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PREVENTING CRIMINALIZATION OF THE HOUSE

*Shreenath A. Khemka**

Democracy is the edifice of the Indian Constitution, and the electoral process is its cornerstone¹. With political experience it has become evident that democratic success lies in the quality of choice presented to the electorate. Choosing the bad among the worse is not only electorally adverse, but also deleterious to political institutions in the longer run. The foremost contention in this regard has been to keep criminals out of the political system.

Questions of electoral reform have been a tug of war between the executive and the judiciary and now with the petition² before the Supreme Court to disqualify chargesheeted individuals from contesting elections, the rope has been pulled taught to its snapping point. While the prayer in the particular case is audacious, the irony is that the law does not even keep the convicts out of the Parliament; let alone chargesheeted individuals. At the present, lacunas allow convicts to contest elections³ and legislators are not wholly disqualified for criminal convictions.⁴

Electoral participation occurs either as a voter or a candidate.⁵ A voter can be disqualified only through a parliamentary law imposing restrictions on the exhaustive criteria of non-residence,

* Lawyer, NALSAR (2017) & Cambridge (2018).

¹ Read by the Supreme Court through the Basic Structure Doctrine.

² In the case of *Public Interest Foundation v. UOI*, pending before the Constitutional (5 Judge) Bench of the Supreme Court.

³ 2013 amendment to Section 62 of the Representation of Peoples' Act.

⁴ Sections 8(1), 8(2), and 8(3) of the Representation of Peoples' Act.

⁵ As direct participants under the Constitution, read along with the Representation of Peoples' Act.

unsoundness of mind, and crime.⁶ A candidate may be disqualified on various grounds, accruing before and after the electoral verdict. Articles 102(e) and 191(e) augment the Constitutional grounds⁷ by providing the Parliament with the power to create additional grounds. The rationale for having separate set of criteria between a voter and a candidate was to maintain a higher threshold for admittance to the House, than to elect them.

The Representation of Peoples' Act (RoPA) is a parliamentary law in furtherance of both Articles 102(e) and 326 of the Constitution as it lays down detailed circumstances of disqualification for both voters and candidates in the electoral process. Therein, Chapter III of the RoPA enlists exhaustive statutory grounds of disqualification for candidates, which although addresses criminal convictions, does not extend to chargesheets.

Criminal conviction under the RoPA is not an absolute disqualification for legislators. Sections 8(1) and 8(2) only provide for a particular set of crimes for which the person can be disqualified. Section 8(3) holds that convictions only of a minimum term of 2 years are adequate to disqualify a legislator. Therefore, a sitting MP or MLA convicted for any term less than 2 years cannot be disqualified from their seat. In other words, the legislator holds the seat while serving the sentence for their crimes. This is an egregious legislative condonation to allow criminals to hold parliamentary positions.

Disqualification under the Indian law can be understood to

⁶ Article 326 of the Constitution.

⁷ Office of profit, unsoundness of mind, insolvency, foreign citizenship, and defection.

be of two types: immediate⁸ and continuing⁹ (or punitive). While all disqualifications are immediate, not all are continuing¹⁰. Whilst the Parliament has the prerogative to legislate on punitive disqualification for certain class of misdemeanor, it cannot condone an immediate disqualification by clubbing the two together. Section 7(2) of the RoPA makes the blunder by conflating the two kinds of disqualifications thereby allowing petty crimes¹¹ to neither be a continuing disqualification, nor an immediate one¹². Petty crimes may not invite punitive disqualification of 6 years¹³, yet should still apply as an immediate disqualification till the time the defect has been cured¹⁴. The current legislation¹⁵ wrongly clubs different classes within the same category and therefore amounts to an over-categorization under Article 14.

Interestingly, Section 62(5) of the RoPA restricts the right to vote in case the voter is under custody or undergoing sentence, thereby automatically disqualifying the voter¹⁶. This creates a bifurcation between voters and candidates; where conviction and custody serve as disqualification for the former and not for the latter.

⁸ An immediate disqualification is when a defect exists to contest or continue to hold the post of legislator.

⁹ Continuing disqualification is punitive in the sense that it disallows a person from contesting elections for a certain time period, even after the defect has been cured.

¹⁰ Defection and Office of Profit are examples of disqualifications which do not continue once the defect has been resolved.

¹¹ Up to 2 years of imprisonment.

¹² Excepted by Section 8(3) of the Representation of Peoples' Act.

¹³ As per legislative prerogative encapsulated within Section 8(3) of the Representation of Peoples' Act.

¹⁴ In the present context, completion of the criminal sentence.

¹⁵ Section 7(2) of the Representation of Peoples' Act.

¹⁶ Interestingly, the Chief Election Commissioner had recently expressed favorability to provide under-trial prisoners the right to vote (but not convicts), currently the right is sanctioned at present (for both alike).

In *Chief Election Commissioner v. Jan Chaukidar*¹⁷, the Supreme Court had upheld the Patna High Court's decision¹⁸ to bar criminal convicts from contesting elections. The decision bridged the gap between the different disqualificatory criteria for a voter and a candidate by holding that a person barred from voting could equally not contest the elections. Because Section 62(5) of the RoPA prohibited people serving sentences from voting; they equally couldn't contest elections.

The Centre (UOI) filed a Review Petition against this decision, however while the Review was pending, the 2013 amendment to the RoPA was adopted. The RoPA was craftily amended so that even though an 'elector' maybe barred from voting in an election, they could still contest it¹⁹. The subterfuge in the 2013 amendment was to carve out a distinction between 'electors' who were voters, and those who could not vote but still would be eligible to contest elections. With the amendment in the law, the Review Petition became unnecessary and the *Jan Chaukidar* verdict became infructuous. Later, the Delhi High Court²⁰ and the Allahabad High Court²¹ reaffirmed the 2013 amendment and ratified the paradoxical legal position that a person could be barred from voting in an election and still retain the right to contest.

Such a legal position violates the rudimentary logic that one must first be eligible to vote, if they are to contest elections²². The threshold for voting is much lower than the threshold for contesting

¹⁷ Civil Appeal Nos. 3040-3041 of 2004.

¹⁸ 2004 (2) BLJR 988, 2004 (3) JCR 284 Pat.

¹⁹ Provided further that by reason of the prohibition to vote under this sub-section, a person whose name has been entered in the electoral roll shall not cease to be an elector.

²⁰ *Manohar Lal Sharma v. UOI*, W.P. (C) 7459/2013 & CM. APPL. 15956/2013.

²¹ *Lok Prahar v. UOI*, Misc. Bench No. 800 of 2014.

²² Because the set of candidates is a sub-set of voters.

elections, and allowing the latter over the former, defies reason. This classification between ‘electors eligible to vote’ and ‘electors not eligible to vote, but eligible to contest’ is absenting any rationale, except to allow a loophole for convicts to contest elections.

To propose through the RoPA that an ‘elector’ under Article 325 is distinct from a ‘voter’ under Article 326 is interpretively myopic, simply because a statutory construct cannot bind a constitutional term. Article 325 of the Constitution envisages a unified general electoral roll, whereas Article 326 lays down the criteria of universal adult suffrage. That is the reason for the Constitution to enunciate ‘elector’ under Article 325 in different terms from a ‘voter’ under Article 326. Moreover, the distinction is arbitrary under Article 14 because it lacks both an intelligible differentia and reasonable nexus with Part XV of the Constitution. Article 325 prescribes no criteria to be an elector. Article 326 enunciates both the qualifications and the disqualifications so as to define elector as ‘voter’. Statutorily segmenting the terms into two artificial classes of persons is both interpretively bad and technically myopic²³.

On the other hand, the plea of chargesheet-based disqualification²⁴ might be jumping the gun. Firstly, stretching Sections 8(1), 8(2), and 8(3) of the RoPA so that convictions include chargesheets would lead to a forced reading of the statute. Secondly, to restrict the right to contest elections merely on the basis of a chargesheet is a tough proposition²⁵. Thirdly, such a low threshold

²³ Because an elector under Article 325, absenting the definition of the voter under Article 326, is a strawman.

²⁴ In the pending case of Public Interest Foundation v. UOI.

²⁵ Presumption of innocence in criminal law dictates that guilt cannot be adduced without a successful conviction.

for electoral exclusion is capable of being misused to deny competing candidates a chance at the polls, especially in favor of the government²⁶.

The primary need is to ensure that criminals do not sit in the House. Statutory evasions of allowing convicts to contest elections and not disqualifying legislators for their criminal convictions erode public confidence in the House. The Supreme Court must reconsider the constitutionality of the 2013 amendment to the RoPA, whilst not creating a threshold so low; so as to be misused by political opponents, most of all the government.

²⁶ Which has a favorable position in determining as the prosecution who gets chargesheeted and when.