Act, 1976.

#### Part IVB: REGULATION OF ELECTORAL TRUSTS

**29I. Electoral Trusts entitled to accept contribution.** (1) Subject to the provision of the Companies Act, 2013 and the Income Tax Act, 1961, an Electoral Trust approved by the Central Board of Direct Taxes under the Electoral Trusts Scheme, 2013 may accept any amount of contribution voluntarily offered to it by any person or company other than a Government Company:

Provided that no Electoral Trust shall be eligible to accept any contribution from any foreign source defined under clause (e) of section (2) of Foreign Contribution (Regulation) Act, 1976.

Provided further that all words and phrases used in this Part, shall have the same meaning as assigned to them in section 29B.

**2. Maintenance, audit, publication of accounts by electoral trusts** (a) Each Electoral Trust shall maintain accounts clearly and fully disclosing all the amounts received by it and clearly and fully disclosing the expenditure incurred by it. The account shall be maintained according to the financial year. Within six months of the close of each financial year, each Electoral Trust shall submit its accounts, duly audited by a qualified and practicing chartered accountant from panel of Chartered Accountants, selected by the Comptroller and Auditor General to the Election Commission.

(b) The Election Commission shall make publicly available, on its website, the audited accounts submitted by all electoral trusts under sub-section (1).

(c) The Election Commission shall also keep these accounts on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.

**3. Declaration of contribution received by the Electoral Trusts —** (a) The treasurer of an Electoral Trust or any other person authorised by the trust in this behalf shall, in each financial year, prepare a report in respect of the following, namely: —

(i) the contribution received by such electoral trust from any person in that financial year, with name, address, PAN of such persons.

Provided that the Electoral Trust or any other person authorised by the Trust in this behalf shall not receive any donation in cash and without the name, address and PAN (if any);

(ii) the contribution to political parties from electoral trusts in that financial year with date amount, mode of payment and name of political party.

Provided that the electoral trusts shall not make any contribution to political parties in cash other than by bank account transfer.

(b) The report under this sub-section 2 shall be in such form as may be prescribed.

(c) The report for a financial year under sub-section (1) shall be submitted by the treasurer of an Electoral Trust or any other person authorised by the Trust within six months of the close of each financial year to the Election Commission.

**4. Disclosure of contribution reports submitted by Electoral Trusts by Election Commission –** (a) The Election Commission shall make publicly available, on its website, the contribution reports, submitted by all Electoral Trusts under sub-sections (2) and (3) of this section.

(b) The Election Commission shall also keep these reports on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee.

**5. Penalty.—**(1) Where the Electoral Trust fails to submit a report in the prescribed form within the time specified under sub-sections (2) or (3) of this section then, notwithstanding anything contained in the Income-tax Act, 1961 (43 of 1961), such Electoral Trust:

(a) shall not be entitled to any tax relief for such financial year under the Income-tax Act, 1961; and

(b) shall be liable to a penalty of twenty five thousand rupees for each day of non-compliance and so long as the non-compliance continues.

Provided that If such default continues beyond the period of ninety days, the Election Commission may ban the electoral trust from receiving any donations in future, after giving a reasonable opportunity.

(2) If the Election Commission finds on verification, undertaken whether suo motu or on information received, that the statement of accounts filed under this section is false in any particular, the Election Commission shall impose a fine up to a maximum of fifty lakh rupees on such Electoral trust.

(3) If the Electoral Trust has received funds from an impermissible donor, it shall be liable to penalty that is five times the amount so accepted by the Trust.

Explanation.— For the purpose of this section, “impermissible donor” refers to:

(a) a government company, as defined in section 29B;

(b) a company that does not comply with the requirements of sub-section (1) section 182 of the Companies Act, 2013; or

(c) any foreign source defined under clause (e) of section 2 of the Foreign Contribution (Regulation) Act, 1976.

#### Part IVC: REGULATION OF POLITICAL PARTIES

**29J. Formation of political parties—** (1) Political parties can be freely formed by the citizens of this country. The political parties shall form a constitutionally integral part of free and democratic system of Government.

(2) Each political party shall frame its constitution defining its aims and objects and providing for matters specified in this Part. The aims and objects of a political party shall not be inconsistent with any of the provisions of the Constitution of India.

(3) A political party shall strive towards, and utilize its funds exclusively for, the fulfilment of its aims and objects and the goals and ideals set out in the Constitution of India.

**29K. Name of political parties and power to sue—** (1) A political party may sue and may be sued in its own name. A political party shall be competent to hold and dispose of properties.

(2) The name of a political party must be clearly distinguishable from that of any existing political party and shall be subject to approval by the Election Commission. In election campaigns and in elections, only the registered name or its acronym, as may have been approved by the Election Commission, alone shall be used.

**29L. Constitution of a political party—** The Constitution of a political party shall provide for the following matters:-

- (a) name of the political party and acronym (if used) and the aims and objectives of the party;
- (b) procedure for admission, expulsion and resignation by the members;
- (c) rights, duties and obligations of the members;
- (d) grounds on which and the procedure according to which disciplinary action can be taken against the members;
- (e) the general organisation of the party including the formation of State, regional, district, block and village level units;
- (f) composition and powers of the executive committee (by whatever name it is called) and other organs of the party;
- (g) the manner in which the general body meetings can be requisitioned and conducted and the procedure for requisitioning and holding conventions to decide questions of continuance, merger and other such fundamental organisational matters;
- (h) the form and content of the financial structure of the party consistent with the provisions of this part.

**29M. Executive committees—** The executive committee of a political party shall be elected. Its term shall not exceed years. Well before the expiry of the term, steps shall be taken for electing a new executive committee. It shall be open to the executive committee to constitute a sub-committee (by whatever name called) to carry out the business of the executive committee and to carry on regular and urgent executive committee business. The members of the sub-committee shall be elected by the members of the executive committee.

**29N. Voting procedures—** A political party and its organs shall adopt their resolutions on the basis of a simple majority vote. The voting shall be by secret ballot.

**29O. Candidate selection—**The candidates for contesting elections to the Parliament or the Legislative Assembly of the States shall be selected by the executive committee of the political party having due regard for the recommendations and resolutions passed by the concerned local party units.

**29P. Regular elections—** It shall be the duty of the executive committee to take appropriate steps to ensure compliance with the provisions of this chapter including holding of elections at all levels. The executive committee of a political party shall hold elections of national and State levels in the presence of the observers to be nominated by the Election Commission of

India. Where considered necessary, the Election Commission may also send its observers at elections to be held at other national and state levels.

**29Q. Penalties for non compliance—** The Election Commission shall be competent to inquire, either suo motu or on information received into allegation of non-compliance of any of the provisions of this Part. If on due inquiry, the Election Commission is satisfied that there has been non-compliance of any of the provisions of this chapter by any political party, the Commission shall call upon the party to rectify the non-compliance within the period prescribed by the Election Commission. In case, the non-compliance continues even after the period so prescribed, it shall be open to the Election Commission to impose such fine on the political party as it may deem appropriate in circumstances of the case including imposition of a penalty of Rs. 25,000/- per day for each day of non-compliance and withdrawal of registration of the party.

**29R. Penalty for failure to contest elections for ten years consecutively—**  
– (1) If any political party registered under section 29A of this Act does not contest any election to the House of the People or the Legislative Assembly of a State for ten consecutive years, its registration shall be liable to be cancelled by the Election Commission.

(2) The Election Commission shall scrutinise the registrations of all the political parties under section 29A, and if it finds that any registered party has not contested any election to the House of the People or the Legislative Assembly of a State for ten consecutive years, it shall cancel such registration.

## **Part V: CONDUCT OF ELECTIONS**

### **CHAPTER I: NOMINATION OF CANDIDATES**

**33. Presentation of nomination paper and requirements for a valid nomination.** —(1) On or before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer :

Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election from a constituency unless the

nomination paper is subscribed by ten proposers being electors of the constituency:

Provided further that no nomination paper shall be delivered to the returning officer on a day which is a public holiday:

Provided also that in the case of a local authorities' constituency, graduates' constituency or teachers' constituency, the reference to "an elector of the constituency as proposer" shall be construed as a reference to ten per cent. of the electors of the constituency or ten such electors, whichever is less, as proposers.

(1A) Notwithstanding anything contained in sub-section (1) for election to the Legislative Assembly of Sikkim (deemed to be the Legislative Assembly of that State duly constituted under the Constitution), the nomination paper to be delivered to the returning officer shall be in such form and manner as may be prescribed :

Provided that the said nomination paper shall be subscribed by the candidate as assenting to the nomination, and—

(a) in the case of a seat reserved for Sikkimese of Bhutia-Lepcha origin, also by at least twenty electors of the constituency as proposers and twenty electors of the constituency as seconders;

(b) in the case of a seat reserved for Sanghas, also by at least twenty electors of the constituency as proposers and at least twenty electors of the constituency as seconders;

(c) in the case of a seat reserved for Sikkimese of Nepali origin, by an elector of the constituency as proposer:

Provided further that no nomination paper shall be delivered to the returning officer on a day which is a public holiday.]

(2) In a constituency where any seat is reserved, a candidate shall not be deemed to be qualified to be chosen to fill that seat unless his nomination paper contains a declaration by him specifying the particular caste or tribe of which he is a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Scheduled Tribe of the State.

(3) Where the candidate is a person who, having held any office referred to in section 9 has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls :

Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral roll or in the nomination paper shall be overlooked.

(5) Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny.

(6) Nothing in this section shall prevent any candidate from being nominated by more than one nomination paper:

Provided that not more than four nomination papers shall be presented by or on behalf of any candidate or accepted by the returning officer for election in the same constituency.

(7) Notwithstanding anything contained in sub-section (6) or in any other provisions of this Act, a person shall not be nominated as a candidate for election,—

(a) in the case of a general election to the House of the People (whether or not held simultaneously from all Parliamentary constituencies), from more than ~~two~~ one ~~Parliamentary~~ Parliamentary constituency;

(b) in the case of a general election to the Legislative Assembly of a State (whether or not held simultaneously from all Assembly constituencies), from more than ~~two~~ one ~~Assembly~~ Assembly constituency ~~constituencies~~ in that State;

(c) in the case of a biennial election to the Legislative Council of a State having such Council, from more than ~~two~~ one ~~Council~~ Council constituency ~~constituencies~~ in the State;



(d) in the case of a biennial election to the Council of States for filling two or more seats allotted to a State, for filling more than ~~two such seats~~ one such seat;

(e) in the case of bye-elections to the House of the People from two or more Parliamentary constituencies which are held simultaneously, from more than ~~two one such Parliamentary such Parliamentary constituency~~ constituencies;

(f) in the case of bye-elections to the Legislative Assembly of a State from two or more Assembly constituencies which are held simultaneously, from more than ~~two one such Assembly such Assembly constituency~~ constituencies;

(g) in the case of bye-elections to the Council of States for filling two or more seats allotted to a State, which are held simultaneously, for filling more than ~~two one such such seats~~ seat;

(h) in the case of bye-elections to the Legislative Council of a State having such Council from two or more Council constituencies which are held simultaneously, from more than ~~two one such Council such Council constituency~~ constituencies.

*Explanation.*— For the purposes of this sub-section, two or more bye-elections shall be deemed to be held simultaneously where the notification calling such bye-elections are issued by the Election Commission under section 147, section 149, section 150 or, as the case may be, section 151 on the same date.

## CHAPTER VIIA: DECLARATION OF ASSETS AND LIABILITIES

### **CHAPTER VIIB: RESTRICTION ON GOVERNMENT SPONSORED ADVERTISEMENTS**

**75B. Restriction on Government Sponsored Advertisements.** – No Central or State government, as the case may be, shall, publish any advertisements of achievements of the Central or State government either in the print media, electronic media, or by way of banners or hoardings in public places for a period of six months prior to the date of expiry of the term of the House of the People or the Legislative Assembly of the concerned State.

Provided that the restrictions above shall not apply to the advertisements of achievements of the governments relating to their poverty alleviation programmes or any health related schemes; however, such advertisements shall not carry any symbol of a political party or the names or photographs of any Minister or leader of any political party.”

## **CHAPTER VIII: ELECTION EXPENSES AND MAINTENANCE OF ACCOUNTS**

**77. Account of election expenses and maximum thereof.**— (1) Every candidate at an election shall, either by himself or by his election agent, keep



a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date ~~on which he has been nominated~~of notification of such election and the date of declaration of the result thereof, both dates inclusive.

*Explanation 1.*—For the removal of doubts, it is hereby declared that—

(a) the expenditure incurred by leaders of a political party on account of travel by air or by any other means of transport for propagating programme of the political party shall not be deemed to be the expenditure in connection with the election incurred or authorised by a candidate of that political party or his election agent for the purposes of this sub-section.

(b) any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing done by any person in the service of the Government and belonging to any of the classes mentioned in clause (7) of section 123 in the discharge or purported discharge of his official duty as mentioned in the proviso to that clause shall not be deemed to be expenditure in connection with the election incurred or authorised by a candidate or by his election agent for the purposes of this sub-section.

*Explanation 2.*—For the purposes of clause (a) of Explanation 1, the expression “leaders of a political party”, in respect of any election, means,—  
(i) where such political party is a recognised political party, such persons not exceeding forty in number, and

(ii) where such political party is other than a recognised political party, such persons not exceeding twenty in number,

whose names have been communicated to the Election Commission and the Chief Electoral Officers of the States by the political party to be leaders for the purposes of such election, within a period of seven days from the date of the notification for such election published in the Gazette of India or Official Gazette of the State, as the case may be, under this Act:

*Provided* that a political party may, in the case where any of the persons referred to in clause (i) or, as the case may be, in clause (ii) dies or ceases to be a member of such political party, by further communication to the Election Commission and the Chief Electoral Officers of the States, substitute new name, during the period ending immediately before forty-eight hours ending with the hour fixed for the conclusion of the last poll for such election, for the name of such person died or ceased to be a member, for the purposes of designating the new leader in his place.

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed.

**77A. Account of contributions received.**—Every candidate at an election shall, either by himself or by his election agent, also keep an account of the following particulars in respect of the donations or contributions received by the candidate after the date of notification of election, namely: —

- (a) the amount of contribution received by the candidate from his party for the election;
- (b) the amount of contribution received by the candidate from—
  - (i) any person;
  - (ii) any company, not being a government company
- (c) the name, address and PAN card details, if applicable, of the donor in sub-clause (b) above;
- (d) the nature of each contribution, in particular, whether it is:
  - (i) cash;
  - (ii) cheque; or
  - (iii) gifts in kind;
- (e) the date on which the contribution was received.

Explanation: All contributions by a political party to its candidate shall be made by a crossed account payee cheque or draft or bank transfer.

**78. Lodging of account with the district election officer.**— (1) Every contesting candidate at an election shall, within thirty days from the date of election of the returned candidate ~~or, if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates,~~ lodge with the district election officer an account of his election expenses and contribution reports which shall be a true copy of the account kept by him or by his election agent under section 77 and section 77A respectively.

**78A. Disclosure of account submitted by contesting candidates.**— (1) The district election officer shall make publicly available, on his website, the accounts of election expenses and contribution reports submitted by every contesting candidate or their election agent under section 78.

(2) The district election officer shall also keep these reports on file for three years after their submission and shall make them available for public inspection on the payment of a prescribed fee under Rule 88 of the Conduct of Election Rules, 1961.

## Part VI: DISPUTES REGARDING ELECTIONS

### CHAPTER I: INTERPRETATION

**79. Definitions.—** In this Part and in [Part VII] unless the context otherwise requires,—

(d) “electoral right” means....

(e) "High Court" means the High Court within the local limits of whose jurisdiction the election to which the election petition relates has been held; wherever applicable, a reference to the High Court in this Part shall also be deemed to include a reference to the ‘election bench’ designated by the Chief Justice of the relevant High Court in accordance with the procedure prescribed by this Part;

(f) “returned candidate” means....

### CHAPTER II: PRESENTATION OF ELECTION PETITIONS TO ELECTION COMMISSION

**80A. High Court to try election petitions.—**(1) The Court having jurisdiction to try an election petition shall be the High Court.

(2) Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court, designated as an election bench, and the Chief Justice shall, from time to time, assign one or more Judges for that purpose:

Provided that where the High Court consists only of one Judge, he shall try all election petitions presented to that Court.

(3) Where the High Court functions in more than one State, or where the High Court has more than one bench, the election petition shall be filed before the Principal Seat of the relevant High Court.

Explanation – The High Court in its discretion may, in the interests of justice or convenience, try an election petition, wholly or partly, at the bench or place other than the Principal Seat of the High Court. The High Court in its discretion may, in the interests of justice or convenience, try an election petition, wholly or partly, at a place other than the place of seat of the High Court.]

**82. Parties to the petition. —**A petitioner shall join as respondents to his petition—

(a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all

the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates;

Provided that in cases where the petitioner makes an additional declaration that he himself or any candidate has been duly elected, no contesting candidates who have lost their security deposit shall be joined by the petitioner as respondents to his petition; and

(b) Notwithstanding anything contained in sub-clause (a), any other candidate against whom allegations of any corrupt practice are made in the petition.

### **CHAPTER III: TRIAL OF ELECTION PETITIONS**

**86. Trial of election petitions.** —(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 ~~or section 117.~~

Explanation.—An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or ~~one of the~~ Judges who has or have been ~~assigned~~ designated by the Chief Justice as the election bench for the trial of election petitions under sub-section (2) of section 80A.

(2A)(1) There shall be one or more election benches, comprising of one or more judges, as designated by the Chief Justice of the High Court under Section 80A(2), which shall only be dealing with election petitions presented in accordance with the provisions of this Part.

(2) The trial of an election petition shall be continued from day to day until its conclusion, and the election bench shall not grant any adjournments unless sufficient cause is made out and may impose costs, including exemplary costs, on the party seeking the adjournment.

(3) Every election petition shall be tried as expeditiously as possible and trial shall be concluded within six months from the date on which the election petition is presented to the High Court for trial.

Provided that if the trial is not concluded within six months, the designated election bench shall, for reasons to be recorded in writing, explain the cause for delay in a report to the Chief Justice of the High Court.

(4) The respondent(s) shall file the written statement within forty-five days from the date of service of summons.

Provided that if the election bench is satisfied that the respondent(s) were prevented by sufficient cause from filing the written statement within the said

period of forty-five days, it may entertain the written statement within a further period of fifteen days, but not thereafter.

Provided further that on expiry of such fifteen-day period, the respondent(s) shall forfeit the right to file the written statement and the election bench shall not allow the written statement to be taken on record thereafter.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same election bench that ~~Judge who~~ may, in ~~his~~ its discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, .....

(5) The High Court may, upon such terms as to costs .....

~~(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.~~

~~(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.~~

(6) <deleted>

(7) <deleted>

**98. Decision of the High Court.**—At the conclusion of the trial of an election petition [the election bench of the High Court] shall make an order—

(a) dismissing the election petition; or

(b) declaring the election of [all or any of the returned candidates] to be void; or

(c) declaring the election, of [all or any of the returned candidates] to be void and the petitioner or any other candidate to have been duly elected.

Provided that such order of the election bench shall be made within ninety-days from the conclusion of arguments.

**98A. Collection and disclosure of data by the High Court:** (1) Complete information regarding the number of election petitions filed and pending, the status of each petition, the names of the parties, and designated election bench shall be maintained and constantly updated by each High Court on its website.

(2) The Election Commission shall prepare an annual report compiling the information mentioned in sub-section (1) from all the High Courts, and shall publish the said information annually on its website.

**99. Other orders to be made by the High Court.**—(1) At the time of making an order under section 98 [the election bench of the High Court] shall also make an order—

[(a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording—

(i) a finding whether any corrupt practice has or has not been proved to have been committed \*\*\* at the election, and the nature of that corrupt practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and]

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid:

Provided that [a person who is not a party to the petition shall not be named] in the order under sub-clause (ii) of clause (a) unless—

(a) he has been given notice to appear before [the election bench of the High Court] and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by [the election bench of the High Court] and has given evidence against him, of calling evidence in his defence and of being heard.

[(2) In this section and in section 100, the expression "agent" has the same meaning as in section 123.]

**100. Grounds for declaring election to be void.**— (1) Subject to the provisions of sub-section (2) if the election bench of the High Court is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance or any nomination, or

- (ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent], or
- (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
- (iv) by any non—compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the election bench of the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the election bench of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice \*\*\* but the High Court is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and [without the consent], of the candidate or his election agent;

\* \* \* \* \*

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt \*\*\* practice on the part of the candidate or any of his agents,

then the election bench of the High Court may decide that the election of the returned candidate is not void.

**102. Procedure in case of an equality of votes.**—If during the trial of an election petition it appears that there is an equality of votes between any candidates at the election and that the addition of a vote would entitle any of those candidates,—

(a) any decision made by the returning officer under the provisions of this Act shall, in so far as it determines the question between those candidates, be effective also for the purposes of the petition; and

(b) in so far as that question is not determined by such a decision the election bench of the High Court shall decide between them by lot and proceed as if the one on whom the lot then falls had received an additional vote.

#### **CHAPTER IV: WITHDRAWAL AND ABATEMENT OF ELECTION PETITIONS**

**109. Withdrawal of election petitions.**—(1) An election petition may be withdrawn only by leave of the election bench of the High Court.



(2) Where an application for withdrawal is made under sub-section (1), notice thereof fixing a date for the hearing of the application shall be given to all other parties to the petition and shall be published in the Official Gazette.

**112. Abatement of election petitions.**—(1) An election petition shall abate only on the death of a sole petitioner or of the survivor of several petitioners.

(2) Where an election petition abates under sub-section (1), the election bench of the High Court shall cause the fact to be published in such manner as it may deem fit.

(3) Any person who might himself have been a petitioner may, within fourteen days of such publication, apply to be substituted as petitioner and upon compliance with the conditions, if any, as to security, shall be entitled to be so substituted and to continue the proceedings upon such terms as the election bench of the High Court may deem fit.

#### **CHAPTER IVA: APPEALS**

**116A. Appeals to Supreme Court.**—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the Supreme Court on any question ~~(whether of law or fact)~~of law from every order made by ~~a~~the election bench of the High Court under section 98 or section 99.

(2) Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the election bench of the High Court under section 98 or section 99:

Provided that if the Court is satisfied that the petitioner was prevented by sufficient cause from filing an appeal before the Supreme Court within the said period of thirty days it may entertain the petition within a further period of thirty days, but not thereafter.

(3) Every appeal under this Chapter shall be tried as expeditiously as possible and every endeavour shall be made to conclude the appeal within three months from the date on which the appeal is presented to the Supreme Court for hearing. Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.

**116B. Stay of operation of order of High Court.**—(1) An application may be made to the election bench of the High Court for stay of operation of an order made by the High Court under section 98 or section 99 before the expiration of the time allowed for appealing therefrom and the election bench of the High Court may, on sufficient cause being shown and on such terms and conditions as it may think fit, stay the operation of the order; but no application for stay



shall be made to the election bench of the High Court after an appeal has been preferred to the Supreme Court.

(2) Where an appeal has been preferred against an order made under section 98 or section 99, the Supreme Court may, on sufficient cause being shown and on such terms and conditions as it may think fit, stay the operation of the order appealed from.

(3) When the operation of an order is stayed by the election bench of the High Court or, as the case may be, the Supreme Court, the order shall be deemed never to have taken effect under sub-section (1) of section 107; and a copy of the stay order shall immediately be sent by the High Court or, as the case may be, the Supreme Court, to the Election Commission and the Speaker or Chairman, as the case may be, of the House of Parliament or of the State Legislature concerned.

## **CHAPTER V: COSTS AND SECURITY FOR COSTS**

**117. Security for costs.—**(1) At the time of presenting an election petition, the petitioner shall deposit in the High Court in accordance with the rules of the High Court a sum of ten thousand two thousand rupees as security for the costs of the petition.

Provided that if the election bench of the High Court is satisfied that the petitioner was prevented by sufficient cause from depositing the said amount of ten thousand rupees, it may grant an extension of such time as it deems reasonable and dismiss the petition if the amount is not deposited within the specified extended period.

(2) During the course of the trial of an election petition, the election bench of the High Court may, at any time, call upon the petitioner to give such further security for costs as it may direct.

**119. Costs.—**Costs shall be in the discretion of the election bench of the High Court:

Provided that where a petition is dismissed under clause (a) of section 98, the returned candidate shall be entitled to the costs incurred by him in contesting the petition and accordingly the High Court shall make an order for costs in favour of the returned candidate.

## **Part VII: CORRUPT PRACTICES AND ELECTORAL OFFENCES**

### **CHAPTER I: CORRUPT PRACTICES**

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

.....

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person 7 [with the consent of the candidate or his election agent], with the free exercise of any electoral right:

Provided that—

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who—

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure; ~~or~~ or

(iii) pays for news.

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

### **CHAPTER III: ELECTORAL OFFENCES**

**126. Prohibition of public meetings during period of forty—eight hours ending with hour fixed for conclusion of poll.—** (1) No person shall—

(a) convene, hold or attend, join or address any public meeting or procession in connection with an election; or

(b) publish, publicise or disseminate any election matter by means of print or electronic media~~display to the public any election matter by means of cinematograph, television or other similar apparatus~~; or

(c) propagate any election matter to the public by holding, or by arranging the holding of, any musical concert or any theatrical performance or any other entertainment or amusement with a view to attracting the members of the public thereto,

in any polling area during the period of forty-eight hours ending with the fixed for the conclusion of the poll for any election in the polling area.

(2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(2A) No court shall take cognisance of any offence punishable under sub-section (1) unless there is a complaint made by order of, or under authority from, the Election Commission or the Chief Electoral Officer of the State concerned.

Explanation.—For the purposes of this section,—

(a) “election matter” means any matter intended or calculated to influence or affect the result of an election.

(b) “electronic media” includes internet, radio and television including Internet Protocol Television, satellite, terrestrial or cable channels, mobile and such other media either owned by the Government or private person or by both;

(c) “print media” includes any newspaper, magazine or periodical, poster, placard, handbill or any other document;

(d) “disseminate” includes publication in any “print media” or broadcast or display on any electronic media.

~~(3) In this section, the expression “election matter” means any matter intended or calculated to influence or affect the result of an election.]~~

**126B. Offence by companies.—** (1) Where an offence under sub-section (2) of section 126A.....

....

**126C. Disclosures relating to opinion polls. —** (1) No person shall publish or broadcast the results of an opinion poll without providing the following together with the results:

(a) the name of the sponsor of the survey;

(b) the name of the person or organization that conducted the survey;

(c) the date on which or the period during which the survey was conducted;

(d) the population from which the sample of respondents was drawn;

(e) the number of people who were contacted to participate in the survey; and

(f) if applicable, the margin of error in respect of the data obtained.

(g) A declaration that the results are in the nature of predictions, to be displayed prominently, in the manner prescribed by the Election Commission

(h) Any other information as may be notified by the Election Commission

(2) In addition to the information under sub-section (1), the publisher or broadcaster of an opinion poll shall, within a period of twenty-four hours after

the publication or broadcast of the opinion poll, publish on its website a copy of a written report on the results of the survey referred to in sub-section (1).

(3) The report referred to in sub-section (2) shall include the following, as applicable:

- (a) the name and address of the sponsor of the survey;
- (b) the name and address of the person or organization that conducted the survey;
- (c) the date on which or the period during which the survey was conducted;
- (d) information about the method used to collect the data from which the survey results are derived, including
  - (i) the sampling method,
  - (ii) the population from which the sample was drawn,
  - (iii) the size of the initial sample,
  - (iv) the number of individuals who were asked to participate in the survey and the numbers and respective percentages of them who participated in the survey, refused to participate in the survey, and were ineligible to participate in the survey,
  - (v) the dates and time of day of the interviews,
  - (vi) the method used to recalculate data to take into account in the survey the results of participants who expressed no opinion, were undecided or failed to respond to any or all of the survey questions, and
  - (vii) any weighting factors or normalization procedures used in deriving the results of the survey; and
- (e) the wording of the survey questions and, if applicable, the margins of error in respect of the data obtained.
- (f) a copy of the poll as published along with the copy of the disclosure under sub-section (1).

(4) The Election Commission may issue further notifications regarding the manner in which the disclosures under sub-sections (1) and (2) are to be made.

(5) Any person who contravenes the provisions of this section shall be punished, on first conviction, with fine which may extend to five lakh rupees, and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

(6) No court shall take cognisance of any offence punishable under this section unless there is a complaint made by order of, or under authority from,

the Election Commission or the Chief Electoral Officer of the State concerned.

*Explanation.*—For the purposes of this section, “opinion poll” means a survey of how electors will vote at an election or of the preferences of electors respecting any candidate, group of candidates, or political party.

**126D. Offences by companies.**— (1) Where an offence under sub-section (1) of Section 126C has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

*Provided* that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.*—For the purpose of this section,—

(a) “company” means any body corporate, and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.

**127A. Restriction on the printing of pamphlets, posters, etc. – (1)** No person shall print or publish .....

### **127B. Paying for news**

(1) Any person who is found paying for news, or receiving payment for news shall be punished with imprisonment for a term which may extend to three years, and with fine, which may extend to twenty-five lakh rupees.

(2) Nothing contained in sub-section (1) shall apply to payments made by registered political parties for the management of official publications (print, radio, television and all other electronic) owned or controlled by them.

(3) To avail of the exemption under sub-section (2) all registered political parties must disclose their interests in any publication in the form and manner notified by the ECI in this regard.

(4) An attempt to commit an act punishable under sub-section (1) shall be punished with imprisonment for a term, which may extend to two years, or with fine, which may extend to ten lakh rupees, or with both.

(5) No court shall take cognisance of any offence punishable under this section unless there is a complaint made by order of, or under authority from, the ECI or the Chief Electoral Officer of the State concerned.

#### **127C. Non-disclosure of interest in political advertising**

(1) Any political advertisement in any media shall carry a disclosure to this effect in the form and manner notified by the ECI in this regard.

~~(1)~~(2) Any person who contravenes the provision of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to five lakh rupees, or both.

**127D. Offences by companies.—** (1) Where an offence under sub-section (1) of Section 127B has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

*Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.*

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other

officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation.*—For the purpose of this section,—

(a) “company” means any body corporate, and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.

## CONDUCT OF ELECTION RULES, 1961

### **PART V: COUNTING OF VOTES IN PARLIAMENTARY AND ASSEMBLY CONSTITUENCIES**

**66A. Counting of votes where electronic voting machines have been used.**— In relation to the counting of votes cast at a polling station, where voting machine has been used,—

(i) the provisions of rules 50 to 54 and in lieu of rules 55, 56, and 57, the following rules shall respectively apply, namely:—

*“55C. Scrutiny and inspection of voting machines.— .....*

*56C. Counting of votes.*— (1) After the returning officer is satisfied that a voting machine has in fact not been tampered with, he shall have the votes recorded therein counted by pressing the appropriate button marked "Result" provided in the control unit whereby the total votes polled and votes polled by each candidate shall be displayed in respect of each such candidate on the display panel provided for the purpose in the unit.

(2) As the votes polled by each candidate are displayed on the control unit, the returning officer shall have,—

- (a) the number of such votes recorded separately in respect of each candidate in Part II on Form 17C;
- (b) Part II of Form 17C completed in other respects and signed by the counting supervisor and also by the candidates or their election agents or their counting agents present; and
- (c) corresponding entries made in a result sheet in Form 20 and the particulars so entered in the result sheet announced.

(2A) In the appropriate case, where the Election Commission apprehends intimidation and victimisation of electors in any constituency, and it is of the opinion that the votes recorded in the voting machines should be mixed before counting, it may by notification in the Official Gazette, specify such constituency where the returning officer shall use a totaliser for the counting of votes recorded in a group of electronic voting machines.

*57C. Sealing of voting machines.*— ....



## AMENDMENTS TO THE CONSTITUTION OF INDIA, 1950

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

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

(2A)(1): The Election Commission shall have a separate independent and permanent secretarial staff.

(2) The Election Commission may, by rules prescribed by it, regulate the recruitment, and the conditions of service of persons appointed, to its permanent secretarial staff.

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

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

(5): Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of ~~the Election Commissioners and~~ the Regional Commissioners shall be such as the President may by rule determine;

*Provided* that the Chief Election Commissioner and any other 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 and any other Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that ~~any other Election Commissioner or~~ a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

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

#### **Tenth Schedule: Provisions as to disqualification on ground of defection**

**1. Interpretation.....**

**2. Disqualification on ground of defection.....**

**4. Disqualification on ground of defection not to apply in case of merger....**

**5. Exemption.—....**

**6. Decision on questions as to disqualification on ground of defection.—**

(1) If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the ~~Chairman or, as the case may be, the Speaker of such House and his decision shall be final:~~

(a) President, in case of disqualification of a member of either House of Parliament;

(b) Governor, in case of disqualification of a member of a House of the Legislature of a State.

Provided that the decision of the President or the Governor as to whether a member of a House has become subject to disqualification under this Schedule shall be final.~~where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.~~

~~(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in Parliament within the meaning of article 122 or, as the case may be, proceedings in the Legislature of a State within the meaning of article 212. Before giving any decision on any~~

such question, the President or the Governor, as the case may be, shall obtain the opinion of the Election Commission and shall act according to such opinion.

Provided that no member of a House shall be disqualified under this Schedule, unless he has been given a reasonable opportunity of being heard by the Commission in the matter.

**7. Bar of jurisdiction to courts....**

**AMENDMENTS TO THE ELECTION COMMISSION  
(CONDITIONS OF SERVICE OF ELECTION COMMISSIONERS  
AND TRANSACTION OF BUSINESS) ACT, 1991**

Election Commission (Appointment and Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991

*An Act to determine the appointment and conditions of service of the Chief Election Commissioner and other Election Commissioners and to provide for the procedure for transaction of business by the Election Commission and for matters connected therewith or incidental thereto.*

**Chapter 1 — Preliminary**

**1. Short title.**— This Act may be called the Election Commission (Appointment and Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991.

**2. Definitions.**—.....

**Chapter 1A – Appointment of Chief Election Commissioner and Election Commissioners.**

**2A. Appointment of Chief Election Commissioner and Election Commissioners** – (1) The Election Commissioners, including the Chief Election Commissioners, shall be appointed by the President by warrant under his hand and seal after obtaining the recommendations of a Committee consisting of:

(a) the Prime Minister of India – Chairperson

(b) the Leader of the Opposition in the House of the People – Member

(c) the Chief Justice of India – Member

Provided that after the Chief Election Commissioner ceases to hold office, the senior-most Election Commissioner shall be appointed as the Chief Election Commissioner, unless the Committee mentioned in sub-section (1) above, for reasons to be recorded in writing, finds such Election Commissioner to be unfit.

Explanation: For the purposes of this sub-section, “the Leader of the Opposition in the House of the People” shall, when no such Leader has been so recognised, include the Leader of the single largest group in opposition of the Government in the House of the People.

## AMENDMENTS TO THE COMPANIES ACT, 2013 (18 of 2013)

**182. Prohibitions and restrictions regarding political contributions.—** (1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:

Provided that the amount referred to in sub-section (1) or, as the case may be, the aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years:

Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at the annual general meeting ~~a meeting of the Board of Directors~~ and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.

## AMENDMENTS TO THE INCOME TAX ACT, 1961(43 of 1961)

**13A. Special provision relating to incomes of political parties.-** Any income of a political party which is chargeable under the head “Income from house property” or “Income from other sources” or “Capital gains” or any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party :

Provided that—

- (a) such political party keeps and maintains such books of account and other documents as would enable the Assessing Officer to properly deduce its income therefrom;
- (b) in respect of each such voluntary contribution in excess of twenty thousand rupees, such political party keeps and maintains a record of such contribution and the name and address of the person who has made such contribution; and
- (c) the accounts of such political party are audited by an accountant as defined in the Explanation below sub-section (2) of section 288 :

Provided further that if the treasurer of such political party or any other person authorised by that political party in this behalf fails to submit a report under sub-section (3) of section 29~~DC~~ of the Representation of the People Act, 1951 (43 of 1951) for a financial year, no exemption under this section shall be available for that political party for such financial year.

Explanation.—For the purposes of this section, “political party” means a political party registered under section 29A of the Representation of the People Act, 1951 (43 of 1951).