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ELECTION LAW

*Virendra Kumar**

I INTRODUCTION

THE SURVEY for the year 2014 includes the exposition of as many as nine different issues. To wit: whether the ambit of 'office of profit' can be extended to include even 'status and influence, *etc.*,[1] ; whether the election commission can conduct an enquiry to determine the falsity of the return of election expenses by an elected candidate, especially after the decline-decision of the high court in the election petition preferred by an unsuccessful candidate;[2] whether or not the Supreme Court should enter into the arena of 'effect and impact of hate speeches' delivered during the election campaign in a public interest litigation under article 32 of the Constitution;[3] when does it amount to improper rejection of the nomination paper the by the returning officer on the basis of construction of 'electoral roll';[4] whether the principle of 'substantial compliance' can counterbalance the mandatory requisite of non-disclosure of material information warranting rejection while considering the plea of improper acceptance of nomination paper;[5] whether the right to recall elected representative through no-confidence motion is constitutionally consistent with relevant provisions of the constitution;[6] whether

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1 See, *infra*, Part II: Chairperson of the State Haj Committee: Whether the Post is an 'Office of Profit'.

2 See, *infra*, Part III: Election Commission's Power to Examine Legality of Election Expenses of the Returned Candidate vis-a-vis Dismissal of Losing Candidate's Election Petition by the High Court affirmed by the Supreme Court.

3 See, *infra*, Part IV: Effect and Impact of Election Speeches: Whether their Legitimacy could become the subject matter of PIL under Article 32 of the Constitution.

4 See, *infra*, Part V: Nomination Paper: when does it amount to its Proper or Improper rejection by the Returning Officer?

5 See, *infra*, Part VI: Improper Acceptance of Nomination Paper of the Returned Candidate: Whether Voiding of Election can be avoided on the Plea of Substantial Compliance in lieu of Non-Disclosure of Material Information Warranting Rejection?

6 See, *infra*, Part VII: Right to Recall Elected *Adhyaksha* of Zila Panchayat through No-confidence Motion: Whether Constitutionally Consistent with Provisions in Part IX of the Constitution?

scrutiny-cum-recounting of ballot papers can be done by the high court as a matter of course in deciding an election petition/recrimination petition;[7]whether the expression,"duly nominated as a candidate at any election" includes within its ambit a candidate whose nomination paper is rejected on ground of disqualification;[8] and whether returning officer is empowered to reject a nomination paper at the threshold if it is accompanied by affidavit with blank particulars.[9]

A couple of these issues as have been expounded in part IV (relating to effect and impact of 'hate speeches') and part X (in respect of power of the returning officer to reject nomination paper accompanied by blank affidavit), are relatively new ones; whereas most of the others are with a perspective reflecting newer dimensions of the familiar issues that have already been dealt with or at least noticed judicially.

II CHAIRPERSON OF THE STATE HAJ COMMITTEE: WHETHER THE POST IS AN 'OFFICE OF PROFIT'[10]

Article 191 of the Constitution deals with disqualifications for membership of the legislative assembly or legislative council of a state. Sub-clause (a) of clause (1) of this article specifically provides that a person shall be disqualified for being chosen as, and for being, a member of the legislative assembly or legislative council of a state 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 any state by law not to disqualify its holder.

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7 See, *infra*, Part VIII: Election/Recrimination Petition: Validity of Recounting/Scrutiny of Ballot Papers.

8 See, *infra*, Part IX: The Expression, "duly nominated as a candidate at any election": Does it include within its Ambit a Candidate whose Nomination is rejected on Ground of Disqualification?

9 See, *infra*, Part X: Nomination Paper Accompanied by Affidavit with Blank Particulars: Whether Returning Officer is empowered to reject Such a Nomination at the Threshold?

10 See also, Virendra Kumar, "Elected director of state corporation: whether holding an office of profit within the ambit of section 10 of the act of 1951 read with article 102(1)(a) of the constitution," XLVIII *ASIL*, 403 at 445-446 (2012); Virendra Kumar, "Village Lambardar: whether he holds an 'office of profit'," in XLVII *ASIL* 411-417 (2011); Virendra Kumar, "Contract for execution of works between returned candidate and Government," in XXXVIII *ASIL* 271 at 280-286 (2002); Virendra Kumar, "Holding an office of profit under the government," in *ASIL*, Vol. XXXVII (2001), 251 at 253-258; Virendra Kumar, "Contract for sale of liquor with State Government – whether disqualification," in XXXV *ASIL* 261 at 266-268 (1999); and Virendra Kumar, "Holding an office of profit under the government," in XXXIII *ASIL* 303-308 (1997-98).

In view of this clear and categorical constitutional provision, a question has arisen before the Supreme Court in *U.C. Raman* v. *P.T.A. Rahim*[11] by way of an appeal,[12] whether the respondent P.T.A. Rahim, held an office of profit under the Government of India. The singular contention of the appellant was that the said respondent, by reason of holding the post of chairperson of state haj committee,[13] held an office of profit, and for that reason his nomination ought to have been rejected by the returning officer and the High Court of Kerala should have set aside his election as a member of Kerala Legislative Assembly for which he was declared elected.[14]

On the basis of their examination of the judgment of the high court, the Supreme Court finds that the appellant has succeeded only in proving that the respondent has obtained pecuniary benefits by way of "travelling allowance" and not "any other pecuniary benefits by way of any other allowances, salary or commission."[15]In fact, travelling allowance (TA) and daily allowance is allowed to the respondent as chairperson for attending meetings of the haj committee.[16] "Keeping in view the nature of TA and daily allowance in mind, the high court has come to the conclusion that not only the pecuniary benefits received by the first respondent are only compensatory in nature but as a matter of fact the post did not carry any other benefits which may be categorized as pecuniary benefits 'receivable' by the first respondent, so as to classify the office in question as an 'office of profit'."[17] This conclusion of the high court is "in tune" with the law enunciated by the Supreme Court in a series of judicial decisions.[18]

However, on behalf of the appellant an attempt was made before the Supreme Court to widen the ambit of 'office of profit' by advancing a submission that the

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11 AIR 2014 SC 3477 see observastions of R.M. Lodha CJI and Shiva Kiriti Singh J. (Hereinafter, *U.C. Raman*)

12 The appeal was filed under s.116A read with s. 116B of the Representation of the People Act, 1951.

13 The respondent was nominated by the state government as one of the members of the haj committee under the provisions of Haj Committee Act, 2002 (Central Act no. 35 of 2002).Thereafter, he was elected as the chairperson, and notified as such by the state government in the official gazette with effect from the stipulated date.

14 *Id*. at 3478. In the assembly elections, the respondent secured the highest number of votes followed by the appellant. In his election petition before the high court, the appellant pleaded that the election of the respondent was vitiated by improper acceptance of his nomination papers to contest the election and that he was wholly disqualified to context in the election on account of his holding an 'office of profit' under the state government.

15 *Supra* note 11 at 3480.

16 Travelling Allowance is admissible to the chairperson, vice-chairperson and members of the Haj Committee under Rule 11 of the Haj Committee Rules, 2002, made by the Central Government in exercise of powers conferred under s. 44 the Haj Committee Act, 2002.

17 *Ibid*.

18 *Id*., at 3481 See also, *infra*.

term "profit" "should not be confined to pecuniary benefits but also to other factors such as status, power and influence emanating from the post."[19] In support of this proposition, reliance was placed by the appellant upon the judgments of the Supreme Court in the following four cases: *Gurugobinda Basu* v. *Sankari Prasad Ghosal*;[20] *Biharilal Dobray* v. *Roshan Lal Dobray;*[21] *Pradyut Bordoloi* v. *Swapan Roy;*[22] and *Jaya Bachchan* v. *Union of India*[23]

On their perusal of the judgments in the four cited cases, the Supreme Court has found that the first three judgments do not require any close scrutiny, for they deal with "various tests which should be applied to find out whether the office in question is an office under the Government or not," and that issue in the instant case is not the matter of core concern.[24] However, the bench of the Supreme Court has closely examined the fourth case – the case of *Jaya Bachchan* because in that case the court was called upon to answer what the term 'office of profit' could mean.[25] Although the occasion of construing the term 'office of profit' in *Jaya Bachchan* was in the context of article 102 of the Constitution, which is concerned with disqualification of member of either House of Parliament, nevertheless the interpretation given by the Supreme Court to the term 'office of profit' is equally applicable in interpreting the same phraseology in the context of article 191 of the Constitution.[26] This prompting has led the Supreme Court to examine specifically the paragraph in *Jaya Bachchan* that deals with the exposition of 'office of profit.'[27] The following propositions expounding the ambit of the expression 'office of profit' may be crystalized and abstracted as under:[28]

(a) The question of "holding an office of profit under the Central or State Government" is required to be interpreted in a "realistic manner."

(b) We need to examine whether or not an office of profit yields some "pecuniary gains" in the form of "some pay, salary, emolument, remuneration or non-compensatory allowance."

(c) "Nature of the payment must be considered as a matter of substance rather than of form."

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19 *Id.* at 3480.

20 (1964) 4 SCR 311: AIR 1964 SC 254.

21 (1984) 1 SCC 551: AIR 1984 SC 385.

22 2001 2 SCC 19: AIR 2001 SC 296.

23 (2006) 5 SCC 266: AIR 2006 SC 2119. Hereinafter, simply *Jaya Bachchan.*

24 *U.C. Raman*, at 3481. This issue in the present case has been decided by the high court in favour of the appellant and there is no serious challenge to that finding. See, *ibid*.

25 *Ibid*.

26 *Ibid*.

27 See para 6 of *Jaya Bachchan*, cited in *U.C. Raman*, at 3481 (para 11).

28 *Ibid*.

(d) "Nomenclature" of the payment is not important, and, therefore, the mere use of the word "honorarium" "cannot take away the payment out of the purview of profit, if there is pecuniary gain for the recipient."

(e) "Payment of honorarium, in addition to daily allowance in the nature of compensatory allowances, rent free accommodation and chauffeur driven car at the State expanse, are a source of pecuniary gain and hence constitute profit."

(f) "For deciding the question as to whether or not one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain."

(g) If the pecuniary gain is 'receivable' in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not.

In the light of all these abstracted statements, the emerging well-settled law is that if the office carries with it, or entitles the holder to, pecuniary gain other than reimbursement of out of pocket/actual expenses, then the office will be an office of profit for the purpose of article 102(1)(a) of the Constitution.[29]

This shows that the term 'profit' in the expression 'office of profit' has always been construed singularly in terms of 'pecuniary' or 'monetary' gains, excluding of course any out of pocket/actual expenses that are obviously compensatory in nature.

From this it also logically follows that for the purpose of construing disqualification what is of critical consideration is 'pecuniary' or 'monetary' gains, and not any other factor, such as the 'status, power and influence emanating from the post.' The Supreme Court has, thus, conclusively stated:[30]

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29 *Supra* note 11at 3481. This position of law, states the court, stands settled for over half a century commencing from the decisions of *Ravanna Subanna* v. *G.S. Kaggeerappa,* AIR 1954 SC 653 [A small amount of Rs. 6/- for each sitting of committee for the chairman was held to be treated as consolidated fee for the out-of-pocket expenses which he has to incur for attending the meeting of the Committee , and cannot be treated as to be a payment by way of remuneration or profit]; *Shivamurthy Swami Inamdar* v. *Agadi Sanganna Andanappa* (1971) 3 SCC 870. [A payment of Rs. 16/- per day payable to the member of a concerned Board as a payment for the purpose of reimbursing the expenses incurred by the members and hence it was held to be a compensatory allowance and not a profit.]; *Satrucharla Chandrasekhar Raju* v. *Vyricherla Pradeep Kumar Dev* (1992) 4 SCC 404; AIR 1992 SC 1949 and *Shibu Soren* v. *Dayanand Sahay* (2001) 7 SCC 425; AIR 2001 SC 2583. See also, *Gajanan Samadhan Lande* v. *Sanjay Shyamrao Dhotre* (2012) 2 SCC 64; AIR 2012 SC 486 ["As an elected Director, the amount paid to the returned candidate by way of allowances, by no stretch of imagination, can be said to be 'remuneration' in the form of pay or commission."]

30 *Id.* at 3483.

> This Court has given categorical clarification on more than one occasion that an 'office of profit' is an office which is capable of yielding a profit or pecuniary gain. The word 'profit' has always been treated equivalent to or a substitute for the term 'pecuniary gain'. The very context in which the word 'profit' has been used after the words 'office of' shows that not all offices are disqualified but only those which yield pecuniary gains as profit other than mere compensatory allowances to the holder of the office.

In view of the above, the Supreme Court has rightly held that there is no requirement "to make a departure from the long line of established precedents" on the issue of construing the expression 'office of profit' so as to include within its ambit even 'status and influence, *etc*.'[31] However, besides this contextual construction of the 'office of profit', the court also added that if the plea of the appellant for extension is accepted, "it would add a great amount of uncertainty in deciding whether an office is an 'office of profit' or not."[32] In our respectful submission, if the extension is not warranted in the context in which it is used under article 191 of the Constitution, the addition of the element of 'uncertainty' seems to be surplus; it does not reinforce the basic objective; it rather distracts from it.

III ELECTION COMMISSION'S POWER TO EXAMINE LEGALITY OF ELECTION EXPENSES OF THE RETURNED CANDIDATE *VIS-À-VIS* DISMISSAL OF LOSING CANDIDATE'S ELECTION PETITION BY THE HIGH COURT AFFIRMED BY THE SUPREME COURT

Whether the Election Commission under section 10A of the Representation of the People Act, 1951, can conduct an enquiry to determine the falsity of the return of election expenses by an elected candidate, especially after a decision is rendered by the high court in the election petition preferred by an unsuccessful candidate. This issue has specifically come up in a bunch of statutory appeals before the Supreme Court in *Ashok Shankarrao Chavan* v. *Dr. Madhavrao Kinhalkar*[33] with *Madhu Kora* v. *Election Commission of India* and *Smt. Umlesh Yadav* v. *Election Commission of India*.[34] Though, it is a "simple and yet important question of law", because it has "serious ramification on the maintenance of sanctity in our democracy."[35]

Section 10A of the Representation of the People Act, 1951, empowers the election commission to disqualify a candidate if he is satisfied that the account of

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31 *Ibid*.

32 *Ibid*.

33 (2014)7 SCC 99.

34 AIR 2014 SC 3102, per Fakkir Mohammed Ibrahim Kalifulla J (for himself and Surinder Singh Nijjar J), hereinafter referred as *Ashok Shankarrao Chavan*.

35 *Id*. at 3106.

election expenses has not been lodged "within the time and in the manner required by or under this Act," and he has "no good reason or justification for the failure." Thereupon, the election commission "shall, by order to be published in the Official Gazette, declare him to be disqualified and such person shall be disqualified for a period of three years from the date of the order."[36]

The specific mode or manner for maintaining the account of election expenses is provided under the Act of 1951, read with the relevant Rules of the Conduct of Election Rules, 1961, which, *inter alia*, includes:

(a) It is obligatory on the part of every candidate at an election, either by himself or his agent to "keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or his election agent "between the date on which he has been nominated and the date of declaration of the result thereof, both the dates inclusive."[37]

(b) The account "shall contain such particulars, as may be prescribed."[38]

(c) The total of the said expenditure shall not exceed such amount as explicitly prescribed under the Conduct of Election Rules, 1961.[39]

(d) Every contesting candidate at an election shall, within thirty days from the date of election of the returned candidate, "lodge with the district election officer [DEO] an account of his election expenses, which shall be a true copy of the account kept by him (the election candidate) or by his election agent."[40]

(e) Within two days after the receipt of the account of election expenses, DEO should cause a notice to be affixed in the notice board, specifying the date on which the account was lodged,

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36 However, the election commission under s. 11 of the Representation of the People Act, "may, for reasons to be recorded, remove any disqualification under this Chapter (except under section 8A) or reduce the period of any such disqualification."

37 S. 77(1) of the Act of 1951.

38 S. 77(2) of the Act of 1951.

39 S. 77(3) of the Act of 1951, read with rule 90 of the Conduct of Election Rules, 1961. This rule lays down the total of the expenditure that can be expended for which account is to be maintained. In this context, there is a separate table applicable to different States, in respect of their Parliamentary Constituency and Assembly Constituency.

40 S. 78 of the Act of 1951. If there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.

the name of the candidate and the time and place at which account could be inspected.[41]

(f) Following this public notice, any person would be entitled on payment of a nominal fee of Rs. 1 to inspect any such document and on payment of such fee that may be fixed by the Election Commission, obtain attested copies of such account or any part thereof.[42]

(g) The DEO on his part should report to the Election Commission as to the name of each contesting candidate and state whether such candidate lodged his account of election expenses and if so the date on which such account was lodged within the required time and in the manner required by the Act and Rules.[43]

(h) If on verification the DEO found that the lodging of the account was not in the manner required, he should send a report to that effect to the Election Commission along with the accounts lodged by the candidate concerned, and also publish a copy of the report in the notice board.[44]

(i) The Election Commission, in turn, after considering the DEO's report, holds that the contesting candidate failed to lodge his accounts of election expanses within time and in the manner required by the Act as well as the Rules, he would issue a notice in writing calling upon the candidate to show cause why he should not be disqualified under Section 10A for such a default.[45]

(j) After receiving the representation from the concerned candidate, which he is obliged to make within 20 days of receipt of such notice, the Election Commission, after such enquiry, as he thinks fit, on being satisfied that no good reason or justification was shown for the failure to lodge the account, can pass an order of disqualification as provided under Section 10A for a period of three years from the date of the order and publish such order in the official gazette.[46]

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41 R. 87 read with s. 78 of the Act of 1951.

42 R. 88 read with s. 78 of the Act of 1951.

43 Sub-rule (1) of r. 89 read with s. 78 of the Act of 1951.

44 Sub-rule (2) of r. 89 read with s. 78 of the Act of 1951.

45 Sub-rules (4) and (5) of r. 89 read with s. 78 of the Act of 1951.

46 Sub-rules (6), (7) and (8) of r. 89 read with s. 78 of the Act of 1951.

In the light of the position as abstracted above,[47] the Supreme Court has summed up the resultant effect as follows:

> ...[T]he intention of the legislature has been explicitly made clear the maintenance of the correct account of the election expenses within the time lime limit prescribed in making such expenses is not for the satisfaction of the Election Commission alone. The purport and intent of the said exercise is to ensure that none of the candidates can take it as a formality and file some return without disclosing their correct particulars, inasmuch as once the true copy of the account maintained is lodged with the DEO it is not only for the candidates who contested in the election by 'any person' meaning thereby, any citizen of the country can have access to verify the account lodged with the DEO and also get a authenticated copy of the statement. In fact, such a stipulation … were brought into statute book in order to ensure that the purity in the election is maintained at any cost and nobody is allowed to take the voting public of this country for a ride.[48] ….
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> In our considered opinion if such a (sic) onerous responsibility has been imposed on the Election Commission while scrutinizing the details of the accounts of the election expenses submitted by a contesting candidate, … no stone is left unturned before reaching a satisfaction as to the correctness or the proper manner in which the lodgement of the account was carried out by the concerned candidate. If such a meticulous exercise has to be made as required under the law, *it will have to be held that onerous responsibility imposed on the Election Commission should necessarily contain every power and authority to hold an appropriate enquiry*.[49]

Besides treating the election commission as an independent Constitutional authority and vesting it with the power of 'superintendence, direction and control of elections' under article 324(1) of the Constitution, the election commission is also called upon to assist the President in deciding crucial questions under articles 103 and 192 of the Constitution. One of such questions to be decided by following the provisions of section 146 of the Act of 1951 is, whether a member of Parliament or member of state legislature has incurred a disqualification by or under any law made by the Parliament. The purpose of invoking such a parallel provision is to show that the power of the Election Commission under section 10A is not just a matter of "form" but of "substance."[50] This reasoning is reinforced when it is

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47 The provision of s.78 of the Act of 1951, read with relevant rules, namely, r. 87, 88 and 89 of the rules of 1961.

48 *Supra* note 33 at 3123-24.

49 *Id*. at 3125. Emphasis added

50 *Id*. at 3126. This is how the contention of the appellant in the instance case has been repelled by the court. See also, *id*. at 3127-28; "… We, therefore, have no hesitation in asserting the legal position that an order to be passed under Section 10A of the

realized that "Section 10A has been comprehensively enacted replacing earlier sections 7(c) and 8(b) of the Act in order to ensure that the contesting candidates in an election cannot deal with the expenses in regard to the election in any manner he likes, but such expenses can be incurred only in the manner required under the law."[51]

However, the crucial question of law relating to the power of the election commission *vis-à-vis* the decision of the election tribunal (high court) comes to the fore when it is noticed that the provision contained in section 77(3) that stipulates that the expenses incurred at the election by the candidate do not exceed the limit prescribed under the law is relevant not only under section 10a of the act of 1951, empowering the election commission to disqualify an election candidate who exceeds the prescribed limit, but also for ascertaining the corrupt practice under section 123(6).[52]

The assertion of the appellant in the instant case is that the prime purpose of section 77(3) is to assist the high court in discharging its responsibility and adjudicating under article 123(6) and not under article 10A of the Act of 1951 by the election commission, which is only a matter of 'form' rather than 'substance.'[53]

The Supreme Court discounted this assertion by stating that in their "considered opinion" the requirement under section 10A "would certainly include the requirement of not a farce of an enquiry but a true and complete one to determine whether the return of election expenses by an elected candidate is a true/correct or false/bogus return and that would not depend upon the decision of the Election Tribunal (High Court), which is provided under the Act for validating the election of a returned candidate on very many grounds set out in Section 123 of the Act, including the one under Section 123(6) which contemplates the compliance of the requirement under Sections 77 and 78 of the Act."[54] However, the seeming conflict and confusion on the issue of commonality has been straightened by the Supreme

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said Act, could be no less important than an opinion to be rendered by the Election Commission under Section 146 when sought by the President of India or the Governor of the concerned States…."

51 *Id.* at 3125-26. On a bare reading of s. 7(c) along with s. 8(b), as it originally stood, there is no scope to hold that the failure to lodge a return of election expenses within the time and in the manner required by or under the law can be examined by an election commission in a manner known to law. This limitation has been removed by the enactment of s. 10A.

52 *Id*. at 3127. This two-fold relatedness of s. 77(3) of the Act of 1951 has been described as "twin objectives" to be fulfilled.

53 This line of reasoning is advanced on the basis of interpretation by the Supreme Court of s. 7(c) of the Act of 1951 in *Sucheta Kriplani* v. *S.S. Dulat*, AIR 1955 SC 758, wherein it was ruled that the requirement of lodgement of the account of election expenses is only in form and not in substance. However, this position is no more available after the enactment of s. 10A, replacing the provisions of s. 7(c) and 8(b) of the Act of 1951. For the contrary view, see *L.R. Shivaramagowda* v. *T.M. Chandrashekar (D)*, AIR 1999 SC 252.

54 *Id*. at 3128.

Court Bench by stating further that "if the said issue was squarely dealt with by the Election Tribunal (High Court) based on the entire materials that were also placed before the Election Commission and the Election Tribunal (High Court) had dealt with the said issue in detail and recorded a finding after examining such materials threadbare, there is no reason for the Election Commission [not] to give due weightage to such a finding of the Election Tribunal (High Court) while exercising its jurisdiction under Section 10A."[55]

In the instant case, one of the complaints before the election commission who was an unsuccessful candidate in the very same election in which the appellant was successful also challenged the said election in an election petition which was enquired into by the election tribunal (high court)[56] and the same came to be dismissed for want of material facts, the decision was later stated to be confirmed by the Supreme Court.[57]

Moreover, the nature and scope of proceedings before the election commission under section 10a and the election tribunal (high court) under section 123(6) of the Act of 1951 are distinct.[58] Notwithstanding the commonality of the relevance of section 77(3) of the said Act, "one does not conflict with the other."[59] "Section 10A talks of only an order of disqualification that can be passed by an Election Commission" "for failure to lodge an account of election expenses," "within the time and in the manner required by or under the Act."[60] Whereas, the election tribunal (high court) has a jurisdiction to deal with "successful election of the candidate concerned,[61] under section 123 of the Act of 1951, including the failure in contravention of section 78. On this count, the Supreme Court has stated: "it cannot be held that the area of disqualification to be considered by the Election Commission under Section 10A is fully covered in an Election Petition and thereby the power and jurisdiction of the Election Commission would stand excluded."[62] Accordingly, contention of the appellant is rejected by the court by observing: "It cannot, therefore, be contended that once the Election Petition having been rejected for want of particulars, which order has become final, a complaint under Section 10A cannot be pursued."[63]

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55 *Ibid*.

56 See election petition no. 11 of 2009.

57 See civil appeal no. 9271 of 2012.

58 See *supra* note 33, at 3133.

59 *Ibid*

60 *Ibid*.

61 *Ibid*.

62 *Ibid*. s. 123(6) lays down that "incurring or authorizing of expenditure in contravention of Section 77" is a corrupt practice. But every contravention of s. 77 does not fall within the ambit of s.123(6). It is relatable only to sub-s. (3). From this it is inferred that there is no bar to invoke sub-s. (1) and (2) while holding an enquiry under s. 10A of the Act of 1951. See *supra* note 33 at 3148.

63 *Ibid*.

The jurisdiction of the election commission under section 10A of the Act of 1951 is much wider than that of the election tribunal (high court) under section 123 of the same Act, at least in two specific respects. In one sense, the challenge to the validity of election of a successful candidate can be considered by the election tribunal (high court) only at the behest of other contesting candidates, and the ultimate conclusion may be either validating the election or invalidating the election by setting it aside; whereas the power of the election commission under section 10a would apply to all the candidates who contested the election, for they are all mandatorily required to comply with the requirements of sections 77(1) and (3) as well as section 78 along with the prescribed rules in that respect.[64] It is on the basis of this reasoning, the Supreme Court has held in the instant case that the submission of the appellant that under section 10A, the Election Commission cannot venture to hold an enquiry for the purpose of disqualification in the light of the decision of the election tribunal (high court) is "far-fetched one."[65]

In another sense, in the sense of *locus standi*, the jurisdiction of the election commission under section 10A of the Act of 1951 is still wider than that of the election tribunal (high court) under the relevant provisions of the Act of 1951. For invoking the jurisdiction of the election tribunal (high court) by way of an election petition, the complaint has to be either a losing candidate or at least a voter simpliciter; but the election commission under section 10A of the Act of 1951 read with rules 87 to 90, can initiate probing at the instance of any person. Under the said rules any person has a right to seek inspection of the election accounts submitted by any of the election candidates, and if he finds any illegality in those submissions, he has every right to bring it to the notice of the election commission for taking appropriate legal recourse available to that person under the Act.[66] The election commission, in turn, "can call upon the concerned individual to substantiate the complaint with relevant materials" to enable it "to pass appropriate orders of disqualification" under section 10 of the said Act.[67]

One of the interesting feature of *Ashok Shankarrao Chavan* case[68] is that while explaining the wide ambit of *locus standi* under section 10A of the Act of 1951, the Supreme Court dilates upon the issue why necessity has arisen for widening the ambit. It is solely with the objective of cleansing the electoral process. Since the elections are held in sprawling constituencies, inadequacy of the election personnel is compensated by involving other citizens. This stance is borne out in the following observations of the Supreme Court:[69]

> ...[T]he Election Commission may not be in a position to have access to any kind of illegality or irregularity indulged in by the candidates

64 *Id.* at 3134.

65 *Ibid*.

66 *Id.* at 3136.

67 *Id*. at 3137.

68 *Supra* note 33.

69 *Id*. at 3136-37.

> concerned, irrespective of the various personnel such as Election Officers, security personnel, etc., functioning exclusively for the purpose of holding the election under the control of the Election Commission. Therefore, such instances of illegalities committed by the candidates contesting in the election in certain areas of the constituency may come to the notice of some individuals, which may have a serious ramification relating to the conduct of the candidate by abusing the process of election with the aid of money power available with such candidate. Therefore, if someone is able to assert such misuse of funds in the process of election by a candidate by making an inspection under Rule 88 … he would have every locus to prefer a complaint. …

The category of complaints includes not only individuals as individuals, but also persons in their organizational capacity. For instance, the bodies like the Press Council of India and the board of direct taxes, which cannot be imputed with any malice or motive against candidates concerned, may bring the illegalities committed by the election candidates to the notice of the election commission.[70]

In sum, the following legal propositions may be abstracted from the detailed critical analysis of the cited judicial precedents:

(i) There is no conflict of jurisdiction between the Election Commission and the Election Tribunal (High Court) while exercising their respective powers under the relevant provisions of the Act of 1951. The Election Commission under Section 10A read with relevant rules deals only with the issue of 'disqualification' quite independently of the holding of the Election Tribunal (High Court) in the matter of setting aside the election of the returned candidate. Though the impact of disqualification may result in annulling the election, yet it needs to be understood that "in a proceeding under Section 10A, there is no scope or power vested with the Election Commission to declare the election as invalid."[71]

(ii) The jurisdiction of the Election Commission under Section 10A would not stand excluded by virtue of the dismissal of an election petition by the Election Tribunal (High Court) at the instance of one of the complaints on ground of corrupt practice as specified in Section 123(6) that deals with suppression of

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70 See, *Id.* at 3137.

71 *Id.* at 3138. See also, *id*. at 3139.While discounting the argument of two parallel proceedings, the Supreme Court observes, "[T]he Election Commission to pass an order of disqualification under section 10A, … does not deal with the validity of the election but is only concerned with the failure to lodge a statement of election expenses in the manner as required by or under the Act, for the purpose of passing an order of disqualification."

certain expenses incurred in the election while submitting the return as stipulated under Section 77.[72]

(iii) The nature of enquiry by the Election Commission under Section 10A is "more or less of a civil nature and, therefore, the principles of preponderance of probabilities alone would apply."[73] While applying relatively the liberal standards as compared to the ones applied by the Election Tribunal (High Court) in considering the issue of corrupt practice under Section 123,[74] the person affected by the order of disqualification is sufficiently equipped with safeguards. For instance, even when the order of disqualification is passed under Section 10A after following the requirement of issuing of show cause notice, receipt of reply, etc., there is a further remedy available to the contesting candidates under Section 11 by which the aggrieved candidate can d3monstrte before the Election Commission as to how the order of disqualification cannot stand and that it has to be varied.[75] If the candidate feels that he has not been able to get his grievance redressed, the constitutional remedy under Article 32 and 226 of the Constitution is always available to question the correctness of any order that may be passed by the Election Commission under Sections 10A and 11 of the Act of 1951.[76]

(iv) The power of the Election Commission to consider the issue of disqualification under Section 10A is "inherent,"[77] inasmuch as it is "based on an interpretation of the statutory provisions in the Act, as well as the Rules."[78] In this respect, the Supreme Court "has not attempted to enlarge the scope of Section 10A."[79] On its plain reading, there is no escape but to hold that "the Election Commission has the required jurisdiction to make the enquiry into the complaint alleged as against the appellant."[80] Otherwise also, the power of the Election

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72 *Id*. at 3139.

73 *Id*. at 3142.

74 The scope of examination of the issue of corruption practice under s.123(6) is strictly required to be with the four corners of an election petition as prescribed in the various provisions specifically laid down under the Act of 1951 for this purpose.

75 *Ibid*.

76 *Ibid*.

77 *Id*. at 3143.

78 *Ibid*.

79 *Id*. at 3144.

80 *Id*. at 3146.

> Commission under Section 10A to hold the necessary enquiry to ascertain the fact about the compliance of the statutory requirements in the matter of submission of the accounts of the election expenses is in consonance with the spirit of Article 324 of the Constitution, which confers broad and general powers on the Election Commission in order to maintain basics of democracy and purity of elections.[81]

IV EFFECT AND IMPACT OF ELECTION SPEECHES: WHETHER THEIR LEGITIMACY COULD BECOME THE SUBJECT MATTER OF PIL UNDER ARTICLE 32 OF THE CONSTITUTION

This seminal question has come up for consideration before the Supreme Court by way of public interest litigation under article 32 of the Constitution in *Jafar Imam Naqui* v. *Election Commission of India.*[82]

The basic assertions of the petitioner in this case relate to speeches delivered by leaders of various political parties during the recently concluded Lok Sabha elections. These speeches, called the "hate speeches," he vehemently pleaded, potentially "affect the social harmony," and, therefore, "are totally unwarranted and can endanger the safety and security of public at large and undermine the structuralism of democratic body polity."[83]Since in view of such speeches, "the equilibrium of society is disturbed," and "there is a possibility of creating a crack in the multi-faceted fabric of the society," it is the constitutional duty of the Supreme Court to issue writ of *mandamus* to the Election Commission of India to take appropriate steps.[84] Besides, the petitioner also averred for the issue of mandamus to cancel the recognition of such political parties and thereby protect the liberty and safety of the citizens.[85]

The critical question to be considered is whether or not the Supreme Court should "enter into the arena of effect and impact of election speeches rendered during the election campaign in a public interest litigation."[86] In this predicament, the court has recalled the evolution and development of the principle of public interest litigation:[87]

> ...[P]ublic interest litigation was initially used by this Court as a tool to take care of certain situations which related to the poor and under-privileged who were not in a position to have access to the

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81 *Id*. at 3146, 3147 and 3149.

82 AIR 2014 SC 2537, see observations of Dipak Misra J(for himself and N.V. Ramana J). Hereinafter referred as *Jafar Imam Naqui.*

83 *Id*. at 2538.

84 *Id*. at 2538.

85 *Ibid*.

86 *Id.* at 2538.

87 *Id.* at 2540-41.

> Court. Thereafter, from time to time, the concept of public interest litigation expanded with the change of time and the horizon included the environment and ecology, the atrocities faced by individuals in the hands of that authorities, financial scams and various other categories including eligibility of the people holding high offices without qualification. …

Bearing this short account of public interest litigation in mind, the Supreme Court examines the string of judicial precedents put forth by the petitioner for showing how the concept of public remedy has been hitherto expanded by the apex court where there had been violation of fundamental rights. The propositions emerging from *Smt. Nilabati Behera alias Lalita Behera v. State of Orissa*[88] may be abstracted as under:

(a) Article 32 of the Constitution, which itself is a fundamental right, "imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution."[89]

(b) Under Article 32 of the Constitution, in the enforcement of fundamental rights, the Supreme Court has been enabled to award "monetary compensation in appropriate cases, where that is the only mode of redress available."[90]

(c) In a writ petition under Article 32, the Supreme Court may also invoke its power available to it under Article 142 of the Constitution, which "is also an enabling provision in this behalf."[91]

(d) Non-recognition of this potential constitutional power "would not merely render this court powerless and the constitutional guarantee a mirage but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process."[92]

(e) If the guarantee that "deprivation of life and personal liberty cannot be made except in accordance with law, is to be real,

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88 AIR 1993 SC 1960.

89 *Id.* at 2538.

90 *Ibid.*

91 *Id.* at 2539.

92 *Ibid*.

the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case."[93]

(f) "This remedy in public law has to be more readily available when invoked by have not, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate."[94]

Since the propositions as abstracted above are propounded in the context of violation of fundamental rights enshrined in article 21 of the Constitution, on the strict principle of stare decisis these have no application in the context of the case in hand that concerns with the delivery of 'hate speeches'.[95]

Likewise, after the perusal of other under noted judicial precedents cited by the petitioner,[96] the Supreme Court has held that decisions in all these cases pertain to "different field altogether," and, therefore, these "are not really attracted to the present case."[97]

However, the Supreme Court has also considered a three-judge bench case – *Pravasi Bhalai Sangathan* v. *Union of India*,[98] which relates to the realm of legal remedy in the context of 'hate speeches' pertaining to inter-state migrants, bears some proximity to the case in hand. In this case, the court had the opportunity to take note, *inter alia*, of certain decisions of the Supreme Court of Canada; dictionary meaning of 'hate speeches' and the offences for the hate speeches in the Representation of the People Act, 1951; Code of Criminal Procedure, 1973; Unlawful Activities (Prevention) Act, 1967; Protection of Civil Rights Act, 1955; Religious Institutions (Prevention of Misuse) Act, 1980; and thereafter specifically sections 124A, 153A, 153B, 295A, 298, 505(1), 505(2) of the Indian Penal Code, 1860.[99] Nevertheless, what is of significance in the instant case is the exposition of article 141 of the Constitution by the three-judge bench in the construction of public remedy in the light of the earlier decision of the apex court in *Nand Kishore* v. *State of Punjab*.[100]

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93 *Ibid*.

94 *Ibid*.

95 *Supra* note 91.

96 *Daryo* v. *State of U.P.*, AIR 1961 SC 1457; *Union of India* v. *Raghubir Singh (Dead) by LRs, etc*., AIR 1989 SC 1933; *Kanusanyal* v. *District Magistrate, Darjeeling*, AIR 1973 SC 2684; *M.C. Mehta* v. *Union of India*, AIR 1987 SC 1086; and *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

97 *Supra* note 82 at 2539.

98 AIR 2014 SC 1591.

99 *Supra* note 97.

100 (1995) 6 SCC 614.

The lessons extracted by the three-Judge bench in *Pravasi Bhalai Sangathan* from *Nand Kishore*, cited in the instant case, may be recognized as under:

> *First lesson*: Under Article 141 of the Constitution, the Supreme Court is "not merely the interpreter of the law as existing, but much beyond that: The Court as wing of the State is by itself a source of law. The law is what the Court says it is."[101]
>
> *Second lesson*: The power to make law by way of issuing directions in appropriate cases is not without a caveat: "direction can be issued only in a situation where the will of the elected legislature has not yet been expressed."[102]
>
> *Third lesson:* In the matter of imposing reasonable prohibition on the so-called 'hate speeches', the current trend in judicial thinking at international level is tilting in favour of "individual freedom of speech and expression as opposed to the order of a manageable society."[103]
>
> *Fourth lesson:* In order to eventually resolve the issue, how to balance 'individual freedom of speech and expression' against the curtailment of the menace of 'hate speeches' by the State, the three-Judge Bench, instead of answering this question, preferred to refer the issue to the Law Commission of India, who was already examining 'whether the Election Commission should be conferred the power to derecognize a political party disqualifying it or its members, if a party or its members commit the offences referred to hereinabove."[104]

In view of this backdrop, in *Jafar Imam Naqui*, in order to decide for itself, whether "this Court, being the guardian of the Constitution is obligated to issue notice, call for the response and issue appropriate directions," the Supreme Court through Misra J like the three-judge bench in *Pravasi Bhalai Sangathan* case[105] has not deferred the issue of 'hate speech', say by way of making a reference to the Law Commission of India. Instead, on this count he declined to widen the ambit of public interest litigation (PIL) for two reasons. The first reason is of somewhat peripheral nature when it is stated that "the Election Commission might

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101 *Supra* note 82 at 2540, citing para 21 of *Nand Kishore.*

102 *Supra* note 82 at 2540, citing para 22 of *Nand Kishore.*

103 *Supra* note 82 at 2540, citing para 25 of *Nand Kishore.* In support of this emerging trend, the Supreme Court in *Nand Kishore* cited *Beauharnais* v. *Illionis*, 343 U.S. 250 (1952); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); and *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992).

104 *Supra* note 82 at 2540, citing in continuation, *Nand Kishore*

105 *Supra* note 98.

have taken note of it and initiated certain action."[106] The second reason, which is of substantive nature, comes to the fore when it is held:[107]

> The matter of handling hate speeches could be a matter of adjudication in an appropriate legal forum and may also have some impact in an election disputes raised under the Representation of the People Act, 1951. Therefore, to entertain a petition as a public interest litigation and to give directions would be inappropriate.[108]

This is how the Supreme Court is not persuaded to issue notice and accordingly the writ petition has stood dismissed *in limine*.[109]

V NOMINATION PAPER: WHEN DOES IT AMOUNT TO ITS PROPER OR IMPROPER REJECTION BY THE RETURNING OFFICER

This simple and yet central issue appears before the Supreme Court in *Balram Singh Yadav alias Balram Yadav* v. *Abhey Kumar Singh*[110] against the judgment of the High Court of Patna. On fact matrix, the respondent's nomination paper for contesting election to Bihar Legislative Council from a particular constituency was rejected by the returning officer. The singular ground of rejection was that he did not file the relevant electoral roll, which was required to be done, for he belonged to another constituency.

After the elections were over, the respondent instituted an election petition in the High Court of Patna seeking a declaration that rejection of his nomination paper was improper and, therefore, the election of the appellant as returned candidate was void. The appellant contested the petition.

The respondent's main challenge to the rejection was on the ground that he had filed the requisite voters' list as contemplated under section 33(5) of the Representation of the People Act, 1951, which reads as follows:

> Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny.

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106 *Supra* note 82 at 2540.

107 *Ibid.*

108 Lest this disinclination to interfere be construed as abdication of constitutional responsibility under art. 32 of the Constitution, the Supreme Court has hastened to add: "We have said so in view of the judgments in *Manohar Joshi* v. *Nitin Bhaurao Patil and another* (1996) 1 SCC 169; AIR 1996 SC 796; *Prof. Ramchandra G. Kapse* v. *Haribansh Ramakbal Singh* (1996) 1 SCC 206; AIR 1996 SC 817.

109 *Supra* note 82 at 2541.

110 AIR 2014 SC 2297, see observations of Dipak Misra J(for himself and N.V. Ramana J). Hereinafter referred as *Balram Singh Yadav.*

There was no dispute before the high court that the respondent did not belong to the constituency, and, therefore, he was required to comply with the section 33(5) of the Act of 1951.[111] In its analysis the high court found that the respondent had fully complied with the requisite of section 33(5) of the said Act, and, therefore, the rejection of respondent's nomination was by the returning officer was declared to be improper. Accordingly, the high court, as per the provisions of section 100(1)(c) of the said Act, which obliges it to "declare the election of the returned candidate to be void" if in its opinion "any nomination paper been improperly rejected," set aside the election of the appellant.

The Supreme Court reversed the decision of the high court by holding that "the High Court has fallen into serious error by setting aside the election of the appellant."[112] The reasoning of the apex court that has enabled it to reach this reversal conclusion relates to the holding of the high court that the rejection of the nomination paper of the respondent was 'improper.' The apex court's analysis on this count is instructive and may be abstracted as under.

(a) For examining the issue whether the High Court was justified in accepting the plea of the respondent that his nomination paper was improperly rejected, the Supreme Court adverted to the meaning and connotation of 'electoral roll' as it occurs in the expression "a copy of the electoral roll of that constituency or of the relevant part thereof" under Section 33(5) of the Act of 1951.[113]

(b) In the light of the judicial exposition of Section 33(5) of the Act of 1951 in *B. Dandapani Patra v.Returning Officer-cum-Sub-Divisional Officer, Berhampur and others*,[114] it is held that the connotation of the expression 'a copy of the electoral roll of that constituency or of the relevant part thereof' under Section 33(5) of the Act of 1951 means that "unless *the current electoral roll* is filed with the nomination paper, that would tantamount to non-compliance of Section 33(5) of the Act."[115]

(c) In *Balram Singh Yadav*, the respondent, instead of filing the current electoral roll, filed the Electoral Roll of 1995, which

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111 *Id.* at 2298.

112 *Id.* at 2301.

113 *Id.* at 2300.

114 (1990) 1 SCC 505. In this case, the two-judge bench of the Supreme Court, by relying upon *Ranjit Singh* v. *Pritam Singh* (1996) 3 SCC 543, observed: "… it has been held that when Section 33(5) of the said Act refers to a copy of the electoral roll, it means a part as defined in Rule 5 of the said Rules of 1960. The complete copy would carry the various amendments made in the roll to enable the Returning Officer to see whether the name of the candidate continues in the roll."

115 *Supra* note 110 at 2300. Emphasis added

according to the Returning Officer was not in conformity with requirement of Section 33(5) of the Act, and, therefore rejected his nomination paper. However, the High Court, referring to this order of rejection, "opined that none had filed the electoral roll of 1.1.2002 and therefore, the nomination paper could not have been rejected."[116]

(d) This view of the High Court about Returning Officer's order of rejection "is the resultant of erroneous perception of the fact," inasmuch as the "ground that was indicated by the Returning Officer was that the valid electoral roll as on 1.1.2002 had not been filed."[117] Since the Electoral Roll of 1998 was the latest one as on 1.1.2002, which admittedly was not filed by the respondent, his nomination paper was held to be rightly rejected by the Returning Officer, and thus "the High Court has fallen into serious error by setting aside the election of the appellant."[118]

Accordingly, the Supreme Court has set aside the judgment of the high court and treated the election of the appellant as valid, and consequently further directed that "the appellant shall get the entire remuneration for the period for which he was elected as a member of the Legislative Council."[119]

The judgment of the Supreme Court in *Balram Singh Yadav*, in reversing the decision of the high court, should be of special interest for the election judges in learning the relevance of 'form' and 'substance' in the matters of deciding election petitions. For the concretion of this learning, we may refer to the following statement of the high court:[120]

> Petitioner does not deny that he had filed an extract of 1995 electoral roll and even in the electoral roll of 1998 the Part and Serial Number where the petitioner's name figured was identical. If the Returning Officer had bothered to turn pages of 1998 electoral roll at the time of scrutiny then the above declaration of the petitioner in the nomination paper would have stood verified and corroborated….

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116 *Id.* at 2301.

117 *Ibid.*

118 *Id.* at 2301. See also, *id*. at 2298, wherein the High Court has, inter alia, observed: "The reason assigned is that he [respondent] did not have the Aharta as on 1.1.2002 and he had not annexed Satyapit (certified) extract of the electoral roll in the (sic) regard."

119 *Ibid*. This stance of the Supreme Court in the instant case is based on the judgment of the Constitution Bench decision in *Kirpal Singh, M.L.A.* v. *Uttam Singh* (1985) 4 SCC 621*;*AIR 1986 SC 300.

120 *Supra* note 118.

Assuming for a moment that the roll of 1995 and that of 1998 in respect of the respondent's position is identical, would it make the roll of 1995 as the 'current' or the latest role as on the stipulated date, namely, 1.1.2002 in the instant case, in consonance with the requirement of section 33(5) of the Act of 1951? In our view in summary-decision-making, as is required to be done by the returning officer at the stage of scrutiny of nomination papers, the observance of the requisite 'form' becomes as crucial as 'substance'. More so when the respondent as election candidate remained absent at the crucial time of scrutiny of nomination papers.[121]

There is one more aspect of the judgment in *Balram Singh Yadav* that needs our attention. It relates to the exposition by the Supreme Court as to why the improper rejection of a nomination paper of an election candidate results instantly in voiding the election of the returned candidate under section 100(1)(c) of the Act of 1951?[122] The need for making elaboration on this count arose because, on behalf of the appellant, while initially opposing the election petition of the respondent on many a ground, it was also "seriously" stressed that "in the absence of any pleading in the petition to substantiate the fact of his contesting in the election would have materially affected the results of the election, the election petition was totally devoid of any substance."[123] Though the high court, while dealing with the election petition, did formulate one of the issues in this respect,[124] but did not consider the same as the "principal issue."[125]The Supreme Court, however, in this case has relatively devoted substantial space in their judgment to clarify the law on this count.[126]

In order to explain how section 100(1)(c) of the Act of 1951 has come to be enacted, the court reviews the history of its development. In its present form, it was incorporated by the Representation of the People (2nd Amendment) Act, 1956.[127] Initially, section 100(1)(c) read as follows:[128]

> If the Tribunal is of opinion that the result of the election has been materially affected by the *improper acceptance* or *rejection of any nomination*, the Tribunal shall declare the election to be wholly void.

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121 *Id.* at 2301.In their analysis, the Supreme Court has, inter alia, noted: "It is also clear from the evidence that at the time of scrutiny, he (the respondent – the election candidate) was not present."

122 S. 100 (1)(c)of the Act of 1951 while dealing with the grounds for declaring election to be void, specifically provides that "if the High Court is of the opinion that any nomination has been improperly rejected, the High Court shall declare the election of the returned candidate to be void."

123 *Supra* note 110 at 2298.

124 "Whether this election petition, as framed, is maintainable?" See, *ibid.*

125 *Supra* note 110 at 2298. Instead, the high court focussed its attention on, whether the nomination paper of the petitioner was improperly rejected by the Returning Officer, along with the consequential relief, whether the petitioner is entitled to any relief or reliefs? See, *id*. at 2298 (paras 5 and 6).

126 See, *id.* at 2298-2300.

127 No. 27 of 1956.

128 Emphasis added

A bare reading of this un-amended provision of section 100(1)(c) reveals that both 'improper acceptance' or 'improper rejection' of the nomination papers, for the purpose of voiding the election of the returned candidate, were put on the same footing. From the stand point of practical difficulties, however, the Supreme Court has shown in the light of the consistent view of 'almost all the Election Tribunals in the country' that it is difficult to treat both of them on par.[129] In the case of improper rejection of a nomination paper, it is not difficult to imagine that it has materially affected the result of the election. The reason adduced for this stance is as follows:[130]

> Apart from practical difficulty, almost the impossibility of demonstrating that the electors would have cast their votes in a particular way, that is to say, that a substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of the several candidates for an election had been kept out of the arena is by itself a very material consideration. Cases can easily be imagined where the most desirable candidates from the point of view of electors and the most formidable candidate from the point of view of the other candidates may have been wrongly kept out from seeking election. By keeping out such a desirable candidate, the officer rejecting the nomination paper may have prevented the electors from voting for the best candidate available.

On the other hand, in the case of an improper acceptance of a nomination paper, in terms of practicalities, situation is a lot easier, because "proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the field.[131]

It is this functional difference between 'improper acceptance' and 'improper rejection' of the nomination papers that might have led the legislature to amend section 100(1)(c) by the amending Act of 1956 and provide conclusively "that an improper rejection of any nomination paper is conclusive proof of the election being void."[132] The position that this was so, stands affirmed by the Supreme Court later by stating that "if it is shown that at any election, any nomination paper has been improperly rejected, the improper rejection itself renders the election void without any further proof about the material effect of this improper rejection."[133]

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129 *Supra* note 110 at 2299, See observations in the decision of the Constitution Bench in *Surendra Nath Khosla* v. *S. Dalip Singh*, AIR 1957 SC 242.

130 *Ibid.*

131 *Ibid.*

132 *Ibid*.

133 *Id*. at 2300. See observations of the three-judge bench decision in *Mahadeo* v. *Babu Udai Partap Singh*, AIR 1966 SC 824. See also, Virendra Kumar, "Non-compliance with statutory provisions: whether election can be declared void without proving that the result of that election has been materially affected," XLVIII *ASIL* 430-432 (2012).

VI IMPROPER ACCEPTANCE OF NOMINATION PAPER OF THE RETURNED CANDIDATE: WHETHER VOIDING OF ELECTION CAN BE AVOIDED ON THE PLEA OF SUBSTANTIAL COMPLIANCE IN LIEU OF NON-DISCLOSURE OF THE MATERIAL INFORMATION WARRANTING REJECTION

This issue has come before the Supreme Court in a statutory appeal in *Kisan Shankar Kathore* v. *Arun Dattatray Swant*[134] against the judgment of the Bombay High Court. In this case the election of the appellant, who was declared successful in Assembly elections, was challenged by a voter of the constituency in an election petition in the High Court of Judicature at Bombay. The election petition was filed under section 100(1)(d)(i) and (iv) of the Act of 1951[135] on the ground that in the nomination form filled in by the appellant he had suppressed the vital information on the following counts: his dues payable to the Government, the assets of his spouse and his assets in a partnership firm.[136] The appellant contested the said petition. The high court by upholding the contentions of the respondent set aside the election of the appellant.[137]

In appeal before the Supreme Court, the dispute does not centre around the fact of non-disclosure of certain information, but on the issue as to the "nature of information given by the appellant in his information form, on the basis of which the appellant contends that it ought to have been treated as substantial compliance."[138] In order to understand as to "whether there was a substantial compliance by the appellant in the form information given by him or it amounted to non-disclosure of the material information warranting rejection of his nomination,"[139] the Supreme Court has taken note not only of the relevant statutory provisions, rules and orders,[140] but also culled out "legal principles" emanating from leading judgments of the apex court.[141]

On the issue of disclosure of information, hitherto mostly the legal principles have emerged in the form of 'directions' given by the apex court from time to time since the two landmark judgments *Union of India* v. *Association for*

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134 AIR 2014 SC 2069, observations of A.K. Sikri J(for himself and Surinder Singh Nijjar J). Hereinafter simply, *Kisan Shankar Kathore.*

135 S. 100(1)(d)(i) and (iv) of the Act of 1951, while dealing with the grounds for declaring election to be void, specifically states that "if the High Court is of opinion (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 of any nomination, or … (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void."

136 *Supra* note 134 at 2071.

137 *Ibid*.

138 *Id*. at 2071.

139 *Ibid.*

140 See, *id*. at 2071-2074.

141 *Id*. at 2074- 2078.

Democratic Reforms,[142] and *People's Union for Civil Liberties* v. *Union of India*.[143] In order to bring these directions within the statutory framework for their proper implementation, the election commission issued guidelines. Since the very source of these 'guidelines' framed by the election commission are judicial 'directions' that are issued invariably only contextually, such guidelines tends to remain in the state of flux. The Supreme Court, therefore, has identified "the nature and scope of these guidelines" as unfolded in its recent decision in *Resurgence India* v. *Election Commission of India*.[144] The "legal position" as summarized in paragraph 27 of *Resurgence India*,[145] and reproduced in the instant case, may be usefully abstracted as follows:[146]

(a) It is the "universally recognized" fundamental right of every voter "to know the full particulars of a candidate" – a right which is "an integral part of Article 19(1)(a) of the Constitution."

(b) "The ultimate purpose of filing of affidavit along with the nomination paper is to effectuate the fundamental right of the citizen under Article 19(1)(a) of the Constitution," "and for this purpose, the Returning Officer can very well compel a candidate to furnish the relevant information."

(c) "Filing of affidavit with blank particulars will render the affidavit nugatory."

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142 (2002) 5 SCC 294; AIR 2002 SC 2112. This is the first case of its own kind that triggered electoral reforms in India by holding that it is incumbent upon every election candidate to give information about his assets, liabilities and other affairs, which requirement is not only essential part of free and fair elections, inasmuch as, every voter has a right to know about these details of the candidates. Such a requirement is also covered by freedom of speech and expression guaranteed under art. 19(1)(a) of the Constitution.

143 (2003) 4 SCC 399; AIR 2003 SC 363. In this case, the Supreme Court struck down s. 33B, which was introduced by the Parliament along with s. 33A into the Representation of the People Act, 1951 in pursuance of directions of the earlier decision of 2002 in *Association for Democratic Reforms* case.

144 (2013) 11 SCALE 348; AIR 2014 SC 344. In this case, a writ petition was filed under art. 32 of the Constitution urging the Supreme Court to take note of the practice that had started prevailing, namely, many candidates were, while filing their nomination papers, leaving some of the columns blank in their affidavits, and, thereby omitting to provide the requisite information and frustrated the very objective of the directions laid down by the apex court in *Association for Democratic Reforms* (2002) and *People's Union for Civil Liberties* (2003). See also, *infra*, Part X.

145 In *Resurgence India*, the Supreme Court, while crystalizing the 'legal position', took note of the provisions of ss. 33A, 36 and 125A of the Act of 1951, and also the earlier three-Judge bench judgment in *Shaligram Shrivastava* v. *Naresh Singh Patel* (2003) 2 SCC 176; AIR 2003 SC 2128, the court had discussed the power of rejecting the nomination paper by the returning officer of a candidate filing the affidavit with particulars left blank.

146 *Supra* note 134 at 2078.

(d) If the requisite information, which is vital for giving effect to the 'right to know' of the citizens is not supplied even after the reminder by the Returning Officer, "the nomination paper is fit to be rejected," though this power of rejection "must be exercised very sparingly, but the bar should not be laid so high that the justice itself is prejudiced."

(e) It is clarified that the reservation expressed by the Supreme Court in para 73 of *People's Union for Civil Liberties* "will not come in the way of the Returning Officer to reject the nomination paper when the affidavit is filed with blank particulars."

(f) "The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not known' in the columns and not to leave the particulars blank."

(g) "Filing of affidavit with blanks will be directly hit by Section 125A (i) of the RP Act," and in that eventuality, "as the nomination paper it is rejected by the Returning Officer," there is "no reason why the candidate must be penalized for the same act by prosecuting him/her."

Bearing in mind the statutory framework and the legal principles as enunciated above, the Supreme Court has examined in the instant case the nature of information about which there was non-disclosure by the appellant in the affidavit filed by him along with the nomination paper. Specifically, the issue to be considered before the apex court is whether information given by the appellant in his affidavit amounts to substantial compliance with the prescribed format in respect of particulars regarding the Government dues he owed, his assets and liabilities, *etc*.[147] The following two facets of this issue has been put forth by the court:[148]

> One, whether there is a "substantial compliance in disclosing the requisite information in the affidavits filed by the appellant along with the nomination paper?"
>
> Two, whether non-disclosure of the information on account of Government dues he owed, his assets and liabilities, etc. "has materially affected the result of the election?"

While dealing with these two facets, the Supreme Court has kept in mind the application of the following principle of 'substantial compliance' as enunciated by it earlier in *G.M. Sidheshwar* v. *Prasanna Kumar*:[149]

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147 *Id.* at 2084.

148 *Id.* at 2085.

149 (2013) 4 SCC 776; AIR 2013 SC 1549 , cited in *Kisan Shankar Kathore,* at 2084.

> The Court must make a fine balance between the purity of the election process and the avoidance of an election petition being a source of annoyance to the returned candidate and his constituents.[150]

The Supreme Court, in their critical review of the judgment of the high court in the election petition on all the counts that came up for consideration of the election court,[151] finds themselves in "agreement" with the high court by stating clearly and categorically that "we are of the opinion that its findings about non-disclosure of the information qua all the aspects is without blemish," inasmuch as the information that was to be given in "specific format" "was not adhered to."[152] Nevertheless, the apex court in order to "make a fine balance" has re-visited the findings of the high court on all the four counts with the following effect:

i. *Re. non-disclosure of the electricity dues in respect of two electricity meters*: Contrary to the view of the High Court, in the opinion of the Supreme Court, non-disclosure of government dues in respect of first electricity meter "may not be a serious lapse," because "there was a bona fide dispute about the outstanding dues" in respect of that meter, and, as such, those dues had not become "payable."[153]

Likewise, in respect of the second electricity meter, which was installed in the rented premises, the appellant might have entertained bona fide belief that though the meter was in his name, and yet the dues were payable by the tenant, and therefore, he need not disclose his liability on that count.[154]

ii. *Re. non-disclosure of outstanding municipal dues:* Since there was a pending genuine dispute as to revaluation and

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150 For the exposition of how an election petition can become a source of annoyance to the returned candidate and his constituents, the court in *G.M. Sidheshwar* cited the following observation from *Azhar Hussainon v. Rajiv Gandhi*,1986 Supp SCC 315 (Para 12): AIR 1986 SC 1253: "…. So long as the sword of Damocles of the election petition remains hanging, an elected member of the legislature would not feel sufficiently free to devote his whole-hearted attention to matters of public importance which clamour for his attention in his capacity as an elected representative of the constituency concerned. The time and attention demanded by his elected office will have to be diverted to matters pertaining to the contest of the election petition. Instead of being engaged in a campaign to relieve the distress of the people in general and of the residents of his constituency who voted him into office, he would be engaged in campaign to establish that he has in fact been duly executed."

151 *Supra* note 134 at 2078-2084.

152 *Id.* at 2085 (para 33).

153 *Id.* at 2085 (para 34).

154 *Ibid*. In this respect, the Supreme Court clarifies: "No doubt, if the tenants do not pay the amount, the liability would have been that of the owner, i.e. the appellant. However, at the time of filing the nomination, the appellant could not presume that the tenants would not pay the amount and, therefore, it had become his liability."

reassessment for the purpose of assessing taxes, the non-payment of outstanding municipal dues to the tune of Rs. 1783/-, like those of electricity dues, had not become truly 'payable', and, therefore, does not amount to substantial lapse.

iii. *Re. non-disclosure of assets (a bungalow and a car) in the name of the appellant's wife:* Non-disclosure of "bungalow No. 866" and "of the vehicle in the name of appellant's wife" "is a substantial lapse."

iv. *Re. non-disclosure of the appellant's interest/share in the partnership form:* This is indeed "a very serious and major lapse."

On having a rounded view, the resultant conclusion of the Supreme Court is:[155]

> On all these aspects, we find that the defence/explanation furnished by the appellant does not inspire any confidence. It is simply an afterthought attempt to wriggle out of the material lapse on the part of the appellant in not disclosing the required information, which was substantial. We, therefore, are of the view that in affidavits given by the appellant along with the nomination form, material information about the assets was not disclosed and, therefore, it is not possible to accept the argument of the appellant that information contained in the affidavits be treated as sufficient/substantial compliance.

The judgment in the instant case answers the predicament that why the issue of improper acceptance of a nomination paper could not be resolved by the returning officer at the threshold, and that why the same issue is required to be deferred in an election petition till the conclusion of the election? The rational for this enigmatic approach is, not that the returning officer is not qualified or empowered to decide the issue but, at the time of scrutiny in a "summary enquiry" it may not be possible for him "to conduct a detailed examination."[156] Moreover, for the same reason, "it would not be possible for the Returning Officer to reject the nomination for want of verification about allegations made by the objector."[157] "In such a case," it is stated by the Court, "when ultimately it is proved that it was a case of non-disclosure and either the affidavit was false or it did not contain complete information leading to suppression, it can be held at that stage that the nomination was improperly accepted."[158]

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155 *Id*. at 2085.

156 *Id*. at 2086.

157 *Id*. at 2086-87 (para 38).

158 *Id*. at 2087 (para 38).

Thus, the issue of 'improper acceptance' of a nomination paper falls into two parts for decision-making. At the time of scrutiny of nomination, there are grounds under sub-section (2) of section 36 of the Act of 1951 on the basis of which the returning officer after holding a summary enquiry can decide "there and then" whether the nomination paper is required to rejected, as in a case "where the blanks are left in an affidavit."[159] This may be considered as the first part of decision-making. On the other hand, where detailed enquiry is needed, it would be a case to be decided in an election petition as to whether the nomination was properly accepted or it was a case of improper acceptance.[160] "Once it is found that it was a case of improper acceptance, as there was misinformation or suppression of material information," observes the Supreme Court, "one can state that question of rejection in such a case was only deferred to a later date."[161]

In view of this analysis, the Supreme Court concludes by observing: "When the Court gives such a finding, which would have resulted in rejection, the effect would be same, namely, such a candidate was not entitled to contest and the election is void."[162] Any position to the contrary would lead to an "anomalous situation", namely, "that even when criminal proceedings under Section 125A of the Act can be initiated and the selected candidate is criminally prosecuted and convicted, but the result of his election cannot be questioned."[163] "This," asserted the court rightly, "cannot be countenanced."[164] Accordingly, finding no merit, the Supreme Court has eventually dismissed the appeal.[165]

VII RIGHT TO RECALL ELECTED *ADHYAKSH* OF ZILA PANCHAYAT THROUGH NO-CONFIDENCE MOTION: WHETHER CONSTITUTIONALLY CONSISTENT WITH PROVISIONS IN PART IX OF THE CONSTITUTION

This indeed is one of the "pristinely legal" issues that falls for determination by the Supreme Court in *Usha Bharti* v. *State of U.P.*[166] In this case, the appellant successfully contested the election for becoming the member of the Zila Panchayat, Sitapur, UP. 62 candidates in all were elected including the appellant. Soon thereafter, the appellant was elected as adhyaksha of the zila panchayat under section 19 of the U.P. Kshettra Panchayat and Zila Panchayat Act, 1961.[167] However,

159 *Ibid*.

160 *Ibid.*

161 *Ibid.*

162 *Ibid*.

163 *Ibid*.

164 *Ibid.*

165 *Id.* at 2087.

166 AIR 2014 SC 1686, at 1688, see observations of Surinder Singh Nijjar J (for himself and Fakkir Mohamed Ibrahim Kalifulla J). Hereinafter simply, *Usha Bharti*.

167 No. 33 of 1961. Hereinafter simply, the U.P. Act of 1961. S. 19 of the said Act provides that in every zila panchayat, an adhyaksh shall be elected by the elected members of the zila panchayat through amongst themselves.

within less than two years of her being elected as Adhyaksha,[168]a notice of motion of no-confidence signed by more than half of the total membership of the zila panchayat was brought against her under section 28 of the said Act. After a few rounds of litigations, mostly on counts that are not related to the issue of constitutionality, the matter reached the Supreme Court.

In this espect, the "whole debate" in this case at the Supreme Court "revolves around section 28 of the U.P. Act of 1961, which provides for a motion of no-confidence in adhyaksha.[169] The eventual question to be decided is, whether this mode of removal of adhyaksha is constitutionally consistent with the provisions of part IX of the Constitution. In this respect, the clear and categorical response of the Supreme Court is as follows:[170]

> In our opinion, the aforesaid provision contained in Section 28 is, in no manner, inconsistent with the provisions contained in Article 243N. To accept the submission … of inconsistency would be contrary to the fundamental right of democracy that those who elect can also remove elected person by expressing No-confidence Motion for the elected person. Undoubtedly, such No-confidence Motion can only be passed upon observing the procedure prescribed under the relevant statute, in the present case the Act.[171]

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168 S. 21 of the U.P. Act of 1961 provides that save as otherwise in this Act, the term of office of the adhyaksh shall commence on his election and with the term of zila panchayat, which, under s.20 of the said Act shall continue for five years from the date appointed for its first meeting and no longer.

169 *Supra* note 166 at 1697.

170 *Id.* at 1698.

171 S. 28 of the U.P. Act of 1961 details the procedure with regard to the issuance of written notice of intent to make the motion, in such form as may be prescribed, signed by not less than half of the total number of the elected members of the zila panchayat for the time being. Such notice together with the copy of the proposed motion has to be delivered to the collector having jurisdiction over the zila panchayat. Therefore, the collector shall convene a meeting of the zila panchayat for consideration of the motion on a date appointed by him which shall not be later than 30 days the date from which the notice was delivered to him. The collector s required to give a notice to the elected members of not less than 15 days of such meeting in the manner prescribed. The meeting has to be presided over by the district judge or a civil judicial officer not below the rank of a civil judge. By virtue of sub-s (7) of s. 28 of the said Act, the debate cannot be adjourned. Sub-s (8) further provides that the debate on the no-confidence motion shall automatically terminate on the expiration of 2 hours from the time appointed for the commencement of the meeting, it is not concluded earlier. Either at the end of 2 hours or earlier, the motion has to be put to vote. Furthermore, the presiding officer is not permitted to speak on the merits of the motion, and also not entitled to vote.Sub-s (11) provides that if the motion is carried with the support of (more than half) of the total number of (elected members) of the zila panchayat for the time being, the person stands removed from the position of adhyaksha.

The rationale of the Supreme Court for reaching the conclusion of constitutional consistency, namely, the provision of no-confidence motion under section 28 of the U.P. Act of 1960 is in consonance with the provisions of part IX of the Constitution may be abstracted as under:

> (a) The provision of no-confidence motion under Section 28 is independent of the provision of removing an Adhyaksha who is found guilty of misconduct in the discharge of his or her duties under Section 29 of the said Act: the latter provision "in no manner, either overrides the provisions contained in Section 28 or is in conflict with the same."[172]
>
> (b) Even assuming that the provision of no-confidence motion in Section 28 is pre-constitutional,[173] it is not inconsistent with the provisions of Part IX of the Constitution[174] for the following reasons:
>
> (i) The provision of Section 28 inhering the provision of no-confidence motion "was never repealed by any competent legislature as being inconsistent with any of the provisions of Part IX,"[175] as specifically stipulated under Article 243-N that any provision of law relating to Panchayats in force immediately before the 73rd Amendment, which is inconsistent with Part IX continues until amended or repealed.
>
> (ii) The provision of no-confidence motion was not only confirmed "by subsequent statutory provisions" "with some ancillary changes,[176] but the essence of the no-confidence provisions was continued."[177]

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172 *Supra* note 166 at 1698.

173 *Id*. at 1705, See *Bhanumati* v. *State of Uttar Pradesh through its Principal Secretary* (2010) 12 SCC; AIR 2010 SC 3796."[T]he statutory provision of No-Confidence Motion against the Chairman is a pre-constitutional provision and was there in Section 15 of the 1961 Act." Hereinafter simply, *Bhanumati*.

174 *Ibid*.

175 *Id*. at 1705, see observations in *Bhanumati,* AIR 2010 SC 3796 (para 45).

176 It is a matter of record that the State of Uttar Pradesh enacted U.P. Panchayat Law (Amendment) Act, 1994 on April 22, 1994 to give effect to the provisions of part IX of the Constitution. It was again amended by the Amendment Act of 1998 (U.P. Act No. 20 of 1998); Amendment Act of 2007 (U.P. Act No. 4 of 2007), whereby the period of moving a no-confidence motion was reduced from two years to one year, and the requirement that for a motion of no-confidence to be carried, it had to be supported by a majority of 'not less than two third' was reduced to 'more than half.' See *supra* note 166 at 1706 (para 51).

177 *Ibid*.

(iii) Since the provision of Section 28 has not been discontinued after the expiry of one year of the enactment of 73rd Amendment of the Constitution, which came into effect on 24th April 1993, such an eventuality of discontinuance "would have arisen only in case it was found that Section 28 is inconsistent with any provision of Part IX of the Constitution."[178]

(iv) Section 28 does not frustrate the provisions for reservation made by Part IX of the Constitution for Scheduled Caste, Scheduled Tribes and Other Backward Classes, inasmuch as the removal made through no-confidence can only be replaced by a candidate belonging to one of the reserved categories.[179]

(v) Section 28 cannot he held unconstitutional merely because Part IX of the Constitution which makes elaborate provisions for the setting up Panchayats at the village, intermediate and district level does not include the provision of no-confidence motion,[180] for there is a string of Articles in Part IX of the Constitution[181] that "make provision for the State to enact necessary legislation to implement the provisions in Part IX," including the power to make provision for No-confidence Motion against Adhyaksha of Zila Panchayat."[182]

(vi) To accept the reasoning that "a person once elected to the position of Adhyaksha would be permitted to continue in office till the expiry of the five years term, even though he/she no longer enjoys the confidence of the electorate," "would destroy the foundational precepts of democracy that a person who is elected by the members of the Zila Panchayat can only remain in power so long as the majority support is with such person."[183]

(vii) Provision of no-confidence motion in Section 28 does not put the executive authority in the State in control of Village Panchayats or District Panchayats."[184]

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178 *Id*. at 1698 (para 22).

179 *Id*. at 1698 (para 23).

180 *Id*. at 1705, citing *Bhanumati* (para 41): "… A Constitution is not to give all details of the provisions contemplated under the scheme of amendment."

181 Such as art. 243-A, 243-C(5), 243-D(4), 243-D(6), 243-F(1), (6), 243-G, 243-H, 243-I (2), 243-J, 243-K(2), (4), see *supra* note 166 at 1699 (para 24).

182 *Ibid.*

183 *Supra* note166 at 1699.

184 *Id*. at 1700.

> (viii) To compare the removal of Adhyaksha of a Zila Panchayat through no-confidence motion to those of holding such higher positions as in the case of Rajya Sabha and Lok Sabha members, President of India is not at all tenable[185] inasmuch as Article 243-F placed in Part IX of the Constitution, empowers the State to enact any law for a person who shall be disqualified for being chosen as a member of a Panchayat, which would also include a member of Panchayat , who is subsequently appointed as Adhyaksha of Zila Panchayat.[186]

In the light of the above, it is concluded that the avowed objective part IX, introduced by the 73rd amendment of the Constitution, is "to ensure that Panchayat Raj Institutions acquire 'the status and dignity of viable and responsive people's bodies'."[187] "The provisions are not meant," it is further stated, "to provide an all pervasive protective shield to an Adhyaksha, Zila Panchayat, even in cases of loss of confidence of the constituents."[188] Provision of no-confidence motion in section 28 of the U.P. Act of 1960, therefore, "cannot be said to be repugnant to Part IX of the Constitution of India."[189]

Putting the whole issue of section 28 of the said Act along with part IX of the Constitution in the broader perspective as enunciated in the Preamble, the summation of the Supreme Court is as follows:[190]

> In our opinion, the amendment as well as the main provision in Section 28 is in absolute accord with the vision explicitly enunciated in the Preamble of the Constitution of India. In fact, the spirit which led to ultimately encoding the goals of "WE THE PEOPLE" in the Preamble of the Constitution of India, permeates all other provisions of the Constitution of India. The fundamental aim of the Constitution of India is to give power to the People. Guiding spirit of the Constitution is "WE THE PEOPLE OF INDIA." In India, the People are supreme, through the Constitution of India, and not the elected Representatives. Therefore, in our opinion, the provision for right to recall through Vote of No-confidence is in no manner repugnant to any of the provisions of the Constitution of India.

This is how the Supreme Court has held that the provision of no-motion in Section 28 of the U.P. Act of 1960 is "not only consistent with part IX of the Constitution, but is also foundational for ensuring transparency and accountability

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185 See, *id*. at 1706 (para 52): To put chairman of a District Panchayat "on the same footing as the President of India," is simply "an argument of desperation."

186 *Id*. at 1700 (para 29).

187 *Id*. at 1702 (para 36).

188 *Ibid.*

189 *Ibid*.

190 *Id.* at 1702 (para 37).

of the elected representatives, including Panchayat Adhyakshas," and that such a provision "sends out a clear message that an elected Panchayat Adhyaksha can continue to function only so long as he/she enjoys the confidence of the constituents."[191] For reaching this conclusion, there is no need to re-interpret the Constitution, requiring a reference to the Constitution bench of at least five judges;[192] for the "entire issue has [already] been elaborately, and with erudition, dilated upon by this Court in *Bhanumati and Others*," and that "there is no occasion for reconsideration" of this judgment.[193]

VIIIELECTION/RECRIMINATION PETITION: VALIDITY OF RECOUNTING / SCRUTINY OF BALLOT PAPERS[194]

The issue whether scrutiny-cum-recounting of ballot papers can be done in deciding an election petition/recrimination petition has emerged before the three-Judge bench of the Supreme Court in appeal against the judgment of the High Court of Judicature of Andhra Pradesh in *Arikala Narasa Reddy* v. *Venkata Ram Reddy Reddygari*.[195] This case relates to the election for the state legislative council from a constituency consisting of a total 706 votes out of which 701 were polled.[196] At the time of initial counting both the appellant and the respondent secured equal votes as 336, and 29 votes were found invalid. On the request of the appellant, the returning officer permitted recounting of the votes, and the appellant got 336 votes, while the respondent no. 1 got 335 votes and 30 votes were found to be invalid. The challenge in the election petition by the respondent no. 1 centred around only four votes out of the ones that were declared invalid alleging that the three identified votes polled in his favour had been wrongly rejected, and one another identified vote had been counted in favour of the appellant that ought to have been declared invalid.

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191 *Id.* at 1703 (para 40). To the same effect, see, *id.* at 1705.

192 See, *id*. at 1706.

193 *Id.* at 1707.

194 See also, Virendra Kumar, "Election papers including the record of register of voters' counterfoils (in form 17a): when can an order for their production and inspection be made?" in XLVIII *ASIL* 432-435 (2012) ; Virendra Kumar, "Secrecy of voting and purity of election," in XLV *ASIL*, (2009) at 366-369; Virendra Kumar, "Election papers cannot be opened as a matter of course under Rule 93(1)," in XLV*ASIL* 369-372 (2009) and Virendra Kumar, "Recount of ballot papers," in XXXVII *ASIL* 271-274 (2001).

195 The sub-rule of r.93(1) of the Rules of 1961, namely "the packets containing registers of voters in Form 17A," was added by Notification dated 24.3.1992. Form 17A mentioned therein is related to r. 49(L) which is concerning the procedure about the voting by voting machines. Sub-rule (a)(a) of r. 49(L) requires the polling officer to record the electoral roll number of the elector as entered in the marked copy of the electoral roll in a register of voters which is maintained in Form 17A.

196 AIR 2014 SC 1290, See observations of B.S. Chauhan J (for himself and J. Chelameshwar and M.Y. Iqbal JJ.). Hereinafter simply, *Arikala Narasa Reddy.*

The high court issued notice to the appellant regarding the lodgement of the election petition.The appellant not only filed the written statement refuting the allegations and averments made in the petition, but also filed a recrimination petition[197] under section 97 of the Representation of the People Act, 1951.The returning officer also stepped in as respondent no. 2, who filed his written statement, seemingly to explain how the scrutiny and counting was done.

During the pendency of the election petition, the high court directed the registrar (judicial) "to scrutinize and recount all the ballot papers in the presence of parties and their counsel as per the rules and regulations and the instructions and guidelines issued by the Election Commission of India and submit the report within a stipulated period."[198]

Aggrieved, the appellant challenged the order of high court in respect of recounting all the votes by filing special leave petition(SLP) in the Supreme Court. The apex court "set aside the impugned order of the High Court, and directed to first determine the question relating to the validity of the 3 disputed votes and, thereafter, to examine the issue of re-counting of all the votes, if required."[199]

In pursuance of the order of the Supreme Court, the high court scrutinized and examined the 3 disputed votes, and came to the conclusion that "the Returning Officer had wrongly rejected the said 3 votes as invalid and ordered that all the 3 disputed votes to be counted in favour of respondent No. 1."[200]

The aggrieved appellant again approached the Supreme Court though another SLP for preventing the high court to proceed further to recount all the votes, but the apex court refused to do so by observing "that it was not appropriate to interfere at that stage but the appellant would be at liberty to urge the same point at the time of final hearing."[201]

Accordingly, the high court proceeded with the scrutiny and recounting of all the ballot papers, and eventually allowed the election petition by holding "that certain votes cast in favour of respondent No. 1 and wrongly been rejected and the vote which should have been declared as invalid had wrongly been counted in favour of the appellant as valid and, thus, the respondent No. 1 was declared as successful candidate and elected as MLC."[202]

In appeal, after the perusal of the record and in the light of the settled propositions of law, the Supreme Court eventually has set aside the judgement of the high court, by holding that in their "inescapable conclusion," "even after deciding the Recrimination Petition," both the appellant and the respondent no. 1 "have received equal number of votes."[203] In this "fact situation", the court, by

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197 For the fact-matrix abstracted hereinafter, see *id.* at 1293 and 1298 (paras 2, 19).

198 See, *id*. at 1301 (para 31).

199 *Id*. at 1293.

200 *Id*. at 1294.

201 *Id*. at 1294.

202 *Id*. at 1294.

203 *Id*. at 1294.

virtue of the provisions of section 102 of the Act of 1951, has decided the result by the draw of lots in the open court, in which "the appellant succeeds."[204]

The rationale for modifying the decision of the high court as it relates to allowing the election petition may be crystalized as under.

> *i. It is impermissible for the High Court to travel beyond the pleadings in the election petition.* Since the challenge in the election petition was confined only to four votes,[205] there was "no occasion for the High Court to direct recounting of all the votes."[206] "The course adopted by the High Court is impermissible and cannot be taken note of being in contravention with statutory requirements."[207] "Therefore, the case has to be restricted only to the four votes in the election petition and the allegations made in the recrimination petition ignoring altogether what had been found out in the recounting of votes as under no circumstances the recounting of votes at that stage was permissible."[208]
>
> *ii. Reappraisal of the validity or invalidity of four ballot papers referred in the election petition.* On perusal of "the record of the case including the four disputed ballots," the Supreme Court has found itself in agreement with the reasoning given by High Court with respect to two ballot papers, whereas differed in respect of the other two.[209]

The reasoning of the high court regarding the first two ballots, with which the apex court has agreed, is as follows:

> In the first ballot paper, shown as Ex. X-1, the figure "1" is clearly marked by the voter "not in the space which is actually meant for marking" that figure, but still "in the panel meant for petitioner in the ballot paper."[210] Agreeing with the decision of the Returning Officer, the High Court held that "since it in the panel (space) provided for the petitioner, it has to be treated as valid."[211] Another

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204 *Id*. at 195 (para 35).

205 *Id*. at 1302 (paras 36 and 37).

206 *Id*. at 1299 (para 22): Prayer of the election petition, inter alia, reads – "To direct recounting and scrutiny of the ballot papers and validate three votes cast in favour of the petitioner;" and "To declare one vote cast in favour of the respondent No. 1 as invalid."

207 *Id*. at 1299.

208 *Ibid.*

209 *Ibid.*

210 *Id.* at 1301.

211 *Id*. at 1300 (para 26).

> objection regarding this ballot taken by the respondent was that the figure "1" looked like the figure "7" and, therefore, by this fact alone, that ballot becomes invalid. Discounting this contention, the High has held that since the intention of the voter is clear, as long as "the figure marked resembles '1', it is illegal to reject the ballot mechanically whenever a doubt arises that the figure marked does not accord in all respects with the figure viewed by the Returning Officer or the court."[212] The same was validated for the petitioner.
>
> In the second ballot paper, shown as Ex. X-2, the figure "1" marked by the voter in the panel meant for the petitioner looked like a "dot." "on careful examination," the High Court has found "that the voter in fact marked figure '1', but it is short in length and the width appears to be more because of the discharge of more ink from the instrument supplied to the elector by the Returning Officer for the purpose of marking."[213] Accordingly, its rejection by the Returning Officer was 'improper', and, thus, the same was validated for the petitioner.[214]

The reasoning of the high court regarding the other two ballots, with which the apex court has disagreed, is as follows:

> In respect of the third ballot paper marked as Ex. X-3, a 'tick' mark was put in the column meant for the first respondent in addition to figure "1" which was clearly put in the space meant for the petitioner.[215] The crucial question to be answered in this fact matrix is: 'Is it possible to identify whether the voter intended to vote for the appellant or the respondent No. 1"? The Supreme Court, answering the question in the negative, has held that "it is impossible to make out in whose favour the elector has voted and hence, this ballot paper is rejected as being invalid."[216]
>
> This reasoning is, however, seemingly somewhat suspect, because the elector has also clearly stated that his vote is meant for the petitioner. Though the same ballot paper can be rejected on ground of revealing one's own identity by putting the added remark.

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212 *Ibid.*

213 *Ibid*. See also, *id.* at 1301-1302 (para 33): "on a careful examination of the said exhibit, it is to be held that though the same may appear to be '7' but it is also another form of writing '1' and thus, there was no illegality committed by the Returning Officer. In holding the same in favour of the respondent No. 1."

214 *Ibid.*

215 *Ibid.*

216 *Ibid*. See also, *id.* at 1301 (para 28).

> The reasoning of the High Court on this count is also shaky when it is observed: "As regards the 'tick' mark, since such mark is not contemplated by the rules it has to be ignored," and that "since the figure '1'was clearly put by the voter, it has to be validated in favour of the petitioner."[217]
>
> In totality, the Supreme Court is right in holding the ballot paper as 'invalid' "because of the ambiguity and the additional marking, i.e. 'his vote is for Venkata Rama Reddy."[218]
>
> In respect of the fourth ballot paper marked as Ex. Y-13, the voter put the figure "1" along with his signature in front of the name of respondent No. 1, the petitioner. "The said signature is legible and distinguishable and keeping in mind that only 701
>
> Votes were polled, it would not be difficult to identify the elector and, thus, the ballot is invalid being hit by Rule 73(2)(d) of the Rules."[219] In this respect, it is not understandable how the High Court could hold that in a relatively small constituency "it is not possible to trace the identity of the voter."[220]
>
> *iii Validity or invalidity of the ballot papers referred in the Recrimination Petition*:[221]

The appellant has raised the four objections in his recrimination petition; three of these relate to three specific or identified ballot papers, and one bears a reference to "some other votes" that were validly polled in favour of the petitioner, but the Returning Officer has "illegally rejected" "on flimsy and untenable grounds."[222] Response of the Supreme Court to these four objections may be summed up as under:

> (i) The objection regards 'some other' votes is "non-descriptive and vague," and, therefore, "the court cannot be asked to make a roving and fishing enquiry on the mere asking of a party," and thus, such a ground is "not worth considering."[223]

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217 *Id.* at 1301 (para 28).

218 *Id.* at 1300 (para 26).

219 *Id*. at 1301 (para 28).

220 *Id*. at 1301 (para 29).

221 *Id*. at 1300 (para 26).

222 See *id*. at 1301 (para 31).

223 *Id*. at 1301 [para 31(d)]. The following issues has been raised by the appellant in his recrimination petition: "(a) That one vote marked as '7' was illegally counted in favour of the 1st respondent herein

(ii) The Returning Officer committed no illegality in treating the ballot mark '7' as mark '1' and counting the same in favour of respondent, because on "a careful examination" of the said ballot "it is to be held that though the same may appear to be'7' but it is also another form of writing '1'."[224]

(iii) The contention that a mark denoting the number '1', because of "a small curve connecting the stroke is to be read as number '9', "is noted just to be rejected as such figure is to be read only as '1' for it is impossible to take such a technical and impractical view," and, thus, "the same is to be counted in favour of respondent No. 1, as has been done [by the Returning Officer]."[225]

(iv) The ballot paper [Ex. Y-11] that not only bears the "scribbling" but also "the final mark that is made on the ballot is '2', which is in direct conflict with Rule 73(2)(a) of the Rules and hence, the Returning Officer rightly rejected the same."[226]

In view of this analysis, including the consideration of recrimination petition, the Supreme Court has reached "the inescapable conclusion" that "the appellant and the respondent No. 1 have received equal number of votes."[227] In this "fact-situation" "the decision as to who will be the returned candidate" has been decided by the draw of lots as envisaged under section 102 of the Act of 1951,[228] which stipulates that one of the two candidates "on whom the lot then falls had received an additional vote."[229] In the process of 'draw of lots', the appellant is lucky to succeed.[230]

IX THE EXPRESSION, "DULY NOMINATED AS A CANDIDATE AT ANY ELECTION": DOES IT INCLUDE WITHIN ITS AMBIT A CANDIDATE WHOSE NOMINATION IS REJECTED ON GROUND OF DISQUALIFICATION?

This short and specific question has arisen in *Devendra Patel* v. *Ram Pal Singh*[231] in the context of interpretation of section 82(b) read with section 79(b) of

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224 *Id*. at 1301 (para 32).

225 *Id*. at 1301 (para 33).

226 *Id*. at 1302 (para 33). "If all the ballots are started to be scrutinized and examined in such a hyper technical manner then most of the ballots would only stand rejected," *ibid*.

227 *Id*. at 1302 (para 34).

228 *Id*. at 1302 (para 35).

229 *Id*. at 1302 (para 36).

230 S. 102(b) of the Act of 1951.

231 *Supra* note 198 at 1302.

the Representation of the People Act, 1951. Section 82(b) of the said Act, which deals with the parties to the election petition, stipulates, *inter alia*, that a petitioner shall join as respondents to his petition apart from the returned candidate(s), "any other candidate against whom allegations of any corrupt practice are made in the petition."

The term "candidate" used here has been defined in section 79(b) of the said Act, which means "a person who has been or claims to have been duly nominated as a candidate at any election."

In this backdrop an issue arose earlier in *Mohan Raj* v. *Surendra Kumar Taparia*[232] whether a person (namely, R.D. Pariwal) who was duly nominated candidate and against whom allegations of corrupt practice were made but withdrew his nomination later was required to be joined as a party in the election petition. The Supreme Court responded in the affirmative by holding that such a 'candidate' is "a candidate who is duly nominated to be candidate for the purpose of Section 82(b) in spite of withdrawal."[233]

In *Devendra Patel*, the stand of the appellant on the strength of the holding of the Supreme Court in *Mohan Raj* is that one Jaswnat Singh "whose nomination was rejected must be regarded as a 'candidate' for the purpose of section 82(b) of the Representation of the People Act, 1951, and since he has not been joined as a party respondent in the election petition although there is allegation of corrupt practice against him, the election petition is liable to be rejected."[234] This plea of the appellant has been counteracted by the apex court by observing:[235]

> There is an important difference between that case [*Mohan* Raj] and this case (*Devendra Patel*). In that case, R.D. Pariwal was duly nominated candidate but he withdrew later, whereas here Jaswant Singh's nomination was rejected as he was found to be disqualified. *For this crucial and compelling difference*, the statement of law in *Mohan Raj* has no application. Where the nomination of a person is rejected by the returning officer on the ground of such person being disqualified, in our view, such person is neither a duly nominated candidate nor he can claim to be duly nominated as a candidate.

Accordingly, the Supreme Court has dismissed the appeal by observing that the high court "did not commit any error in not treating Jaswant Singh as a 'candidate' for the purpose of Section 82(b) of the Act."[236]

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232 AIR 2014 SC 404, see observations of R.M. Lodha J (for himself and Madan B. Lokur J). Hereinafter simply *Devendra Patel.*

233 AIR 1969 SC 677; (1969) 1 SCR 630 (hereinafter simply *Mohan Raj*), cited in *D evendra Patel,* at 405.

234 *Ibid*.

235 *Supra* note 231 at 404.

236 *Id.* at 405 (para 9). Emphasis added.

On fact matrix, the seeming difference between *Mohan Raj* and *Devendra Patel* is that in the former case, one person, namely, R.D. Pariwal, withdrew from the contest; and in the latter case the nomination of the person in question, namely, Jaswnat Singh, was rejected by the returning officer. However, there is one commonality between the two, and that common point relates to the allegations of corrupt practice. The question that needs to be agitated here is, whether it is this seeming difference on the ground of 'withdrawal' and

rejection', or the factor of commonality between the two cases, which should be of '*crucial and compelling'* concern in extracting the statement of law from *Mohan Raj*.

In our respectful submission, in the domain of elections, where ridding the electoral system of corrupt elements is one of the most singular concerns, the commonality of the allegation of corrupt practice needed to be taken into account in the abstraction of the statement of law. Looked from this perspective, *Mohan Raj* seems to be indistinguishable from *Devendra Patel.*

Moreover, the high court judgment, which has been found to be 'error-free' by the Supreme Court in the instant case, relied upon *Mithilesh Kumar Sinha* v. *Returning Officer for Presidential Election*[237] for holding that Jaswant Singh could not be regarded as a 'candidate' as defined in section 79(b) for the purpose of section 82(b), and over-ruled the objection regarding non-joinder of Jaswant Singh.[238] However, a bare perusal of facts of *Mithilesh Kumar Sinha* reveals that here the issue to be decided by the Supreme Court was whether the petitioner Mithilesh Kumar Sinha had the requisite *locus standi* to challenge the election of the President of India. The court responded by observing:[239]

> To be entitled to present an election petition calling in question an election, the petitioner should have been a 'candidate' at such election within the meaning of Section 13(a) for which he should have been 'duly nominated as candidate' and this he cannot claim unless the mandatory requirements of Section 5B(1)(a) and Section 5C were complied by him. Where on undisputed facts there was non-compliance of any of these mandatory requirements for a valid nomination, the petitioner was not a 'candidate' within the meaning of Section 13(a) and, therefore, not competent according to Section 14A to present the petitioner.

Moreover, there is neither any reference to *Mohan Raj* by the high court, nor any discussion or elaboration regarding the application of *Mithilesh Kumar Sinha* by the Supreme Court in the instant case, we are encouraged to re-state that *Mohan Raj* seems to be indistinguishable from *Devendra Patel* for deriving the statement of law.

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237 *Id.* at 405 (para 10).

238 AIR 1993 SC 20. Hereinafter simply *Mithilesh Kumar Sinha*.

239 *Id.* at 404 (para 3).

X NOMINATION PAPER ACCOMPANIED BY AFFIDAVIT WITH BLANK PARTICULARS: WHETHER RETURNING OFFICER IS EMPOWERED TO REJECT SUCH A NOMINATION AT THE THRESHOLD[240]

This issue has emerged in a precipitant form before a three-Judge Bench of the Supreme Court in *Resurgence India v. Election Commission of India.*[241] In this case, the petitioner, Resurgence India, a non-governmental organization (NGO), during the Punjab Legislative Assembly Elections, 2007, undertook a massive exercise to analyse affidavits pertaining to the candidates of six major political parties in the state.[242] The singular objective was to verify their completeness in terms of the directives issued by the Supreme Court in the landmark judgments in two cases[243] *Union of India* v. *Association for Democratic Reforms*[244] and *People's Union for Civil Liberties* v. *Union of India.*[245]Since their analysis revealed 'large number of non-disclosures in the affidavits by the contestants' and 'poor level of scrutiny by the Returning Officers,' they drew the attention of the Election Commission of India.[246] In response, the commission "expressed its inability in rejecting the nomination papers of the candidates solely due to furnishing of false/ incomplete information in the affidavits in view of the judgment in *People's Union for Civil Liberties.*"[247]

In this backdrop, in a writ petition under article 32 of the Constitution the petitioner has sought specific directions of the Supreme Court to be issued to the Election Commission of India "to effectuate meaningful implementation of the judgements by this Court in and also to direct the respondents herein to make it compulsory for the Returning Officer to ensure that the affidavits filed by the contestants are complete in all respects and to reject the affidavits having blank particulars."[248]

As a sequel to the initiative of the apex court in *Association for Democratic Reforms*, each candidate seeking election to the Parliament or state legislature is

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240 *Supra* note 237 at 35 (para 29).

241 See also, Virendra Kumar, "Nomination papers without affidavits in prescribed format: whether their acceptance is invalid," in XLVIII *ASIL*, (2012) at 409-414; Virendra Kumar, "Improper rejection of nomination paper," in XLV *ASIL* 359-366 (2009).

242 AIR 2014 SC 344, see observations of P. Sathasivam, CJI (for himself and Ranjana Prakash Desai and Ranjan Gogoi JJ). Hereinafter simply *Resurgence India*.

243 *Supra* note 241 at 345 (para).

244 For critical analysis of the two landmark judgments, see Virendra Kumar, "People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies," 47*JILI* 135-157 (2005).

245 AIR 2002 SC 2112: (2002) 5 SCC 294. Hereinafter simply *Association for Democratic Reforms.*

246 AIR 2003 SC 2363: (2003) 4 SCC 399. Hereinafter simply *People's Union for Civil Liberties.*

247 *Supra* note 241 at 345 (para 8).

248 *Id.* at 346 (para 8).

required to furnish information relating to his conviction/acquittal/discharge in any criminal offence in the past, any case pending against him of any offence punishable with imprisonment for two years or more, information regarding assets (movable, immovable, bank balance, *etc*.) of the candidate as well as of his/her spouse and that of dependents, liability, if any, and the educational qualification of the candidate.[249] All this information is required to be furnished in the form of an affidavit sworn before a magistrate of the first class and such an affidavit shall be treated as an integral part of the candidate's nomination paper. In the directions issued by the Law Commission in order to effectuate 'meaningful implementation' of the judgement, it was also emphasized "non-furnishing of the affidavit by any candidate or furnishing of any wrong or incomplete information or suppression of any material information will result in the rejection of the nomination paper, apart from inviting penal consequences under the Indian Penal Code, 1860."[250] However, regarding the eventual act of 'rejection' of the nomination paper by the returning officer, it was further clarified that "only such information shall be considered to be wrong or incomplete which is found to be a defect of *substantial character* by the Returning Officer in the summary inquiry conducted by him at the time of scrutiny of nomination papers."[251]

The basic propounding in *Association for Democratic Reforms* was reaffirmed by the Supreme Court in *People's Union for Civil Liberties,* but only with a small caveat that seems to have prompted the Election Commission of India, as stated earlier, to express "its inability in rejecting the nomination papers of the candidates solely due to furnishing of false/ incomplete information in the affidavits."[252]Such an understanding of the election commission negates the whole objective of the two judgments. The three-judge bench of the Supreme Court tends to remove this 'blockade of misgiving' in the instant case by locating the paragraph of concern in the judgment of *People's Union for Civil Liberties,* and clarifying the same through interpretation.

The 'blockade of concern' is reflected in paragraph 73 of *People's Union for Civil Liberties,* which reads as under:[253]

> While no exception can be taken to the insistence of affidavit with regard to the matters specified in the judgment in *Association for Democratic Reforms* case, the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nominations, cannot be justified. In the case of assets

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249 *Id.* at 344 (para 1). The petitioner organization also prayed for deterrent action against the returning officers in case of acceptance of such incomplete affidavits in order to remove deficiencies in the format of the prescribed affidavit. *Id*. at 346 (para 9).

250 *Id.* at 345 (para 2).

251 *Id.* at 345 (para 3).

252 *Ibid.* Emphasis added.

253 *Id*. at 346 (para 8).

> and liabilities, it would be very difficult for the Returning Officer to consider the truth or otherwise of the details furnished with reference to the 'documentary proof'. Very often in such matters the documentary proof may not be clinching and the candidate concerned may be handicapped to rebut the allegations then and there. If sufficient time is provided, he may be able to produce proof to contradict the objector's version. It is true that the aforesaid directions issued by the Election Commission are not under challenge but at the same time prima facie it appears that the Election Commission is required to revise its instructions in the light of directions issued in *Association for Democratic Reforms* case and as provided under the Representation of the People Act and its third Amendment.

In the "coherent opinion" of the three-judge bench, the bare reading of the paragraph 73 as reproduced above, the "power of rejection by the Returning Officer is not barred" in case blanks left in the affidavit are not filled with requisite particulars even after a reminder.[254] The seeming restraint on the power of rejection by the Returning Officer is only contextual. It is "to accommodate genuine situation where the candidate is trapped by false allegations and is unable to rebut the allegations within a short time."[255] "Para 73 of the aforesaid judgment," emphatically states the Supreme Court, "nowhere contemplates a situation where it bars the Returning Officer to reject the nomination paper on account of filing affidavit with particulars left blank."[256] In the light of this assertion, the court clarifies paragraph 73 of *People's Union for Civil Liberties*, by summing up:[257]

> Therefore, we hereby clarify that the above said paragraph will not come in the way of Returning Officer to reject the nomination paper if the said affidavit is filed with blank columns. The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not Known' in the columns and not to leave the particulars blank, if he desires that his nomination paper be accepted by the Returning Officer.

This view of the three-judge bench in *Resurgence India* that the returning officer has the power to reject the nomination paper in case the candidate filing the affidavit with particulars left blank is reinforced by the reasoning of the three-judge bench of the Supreme Court in *Shaligram Shrivastava* v. *Naresh Singh*

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254 *Id*. at 351 (para 22), see observations in para 73 of *People's Union for Civil Liberties.*

255 *Id*. at 350-351 (para 22 read with para 21).

256 *Id*. at 351 (para 23). The restraint on the power of rejection was in respect of nomination papers for furnishing wrong information or concealing material information and verification of assets and liabilities by means of summary inquiry at the time of scrutiny of the nomination. See, *id*. at 345 (para 4).

257 *Ibid.*

Patel.[258] In this case, the nomination paper of a candidate got rejected at the time of scrutiny under section 36(2) of the Representation of the People's Act, 1951 on the ground that he had not filled up the pro forma prescribed by the election commission wherein the candidate was required to state whether he had been convicted or not for any offence mentioned in section of the said Act. In reality, what the candidate did was that he filed an affidavit stating that the information given in the pro forma was correct but the pro forma itself was left blank.

In this factual situation, the bench had no difficulty in holding in paragraph 17 that the non-furnishing of the requisite information as required to be given in pro forma "certainly rendered the nomination paper suffering from defect of substantial character and the Returning Officer was within his rights in rejecting the same."[259] From this holding, the meaningful message derived for deciding the writ petition in *Resurgence India* is:[260]

> It is clear that the Returning Officer derives the power to reject the nomination papers on the ground that the contents to be filled in the affidavit are essential to effectuate the intent of the provisions of R.P. Act and as a consequence, leaving the affidavit blank will in fact make it impossible for the Returning Officer to verify whether the candidate is qualified or disqualified which indeed frustrate the object behind filing the same. In concise, this Court in *Shaligram (supra)* evaluated the purpose behind filing the pro forma for advancing latitude to the Returning Officer to reject the nomination papers.

The three-judge bench in the instant case has deciphered 'the purpose behind filing the pro forma' by revisiting the propounding of the Supreme Court in *Association for Democratic Reforms*,[261] and the subsequent enactment of section 33A of the Act of 1951[262] to give effect to that judicial propounding.[263] "The ultimate purpose of filing of affidavit along with the nomination paper is," says the Supreme Court, "to effectuate the fundamental right of the citizen under Article 19(1)(a) of the Constitution of India."[264]"The citizens are required to have the necessary information at the time of filing of the nomination paper in order to make a choice of their voting."[265] "When a candidate files an affidavit with blank particulars, it renders the affidavit itself nugatory."[266] As a logical corollary, "the Returning Officer

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258 *Ibid*.

259 AIR 2003 SC 2128;(2003) 2 SCC 176. *Supra* note 241 at 348 (para 14).

260 *Supra* note 241 at 349 (para 15).

261 *Resurgence India*, at 349 (para 16).

262 See, *id.* at 349-350 (paras 17 and 18).

263 Act No. 72 of 2002 with effect from 24.08.2002.

264 *Supra* note 241 at 350 (para 19).

265 *Id*. at 350 (para 20).

266 *Ibid*.

can very well compel a candidate to furnish information relevant on the date of scrutiny."[267] "If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected."[268] However, while reaching this eventual conclusion, the Bench added a note of caution: "We do comprehend that the power of Returning Officer to reject the nomination paper must be exercised very sparingly, but the bar should not be laid so high that justice itself is prejudiced."[269]

In conclusion, a few salient points may be abstracted from the summarized "directions" emerging from "discussion" in *Resurgence India*:[270]

(a) The right to know about the election candidate is "a natural right flowing from the concept of democracy and is an integral part of Article 19(1)(a) of the Constitution."

(b) "The ultimate purpose of filing of affidavit along with nomination paper is to effectuate" this right.

(c) Filing of affidavit with blank particulars will negate this right.

(d) If a candidate fails to fill the blanks even after the reminder by the Returning Officer, the nomination paper is fit to be rejected; the power of rejection, however, is to be exercised with extreme caution and circumspection.

(e) The restraint on the power of rejection of the Returning Officer as envisaged under para 73 of *People's Union for Civil Liberties* "will not come in the way of the Returning Officer to reject the nomination paper when affidavit is filed with blank particulars."

(f) "The candidate must take the minimum effort to explicitly remark as 'NIL' or 'Not Applicable' or 'Not Known' in the columns and not to leave the particulars blank."

(g) Since the filing of affidavit with blanks will be directly hit by Section 125A(i) of the Act of 1951, if the nomination paper itself is rejected on account of blank particulars, there is no reason why such a candidate must be again penalized for the same act by prosecuting him or her.[271]

XI CONCLUSION

Each one of the nine issues expounded in this survey is complete in itself inasmuch as it carries its own conclusion. Any further statement or re-statement

267 *Id.* at 350 (para 21).

268 *Id.* at 351 (para 21).

269 *Ibid.*

270 See, *id*. at 352 (para 27).

271 S. 125A(i) of the Act of 1951 stipulates that a candidate who fails to furnish the requisite information as required under s. 33A of the said Act shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

on that count by way of conclusion will amount to sheer repetition of what has already been stated and submitted. Moreover, any conclusion, divorced from its context, would reduce its efficacy and functional value.

Nevertheless, one conclusion of generic nature is desiderated here. The judge-made law, which is perhaps the most prolific source of 'living law', needs periodic restatement by the legislature in order to transform it into a rounded generic principle through open debate and discussion. In essence, such a re-statement would lead to codification of the judge-made law, reflecting a meaningful pragmatic cooperation between the Supreme Court and the Parliament for fulfilling the constitutional commitments.

Hitherto, somehow or the other there has been a critical void of, what I may call, 'juristic-legislative venture'. Such a void affects the whole gamut of democratic functioning, which is solely and singularly premised on the basic notion of 'rule of law' as enunciated and amplified in the very concept of constitutionalism, a concept that implies that the whole system of governance derives its sustenance from nowhere but the fundamental principles enshrined in the Constitution.

The conspicuous absence of such a 'juristic-legislative venture' often nullifies the breakthrough-principles propounded by the courts in the course of administration of justice. This may be exemplified by the predicament presented before the three-Judge Bench of the Supreme Court in *Resurgence India* – a case that has been included and analysed in our present survey.[272] In this case, the presented predicament to be resolved by the Supreme Court is, why the fundamental right of the citizen to know the antecedent of the election candidate – a right that has been made available to the citizens by the two landmark judgments of the apex court in succession - *Association for Democratic Reforms* (2002) and *People's Union for Civil Liberties* (2003) – virtually remained unfulfilled for at least more than 50 years after the inauguration of the Constitution that we, the people of India, have given to ourselves?

Speaking referentially, why the returning officer could not reject out rightly the nomination of the election candidate whose nomination paper omitted to provide the requisite information as directed by the court more than a decade ago in the said two landmark judgments?[273] The cryptic response of the Election Commission of India before the three-judge bench of the Supreme Court in *Resurgence India* case is that the returning officer cannot reject "the nomination papers of the candidates solely due to furnishing of false/incomplete information in the affidavits in view of the judgment in *People's Union for Civil Liberties.*"[274]

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272 See, *supra,* part X.

273 As per the directives of the apex court in *Association for Democratic Reforms*, each candidate seeking election to the Parliament or State Legislature is required to furnish information relating to his conviction/acquittal/ discharge in any criminal offence in the past, any case pending against him of any offence punishable with imprisonment for two years or more, information regarding assets (movable, immovable, bank balance, etc.) of the candidate as well as of his/her spouse and that of dependents, liability, if any, and the educational qualification of the candidate.

274 *Supra* note 241at 346 (para 8).

Would the Supreme Court affirm the propounding of a break-through principle for strengthening the democratic fundamental rights of the citizen, and then instantly neutralize the same by making it unenforceable in that very judgment? If so, then the whole exercise of expounding the fundamental constitutional rights would become otiose.

The Supreme Court in *Resurgence India* case has met the concern of the election commission by locating the problematic paragraph 73 of *People's Union for Civil Liberties* (2003), and then showing, through purposive analysis, that the seeming restraint on the power of rejection of the nomination by the returning officer is only contextual, and that nowhere in that para the general power to reject the deficient nomination paper as such is 'barred'; that is, in case blanks left in the affidavit are not filled with requisite particulars even after a reminder, the returning officer is empowered to reject the same.[275]

> What legitimate conclusion may we derive from this experience that devalues, nay denies, the constitutional democratic fundamental rights so painstakingly hitherto expounded by the Supreme Court? How can we resurrect and put them on firmer footing? In my own view, our salvation on this count lies in legislative codification of the un-codified Judge-made law, which is lying embedded in scattered landmark judicial decisions. Since the judge-made law is highly contextual, its abstraction and crystallisation in the form of systematic, coherent and consistent principles requires research prompted juristic handling. This indeed is the work that can be usefully entrusted to the premier research institutes like the Indian Law Institute at New Delhi (ILI). Realizing the sheer volume of work involved in such a project, if undertaken, the ILI may function as a nodal agency, initiating and coordinating the research work in other established academies – like the State Judicial Academies led by the National Judicial Academy at Bhopal.

In short, periodic codification of the un-codified Judge-made law, preceded by sustained juridical analysis, and followed by comprehensive re-statement of the law, is the imperative need of the time. After all, codification is the singular mode of refining and redefining the law through parliamentary debates, discussions and deliberations, eventually representing the cumulative wisdom of society. Such a legislative measure not only averts the possible conflict, confusion or the sway of internal inconsistencies,[276] but also admirably strengthens the whole notion of Constitutionalism and thereby sovereignty of the rule of law.

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275 See, *supra*, footnotes 250-266, and the accompanying text.

276 Invariably, a conflict, confusion or some sort of internal consistency often creeps in either when the court is trying to meet an unprecedented situation by evolving relatively a new principle in order to do justice, or the legislature is employing the non-obstante clause – "Notwithstanding anything contained" – to provide primacy to a policy perspective over the existing one.