

OCCASIONAL PUBLICATION 45

IIC

Electoral Reforms

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Electoral Reforms

Self-annihilating Jacobinism doubly ensured the French Revolution concluded as a bourgeois revolution. And the earliest modern democracy, the United States, with its effusive 'we the people' just to delude, is a bourgeois democracy. The repetition of this populist phrase in the Indian Constitution, though grouted in more equal institutions has, nevertheless, yielded a similar result.

If we expect a democracy to be at least an attempt to be equal, we have to acknowledge that ours is patently and unabashedly unequal. Everyone of age has a vote, but viable candidates must be drawn from a tight circle of political dynasties/families, retainers, party hierarchies and money bags/alleged criminals. Indian democracy is strictly no more than universal adult suffrage, in which the voter is vouchsafed the privilege of selecting from among an increasingly unappetizing few, but cannot himself be a member of the contesting club.

First-past-the-post, adopted for its easy operability in a large and complex country, and the facility with which it could submerge self-conscious and articulated differences in a variegated population, now seems, like the restricted club of candidates, designed for the wealthy. For, first-past-the-post-India's dictum is 'he who spends most wins', and spiralling expenses confirm contesting as the monopoly of the few.

Besides, representation under first-past-the-post today is usually very marginal. Typically, the winning candidate secures 30 per cent of the votes polled with just 50 to 60 per cent of the electorate voting. So, 82 to 85 per cent of the electorate goes unrepresented. To address the marginality of representation under first-past-the-post,

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the Law Commission has recommended that the winner must secure 50 per cent + 1 of the votes polled. But in the event that none of the candidates does so, there will be a run-off election between the two candidates with the highest number of votes, the winner obviously then getting at least 50 per cent of the votes polled + 1. But a run-off here is only a device to bring to a conclusion an inherently unsatisfactory situation in which no one in the original election has 50 per cent + 1 of the votes polled.

Politics is now almost exclusively the game of the very affluent, pursuing their own as well as their class interests. The players are usually votaries of neo-liberal policy, of networking with foreign and indigenous capital, of high growth rates, and of even external sovereign interference in the pursuit of India's so-called 'super-power' status. Ironically, anyone speaking up for the masses or just holding a different view is liable to be called a traitor or a terrorist. Under these synthetic circumstances, a union government that once panicked over a partial failure in the monsoon and rising prices now periodically raises the prices of fuel with complete sangfroid in compliance with World Bank prescriptions, even though this is excruciatingly hurtful to most Indians. An elected government can afford to behave like a nominated one because the opposition in power would probably do the same thing. Any wonder, therefore, that there is a strong public demand for the voter's right to recall his representative?

Is there any remedy? You cannot make a grossly unequal society equal by electoral manipulation. But a few valves can be opened to admit ordinary people into positions of power and common concerns into the considerations of governance.

Judging from the Foundation for the Advanced Management of Election's experience of conducting the internal elections of the Indian Youth Congress with independence and impartiality, it is possible, though the offspring of some VIPs have had to be severely disciplined, to generate genuine competition and raise legitimate leaders. FAME acted by invitation, but were the Election Commission to thrust itself on the political parties for the same purpose, current public opinion and even the courts would probably approve. The recommendation that legal provisions be made to regulate the functioning of political parties may be accepted if it confirms the

Election Commission's pro-action. The second part of the recommendation, viz., that the Election Commission be empowered to regulate the registration and deregistration of political parties will be dealt with later. The Election Commission is already taking stock of the elections within political parties under Section 29A of the Representation of the People Act. But evidently many of these are fudged. The Election Commission doing an honest job of the elections seems to be the only way to secure a mixed crop of office bearers and candidates, both from within and without the club to which the present lot belong. New blood can only invigorate the parties and Indian democracy.

I shall later, while addressing the point on excessive expenditure, show how this can be substantially reduced by switching partially or wholly from first-past-the-post to proportional representation. Proportional representation, by having groups of all kinds pre-negotiate for adequate representation on the lists of political parties, or alternatively by forming parties dominated by them and securing seats in proportion to the votes accounted for by them as a percentage of the whole, would ensure a more inclusive and down-to-earth democracy; one addressing the concerns of a diverse society and more resistant to manipulation from outside.

The Law Commission in 1999 recommended that Parliament and State Assembly seats be increased by 25 per cent, the additional seats being filled under the proportional representation list system, evidently to make representation more inclusive.

Proportional representation could also be an effective solution for a territorially fast-unravelling state in India with an ever-increasing area falling under the control of militant parastatals. It is instructive to note that South Africa and Nepal have used proportional representation to politically integrate all previously combatant sections of society. Incidentally, 80 countries have adopted proportional representation, of which the Netherlands has done so fully.

There is a strong public demand for the recall of an unsatisfactory representative. No doubt a legal amendment needs to be made to provide for a representative's recall. But on objective criteria such as the number of tours in his constituency; the villages and projects visited; the social, economic and political problems he

has tried to tackle, and how. In the legislature, his attendance and contribution to debates, the questions he has asked and pursued, his work in various committees and sub-committees would be relevant. A substantial number of voters from his constituency would have to petition for his recall, giving details of his performance on such criteria. No opportunity should be given to the speaker of the house to sit on such a petition as he does with matters of defection.

I have stressed that Indian democracy is in fact some kind of plutocracy and that too much money flows during elections. Where do the funds come from? Not from corporate and private donations as in Britain and America where first-past-the-post also obtains, but from the looting of the Treasury, the disposal of state assets and questionable deals on land and other natural resources. This guarantees the decomposition of governance, and is not just kleptocracy as one of my genteel friends from academia would call it. But this is just to complete the picture. I am here concerned with showing how proportional representation is going to be cheaper at the elections. In first-past-the-post, whatever his percentage of the votes polled, all the victor needs is one vote more than his closest rival. He is then supposed to represent everybody in the constituency though we know he actually represents only his vote bank, while his nearest rival formally represents no one. So, there is a competition in spending with each candidate trying to gain that extra vote.

Under proportional representation, the contest would not be between individual candidates as in territorial constituencies, but between political parties with the whole state as a constituency, parties getting as many seats in the legislature as votes obtained by them in proportion to the total number of votes polled. For example, with 15 per cent of the votes polled by party A in a house of 100 seats, it would secure 15 seats. The impersonal nature of the contest, bereft of all flair and flamboyance, and the well-known fact that over the short-term the vote share of a political party does not vary appreciably, would together render electoral profligacy nugatory. So elections would become cheaper and more sedate.

Ransacking the Treasury would of course continue, and part of the money might be used to buy groups into coalitions. But just as likely they could be incorporated in exchange for policy concessions.

We will have to accept that with a multiplicity of political parties, decision-making in government would be slower but more carefully considered. For example, no nuclear power generation in Kudankulam or Jaitapur without proper public consultation.

Whatever view is taken, with a Rs. 5,000 bribe per voter from political parties in the recent by-elections in Andhra Pradesh (and much more to come) despite the Election Commission's recent heroic achievements in seizing some of the money, an experiment with proportional representation seems inevitable.

Alleged criminals are in the elite club of candidates as I have mentioned before, and crime is a serious problem in Indian politics. It just has to be in the very operation itself of the utterly corrupt first-past-the-post-looting-the-treasury etc.-system. How many initially decent representatives have we seen resisting for a while, but ultimately being sucked into the cloacal slough?

Despite the public outcry against criminal politicians, the law in keeping them out of elections has not changed. Since the enactment of the Representation of the People Act, 1951 to disqualify a candidate, the person has to be convicted of at least one of the offences mentioned in Section 8 of the Representation of the People Act. There are three classifications in descending order of repugnance as associated with a representative. Under the first classification are offences relating to enmity between different sets of people, foreign exchange, narcotics, insulting the national flag or Constitution of India and personation. Against these offences a conviction is enough. In the second category which relates to hoarding or profiteering, adulteration of food or drugs and dowry, a conviction and a sentence of imprisonment of not less than six months are necessary.

In the third category which encompasses other offences, the requirement is a conviction and a sentence of imprisonment of not less than two years. In other words, in the representational ethics of Section 8 of the 'Representation of the People Act', the candidate's conviction of rape or murder is less repugnant than his conviction of creating enmity between different sets of people or of hoarding and profiteering.

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But the disqualification does not apply to anybody who is already a sitting MP or MLA. He is allowed the immunity as long as he remembers to file an appeal or revision petition within three months of the date of conviction. This immunity previously lasted until his petition was rejected by the highest court of appeal. Fortunately, in 2005 the Supreme Court held that this immunity expired with the term of the House in which the petitioner was a member.

There are two remedial recommendations which legislators have been reluctant to pass into law: debarring, until cleared by the court, persons charge-sheeted by a court with offences punishable with five years imprisonment or more; permanently debarring persons convicted of heinous crimes such as rape or murder.

Defection not only nullifies an election but amounts to a betrayal of the voter. Yet defections are still allowed, despite an amendment in the law. Splitting a party for the formation of a new party is no longer permissible. But splitting for merging with another party is countenanced provided two-thirds of the party representatives are involved. So the fig leaf of splitting to sit apart because of a strong difference of views has fallen off. The parties are interested in defection only as part of a wholesale purchase of a smaller party. The law must be amended again to disallow defection of any kind.

And Parliament is not interested in the recommendation that the Election Commission should decide on whether members of the House have defected, rather than the Speaker of the House. There are umpteen instances of prohibited defections not being taken cognizance of. If defection is still allowed then this recommendation must be written into the law.

There are set limits to a candidate's expenditure (40 lakh for Parliamentary elections and 16 lakh for Assembly elections). Section 77 of the Representation of the People Act had been amended to allow the candidate to attribute much of his substantial expenditure to party and friends. There was a demand for the removal of this blatant circumvention of the original legal provision. So, there was another amendment of the law which made it so permissive that the travel expenses of 40 national leaders on behalf of the candidate of a national or regional party are now excluded from his election expenses. For other registered parties, the travel expenses of 20 national leaders per candidate are excluded. The expense on 'helicoptering' these national leaders alone runs into many crore. The amendment conveniently leaves the party out of the reckoning. The travel expenses are evidently just manna from heaven. If the

candidate is not supposed to account for these travel expenses, his party must do so. So it is necessary to make another amendment in Section 77 to this effect.

There is a recommendation requiring the annual auditing of the accounts of political parties, and its publication on the web. It could be useful, but most of the funds being illegally acquired from ransacking the Treasury etc. would obviously not be reflected in the accounts. With Section 77 as it is at the moment, it is also unlikely that the travel expenses of national and regional leaders kept out of the candidates' accounts would be shown in those of the parties. An amendment in the Representation of the People Act is required to enable the Election Commission to scrutinize the annual accounts of political parties and to take action for the deregistration of parties that cannot account for the national or regional or state expenditure on their candidates. But the auditing must be done by a panel of auditors approved by the Election Commission, and not by the one auditor who has been servicing all political parties for years together.

Which leads me to the next recommendation, viz., that the Election Commission should be empowered under the law to deregister political parties. There is no greater punishment to a national political party than its deregistration. In effect it would mean that it would no longer have one symbol for the whole country, and its candidates would need to contest as independents with whatever symbols they could get. It would mean the disintegration of the party.

In an order of 1992, the Election Commission curiously held that whereas it could register a party, it could not deregister it. This was on a petition from the Congress seeking a deregistration and de-recognition of the Bharatiya Janata Party and the Shiv Sena on the ground that these parties had indulged in religious activities opposed to the principles of secularism.

Since an appeal before the Supreme Court was dismissed *in limine*, the only remedy is an amendment in the law specifically providing for a party's deregistration by the Election Commission for malpractices like inciting one group against another, exciting religious feelings, etc. The amendment must provide for a bar on re-registration for say, a period of five years.

There has been much noise about the need for state funding of elections. But the Election Commission has already provided for important state funding in kind by way of free time given by *Doordarshan* and *All India Radio* to political parties. The allocation of time is on the basis of whether the parties are recognized national

or regional parties as well as on their percentages of votes polled in the previous elections. State funding, which obviously cannot be for bribing voters or for paid news, is therefore no longer a serious point.

A recent phenomenon upsetting the level playing field has been 'paid news'. Highly subjective reports on different candidates are passed on to the reader or viewer ostensibly as objective assessments. Actually candidates pay enormous sums for a favourable write-up or television coverage with all the exaggerations thrown in. But here a whole range of nuanced reporting is possible. This is a development from the increasing ownership/cross-ownership of the media by the biggest corporate houses, the opportunity to vacuum some of the election funds as well as the attempt lately at not only influencing the course of elections, but setting up individual candidates for strategic positions in government. The proposal is that the law should provide for making paid news an electoral offence with a sentence of at least two years. The recommendation is fully justified.

One of the most popular demands is for negative voting, i.e., providing on the ballot unit of the EVM a 'none of the above' option to enable the voter to reject all the candidates. Such is the disgust of the voter that we could have a sudden spurt in the percentage of voting and 'none of the above' might score more than anybody else. In which case nobody should be declared elected.

The final significant recommendation, according to me, concerns the enhancement of punishment for electoral offences most commonly encountered. The details of some of these are:

Section 171B RP Act—Bribery	Non-cognizable with one year's imprisonment or fine or both
171C, RP Act— Undue Influence	Non-cognizable with one year's imprisonment or fine or both
171G—RP Act Publishing a False Statement to Effect an Election Result	Only a fine
125A—RP Act False Information by a Candidate	Imprisonment of upto six months or fine

Publishing a false statement to effect an election could carry a sentence of a year. The others could be made punishable with at least two years' imprisonment. They could also attract disqualification for six years as in the case of offences under Section 8 of the RP Act where candidates are offenders.

Electoral reforms through the legislative route have raised many hopes and provided much fodder for debate over the years, but have virtually not materialized. By contrast, contributions to electoral reforms by the Election Commission, the judiciary and civil society have been very significant but, except by the initiated, have gone almost unnoticed.

Until 1989, the Representation of the People Act, 1951 took no cognizance of political parties, though it should have been obvious there could be no democracy without them. The Election Commission filled the vacuum with elaborate regulations on the creation and conduct of political parties which partook of the nature of subordinate legislation. One set, relating to the registration and recognition of political parties is incorporated in the Election Symbols (Reservation and Allotment) Order 1968. The second set relates to the Model Code of Conduct. Initially just a list of do's and don'ts agreed upon by political parties at a time when politicians were less devious, it is now an electoral bulldozer for reducing the government of the day to the level of its competitors. Once elections are announced, governments are not allowed to make new appointments and transfers and postings, to take up new projects and to bring out self-embellishing advertisements. It also prohibits ministers from electioneering in the guise of official tours. Stripped to being a mere citizen, a minister cannot be met by local officialdom, use official transport or even government rest-house accommodation unless he is next in the queue of applicants. There is particularly close monitoring of the use of government aircraft, and ministers have found it simpler to hire private helicopters.

The Election Commission's other major contribution, as mentioned, to an electoral level playing field has been the free time given to political parties on *Doordarshan* and *All India Radio*, a significant example of state funding of elections.

Frustrated by not being able to secure any electoral reforms to filter out contestants with a criminal background, the Commission imposed

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the first affidavit on the candidate, requiring him to declare on oath details of his involvement in criminal cases.

With the requirement of five million personnel just to man polling stations in a general election, the Election Commission perforce has to use the state machinery. How then does it ensure impartiality in the elections? By having its representative or the Chief Electoral Officer in each state. The CEO was not contemplated in the original scheme of the Representative of the People Act but was an improvisation subsequently recognized in the 1956 Amendment of the Act. Gradually the Commission won the right to select the CEO in consultation with the state government, and not vice versa.

By the 1980s, booth-capturing had become so rampant, especially in Bihar, that a small-time politician who met me in office when I was Commissioner, Darbhanga, boasted he knew at least two hundred ways to capture a booth. The CEC in the 1990s realized that elections without impartial observers and substantial police and paramilitary forces from outside the state had become a farce. But such personnel were not contemplated by the electoral law. So he leaned on the state governments and the Government of India to provide them. They both played at being cute, each referring him to the other. He then decided—no more elections until the matter was settled. It went to the Supreme Court which compelled the Government of India to provide the Commission with observers and police forces. In the Jammu and Kashmir 2002 elections, the Election Commission refused to have formal foreign observers, but in effect encouraged foreign diplomats to function as informal observers, to very good effect.

In very unusual circumstances, even polling parties, wholly or partially, have been imported from outside the state. Half of them in the Jammu and Kashmir 2002 elections came from UP and Punjab.

To combat electoral malpractices, the Commission also had to bring in technological innovations. The electronic voting machine was an outcome of a specific demand placed with the Electronics Corporation of India Ltd. in 1977 by the then Chief Election Commissioner, S.L. Shaktiher. The present version costs about Rs. 10,000, is virtually tamper-proof, and is the most effective in the world. It has done away with the fiddling of ballot papers, especially at the time of counting, and reduced counting from days to hours. It has also saved 800,000 trees from being converted to ballot paper in each general election.

To check personation the Commission introduced the system of electoral photo identity cards. This has helped, but it is difficult to maintain the momentum of generation of cards to keep up with the ever-increasing number of new voters. And the ID card will not be complete proof against personation until it has the voter's thumb impression on it, and each polling station is equipped with a machine to check each voter's thumb impression. In the Jammu and Kashmir elections, since the mass generation of ID cards would have put voters at risk of being targeted by militants, voters were allowed to bring their photographs to be affixed on specially made ID cards.

As long as the trouble in Jammu and Kashmir lasts, there cannot be a proper election without confining to barracks ex-militants who are the property of the police and are used to eliminate anyone the police or the government do not like. The Government of India and the Jammu and Kashmir government officially denied they had ex-militants with them. But the Election Commission used its own initiative to not only dig out these ex-militants both with the state police and army, but to also have them confined. No opposition candidate was prepared to start campaigning seriously without this. Evidently the Commission will in future have to deal similarly with ex-militants in north-east and central India.

The Court's main contribution to electoral reforms has been in encouraging the Election Commission to innovate where there are no legal signposts to indicate its jurisdiction. This is well set out by the Supreme Court in *Mohinder Singh Gill versus Chief Election Commissioner (1978)* | SSC 405:

....Once the appointment is made by the President, the Election Commission remains insulated from extraneous influences, and that cannot be achieved unless it has an amplitude of powers in the conduct of the elections—of course in accordance with existing laws. But where these are absent, and yet a situation has to be tackled, the CEC has not to fold his hands and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of powers to deal with the situation. He must lawfully exercise his power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly, in a free and fair manner....

As we have seen, the yield from reforms requiring the amendment of the law is not worth mentioning. Nevertheless, the vital reforms needed can only come about by this route.

Though the legality of the Code of Conduct and Symbols order were often contested, the petitions were not allowed. Similarly, Election Commission directives transferring questionable officers on the eve of the elections have often been challenged, but the petitions have never been allowed. Reference has already been made to how the Supreme Court intervened and got the Commission its observers and necessary police forces. On a petition from civil society, the Court also added some more items to the affidavit filed by candidates.

Civil society has taken the burden of adding items to the candidate's affidavit. It has been particularly alert about making the contents of affidavits available to the voters before polling, as well as in analyzing the contents and comparing affidavits filed in succeeding elections for long-term appraisal. It has also initiated the thorough scrutiny of the electoral roll, ward by ward and village by village, the roll being consistently manipulated by parties in power.

As we have seen, the yield from reforms requiring the amendment of the law is not worth mentioning. Nevertheless, the vital reforms needed can only come about by this route. There is a limit to the willingness, no matter how strong the provocation, of a responsible judiciary within a system of checks and balances, to legislate on behalf of the legislature. And the Election Commission has just about exhausted its capacity for creative encroachment on no-man's-land within the overall boundaries of the law.

But governments and legislatures, which are meant to check each other, invariably unite to avoid electoral reforms. In the circumstances it is left to civil society to press for the reforms. The Indian Constitution does not provide for a formal referendum. But no one can prevent an informal referendum through modern electronic means. If the outcome is millions behind electoral reforms, politicians would eventually have to give in.

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