Election Finance as a Challenge to Democracy in India: Legal, Policy, and Institutional Challenges and Responses

By *Jasmine Joseph* and *Daniel Mathew*[*]

Abstract: India has been struggling to regulate campaign finances for long. A more recent addition to the predicament is the phenomenon of 'paid news'. Different institutions, the Election Commission of India (EC) and the judiciary being the most active among them, have tried to address concerns surrounding campaign finance with mixed results. Despite their efforts, brazen over-spending beyond legislative limits has become the norm. This paper addresses the issue of campaign spending and maps out the legal regime administering it in India. The monitoring of campaign finance is legislatively entrusted with the EC. However, actions of the EC are regularly challenged on the grounds of competency to inquire into the specifics of spending. The Supreme Court of India settled the issue of competence of the EC to investigate into campaign spending in *Ashok Chavan v. Dr. Madhavrao Kinhalkar* (Civil Appeal 5044 of 2014, SLP (C) No.29882 of 2011) through purposive interpretation of the relevant provisions of Representation of the People Act, 1951. Yet in doing so it arguably stretched itself to find this solution. Locating the power with the EC has raised further concerns pertaining to institutional limitations, procedural lacunae, necessity to have a clearer legal prescription, and natural justice issues. These are matters ideally to be dealt with by the legislature, which perhaps is unlikely given the lethargy of the Indian legislature. The article will help to understand the legal regime in India on regulation of campaign finance, and give a glimpse of how law is interpreted and managed by relevant Indian institutions. This paper also attempts to detail the practicalities of the working of campaign finance regulation in India and the need to revisit the same for achieving the desired objectives.

***

A. The Background

'Paid news' has been making regular headlines globally, and continues to remain one of the most controversial topics within the realm of honest politics, freedom of speech and expres-

* Jasmine Joseph (Assistant Professor, Tamil Nadu National Law University, jasjosep@gmail.com) and Daniel Mathew (Assistant Professor, National Law University, Delhi, daniel.mathew@nludelhi.ac.in). All weblinks were last accessed on 10 May 2018.

sion, and role played by the fourth estate in building public opinion.[1] The problem lies not just in the use of media to put forward what one commentator calls 'paid news advertisements',[2] instead it touches on the broad powers of the EC to bring to account those who through the use of such means, attempt to subvert the stringent norms of election expenditure[3] and campaigning.

The relationship between campaign expenditure and the extent of sway it generates on election results is an ongoing debate.[4] Countries have taken clear, albeit, different approaches towards regulating campaign spending. Ceiling and control on election finance are ordinarily regulated at two points: (i) the sources of raising political party funding, and (ii) spending in election campaign. There are three basic models followed with regard to campaign funding and expenditure: (a) no control on spending;[5] (b) absolute control;[6] and, (c) partial control.[7] More than 50% of the nations do not have any limits on spending by the candidate in elections.[8] Countries justify limits for multifarious reasons, primary among them being, that spending limits would act as a tool to curb the possibility of corruption that pressure of garnering adequate resources could bring; and eliminating the obstacle that boundless spending places on candidate with less or minimal resources would prevent elec-

1 See Standing Committee on Information Technology to the Indian Parliament, Lok Sabha, Report on Issues Related to Paid News, 15th Sess, No.47, (23 May 2013),http://www.prsindia.org/parliamenttrack/report-summaries/issues-related-to-paid-news-2780/. Also see, Press Council of India, Report on Paid News (30 July 2010), http://presscouncil.nic.in/OldWebsite/CouncilReport.pdf.

2 *P Sainath*, "Yes, we spent money on paid news ads" The Hindu, (30 January 2013), http://www.thehindu.com/news/national/yes-we-spent-money-on-paid-news-ads/article4354575.ece.*Swaraj Thapa*, EC to upload paid news violations on website,The Indian Express (30 January 2013), http://www.indianexpress.com/news/ec-to-upload-paid-news-violations-on-website/1066578.

3 *Conduct of Elections Rules 1961* (India), 1961, Rule 90 prescribes limits for expenditure during elections to Parliament and State Legislatures. It varies depending on whether the elections are for the Parliament or State Legislature, and whether it is big or a small state. The present limit is Rs. 70 lakhs (approx. USD 110,000) for elections for a parliamentary constituency and Rs. 28 lakhs (approx. USD 44,000) for elections for a state assembly constituency in bigger states and Rs.54 lakhs (approx. USD 84,865) and Rs. 20 lakhs (approx. USD 31,432) respectively for smaller states. See *Ministry of Law and Justice*, Notification No. H-11019(3)/2014-LegII, (28 February 2014),http://eci.nic.in/eci_main1/current/ImpIns1_06032014.pdf.

4 *Lori A. Ringhand*, Concepts of Equality in British Election Financing Reform Proposals, Oxford Journal of Legal Studies 22(2) (2002), pp.253-273. *Lott Jr. J R*, Campaign Finance Reform and Electoral Competition, Public Choice 129 (2006), pp.263-300. *Michael S Kang*, Campaign Finance Debate after Citizens United, Georgia State University Law Review 27(4) (2011), pp.1147-1154. See *Kanwar Lal v. Amarnath* (AIR 1975 SC 308) and *Ajit Joy v. Dr. Shashi Tharoor* (El.Pet.No. 6 of 2014, Kerala High Court, 25 May 2015),https://indiankanoon.org/doc/194931297.

5 Germany, Austria andSwitzerland are some examples.

6 India is an example.

7 UK is an example, wherein there is no ceiling on party spending but limits are placed on spending by individual candidate.

8 See International Institute for Democracy and Electoral Assistance, Are there limits on the amount a candidate can spend?,http://ideadev.insomnation.com/data-tools/question-view/562.

tions from turning into an elitist exercise. The pressures that various 'funders' are capable of wielding in a post-election scenario is also highlighted as a reason to limit campaign funding.[9]

The foundational argument of this paper is that the law prescribing expenditure limits in India is disconnected from reality. The legal and structural deficiencies in monitoring election expenditure incentivize political parties to fabricate the expenditure accounts with impunity. Litigations on elections spending are glaring examples. Through the life of one such litigation, this paper, demonstrates the deficiency in the language of the law and how it pans out creating institutional bottlenecks in the regulation of election expenditure in India. Two institutions in India, the judiciary and the EC have taken measures to regulate election expenditures within the existing legal framework. While doing so it has exposed glaring structural inconsistency that of EC being both the investigator and the adjudicator. This is critical in the context of the consequence of the EC's decision that of unseating a democratically elected representative. The paper argues that this calls for redefining of institutional dynamics and prescription of clear procedures.

India has, by law, established a ceiling on spending in elections. Rule 90 of the *Conduct of Election Rules, 1961* prescribes the maximum spending scope.[10] Political parties perennially complain that the ceiling, though revised from time to time, is pegged at unrealistically low levels. Therefore, they seek ways and means to circumvent the regulatory limit. Surrogate advertisement and 'paid news' in the dailies, veiled as regular news articles or features are two such methods. 'Paid news' serve two purposes - exhibiting the image of neutrality and covering up payments which otherwise should have been accounted for advertisement. In the age of social media elections,[11] where the format of election communication taps the potential of fifth estate, it has added another dimension to 'paid news' i.e. Internet 'paid news'. In the recently concluded Legislative Assembly elections of the State of Karnataka, India, social media cells of all major political parties were active.[12] Tools of data analytics

9 The Indian judiciary has also highlighted the potential of pre-election benefactions to transform as post-election promises which in turn effect the implementation of legislations and executive and policy decisions. See *Ajit Joy v. Dr. Shashi Tharoor*, note 4, paragraph 67.

10 See also sections 77 and 123 (6) of the Act.

11 This phenomena, also referred as Internet elections, is said to have demonstrated itself in the 2007 U.S Presidential elections followed by 2010 U.K General Elections. India witnessed its resonance in 2014 Parliamentary general elections. See *Nic Newman*, #UK Election 2010, Mainstream Media and the Role of the Internet: How Social and Digital Media Affected the Business of Politics and Journalism, Working Paper, Reuters Institute for the Study of Journalism, University of Oxford, Oxford July 2010, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Social%2520Media%2520and%2520the%2520Election.pdf.*Gayatri Wani N. V. Alone*, A Survey on Impact of Social Media on Election System, International Journal of Advanced Research in Computer Engineering & Technology (IJARCET) Volume 4 Issue 6 (June 2015), http://ijarcet.org/wp-content/uploads/IJARCET-VOL-4-ISSUE-6-2659-2662.pdf.

12 *Anusha Ravi*, Karnataka Assembly Elections: All is Geek on this Western Front, The New Indian Express (12 April 2018), http://www.newindianexpress.com/states/karnataka/2018/apr/12/karnataka-assembly-elections-all-is-geek-on-this-western-front-1800345.html.

were employed to profile voters and professionals engaged by campaigns[13] to generate and disseminate information often disguised as news to cater to groups or even to individuals. This will also fall in the spectrum of 'paid news'. Even the EC was forced to acknowledge the need to formulate a social media policy in the face of rampant use by the political parties of paid operators to shape public opinion during elections.[14]

The issue of 'paid news' and the ensuing power of EC to disqualify a candidate for misrepresenting election expenditure has been the subject matter of a handful of legal proceedings before the EC and the courts.[15] The recent legal discourse on this subject matter is the disqualification of Narottam Mishra, a Minister of the State of Madhya Pradesh, India by the EC for failure to submit proper election expenditure and publishing 'paid news'.[16] The order of the EC was duly challenged in the High Court which was dismissed affirming the findings of the EC.[17]The operation of the EC order is stayed by the apex court and full magnitude is still to be played out. In this backdrop a closer look at a previous but contemporaneous completed litigation which had been litigated at all levels of Indian judiciary will be beneficial. A Special Leave Petition (SLP) dismissed by the Supreme Court of India (Chavan) dealt with 'paid news' and the fundamental issue of the monitoring of the election expenditure.[18] In this petition, the Supreme Court of India (SC) clubbed two other SLPs

13 *Vidya Ram*, Cambridge Analytica worked 'extensively' in India, and for Congress: Whistleblower tells UK parliamentary panel, The Hindu Business Line (27March 2018), https://www.thehindubusinessline.com/info-tech/social-media/cambridge-analytica-worked-extensively-in-india-and-for-congress-says-whistleblower-tells-uk-parliamentary-panel/article23366308.ece.

14 Election Commission to formulate social media policy soon: O P Rawat, The Economic Times(19 August 2017), https://economictimes.indiatimes.com/news/politics-and-nation/election-commission-to-formulate-social-media-policy-soon-o-p-rawat/articleshow/60126838.cms.

15 See, order of the Election Commission of India dated 20 October 2011, in:In Re: Account of election expenses of Smt. *Umlesh Yadav*, returned candidate from 24-Bisauli Assembly Constituency at the general election to Uttar Pradesh Legislative Assembly, 2007- Scrutiny of account under section 10A of the Representation of the People Act*, 1951*, (20 October 2011),http://eci.nic.in/eci_main/recent/Disqualification_case_Umkesh_Yadav.pdf, and the order dated 13 July 2014, in:In Re: Account of election expenses of Shri Ashok Chavan returned candidate from 85-Bhokar Assembly Constituency at the general election the Maharashtra Legislative Assembly, 2009- Scrutiny of account under section 10A of the Representation of People's Act*,* 1951, (13 July 2014),http://eci.nic.in/eci_main1/current/Ashok_Chavan_order_13072014.pdf.

16 Election Commission of India, Order dated 23 June 2017, http://eci.nic.in/eci_main1/current/narottam_mishra_24062017.pdf. The disqualification is for a period of three years from the date of the order, for the violation of s 10A read with ss.77&78 of the Representation of People Act, 1951. The violation occasioned in the election to the Legislative Assembly of the State of Madhya Pradesh in November-December 2008, the life of which has expired on 2013.

17 *Narottam Mishra v. The Election Commission of India*, MANU/DE/1917/2017.

18 *Ashok Shankarrao Chavan v. Dr. Madhavrao Kinhalkar* Civil Appeal 5044/2014, SLP (C) No.29882/2011http://164.100.107.37/outtoday/SLP%20_C_%2029882%20of%202011%20latest.pdfon appeal from the Delhi High Court decision in *Ashok Shankarrao Chavan v. Madhavrao Kinhalkar* Writ Petition. No.2511/2011, http://lobis.nic.in/ddir/dhc/DMA/judgement/30-09-2011/DMA30092011CW25112011.pdf.

that had identical question of law, namely the width of the power of EC under s.10A of the Representation of the People Act, 1951 (Act).[19]

I. Brief History of the Ashok Chavan Litigation

The litigation in the election matter of Ashok Shankarrao Chavan began in 2009, post the elections to Maharashtra State Legislative Assembly. Chavan won a seat to the State Legislative Assembly and eventually became the Chief Minister. A complaint was filed against him in the EC on 4 December 2009, alleging *inter alia* that the expenditure statements as declared by him suppressed millions spent on 'paid news' as the statement indicated a measly sum of Rs. 5379/- (approx. USD 115) against advertisements, which included full pages extolling Chavan in 25 newspapers, including national dailies. An Election Petition[20] noting substantially similar allegations was filed before the High Court of Bombay, which is the designated Election Tribunal. In the meantime, Chavan had resigned from the State Assembly,[21] and successfully contested the election to the Parliament.[22] The Election Petition was dismissed on 18 October 2012 for want of material facts in the petition. A Civil Appeal[23] was filed against the dismissal, which was also dismissed on 21 January 2013. In the complaint filed with the EC, an order was passed on 02 April 2011 against which Chavan moved the High Court of Delhi, which affirmed the EC order on 30 September 2011.[24] An appeal by Chavan before the SC against the order of the High Court was dismissed on 05 May 2014. Post this judgment, the EC issued an order on 13 July 2014 concluding that Chavan had violated the expenditure disclosure norms and directed him to show-cause why he should not be disqualified. Chavan secured a stay of the EC proceedings from the High Court of Delhi on 28 July 2014. The SC by an order dated 13 August 2014, refused to interfere with the stay but directed the High Court of Delhi to decide the

19 *Madhu Kora v. Election Commission of India* Civil Appeal 5045/2014, SLP (C) 14209/2012, and *Smt. Umlesh Yadav v. Election Commission of India* Civil Appeal 5078/2014, SLP (C) 21958/2013.

20 See sections 80 and 80A of the Act. The expenditure statement of Chavan in the 2009 Assembly elections showed an expenditure of Rs. 4440/- (approx. USD 70) for an election rally featuring Bollywood star Salman Khan. Out of this, Rs. 1500/- (approx. USD 23) was spent on loudspeaker leaving Rs. 2940/- (approx. USD 47) for rest of the organizational expenditure for a meeting attended by few thousands. To put matters in perspective, Salman Khan is one of the most expensive Bollywood stars, and in 2014 was making approximately 50 crores (approx. USD 7 mn) per movie.*P Sainath,* The low cost of high celebrity,The Hindu (10 June 2015), http://www.thehindu.com/opinion/columns/sainath/the-low-cost-of-high-celebrity/article878588.ece.

21 On 9 November 2010, he had to step down on the direction of Indian National Congress party due to allegations of corruption, though he was later part of list of the party candidates for the 2014 Lok Sabha elections.

22 For information on Indian Parliamentary system, see http://loksabha.nic.in/ and http://rajyasabha.nic.in/.

23 Civil Appeal 9271 of 2012.

24 *Ashok Shankarrao Chavan v. Madhavrao Kinhalkar* Writ Petition (Civil) No. 2511/2011.

matter within 15 days. The High Court eventually decided the matter on 12 September 2014,[25] setting aside both, the EC order of 13 July 2014 that found violation of disclosure norms by Chavan and the order to show cause.

The legal battle would have been far from over had the EC preferred to appeal. Meanwhile the State of Maharashtra witnessed another election to its State Assembly on 15th October 2014. The chronology of events not only gives an understanding of the context and proceedings that occurred, but also portrays the time lag between the event and a final judicial determination. Life of a legislature had slipped by without a logical conclusion to a complaint relating to an important aspect of democracy, namely, valid representation.

In this set of legal battles of particular relevance was the proceeding before the SC were Chavan had raised three major issues, namely:

i. *Jurisdiction*: The Election Tribunal had already rejected the Election Petition by the same parties on the same subject matter, which left no residuary jurisdiction with EC to further proceed on this matter.[26]
ii. *Form and substance*: The power of EC under s.10A pertains to verifying the compliance with Act and Rule. It is however limited only to formal requirements (e.g. whether the statement is filed on time) and does not include power to verify the substance of the submission (e.g. veracity of the election expenditure statement).[27]
iii. *Lack of procedure*- a limitation ingrained: The course of action the EC had taken was akin to a trial. It violates Art. 329 (b) of the Constitution of India. Additionally, lack of any statutory rules or procedure to be adopted for the conduct of such an enquiry vitiates the entire enquiry.[28]

The issues involved in the second and third arguments are the focus of this article. This paper attempts an analysis of the power of the EC under the applicable laws to verify accuracy of the election expenditure incurred by a *person* including a candidate. It begins by discussing the specifics of the issue, and how it is currently being tackled under the existing law. It then subjects the existing jurisprudence on this matter to a critical analysis to argue that EC has the power to check the veracity of accounts of election related expenses as submitted by a candidate or any person associated with her. It further isolates certain critical gaps in the law that are necessary to be plugged if the existing law is to be of any relevance in curbing the menace of money power in elections. It concludes by arguing that the judiciary is ill-equipped for sealing these gaps and the solution continues to reside with the legislature.

25 *Ashok Shankarrao Chavan v. Madhavrao Kinhalkar*, Writ Petition (Civil) No. 4590/2014,http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=143852&yr=2014.

26 *Ashok Shankarrao Chavan,*note 18, paragraph 59, resolves the issue and holds as untenable the argument that a complaint under s.10A cannot be pursued since an election petition on the issue had been rejected for want of particulars.

27 Ibid, paragraph 103.

28 Ibid, paragraph 86.

B. The Problem

I. Eye of the storm

At the eye of the storm is the power of the EC under s.10A of the Act. The provision[29] empowers the EC to disqualify a person from holding a seat in legislature or running in future elections for a period of three years if they - (i) fail to lodge accounts of election expenses within the stipulated time period and in specified manner; and (ii) on the occurrence of such failure, are unable to provide a justification.

What understanding does one accord to this section? A plain reading seems to suggest the following – (a) every candidate is required, within a time and manner specified[30] by the EC, to file an account of her election expenses with the EC; (b) a candidate who fails to make such disclosure has to provide adequate and sufficient reasons to the EC justifying such failure; and (c) if the EC finds such reasons to be inadequate then it has the power to disqualify such a person.

Implications of this power therefore are the following – (a) it does not matter whether the candidate won or lost the elections, the term used is *a person*.[31] So if she did contest the elections then accounts of election expenses incurred have to be filed, making this requirement obligatory in nature. (b) Since the term used is *justify*, determination of adequacy and sufficiency of reasons for delay in or failure to disclose are sole prerogative of EC subject to broad constraints as noted in *Conduct of Election Rules, 1961*, Rules 89 and 90. (c) Finally, determination of point (b) cannot be one-sided i.e. bearing in mind the penalty of three years disqualification, the persons accused has to be given an opportunity to present their case. Failure to accord due opportunity would violate principles of natural justice. Principles of natural justice are an integral part of rules governing administrative decision-making,[32] and as such actions of EC would be governed by it. In short, EC has the power to conduct an enquiry while reaching a conclusion whether the failure to lodge accounts was 'justified'.

29 Section 10A. Disqualification for failure to lodge account of election expenses. — "*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.*".

30 The Conduct of Election Rules, 1961 provide the procedural format for the actions of EC.

31 Even though the term used is person, disclosure would have relevance only in the case of a candidate. In other words obligation is on the candidate in respect of all persons attached with him.

32 *Maneka Gandhi v. Union of India* [1978] 1 SCC 248.

II. A Gordian Knot?

Difficulty however arises when one attempts to locate within this section, the power of the EC to verify the accuracy of the disclosure. It is imperative that this question is viewed not just as concerning the powers of the EC rather from the perspective of constitutional requirements and larger interests of democracy.

The Constitution of India provides that a person can be disqualified to be an elected representative if so, found under any law made by the Parliament.[33] To put it simply, a person cannot be a member of the Parliament if an existing law pronounces her ineligible from being so, for instance, she contravene an obligation imposed upon her by the law. Therefore, it becomes essential to determine not only the existence of an obligation but the true nature and purport of the obligation, and the specific duties it imposes upon a person desirous of becoming a member of the Parliament.

The Act imposes a multitude of obligations on a candidate. The focus here is on one singular obligation - disclosure of election expenses under s.10A. A pertinent question to be asked is whether that obligation requires the person to make an accurate disclosure. When viewed in context of the powers of the EC, this question translates into asking, whether the EC, operating under s.10A of the Act, has the power to *verify the correctness* of the disclosure made by a candidate regarding her election expenditure? Herein lies the Gordian knot of s.10A, which could be categorised into the following concerns:

a) *whether* under s.10A the candidate is required to make an accurate/correct disclosure;
b) *whether* the term *person* includes, within its fold in addition to the candidate and/or his electoral agent, all who are associated with and/or act on behalf of the candidate (surrogate spending);[34] and
c) *most importantly*, whether EC has the power to scrutinize correctness of disclosure made by a candidate.

The answers to these questions are important since an affirmative answer implies that filing of inaccurate accounts would violate the mandate of the Act. Such violation in turn would disqualify her from being a member of the Parliament since such disqualification would fall

33 Constitution of India 1950 Art. 102(1)(e). Disqualification from State Legislatures is under Art. 191(1)(e).

34 Surrogate spending is a phenomenon whereby the candidates attempt to bypass the upper limit of spending in elections often through spending by persons other than the candidate including his election agent. Act, ss. 77 & 127A and *Indian Penal Code, 1860*, s.171H are relevant provisions. For a brief discussion on surrogate spending in India, see *VS Rama Devi and SK Mendiratta*, How India Votes: Election Laws, Practice and Procedure, 2nd ed., New Delhi 2007, pp.966-976.

within the ambit of Art. 102(1)(e).[35] The Indian Supreme Court in the Ashok Chavan's case or more notoriously referred to as the *Paid news* case sought to address these questions.[36]

C. Not the concern of the Election Commission: An ill-advised stand

The Union Government in Chavan stirred up a hornet's nest by taking a stand that the EC's powers were limited only to conducting and regulating elections, and therefore it lacked jurisdiction to look into the correctness of disclosures made under s.10A.[37]

An opinion as that advocated above by the Union Government seems to be based on a literal reading of the section, which ostensibly calls only for a disclosure. Reasons become relevant only in the event of non-disclosure, so mere disclosure should be sufficient compliance with the requirements of the provision. Arguing on these lines, an attempt by the EC to go into the *adequateness*, *sufficiency* or *correctness* of the disclosure itself, the government urged, would be overstepping the boundaries of the powers accorded to it under the Constitution and other relevant legislations.[38]

D. Understanding existing law: Omission of clear expression

The elections, the backbone of a democracy, should be free, fair and accord equal opportunity to all to contest. Sadly, this remains a utopian idea, with reality distant from the ideal. Results of an election are contingent on many variables, and arguably money is one such

35 As was noted by Chandrachud CJ, in the *Election Commission v. NG Ranga* [1979] 1 SCR 210, paragraph 9 – "*A declaration of disqualification made in pursuance of power conferred by Section 10A is a declaration made by the Election Commission under a law made by Parliament. It, therefore, attracts Article 102(1)(e) and consequently Article 103(1) of the Constitution*.".

36 *Ashok Shankarrao Chavan,*note 18. See also *P Sainath*, Is the 'Era of Ashok' a new era for 'news'?,The Hindu (5 January 2010), http://www.thehindu.com/news/national/article56964.ece, and *P Sainath*, Paid news pandemic undermines democracy,The Hindu (10 May 2013),http://www.thehindu.com/opinion/columns/sainath/paid-news-pandemic-undermines-democracy/article4699679.ece.

37 Editorial, Dangerous for democracy, The Hindu (21 March 2013),http://www.thehindu.com/opinion/editorial/dangerous-for-democracy/article4530365.ece. See also *P Sainath*, EC can't disqualify candidate over poll accounts, paid news: Government,The Hindu(20 March 2013),http://www.thehindu.com/news/national/ec-cant-disqualify-candidate-over-poll-accounts-paid-news-government/article4526694.ece. What is strange about Union of India's stand is that it chose to remain silent when the Election Commission operating under s.10A disqualified Ms. Umlesh Yadav for lodging incorrect accounts. One could safely assume she did not carry enough political clout (belonged to Rashtriya Parivartan Dal, a state party) to be able to marshal resources of the state to come to her rescue. The disqualification order could be found at http://eci.nic.in/eci_main/recent/Disqualification_case_Umkesh_Yadav.pdf. See also, *N Gopalaswami*, Doublespeak on electoral reforms,The Hindu (16 April 2013),http://www.thehindu.com/opinion/lead/doublespeak-on-electoral-reforms/article4624069.ece. This stand of the Union Government is reminiscent of the argument taken by the respondent in leading case on this issue *LR Shivaramagowda v. TM Chandrashekar* [1999] 1 SCC 666, paragraph 22.

38 See, *Ashok Shankarrao Chavan,*note 18, paragraph 12, for detailed arguments of Union of India.

variable that can have an enormous impact on the outcome of elections.[39] The fact that a number of multi-millionaires is increasing in successive Lok Sabha makes it a potent conclusion.[40] It is virtually impossible to make an empirical analysis on the ratio of winning-to-spending in elections in India as election expenditure is often under-declared, yet journalistic sources vouch for the connection.[41] One could thus argue that, unequal money power resulting from black money and other corrupt sources of the campaign fund, places free and fair election in a vulnerable position.

I. Abrasive effect of money on democracy

> *"If you are worth over Rs. 50 million, you are 75 times more likely to win an election to the Lok Sabha than if you are worth under Rs. 1 million."*[42]

The role of money and muscle power in deciding the fate of elections in India has long been lamented.[43] To counteract this growing influence, repeated attempts were made to impose limits on spending in elections. The danger created by evasion of spending norms was succinctly detailed in the decision of the SC in *Kanwar Lal Gupta v. Amar Nath Chawla.*[44] The concern was of denial of equal voice and the potential abrasive effect on equal representation.[45] Money power, according to the court, denies level playing field, and results in exclusion of political parties or individuals with limited resources from the fray, in turn making

39 *P Sainath*, The age of aam crorepati,The Hindu (20 June 2009),http://www.thehindu.com/todays-paper/tp-opinion/the-age-of-the-aam-crorepati/article264892.ece.

40 Ibid. An analysis of the number of millionaires in Lok Sabha of 2004 and 2009 shows an increase of 98%.

41 Ibid.

42 Ibid.

43 For instance, see generally, *Law Commission of India*, Report on Reform of the Electoral Laws, No. 170 (29 May 1999) http://www.lawcommissionofindia.nic.in/lc170.htm#CONTROL OF ELECTION EXPENSES. See also, *MV Rajeev Gowda & E.Sridharan*, Reforming India's Party Financing and Election Expenditure Laws, Election Law Journal: Rules, Politics and Policy11(2) (2012), pp. 226, 232. The Union budgets of 2017 & 2018 have also suggested certain measures to streamline campaign contributions and bring in transparency. For a critical analysis, see *Yogendra Yadav*, The Devil is in the fine print, The Hindu (16 February 2017), http://www.thehindu.com/opinion/lead/The-devil-is-in-the-fine-print/article17308089.ece.

44 AIR 1975 SC 308, paragraphs 9 and 10.

45 The idea of equal representation has two aspects to it, *One*, ability of the candidate to reach out to voters so as to inform them of her election manifesto, and *two* the ability of the voters to engage with the candidates to clarify, and debate on various issues of importance. Opportunity of debate and discussion provides for a platform where issues of importance and political response thereof from different candidates could be discussed. Lopsided campaigning jettisons this critical aspect. The consequences could be extremely dangerous especially where elections are fought on caste and religious lines. Excess money also changes the very nature of how a voter views the process. If money is offered as an inducement she might readily accept it, on the justification that the politicians amassed fortunes by running dry public coffers. So the money being offered to voters is essentially public funds, and therefore there is nothing wrong in accepting it. This generates a vi-

the process anti-democratic. Ability to marshal disproportionately large resources allows a potential candidate to blank out opposition through a prodigious election campaign involving all available paraphernalia. This ability translates into significantly greater and better opportunity to reach and influence the electorate thereby having the prospect to materially alter the outcome of the election.

Such heavy advantage induces higher electoral expenses, leading to a point where the high cost of contesting elections eliminates all except those with deep pockets. This would force the candidates to explore multiple sources of funds, including unaccounted money, often leading to ruinous consequences. The old adage that there is nothing called a free lunch works perfectly here. Be it criminal or commercial source, all who provide funds expect a high return on their investment. This, in turn, is a prescription for corruption, favouritism and compromised governance including buying of legislations.[46] The National Commission to Review the Working of the Constitution 2001, concisely summed it up when it observed "*Electoral compulsions for funds become the foundation of the whole superstructure of corruption*".[47]

II. Focus on India: Sections 77 and 78 of the Representation of Peoples Act 1951

To offset the effect of money power on democracy, the Act*inter alia* utilizes three specific provisions, namely, ss. 77, 78[48] and 10A. An analysis as to what these sections attempt to achieve will be instructive.

Sections 77 and 78 are aimed at ensuring proper accounting of election expenses by a candidate and her election agents. Disclosure of the accounts and keeping the expenses within the prescribed limit of expenditure are the mandates of the above sections. The operation of these sections could be understood in the following manner: (i) ss. 77 & 78 stipulate that accounts have to be duly maintained and shall not exceed the prescribed limits for *all candidates*; (ii) s.123(6) delineates the actions that could be considered as corrupt practices and s.100(i)(b) makes corrupt practice by a *returned candidate* a ground for dis-

cious circle of expectations, offer and acceptance of money as inducement to vote for a certain candidate.

46 There have been instances when funders have not stopped with economic concessions; instead they have played a direct role in the formulation of laws and policy of the state. See for instance *Devesh Kapur* and *Milan Vaishnav*, Quid Pro Quo: Builders, Politicians, and Election Finance in India,Centre for Global Development Working Paper no. 276, (7 December 2011)https://www.cgdev.org/sites/default/files/Kapur_Vaishnav_election_finance_India-FINAL-0313.pdf. See also, *Charles Riley*, Can 46 Rich dudes buy an election?,CNN Money(26 March 2012), http://money.cnn.com/2012/03/26/news/economy/super-pac-donors/index.htm. See also, *S.R.Sen*, Vote Power and Lobby Power, Economic and Political Weekly 29(33) (1994), pp.2138-2140.

47 *National Commission to Review the Working of the Constitution*, A Consultation Paper on: Review of Election Law, Processes and Reform Options (8 January 2001), http://lawmin.nic.in/ncrwc/finalreport/v 2b1-9.htm. Paragraph 14.2.

48 For a lucid exposition on reasons for inclusion of sections 77 and 78 in the elections laws of India see *Kanwar Lal Gupta v. Amar Nath Chawla* [1975] 3 SCC 646.

qualification; and (iii) s.100(i)(d)(iv) specifies contravention of the provisions of the Constitution as well as the Act, rules or orders made thereunder as a ground for disqualification of a *returned candidate*.

The above analysis leads to three deductions. *One*, it becomes imperative to inquire whether the accounts are correctly submitted and have not crossed the bar set for expenditure. This invariably, will require a mechanism to investigate and determine the same. Also as the impact of determining a violation will be vacation of seat, the claims of justice would necessitate clear specification of procedures. *Second*, since the impact of violation of legal norms falls only on a returned candidate, there will be no incentive for any other candidate to file correct accounts. *Third*, this will leave persons other than the candidate and her electoral agents incurring expenditure on behalf of the candidate outside the scope of these sections. All others even though intimately related and working for and on directions or under express/implicit authorization from the candidate are excluded.[49]

The catch, however, lies in the manner in which the SC has interpreted the interplay of ss.77 and 123(6). The apex court has observed that a corrupt practice for the purposes of the Act occurs only in the instance of failure to limit election expenditure within prescribed limits i.e. failure to act in accordance with s.77(3). It has nothing to do with the accuracy or correctness of the declaration made under ss. 77(1) & (2) read with 78.[50] Accordingly the failure to file accurate accounts has been held to be not a corrupt practice.[51]

Such an interpretation is clearly counter-intuitive. That is so because limits to election expenditure have been fixed to attain certain public policy goals. If a false disclosure indicating expenditure within prescribed limits, while the candidate has expended much more, were to be accepted as sufficient compliance, it would make a mockery of the law. In fact, why would any candidate declare that they incurred more than the prescribed limit when such declaration would lead them into trouble? Nothing prevents a candidate from filing sham accounts and getting away with it. That possibly could not have been the intention of the legislature.

A commonsensical reading would therefore suggest that under ss.77&78, the question of whether a candidate has remained within prescribed statutory limits could be properly assessed only on the determination of whether she has filed accurate accounts. That seems to be a reasonable conclusion to make, especially when s.77(1) talks of the need to maintain

49 *Kanwar Lal Gupta v. Amar Nath Chawla* [1975] 3 SCC 646. Even the National Commission for Review of Working of the Constitution had suggested that since expenses could be made by or on behalf of the candidate, even such expenses had to be accounted for (Paragraph 4.14.2). Currently this aspect remains an unresolved matter. Election Commission through its instructions on the conduct of elections has made an attempt to curb surrogate advertisement by bringing it under the purview of s.127A of the Act. See *Election Commission of India*, Model Code of Conduct: Compendium of Instructions, (31 August 2013, http://eci.nic.in/eci_main/ElectoralLaws/compendium/VOL-III_24022014.pdf, see instruction no. 49.

50 *Dalchand Jain v. Narayan Shankar Trivedi* [1969] 3 SCC 685.

51 *LR Shivaramagowda,* note 37, paragraph 18.

separate and correct account and rules 86 to 90 of Rules set out the process to be followed. Mere statement of the candidate cannot be taken as gospel truth. The lack of verification generates an incentive for the candidate to be dishonest and spend beyond the prescribed limit.[52]

The law as it now stands in *Dalchand Jain*,[53] and *Shivaramagowda*[54] in view of the elucidation by the apex court, is that s.123(6) deals with corrupt practices and does not take into account failure to maintain and file true and correct accounts, a requirement noted in ss.77&78. This remains a major lacuna in law. The corrupt practice is reduced to the action of spending more than the limit. The integrity of the accounts is in a relegated position not making it a corrupt practice in itself. It is only in s.10A that a penalty is prescribed for the inaccurate book-keeping of election expenses.

Interestingly, the SC in Chavan makes a conjoint reading of ss.10A and 77(3). The requirement under s.77(3) that the candidate shall not incur excess expenditure requires an ascertainment of the veracity of the expenses. The same action of ascertainment under s.77(3) can be used for the purpose of s.10A. Therefore, to court, s.77(3) had twin objectives. The attempt of the court clearly was to clothe s.10A with the power to enquire into the correctness of the account submitted and the same was located in s.77(3) read with rules 86 to 89. The fact of the EC finding submission of incorrect accounts but within the prescribed limits will not attract the offence of corrupt practice under s.123(6), was neither a subject matter before court nor the court looked into previous judgments that restricted the scope of s.123(6).[55] The judgment of the High Court of Delhi in Chavan reflects similar reasoning.[56] A support is also sought to exonerate Chavan, referring to the arithmetic, that "*[a] margin of Rs.3,14,808/- (approx. USD 4947.5) was still available with the petitioner to incur further expenditure up to the ceiling limit*". The court went on to observe that even if an accepted *pro rata* share was added to the account of Chavan it would not cross the limit.[57] This creates a situation that as long as a candidate is within the permissible limit in overall spending, submission of incorrect accounts has no implication, i.e., s.10A is treated as a gatekeeper provision only to verify whether accounts are submitted and done so in time.

52 This phenomena has been noted by many commentators and finds a mention in the draft report by *Core Committee on Electoral Reforms*, on Summary of Recommendations Made in Regional Consultations(28 February 2011),http://lawmin.nic.in/legislative/ereforms/prs1.pdf. The report suggested that the present levels of permitted expenditure were unrealistically low and either should be raised or completely done away with.

53 Note 50.

54 *LR Shivaramagowda*, note 37.

55 *Ashok Shankarrao Chavan,*note 18, paragraph 48.

56 *Ashok Shankarrao Chavan v. Madhavrao Kinhalkar*, note 25, paragraph 235.

57 Court concluded the expenses incurred as alleged by the petitioner in the initial proceeding before EC against Chavan failed to be proved as authorised expenditure. See, id., para 225.

E. A closed chapter? Reading the three sections together

It is to plug this loophole that one looks intently at s.10A and seeks to determine whether the EC has the power to verify the accuracy of information disclosed. It could well be argued that this matter is no longer *res integra* in view of the decision of the SC in *LR Shivaramagowda v. TM Chandrashekar,*[58] wherein it was held that the EC has the authority under s.10A to verify the accuracy of account of election expenses lodged by the candidate. The position has been reiterated in Chavan.[59] S. 10A is enacted to ensure that the contesting candidate has no option but to submit the accounts in the manner required by law and not in a manner she desires, according to Chavan.

The Delhi High Court in the Chavan's case[60] has followed the view expressed in *Shivaramagowda* and reiterated that s.10A embraces within it the power to verify the correctness of the account submitted and not just the default check of timely submission.[61] The reasoning was found by the court in the language of the Act, the need to file a 'correct account' and the stipulation in the Rule that it has to be 'in the manner required'.[62]

However, one must be cautious to cite the *Shivaramagowda* decision as a precedent. The issue before that court was whether failure to comply with s.77(1)&(2) would tantamount to a corrupt practice under s.123(6). The court responded in the negative. Its observations on s.10A were purely in response to a suggestion by the respondent that s.10A merely dealt with declaration and not question of accuracy, and therefore it was necessary to locate the power of the EC to verify accuracy of declaration under ss.77 & 78.[63] Since the scope of powers of the EC under s.10A was not the material question before the court, its observations could best be regarded as obiter, highly persuasive but nevertheless obiter.

An additional complication would be that if the EC has the power to establish veracity under s.10A, would natural justice permit the EC to be both an investigator and adjudicator in the same matter?[64]

The above analysis leads us to add two more strands to the Gordian knot constructed above:

a) *what* is the interrelationship between ss.10A, 77, 78, 123(6) and 100(1)(d)(iv); and
b) *is there* a potential overlap of the consequence noted under s.10A on the one hand and ss. 77, 78, and 100(1)(d)(iv) on the other for crossing the limits on election expenditure?

58 *LR Shivaramagowda,* note 37, paragraph 22.

59 *Ashok Shankarrao Chavan,*note 18, paragraph 78.

60 *Ashok Shankarrao Chavan v. Madhavrao Kinhalkar*, note 25.

61 See also *Madhu Kora v. ECI,* Writ Petition (Civil) no. 4662/2011, paragraph 13.

62 Rule 89(i)(c), (2) and (4) of the Conduct of Election Rules 1961.

63 *LR Shivaramagowda,* note 37, paragraph 18.

64 A more detailed discussion is done on this matter under the heading Institutional Bottleneck: A way out. See Heading G.

F. Light at the end of the tunnel: A counter point

Before we begin exploring the above noted ideas, it is necessary that we first understand the working of s.10A. There are two possible ways of reading s.10A.

I. The overlap argument

One, the legislature merely emulated the existing statute. The law through ss.77&78 proscribes excessive expenditure and incorrect keeping of accounts by *any contesting candidate*. S. 10A is a mere reiteration of the same. Such a reading would lead to a potential overlap between ss.77&78 and 10A. An overlap could not have been the intention of the legislature[65] and therefore one could argue that ss.77&78 pertains to all candidates and their electoral agents, and further funnels down the impact only on returned candidate; while s.10A being a residual provision would cover all other individuals including an unsuccessful candidate. The actual obligation of filing disclosure does not vary, instead only the target varies. This connects amiably with the argument that s.10A merely discharges a gatekeeper's role in an attempt to cleanse the elections of the menace of money power. The power in s.10A therefore is only the threshold check of whether accounts are submitted and done so within the prescribed time. This minimal command does not include within it any power to investigate and determine the veracity of the account statement. The obvious conclusion would then be that the EC has no power to investigate and disqualify a candidate for filing incorrect returns.

The *alternate* reading[66] of s.10A would argue that the section is an elaborate provision comprising within it both the description of violation and related punishments[67] with the widest possible application as it uses the expression *a person* to bring within its net the objects of the section. Sections 77&78 on the other hand, enjoin certain obligations on all the candidates. It does not carry within it the implications/consequences of violating its mandates. The consequences of violation are located in ss. 123 (6) and 100 (1)(d)(iv), which pertains only to returned candidates. Most importantly application of these sections will on-

65 The canon against surplusage is an established principle in interpretation of statutes. See, *Vijaya Bank v. Shyamal Kumar Lodh*, [2010] 7 SCC 635.

66 Before one progresses to the alternate reading that could be accorded to s.10A, it is necessary to flesh it out in slightly greater detail the overlap argument. At the core of this argument lies a reading of the interrelationship between ss.10A, 77 and 78.These three sections on a fundamental level deal with the same subject matter namely election expenditure and limits thereon. Sections 77 & 78 find a place in Part V, Chapter VIII detailing Conduct of Elections and in particular election expenses. S. 10A on the other hand is featured in Part II, Chapter III detailing Qualifications and Disqualifications, in particular disqualification from being a Member of Parliament and state legislatures. S. 7(b) in the same chapter defines disqualification as "… *disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State*.".

67 The term 'self-contained' would imply that concerned section both describes an offence and prescribes the punishment for it.

ly attract vacation of seat but not the continuous three years disqualification to contest. This again will leave out candidates other than the returned candidate from the consequences of violation of ss.77&78. It should be noted here that the Act is silent on whether in the ensuing elections for the vacated seat, the removed candidate would be permitted to re-contest.[68]

Therefore, at the first flush one may tend to conclude that s.10A takes into account candidates other than the returned candidates and arguably other persons spending for the candidate. Such a conclusion however creates two hurdles - (i) the disqualification mentioned in the definition is both for contesting in elections and from holding the post once found to be in violation of the provision. Therefore s.10A implicates both the returned and other contesting candidates and creates an overlap. (ii) A returned candidate will be de-seated under ss. 123(6) and 100, and then will further be disqualified under s.10A for the next three years. This entails treating a returned candidate and others differently for the same offence. The returned candidate is punished twice, read graver, for committing the same offence as others.[69]

The alternate reading seems to create two overlaps in so far as a returned candidate is concerned - (i) *overlap of offence* - single offence of violating the mandate of keeping and filing of accurate election expenditure making a returned candidate amenable to two sets of sections (ss. 10A as well as 123(6)&100); and (ii) *overlap of the punishment* - disqualification from holding seat for returned candidate in ss.10A and 100.

Such a reading has the impact of making part of the sections otiose, which runs contrary to established canons of legislative interpretation. The fundamental norm is that the legislature is not expected to speak without purpose and waste words. Therefore, an attempt has to be made to read the provisions in a way that the result harmonizes the imperatives of the provisions.

II. Purposive interpretation

Another way would be to interpret the provision purposively. The starting point would be an attempt to understand the reasons that prompted inclusion of a provision in the nature of s.10A in the Act. The purpose or reasons could be found in parliamentary debates, which unfortunately are not available in the public domain.[70] Two alternate authoritative sources that could be referred to are the Report of the National Commission to Review the Working

68 If the punishment were only removal from seat with nothing more attached to it, then the logical conclusion would be that such a candidate would again be able to contest for the same seat from which she was removed whenever the elections are next called.

69 When the offence is the same, would two separate treatment be justified on the basis of objective classification?

70 The present s.10A is a revised consolidated version of earlier sections. 7(c) and 8(b) of the Act. Section 7 (c) calls for a disqualification for 5 years, which is reduced to 3 years in s.10A, and s.8 (b) states the commencement of disqualification under clause (c) shall not take effect until the expiration of two months from the date by which return of election expenses ought to have been lodged or of such longer period as the Election Commission may in any particular case allow. The

of the Constitution, and the Background Paper on Electoral Reform, circulated by the Ministry of Law and Justice. Both noted the increasingly baneful and corrupting influence of money on elections in India at various levels and raised concerns regarding lateral and surrogate spending by persons other than agent or candidate on behalf of candidate.[71]

If the above is indeed the case, then purportedly s.10A was put in place to ensure that the election expenditure incurred by the candidate, and any person associated with him, did not cross the prescribed statutory limit. The inevitable conclusion then would be that the EC is under an obligation to check the veracity of the disclosure made by the candidate. A conjoint reading of ss.77, 78, 10A and rules 86 to 90 gives a clear indication that the EC has the power not only to verify threshold requirements like the time of filing but also check whether truthful statement have been filed. Rule 89 mandates the District Election Officer to report to the EC within a prescribed time, details regarding whether candidates have filed returns in time and in the manner required by law. It is implied that *any filing of accounts* cannot be treated as filing *in a manner as required by law*. *Shivaramagowda* and *Madhu Kora*[72] reiterate the position that the provision definitely means a true and correct account. It is therefore reasonable to argue that requirements of s.10A cannot be limited to form alone and unambiguously involves a question of substance. The SC in Chavan reaffirms the idea by noting that the high expectation cast on the EC by the citizenry mandates the EC to conduct a thorough enquiry about the details and correctness of the account submitted by a candidate.[73] The court also reposes on the constitutional obligation cast upon the EC as the guardian of democracy. Thus clearly, in view of the fact that the EC is entrusted with the powers of superintendence, control and issue direction for the conduct of elections, s.10A needs to be given a liberal interpretation.[74]

To put it differently, s.10A arguably provides for the possibility of an audit through adoption of a two-pronged strategy to counter the above noted issues - (a) empower the EC to audit the submitted accounts,[75] and (b) extend the net to cover not merely the candidates or his agent but also those working for and on her instructions/authorization. To reach such a conclusion, it may require purposive construction of the provisions, as the language does not explicitly talk of 'correct accounting' and 'the ECs power to investigate.'

conclusion therefore would be that the legislature found 5 years of disqualification to be harsh and reduced the same and that a clear vesting of power with EC is made in s.10A.

71 To curb this practice the Commission to Review of the Working of the Constitution recommended a mandatory audit of election related expenses incurred by all the candidates and not merely the returned candidate or his electoral agent. *National Commission to Review the Working of the Constitution*, A Consultation Paper on : Review of Election Law, Processes and Reform Options (8 January 2001),http://lawmin.nic.in/ncrwc/finalreport/v 2b1-9.htm, paragraph 4.14.3.

72 Incidentally, Madhu Kora is an appellant in the proceeding before the Supreme Court. See *Madhu Kora,* note 61.

73 *Ashok Shankarrao Chavan,*note 18, paragraph 44.

74 Ibid.

75 Interestingly the very same Article, i.e. Art 324 was utilised by the apex court in *Common Cause v. UOI* AIR 1996 SC 3081 to arrive at a diametrically opposite conclusion, paragraph 23.

The position of the Union Government in Chavan to the contrary is dangerous, since it leads to the conclusion that even a perfunctory declaration is declaration enough for the purposes of s.10A so long as it is filed and done so within the time limit.

G. Institutional bottleneck: A way out

The problem is further compounded owing to institutional limitations. If the EC has to check the veracity of the disclosure, it would need access to records, have the ability to conduct an inquiry and marshal necessary evidence. Under the law as it exists, it is not readily apparent whether the EC is authorized to conduct an inquiry for the purposes of s.10A determination. The power of the EC is by implication.[76] Besides, if the EC is to conduct an inquiry, adequate procedural requirements and safeguards have to be clearly laid out. Mere overarching requirement of complying with the norms of natural justice will fall short given the potential of three years disqualification. Greater is the concern as the present situation leaves the EC with the powers of inquiry and determination and that too without clearly defined procedures. All powers rolled into one without a clear prescription is an ideal recipe for arbitrariness and abuse, and therefore an inadvisable policy to follow.

The 255th Report of the Law Commission of India dealt with the Electoral Reforms with a good measure of discussion on election finances.[77] The report suggested submission of an additional account statement by the candidates of contribution received to election funds to EC. It has also proposed corresponding changes in s.10A making filing of incorrect contribution statement equally punishable as filing of an incorrect expenditure statement. It is also the suggestion of the Law Commission to enhance the punishment of disqualification to contest elections from 3 years to 5 years for defaulting candidates. This adds additional responsibilities and roles for the EC.

Having said that, it is not unknown for the EC to act both as an inquiring and adjudicating agency. The EC carries out these functions under the *Election Symbols (Reservation and Allotment) Order 1968*,[78] and while exercising its power under *Constitution of India 1950* Arts 103 & 192.[79] Section 146 of the Act provide for the procedure to be followed while acting under the constitutional obligation of tendering advice to the President or Governor. Though it is not suggested that same procedure could be utilised while conducting an inquiry under s.10A, the example is proffered to reiterate the point that in principle it is not alien for the EC to act as an inquiring and adjudicatory agency in the same matter.

This issue was mooted in Chavan and the court took the following position:[80]

76 The position has not changed even after Ashok Chavan case. *Ashok Shankarrao Chavan,*note 18.

77 Submitted on 12th March 2015,http://lawcommissionofindia.nic.in/reports/Report255.pdf.

78 See, Rules 15 and 16.

79 While advising the President or Governors on the issue of disqualification of members of the respective Houses.

80 *Ashok Shankarrao Chavan,*note 18, paragraph 86.

a) The enquiry under s.10A is not one to prove allegation of corrupt practice as under s.123.
b) The only area of examination to be made under s.10A is with regard to the lodging of the account of election expenses and whether done in the manner and as required by or under the Act. The scope would be as contained in ss. 77(1)&(3) and s.78.
c) The enquiry under s.10A would be *more or less* of a civil nature and therefore, the principles of preponderance of probabilities alone would apply.
d) The aggrieved parties have the option of further proceedings under s.11 of the Act as well as writ remedy.

The question of fair procedure remains unanswered even after Chavan. The ambivalent position of the court about the nature of the procedure itself is an indication of the complexity of the question. The court of course has only attempted to lay down the principles, not the specifics. The issue becomes all the more intricate with the requirement of *Constitution of India 1950*, Arts 103&192.[81] The question of a returned candidate disqualified under s.10A by the EC will come up again before the EC in a call for advisory opinion mandated under Arts 103&192. The enquiry envisaged under s.146 of the Act before rendering an advisory opinion to the President or the Governor becomes futile. It could be argued that the enquiry within s.146 is at the discretion of the EC.[82] Once a process is completed by the EC under s.10A, there is no need for a further enquiry under s.146. Though this is an escape route to preserve the power of enquiry by the EC under s.10A, it results in the loss of a tier of scrutiny before unseating a legislator, who otherwise would have gotten a judicial or quasi-judicial forum and then an enquiry under s.146 by EC. This therefore will result in asymmetry between a candidate who is disqualified, say for corrupt practice, who gets a judicial proceeding and a further scrutiny in the proceeding with the EC if the latter decides to conduct an inquiry, and a person dislodged from seat under s.10A. Even a legislator disqualified for defection by the House gets two different venues to represent her case unlike the proceeding under s.10A. The court in Chavan attempted to secure this loose end by reposing the possibility of writ jurisdiction.[83]

Putting it all together, the issues involved are: (i) The EC is both the inquiring and deciding authority on disqualification; (ii) with no procedural prescription for the EC to follow; and (iii) the EC is the tenderer of advisory opinion in case of disqualification of a sitting legislator, which makes two proceedings before the EC in case of a returned candidate.

One can analyse these three issues one by one. Investigation and adjudicating authority rolled into one is not completely alien to India. Analogous situation could be found in the

81 Arts 103 and 192 deals with decision on questions as to disqualifications of members of Parliament and House of Legislatures respectively.

82 The language used in *Representation of Peoples Act 1951*, s.146 is *" ...[if]the Election Commission considers it necessary or proper to make an inquiry, [...]*".

83 *Ashok Shankarrao Chavan,*note 18, paragraph 50.

functioning of Securities and Exchange Board of India (SEBI).[84] In exercise of its powers[85] the SEBI causes investigations, adjudicates and mete out punishments.[86] The process of the SEBI is that in exercise of its powers it may direct any person to investigate and report to the Board. After enquiry if the Board finds violation or likelihood of violation, it is empowered to issue a cease and desist order.[87] The adjudicating power with the SEBI is exercised through appointing *any of its officers* not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry,[88] who is empowered to impose penalties.[89] In a proceeding before the EC under s.10A, if the EC sits as a quasi-judicial body and less as an investigating or enquiry body, the first issue could be dealt with. But the problem lies in the language of s.10A and in circumstances where there is no complainant, but the EC moves either *suo motu* or on the report by the District Election Officer.

Second issue of lack of procedural prescription can only be addressed by laying down the required procedures. The apex court in Chavan and later the Delhi High Court in the last of the rounds in the same matter highlighted the importance of process of enquiry conducted by the EC. The Delhi High Court quotes the SC and states, "*while conducting such an enquiry, every care should be taken that no prejudice is caused to the contesting candidate. No stone is to be left unturned before reaching a satisfaction as to correctness or the proper manner of lodgement of election expenses. Such enquiry is a meticulous exercise. The enquiry has to be extensive and not be a farce but a true and complete one.*"[90] This reinforces the argument that the duty of the EC is crucial and therefore needs procedural guidance. There is no other alternative but a legislative intervention.

The dual role of the EC in the third issue being the investigator as well as adjudicator under s.10A and later in conducting enquiry and tendering advice to the President on the disqualification of the same returned candidate also reaches a dead end. The situation is trickier as the EC's advisory role is constitutionally prescribed with less or no negotiability. The investigation and enquiry under s.10A are fastened upon the EC and divesting it to another agency will upset the scheme of election laws.

The role of the EC to deal with the menace of money power has to be backed by clear legal prescriptions. It cannot be left to interpretations and inferences. Leaving it with loose ends will only prompt the corrupt to take advantages of the lacuna in the law and the governments to take dangerous democracy-negating stands for instance as adopted by the Union Government in Chavan. At the same time open-ended power with the EC could be a double-edged sword. A biased EC could run amok with unregulated power. It is a very

84 Securities and Exchange Board of India, see https://www.sebi.gov.in/about-sebi.html.

85 *The Securities and Exchange Board of India Act 1992*, ss. 11 and 15 A to H.

86 Ibid, s.11C, s.15 I, s.15 A to H respectively.

87 Ibid, s11D.

88 Ibid, 15I(1).

89 Ibid, 15I(2).

90 *Ashok Shankarrao Chavan v. Madhavrao Kinhalkar*, note 25, paragraph 232.

valid argument that the EC is attempting to cleanse the elections from unprecedented levels of corruption and therefore requires its hands to be strengthened. Having said that, power without procedural prescriptions could well place even the most well-intentioned actions of the EC in the line of fire. Resultant consequence will be that much of the resources and time of the EC will have to be spent defending its actions in the courts of law. Chavan and Narottam Mishraare are cases in point. An action commenced by the EC has done multiple rounds in courts and would not have been over in the event of an appeal. The fact that legal proceeding seldom ends in the life of a House incentivizes the candidate to take risks. It is therefore argued that clarity in the vesting of power with the EC to counter money power and a prescription as to how the EC shall proceed in imperative.

H. Conclusions

A reconnaissance of the capabilities and limitations of the EC as the monitor of election expenditure in India was the central objective of this article. The predicament of the EC is enlarging given the advent of Internet 'paid news', which require a new set of skills of gatekeeping. Despite having an unequivocal ban on overspending on elections, its infraction has become the norm. Legal proceedings to challenge violation of the law prohibiting excessive spending have exposed certain vulnerabilities of the law and institutions handling the law. Chavan's case for example has opened multiple vistas for consideration.

The main issue stems from the power of the EC to scrutinize the accuracy of election expenditure under s.10A. An attempt to understand the implications of s.10A revealed other related issues. When the law requires the expenditure to be within a limit and prescribe disqualification for violation of it, there must be an institution legally capable, equipped with procedural rules, and duly assigned with the task of oversight. The review of existing law however highlights lacunae, overlap and raises questions of natural justice of EC being both investigator and decision maker. The power of the EC to verify the veracity of the accounts is implied and has to be purposively read in. With the concerns laid out and calling for resolution, and the scope for a reconciled reading of the provisions to finally resolve the issues raised in this article looking grim, the ball is now firmly with the legislature. The judiciary has already stretched itself to come up with a solution in Chavan. It is interpretative dexterity that helped the court to locate the power to probe into election expenditure statements in s.10A. Even though the judiciary in Ashok Chavan was alive to the issue of a lack of procedural guidelines in s.10A and concomitant concerns of natural justice, it left the matter open with the sanguineness that the EC will follow all the principles of natural justice and should there be any violation there was always the road to writs. Any further would attract the critique of overstepping and transgressing into the legislative province.[91] As what was left for

91 Squaring an argument that reading power of enquiry will be sidelining the plain meaning of the section, the court said, "[w]*e have only analyzed the said provision for the working of which Rules have also been framed and by reading Section 10A along with the said Rules, and we wish to point out that the many expressions and ingredients set out in the Section itself, read along with Rules*

the judiciary to do was to prescribe procedural rules for dealing with s.10A proceedings by the EC. The unease concerns not merely the power of interpretation and accommodation of the relevant provisions,[92] but the larger interests of democracy to extend electoral equality and have an unpolluted turf to fight elections, and at the same time to ensure due process in determining questions of disqualification under s.10A. Though the judiciary could find a solution by conjoined reading of the sections to accommodate both the provisions and save the overlap, fundamentally it is not the duty of the judiciary to mop up the muddle created by the legislature.

The pertinent question about the extent of power of the EC under s.10A is settled post Chavan, but this has opened up other fundamental issues. The question of dual role of the EC as investigator and adjudicator needs closer attention. The fact that there are other agencies which function similarly is not the best of the arguments to justify something which goes against the dictates of natural justice, especially given the impact of a three-year disqualification and unseating in case of a returned candidate. The only way in which the fear of arbitrariness can be addressed is by clear prescription of procedural rules and safeguards. This definitely is a domain of the legislature and not of the judiciary. The question of Presidential Reference for advisory opinion also remains unresolved in Chavan. This would require changes in institutional dynamics and not mere procedures. Even this rests in the province of the legislature. With deficient judicial authority to deal with these specific issues and tardy legislature, the lacuna remains and so does the question, who would clean the mess of spending in elections.

disclose what is the nature and extent of power that has been invested with the Election Commission." See, *Ashok Shankarrao Chavan v. Dr. Madhavrao Kinhalkar,* note 18 paragraph 94.

92 The court used the principle of interpretation that when two possible constructions are present, the one that reduces the legislation to futility shall be avoided. See Ashok *Shankarrao Chavan v. Dr. Madhavrao Kinhalkar,* note 18, paragraph 100.