Electoral Reforms in India: Perceptions of Supreme Court and Law Commission

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Abstract

Electoral reforms have been implemented in India mainly through judicial intervention and supported by legal opinion, and have helped to improve perception about the electoral process. Perception in a democracy like India might be defined as the opinion of the people gathered by surveys or election studies, and is sought to be represented in political campaigns or decisions on electoral process, interventions of the Election Commission of India (henceforth, ECI), judicial verdicts on reforms like candidate affidavits, and authoritative reports of commissions set up to explore electoral reforms. The successful implementation of reforms with judicial and legal support also entrenched the perception that democracy was ill served by the elected representatives who withheld such reforms that could improve the process. The present research sought to learn the substantive context provided by perception in judicial verdict and legal opinion in favour of electoral reforms. The research question of this study was, whether or not the judicial and legal interventions in the electoral process were inclusive of the perception about electoral reforms? The recommendations of the commissions set up by the government to explore electoral reforms had gathered dust until the SCI endorsed civil society action for reforms and facilitated the implementation by the ECI, as in the case of the filing of candidate affidavits. Similarly, the Law Commission had insisted on several reforms of the electoral process, most prominently, in its reports of 1999, 2014 and 2015. This paper would endeavour to qualitatively study the prominent SCI verdicts on electoral reforms and the Law Commission reports to ascertain whether the perceptions about the electoral process were included in the judicial and legal support for reforms.

Keywords: *Election, Reforms, Election Commission, Law Comission of India.*

I. Introduction

Electoral reforms in India have been realised mainly through the judiciary, the Election Commission of India (henceforth, ECI) and civil society groups, with a conspicuous absence of legislative effort by Parliament.[1] Elected governments have set up several committees and commissions that made recommendations on issues that the elected representatives have been reluctant to address, namely, criminalisation of politics, election spending, transparency in donations, and the possibilities of an alternative electoral system. The Supreme Court of India (henceforth, SCI) had stepped in to assist and strengthen the hand of the ECI in interpreting the Representation of People's Act (henceforth, RPA), as in the recent judgment on January 2, 2017, by a seven-judge Constitution Bench[2] led by Chief Justice of Indiaon an appeal[3]filed in 1990 on whether seeking of votes in the name of religion, race, caste, community or language would be a corrupt practice eligible for disqualification.[4]

Perception about the electoral process in a democracy like India might be defined as the opinion of the people gathered by surveys or election studies,[5] and is sought to be represented in political campaigns or decisions on electoral process,[6] interventions of the ECI,[7] judicial verdicts on reforms like candidate affidavits,[8] and authoritative reports of commissions set up to explore electoral reforms.Thejudicial and legal opinions that facilitated electoral reforms also entrenched

the perception that democracy was ill served by the elected representatives who withheld reforms that could improve the process. There was distrust towards the election process itself due to long-standing and unaddressed violations of the law and of people's trust.[9]Although electoral process reforms, like Electronic Voting Machine or Election Photo Identity Card, had been implemented successfully, perceptions about the process among the voters had remained negative despite the high credibility of the ECI itself as an independent and trusted institution.[10] An efficient electoral process was not entirely sufficient for a good democracy and it was necessary that the perceptions of the voters contributed to ushering in the required reforms. As such reforms were supported by the judiciary and the legal opinion, the research question of this study was, whether or not the judicial and legal interventions in the electoral processwere inclusive of the perception about electoral reforms? The recommendations of the commissions set up by the government to explore electoral reforms had gathered dust until the SCIendorsed civil society action for reforms and facilitated the implementation by the ECI, as in the case of the filing of candidate affidavits. Similarly, the Law Commission had insisted on several reforms of the electoral process, most prominently, in its reports of 1999, 2014 and 2015. This paper would endeavour to qualitativelystudy the SCI verdicts on electoral reforms and Law Commission reports to ascertain whether the perceptions about the electoral process were included in the judicial and legal support for reforms.

II. Perceptions in Verdicts of the Supreme Court of India:

While the recommendations of the committees and commissions might have been totally or partially ignored, reforms have largely been implemented due to the initiatives of the ECI and civil society through the judiciary. Following were the main judicial verdicts that have ushered in the reforms that the government had been stalling since 1990, if not 1973.[11]

(a) Association for Democratic Reforms vs. Union of India (2000)[12] and People's Union of Civil Liberties & Anr. vs. Union of India & Anr (2003)[13]: The verdicts established the filing of affidavits by candidates as the right of the voter. The SCI stated that freedom of expression was promoted by information about candidates in election fray and supported Article (19)(1)(a)[14] as did the right to vote, which was a constitutional right. "The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter."[15] The SCI did not find constitutional Section 33B inserted by the Representation of People (3rdAmendment) Act, 2002 as it "imposes blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients."[16] The ban would operate even if the disclosure of information might be "deficient and inadequate."[17] While upholding adequacy of Section 33A[18] on right to information about pending cases, the SCI stated there was "no good reason for excluding the pending cases in which cognizance has been taken by SCI from the ambit of disclosure."[19] Declaration of assets and liabilities to Speaker or Chairman of the House by elected members was found to be ineffective by the SCI to promote right to information of voters and their freedom of expression in vote. The SCI felt that the Parliament "ought to have made a provision"[20] for disclosure of assets and liabilities of elected candidate and their family at the time of nominations. "Failure to do so has resulted in the violation of guarantee under Article 19(1)(a),"[21] the SCI observed.

(b) Lily Thomas vs. Union of India & Ors.[22]: The SCI had decided on disqualification of convicted candidates and examined whether this was ultra vires the Constitution on those elected members who have appealed against their convictions within three months and had their appeals pending. The Court stated that under Section 8(1)(2)(3) of RPA, the disqualification

was triggered on date of conviction for the offences listed and remained in force. However, as such candidates would not have been aware of the forthcoming Court order, they were saved, but those who were convicted in future would be subject to the law. The SCI observed that sitting Members of Parliament and State Legislatures convicted for offences mentioned in Section 8(1)(2)(3) and whose appeals were pending, "should not, in our considered opinion, be affected by the declaration now made by us in this judgment.''[23] The Court also stated that convicted Members of Parliament or State Legislatures who faced disqualification under Section 8 (1)(2)(3) after the date of the judgment, would "not be saved by subsection (4) of Section 8 of the Act which we have by this judgment declared as ultra vires the Constitution notwithstanding that he files the appeal or revision against the conviction and /or sentence.''[24]

(c) People's Union for Civil Liberties vs. Union of India &Anr.[25]: The SCI in its order in favour of NOTA said that it was "extremely important in a democracy'' that voters could reject a candidate in election in secrecy. "When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity,'' the SCI had said in its verdict. The Court also observed that at present a voter who disapproved of the candidates expressed his or her dissatisfaction mainly by not voting, which gave an opportunity to "unscrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one.''[26] Also, the SCI stated that the negative vote would give a clear signal about voter disapproval. Giving the example of the Abstain choice in the form of a button for Parliamentarians to vote, the verdict stated that NOTA button was the same, as "the voter is in effect saying that he is abstaining from voting since he does not find any of the candidates to be worthy of his vote.''[27]

(d) Dr. Subramanian Swamy vs. Election Commission of India[28]: After the introduction of the Electronic Voting Machines (henceforth, EVMs), the ECI contemplated the introduction of a paper trail of the vote that was pilot tested. The SCI studied the results of the introduction of Voter Verified Paper Audit Trail(henceforth, VVPAT) system in Noksen Assembly constituency in Nagaland and the ECI had reported that it was successfully used in 21 polling stations. The paper slips produced by VVPAT would not be counted by Returning Officer unless applied for by a candidate. But to ascertain that there was no discrepancy in the pilot case, the ECI had counted the paper slips in Noksen and found them to be accurate. Following the success of VVPAT, the ECI had decided to introduce it in a phased manner in the country and had sought sanction from government "for procurement of 20,000 units of VVPAT [10,000 each from M/s Bharat Electronics Limited (BEL) and M/s Electronics Corporation of India Limited (ECIL)] costing about Rs. 38.01 crore.''[29]The SCI noted that the paper trail provided verification to the voter of his or her vote and was indispensable for free and fair elections. The Court also observed that voters' confidence in EVMs would be "achieved only with the introduction of the "paper trail".[30] It felt VVPAT could restore voter confidence and make the system more transparent.

(e) Krishnamoorthy vs Shiv Kumar & Ors:[31]The SCI had argued that as mandated by law, the disclosure of criminal antecedents by a candidate was a "categorical imperative.''[32] Non-disclosure hinders the ``free exercise of electoral right'' as voters were prevented from making an informed choice and is therefore, an interference with their right to vote. As the candidate himself would have the knowledge of the pending cases against himself where cognisance has been taken or charges framed, the non-disclosure of the same during filing of nomination "would amount to undue influence and, therefore, the election is to be declared null and void by the Election Tribunal under Section 100(1)(b) of the 1951 Act."[33]

III. Perception in Law Commission Reports

The Law Commission had studied SCI interpretations of the law and included perceptions about the electoral process to formalise recommendations on electoral reforms. Three major interventions by the Law Commission were in 1999, 2014 and 2015 that suggested changes ranging from election finance reform to an alternative electoral system. For instance, in the 2014 report, the Law Commission quoted the SCI judgment in case of Ashok ShankarraoChavan versus Madhavrao Kinhalkar in which it noted that "money power plays a very vital role" [34] and that it was unfortunate that voters were "prepared to sell their votes for a few hundred rupees."[35] The SCI expressed concern that citizens were "taken for a ride by such unscrupulous elements"[36] who sought to win elections and gain power as Members of Parliament or Legislative Assembly "by hook or crook."[37] Following is the study of perceptions expressed in the Law Commission reports on electoral laws, disqualification and reforms, respectively.

(a) Reform of the Electoral Law (1999): The 170th Report of Law Commission of India on Reform of the Electoral Laws[38] in 1999 suggested amendments in the Constitution and the RPA. Considering the negative ramifications of elected representatives winning on minority percentage vote, the Commission examined the List System in Chapter II of Part III and suggested amendments to Articles 81 and 170 of the Constitution[39]. In summary, the Committee proposed amendments to Article 81 to include that 530 members to be chosen through direct election for Parliament, 20 members from Union Territories and 138 members according to the List System. The proposed amendments to Article 170 were that a state assembly must have 60 members, and 60 chosen by direct election and through the List System. An additional clause was that the present assembly seats were to be filled through direct election and an additional 25 percent of the total number chosen through the List System.[40] The List System was to consider the entire nation as a single unit, as the Commission had changed its earlier opinion for territorial units.[41] The Lok Sabha seats, as given in the First Schedule of the RPA, were to be frozen for 25 years. For this, Constitution Amendment was to be made in Article 81, clause 3, to freeze the present Lok Sabha seats until the year 2025 instead of the year 2000.[42]

The Law Commission had also recommended an alternative method of elections, in which a winner would have to get 50 percent of the valid votes-plus-1 (50%+1) in his or her constituency. Experts had felt that this reform along with the 'negative vote' would ensure "purity of election, keeping out criminals and other undesirable elements and serves to minimize the role and importance of caste and religion.''[43] Voters would get the chance to disapprove undesirable candidates fielded by political parties. In such a situation, the Commission felt that the political parties and their candidates would reach out for a wider voter base with their "ideologies and programmes rather than on caste or religious vote banks.''[44] While supporting the intention behind the concept, the Commission also highlighted the inherent problems that were: one, elections for Parliament and various state assemblies were not held on a single date; two, votes were not counted immediately after the elections, but after every election was completed across the country. For run-off elections (to decide winner in the 50%+1 system) new ballot papers would have to be printed for the required constituencies, and the entire election exercise had to be repeated, including stationing of security forces; and, three, in case the negative vote was implemented with the 50%+1 system, then no single candidate might get the required majority even in a run-off election.[45]

(b) Electoral Disqualification (2014): The issue of electoral disqualifications was studied by the Law Commission 244th Report on Electoral Disqualification (2014)[46] based on the order of the SCI in Public Interest Foundation &Ors. V. Union of India and Anr..[47] The introductory chapter

of the report stated that out of the 157 responses received on its first consultation paper, only two were from political parties, one of which was the Welfare Party of India. Even the second consultation paper received responses from only two national parties and three state parties, including the Zoram Nationalist Party and the People's Party of Arunachal Pradesh.[48]The Commission made recommendations on the conditions for disqualification and whether false affidavits should be basis for such disqualifications.[49] First, the Law Commission examined whether candidates should be disqualified on conviction for charges by the police or on framing of charges, and felt that due to trial and conviction delays, "disqualification upon conviction has proved to be incapable of curbing the growing criminalisation of politics."[50] The Commission also felt that disqualification was inappropriate at the stage of filing of charges in police report due to inadequate judicial scrutiny at this stage. With legal safeguards against misuse, this had "significant potential in curbing the spread of criminalisation of politics.''[51] To address possible misuse, the Commission suggested inclusion of only offences with a maximum punishment of five years or above; charges filed up to one year before the date of scrutiny of nominations for an election not to be considered; and, that the provision should operate till an acquittal by the trial court, or for a period of six years, whichever was earlier. In case of charges framed against sitting MPs/ MLAs, the trials must be expedited on a day-to-day basis and concluded within a year.[52]On whether filing of false affidavits should lead to disqualification, the Commission felt that this was a "large-scale violation''[53] of laws due to insufficient legal safeguards and recommended amendments to the RPA to include enhanced sentence of a minimum of two years, to also include conviction under Section 125A as a ground of disqualification and, to also include filing false affidavit as a corrupt practice under Section 123 of the RPA. The Commission also sought a week's period between last day of nominations and the day of scrutiny of papers to give time for "filing of objections to nomination papers.''[54]

(c) Electoral Reforms (2015): A year later, the Law Commission's 255th Report on Electoral Reforms (2015)[55] presented its report to the government. On election finance, the Commission recommendations stated that election expenses must be counted from the date of notification and not just from date of nomination, and companies making political contributions must get approval in their Annual General Meeting, and not just from the Board of Directors.[56] On proportional representation as an electoral system, the Commission stated that it was more representative while the First-Past-The-Post system (henceforth, FPTP) was more stable. Experience of other nations showed that to change the electoral system, India would have to combine direct and indirect elections that would mean increasing number of Lok Sabha seats, which "raises concerns regarding its effective functioning.''[57] The Commission also suggested measures to strengthen ECI[58], to curb paid news,[59] on opinion polls[60] and against compulsory voting.[61] The report rejected invalidating elections on the majority of None of the Above (henceforth, NOTA) votes on the basis of secrecy of the vote and that "good governance, the motivating factor behind the right to reject, can be successfully achieved by bringing about changes in political horizontal accountability, inner party democracy, and decriminalisation.''[62] The Commission also rejected right to recall and felt it could lead to an "excess of democracy'' and affect independence of elected candidates and interest of minorities. It also felt the right "increases instability and chaos, increases chances of misuse and abuse, is difficult and expensive to implement in practice,''[63] especially in a FPTP system. The Commission, however, favoured vote totaliser in counting to "prevent the harassment of voters in areas where voting trends in each polling station can be determined'' and counter "fears of intimidation and victimisation.''[64]

IV. Conclusion

The election was a vehicle of hope. When asked why elections mattered, people referred to waiting for a "transcendent utopia of equality''[65]that overwhelmed the inequality and injustice that surrounded them. This is an adequate reason for ensuring reforms that, as the 2010 Core-Committee on Electoral Reforms noted, the election system was in "dire need''[66] of starting from selection of candidates to election funding. There are repercussions for neglect of the reforms on the quality of democracy itself. For instance, although criminalisation of the electoral process had many forms, the most alarming was "the significant number of elected representatives with criminal charges pending against them.''[67]Secondly, the impact of money power on elections might be evident in three ways. One, the candidates funded to contest elections might be motivated to earn back the expenditure when they were elected to power. Two, the winning candidates might have to take care of the interests of their "investors,''[68] by serving policy interests at the cost of others. Third, such candidates might have neither reason nor an understanding of what the citizens wanted.

The research discovered that the judicial and legal interventions in the electoral process had included the perceptions about the electoral reforms as well. This was evident also in cases where the legal opinion on electoral process extended beyond the question of electoral reforms. For instance, beside the ECI, the judiciary endorsed in a landmark judgment the demand of civil society to make compulsory the filing of affidavits by candidates contesting in elections, vouching for their criminal and financial antecedents.[69] However, the issue of criminals in the electoral process was revisited forcefully after the Nirbhaya tragedy[70] in 2012 by the Justice Verma Committee set up to examine amendment of criminal law.[71] The late Justice J.S. Verma (Retd.), also considered electoral reforms as the Committee felt these were "integral to the achievement of gender justice and the prevention of sexual offences against women."[72] The Committee was concerned for the legislative process' integrity on reform of the criminal justice system "if lawmakers themselves have serious charges – of which cognizance has been taken by a court of competent jurisdiction – pending against them."[73] Reforms, it stated, would be "essential to avoid any conflict in the discharge of their legislative functions."[74] The Committee recommended that a certificate from the Registrar of High Court should be "necessary for the validity of the nomination"[75] of candidate and expansion of the list of offences under Section 8(1) of RPA to include all heinous crimes and on being taken cognizance, should be disqualified.[76] Similar disqualification was recommended if candidates hid a crime from the affidavit at the time of nomination. The Committee noted that if elected representatives in Parliament and state legislatures, with pending criminal cases against them, vacated their seats "as a mark of respect"[77] to the House they were elected to and towards "the Constitution (which they have sworn to uphold), it would be a healthy precedent and would raise them in public esteem."[78] It was "the least to expect"[79] that candidates with criminal antecedents were not nominated by political parties. If such candidates were nominated, the report warned that it could "set in motion social urges of inestimable dimensions."[80] As an example, the report revealed from its findings that fielding of candidates with criminal background caused "women being deterred from exercising their right to vote."[81]

Electoral reforms in a society that counted on elections for justice and rationalisation might not be limited to process and procedure; it might also be about perception of what democracy delivered to the voters and what they thought they deserved. The perceptions expressed by the SCI and Law Commission provided the substantive context for electoral reforms and a way for a better democracy.

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