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Mr. Varun Kumar, V.P.O. Gagret, Ward No.5, Tehsil. Ghanari, District. Una, Himachal Pradesh, Pincode: 177201,

Phone: +91-8351033361,

Email: lawjournal@lawaudience.com, info@lawaudience.com,

Website: www.lawaudience.com,

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ELECTORAL REFORMS: THE TUG OF WAR BETWEEN EXECUTIVE AND JUDICIARY.

AUTHORED BY: MR. ANURAG SHAH, SCHOOL OF LAW, CHRIST UNIVERSITY, BANGALORE.

I. INTRODUCTION:

Electoral reforms in India have been a topic of intense debate, especially over the last few decades. Electoral reform is the change in the electoral system of a country that helps the citizens in choosing the right kind of government and makes the election process smoother.[1] The political system of India has been infected with way too many malpractices and scams. From selling of party tickets to criminals coming in key positions in parliament, there is nothing which hasn't been in the news about Indian politics. On the golden jubilee celebrations of the Election commission of India, the then President in his speech said some powerful lines about the Indian political system. Quoting the Father of the Nation, Mahatma Gandhi, he answered in reply to the question that what if unworthy people get elected because we do not come forward? If such people do get an entry into the legislatures, then the ruling government will not be able to run the government in the way it is supposed to."[2] Even though his words were powerful enough to get him a standing ovation, it couldn't make much of a change.

There have been a number of failed and some successful attempts by the legislature and judiciary in bringing in electoral reforms. The judiciary in most of the situations has stepped in and taken the charge of eliminating the lacunas of the political system which has been exploited by various political parties. The system in India has failed to such an extent that English daily once wrote "clearly the system in India has now changed. Now it is for the politicians, of the politicians and by the politicians."[3] The attempts of reforms could have worked for the Indian political system if it wasn't for the tug of war between the two most important wings of India, the judiciary and the legislature.

[1] Electoral Systems: Urgency of basic reforms, Economic and Political Weekly Vol. 26, No. 6 (Feb. 9, 1991), pp. 282-283.
[2] Speech by president of India, K R Narayanan, while inaugurating the Golden Jubilee Celebrations of the Election Commission of India, Vigyan Bhavan, New Delhi, January 17, 2001.
[3] 'Of Neta, For Neta', The Times of India, Ahmedabad, January 2, 2018, p 12.

II. THE PROBLEM OF ELECTION FINANCING:

Every attempt to improve the political scenario goes into vain because these two wings are not on the same page. For instance, the issue of election financing has been one wherein the legislature tried everything to not let judiciary interfere. Section 77 of the Representation of People Act, 1951, states that all candidates should disclose to the election commission all the expenditure that was incurred by the candidate from the day he or she filed the nomination to the day when results are announced. And also Section 123(6) declares excessive expenditure on elections as a corrupt activity. The maximum amount of expenditure on an election that may be incurred by a candidate in various states has been mentioned in Rule 90 of the Conduct of Elections Rules, 1961. This rule also specifies that mere non-disclosing of the expenditure incurred is not a corrupt activity but it does become a corrupt activity as it amounts to expenditure more than the specified amount. Hence it is in contravention to Section 77 of the Representation of People Act, 1951, which falls within the ambit of Section 123 (6).

The Supreme Court in many cases had the chance to look into an issue relating to the above law. The issue was whether the expenses by the political parties shall also be included under, the costs of a candidate which falls inside the extent of Section 123(6), read with Section 77 of the Representation of People Act, 1951. On account, ***Kanwarlal Gupta v. Amarnath Chawla***[4] of the Apex Court held that the costs brought about by a political party should be incorporated into the election costs of the candidate. Nonetheless, the political party couldn't stand the fact that something was being done against their advantage. Along these lines, to invalidate the impacts of the ***Kanwarlal Gupta case***, Representation of the People Act was altered by the parliament. Clarification 1 of Section 77 was affixed. This specified unauthorised party and supporter expenditure in the help of any applicant won't be tallied in election costs of the candidate, with the end goal of the ceiling. Hence, this entire scene made the limitation a pointless activity.

After analysis of this episode of the tug of war between legislative and judiciary, many scholars were of the view that the only way to solve the issue of election financing would be the introduction of State-funded elections. A certain level of institutionalised funding of elections is one of the most pressing needs. But the funding shall be adequate otherwise its

[4] 1975 AIR 308, 1975 SCR (2) 269

purpose would be easily defeated as the most important purpose of state funding is not only to reduce costs of elections but also to curb illegal flow of money.[5]

III. CRIMINALISATION OF POLITICS:

The criminalisation of politics is another topic that is always on the headlines. Most of the Indian politicians either have one or other kind of connection with the criminals. The parliament has more than once ducked this issue. The election commission also suggested a number of steps to remove criminals from the political system. They put forward the idea of filing of declarations by parties to the commission that they would not give tickets to contest elections to those who were convicted as criminals even for a period of less than five years for a cognizable offence. They even suggested that they should be given the power to de-recognise and de-register parties that give tickets to criminals. The election commission had asked returning officers to take affidavits from all candidates stating whether they have been convicted by a court of law, besides the date of conviction, the nature of the offence, the punishment imposed and other such information.[6]

But the rules suggested by the election commission could not be well implemented. However, the Indian judiciary has made it clear that it would not let Indian politics to be handled by criminals. Two recent judgements that show the judiciary's stand upon the issue and also the tug of war between judiciary and legislative are the *Jan Chuakidar judgement* and *Lily Thomas judgement.*

While there are a number of instances where the Supreme Court of India took a step forward and encroached upon the scope of legislature and executive, few of them have been to bring in electoral reforms. It has been often seen that political parties that keep accusing each other of corruption and bad administration, team up and prevent electoral reforms which are against their interests. Thus it was the judiciary that had to step up and bring in the reforms.

One of such cases is ***Jan Chaukidar v. Association of India***, where the court held that people in police custody ought to be suspended from standing in elections. In 2004, Jan Chaukidar an NGO working in Patna filed a PIL in the High court of Patna against a few acts of malpractices in the elections of Bihar. It was then when the Patna High court suspended each

[5] Kumar B. Venkatesh (1999). 'Funding of Elections (Case for Institutionalised Financing)', Economic and Political weekly, 34(28), pp.2119-21.
[6] Gehlot, N.S. (1991). 'Appointment of Chief Election Commissioner in India', Journal of Constitutional and Parliamentary Studies, 25(1-4), January December, pp.56-6.

one of those in legitimate police custody and serving jail terms from challenging elections regardless of whether they are enlisted as voters. The basis behind the judgment was that Section 4(d) of Representations of People's Act expresses that, for a man to be qualified as a member of parliament he/she should be a voter. A voter is a man who is qualified for the vote. Be that as it may, 62(5) of Representations of People's Act expresses that a man does not have right to vote if he is a detainee with the exception of in the event that he is under preventive confinement. Hence each one of the individuals who are under lawful custody with the exception of preventive detainment might not have the privilege to vote or contest elections.

However since this judgement was against the corrupt political parties that have been giving tickets to criminals and regular law offenders, the verdict was challenged in the Supreme court of India. In July 2013, a divisional bench, comprising of Justice A.K Patnaik and Justice S.J Mukhopadhaya upheld the verdict given by Hon'ble Patna High Court. The Apex court further substantiated that section 62(5) clearly shows that a person falling under the ambit of this section is not entitled to vote, hence is not qualified to be an elector. The clear interpretation of this is that a prisoner cannot be allowed to contest an election to the house.

The verdict was followed by quick reactions by the legislature. A bill was passed and assented by the president on 23rd September 2013. The Representation of People (Amendment and Validation Act) 2013 was passed within three months and it amended section 7, 62 and 43 of the original Act. The major amendment was done to section 62 and also Section 4 of the amendment made the act retrospective for July 2013 thus nullifying the effects of *Jan Chuakidar Case.*

Be that as it may, in the event that we break down the case, at that point section 62(5) of the Representation of People's Act itself is by all accounts constitutionally invalid. And furthermore, a legitimate issue raised by the main government officials was that this lead could be utilized by more intense and well-off candidates to expel their rivals. Discussing the deficiency of Section 62(5), we need to comprehend that dissimilar to Right to life or equality, right to vote is a legal right and not a fundamental right henceforth it is under the control by the legislative body, subject to Article 325 and Article 326 of the constitution of India.

The constitutional validity of Section 62(5) in front of the apex court in ***Anukul Chandra Pradhan v. Union of India***[7]. It was contended that the section is violating Article 14 which is the right to equality and Article 21 which is right to life. However, the court rejected the challenge. Even if the above argument is ignored, the fact that Section 65(2) still violates the principle of "Innocent until proven guilty". Under this section, we are treating those who are just accused of committing an offence on equal terms with those who have been convicted by a court and thus denying them the right to vote. The classification being used here is also opposed to the principle of reasonable classification under Article 14 of the Constitution of India. Thus, at last, it can be understood that this provision might turn into a lethal diplomatic weapon which can be used to deprive another person of his right to vote by simply accusing him and making sure he lands up in jail.[8]

While there were many who were in support of the said reform brought in by the Apex court but eventually the criticism of the verdict increased. The common mass happily accepted the judgement along with the Lilly Thomas case, which declared another Section of the Representation of the People Act to be *ultra vires*. The initial support to the judgement can be seen by the editorial of The Times of India that said that such rulings and judgements go on a long way in rescuing Indian politics from the control of the criminals and law offenders. Also the then Chief Election Commissioner put forth his opinion that this verdict would help in cleansing India' political system. However, after some time, people and various leaders started criticising the judgement.[9] Most of the criticism came from the political parties. The fact that an amendment was passed to nullify the judgement shows how these parties can join in together to oppose something that is dangerous to their interests.

However, even after the nullification of the *Jan Chaukidar case*, it did leave a few things to learn from it. The concerns raised by various criticizers are genuine. India is a country where the law has been used since time immemorial for personal benefits. There can be no assurance that this rule could not be used as a potential weapon to do away with good candidates. In such a scenario the prompt action taken by the legislative seems appreciable. If this move was done with the intention which is was said to be done, then this shows to the general public that the parliament still hasn't lost its essence. However, the fact that there are

[7] AIR 1947 SC 2140.
[8] Kumar B. Venkatesh (2015). 'Electoral reforms: Too Little, Too Late', Economic and political weekly, 37(4), pp.292-93.
[9] Iyer, R. Ramaswami (2005). 'The Election Commission and the Judgement', Economic and Political Weekly, 31(1), January 6, pp. 37-42.

a huge number of MP's and MLA's that has cases registered against them cannot be denied. So if the amendment was a way of doing something indirectly that could not have been done directly, then this whole episode favours the judiciary.

No decision can be completely right or completely wrong. Any judgement that is correct in the eyes of the law might not seem to be correct to the general mass. Thus the correctness of the verdict of *Jan Chaukidar Case* has to be decided by weighing both the positive as well as the negative aspects of it. It needs to be judged taking into account the issues raised and the gross reality of our country's politics.

IV. THE UNCONSTITUTIONALITY OF SECTION 8(4) OF THE REPRESENTATION OF PEOPLE ACT, 1950:

Yet another case involving Representation of People Act, 1950 is the ***Lily Thomas v. Union of India***[10]. This was a Supreme Court judgement that declared Section 8(4) of the Representation of People Act as unconstitutional. Section 8(4) of the Representation of People Act is as follows:

This Section was often used as a tool for delaying the disqualification of the legislators until such appeals were exhausted. Two writ petitions were filed in the Supreme Court of India. These were ***Lily Thomas v. Union of India*** and ***S.N Shukla v. Union of India***[11]. These were filed as public interest litigation with the demand of declaring Section 8(4) of the Representation of People Act, 1950 as *ultra vires* to the constitution of India. When a reporter asked Lily Thomas about the reason behind the PIL, she said that this particular section encourages tainted leaders to join and contest elections. She wanted the court to declare the section as *ultra vires*[12]. Lok Prahari, a Lucknow based NGO also filed a petition regarding the same issue. So, both of them were clubbed together.

On July 10th, 2013 a divisional bench of the Supreme Court comprising of Justice A.K Patnaik and Justice S.J Mukhopadhya declared Section 8(4) of the Representation of People Act as unconstitutional and being out of the legislative competence of the Parliament of India. The government in the *Lily Thomas case* was represented by the ASG Siddharth Luthra. He argued before the court that since the parliament of India has been given the

[10] 2000 (2) ALD Cri 686.
[11] AIR 2016 SC 5593.
[12] Navin B. Chawla, Criminality in the Indian Political system, The Hindu, 2013, November 16, pp. 12.

powers to decide the criteria for the disqualification of a member of parliament under Article 102 (1) (e) and for the member of legislative assembly under the Article 191 (1) (e) of the constitution of India. Thus this necessarily includes within its ambit the legislative 'competence' to make a law that may temporarily postpone the disqualification. He also went forward and argued that the legislative competency of the parliament to pass Section 8(4) came from Article 246 of the Constitution rather than Article 102 (1) (e) and Article 109 (1) (e). Article 246 states that the parliament can make laws on the subjects given in the List 1 of Schedule 7 of the constitution while the state can make laws related to subjects given in List 2 of Schedule 7. Thus when Article 246 is read with Entry 97 of List 1 of Schedule 7 then this gives the legal competence to the parliament. Entry 97 is 'residuary entry' which means that if any subject is not given in any of the lists then the Subject falls in List 1. Thus if it is not clear where the present subject shall go, then to establish legislative competency the subject will go to list 1 and hence the parliament can legislate upon it.

Both of Luthra's arguments were rejected by the court. The court held that Entry 97 comes into play only when the constitution is silent about any topic. However, in this case, the constitution talks about disqualification under Article 102 and 109, hence Entry 97 cannot be used. The court further talked about Article 101 (3) (e) of the constitution that states that if an MP gets disqualifies under Article 102 (1) (e), then his seat shall thereupon become vacant. Article 190 (3) (a) mentions the same rule for MLA's. The court stated that the parliament does not have the competency to pass a law that defers that date on which a sitting member shall be disqualified thus delaying the seat from being vacant. However, the disqualification can be suspended when an appeal is filed in an appellate court and the court under Section 398(1) of Cr.P.C gives a stay order to the conviction. Also, the member can preserve his membership if the High Court, under Section 482 of Cr.P.C, exercising its inherent powers, gives a stay against the order of conviction.

In simple words, the parliament is competent to make laws related to the disqualification of an MP or MLA but it isn't competent to pass rules about the duration within which the disqualification shall be applicable. Thus Section 8 (4) which delays the disqualification of a member is unconstitutional as the constitution mandates that once a member is disqualified the seat shall thereafter fell vacant. Thus using this rationale the court declared Section 8 (4) of the Representation of People Act as unconstitutional and outside the competence of the parliament. This was a major electoral reform brought in by the judiciary. The *Lily Thomas*

case and the *Jan Chaukidar case* together sought to prevent criminals and law offenders from being at important positions in the government of India. There have been many instances wherein criminals have become politicians and also won a seat in the law-making bodies.

However, the reaction of the politicians to this judgement was nothing less as compared to the *Jan Chaukidar*. The politician came out and criticised the judgement. They argued that the apex courts rationale behind the judgement was flawed. They claimed that is a period when the court has, again and again, expressed its frustration with the political scenario of our country and thus using this case it has tried to assert it as the saviour of the constitution and an alternative to corrupt legislative and executive. However while doing so the court sacrificed the legal clarity that is essential in such important verdicts. A sound judgement on the argument presented by the petitioner related to Article 14 (Right to equality) would have been better rather than a fatal blow on the Parliament's legislative power. At the end of this episode, the judiciary has taken the parliament's power of suspending disqualifications on convictions and taken the power under their ambit.[13]

This criticism shows us that the politicians have been trying to resist electoral reforms in the country for their personal interests.

V. CONCLUSION:

Finally concluding, all these episodes lead us to the one final point, Just as ' war is too important to be left to the generals', so is politics. If the politics is left only under the purview of the legislative then it will degrade to its lowest possible standards in the upcoming year. It is important for another equally strong wing of the system i.e. Judiciary to step in and take the situation under their control. Another important thing that is the need of the hour is the involvement of citizens and the people of India. The tug of war that has been talked about in this paper can only be resolved if the general mass supports electoral reforms. Leaving politics in the hands of politicians has been a mistake by the post-independence people and judiciary resulting in the current situation. The present scenario is a very apt example of the Greek saying 'the price that good men will be paying for not getting involved will be to be governed by bad men'. Judiciary and concerned citizens (using the system of Public Interest Litigation) have to use all possible means to use reform the political system.

[13] Kochanek, Stanley A. (1987). 'Brief Case Politics in India', Asian Survey , 27(12), December.

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