JUDICIAL ACTIVISM IN ELECTION LAWS

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"Building democracy is a complex process of which elections is only a starting point, but if their integrity is compromised, so is the legitimacy of democracy"

- Kofi A Annan, Former Secretary General, United Nations

Election and Democracy

Election is the very foundation of democracy for without election there cannot be democracy. Election is the only way of peaceful political change. Purity of election is therefore absolutely essential for a meaningful democracy.

History has shown that whenever flawed elections are held, it leads to discontent amongst the people. History also has shown that people in power tend to stick to power and in this regard, use means, fair or foul, to stick to power. When unfair means are used to continue in power, discontent amongst the masses increases exponentially resulting in violence and ultimate destruction of the democracy itself. Therefore, purity of election is absolutely essential for the survival of democracy. Election must be free and fair. It is seen that many autocratic governments tend to use the veneer of democracy and electoral process to legitimize their autocratic system of governance by subverting the very electoral process. It is in this background that electoral reforms assume all importance.

Justice Scalia, one of the Judges of Supreme Court of US, in the case of *Mc. Connel vs. FEC 540 US 93, 263 (203)* has stated *"the first instinct of power is the retention of power."* This truism is absolutely true all across the globe. Therefore every attempt will be made by persons in power to hold on to power by subverting the electoral process and therefore intervention by legislatures or courts become necessary to ensure transparency and purity of election. It is in this background that electoral reforms are absolutely essential to ensure transparency and purity of elections.

The Constitution as well as Representation of Peoples Act provide various measures for the conduct of election. However, it is found that there are innumerable lacunae in these Constitutional and statutory provisions. The working of democracy in India for the last over 66 years has clearly shown that there are ways and means of subverting democracy by tweaking electoral process. It is in this background that in the absence of proper and positive legislative intervention courts by judicial activism have tried to maintain the purity of election and sought to bring in transparency and order in elections.

Article 102(1)(e) and Article 191(1)(e) specifies that a person shall be disqualified for being chosen to either Houses of Parliament or the State Legislature if he is so disqualified by any law made by Parliament. Section 8 of the Representation of Peoples Act, specifies that a person convicted of an offence punishable under offences, set out in the said section attracts disqualification. However, sub-section (4) of Section 8 specifies that in case of a person, who on the date of conviction is a Member of Parliament or the Legislature of the State, disqualification shall not take effect until three months have elapsed from the date of conviction or if within that period an appeal or application for revision is filed, until that appeal or revision is disposed of by the court (irrespective as to whether stay is obtained or not). The Supreme Court in the case of *Lily Thomas-vs Union of India 2013(7) SCC653* has held that sub-section (4) of Section 8 is *ultra vires* the Constitution, since Article 101(1) (e) or Article 191(1)(e) has vested Parliament with the power to make law laying down the same disqualification for person to be chosen as Member of the Parliament or State Legislature and for a sitting Member of the House of Parliament or Legislature. It further held that the disqualification under Article 101(3)(a) and 190(3)(a) of the Constitution expressly prohibit Parliament to defer the date from which disqualification will come into effect in case of

sitting member of the parliament or State Legislature, and therefore the Parliament has exceeded its powers conferred by the Constitution by enacting Sub-section (4) of Section 8 of the Act and accordingly held Sub-section (4) of Section 8 of the Act as being *ultra vires* the Constitution. The implication of this Judgment is that on conviction, a Legislator or a Parliamentarian ceases to be a Legislator or a Parliamentarian.

It is undisputed that while majority of the people in India applauded the decision of the Supreme Court when it held that the legislators who are convicted shall cease to be legislators, legislators, irrespective of the party affiliations ganged up together and moved an amendment to the Statute to enable convicted legislators to continue as legislators, which ultimately has not been given effect to because of the widespread criticism of the same in the media and groundswell of antipathy amongst the people to the legislative intervention.

Recently, one of the headlines in one of the newspaper stated *"Where Parliament fails, Judiciary saves."* It aptly describes the position in India. The widespread criminalization of politics is well known. Despite a host of reports by Committees set up by the Parliament or the Executive like the Vohra Committee (1993) Indrajit Gupta Committee on state funding of elections (1998), Law Commission Report on the Reform of Electoral Laws (1999), National Commission to Review Working of the Constitution (2000), Election Commission of India Report on proposed Electoral Reforms (2004), etc., no electoral reforms have been brought out by the Legislature. It is in this background of status quoism which only helps the persons in power that courts have sought to intervene to set right the malaise. Statistics reveal that nearly one -third of the Members of Lok Sabha have criminal records. It is a shame that such people represent us. In fact some of the legislators have charges of such heinous offences as murder, kidnapping, cheating, etc.

Just a few days back, the Central Government in a Public Interest petition filed before the Supreme Court to bring about transparency in elections, has filed an affidavit stating that electoral reforms is not the job of the court but that of the Government and that courts cannot interfere in policy matters of the State, unless the policy violates the mandate of the Constitution. While the latter may be true the former is not. Whenever there is a danger to

democracy as a result of ennui that has set into the body polity as a result of the persons in power wanting *status quoism* to continue, judicial intervention is called for.

Judicial Activism

Judicial activism has been described variously. Wikipedia defines judicial activism as *"judicial rulings suspected of being based on personal or political considerations rather than existing law."* It is sometimes used as an antonym of "judicial restraint". It is said that the term 'judicial activism' was coined by the Fortune Magazine way back in the year 1947 in article titled "The Supreme Court 1947". Black's Law Dictionary defines judicial activism as *"Judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusion into legislative and executive matters. While the critics of judicial activism claim that it usurps the powers of elected branches of Government, thereby damaging the rule of law and democracy, defenders claim that it is a legitimate form of judicial review. They also claimed that interpretation of law must change with the changing times."*

The Supreme Court of India has been accused by politicians of judicial activism in respect of the recent judgment rendered by it pertaining to barring convicted legislators / parliamentarians from continuing as members of the Legislature/ Parliament (*Lily Thomas Case)*. A perusal of the said judgment would indicate that there was no personal philosophy which percolated into the judgment. It was a pure interpretation of the Constitutional provision and examination of the legislation namely, the Representation of Peoples act vis-à-vis the Constitutional provisions. Our Supreme Court has always been guarded in rendering judgments which have a colour of judicial activism. It has always tempered its decisions bearing in mind that Judges and Judiciary have only a limited role to play in matters of policy. This is apparent from the decisions that the Supreme Court has rendered in respect of elections-decisions which are perceived to be judgments which have a tinge of judicial activism in them. They are the following:

Mohinder Singh Gill vs. Union of India (1978(1) SCC 405)

Seeds of electoral reforms was possibly sown in the judgment of *Mohinder Singh Gill vs. Chief Election Commissioner* wherein the Constitution Bench of the Supreme Court dealing with the matter pertaining to declaration of results in an election which had been postponed by the Returning Officer on account of violence, vandalism and destruction of postal ballots, etc., and which election was ultimately cancelled and fresh poll ordered by the Election Commission.

The facts of the said case are that during the General Elections held to the Parliament, elections were also held in Ferozpur Parliamentary constituency. The counting of ballots, except postal ballots was completed. However, when the postal ballots were being counted there was mob violence engineered by the candidate who was perceived to be losing and the postal ballot papers were destroyed. Ballot boxes from Fazilka segment disappeared as a result of mob violence. The Returning Officer postponed the counting of postal ballot and declaration of the results on account of the untoward incidence referred to herein above. The Election Commission thereafter cancelled the very election and directed holding fresh polling.

A writ petition came to be filed by Mohinder Singh Gill; according to him he had won by margin of nearly 2000 votes and sought for declaring him as elected and quashing of the order of fresh polls by the Election Commission. This was challenged before the High Court. High Court dismissed the petition against which the matter came before the Supreme Court. Very many intricate legal, Constitutional and political questions were considered by the Supreme court. Justice Krishna Iyer delivered the judgement for himself. Justice Bhagavathi and Justice Beg a separate Judgment for themselves and Justice Singhal. The arguments mainly centered round the power of the Election Commission to cancel the poll and order fresh poll especially in view of the fact that only postal ballot paper was destroyed and counting of other ballot papers were complete. Justice Krishna Iyer in his inimitable style has stated that the *"Judgment relates to the pervasive philosophy of democratic election"* by quoting Winston Churchill who said:

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

While dealing with the matter Justice Krishna Iyer has devoted five paragraphs to mechanism of elections in our country as provided under the Constitution. He has held in paragraph 23 as under.

"Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. 'The right of election is the very essence of the constitution.' (Junius). 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."

Justice Krishna Iyer held that the little large Indian shall not be hijacked from the course of free and fair elections. While dealing with the power of the Election Commission and its supremacy in matters of election, the Court upheld the decision of the Election Commission.

This little man who was referred to by Justice Krishna Iyer became the focal point in subsequent judgment rendered by the Supreme Court in the matter of *Union of India vs. Association for Democratic Reforms {2002(5)SCC 294},* wherein the Supreme Court directed information pertaining to candidates being compulsorily revealed by the candidates contesting to the Legislature by means of an affidavit.

Union of India vs. Association for Democratic Reforms & another (2002(5) SCC294)

In this case, Supreme Court held that in a democratic form of Government, voters have a right to elect or re-elect members of the legislature on the basis of antecedents and past performance of the candidates including criminal cases against a candidate. Supreme Court held that for maintaining the purity of elections and a healthy democracy, electoral process has a strategic role and that *"little man of the country would have basic elementary right to know full particulars of a candidate who is to represent him in the parliament where laws to bind his property and liberty may be enacted."* This case arose out of a writ petition filed before the High Court of Delhi for a direction to implement the recommendations made

by the Law commission in its 170th Report and to make necessary changes in Rule 4 of the Conduct of Election Rules 1961, so as to make electoral process more fair, transparent and equitable and to reduce distortions and evils that have crept into the Indian electoral system and to identify the areas where legal provisions require strengthening and improvement. There was also a reference to the report of Vohra Committee wherein the criminalization of the society and politics was highlighted and remedial measures set out.

The High Court allowed the writ petition in its entirety. The High Court gave directions that the candidates for the election must disclose (i) detailed information as to whether the candidate is accused of offences punishable, with imprisonment and the details thereof, (ii) assets possessed by the candidate, his spouse and dependent relatives, (iii) facts giving insight into the candidate's competence, capacity and suitability for acting as parliamentarian or legislator, his educational qualification and (iv) information which the Election Commission considers necessary for judging capacity and capability of political party fielding the candidates for election. The Supreme Court modified the same and gave direction to the Election Commission to seek the following information on affidavit from each candidate seeking election to Parliament or State Legislature:

i. Whether the candidate is convicted/ acquitted/ discharged of a criminal offence in the past and whether he is punished with imprisonment or fine;

ii. Prior to six months of filling of nomination whether candidate is accused of any pending case of any offence punishable with imprisonment for two years or more and in which charge is framed and cognizance is taken and details;

iii. The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants;

iv. Liabilities, if any, particularly whether there are any over dues of any public financial institution or government dues;

v. The education qualifications of the candidate.

The Supreme Court held that the voter speaks or expresses by casting the vote and for this purpose information of the candidate to be selected is a must and consequently the voter's right to know the antecedents of the candidate is more fundamental and basic for survival of democracy and further that 'the little man' may think over before making his choice of electing the law breakers as law makers. *(Para45)*

In *Para 46* the Supreme Court has summed up the legal and Constitutional position as under:

i. The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word "elections" is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps.

ii. The limitation on plenary character of power is when Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. The Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from foreseen or anticipated by the enacted laws or the foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, the Commission can fill the vacuum till there is legislation on the subject. In *Kanhiya Lal Omar case* the Court construed the expression "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which many may have to follow an it may be a specific or a general order and such phrase should be construed liberally empowering the Election Commission to issue such orders.

iii. The word "elections "include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate. Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the candidate according to his thinking and opinion. As

stated earlier, in *Common Cause case* the Court dealt with a contention that elections in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money which is used for retaining power and for re-election. If on an affidavit a candidate is required to disclose the assets held by him at the time of election, the voter can decide whether he could be re-elected even in case where he has collected tons of money.

Peoples Union for Civil Liberties (PUCL) and another vs. Union of India (2003(4) SCC 399)

In furtherance of the directions of the Hon'ble Supreme Court in the above case, Parliament amended the Representation of Peoples Act and Section 33-A and 33-B were introduced wherein it was made mandatory for the candidate to disclose information regarding himself. Section 33-A reads as under:

"33-A, Right to information- (1) A candidate shall, apart from any information which he required to furnish, under this act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of Section 33, also furnish the information as to whether –

i. *He is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction.*

ii. *He has been convicted of an offence other than any offence referred to in subsection (1) or subsection (2) or covered in subsection (3) of Section 8 and sentenced to imprisonment for one year or more.*

(2) The Candidate or his proposer, as the case may be, shall, at the time of delivering to the Returning Officer the nomination paper under subsection (1) of Section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in subsection (1)

(3) The Returning Officer shall, as soon as may be after the furnishing of information to him under subsection (1), display the aforesaid information by affixing a copy of the affidavit, delivered under subsection (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered."

Section 33-B reads as under:

"33-B. Candidate to furnish information only under the Act and the rules –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."

It therefore became clear that the amendment brought about did not include disclosure regarding cases in which the candidate is acquitted or discharged of a criminal offence, his assets and liabilities and education qualification. Under these circumstances, validity of Section 33-B of the Representation of Peoples Act was challenged on the ground that Section 33-B is arbitrary, unjustifiable and void, being violative of fundamental right of the citizens to know the antecedents of candidates. The matter came up before a three judge Bench of the Supreme Court. All of them gave different judgments, Justice M.B. Shah concluding as under:

A. *"The Legislature can remove the basis of a decision rendered by a competent Court thereby rendering that decision ineffective but the legislature has no power to ask the instrumentalities of the State to disobey or disregard the decisions given by the court. A declaration that an order made by a court of law is void is normally a part of the judicial function. The legislature cannot declare that decision rendered by the Court is not binding or is of no effect.*

   It is true that the legislature is entitled to change the law with retrospective effect which forms the basis of a judicial decision. This exercise of power is subject to constitutional provision; therefore, it cannot enact a law which is violative of fundamental right.

B. *Section 33-B which provides that notwithstanding anything contained in the judgment of any court or directions 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 the Act or the rules made thereunder, is on the face of it beyond the legislative competence, as this court has held that the voter has a fundamental right under Article 19(1)(a) to know the antecedents of a candidate for various reasons recorded in the earlier judgment as well in the judgment.

The Amendment Act does not wholly cover the directions issued by this court. On the contrary, it provides that a candidate would not be bound to furnish certain information as directed by this Court.

B. *The judgment rendered by this Court in Assn. for Democratic Reforms has attained finality therefore, there is no question of interpreting Constitutional provision which calls for reference under Article 145(3).*

C. *The contention that as there is no specific fundamental right conferred on a voter by any statutory provision to know the antecedents of a candidate, the directions given by this Court are against the statutory provisions is, on the face of it, without any substance. In an election petition challenging the validity of an election of a particular candidate, the statutory provisions would govern respective rights of the parties. However, voters' fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is a first citizen of this country and a part of statutory rights, he is having fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who are to govern them. Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures.*

D. *It is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. During the*

last more than half a decade, it has been so done by this Court consistently. There cannot be any distinction between the fundamental rights mentioned in Chapter III of the Constitution and the declaration of such rights on the basis of the judgments rendered by this court. Justice P.V. Reddy concluded as under.

(1) Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(a). This right to information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though, to a certain extent, there may be overlapping.

(2) The right to vote at the elections to the House of the People or Legislative Assembly is a Constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter.

(3) The directives given by this Court in Union of India vs. Assn. for Democratic Reforms were intended to operate only till the law was made by the legislature and in that sense "pro tempore" in nature. Once legislation is made, the Court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right of information available to the voter/citizen. In embarking on this exercise, the points of disclosure indicated by this Court, even if they be tentative or ad hoc in nature, should be given due weight and substantial departure there from cannot be countenanced.

(4) The court has to take a holistic view and adopt a balanced approach in examining the legislation providing for right to information and laying down the parameters of that right.

(5) Section 33-B inserted by the Representation of the People (Third Amendment) Act, 2002 does not pass the test of Constitutionality, firstly, for the reason that it imposes a blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients and secondly, for the reason that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate.

(6) The right to information provided for by Parliament under Section 33-4 in regard of the pending criminal case and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the Court from the ambit of disclosure.

(7) The provision made in Section 75-A regarding declaration of assets and liabilities of the elected candidates to the Speaker or the Chairman of the House has failed to effectuate the right to information and the freedom of expression of the voters/citizens. Having accepted the need to insist on disclosure of assets and liabilities of the elected candidate together with those of the spouse or dependent children, Parliament ought to have made a provision for furnishing this information at the time of filling the nomination. Failure to do so has resulted in the violation of guarantee under Article 19(1)(a).

(8) The failure to provide for disclosure of educational qualifications does not, in practical terms, infringe the freedom of expression.

(9) The Election Commission has to issue revised instructions to ensure implementation of Section 33-A subject to what is laid down in this judgment regarding the cases in which cognizance has been taken. The Election Commission's orders related to disclosure of assets and liabilities will still hold good and continue to be operative. However, Direction 4 of para 14 insofar as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information should not be enforced.

Justice Dharmadhikari concurred with the judgment of Justice M.B. Shah and did not concur with the conclusions (3) and (8) of the opinion (Judgment) of Justice P.V. Reddi.

Ravi Yashwant Bhovi vs. District Collector, Raigad & Others (2012(4) SCC 407)

The Supreme Court in this Judgment has held that, democratic set up of the country is a Basic Feature of the Constitution. It has held that removal of duly elected President of Municipal Council by the competent authority being the Chief Minister of the State (holding the concerned portfolio) in a casual manner, without following the procedure prescribed by law is a danger to democratic set up of the country, and therefore held that Supreme Court's interference in such a situation by striking down illegal and unconstitutional removal was justified. In the said case, the Chief Minister of Maharashtra removed the President, of Uran Municipal Council and declared him to be disqualified for the remaining ten years of the Municipal Councilship under Section 55(B) of the Maharashtra Municipal Councils, Nagar Panchayat and Industrial Townships Act of 1965, on certain charges. The Supreme Court held that mere error of Judgment resulting in doing of a negligent act does not amount to misconduct. The Court held that the order passed by the Chief Minister was bereft of reasons and that there was no consideration of the factual matrix and set aside the order of the Bombay High Court, which upheld the order of the Chief Minister.

In a writ petition filed by Subramanian Swamy seeking safeguards in respect of electronic voting machines on the ground that they were open to hacking, Supreme Court has directed the Election Commission to implement paper trail in electronic voting machine for 2014 Lok Sabha election on the ground that it is an indispensible requirement of free, fair and transparent system that will restore the confidence of voters. The Supreme Court has also directed the Central Government to provide financial assistance to the poll panel for introduction of vote verifier paper audit trail system with electronic vote verifier paper audit trail system with electronic voting machine on the ground that it will also help in manual counting of votes in case of disputes. It held that paper trail is an indispensable requirement of free and fair elections and that confidence of voters in the electronic voting machines can be achieved only with the introduction of paper trail. Voting verifier paper audit trail is a system of printing paper trail when the voter casts his vote, in addition to the electronic

record of the ballot for the purpose of verification of the choice of his candidate and also manual counting of votes in case of disputes.

Lily Thomas vs. Union of India (2013(7) SCC 653)

In this case, the Supreme Court has struck down Subsection (4) of Section 8 of the Representation of Peoples Act 1951 as being *ultra vires* the Constitution, which section specifies that the disqualification will not get attracted to sitting Legislators and Parliamentarians on their conviction for a period of three months from the date of conviction and during the period an appeal or revision filed by them is pending before the court, irrespective as to whether a stay of conviction is granted by the court or not. The Supreme Court held that:

"the affirmative words used in Articles 102(1) (e) and 191(1) (e) confer power on Parliament to make one law laying down the same disqualifications for a person who is to be chosen as member of either House of Parliament or as a member of the Legislative Assembly or legislative Council of a State and for a person who is a sitting member of a House of Parliament or a House of the State Legislature and the words in Articles 101(3)(a) and 190(3)(a) of the Constitution put express limitations on such powers of the Parliament to defer the date on which the disqualifications would have effect. Accordingly, subsection (4) of Section 8 of the Act which carves out a saving in the case of sitting members of Parliament or State Legislature from the disqualifications under sub-sections (1) (2) and (3) of Section 8 of the Act or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature is beyond the powers conferred on Parliament by the Constitution.

Looking a the affirmative terms of Articles 102(1)(e) and 191(1)(e) of the Constitution, we hold that Parliament has been vested with the powers to make law laying down the same disqualifications for person to be chosen as a member of Parliament or a State Legislature and for a sitting member of a House of Parliament or a House of a State Legislature. We also hold that the provisions of Articles 101(3)(a) and 190 (3)(a) of the Constitution expressly prohibit Parliament to defer the date from which the disqualification will come into effect in case of a sitting member of Parliament or a State Legislature. Parliament, therefore, has exceeded its powers conferred by the Constitution in enacting sub

section (4) of Section 8 of the Act and accordingly sub-section (4) of section 8 of the Act is ultra vires the Constitution".

Chief Election Commissioner vs. Jan Chaukidar (2013(7) SCC 507)

In this case, the High Court of Patna held that persons convicted of crime are kept away from elections to State Legislature or to the Parliament and all other public elections and that persons in lawful custody of the police will not be voters and will not be electors. This decision of the Patna High Court was upheld by the Supreme Court. It held that

"we do not find any infirmity in the findings of the High Court in the impugned common order that a person who has no right to vote by virtue of the provisions of sub-sections (5) of Section 62 of the 1951Act is not an elector and is therefore not qualified to contest the election to the House of the People or the Legislative Assembly of a State."

Peoples Union for Civil Liberties vs. Union of India (2013 (1) SCC 1)

In this case the Supreme Court while directing Election Commission to enable voters to have the option to choose none of the candidates has held as under:

i. *Free and fair elections are part of Basic Structure of the Constitution which necessarily includes within its ambit right of an elector to cast his vote without fear of reprisal, duress or coercion.*

ii. *Protection of electors identity and affording secrecy is integral to free and fair elections.*

iii. *An arbitrary distinction between voter who costs his vote and voter who does not cast his vote is violative of Art.14.*

iv. *For democracy to survive, it is essential that the best available persons should be chosen as peoples representative for proper governance of the country which can be*

best achieved through persons of high moral and ethical value who win elections on a positive vote.

v. *In vibrant democracy, voters must be given an opportunity to choose "none of the above" (NOTA) button which will compel political parties to nominate a sound candidate.*

vi. *Democracy being all about choice, this choice can be better expressed by giving the voters an opportunity to verbalise themselves unreservedly and by imposing least restrictions on their ability to make a choice.*

vii. *By providing NOTA button in the electronic voting machines, effective political participation in the present state of democratic system and the voters will be empowered.*

viii. *NOTA being a form of negative vote will foster purity of the electoral process and result in wider participation of people. Because dissatisfied voter does not turn up, it will provide, a chance to unscrupulous elements to impersonate the dissatisfied voter. NOTA. It gives the Voter right to express his disapproval with the candidate put up.*

S. Subramaniam Balaji vs. State of T.N (2013 (9) SCC 659)

In this case, the distribution of free gifts by political parties (popularly known as "freebies" as set out in the election manifesto, came to be challenged before the High Court. The High Court dismissed the Writ Petition. While dismissing the Special Leave Petition, the Supreme Court gave the following directions:

"77) Although the law is obvious that the promises in the election manifesto cannot be construed as 'corrupt practice' under Section 123 of RP Act, the reality cannot be ruled out that distribution of freebies of any kind, undoubtedly, influences all people. It shakes the root of free and fair elections to a large degree. The Election Commission through its counsel also conveyed the same feeling both in the affidavit and in the argument that the promise of such freebies at government cost disturbs the level playing field and vitiates the electoral process

and thereby expressed willingness to implement any directions or decision of this Court in this regard.

78) As observed in the earlier part of the judgment, this Court has limited power to issue directions to the legislature to legislate on a particular issue. However, the Election Commission, in order to ensure level playing field between the contesting parties and candidates in elections and also in order to see that the purity of the election process does not get vitiated, has in past been issuing instructions under the Model Code of Conduct. The fountainhead of the powers under which the Commission issues these orders is Article 324 of the Constitution, which mandates the Commission to hold free and fair elections. It is equally imperative to acknowledge that the Election Commission cannot issue such orders if the subject matter of the order of Commission is covered by a legislative measure.

79) Therefore, considering that there is no enactment that directly governs the contents of the election manifesto, we hereby direct the Election Commission to frame guidelines for the same in consultation with all the recognized political parties as when it had acted while framing guidelines for general conduct of the candidates, meetings, processions, polling day, party in power, etc. In a similar way, a separate head for guidelines for election manifesto released by a political party can also be included in the Model Code of Conduct for the Guidance of Political Parties and candidates. We are mindful of the fact that generally political parties release their election manifesto before the announcement of election date, in that scenario, strictly speaking, the Election Commission will not have the authority to regulate any act which is done before the announcement of the date. Nevertheless, an exception can be made in this regard as the purpose of election manifesto is directly associated with the election process.

80) We hereby direct the Election Commission to take up this task as early as possible owing to its utmost importance. We also record the need for a separate legislation to be passed by the legislature in this regard for governing the political parties in our democratic society".

Resurgence India vs. Election Commission of India {Writ Petition (Civil) no.121 of 2008 (Supreme Court) (DD 13.09.2013}

A Writ Petition was filed under Article 32 of the Constitution of India for meaningful implementation of the judgment passed by the Supreme Court in *(2002) 5 SCC 294* and *(2003) 4 SCC 399* and to direct the Election Commission to ensure that the affidavit filed by the contestants for the election of State Legislature and the Parliament are complete in all respects and to reject the affidavit having blank particulars. Allowing the Writ Petition, Supreme Court gave the following directions:

i. *The voter has the elementary right to know full particulars of a candidate who is to represent him in the Parliament/Assemblies and such right to get information is universally recognized. Thus, it is held that right to know about the candidate is a natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution.*

ii. *The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizens under Article 19(1)(a) of the Constitution of India. The citizens are supposed to have the necessary information at the time of filling of nomination paper and for that purpose, the Returning Officer can very well compel a candidate to furnish the relevant information.*

iii. *Filling of affidavit with blank particulars will render the affidavit nugatory.*

iv. *It is the duty of the Returning Officer to check whether the information required is fully furnished at the time of filling of affidavit with the nomination paper since such information is very vital for giving effect to the 'right to know' of the citizens. If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected. We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly but the bar should not be laid so high that the justice itself is prejudiced.*

v. *We clarify to the extent that Para 73 of people's Union for Civil Liberties case (supra) will not come in the way of the Returning Officer to reject the nomination paper when affidavit is filed with blank particulars.*

vi. *The candidate must take the minimum effort to explicitly remark as 'NIL' or Not Applicable' or Not known' in the columns and not to leave the particulars blank.*

vii. *Filling of affidavit with blanks will be directly bit by Section125A (i) of the RP Act. However, as the nomination paper itself is rejected by the Returning Officer, we find no reason why the candidate must be again penalized for the same act by prosecuting him/her.*

All these judgments of the Supreme Court clearly indicate a determined attempt to cleanse the electoral process and to ensure purity of elections. All these judgments are garnered towards empowering the little Indian and to ensure that **"he shall not be hijacked from the course of free and fair elections."** There cannot be any doubt that the judgments of the Supreme Court are in conformity with the thinking of the overwhelming majority of the Indians (possibly with the exception of a few politicians). Some of these judgments are in the conservative mode of interpreting the law and a few of them may be in the realm of judicial activism, namely, intrusion into the realm of policy making and legislation. However, the same is welcomed by the overwhelming majority of our people.

Other Countries

In USA also there have been series of judicial intervention in respect of election laws. One of the Professors of law has stated that *"nowhere is the challenge more prominent and pressing than in election laws".* Therefore, judicial activism on election laws is universal for if there is no such judicial intervention democracy will be in danger. Judicial intervention does not give undue power to the judges and therefore judicial intervention will ensure transparency and purity of elections and probity therein, whereas the executive and the legislature which is interested in retention of power may not prefer purity, transparency and

probity in elections. Therefore, judicial activism in elections is welcome.

In the US way back in 1966 in the case of *Harper vs. Virginia Board of Elections 383 US 663(1966),* the court struck down poll tax of US $ 1.50 as violative of equal protection. The court held that the tax would inhibit participation of economically disadvantaged voters.

During 2000 US Presidential Elections, when Mr. Bush and Mr. AI Gore were the contestants for the Presidential posts, the US Supreme Court brought to fore the Equal Protection Principle. It held that the denial of recount of votes in Florida amounted to arbitrary and disparate treatment denying the voters equal protection. This case is reported in *531 US 98(2000).*

Recently, the US Supreme Court had an occasion to deal with the right of the Corporations to spend money on campaign. The legislature barred Corporations from funding elections. That was struck down by the US Supreme Court in the case of *Citizens United vs. FEC-558 US 310(21).* The US Supreme Court held that the first amendment prohibited Government from restricting political independent expenditure by Corporations, Associations or Labour Unions. The said case arose in the context of lobbying group belonging to the conservatives wanting to air a film critical of Hillary Clinton and to advertise the film during television broadcasts in apparent violation of 2002 Bipartisan Campaign Reform Act. The Court held that portions of the said Act violated first amendment. In fact, the District Court held that the said Act applied and prohibited Citizens United from advertising the film 'Hillary.' However, the Supreme Court reversed the said decision and struck down those provisions of the Act which prohibited Corporations, Associations, Labour Unions from making independent expenditure and electioneering Communications. In fact, Bipartisan Campaign Reform Act prohibited Corporations and Unions from using their general treasury to fund electioneering communications with 30 days before primary or 60 days before a general election. The first amendment of the US Constitution protects free speech. The reason ascribed by the US Supreme Court to strike down the portions of the above Act was that it offends the first amendment. In fact, it over ruled an earlier decision, which held that

State Law which prohibited Corporations from using treasury money to support or campaign a candidate from elections did not violate first amendment.

Even in Australia there have been judicial interventions in elections and in respect of political parties. It is said that way back in 1934 when a former Prime Minister of Victoria was expelled from the Labour Party, he approached the court to annul the expulsion. The Court however did not accede to his request. At that time the courts were conservative and consequently declined to interfere. However, there has been a perceptible change in the approach of courts even in Australia as can be seen from the recent trend.

Money Power

It is said that democracy itself breeds corruption. It is universally accepted that amount of money that has been spent by contestants for the Parliament every five years is more than ten times that spent by the candidates during the previous general election. The situation is no different when it comes to elections to the legislative assemblies or any other election, even if it be a Gram Panchayat election. It is said that in the recent bye election held in Karnataka, candidate spent over Rs. 20 crores. If this is the amount spent it is but natural that the same has to be recouped during the next five years and the resultant position is that corruption becomes inevitable. Even though the Representation of Peoples Act and the Rules framed there under prescribe a maximum amount that can be spent, it is well known that the amount spent by each candidate is over a thousand times more than the limit. Therefore, there is a dire need to bring in a change in this regard. Unless it is done corruption in this country will never come down.

Recently Parliamentary Standing Committee on Law, Justice and Personnel and Grievances tabled a Report on Electoral Reforms. I am sure this will be one of the many reports that will remain on paper without being implemented. One of the recommendations is to prevent paid news or surrogate advertisement in the form of news initially sponsored by candidates in the print media to escape restriction on electoral expenses.

BBC recently came up with a news report and the heading was "Indian Media – Threat to Electoral Reforms". While the header was that media is a threat to electoral reforms, the article mentioned about criminalization of politics and the intervention by the Supreme Court barring members of the Assembly and Parliament from continuing if they are found guilty of offences entailing jail term of at least two years. It is undisputed that media also plays a major role in electoral process and elections. The politicians with deep pockets start media houses, they own newspapers, TV channels, etc., which will give a slant in their favour. The amount of money that gets spent on publicity of such politicians by their media is not taken into account while computing the election expenses. That apart, the amount of influence that the media can bring on the electorate is tremendous. There is definitely a need to address this issue, though legislations or rationalization in this regard becomes difficult for implementation.

In the United States way back in 1976 in the case of *Buckly vs. Valeo {424 US(1)-1976}* Supreme Court struck down some of the provisions of the Federal Election Campaign Act of 1971, wherein the Court held that the Government cannot Constitutionally limit the amount individuals can spend to support or oppose the election of political candidates. The reason ascribed is that the expenditure limitation would limit political expression, which is the core of the electoral process and the freedom enshrined in the first amendment, namely free speech, However, during the year 1990 the very Supreme Court of US held in the case of *Austin vs. Michigan State Chamber of Commerce {494 US(652)-1990}* that Corporations do not have the same right as individuals and by a majority of six-to-three, the Supreme Court upheld a Michigan Statute that limited the amount that Corporations could spend to support or oppose the election of candidates for the State Office. The Supreme Court held that Corporations have a unique economic characteristic and enable Corporations to use resources amassed in the economic market place to obtain unfair advantage in the political market place. While this view held the field for over twenty years, in the case of *Citizens United vs. FEC(558) US 310,* the US Supreme Court by a majority of five-to-four overruled the earlier decision and held that Corporations like any other individual is entitled to spend unlimited funds in order to elect or defeat particular political candidate and that any embargo thereon would offend the first amendment, namely, free speech. It is said by critics that the change was brought about because some of the judges retiring and being replaced by others in between the period of 1990 to 2010.

In fact this decision of the US Supreme Court has been described as conservative judicial activism as contrasted with liberal judicial activism.

Parliament

Newspaper reports indicate that in 2008, 16 bills and in 2009, 9 Bills were passed with less than 20 minutes of debate on each of them. During winter of 2010, 3% of the scheduled time could be utilized. In 2011, 4 bills were passed without any discussion in the midst of pandemonium. In 2012, during the monsoon session, only 4 bills were passed in a month-long session leaving a backlog of more than 100 pending legislations, some as old as 25 years. According to research, in 2012 Lok Sabha works for 22% of the scheduled time and Rajya Sabha works for 29% of the scheduled time. It is stated that, since 2009, one in every 5 bills are passed with discussion of less than 5 minutes on the floor of the house. After the Supreme Court passed the judgment in *Lily Thomas case* holding that convicted legislators lose their membership, Parliament passed Representation of Peoples (Amendment and Validation) Bill 2013 in the Lok Sabha in 15 minutes, after a brief discussion. Moving the Bill in the Rajya Sabha, the Law Minister said "Supreme Court is right because it is final. It is not right because it is right".

The trend is not very different in other jurisdiction. It is said that in United Kingdom, 10 bills were hurried through House of Commons in 2012, while the opposition called it undemocratic and Government called it necessary. In New Zealand it is said that during the term of the 49th Parliament, 23 Bills were passed using what is known as urgency motions. These are known as one sitting day motions. That means that the bill is passed with three readings in one single day. It is therefore clear that the Legislators whose main business is to legislate have discarded this solemn responsibility of theirs, resulting in enactments which are half baked. Many a time they are simply copied from other enactments of other nations. The situation is no better in other countries around the globe. It is in this background that the judicial intervention assumes importance so as to ensure that the enactments cater to the needs of the society and responds to the times.