

## Decriminalization of Politics in India

### Introduction:

The Republic of India is the largest democracy in the world. The Preamble of the Constitution of India begins with the phrase “WE THE PEOPLE OF INDIA”, underlining the spirit of democracy in India. India is one among the ten largest nations in the world in terms of the geographical area and it is also the second most populous country in the world. Given the humungous geographical and demographic nature of India, it is practically impossible for India to have a democracy in the true sense of the term. Therefore, democracy in the form of representation of people is what exists in India, so also in most nations of the world. The legislature reflects the mood and spirit of the nation. The members of the legislature are mandated to represent vicariously the aspirations and concerns of the people whom they represent. Hence it is quintessential for the legislature of a representative democracy to be a true reflection of the aspirations of the people and also to be fair, honest and accountable to the people they represent.

However, unfortunately, in recent times, India has witnessed a crisis of empathy, quality, fairness, integrity, honesty, and intellectual capability among the members of its legislatures, both at the Centre as well as the State level. Not only is there a serious question of propriety lying over the fairness of electoral procedure followed, an even greater concern lies in the kind of people who are entering the polity of India. The very spirit and objective of democracy could be lost if India continues to suffer at the hands of such law-makers who are a liability to the society. Corruption has been rampant in Indian polity, not only at the electoral level, but also at the Executive level. In addition to this, India stands witness to an alarmingly high number of people with criminal background who have polluted Indian polity. Though it has been 61 years since India’s first ever General Elections, the existing electoral laws have failed in more ways than one to prevent the menace of criminalization in Indian politics. In this regard, it is necessary to make a critical analysis of the existing electoral and post-electoral legal provisions governing the representation of people in India.

### **Statistical Data:**

As mentioned in the introduction, the number of candidates in the electoral fray and the subsequent number of legislators with criminal records is an alarmingly high figure.

Vohra Committee Report on Criminalisation of Politics which was constituted to identify the extent of the politician-criminal nexus says: “The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country” and that “some political leaders become the leaders of these gangs/armed senas and over the years get themselves elected to local bodies, State assemblies, and national parliament.”<sup>1</sup>In the 2009 General Elections for the 15<sup>th</sup> Lok Sabha, among the 7810 out of 8070 candidates whose affidavits were considered, 1158 candidates have declared that criminal cases are pending against them. This constitutes around 15% of the total number of candidates contesting in the election. Out of these 1158 candidates, there are serious criminal cases pending against 608 candidates.<sup>2</sup>

Ironical as it is, a large number of people with criminal background not only contest elections, but also subsequently manage to become the members of the legislature. This is highlighted by the fact that as many as 162 Members of Parliament of the 15<sup>th</sup> Lok Sabha have pending criminal cases. These 162 MPs, in toto, have 522 cases pending against them. 76 out of the 543 MPs(constituting nearly 14% of the total membership) have serious criminal cases pending against them. A matter of grave concern lies in the fact that there has been an increasing trend in the number of MPs with criminal background, in comparison with the statistical figure for 2004 where there were 128 MPs with pending criminal cases in comparison with the 2009 figure of 162.<sup>3</sup>

### **Disqualification of candidates with criminal background:**

Articles 102 and 191 of the Constitution of India, 1950 deal with disqualifications for membership of the Parliament and the State Legislatures respectively.

The said Articles are extracted herein below:

**“102. Disqualifications for membership.** – (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

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<sup>1</sup> Chapter 4 of the National Commission on the Review of the Working of the Constitution

<sup>2</sup> Page 27, LOK SABHA WATCH 2009-A Compendium of State Election Watch Reports by National Election Watch and Association for Democratic Reforms

<sup>3</sup> Page 38, LOK SABHA WATCH 2009-A Compendium of State Election Watch Reports by National Election Watch and Association for Democratic Reforms

- (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.”

**“191. Disqualifications for membership.** – (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

- (a) 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 Legislature of the State by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.”

The aforesaid Articles of the Constitution provide for the grounds for a person to be disqualified for being chosen as, and for being, a member of either House of the Parliament or a member of the Legislative Assembly or Legislative Council of a State. One of the grounds so mentioned is by the passing of a law by the Parliament of India. In other words, the Parliament is empowered to make any law by which a person stands disqualified to be chosen as or to be a member. Accordingly, The Representation of the People Act, 1951 (hereinafter referred to as ‘the Act, 1951’) was enacted by the Parliament of India “to provide for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections”<sup>4</sup>

Chapter III of the Act, 1951 deals with the ‘Disqualifications for Membership of Parliament and State Legislatures’. In order to understand and examine the provisions related to disqualification,

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<sup>4</sup> Purpose of the statute’s enactment.

it is necessary to know the meaning of the term 'disqualification', which has been provided in Section 7(b) of the Act, 1951. It reads as hereunder:

**“7. Definition. - XXX**

(b) "disqualified" means disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.”

Further, Section 8 of the Act, 1951 provides for disqualification on the ground of conviction. The said section is of paramount essentiality for the purposes of this article, as it specifically deals with conviction of a person or an incumbent member, as the case might be, as a ground for disqualification. Articles 102 and 191 of the Constitution, and further, Section 7 of the Act, 1951 have expressly declared that the provisions so mentioned therein are equally attracted to a person for being chosen and for being a member of the legislative Houses. The conviction under any of the offences mentioned in sub-sections (1) and 2 of Section 8 results in disqualification.

The two sub-sections are extracted herein below:

**8. Disqualification on conviction for certain offences.** — (1) A person convicted of an offence punishable under—

(a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955) which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub-section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; or

(j) section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991; or

(k) section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971); or

(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002),

shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or  
(b) any law relating to the adulteration of food or drugs; or  
(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961); and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

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*Explanation.* —In this section, —

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(I) the regulation of production or manufacture of any essential commodity;

(II) the control of price at which any essential commodity may be bought or sold;

(III) the regulation of acquisition, possession, storage, transport distribution, disposal, use or consumption of any essential commodity;

(IV) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodity Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).”

If a person is convicted and sentenced to pay fine for an offence punishable under any of the provisions provided in sub-section (1), then the period of conviction is six years from the date of conviction. However, if the person is convicted and sentenced to imprisonment, then the disqualification shall operate from the date of conviction and it shall also continue for a further period of six years from the date of his release. If a person is convicted for the contravention of any of the provisions referred to in sub-section (2) and is sentenced to imprisonment for a period exceeding six months, he shall stand disqualified from the date of such conviction and further continue to be disqualified for a period of six years from the date of his release. An Explanation relating to the contraventions so mentioned has also been provided in the Act, 1951.

Sub-section (3) of Section 8 is a residuary provision. A detailed list of the punishable offences the conviction for which the disqualification operates has been made in sub-section (1). A contravention of the provisions mentioned in sub-section (2) also results in disqualification. However, a question arises as to the eligibility as against a person convicted and imprisoned for an offence other than those mentioned in the two sub-sections. This problem has been solved by sub-section (3) which reads as hereunder:

**“Section 8. - XXX**

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.”

If a person is convicted and sentenced to imprisonment for more than two years for an offence other than those mentioned in the section, he shall be disqualified from the date of conviction and shall continue to be disqualified for a further period of six years.

The duration of disqualification is similar to the duration mentioned for a sentence of imprisonment under sub-section (1) and a conviction under sub-section (2). A bare reading of the above mentioned sub-sections suggests that the intention of the legislature is to keep those convicts away from contesting for or continuing in political office.

However, a person sentenced to imprisonment for less than two years, for an offence other than those mentioned in sub-sections (1) and (2), does not stand disqualified from contesting for or continuing in political office. While throwing some much needed light upon the criminalization of politics, K Prabhakaran case enumerates the importance section 8(3). “The purpose of enacting disqualification under Section 8(3) of the RPA is to prevent criminalization of politics. Those who break the law should not make the law. Generally speaking, the purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent persons with criminal background from entering into politics, and the House -- a powerful wing of governance. Persons with criminal background do pollute the process of election as they do not have many a holds barred and have no reservation from indulging into criminality to win success at an election. Thus, Section 8 seeks to promote freedom and fairness at elections, as also law

and order being maintained while the elections are being held. The provision has to be so meaningfully construed as to effectively prevent the mischief sought to be prevented.”<sup>5</sup>

A person convicted under the provisions of Section 8(3) of the Act stands disqualified for the period mentioned thereof. However, the person so convicted may move a higher court challenging the conviction. The obvious question which arises is regarding the validity of disqualification if the appeal is allowed by the higher court and consequently the judgment of the lower court is reversed. The question was meticulously answered in the K. Prabhakaran case wherein the petitioner and the respondent contested for an election to the State Legislative Assembly from the same constituency. The respondent previously was convicted by a Magistrate court for several offences. The sentences were to run consecutively and not concurrently. Consequently the total period of imprisonment was more than two years and the respondent stood disqualified under the provision of section 8(3). However his nomination was accepted by the Returning Officer. Post declaration of the result, the appellate court ordered that the sentences be run concurrently and not consecutively. The petitioner filed an Election Petition pleading to declare the election of the respondent as void since the latter was disqualified as on the date of scrutiny of nomination. The designated Election Judge did not find fault with the R.O’s decision to accept the respondent’s nomination.

The designated Election Judge referred to the Honourable Supreme Court’s finding in *Manni Lal v. Parmai Lal*.<sup>6</sup> In the said case, the court held that in a criminal case, acquittal in appeal does not take effect merely from the date of the appellate order setting aside the conviction; it has the effect of retrospectively wiping out the conviction and the sentence awarded by the lower court. Therefore, a disqualification resulting out from out of a conviction would be wiped out in case of an acquittal by an appellate bench. The Honourable Supreme Court, while dealing with the same issue in the Prabhakaran case took a different view thereby overruling its earlier finding in the Manni Lal case.

Under Sub-clause (i) of Clause (d) of Sub-section (1) of Section 100 of the Act, 1951<sup>7</sup>, the improper acceptance of any nomination is a ground for declaring the election of the returned

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<sup>5</sup> *K Prabhakaran v. P. Jayarajan* C.A. No. 8213/ 2001

<sup>6</sup> AIR 1971 SC 330

<sup>7</sup> “**100. Grounds for declaring election to be void.**—(1) Subject to the provisions of sub-section (2) if the High Court is of opinion—

candidate to be void. This provision is to be read with Section 36(2) (a) <sup>8</sup> which casts an obligation on the returning officer to examine the nomination papers and decide all objections to any nomination made, or on his own motion, by reference to the date fixed for the scrutiny of the nominations. Whether or not a candidate is qualified to contest is to be determined with reference to the date fixed for scrutiny of nominations. In other words, if a person is found to be disqualified for being chosen as or for being a member of the legislature as on the date fixed for scrutiny of nominations, his nomination is liable to be rejected. Therefore, in the Prabhakaran case, act of the Returning Officer to accept the nomination of the respondent was incorrect and the election of the respondent stands to be declared void. Further, the Honourable Court pointed out that even if the candidate whose nomination is rejected files an appeal in a higher court and the appellate order has a bearing on the conviction of the candidate, the appellate order would not have the effect of wiping out the disqualification. What is relevant is only the sentence of imprisonment as on the date of scrutiny of nominations. An appeal may be filed or even an order under Section 389 of the Code of Criminal Procedure, 1973 suspending the execution of the sentence may have been passed. But, they are of no significance in wiping out the disqualification of the candidate as the date of scrutiny of nominations is the focal point.

Sub-section (3) of Section 8 of the Act, 1951 says that a person convicted of any offence and sentenced to imprisonment for not less than two years stands disqualified. The question is whether the sentence of imprisonment mentioned is with reference to a single offence. Is a person who is convicted of several offences wherein the sum total of the sentences of those offences is more than two years liable to disqualified under the meaning of sub-section (3) of section 8? This was one of the questions which came before the Honourable Supreme Court in the Prabhakaran case. Answering the issue regarding the interpretation of the word 'any' which

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(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance or any nomination, or

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the High Court shall declare the election of the returned candidate to be void.”

<sup>8</sup> “**36. Scrutiny of nominations.**—xxx

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:—

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:

Articles 84, 102, 173 and 191, Part II of this Act, and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); xxx”

is used in sub-section (3) of section 8, the court held that the adjective 'any' qualified the nature of the offence mentioned and not the number of offences. Therefore, merely because the candidate is convicted of several offences and not a single offence with a sentence exceeding two years, he does not qualify to contest elections. Further, in the case of consecutive sentences for several offences, the aggregate period of imprisonment awarded as punishment and in the case of punishments consisting of several terms of imprisonment made to run concurrently, the longest of the several terms of imprisonment would be relevant to be taken into consideration for the purpose of deciding whether the sentence of imprisonment is for less than two years or not.

### **Section 8 (4) of the Act, 1951**

Sub-section 4 of Section 8 of the Act, 1951 is an exception carved out from sub-sections (1), (2) and (3). For the purposes of disqualification, the Act deals with incumbent members of the legislature on a different footing from non-members. The provision reads as hereunder:

#### **“Section 8.-**

(4) Notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3) a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.”

The provision states that if an incumbent member is convicted of any offence mentioned in the section, the disqualification does not take effect till a period of three months from the date of conviction elapses. If an appeal or application for revision is brought with respect to the conviction or sentence, then the disqualification does not operate till that appeal or application is disposed of by the court. Therefore, the provision serves as immunity for all the incumbent members from being disqualified. The intention of the legislature in enacting such a provision is to protect the stability and existence of the House. As pointed out in the Prabhakaran case (supra), there would be two immediate consequences if the disqualification were to operate immediately from the date of conviction, as in the case of non-members. “First, the strength of membership of the House shall stand reduced, so also the strength of the political party to which such convicted member may belong. The Government in power may be surviving on a razor edge thin majority where each member counts significantly and disqualification of even one

member may have a deleterious effect on the functioning of the Government. Secondly, bye-election shall have to be held which exercise may prove to be futile, also resulting in complications in the event of the convicted member being acquitted by a superior criminal court.” However, more often than not, the members who are convicted would file an appeal or application with regard to the conviction or sentence within three months from the date of disqualification. The time taken for the appeal to be disposed of by the court is generally sufficient enough for the member to continue to be so for a considerable period of time. In this regard, the Supreme Court ruling in *Lilly Thomas vs. Union of India*<sup>9</sup> served as a much needed panacea to solve the issue.

In the said case, issue of the constitutional validity of sub-section (4) of section (8) of the Act was raised. The language of Articles 102 and 191 of the Constitution is clear that the Parliament has the power to enact any law regarding the disqualifications for membership to either House of the Parliament or of the State Legislatures. It is in exercise of this power that the Representation of People Act, 1951 is enacted. The Honourable court pointed out that the grounds for disqualification mentioned in the aforesaid Articles are both for being chosen and for being members of the legislatures. Therefore, the same set of disqualifications applies for non-members and members. The Constitutional Bench of the Supreme Court, in *Election Commission of India v. Saka Venkata Rao*<sup>10</sup> opined that the language of Article 191 suggests that the same set of disqualifications operates for election and for continuing as a member. Article 102 (1) is identically worded with Article 191 (1). Therefore, the principle applies to Article 102 (1) inasmuch as it applies for Article 191 (1). The court, therefore, held that the Parliament is not empowered to enact different provisions concerning election and for continuing as members. The principle, as the Supreme Court pointed out in the case, is “if because of a disqualification a person cannot be chosen as a member of Parliament or State Legislature, for the same disqualification, he cannot continue as a member of Parliament or the State Legislature”.

Further, Articles 101 (3) (a) and 190 (3) (a), the wordings of which are identical state that “if a member ... becomes subject to any of the disqualifications mentioned in clause (1) or clause (2) of article 102 (*or 191*), ... his seat shall thereupon become vacant.” Therefore, if a person is disqualified as per Articles 102 or 191, as the case might be, then his seat shall become vacant.

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<sup>9</sup> Writ Petition (Civil) No. 490 of 2005

<sup>10</sup> AIR 1953 SC 210

Articles 101 and 190 also prohibit deferring the date of disqualification for a member, which is the case as per sub-section (4) of section 8 of the Act, 1951. By virtue of the fact that the Parliament is not empowered to enact different provisions and Articles 101 and 190, The Supreme Court held that the saving provided for incumbent members under sub-section (4) of section 8 of the Act, 1951 is *ultra vires* the Constitution.

Sub-section (4) of section 8 has been struck down by the Supreme Court for being *ultra vires* the Constitution. This, to a very large extent, is helpful in the decriminalization of politics for those members who are convicted are prohibited from continuing in office with immediate effect. However, the problem of criminalization continues to exist despite the said decision. Under the existing provisions of the Act, 1951, the ground for disqualification is conviction under any of the offences mentioned in section 8 of the Act. Once the criminal proceedings are initiated, the time elapsed between the initiation and the final order of the court is long enough for the accused to contest for elections. Prior to the striking down of sub-section (4) of section 8, the long duration of time taken for the pronouncement of the final judgment served as a blessing to all those candidates with criminal record. Once they were elected as members, the provision saved them from immediate disqualification despite the conviction. In this regard, it is necessary to amend the grounds for disqualification. Therefore, it is opined that framing of charges against the accused should be the ground for disqualification and not the conviction. If the judge is of the opinion that there is ground for presuming that the accused has committed the offence, then, charges are framed against the accused.<sup>11,12</sup>. Therefore, framing of charges implies that there is sufficient ground for presuming that the accused has committed the offence. Hence, once the court frames the charges against the accused, he shall be disqualified from membership.

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<sup>11</sup> **“228. Framing of charge.-** (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

- (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial for warrant-cases instituted on a police report;
- (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.”

<sup>12</sup> **“240. Framing of charge.-** (1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.”

In order to achieve the goal of decriminalization of politics, various proposals concerning the legal provisions related to criminalization have been put forward before successive Governments at the national level.

The Law Commission of India, suggested that section 8 of the Act, 1951, be continued in its current form without any amendments. However, with regard to the offences for which disqualification operates, the Commission proposed that a new section (Section 8B) be inserted to deal with electoral offences and offences having a bearing upon the conduct of elections under sections 153A and 505 of the Indian Penal Code, 1860 and those serious offences punishable with death penalty or life imprisonment. Under the proposed section 8B, framing of charges must be a ground of disqualification; but this disqualification shall last only for a period of five years or till the acquittal of the person of those charges, whichever event happens earlier.<sup>13</sup>

The Election Commission proposed that Section 8 of the Act, 1951 should be amended to disqualify candidates accused of an offence punishable by imprisonment of 5 years or more even when trial is pending, given that the Court has framed charges against the person. However, since the law enforcement agencies in India work under the direct control of the Governments both at the State and at the National level, there is every possibility of the ruling party misusing the provision by falsely implicating the opponents at the time of elections. The Commission addressed the issue and hence to prevent such misuse, the Commission suggested a compromise whereas only cases filed prior to six months before an election would lead to disqualification of a candidate. In addition, the Commission proposed that Candidates found guilty by a Commission of Enquiry should stand disqualified.<sup>14</sup>

The National Commission to Review Working of Constitution recommended that the Representation of the People Act, 1951 be amended to provide that any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as, or for being, a member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence and unless cleared during that one year period, he shall continue to remain so disqualified till the conclusion of the trial for that offence. It was also suggested by the Commission that the aforesaid provision must equally be applicable to sitting members as well.

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<sup>13</sup> Part 5.3 of the Report on Reform of the Electoral Laws, 1999

<sup>14</sup> Election Commission of India Report, 2004

In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. Further, it recommended that persons convicted of heinous crimes such as murder, sexual assault, smuggling, dacoity should be permanently barred from contesting for any political office.<sup>15</sup>

On the 30<sup>th</sup> of August, 2013, the Honourable Minister for Law and Justice, Government of India introduced The Representation of the People (Second Amendment and Validation) Bill, 2013<sup>16</sup> in the Rajya Sabha, *inter alia*, to substitute sub-section (4) of section 8, so as to provide that the disqualification in view of conviction under sub-sections (1), (2) or (3) of the said section in respect of a member of Parliament or the Legislature of a State shall not take effect, if an appeal or application for revision is filed in respect of the conviction and sentence within a period of ninety days from the date of conviction and such conviction or sentence is stayed by a court, and further to provide that after the date of conviction and until the date on which the conviction is set aside by the court, the member shall neither be entitled to vote nor draw salary and allowances, but may continue to take part in the proceedings of Parliament or the Legislature of a State, as the case may be. Be it enacted by the Parliament of India, the Act shall be deemed to have come into force from the 10<sup>th</sup> of July, 2013, the date on which the Supreme Court of India pronounced the judgment in the Lilly Thomas case (*supra*).

### **Contesting from prison:**

Over the last six decades, Indian politics has seen various facets of criminalization and it has come across umpteen examples of candidates contesting for elections from prison and has even managed to gain electoral success subsequently. The very purpose of contesting for a political office is, in a way, lost if the person contests elections from prison. It is necessary for a leader or a representative to have an untainted reputation, so far as his criminal antecedents are concerned. However, we have often witnessed the ruling parties try abuse their direct control over the law enforcement agencies against the opponents at the time of elections. The issue of prohibiting an individual from contesting elections behind bars has its merits and demerits. Unlike conviction serving as a ground for disqualification from membership, confinement in a prison is an issue

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<sup>15</sup> Part 4.12.2 of the Report of The National Commission to Review Working of Constitution

<sup>16</sup> Bill No. LXII of 2013

where the role of the law enforcement agency is to a greater extent and consequently, the levels of political interference too are to a large extent. It is therefore necessary for us to look into the legal provisions with regard to the issue.

Sections 4 and 5 of the Act, 1951 deals with the qualifications for membership to the House of People and State Legislative Assembly, respectively. It has been expressly provided in both the sections that a person shall not be qualified, unless he is an 'elector' for any Parliamentary constituency or Legislative Assembly constituency, as the case may be. Section 2 (e) states that an "elector" in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950." Section 62 of the Act, 1951 deals with the 'Right to vote'. Sub-section (5) of section 62 reads as hereunder:

**"Section 62.-**

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force."

Therefore, a person ceases to be an elector if he is in lawful custody of the police, save the preventive detention. Though the right may be temporarily taken away, the ultimate result is that the right to vote is lost or in other words, he ceases to be an elector. It is quite fair and just that a person who is not an elector should not be elected. The Honourable Supreme Court, in *The Chief Election Commissioner v. Jan Chaukidar (Peoples Watch) & Ors.*<sup>17</sup> did not find any infirmity in the findings of the Patna High Court in the impugned common order that a person who has no right to vote by virtue of the provisions of sub-section (5) of Section 62 of the 1951 Act 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.

On the 26<sup>th</sup> of August, 2013, a Bill was introduced in the Rajya Sabha<sup>18</sup> by which a person in prison serving a sentence of imprisonment or in lawful police custody is entitled to contest for

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<sup>17</sup> Civil Appeal Nos. 3040/3041 of 2004

<sup>18</sup> The Representation of the People (Amendment and Validation) Bill, 2013, Bill No. LVII of 2013

the membership of the legislatures. As per the amendment proposed by the Bill, by reason of the prohibition to vote under sub-section (5) of Section 62 of the Act, 1951, a person whose name has been entered in the electoral roll shall not cease to be an elector.

**Declaration of criminal record:**

For a fair election to take place, it is quintessential that the voter knows the antecedents of the candidates who are in the electoral fray. Often, the voters are found to be unaware of the background of their candidates. Further, at the time of elections, the candidates present before the voters, an array of freebies and populist schemes to galvanize the votes and the voters, particularly the politically illiterate classes, fall prey to these. They are grossly unaware of the criminal antecedents of the candidate they intend to vote for. In this regard, several provisions have been enforced to made known to the voter, the profiles of the candidates seeking the former's valuable vote.

By an amendment<sup>19</sup> enacted in the year 2002, Section 33A titled 'Right to Information' was inserted in The Representation of the People Act, 1951. Sub-section (1) of section 33A deals with the declaration of the criminal record of the candidate. As per the provision, a candidate shall in his nomination paper delivered under sub-section (1) or section 33, inter alia, 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 sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8 of the Act, 1951 and sentenced to imprisonment for one year or more.

Rule 4A of the Conduct of Election Rules, 1961, prescribes that each candidate must file an affidavit (Form 26 appended to Conduct of Election Rules, 1961) regarding the information which is required to be furnished as per the provisions of sub-section (1) of section 33A.

Section 125A of the Act, 1951 prescribes the penalty for contravening the provisions of section 33A. As per section 125A, if a candidate fails to furnish the information required to be furnished

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<sup>19</sup> Act 72 of 2002, Section 2 (w.e.f. 24-8-2002)

as per sub-section (1) of section 33A; or furnishes false information; or conceals any information, he be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

In its report on Proposed Election Reforms, 2004, the Election Commission of India recommended that an amendment should be made to Section 125A of the R.P. Act, 1951 to provide for more stringent punishment for concealing or providing wrong information on Form 26 of Conduct of Election Rules, 1961 to minimum two years imprisonment and removing the alternative punishment of assessing a fine upon the candidate.

In order to achieve the objective of conducting fair elections, it is quite necessary for the voters to know the criminal profile of their candidates and it is in this direction that section 33A was inserted in The Representation of the People Act, 1951. However, if the candidate furnishes concealed or false information in the said affidavit relating to his criminal record, the very purpose of filing the affidavit is defeated. It is opined that section 125A of the Act, 1951 which deals with penalty for the said offence is not in accordance with the gravity of the offence. In order to achieve the goal of decriminalization of politics, it is quite necessary to strengthen the penal laws so as to put an end to the culture prevalent. Therefore, a contravention of section 33A of the Act, 1951, if proven, in addition to the existing punishment, should result in the disqualification of the member, who has so contravened.

### **Conclusion :**

Famous contemporary philosopher and activist Naom Chomsky rightfully points out that “For the powerful, crimes are those that others commit.” Perhaps that’s why our dear old politicians are unable to spot the black sheep in our flawed structure. The “Theory of Separation of Power” in literal sense is just a theory in today’s democracy. We have lost the good old days where philosophers and theorists were viewed vitally.

World renowned jurist Salmond opines that “Moral rules cannot be brought into existence or altered or done away in its own way. Standards of conduct cannot be endowed with or deprived of moral status by human fiat, though the day to day use of such concepts as enactment and repeal indicates that the same is not true of law. The idea of moral legislature with competence to make and change morals, as legal enactments makes and change law, is repugnant to the whole notion of morality.” A lot of might and moral fiber is required to lead a principled life without

rules and regulations guarding our every step. When most of our politicians have dirtied their hands as criminals, the issue now is way beyond “means and ends” and “is and ought”. The burning question now is to ask ourselves - What will we do about this?

We have witnessed the rise of criminals as politicians in our very own beloved backyard called democracy since last few decades or so. It is indeed high time that we stand up against politicians with criminal background and take a stand to weed them out of the system. Apart from tough legislative measures, we the people have to play an active role in electing our leaders and should create awareness about the importance of public participation to achieve criminal free political system.

Agreed that society being ideal is too idealistic in theory as well as in practice but in a free world all possibilities should be explored. Now it is up to the countrymen to bring in some change to cleanse the existing system and build a new one in which faith and integrity plays a key role in laying foundation to the new corruption and criminal free political system so that we can relive the true definition of democracy “by the people, for the people and of the people”

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