

Electoral process: Fairness and Transparency

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ABSTRACT: India is a constitutional democracy with a parliamentary system of government, and at the heart of the system is a commitment to hold regular, free and fair elections. For the purpose of ensuring free and fair elections, Part XV of the Constitution visualizes an Election Commission, adult suffrage, electoral rolls and provisions relating to the holding of elections. Parliament enacted the Representation of the People Act 1950 and the Representation of the People Act 1951 to regulate the electoral process. Our electoral system as well as the electoral process cannot function successfully without certain fundamental principles of election.

The Indian electoral system has experienced a rapid criminalisation of politics and the rise of politician underworld network and corruptive exercises like booth capturing, intimidation and impersonation of voters, this kind of practice it hamper our system. The government of India have enacted various election laws and rules and the primary object of these laws is to create and maintain that sort of atmosphere in which the electorate can choose their representatives by the exercise of their free will without any pressure or hindrance or undue influence from any quarter but however, in the present context there is one or the other hindrance which affect our electoral system and the paper attempt to analyse these hindrances.

The paper attempts to analyse the challenges against the free and fair elections in accordance with the legal aspects and the paper will also highlights judicial approach in the free and fair elections in our country. This Paper will emphasize on the electoral problems and issues of elections. Further, the paper will recommends for better techniques through legal prospect in order to maintain free and fair elections.

Keywords: Electoral Reforms, Free and Fair Elections, legal prospect, electoral system, election laws.

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India's independence was significant not only as a major historical event making the end of colonial era and beginning of another era, but India chose representative democracy, a parliamentary form of government. Today, India is the biggest democratic country in the world.ⁱ The Constitution of India ushered in a democratic republic for the free people of the countryⁱⁱ and it is the basic law relating to the government of the country. It not only defines various organs of the State, enumerates their functions and demarcates their fields of operation, but it also is the vehicle of nation's progress. The preamble of the Constitution itself indicates that India is a "sovereign, socialist, secular, democratic republic". It gives sovereignty to the people and sets out the ideological aspirations, and essential features of the great concepts delineated in the various provisions of the Constitution which determine the type of democracy, our founders established. The equality and nature of justice, political, social, economic, the extent of liberty of thought, expression, belief, faith and worship in the Constitution cumulatively determines the basic structure of our democracy.ⁱⁱⁱ

Constitutional commitment to Free and fair elections in India.

Laws pertaining to the elections in India are contained in Part XV of the Indian Constitution. The provisions mentioned in the Articles (324 to 329) cover all aspects of conducting elections starting from inclusion of names in electoral roll to formulation of laws pertaining to elections.^{iv} The Constitutional foundation of free and fair elections lies in these provisions mentioned in the Constitution. The first requisite of free and fair elections under the Constitution is Article 327 and 238 which provide power for the parliament to make provision with respect to elections to legislatures and power of legislature of a state to make provision with respect to elections to such legislature respectively. The second requisite is Article 324 which provides for an independent authority, an Election Commission who is vested with power of superintendence, direction and control of the entire election process under the law and the commission is entrusted to conduct all elections to parliament and to the legislature of every State and the election to the office of President and vice-president. The third requisite is provide in Article 329 which lays down for judicial supervision of disputed elections and the limitations of judicial review of election laws.^v

A democratic government is the outcome of elections conducted according to the standard or principles of fairness and impartiality. However, the concept of free, fair and peaceful elections cannot be defined in a few words. The concept includes preliminary stages to election such as delimitation of constituencies, preparation, revision or amendment of electoral rolls and many others. Mainly the concept of free and fair election connotes that no one, under the electoral process, is in bondage of another, having his personal rights, social and political liberty, free thinking and choice subjected to a legal discipline. While exercising his right to vote one is not under undue influence of party discipline, religion, caste, creed, sex, language and also one is not under the strain of corrupt practices and so on.^{vi}

For ensuring purity in elections, there should be a set of elections laws which must cover the entire process of elections with the primary object to create and maintain that sort of atmosphere in which the electorate can choose their representative by the exercise of their free will without any pressure or hindrance or undue influence from any quarter. Law should extend full protection to the electorates against any fear, injury, fraud, misrepresentation or other undesirable practices, which may be indulged in by or on behalf of the candidate at an election. Such laws must also provide unfettered freedom to every person, who is qualified to offer himself as a candidate for election and all civil liberties should be allowed to him for campaigning his policies and the candidature. The election law must contain equal and justful demarcation of constituencies, principle of one man one vote and the secrecy of voting, just procedure for casting votes and for counting and declaration of election results. The conduct of elections must be

assigned to an independent authority who can function impartially and who is free from external pressures from the party in power or executive of the day. There should not be any encroachment by government or other agency in exercise of his powers and duties assigned to him under the law. Further, there must also be co-operation between the wings of government and citizenry, each of them discharging the duties assigned to them by law and also the supervision of disputed elections should be assigned to some judicial authority who can determine the question whether there has been a valid election on the basis of facts and election law which should contain the requisite qualification for candidates, the method of voting, definition of corrupt practices by candidates and their election agents, etc. and other cognate matters.

The Constitutional commitment to free and fair elections start with the right to vote, for the proper functioning of a democracy, there are certain freedoms given to the people and it is in the interest of the State that these freedoms are protected. To ensure this, every citizen in a democracy must be free to vote and this vote must count and be of value. In India, the universal adult suffrage is the development of the post-independence era. The reason for introduce adult franchise was to retain unity and integrity of the nation and as it was felt that separate electorates were responsible for communal and separatist tendencies. According to Article 325 of the Constitution provides that no person shall be ineligible for inclusion in the electoral-roll on grounds only of religion, caste, race, sex or any of them. And only that citizen shall be entitled to be registered as a voter at an election who is not less than eighteen years of age on the qualifying date.^{vii} To disqualified for voting are non-citizen^{viii}, persons who have not attained the voting age on the prescribed date,^{ix} non-resident,^x persons of unsound mind,^{xi} persons convicted of criminal offences or corrupt practices in election.^{xii} Thus, the regulation of franchise in India proceeds under the Constitution and the statutory rules made thereunder.

However, the right to vote or to contest election is not a constitutional or fundamental right but it is a statutory one. Elections to Lok Sabha or the State Legislatures are ultimately regulated by the Constitution. The Constitution, being supreme source of law is higher than the law made by Parliament because the validity of the later is determined with reference to the former. Provisions for conducting of free, fair and peaceful elections are generally incorporated in the Constitution itself. The Constitution confers powers on parliament and the legislatures of States to make provisions by law subject to the provisions of the Constitution with respect to all matters relating to or in connection with elections to either House or Parliament or to the State Legislature.

The essentials to free and fair elections.

The other commitments for the free and fair elections are that, *firstly*, there must be ‘transparency’, each step of the election process should be easily understood and open to scrutiny by all stakeholders (voters, political parties, outside observers and others). All results should be independently verifiable and auditable. Voters today demand greater transparency in their elections. *Secondly*, there must be ‘privacy’; the choices that each voter makes should remain private both during and after the election. *Thirdly*, affordability; the election process must be affordable to governments and its citizens in order to maintain sovereignty. *Lastly*, ‘accessibility’; all eligible voters, regardless of location, group membership or disability, should have reasonable and equal opportunity to cast their ballot.

Free and fair elections are not only a commitment of the Constitution of India, but a requirement of the international standards laid down by the comity of nations in various fora/conventions. For example, the ‘Declaration on Criteria for Free and Fair Elections’ unanimously adopted by the Inter-Parliamentary Council (of which India is one of the members) at its 154th session (Paris, 26 March 1994)^{xiii}

The free and fair elections and its reality

In India the Election Commission has conducted many elections for the parliament as well as for the state legislatures assemblies in our country since 1951-52. The statistics of today’s Indian elections may be mind boggling, even if you look at them purely as numbers. There are around 780 million electors on the Electoral Roll of India, as on 1st of January, 2014, which is more than the population of both North and South American continents taken together or all the countries of Europe or of Africa combined. The last elections to the Indian Parliament held in 2009 can be described as the biggest humanly managed event in the world. It involved 714 million voters, 835 thousand polling stations, 1.18 million Electronic Voting Machines and 11 million personnel.^{xiv} In our democratic system it is possible for a party to secure a substantial percentage of the total votes cast and yet fail to get a single seat. Under this system whether it really representing the will of the people of the electorates? In this system a candidates securing less than 50% of vote is also represent to the total electoral of that constituency.

The Indian electoral system has experienced a rapid criminalisation of politics and the rise of politician underworld network and corruptive exercises like booth-conquering, intimidation and impersonation of voters. The high number of candidates have criminal records, as over the past ten years, the number of sitting members of parliament with criminal charges has risen from 24% (in 2004), 30% (in 2009) and 34% (in 2014) again 30% (in 2019).^{xv} In elections there are greater incoming of money, previously voters bribed person to person, later it supposed to be more favourable to purchase musclemen who could assure triumph by seizing booths or frightening voters. Further, it is to take note that a person who is in jail or in police custody due to any reason cannot vote^{xvi} but he/she can contest election and moreover he/she is qualified to be a member of the legislature till his conviction is confirmed by the court of law^{xvii}. When this same person is out on bail he will not be disqualified for contesting election and the person convicted with any criminal offences by any court in India is also contesting and there is no process to remove such candidates from the election process. It is found that money plays a vital role of getting votes in election. Under the existing laws, once the election machinery is put into action, election petition on alleged corrupt practices or any illegality on election process are not permitted, no one can get an order of a court to settle a disputed matter unless the election process is over.

There are many political parties and independent candidates who contest in the election are for their self-interest rather than contesting for the welfare of the society and for the good governance in our country. There is no provision in law for the de-registration of a political party which has been failed to abide with the principles of the Constitution and the election rule.

Further, the independent authority for the conduct of election is also inadequacy as the ground reality is that the appointments of certain election commissioners have generated controversies and the particular example of Navin Chawla is a

case^{xviii}. His appointment as Election Commissioner was challenged in the Supreme Court and over 200 Members of Parliament from the opposition even submitted a memorandum to the President of India alleging his close links with ruling party. While the apex court ruled that it was up to the CEC to recommend the removal, the President rejected the then Chief Election Commissioner's recommendation of removing Chawla on the grounds of political bias. Chawla became the CEC and held the office between 21 April 2009 and 29 July 2010. This case shows the reality as to what extend our election commission is an independent body.

In 2014 general election, people of Kendrapada in Odisha hit the streets and staged demonstrations after the seizure of 28 EVMs from outside the residence of a government official. The BJP accused the authorities of attempting to tamper with the machines.^{xix} Further, a television sting operation in Gurgaon 2014 exposed how the Booth Level Officers (BLOs) and agents were hand in gloves to make multiple voter IDs on a single voter's photograph so as to facilitate fake and bogus voting. The same sting operation showed an agent saying that the election ink removers were available in open market. 3 poll officials were arrested after the sting operation.

Reports suggest that thousands of crore of unaccounted money was used to lure the voters and that the EC can do little because the money is distributed clandestinely. The purchase of vote is at the individual level and there are hundreds employed by political parties in the name of 'bandobast' for this nefarious activity in every constituency. Over six million voters failed to cast their vote in Maharashtra this time as their names were missing from the voters' list. While the EC could only tender an apology for the lapse, doesn't the way political parties' hammered each other on the issue, suggest a larger political conspiracy.

Yet, the most crucial aspect coming in the way of holding fair and free elections are the outdated election laws in the age of social media and internet. With regards to this the best example was during the general elections, the present Prime Minister Narendra Modi exploited these loopholes. Modi released the party's poll manifesto on the first day of the election (April 7).^{xx} Similarly, filed his nominations from Vadodara as well as Varanasi on a polling day (April 9 and April 24), making them big media events that in no uncertain way influenced the voters. After casting his vote in Vadodara, Modi posed for a 'selfie' showing his 'voting finger' while holding the BJP election symbol in hand. He also made a public speech. It created uproar. The opposition accused him of influencing voters. First Information Reports were filed against him and the EC too booked him for violating the Representation of the People Act, 1951. However, the next day, the police affirmed that Modi had not flouted any rules since he made the speech outside the restricted 100 meter radius.

Judicial approaches

In the context of democratic institutions, mean free and fair elections and not merely a ritual to be gone through periodically. In the words of the Constitution Bench of the Supreme Court in *T.N. Seshan v. Union of India and Ors*^{xxi} it state that 'Democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections to our Legislative bodies alone would guarantee the growth of a healthy democracy in the country. In order to ensure the purity of the election process, it was thought by our Constitution-makers that the responsibility to hold free and fair election in the country should be entrusted to an independent body which would be insulated from political and/or executive interference.'

The Constitution Bench of the Supreme Court observed in the famous *Keshavanand Bharati v. State of Kerala*^{xxii} that 'Free, fair, fearless and impartial elections are the guarantee of a democratic polity.' In the case of *Mohinder Singh Gill v. Chief Election Commissioner and Others*^{xxiii}, the Supreme Court observed that the free and fair election based on universal adult franchise is the basic ... it needs little argument to hold that the heart of the Parliamentary system is free and fair election periodically held, based on adult franchise and that social and economic democracy may demand much more.' Similar sentiments of the Supreme Court laying stress on free and fair elections to the legislative bodies have found echo in every other decision of the Supreme Court on elections. further the court also held that under Article 324, the Commission is entitled to exercise certain powers in its own right in an area not covered by the Representation of the People Act and Rules; the Commission shall act in conformity with any valid law made by Parliament or any State Legislature and where the law is silent, Article 324 is a reservoir of power for it to act for the purpose of pushing forward, but not divorced from, a free and fair election.

People's Union for Civil Liberties (PUCL) & Another v. Union of India &Another^{xxiv} in this case Supreme Court observed that, a voter has a fundamental right to know the antecedents of a candidate and this right was independent of the statutory rights under the election law. Further it has emphasized that all the candidates have to declare their criminal antecedents, wealth and educational qualifications etc. In the case of *Sasangouda v. S.B Amarbhed*^{xxv} the Supreme Court observed that; booth capturing wholly negates the election process and subverts the democratic set up which is the basic feature of our constitution. The Court has expressed its concern in various issues which curtails the free and fair election in our country.

Election Commission of India v. Mukhtar Ansari & Anr^{xxvi} The legal right of a candidate to contest an election does not translate into a legal right to canvass for his candidature. Further the requirement of a candidate to canvass in an election for himself is always subservient to the larger public interest i.e. the Constitutional mandate of holding a free and fair election. No candidate can be permitted to do any act which interferes with the process of a free and fair election.

People's interest foundation & ors v. Union of India & Anr^{xxvii} the court cannot add to the grounds of disqualification. However, the apex court handed out a slew of directions for curbing criminalisation of politics including asking candidates contesting elections to declare their criminal antecedents. The court also directed the Parliament to make a law to ensure that candidates with criminal records don't enter public life and take part in lawmaking.

Conclusion

India, one of the largest democratic countries in the world and to conduct election in this largest electoral system in the world is not an easy task. However, election commission of India has successfully conducted the elections but there is always unsatisfaction to the people as well as to the political parties. This is due to the various challenges which curb the free and fair election in our country and some of the problem which curtails the free, fair and peaceful elections is already mentioned above. As we already know the elections law needs to be amends frequently with the changing needs of the society and with the new advancement

of technology which really affect the polls in our country. The poll law was framed in 1951. It needs to be updated in the age of internet. EC has been asking the government for electoral reforms. As I have mentioned that it is not an easy task to regulate and conduct the election in this largest democratic country but it is also not impossible to maintain a free, fair and peaceful election with the collaboration both the citizen and the government.

Notes

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3. Supra note 1 at 27.
4. Indian Constitution: Election-Related Provisions, available at: <http://www.elections.in> (last modified December 19, 2014)
5. Supra note 1 at 47.
6. Supra note 1 at 44.
7. Article 326 read with S. 19 of the R.P. Act, 1950; before the Constitution (Sixty-first Amendment) Act, 1988 the voting age of the citizen was ‘not less than 21 years’. Section 19(a) of the R.P. Act, 1950 was accordingly amended and the words ‘eighteen years’ were substituted for the words ‘Twenty-one years’ by Act No. 21 of 1989 w.e.f. 28th March, 1989.
8. Section 16(1) (A), the R.P. Act, 1950.
9. Section 19(a), the R.P. Act, 1950.
10. Section 19(b), the R.P. Act, 1950.
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