

**FORTY-SEVENTH  
ANNUAL CONFERENCE  
OF  
MEMBERS OF THE IIPA  
(OCTOBER 17, 2003)**

**ELECTORAL REFORMS IN  
THE CONTEXT OF THE RECENT  
SUPERME COURT JUDGEMENTS**



**INDIAN INSTITUTE OF PUBLIC ADMINISTRATION**  
Indraprastha Estate, Ring Road, New Delhi-110 002 (India)

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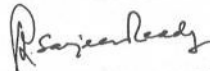


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Highlighting the catalytic role of the civil society organizations, as revealed in these two cases, Prof. Guha Roy has very aptly concluded the theme paper with his poignant observations that "democracy, in contemporary India, despite its limitations, has been blessed with the presence of a large number of vibrant civil society organizations", and that the presence of these organizations "provides the ray of hope in the midst of darkness, and herein lies, the strength of our democracy". Quoting Bertrand Russall's couplet — "Where there is a hope, despair is a coward's part" — Prof. Guha Roy very pertinently observed at the end that when there is hope, let us not despair.

I express my sincere thanks to Prof. Jaytilak Guha Roy who did a commendable work in preparing a comprehensive paper. I am also thankful to the members of the Institute who contributed papers and participated in the discussion. I wish to thank all those who offered remarks as well as to those who actively participated in the deliberations of the Conference.

Last but not the least, my gratitude is due to the chairpersons of the technical sessions, members of the Executive Council, the Academic Committee and Chairman & members of the Standing Committee for their guidance and insightful suggestions which enriched the deliberations of the conference.



(P.L. SANJEEV REDDY)  
*Director*

New Delhi  
October 4, 2004

Indian Institute of Public Administration

## CONTENTS

	PAGE
INTRODUCTION	III
CONFERENCE PROCEEDINGS	1
THEME PAPER	97
LIST OF CONTRIBUTORS	116
LIST OF PARTICIPANTS	118

must take the responsibility to teach moral lessons to their children and to see that they observe them not only in their personal life but also public life.

With these few words, I thank all of you, those who are present here, those who have gone out, all of you who have come over here since yesterday, first for the AGM and then this Conference, for having made your contributions for the success of this Conference. Since the Director is not present here, let me say that on behalf of the Chairman of IIPA Shri Chavan, Director Dr Sanjeev Reddy and on my own behalf, I propose a very hearty Vote of Thanks to all of you for your wonderful and dignified behaviour today while attending this Conference. I am very much impressed by the way you have conducted yourself. Thank you very much for the cooperation extended to me as Chairperson. I wish you a happy journey back and happy memories. Let us meet next year. Wish you all the best. Thank you.

SHRI N K DAS

Let me propose a hearty Vote of Thanks to the Chair for conducting the proceedings in a very competent and dignified way. I have been attending this Conference for the last few years and I can say with confidence the able way in which the Chairperson has been conducting the proceedings all these years. So, I hope you will accept our expression of thanks on behalf of the members present here.

*(The Conference then adjourned)*

*Theme paper*

**ELECTORAL REFORMS IN THE CONTEXT  
OF RECENT SUPREME COURT  
JUDGEMENTS\***

Jaytilak Guha Roy

PROLOGUE

Among the liberated nations in post-colonial world, India has the unparalleled record of successive elections and stable democracy. It also owns the glorious distinction of being the world's largest functioning democracy. Despite the coverage of a vast electorate spread over in a country as ours of such disparities and diversities and geographical proportions as well as the constraints of our plural society with multifarious social, economic and political pressures, the electorate system in our Democratic Republic had by and large performed moderately well during the first three decades though aberrations of a limited extent could not be ruled out. Unfortunately, some disturbing negative traits were noticed, especially since the 1980 elections when notorious history-sheeters or people with criminal records or background were put up for the first time for the Lok Sabha seats, particularly in Bihar and Uttar Pradesh. The emergence of these unwanted and unscrupulous elements "strengthens the theory of the babu-neta syndrome in politics. Since the interests of both groups are common and may even overlap, each accepts the other as a partner in the process."<sup>1</sup> Over the years, this process of what has been euphemistically called the 'criminalisation of politics' had been manifest in the shape of wide spread electoral violence and blatant indulgence in electoral malpractices such as massive booth capturing,

\* (a) People's Union for Civil Liberties (PUCL) & others V. Union of India & Another, (2003), 4 SCC 399.

b) Union of India V. Association for Democratic Reforms & Other, (2003), 5 SCC 294.

1 "Power without Politics" (editorial article), The Statesman, Calcutta, December 9, 1984. Here, babu implies the elite politician and neta means the criminal or the person with criminal background having emerged as a political leader.

rigging, intimidation of voters, use of money and muscle powers and misuse of government power and machinery by the political parties in power so much so that not only the credibility of our electoral system in a large part of the country is now being questioned, but the functional alliance between politics and criminality too seems to be sprouting in the entire gamut of our politico-administrative system. In fact, what had been revealed in the report of the Vohra Committee of the Union Home Ministry, were just tips on the iceberg. The menace of crime-politics-administration nexus is much more threatening and deep-rooted than the common people's perception or imagination.

#### SIGNIFICANCE OF FREE AND FAIR ELECTIONS

Elections are the most important and integral part of politics in a constitutionally ordained democratic system of governance. While politics is the art and practice of dealing with political power, election is the process of legitimisation of such power.<sup>2</sup> Purity of elections is, therefore, the key to the success and sustainability of democracy and democratic institutions. "If democracy is to take deeper roots and mature in this country", observes an eminent scholar very poignantly, "then it is not enough to flaunt its form but to create conditions that facilitate the conduct of free, fair and peaceful elections".<sup>3</sup>

Secondly, democracy and rule of Law are intimately inter-linked. Rule of Law presupposes that a democratic government ought to be a representative, responsible and responsive government. Accordingly, the political institutions of governance in a democracy such as the Parliament and the State Legislatures must possess the traits of three R's - Representativeness, Responsibleness and Responsiveness.<sup>4</sup> In a parliamentary democracy as ours, free and fair elections ensure that all those elected in the legislative bodies are the true representatives of the people as also responsible and responsive to them. In other words, free and fair elections ensure the legitimacy as well as the sanctity of the political institutions of governance in a democracy based on rule of law values.

<sup>2</sup> Jaytilak Guha Roy, "Elections and Corruption in India", the Otherside, 10(4), November 1986, p.5

<sup>3</sup> Kamala Prasad, "Free, Fair, Peaceful Election and Administration", Indian Journal of Public Administration (IIPA), Special issue on Administering Election in India, vol. 37(3), July-Sept. 1991, p.373.

<sup>4</sup> For further illustration of three R's, see P.V. Indiresan, "Electing Representative, Responsible and Responsive Legislators", IIPA, *ibid.*, pp.294-301.

Last but not the least, unlike a totalitarian government, a democratic government needs to be based on the trust of the governed. Free and fair elections are considered as the first and foremost step to ensure the trust of the governed. Fair election contemplates that the voters should be well-informed about the contesting candidates and as such, they must have the right to know the full particulars of a candidate who is to represent him in Parliament or any other legislative body.

#### BACKGROUND OF THE JUDGEMENT

##### (i) *Facts of the Case: Union of India v. Association for Democratic Reforms & Others*<sup>5</sup>

The Law Commission of India had, at the request of the government of India, undertaken comprehensive study of the measures required to expedite hearing of election petitions and to have a thorough review of the Representation of the People Act, 1951 (herein after referred to as "the 1951 Act") so as to make the electoral process more fair, transparent and equitable and to reduce the distortions and evils that have crept into the Indian electoral system and to identify the areas where the legal provisions required strengthening and improvement. Subsequently, the Law Commission in its 170th Report (1998) had recommended changes in the 1951 Act as well as the Conduct of Elections Rules, 1961. It was recommended inter alia by the Commission that at the time of filing of nomination for a seat in the House of the People, the Council of States, the Legislative Assembly or Legislative Council of State the candidate should file a declaration of all his assets possessed by him/her or his/her spouse and dependent relations supported by an affidavit and that he/she should also file a declaration as to whether any charge in respect of any offence referred to in Section 8-B of the Representation of the People Act, 1951 has been framed against him/her by any criminal court. In spite of these recommendations no action had been taken by the Parliament to implement them, and this led to the filing of a Writ Petition<sup>6</sup> by Association for Democratic Reforms before the Hon'ble High Court of Delhi.

<sup>5</sup>(2002) 5 SCC 294 and "Landmark Supreme Court Judgement: For Cleaner Elections", PUCL Bulletin, June 2002, relied on.

<sup>6</sup>CWP No. 7257 of 1999

After hearing the parties, the Delhi High Court by the Judgment and Order dated 2-11-2000,<sup>7</sup> held that it is the function of Parliament to make necessary amendments in the Representation of the People Act, 1951 or the Elections Rules, and therefore, the Court cannot pass any order for amending the Act or the Rules. However, the Court held further that for making a right choice, it is essential that the past of the candidate should not be kept in the dark as it is not in the interest of the democracy and well being of the country. The Court, therefore, directed the Election Commission to secure to voters the following information pertaining to each of the candidates contesting election to Parliament and to the State Legislatures and the parties they represent:

1. Whether the candidate is accused of any offence(s) punishable with imprisonment. If so, the details thereof.
2. Assets possessed by a candidate, his or her spouse and dependant relations.
3. Facts giving insight into the candidate's competence, capacity and suitability for acting as a parliamentarian or a legislator including details of his/her educational qualifications.
4. Information which the Election Commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the State Legislature.

The aforesaid order of the Delhi High Court was challenged by the Union of India by filing an appeal before the Hon'ble Supreme Court. On behalf of Indian National Congress an Interim Appeal was filed for impleadment/intervention in the appeal<sup>8</sup> filed by the Union of India. The permission was granted by the Court. Further, People's Union for Civil Liberties (PUCL) had also filed Writ Petition<sup>9</sup> under Article 32 of the Constitution praying that the Hon'ble Supreme Court may lay down suitable guidelines under Article 141 of the Constitution by taking into consideration the 170th Report of the Law Commission of India.

<sup>7</sup> AIR 2001 Del 126

<sup>8</sup> Civil Appeal No.7178 of 2001.

<sup>9</sup> WP(C) No.294 of 2001.

**(ii) Contentions**

Challenging the decision of the Delhi High Court, the appellant (Union of India) contended that it was for the political parties to decide whether amendments should be brought and carried out in the 1951 Act and the Rules. It added that the Act nowhere disqualified a candidate for non-disclosure of assets or pending charge in a criminal case and hence, directions given by the High Court were improper. The Election Commission supported the High Court's directions. The Indian National Congress contended that the High Court ought to have directed the petitioners to approach Parliament for appropriate amendments to the Act instead of directing the Election Commission to implement the same. It further contended that the citizen's right to know about the affairs of the Government did not mean that citizen's had a right to know the personal affairs of MPs or MLAs.

**(iii) Issues**

After considering the contentions of all sides, the Supreme Court partly allowed the appeal and the writ petition, and formulated the following two questions:

- (a) whether the Election Commission is empowered to issue directions as ordered by the High Court, and
- (b) whether a voter has a right to get the relevant information such as assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA.

**(iv) Constitutional and Legal Position: the Supreme Court's Response**

Disagreeing with the contention of the Union of India, and relying on its earlier judgements, the Supreme Court held that the directions issued by the Delhi High Court to the Election Commission cannot be said beyond its jurisdiction in view of the following:

1. The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections.
2. The word "elections" under Article 324 is used in a wide sense to include the entire process of election which consists

of several stages and embraces many steps.

3. When Parliament or State Legislature has made a valid law pertaining to elections, the Election Commission (EC) will be required to act in conformity with the provisions of law. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair elections. Accordingly, by issuing necessary directions, the EC can exercise its residuary power to fill the vacuum till there is legislation on the subject.
4. In *Kanhiya Lal Omar* case<sup>10</sup> the Supreme 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 and it may be a specific or a general order and such phrase should be construed liberally empowering the EC to issue such orders.
5. In *Common Cause* case<sup>11</sup> the apex 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. Although it may be true that the amount would be unaccounted, yet, according to the Court, this would have its own effect as a step-in-aid and voters may not elect law-breakers as law-makers and some flowers of democracy may blossom.
6. The transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The people of this country have basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.

<sup>10</sup> *Kanhiya Lal Omar v. R.K. Trivedi*, (1985) 4 SCC 628 (emphasis added).

<sup>11</sup> *Common Cause (A Registered Society) v. Union of India*, (1996) 2 SCC 752.

7. The right to information in democracy is recognised all throughout and it is a natural right flowing from the concept of democracy. Article 19(1) and (2) of the International Covenant on Civil and Political Rights provide for everyone's freedom of opinion and expression which include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers. Article 19(1)(a) of the Constitution of India also provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Voter's right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy.<sup>12</sup>
8. If the field meant for legislature and executive is left unoccupied detrimental to the public interest, the Supreme Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the executive to subserve public interest.

**(v) The Supreme Court's Direction**

In view of the legal and constitutional position of the matter and also after considering the submissions of the parties, the directions of the Delhi High Court were modified by the Supreme Court vide its decision dated 2nd May 2002 in which the Election Commission was directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:

- (1) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past - if any, whether he is punished with imprisonment or fine.
- (2) Prior to six months of filing of nomination, whether the

<sup>12</sup> *Romesh Thappar v. State of Madras*, AIR 1950 SC 124; *Attorney-General v. Times Newspapers Ltd.*, (1973) 3 All ER 54 (emphasis added).

candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the court of law. If so, the details thereof.

- (3) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants.
- (4) Liabilities, if any, particularly whether there are any overdue of any public financial institution or government dues.
- (5) The educational qualifications of the candidate.

OUTCOME OF THE JUDGMENT: RESPONSES OF ELECTION COMMISSION,  
GOVERNMENT AND POLITICAL PARTIES

In pursuance with the aforesaid judgment of the Supreme Court, the Election Commission came with a notification on 28th June, 2002 which, inter alia, said: "In case the affidavit is filed, the contesting candidate can challenge that. In the event the Returning Officer finds it true, he can reject the nomination paper."

Subsequently, the Government of India promulgated the Representation of the People (Amendment) Ordinance, 2002 (4 of 2002) on 24th August 2002. Thereafter, it moved the Representation of the People (Amendment) Bill, 2002 in order to replace the Ordinance. Moving the Bill in the Lok Sabha, Shri Ravi Shankar Prasad, the Minister of State in the Ministry of Law and Justice made the following submissions:<sup>13</sup>

- (1) The Government had its commitment towards electoral reforms with a view to eliminate this criminality seeping into the body politic in the country.
- (2) The Election Commission's notification was a matter of concern because in terms of law, rejection of nomination paper is possible only upon a specified ground.
- (3) The Government has come up with the present Bill after a wide-ranging consultation with all the political parties which

<sup>13</sup> LOK SABHA DEBATES, Part II: Proceedings other than Questions and Answers (Lok Sabha), Title: Combined discussion on the Statutory resolution regarding disapproval of Representation of the People (Amendment) Ordinance, 2002 and the Representation of the People (Amendment) Bill, 2002 (Resolution negatived and Bill passed). Emphasis added. Downloaded from internet.

took place in July-August, 2002.

- (4) This Bill is based upon the consensus of all the political parties.
- (5) It is historic in nature. It is though a modest beginning, yet a good beginning.

The salient features of the Bill, as the Minister told the House, were the following:

1. If against a candidate a charge has been framed in criminal proceedings in which a sentence can be given for two years or more, then he has to disclose that.
2. If a person is convicted even for one year, then also he has to disclose it.
3. He has also to submit, after election to the Presiding Officer of the House concerned, his assets and liabilities including his dues to the bank or to the Government within three months of the election.
4. A provision is made that in case there is a willful default, then the Presiding Officer, in terms of the rules to be framed, can initiate action for breach of privilege.

The salient points/issues, raised by the members from different political parties during the discussion on the Bill in the Lok Sabha,<sup>14</sup> are presented below:

1. In the last few years, some kind of a pattern has set in that it is the Judiciary that would have to send a message to the Parliament and then the Parliament would have to respond to that and act accordingly.
2. The judicial institutions are primarily there to interpret the ramifications and complications of legal action and, of course, they are there to interpret the various articles of the Constitution as and when it is required to be done, either in a Writ Bench of a High Court or in a Bench of the Supreme Court. But in the last few years a tendency has developed on the part of the Judiciary to project the nation as if the Parliament is not acting, the Legislatures are not functioning

<sup>14</sup> Ibid, Speeches of Shri Priya Ranjan Dasmunshi (points/issues No. 1-7), Shri Somnath Chatterjee (8-17), Dr. Raghubansh Prasad Singh (18) (translated from Hindi version), Dr. Manda Jagannath (19-22), and Shri G.M. Banatwalla (23-24), emphasis added.



and the Executive is not performing its duties and that they are the masters who are rescuing the nation from all its ills. Now, if this tendency on the part of the Judiciary is encouraged and if we start subscribing to their views continuously, then the supremacy of the Parliament, the sanctity of the Parliament, the will of the people would be interfered with in a different chamber, which is not a good thing to happen.

3. If the Parliament as a whole and the government continue to think that we would not act until the Judiciary intervenes in some matter, then the supremacy of the Parliament would end very soon.
4. More the matters and issues are referred and left in grey areas keeping it pending, the judicial activism will grow like a monster.
5. It is not the Bill that is enough. We (the Congress Party) are opposing it not because your intention is bad but because if you want to decide about transparency, it should begin at the stage of contesting the election and not after getting elected. From day one, let the electorate come to know who is a candidate and what is his academic brilliance and financial viability. We want that this declaration should be at the desk of the Returning Officer. It should be widely known.
6. Regarding the appointment of the judiciary, please ensure that the declaration of judges are also made in the same spirit either to the Rashtrapati or to the Governor, as the case may.<sup>15</sup>
7. The time has come for the government to become more and more transparent and to give a message to the people that it is the Parliament that is supreme and the supremacy of Parliament starts right from selecting the candidate by the Party in the form of a declaration before the Returning Officer.
8. People in jail are coming back here (Lok Sabha) and are being elected with huge margins. Well-known crooks are being re-elected. People with long list of criminal cases are happily raising their voices here against criminalisation. Is this the short-cut method? Is there a short-cut method? Just give one affidavit and all problems are solved!

<sup>15</sup> Personal view of Shri Priya Ranjan Dasmunshi.

9. Unfortunately, even our Judiciary thinks that you must have some money, some assets and you must be somewhat educated. What is this condescension in a country where you keep people uneducated illiterate because of lack of resources. Are they citizens of India or not? Will they have the right to participate in the democratic process or not? Do not apply standards which this country cannot sustain. Is it a fault of anybody, who is illiterate? I would like to have an honest illiterate than a Ph.D. crook. The country has to make a choice. Can there be a comparison between the two?
10. After the declaration of results, the winning candidate must declare his assets. The question of misuse comes after you are elected. The question whether you are misusing your elected position as a Member of Parliament or a Member of Legislative Assembly or a Minister is relevant.
11. What is important is commitment to certain principles, policies and objectives than mere cosmetic attempts.
12. To make elections free and fair, we have to control money power and muscle power and that cannot be controlled through affidavits. We have to stop taking recourse to thugs and mafias during the election which cannot be done through affidavits. It has to be on the basis of principled politics.
13. There are other many important things which have to be done. Please open up those unanimous reports,<sup>16</sup> try to implement them, provide some state funding. At least the list system may somewhat partially reduce this money power.
14. The only authority in this country that can legislate is the Parliament. Whether right or wrong, that is there. That is the very crux of our Constitution. Nowadays we are being advised what should be the law. What is public interest? The public representatives do not understand it. Only those who do not represent the people, those who have no accountability to the people, are supposed to know best.
15. Every body has several assembly constituencies. We cannot

<sup>16</sup> Reports of Jagannath Rao Committee, Dinesh Goswami Committee, non-official committees like Tarkunde Committee, as referred earlier by Shri Chatterjee in his speech.

- even cover the whole area. Then who will read this (the affidavit)? You are decrying people, you are showing them contempt, that if they are illiterate, they are not fully read, but they will read your English affidavits or Hindi affidavits or wrongly translated affidavits. This is expected. It is totally unreal.
16. This law is in the right direction. After a long time, this government has brought some sensible legislation. We (CPI-M) support it.
  17. The government should bring a comprehensive legislation, taking into account the important reports and recommendations of the Committees so that at least in one matter there may be unanimity. Let us not enter the portals of this House with question mark.
  18. There is nexus (politician, criminal and officer) in corruption. Why not the government make Vohra Committee Report public? Why not they take action on it?
  19. The Telugu Desam Party appreciates the directions given by the hon. Supreme Court in respect of Civil Appeal No. 7178 of 2001 and also subsequently by the Election Commission in curbing the criminalisation of politics. But according to the direction, merely by filing an affidavit, the returning officers have been given powers to reject the nomination, which is nothing but arbitrary and uncalled for.
  20. There are many instances where a number of false cases have been filed against the very important politicians of the country, which turned out to be false and they were let off by the court. By filing an affidavit in advance, while filing the nomination, the powers given to the returning officers, it deprives the contesting candidate to present his case properly. These allegations may turn out to be false in later part of the trial.
  21. If the political parties take adequate measures in keeping away the criminals and corrupt people getting into the political system of the parties, we do not need any direction from anybody.
  22. This Bill gives an opportunity of benefit of doubt for the candidates.

23. Electors' right to information about the candidate must be treated with utmost respect.
24. As far as the criminal antecedents of the candidates are concerned, let the fullest information come and some way also be found out so that this information really reaches all the voters.

## CHALLENGE

*(i) Facts of the Case: PUCL & Others V. Union of India and Another*<sup>17</sup>

The Representation of the People (Third Amendment) Act, 2002 (72 of 2002) received the President's Assent on 28th December 2002. Sections 33-A and 33-B as inserted by this Amending Act read as under:

"33-A. Right to information - (1) A candidate shall, apart from any information which he is 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 sub-section (1) or sub-section (2), or covered in sub-section (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 sub-section (1) of Section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).
  - (3) The Returning Officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under

<sup>17</sup> (2003) 4 SCC 399, relied on.

sub-section (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.

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 thereunder.<sup>19</sup>

Thus, as per the aforesaid provisions inserted by the Representation of the People (Third Amendment) Act of 2002, a candidate would not be required to disclose (a) the cases in which he is acquitted or discharged of criminal offence(s); (b) his assets and liabilities; and (c) his educational qualification, as ordered by the Supreme Court in its judgment in the earlier case. So, in the writ petitions filed by PUCL, Lok Satta, Association for Democratic Reforms and others,<sup>18</sup> the validity of Section 33-B was challenged.

**(ii) Submissions**

The Petitioners contended that Section 33-B on the face of it is arbitrary, unjustifiable and void being violative of the fundamental right of the citizens/voters to know the antecedents of the candidates. Without exercise of that right it would not be possible to have free and fair elections and therefore, the impugned section violates the very basic feature of the Constitution, namely republic democracy. For having free and fair elections, anywhere in the country, it is necessary to give effect to the voters' fundamental right as declared by the Supreme Court in its judgment earlier. It was contended further that by issuing the Ordinance the Government has arrogated to itself the power to decide unilaterally for mollifying the decision rendered by the Supreme Court without considering whether it can pass legislation which abridges fundamental right guaranteed under Article 19(1)(a) of the Constitution.

On the other hand, it was submitted on behalf of the respondents (Union of India and Another) that the Ordinance/Amendment Act is

<sup>18</sup> Writ Petitions (C) No.490 of 2002 with Nos. 509 and 515 of 2002.

in consonance with the judgment rendered by the Supreme Court and the vacuum pointed out by the said judgment is filled in by the enactment. It was also contended that voters' right to know the antecedents of the candidate is not part of the fundamental rights, but it is a derivative fundamental right on the basis of interpretation of Article 19(1)(a) given by the Supreme Court. It was submitted further that the Ordinance/Amendment Act is in public interest and, therefore, it cannot be held to be illegal or void.

**(iii) Issues**

The key issues in this case were:

- (1) Whether Section 33-B of the Amendment Act is legally valid?
- (2) Whether this Section is violative of the fundamental right of the citizens/voters to know the antecedents of the candidate?
- (3) Whether the Amendment Act is in consonance with the judgment rendered by the Supreme Court in Association for Democratic Reforms?<sup>19</sup>

**(iv) Court's Conclusions & Judgment**

After considering the contentions of all sides, the Supreme Court<sup>20</sup> came to the following conclusions:

- (A) The legislature can remove the basis of a decision rendered by a competent court thereby rendering the decision ineffective but it has no power to ask the instrumentalities of the State (such as the Election Commission) 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 direction issued by the

<sup>19</sup> Union of India v. Association for Democratic Reforms & Others, (2002) SCC 294.

<sup>20</sup> Per Shah, J. (Dharmadhikari, J. concurring), relied on (emphasis added).

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 as in this judgment.

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

- (C) The judgment rendered by this Court in *Association for Democratic Reforms*<sup>21</sup> has attained finality, therefore, there is no question of interpreting constitutional provision which calls for reference under Article 145(3).
- (D) Voters' fundamental right to know the antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from 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.
- (E) 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 judgment rendered by this Court.

<sup>21</sup> *Supra.*, n.19.

In the result, the Supreme Court held that Section 33-B, as inserted by the Representation of the People (Third Amendment) Act, 2002 is illegal, null and void. However, this judgment would not have any retrospective effect but would be prospective.<sup>22</sup>

It was held further that this Section does not pass the test of constitutionality.<sup>23</sup>

#### POINTS FOR CONSIDERATION

From our foregoing discussion, we may derive the following points which need due consideration:

1. If the first case (*Association for Democratic Reforms*) was the outcome of executive inaction, the second case (*PUCL*) was the result of legislative activism.
2. The responses of the Government and the political parties are an indicator to the present state of Indian politics characterized by the predominance of political bankruptcy over political wisdom, political hypocrisy over political benevolence. In such a scenario, there was no wonder when some distinguished members of the Lok Sabha advocated "the voters' right to information" or "comprehensive legislation for electoral reforms", knowing fully well that even their own parties would never support such initiatives.
3. The issues such as "parliamentary supremacy" and "judicial activism" were raised during the discussion in the Lok Sabha on the Amendment Bill. There is no doubt that frequent interventions of the Judiciary in the domains of the Executive and the Legislature are not a healthy sign for a democratic system of governance operating on the principle of checks and balance. But the question is: why this is happening? Is it due to judicial activism or executive and legislative inactions? In the humble opinion of this scribe, the term "judicial activism" seems to be misleading. It often gives a wrong impression as if the Judiciary is overstepping its limits by entering the realm of the Executive or the Legislature. In fact, a large number of recent trend-setting rulings by the apex court on public interest issues including its rulings in the cases under discussion reflect

<sup>22</sup> Per Shah J. (Dharmadhikari, J. concurring), emphasis added.

<sup>23</sup> Per Reddi, J. (concurring), emphasis added.

executive inactions and apathy rather than judicial activism or assertiveness. It is, therefore, necessary to evaluate the role of higher judiciary in the correct perspective of our constitutional jurisprudence.<sup>24</sup>

4. During the discussion in the Lok Sabha on the Amendment Act, some members had raised doubts about the efficacy of the voters' right to information in the context of widespread illiteracy in our country. This scribe, however, feels that voters' right to information acquires an added significance in the context of widespread illiteracy and this would help our democracy to survive and subsist. It is true that the voters' right to know the antecedents of the candidates is not enough to combat the menace of criminalisation of politics. Yet, our political parties are not prepared to recognize this right.

#### EPILOGUE

The cleansing of our existing electoral system calls for multi-pronged reforms which is, by and large, the task of our political masters. It would be too much to expect that these masters, who indulge in evil practices in elections to be in power, would readily come forward to bring about much-needed electoral reforms. When political will is lacking, for obvious reasons, the only alternative lies in people's initiative. As Jayaprakash Narayan, the 'moral-conscience of post-Gandhian India', piously wished:

*Let every citizen, who realizes the paramount importance of a moral regeneration of our politics, lend a helping hand in whatever way possible to this process. Only then will he earn the right, and be able to find the way, to take the initiative in his own hands and act massively to undo the present mischief and usher in a new era of moral and material revolution.*<sup>25</sup>

Fortunately, democracy, in contemporary India, despite its limitations, has been blessed with the presence of a large number of vibrant civil society organizations including public spirited bodies and pro bono publico. These organizations may not be very large in

<sup>24</sup> For further details, see Jaytilak Guha Roy, "Judicial Creativity: Its Expanding Horizons", *The Administrator*, Vol. XLII, April-June 1997, pp.43-49.

<sup>25</sup> Jayaprakash Narayan, "The National Malady", *Towards Free and Fair Elections*, Delhi, Lok Niti Parishad, 1975, p.28.

terms of membership, financial and other capabilities. However, their strengths lie in their enthusiasm and spirits. Even the two cases under discussion are due to the initiatives of public spirited bodies such as Association for Democratic Reforms, Lok Satta and People's Union for Civil Liberties. In fact, the presence of these vibrant civil society organizations provides the ray of hope in the midst of darkness, and herein lies, the strength of our democracy. As Bertrand Russell said, "Where there is a hope, despair is a coward's part". So, when there is hope, let us not despair.

#### Issues for Discussion

1. What is the relationship between the citizens' right to vote and the voters' right to information?
2. Is it necessary for the voters to know the antecedents of the candidates?
3. To what extent, this right is relevant in the context of free and fair elections?
4. Is there any justification for inclusion of educational qualifications in the declaration by a contesting candidate?
5. In a country as ours where millions of people are illiterate, how will the voters' right to know the antecedents of the candidates be made effective?
6. Will this right have any impact in some parts of the country where well-known crooks or history-sheeters are being elected and re-elected on the basis of caste or communal considerations?
7. Should the voters' right to know be reinforced with the voters' right to reject undesirable and frivolous candidates?
8. Any other.