

CHAPTER IV

ELECTORAL LAWS AND REFORMS THROUGH JUDICIAL PROCESS

There is much pathos in a democracy. In a democratic process, elections play a very important role. In a country of the size of India with a large proportion of illiterate voters, the organization of elections is a vital administrative task. The study of elections has become the most important branch of law. The electoral law in India is to be gathered from the Constitution and a number of statutes and rules. The Constitution of India incorporates provisions for a fair process of election to central and state legislatures. There is no express provision for regulating the relationship between the elected and the electorate although they do regulate the process of election. They do not spell out as to the matters that the candidates should place before the electorate. In these circumstances, the electorate is left with no choice but to make an uninformed decision in blissful ignorance of the fitness and suitability of the candidate or parties voted to power. The voter, therefore, is unable to make a wise choice thereby shaking the very foundation of the democratic set up. The Law Commission has suggested amendments¹ to the Representation of the People Act, (RPA) 1951 whereby, at the time of filing nomination, the candidate should declare his own assets and those of his relatives and dependants. He should disclose if there was any 'charge' in respect of any offence for the purpose of section 88 of the RPA. He

¹ Reform of the Electoral Laws, 170th Law Commission Report, 1999 at 100-201.

should also declare the details of criminal cases, if any, against him for the offences mentioned in sections 8-B of the said Act.

The word 'democracy' has many meanings and there are various forms of democracies known as 'people's democracy', 'basic democracy', or 'guided democracy'.² The word 'democracy' is used in two senses. In a restricted sense it means a system of Government which gives full expression to the will of the people which in substance means will of the majority. Actually even the will of the majority is illusory because often a well organised party can manage to secure a majority in the House of Representatives or Lok Sabha with only about 35 per cent or even less votes polled in its favour. But democracy is valued not for its majority rule but for its commitment to the good of the people as a whole and respect for spiritual values cherished by the people in general and the dignity of human personality.³

It was Abraham Lincoln who had stated that 'democracy is a government of the people, by the people, for the people'. Justice Hidayatullah would however add that 'democracy is also a way of life and it must maintain human dignity, equality and the Rule of Law. It requires strong public opinion, independence and

² S. M. N.Raina, *Law Judges and Justice*, 1st ed., Sat-Prachar Press, Indore, at 4 (cited from Hidayatullah 'Democracy in India and the Judicial process, at. 15)

³ *ibid.*,

fearlessness in the Press and in educated men and women who are not compliant to authority wrongly exercised'.⁴ This is indeed so, as a vigilant public opinion expressed in diverse ways inclusive of or through the medium of the press is the sine qua non of a vibrant democratic society. For this it is essential that the Press do enjoy full freedom in a democratic country. Democracy is a concept, a political philosophy, an ideal practiced by the resorting to government by representatives of the people elected directly or indirectly.

Democracy, by definition, is a form of government where people exercise their power to take political decisions through their representatives selected by the process of free elections. Democracy may be direct or indirect. In a system of direct democracy, the will of the state was formulated and expressed by the people themselves. In modern states, with enormous territory and vast population, it is physically impossible for the people to assemble together frequently and directly participate in the making of laws. Modern democracy is, therefore, indirect and representative.

A free press is the sine qua non of any free country where dictatorship is absent, where there is no throttling of dissemination

⁴ *ibid.*,

of news and views. A free Press does not necessarily connote licence without any restriction whatsoever. It merely indicates that the press is allowed to function in the country under the minimum normal restrictions conceived in the interest of the health, prosperity and stability of very society which the press wants to safeguard.

The electoral law of India is not contained in a single code. Introduction of identity cards and computerization of polling has come into existence in the conduct of general elections. The Constitution of India provides for the establishment of an independent high level Commission for the effective conduct of elections in India. The RPA ACT 1950 and 1951, form a set of principal enactments in this field. The Registration of Electors' Rules, 1960 and the Conduct of Election Rules, 1961 supplement these two Acts. The Delimitation Commission Act, 1952, the Two-member Constituencies (Abolition) Act, 1961, the Parliament (Prevention of Disqualification) Act, 1959 and the Presidential and Vice-Presidential Elections Act, 1952 are other enactments governing elections in India.

The expression 'election' means selection of a person by vote or even otherwise. In other words it connotes an act of choosing. The term is normally used in its narrow meaning for the final selection

of a candidate. This may be the result of a poll when there is polling, or when a particular candidate is returned unopposed without a poll. In its wide sense, the term may be used to denote the entire process of election ultimately resulting in a candidate being declared elected. For democracy to survive, rule of law must prevail, and it is necessary that the best available men should be chosen as people's representatives for proper governance of the Country. The word 'election' as used in the RPA includes every stage from the time the notification calling for election is issued till the declaration of the result.⁵ Electing representatives to govern is neither a 'fundamental right' nor a 'common law right', but a special right created by the statutes, or a 'political right' or 'privilege' and not a 'natural', absolute' or vested right'. The contention that the word 'election' refers only to the process of casting votes and the declaration of results, ignores the fact that many things have to be done in preparation for, and in connection with elections can actually take place. The word 'election' covers every part of the process. It is in this wide sense that the word is used in Part XV of the Constitution.⁶

There are two systems of election in vogue generally. One is of proportional representation by a single transferable vote. The other

⁵ *Ashraf Ali Khan v. Tika Ram and others*, 20 ELR 470.

⁶ *Election Commission of India v. Shivaji*, AIR 1988 SC 61.

system of election is by multiple votes with distributive voting. The processes used in both the systems of voting are contained in Form 13D under Rule 23 (1) (d) of the Conduct of Election Rules, 1961. Election is an essential part of the democratic process.⁷

In the Constituent Assembly when the question of making the Election Commission an independent body was being debated, Dr Ambedkar observed that 'in the interest of purity and freedom of elections to the legislative bodies, it was of utmost importance that they should be freed from any kind of interference from the executive of the day'. This the House affirmed without any kind of dissent.⁸ Article 324 of the Constitution provides for the appointment of an Election Commission for the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to Parliament and State Legislatures of every state and of elections to the office of the President and the Vice-President. Prior to the Constitution (Nineteenth Amendment) Act, 1966, the Election Commission had the authority to appoint Election Tribunals also. But after this amendment, only the High Courts are to entertain election petitions. The President can appoint Regional Commissioners to assist the Election Commission

⁷ An Election petition is not a suit between the parties, but is a proceeding in which the constituency itself is the principal party. See *K. Kamaraj Nadar v. Kunju Thever*, 14 ELR 270 (SC).

⁸ Constituent Assembly Debates, Vol. 8, at 905.

which he did just before the first General elections in 1952. The conditions of service and tenure of the office of the Election Commissioners and the Regional Commissioners shall be such as the President may, by Rule determine. These Rules, however, are subject to any law made by the Parliament. The Chief Election Commissioner can be removed from his office only in the same manner and on the same grounds as a Judge of the Supreme Court. The conditions of service of the Chief Election Commissioner cannot be varied to his disadvantage after his appointment to the office by the President. Other Election Commissioners and Regional Commissioners can be removed on the recommendation of the Chief Election Commissioner. The President or the Governor shall, when requested by the Election Commission, make available to the Election Commission such staff as may be necessary to discharge its function.⁹ Thus, the Election Commission shall have generally few staff of its own. It can demand necessary staff from the Central and the State Governments whenever required. All these are ensured in the Constitution itself so that the Commission can perform their duties without fear, or pressure from the executive or party in power.

⁹ Article 324.

In *S. S. Dhanoa v. Union of India*,¹⁰ the Supreme Court held that Election Commissioners cannot be placed on a par with the Chief Election Commissioner in terms of power and authority. The Court dismissed the petition of *S. S. Dhanoa* challenging his removal from the post, holding that the removal of the two Election Commissioners, were 'not a case of pre-mature termination of service', but a case of the abolition of the posts, with termination of service as a consequence. Hence, the termination of service was not open to challenge on the ground of illegality. The Court said that the protection available to Chief Election Commissioner is not available either to the Election Commissioners or the Regional Commissioners and therefore, their conditions of service can be varied even to their disadvantage.

On October 2, 1993, the Government issued an ordinance (now an Act) and converted the one-man Election Commission into a multi-member commission by appointing two persons as Election Commissioners. The Ordinance provided specifically that the decision of three-member Election Commission 'shall as far as possible, be unanimous'. But, in case of difference of opinion between the Chief Election Commissioner (CEC) and other Election Commissioners, the matter 'shall be decided according to the

¹⁰ AIR 1991 SC 1745.

opinion of the majority'. The Ordinance issued by the President provides that the allocation of business or work between the C.E.C and other Election Commissioners shall be done under the Act and Rules of Business. The Ordinance has amended the law and equated the two Election Commissioners with CEC in respect of salary and other terms of service. The decision to make the Election Commission a multi-member one was made by the Government in the wake of certain controversial decisions taken by the Chief Election Commissioner T. N. Seshan which had created a serious confrontation between the Election Commission and the Government in August 1993. The C.E.C had postponed certain by-elections and biennial elections to the Rajya Sabha and the State Legislative Councils, unless certain 'unresolved' disputes about the exclusive power and privileges of the Commission to direct the Government about the deployment of Central Police Forces at the time of an election were settled. The Commission had claimed exclusive jurisdiction to take disciplinary action against the staff placed on poll duty.

The decision to have a multi-member Commission was also prompted by the ruling of the Supreme Court in the *S. S. Dhanoa*¹¹ where it had observed that 'when an institution like the Election Commission is entrusted with vital functions and is armed with

exclusive and uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however wise he may be. It all conforms to the tenets of democratic rule.'

In *T.N.Seshan v. Union of India*,¹² a five judge bench of the Supreme Court unanimously upheld the validity of the Act equating the status, power and authority of the two Election Commissioners with that of the C.E.C. Delivering the judgment of the Court, Ahmadi, C.J. rejected Seshan's argument and held that C.E.C does not enjoy a status superior to other Election Commissioners (E.Cs), although there are two differences between the service conditions of C.E.C and other E.Cs. He went on to add that 'no body can be above the institution which he is supposed to serve. He is merely the creature of the institution; he can exist only if the institution exists. To project an individual as mightier than the Institution would be a grave injustice'.

The Supreme Court has held that the right to vote is a statutory right and therefore, subject to limitations imposed by the State which can be exercised only in the manner provided by the Statute. It is neither a fundamental right nor a common law right.

¹¹ AIR 1991 SC 1745.

¹² 1995 (4) SCC 611.

It is pure and simple, a statutory right.¹³ According to Section 5 of the RPA, 1951 which debars a person to vote in an election if he is confined in prison, whether under a sentence of imprisonment or transportation or otherwise, or in lawful custody of police, but not under preventive detention, is not discrimination and is not violative of Article 14 of the Constitution.¹⁴

The Election Commission performs its functions in accordance with Article 324 (1) of the Constitution of India. The Constitution provides that there shall be one general electoral roll for every territorial constituency.¹⁵ No person shall be eligible for inclusion in any such roll on grounds only of religion, race, caste, sex or any of them. The elections to the parliament and state legislatures are to be held on the basis of adult suffrage. Every person who is a citizen of India and who is not less than 18 years of age and is not otherwise disqualified under the Constitution or any law RPA, 1950 made by the legislature on the ground of non-residence, unsoundness of mind, crime or illegal practice, has a right to be registered as a voter.¹⁶

It is the prerogative of the Government to choose the timing of the general elections. The Election Commission's role is to take over

¹³ Although Article 326 of the Constitution provides for it.

¹⁴ *Anukul Chandra Pradhan v. Union of India*, AIR 1997 SC 2814.

¹⁵ Article 325.

¹⁶ Article 326.

the actual conduct and supervision of the elections. The duty and power to initiate elections lies with the Government. This is the view expressed by the Supreme Court in a recent case while hearing a public interest litigation petition filed by the J & K Panther's Party Mr. Bhim Singh, challenging the Election Commission's order, rejecting the request of the Government to hold J & K State Assembly Elections before December 20, 1995.

With regard to the appointment of a private secretary, the court observed that 'the post of Chief Election Commissioner is a sensitive one and the office is called upon to handle correspondence which requires a high degree of secrecy and confidentiality. A person appointed as Private Secretary to the CEC must be of unimpeachable character and integrity, and as such, the discretion in the matter of such appointment is not arbitrary'.¹⁷

On a request by the Election Commission the services of those Government servants who are appointed to Public services and posts under the Central or State Government will have to be made available for the purpose of election. The services of the employees of the local authorities also can be requisitioned by the Election Commission.

¹⁷ *Ajit Singh v. Chief Election Commissioner of India and other*, AIR 1989 SC 2255.

In *State of Bank of India*,¹⁸ the Supreme Court has held that the requisitioning of the services of the employees of the Bank and the LIC by the Election Commission is not permissible.

Article 327 empowers parliament to make provisions with respect of all matters, relating to or in connection with election to parliament and state legislatures, the preparation of electoral roles, the delimitation of constituencies and all other connected matters. In exercise of the power conferred by Article 327, parliament has enacted the Representation of People's Act, 1950 and 1951, the Presidential and Vice-Presidential Elections Act, 1952 and the Delimitation Commission Act, 1952. Article 328 confers a similar power on the State legislatures. Under Article 327, the State legislature can make laws relating to the matters referred to under Article 327 in so far provision in that behalf is not made by Parliament.

In *A.C. Jose vs. Shivan Pillai*,¹⁹ the Court held that the order of the Commission directing casting of votes by mechanical process in some polling stations was without jurisdiction and hence, unconstitutional. The Commission had no power to over-ride the provisions of the Act or Rules made by the legislature under Article

¹⁸ AIR 1995 SC 1078.

¹⁹ AIR 1984 SC 921.

327. Where there is no parliamentary legislation or rule made there under, the Commission was free to pass any orders in respect of the conduct of election. The powers of the Commission are meant to supplement rather than supplant the law in the matter of superintendence, direction and control elections under Article 324, which had to be read harmoniously with the Articles that follow, and the powers given to the legislatures under Entry 72 of the Union List and Entry 37 of the State List in the VII Schedule to the Constitution.

The Election Commission has exclusive power to hold elections. It is not absolute but subject to judicial review. In a recent Presidential Reference 2002, ²⁰ the inter-relationship between Art 174 and Art. 324 was taken up for consideration. In view of this, three questions were referred to the Court for its opinion:

- 1) Whether Article 174 is subject to the decisions of the Election Commission not to hold elections in a State under Article 324?;
- 2) Whether the Election Commission can declare an election schedule which violates Article 174 and after the expiry of the constitutional period of six months for the assembly to meet necessitating imposition of President's rule under Art. 356; and

²⁰ AIR 2003 SC 87

3) Whether the mandate of Article 174 to hold election will be fulfilled by the holding of Election by the Commission under Article 324.

A five-Judge bench held that Article 174 (1) does not apply to a 'dissolved assembly' whose life has come to an end and ceased to exist but applies only to a 'live' assembly. The court opined that Article 174 (1) neither relates to elections nor does it provide any outer limit for holding elections for constituting the legislative assembly. It held that the holding of elections is the exclusive domain of the Election Commission under Article 324 of the Constitution as was evident from Sections 14 and 15 of the RPA which provide that the President or the Governor shall fix the date for holding elections on the recommendation of the Election Commission.

Referring to the contention of the Union Government the Court said that 'on premature dissolution of an assembly, the Election Commission is required to initiate immediate steps for holding election for constituting the assembly on the first occasion and, in any case, within six months from the date of premature dissolution of the assembly'. Regarding the third question, the Court said that 'under Article 324, it is a duty and responsibility of the Election Commission to hold free and fair elections at the earliest. No

efforts would be spared by the Election Commission to hold timely, elections'. In regard to the reference of the Commission's, order postponing election in Gujarat citing law and order situation in the State, the Court said that 'ordinarily the law and order or public disorder should not be the occasion for postponing the election and it would be the duty and responsibility of all concerned to render all assistance and co-operation to the Election Commission for holding free and fair elections'.

In a petition filed by Association for Democratic Reforms against the Union of India under Art.226 of the Constitution the Delhi High Court examined the 170th Report of the Law Commission of India and observed that 'the grave danger posed by the criminalization of politics could be eliminated provided that voters are made aware of the criminal propensities and activities of a candidate'. To keep such activities under a veil of secrecy will perpetuate and aggravate the situation and will not arrest the trend towards criminalization of politics.

The Union of India went in appeal ²¹ before the Supreme Court against the directions issued by the Delhi High court to the Election Commission. The Apex Court endorsed the order of the High Court. The apex Court observed that 'if the right to telecast

²¹ *Union of India v. Association for Democratic reforms*, (2005) 5 SCC 294.

and right to view games was implicit in Art.19 (1) (a) of the Constitution, there was no justification to exclude from the scope of the statute the right of a voter to get material information about his representative who was going to hold a post of utmost importance. The Apex Court observed that democracy could not survive without free and fair election and without informed voters. One-sided information, disinformation, misinformation and non-information, all equally create an uninformed citizenry, which makes democracy a farce'.

The decision of the apex Court rendered in the above said case caused discomfort to political leaders and parties. The political parties were unanimous in their view that the decision should be undone by appropriate legislative measures. The Representation of the People (Amendment) Ordinance 2002 was issued forthwith and was later substituted by the Representation of the People (Amendment) Act 2002. The new Sec. 33A which reads 'notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the Rules made there under'. Manifestly, this ingeniously drafted

non-obstante clause was to override the decisions of the courts. In other words, the Ordinance and the amending Act was to whittle down the effect of the judgment, and to limit the requirement to furnishing of information whether or not the candidate was convicted with imprisonment for one year or more.

The Ordinance and the Act were challenged before the Supreme Court.²² The main attack was that the impugned law abridged the fundamental rights and affected the basic structure of the Indian Constitution, viz. republican democracy. It was also contended that the amendment overriding the prior decision of the Supreme Court in the above said case was not a valid legislative venture as it violated the fundamental right of voters. The Apex Court held that the provisions overriding the verdict were unconstitutional as they abridged the voters' right to know the antecedents of their candidates and that the Election Commission could take necessary steps to implement the order of the court. The Election Commission accordingly issued directions to reject nominations with wrong or concealed information

The decisions of the Supreme Court have settled important questions of law relating to electoral law and process in India.

²² *Peoples' Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399.

Some decisions have resulted in amendments of the existing law. The Supreme Court of India has emphasized the importance of free and fair elections in a democracy. Justice V. R. Krishna Iyer has observed that

‘a free and fair election based on universal adult franchise is the basic; the regulatory procedures vis-à-vis the repositories of functions and the distribution of legislative, executive and judicative roles in the total scheme directed towards the holding of free elections is the specifics. Part XV of the Constitution plus the Representation of the People Act, 1950 and the Representation of the People Act, 1951, Rules framed thereunder, instruction issued and exercise prescribed constitute the package of electoral law governing the parliamentary and assembly elections in the country. The super authority is the Election Commission, the kingpin is the Returning Officer, the minions are the Presiding Officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provisions’.

The Constitution does not prescribe any educational qualifications for membership of Parliament or State Legislature.

Articles 102 and 191 of the Constitution provide that a person shall be disqualified for being chosen as, and for being, member of the Parliament/State Legislature, as the case may be, if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Parliament /Legislature of the State by law not to disqualify its holder. The Apex Court in *Jaya Bachchan v. Union of India*²³ has held that if pecuniary gain is ‘receivable’ in connection with the office then it becomes office of

²³ AIR 2006 SCW 2601.

profit, irrespective of whether such pecuniary gain is actually received or not. In *Abdul Kuddus Anwar*,²⁴ the court held that an indirect control by the government of the company in which the office of profit was held was not contemplated under Article 191. In *M.V.Rajsekharan v. Vatal Nagaraj*,²⁵ the point for consideration was whether the Chairman appointed by the Government to study certain problems and receiving salary and allowances from the Government was holding the office of profit. The apex court after conjoint reading of Sections 2 (a), 2 (b) and 3 (d) of the Karnataka Legislature (Prevention of Disqualification) Act, 1956, together with the proviso held that the post of Chairman of a Commission is an office of profit and the remuneration which the said Chairman was getting cannot be held to be compensatory allowance within the ambit of Sec. 2(b) of the Karnataka Act.

The Constitution (Fifty –Second Amendment) Act, 1985 has been made to curb political defections. It amended Article 101,102,190 and 191 and added Tenth Schedule to the Constitution. Clause (2) in Articles 102 and 191 provides that a member shall be disqualified for being a member of either House of Parliament or of the State Legislature if he incurs the disqualifications as specified in the Tenth Schedule. If any question arises as to whether a

²⁴ AIR 1969 SC 744.

²⁵ AIR 2002 SC 742.

member of a house of a House has become subject to any of the disqualifications under the Tenth Schedule, the question shall be referred to the Chairman or the Speaker of such House, whose decision shall be final. The provision²⁶ that the decision of the presiding officers shall not be called into question in any Court of law has been struck down by the Supreme Court.²⁷

There is a remedy for every wrong done during the election process, although it is postponed to the post election stage as predicated in Article 329 (b) of the constitution and the Act of 1951. The Election Tribunal (now the High Court) has large enough powers to give such a relief. Its powers extends to giving directions to the Election Commission or other appropriate agency to hold a poll to bring up the ballots or do other things necessary for fulfillment of the obligations, to undo illegality and injustice and do complete justice within the parameters set by the existing law.²⁸ In respect of election to a state legislature, a petition under Section 80 is the only remedy; no writ petition is maintainable, in view of Article 329 (b) of the Constitution. No writ petition can lie for adjudication of the question as to disqualification of a Member of a House of State Legislature.

²⁶ Paragraph 7 of the Amendment Act, 1985

²⁷ *Kihota Hollohon v. Zachilhu*, (1992) 1 SCC 309.

²⁸ *Mohider Singh Gill v. Chief Election Commissioner*, AIR 1978 SC 851.

The election of a successful candidate is not to be interfered with lightly. The election petition is not a matter in which the only persons interested are the candidates who strove against each other at the election. The public is also substantially interested in it and this not merely in the sense that an election has news value. Purity of election process must be maintained at all costs and those who violate the statutory norms must suffer for such violation. If the returned is shown to have secured his success at the election by corrupt means he must suffer for his misdeeds.²⁹

In *Yamuna Prasad v. Jagadish Prasad Khare*,³⁰ the Supreme Court has held that the entire election process, culminating in a candidate being declared elected, and any doubts and disputes arising out of and in connection with any of the stages have to be enquired into must be decided by the court after the completion of the entire process, compendiously called 'election'. This judgment is of general application and applies equally to all election disputes, whether in connection with the election to the Parliament and State Legislatures, or to the office of the President and the Vice-President.

²⁹ *F.A.Sapa v. Singora*, AIR 1991 SC 1557.

³⁰ 13 ELR 1(SC).

In *Ponnuswamy v. Returning Officer, Namakal*,³¹ the High Court dismissed the writ petition on the ground that under Article 329 (b) of the Constitution the Court had no jurisdiction to interfere with the order of the Returning Officer. On appeal, the Supreme Court held that the word 'election' under Article 329 connotes the entire procedure to be gone through to return the candidate to the legislature, and bars the jurisdiction of the High Court under Article 326 as well. Acceptance or rejection of nomination paper is included in the term 'election'. The matter can only be challenged in Election Petition before the High Court after the election is over.³²

In *Venkatachalam vs. A. S. Swamickan*,³³ the Supreme Court has held that Article 329 (b) which bars interference of the Court in electoral matters does not come into play in a case which falls under Articles 191 and 193 which provides for disqualification of membership and penalty for sitting and voting when disqualified and the whole election process is over. In such a case, the High Court can interfere under Article 226 and declare that he was not entitled to sit in the State Assembly.

³¹ AIR 1962 SC 64.

³² *Hari Krisna v. Ahamed Ishaque*, AIR 1955 SC 233; *Waaryam Singh v. Amarnath*, AIR 1954 SC 215.

³³ AIR 1999 SC 172.

But neither Article 329(b) nor the RPA (before its amendment), which said that the decision by an order of the Election Tribunal shall be 'final', could restrict the power of High Courts under Article 226,³⁴ and the power of the Supreme Court under Article 136.

The Constitution, by Art 329 (a) has barred the ordinary civil courts from entertaining any dispute about the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies. An election either to House of Parliament or to the House or either House of the Legislature of a State cannot also be challenged before an ordinary court of law. Section 30 of the RPA, 1950 debars the jurisdiction of a civil court to entertain or adjudicate upon the question of a person to be registered as an elector or the legality of any action taken by an Electoral Registration Officer or decision of an authority appointed to revise any roll. Section 170 of the RPA, 1951 bars the Civil Court from exercising jurisdiction to question the legality of any action or of any decision given by the Returning Officer or by any other person appointed under that Act in connection with an election.

³⁴ *Durga Shankar v. Raghuraj*, AIR 1954 SC 520; *Sangaram Singh v. Election Tribunal*, AIR 1955 SC 424.

A three judge bench of the Supreme Court observed³⁵ that democracy could not survive without free and fair election and without informed voters. One-sided information, disinformation, misinformation and non-information, all equally create a uninformed citizenry, which makes democracy a farce. It issued mandatory directions to the Election Commission to require the candidates contesting parliamentary or assembly elections to furnish details of their criminal antecedents, if any, to allow voters a chance to think before they make their choice. These directions were issued in a bid to rid the political process of criminals. The Bench rejected the arguments of the Union that the Election Commission could not be directed by the court to fill in the vacuum in the absence of proper legislation.

The Supreme Court reasoned that it had ample powers to direct the Commission to fill in the void, in the absence of legislation covering the field; and the voters are required to be well informed and educated about their candidates so that they can elect the right aspirant by own assessment.

The court directed that the candidates will be required to give details on the following five counts:

³⁵ *Durga Shankar v. Raghuraj*, AIR 1954 SC 520; *Sangaram Singh v. Election Tribunal*, AIR 1955 SC 424.

1. Whether the candidate has been or is convicted or was acquitted or discharged of any criminal offence in the past, and if so, whether he has been punished with imprisonment or fine?
2. Whether the candidate prior to six months of filing of nomination is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charges have been framed or cognizance taken by a court of law, and if so, details thereof:
3. The assets, including immovable, movable and bank balances, among others, of a candidate and of his/her spouse and dependents:
4. The liabilities, if any and particularly if there are any pending dues to any public financial institution or State or Central Government; and
5. Educational Qualification of the candidate;

The court further directed that the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible, and in any case within two months.

In the absence of these details ignorance about their past dealings prevents the voters to have a clear and vivid picture eclipsing their right to know.³⁶ The voter, therefore, is unable to make a wise choice thereby shaking the very foundation of democratic set up.

In *K.Prabhakaran v. P Jayaraja* ³⁷ Constitution bench of the Supreme Court has overruled two of its earlier judgments in *Manni*

³⁶ Rodney Austin, "Freedom of Information: the constitutional Impact"

³⁷ AIR 2002 SC 3393.

Lal ³⁸ and *Vidya Charan Shukla*.³⁹ The judgment will have far reaching consequences as regards election law in our country

In *Ramesh Singh Dalal* ⁴⁰ a three judge bench of the Supreme Court,⁴¹ expressed doubts about the correctness of the decisions in *Manni Lal* and *Vidya Charan Shukla*. The bench also expressed doubts as regards the correct interpretation of section 8(3) of the RPA. Hence, the matter was referred to the Constitution bench for an authoritative decision on these issues. The Constitution Bench framed three questions as under:

- (i) whether an appellate judgment of a date subsequent to the date of election and having a bearing on conviction of a candidate and sentence of imprisonment passed on him would have the effect of wiping out disqualification from the back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than two years was disqualified from filing nomination and contesting the election on the dates of nomination and election?
- (ii) What is the meaning to be assigned to the expression 'a person convicted of any offence and sentenced to imprisonment for not less than two years' as employed in sub-section (3) of section 8 of the RPA? Is it necessary that the term of imprisonment for not less than 2 years must be in respect of one single offence to attract the disqualification?
- (iii) What is the purport of sub-section (4) of section 8 of RPA? Whether the protection against disqualification conferred by sub-section (4) on a Member of a House to be a Member of Parliament or Legislature of a State on the date of nomination or election?

³⁸ 1970 (2) SCC 462.

³⁹ 1981 (2) SCC 84.

⁴⁰ *Ibid.*

⁴¹ *Prabhakaran v. Jayarajan*, 2002 AIR SC 3393.

The Supreme Court held that the acquittal of the respondent in appeal had the effect of completely wiping out the conviction. The court relied on *Dilip Kumar Sharma v. State of M.P.*⁴²

According to the court, the issue was fully covered by its decision in *Amritlal Ambalal Patel v. Himmatbhai Gomanbhai Patel*.⁴³ In this case the election of Amritlal Ambalal Patel to the Gujarat Legislative Assembly was challenged not on the ground of his conviction for a crime but on the ground that he was on the date of scrutiny of nominations less than 25 years, the minimum age prescribed under article 173 (b) of the constitution and, as such, not being qualified for being elected. The candidate attained the age of 25 years only on the date of election. Thus holding of the court that the nomination of the candidate had been 'improperly accepted' within the meaning of section 100 (1) (d) was perfectly correct because the attainment of the prescribed age by the candidate after the date of scrutiny of nominations in no way could operate retrospectively to remove his disqualification for being chosen, with effect from the date of scrutiny of the nominations. The disqualifications on the date of the scrutiny remained unaffected. The two cases are not *pari materia* and therefore, it is not clear how the Constitution Bench of the apex court could have

⁴² (1976) 1 SCC 560.

placed reliance on *Ambalal Patel* to decide a different issue in question.⁴⁴

The basic structure concept was evolved in *Keshavananda Bharati v. State of Kerala*.⁴⁵ The Apex Court in this case held that the power of Parliament to amend the Constitution was not without limitations and certain features were beyond the pale of the amending power. Evidently hopes, aspirations, morals and ideals of the people at the time of the enactment of the Constitution were the factors that guided the judges in determining whether an aspect can be brought within the basic structure. The philosophies of the 'will of the people,' the 'socio-ethical convictions' of the community, or the 'liberty of the individual' are the obvious factors that had influenced in the formulation of the basic structure theory.

In *Indira Nehru Gandhi v. Raj Narain*,⁴⁶ the Supreme Court specifically declared that democracy was a feature of the basic structure of the Constitution. It came to be recognized that any alteration of the Constitution affecting free and fair election would hit the basic structure. Free and fair election envisages absence of

⁴³ AIR 1968 SC 1455.

⁴⁴ Thomas Paul, 'Conviction and election Law', 47 JILI (2005), at.366.

⁴⁵ 1973 (4) SCC 225.

undue influence or misrepresentation. Election of the candidates without disclosing full facts before the public cannot be said as free and fair election. Needless to say, such facts include the candidates' antecedents such as the wealth, educational qualifications and involvement in criminal activities in the past. Availability of such details is *sine qua non* of election process.

The decisions of the people to form the State, to frame a Constitution and to adopt a form of government are the expressions of non-logical and socio-ethical convictions in the society. The right of the electorate to know the antecedents is integral to the decision of the people to form a political union, and therefore, is associated with the establishment of government. This right is more than a fundamental right; it is an extension of the pre-political liberty and one embedded in the 'socio-ethical conviction' or 'will' or 'consent' or 'liberty' ⁴⁷ or faith, belief, sentiment, principle or prejudice,⁴⁸ of the community or society which creates 'state' for attaining specific ends. Fundamental rights, on the other hand, have relevance only after the adoption of a government. The right of the electorate to know, therefore, shall on no account be confounded with the right under article 19 (1) (a)

⁴⁶ AIR 1975 SC 2299.

⁴⁷ Earnest Barker, *Reflections on Government*, OUP, London, 1942, at 20.

⁴⁸ E. C.S. Wade and Phillips, *Constitutional Law*, Longman, London, 1951, at 24.

which is purely a constitutional right. Nor can the former, which is an ingredient of the consent given by the people for constituting the State, be derived from the latter. The right to be informed of the antecedents of the representatives being necessary for the exercise of power for establishing government, as envisaged by the Constitution, shall operate on a plane beyond the Constitution and accordingly is not amenable to the limitations set by it. If, on the other hand, the right of the electorate is confined under the 'cell' of Article 19 (1) (a), the absoluteness of the right of the sovereign people disappears pushing the legal system to a situation where election is not free and fair.⁴⁹

It is difficult to agree with the above view Art. 19 guarantees to citizens the right to freedoms which cannot be taken away from reference except as provided under Art. 357. Art. 19 (1) (a) would absolutely assure the right of the sovereign people to freedom of expression in its political dimension through free and fair elections which is only to read Art 14 also in context. The fear of the author would seem to be ill-founded. The 'cell' of Art. 19 (1) (a) would be a 'cell' of protection against political assaults because none of the grounds of restrictions in Article 19 (2) can be used to prevent free

⁴⁹ V. R. Jayadevan, *Disclosure of Antecedents for Free and Fair Election: The Need to widen the Basic Structure Doctrine*, 46 JILI (2004), at 563.

and fair elections. The Supreme Court has, in resting the electorates' right to information about a candidate on Art. 19 (1) (a), stressed *sub-silentio* the interest affected and ethical bands of the power spectrum and lifted as statutory right to the plane of constitutional right.

Originally, the Constitution made no reference to the party system. In course of time, however, the party system has come to be recognized formally as being essential for the running of the parliamentary democratic system. In *Rama Kant Pandey v. Union of India*,⁵⁰ the court has pointed out that the Cabinet system adopted in India is based on the British pattern. For a strong vibrant democratic government, it is necessary to have a parliamentary system which involves a majority as well as a minority so that there may be a full-fledged debate on controversial issues on the floor of the House. This is best achieved through party system. The Apex Court has held that 'to abolish or ignore the party system would be to permit a chorus of discordant notes to replace an organized discussion. It is, therefore, idle to suggest that for establishing a true democratic society, the party system should be ignored'.⁵¹ In the instant case, the court upheld a provision providing for counter-mandating of an election if any party

⁵⁰ AIR 1993 SC 1766.

candidate died but not an independent candidate. The court ruled that the differential treatment accorded by law to party candidates does not fall foul of Article 14. The court rejected the contention that the candidates set up by political parties should not receive any special treatment. The court ruled that the candidates set up by political parties constitute a class by themselves. In *P. Nalla Thampy v. Union of India*,⁵² the Supreme Court had upheld a provision according to which a political party can spend, can incur expenses, without any limit, in support of a candidate as not being inconsistent with Art. 14.

In *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi*,⁵³ the Supreme Court held that 'in parliamentary form of democracy political parties play vital role and occasionally they sponsor candidates for the election'. To strengthen the party system, the court even suggested the need for discouraging independent candidates from contesting elections because it causes unnecessary confusion to the voters.

The Election Symbols (Reservation & Allotment) Order, 1968, is also a step in the direction of recognizing the party system. The

⁵¹ AIR 1993 SC 1769.

⁵² AIR 1985 SC 1133.

⁵³ AIR 1987 SC 1577.

Anti-Defection Law introduced in 1985 through the X Schedule to the Constitution is also an attempt to strengthen the party by discouraging defections from one party to another. The Constitution thus formally recognizes the party system as an essential limb of the constitutional process in the country. Time and again, there were proposals for reforming the existing law. The areas relating qualifications and disqualifications, corrupt practices and election expenses require changes. The Apex Court in the past had underscored the importance of democracy in our legal system and dealt with issues that have a telling impact on the right of the voter. In the past, the court adopted a hands-off approach where the issue was the right of voters to know. *Common Cause (A Registered Society) v. Union of India*,⁵⁴ and *Dinesh Trivedi.M. P. v. Union of India*,⁵⁵ are examples of such a judicial outlook. Despite criticisms, the decisions on the disclosure of antecedents are found to have highlighted an issue hitherto unattended. The pronouncement in *Association for Democratic Reform* ⁵⁶ and *In People's Union for Civil Liberties*,⁵⁷ made Indian democracy healthier and made it stand tall among other democracies. Undoubtedly, the decisions of the High Courts and the Supreme Court on the right to information in election are

⁵⁴ (1996) 2 SCC 752.

⁵⁵ (1997) 4 SCC 306.

⁵⁶ (2002) 5 SCC 294.

significant milestones in the judicial review of election process. With a warning signal to politicians, the judiciary strove to unambiguously shed off the tendencies to criminalize politics. These decisions break a new path and provide a guiding light for democracy and judicial process. In this regard, it is observed that the Supreme Court has strengthened the democratic norms by interpreting the provisions of the Constitution and the laws relating to elections.

⁵⁷ (2003) 4 SCC 399.