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## **FROM ELIGIBILITY TO EXCLUSION: AN ANALYTICAL FRAMEWORK FOR CONTESTING ELECTIONS**

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India is a representative democracy and its representatives are chosen by the people at various levels through elections. Like any other technical job requires some skill, representing the people of a democracy as big as India does also require some basic minimum qualifications and also some conditions under which such representative may be disqualified.

### **Constitutional Provisions w.r.t qualifications and disqualifications**

There are various provisions under the Constitution of India that provide for the qualifications that are required for being elected as a member of parliament or as a member of the state legislative assembly. *Article 84* envisages provisions with respect to qualification for membership of Parliament and states that “a person shall not be qualified to be chosen to fill a seat in Parliament unless he

- a. is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;
- b. is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age; and
- c. possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament

Similarly, *Article 173* envisages provisions with respect to qualification for membership of the State Legislature and states that a person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he

- a. is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;
- b. is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age;

and

- c. possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament.

Similarly, there are provisions in the Constitution of India for the disqualification of members. Article 102 lays down grounds of disqualification for members of the Parliament. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament under Article 102 under clause (1)

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

Under clause (2) of Article 102 it has also been laid down that a person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule. The Tenth Schedule to the Constitution was added by (Fifty second Amendment) Act 1985 and the Statement of objects and reasons said this amendment was to curb political defections motivated by lure of office or other similar considerations which endanger the foundations of our democracy.<sup>1</sup> The remedy proposed was to disqualify the Member of either House of Parliament or of the State Legislature who is found to have defected from continuing as Member of the House. The grounds of disqualification are specified in Paragraph 2 of the Tenth Schedule. The Constitutional validity of the Tenth Schedule was assailed and the Constitution Bench of Supreme Court in *Kihoto Hollohan v Zachillhu and Others*<sup>2</sup> held that Speaker/ Chairman while exercising powers and discharging functions under the Tenth Schedule act as Tribunal and though para 6 of Tenth Schedule refers that the order passed by Speaker is final however the order passed can be subject to judicial review on four grounds : mala fides, perversity, violation of constitutional mandate and order passed in violation of natural justice.

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<sup>1</sup> <https://economictimes.indiatimes.com/blogs/et-commentary/an-overview-on-tenth-schedule-of-the-constitution/>

<sup>2</sup> (1992) 2 SCC 651

Under para 2 of the tenth schedule a member of a House belonging to any political party shall be disqualified for being a member of the House under the tenth schedule on the following grounds-

- a. if he has voluntarily given up his membership of such political party; or
- b. if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention.
- c. An elected member of a House who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the House if he joins any political party after such election.
- d. A nominated member of a House shall be disqualified for being a member of the House if he joins any political party after the expiry of six months from the date on which he takes his seat after complying with the requirements of article 99 or, as the case may be, article 188.

The Supreme Court in *Ravi S. Naik v. Union of India & Ors.*<sup>3</sup> held that words “voluntarily given up his membership” in Para 2(1)(a) of the Tenth Schedule are not synonymous with “resignation” and have a wider connotation. A person may voluntarily give up his membership of a political party even though he has not tendered his resignation from the membership of the party. Also Supreme Court in *G Viswanathan v Hon’ble Speaker Tamil Nadu Legislative Assembly, Madras and Another*<sup>4</sup> held that, in view of explanation to para 2(1) of the Tenth Schedule, an elected member of the House shall be deemed to belong to the political party by which he was set up as a candidate for election, and that even if such member is thrown out or expelled from the party, for the purpose of the Tenth Schedule he will not cease to be a member of the political party that had set him up a candidate and also held that the act of voluntarily giving up membership of the party may be express or implied.

In reference to the question as to when the act of defection took place the Constitution Bench

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<sup>3</sup> 1994 SCC (11) 641

<sup>4</sup> (1996) 2 SCC 353

of the Supreme Court in *Rajendra Singh Rana v Swami Prasad Maurya and Others*<sup>5</sup> held that Speaker has to decide the question of disqualification with reference to the date on which a member voluntarily gives up his membership or defies the whip and it is really a decision ex post facto i.e., disqualification relates back to the date when the act of defection takes place.

The Supreme Court in *Speaker Orissa Legislative Assembly v Utkal Keshari Parida*<sup>6</sup> held that Rules framed in exercise of the powers conferred under Para 8 of the Tenth Schedule cannot override provisions of Para 2 of the Tenth Schedule and further held that not only a Member of the House but any person interested would be entitled to bring to the notice of the Speaker the fact that a Member of the House had incurred disqualification under the Tenth Schedule (in this case all the four Members of the NCP had joined BJD and the disqualification petitions were filed by President of the State unit of NCP).

### **Qualifications under Representation of People's Act, 1951**

In addition to the constitutional provisions discussed above the Representation of People's Act, 1951 (RPA) also contains provisions relating to the qualifications and disqualifications as to the members of the Parliament. Qualifications are covered from Section 3 to 6 of the RPA. Section 3 talks about the qualification for membership of the Council of States. According to Section 3 a person shall not be qualified to be chosen as a representative of any State or Union territory in the Council of States unless he is an elector for a Parliamentary constituency in India. Then Section 4 talks about qualifications for membership of the House of the People according to which a person shall not be qualified to be chosen to fill a seat in the House of the People, unless-

- a. in the case of a seat reserved for the Scheduled Castes in any State, he is a member of any of the Scheduled Castes, whether of that State or of any other State, and is an elector for any Parliamentary constituency;
- b. in the case of a seat reserved for the Scheduled Tribes in any State (other than those in the autonomous districts of Assam), he is a member of any of the Scheduled Tribes, whether of that State or of any other State (excluding the tribal areas of Assam), and is an elector for any Parliamentary constituency;
- c. in the case of a seat reserved for the Scheduled Tribes in the autonomous districts of

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<sup>5</sup> (2007) 4 SCC 270

<sup>6</sup> (2013)11 SCC

Assam, he is a member of any of those Scheduled Tribes and is an elector for the Parliamentary constituency in which such seat is reserved or for any other Parliamentary constituency comprising any such autonomous district;

in the case of the seat reserved for the Scheduled Tribes in the Union territory of Lakshadweep, he is a member of any of those Scheduled Tribes and is an elector for the Parliamentary constituency of that Union territory; in the case of the seat allotted to the State of Sikkim, he is an elector for the Parliamentary constituency for Sikkim;

d. in the case of any other seat, he is an elector for any Parliamentary constituency.

Section 5 envisages qualifications for membership of a Legislative Assembly wherein a person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of a State unless

- a. in the case of a seat reserved for the Scheduled Castes or for the Scheduled Tribes of that State, he is a member of any of those castes or of those tribes, as the case may be, and is an elector for any Assembly constituency in that State;
- b. in the case of a seat reserved for an autonomous district of Assam, he is a member of a Scheduled Tribe of any autonomous district and is an elector for the Assembly constituency in which such seat or any other seat is reserved for that district; and
- c. in the case of any other seat, he is an elector for any Assembly constituency in that State

Section 6 provides for qualification for membership of a Legislative Council which states that one, a person shall not be qualified to be chosen to fill a seat in the Legislative Council of a State to be filled by election unless he is an elector for any Assembly constituency in that State. And two, a person shall not be qualified to be chosen to fill a seat in the Legislative Council of a State to be filled by nomination by the Governor unless he is ordinarily resident in the State.

### **Disqualifications under the RPA, 1951 for Members of Parliament and State**

#### **Legislature**

Section 8 provides for disqualification on conviction for certain offences. It states that a person convicted of an offence punishable under

- a. section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence

of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code; or

- b. the Protection of Civil Rights Act, 1955 (22 of 1955) which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom;
- c. section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962;
- d. sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967);
- e. the Foreign Exchange (Regulation) Act, 1973 (46 of 1973);
- f. the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985);
- g. section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987; or
- h. section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or
- i. section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub-section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; or
- j. section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991; or
- k. section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971; or

- l. the Commission of Sati (Prevention) Act, 1987 (3 of 1988);
- m. the Prevention of Corruption Act, 1988 (49 of 1988);
- n. the Prevention of Terrorism Act, 2002 (15 of 2002), shall be disqualified, where the convicted person is sentenced to-
  - i. only fine, for a period of six years from the date of such conviction;
  - ii. imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

Further the section goes on to say any person convicted for the contravention of any law providing for the prevention of hoarding or profiteering or for any law relating to the adulteration of food or drugs or for any provisions of the Dowry Prohibition Act, 1961 (28 of 1961) and such person is sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release. Also, any person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to under section 8 shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

Section 8A talks about disqualification on ground of corrupt practices. It states that in the case of every person found guilty of a corrupt practice by an order under section 99 (Other orders to be made by the High Court) shall be submitted, as soon as may be within a period of three months from the date such order takes effect, by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period provided that the period for which any person may be disqualified shall in no case exceed six years from the date on which the order made in relation to him under section 99 takes effect. Further clause (2) of Section 8A states that any person who stands disqualified under section 8A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period. Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under subsection (2) of Section 8A, the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion.

Section 9 talks about disqualification for dismissal for corruption or disloyalty. The section states that a person who having held an office under the Government of India or under the Government of any State has been dismissed for corruption or for disloyalty to the State shall be disqualified for a period of five years from the date of such dismissal. It goes on to say that for the purposes of sub-section (1) of section 9, a certificate issued by the Election Commission to the effect that a person having held office under the Government of India or under the Government of a State, has or has not been dismissed for corruption or for disloyalty to the State shall be conclusive proof of the fact provided that no certificate to the effect that a person has been dismissed for corruption or for disloyalty to the State shall be issued unless an opportunity of being heard has been given to the said person.

Further Section 9A talks about disqualification for Government contracts, etc., whereby it states that a person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government. The section then goes on to say that for the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part.

Section 10 then talks about disqualification for office under Government company whereby it states that a person shall be disqualified if, and for so long as, he is a managing agent, manager or secretary of any company or corporation (other than a cooperative society) in the capital of which the appropriate Government has not less than twenty-five percent share.

Section 10A states about the disqualification for failure to lodge account of election expenses whereby it states that if the Election Commission is satisfied that a person

- a. has failed to lodge an account of election expenses within the time and in the manner required by or under this Act; and
- b. has no good reason or justification for the failure, the Election Commission shall, by order published in the Official Gazette, declare him to be disqualified and any such person shall be disqualified for a period of three years from the date of the order.

One of the very important qualifications that is time and again raised as an issue as to why it is

not included into the grounds of qualifications is the requirement of minimum educational qualification to be a member of either house of Parliament or of the state assemblies. The politicians represent our country or states not only in our country but outside too. From Prime Minister to Chief Ministers, all play a key role in handling the grievances of the common citizens and solve their problems soon. A politician is a person who is highly active in party politics, or a person who basically holds an office of profit under the government. They use their knowledge and wisdom in framing the laws and regulations i.e., the actual way in which they want to handle their state or area or country as a whole. Precisely speaking a politician can be anyone who seeks to attain political power in any bureaucratic institute. Their posts and positions vary from executive, legislative or judiciary or national governments. They give speeches to people before voting so that they can gain the trust of the people and also if they win, they carry out various activities for the benefit. India has a quite unique system of politics as compared to the other countries. Politics of necessity has become expert users of the media. Earlier in the 19th century, they used the media as a part of their campaign rather than taking out any rally. Once a politician is elected, he/ she becomes the part of the government who has to deal with the permanent bureaucracy of the non-political members.

### **Conclusion**

The basis to contest elections in India need a scrutinized overhauling with more reason-based approach substantiated by logical reasoning as to why what is needed and why certain things are not necessary. The disqualifications in particular need a stricter approach because the current approach is not enough for people to be taking such disqualifications seriously. One very important qualification that needs to be looked upon in the present times is educational qualifications of a person. It is the general opinion that some minimum educational qualification is needed for the representatives of the country keeping in mind the changing geopolitical needs where one needs to have knowledge of everything that is basic. Of course, there are contrary opinions to this with appropriate reason but I personally think that a country like India which is now independent for more than seventy years can afford to have such basic qualification for its representatives.

The present approach is just too mechanical and needs to be more reason oriented and practical keeping in view the needs of the changing political scenario and the demands of the people in this democracy.