

MAKING SENSE OF THE DISQUALIFICATION OF A LOK SABHA MP

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'In focus also is the President of India performing adjudicatory and declaratory functions' | Photo Credit: AFP

The [conviction, on Thursday, March 23, 2023, of Congress leader](#) and now former Member of Parliament from Wayanad Rahul Gandhi by a Chief Judicial Magistrate's court in Surat, Gujarat, and the issuance of a notification the next day by the Lok Sabha Secretariat of [Mr. Gandhi's disqualification](#) raise some important constitutional and legal issues. The legal community is mystified by the harshness of the sentence, which is unprecedented in a defamation case. The issue will anyway be dealt with by the appellate courts. But the issues relating to the disqualification need to be examined carefully.

Section 8 of the Representation of the People Act, 1951 (RP Act) specifies the various offences, conviction for which entail the disqualification of a member of the legislature. Clause (3) of this section says that a person convicted of any offence other than those mentioned in the other two clauses, and sentenced to not less than two years shall be disqualified from the date of conviction. However, clause (4) has exempted sitting members from instant disqualification for three months to enable them to appeal against the conviction. This clause was struck down as ultra vires the Constitution by a two judge Bench of the Supreme Court on the ground that Parliament has no power to enact such an exemption for sitting members of the legislature (Lily Thomas vs Union of India, 2013). The effect of this judgment is that there is an instant disqualification of a sitting legislator as soon as he is convicted. However, the Court made it clear that in the event of the appellate Court staying the conviction and sentence, the disqualification will be lifted and the membership will be restored to him.

Section 8(3) of the RP Act which provides for disqualification on conviction has been subjected to judicial interpretation in a number of cases. A surface view of this provision is that the moment conviction and sentence are announced by the trial court, the member of the legislature will stand disqualified. Upon such disqualification, his seat in the legislature shall fall vacant under Article 101(3)(a). But a closer reading will reveal that the words "shall be disqualified" used therein cannot mean instant disqualification. If words like "shall stand disqualified" were used in this clause, they would have certainly meant instant disqualification without the intervention of any other authority.

The passive voice used in this clause implies that the person shall be disqualified by some authority. Who can that authority be? It cannot be the Secretary General of a House of Parliament or Secretary of a state legislature because the Constitution does not confer such power on them. Article 103 shows that the President of India is that authority who decides that a sitting member has become subject to disqualification in all cases which come under Article 102(1). Sub Clause (e) of this Article relates to all cases of disqualification under the RP Act 1951 which include disqualification on conviction and sentence under Section 8(3) of the Act.

There are differences of opinion on the scope of Article 103, which says that if any question arises as to whether any sitting Member has become subject to any of the disqualifications mentioned under Article 102(1), the question shall be referred to the President whose decision shall be final.

There is a view that this Article can be invoked only when a dispute arises on the fact of disqualification and not otherwise. But this Article covers disqualification arising on conviction for different offences under Section 8 of the RP Act 1951. In a case of conviction under this section, where is the question of disputes? This would mean that reference to the President of the question of disqualification of a sitting Member who has been convicted for an offence covered by Section 8 is a constitutional requirement. The Supreme Court, in *Consumer Education and Research Society vs Union of India* (2009), upholds this position. This judgment says that the President performs adjudicatory and declaratory functions here.

In cases where adjudication is not required, the President can simply declare that the sitting Member has become subject to disqualification. But the intervention of the President is essential under Article 103 even in cases where a sitting member has been convicted and the disqualification is supposed to take effect from the date of conviction. Section 8(3) of the RP Act does not say that in the case of a sitting Member, disqualification takes effect the moment the conviction is announced. The words “shall be disqualified” convey this sense.

The judgment in *Lily Thomas* has certain flaws. It says that Parliament cannot enact a temporary exemption in favour of sitting members of the Legislature. But Article 103 itself provides an exception in the case of sitting Members by stating that the disqualification of sitting Members shall be decided by the President. Thus, the Constitution itself makes a distinction between the candidates and sitting Members. This was ignored by the judgment and the Court struck down the three months window given to the sitting members to enable them to appeal against their conviction. Further, such a temporary exemption in favour of sitting members of the legislature is a reasonable requirement. They are not placed in the same situation as a candidate. A sudden disqualification will cause a lot of dislocation apart from the fact that the constituency will lose its representative.

Section 8(4) was enacted to deal with precisely such a situation. In the absence of a provision such as clause 4 of Section 8, the Lok Sabha Secretariat issued a notification on March 24, 2023 declaring that Mr. Gandhi stands disqualified. This notification has presumably been issued on the basis of the judgment in the *Lily Thomas* case. But Section 8 (3) uses the words “shall be disqualified” and does not specify which authority shall disqualify Mr. Gandhi. Therefore, the Lok Sabha Secretariat cannot perhaps declare him disqualified without referring the case to the President under Article 103 for a declaration, which is the normal procedure followed there. The authority to declare a sitting Member disqualified on the basis of the Court’s decision is not vested in the Lok Sabha Secretariat, either under the Constitution or the RP Act 1951. That power is vested in the President under Article 103. The sitting Member incurs disqualification on his being convicted and sentenced to two year imprisonment. But he “shall be disqualified” through a decision by the President. This appears to be the ratio of the *Consumer Society Case* (supra).

The law on criminal defamation needs an urgent review. Many countries such as the United Kingdom and the United States have scrapped it. India's neighbour Sri Lanka too has done away with it. It is indeed a surrealistic situation where senior political leaders get jailed for making humorous or off the cuff remarks in election speeches. In 1965, the Supreme Court had drawn the attention of the judicial system to the need for a liberal approach to rhetorical, hyperbolic or metaphoric words used by politicians in election speeches. The Court said, "... the atmosphere is usually surcharged with partisan feelings and emotions and the use of Hyperboles or exaggerated language or the adoption of metaphors and extravagance or expression in attacking one another are all part of the game. So when the question... is argued in the cold atmosphere of a judicial chamber some allowance must be made and impugned speeches must be construed in that light" — Kultar Singh vs Mukhtiar Singh (1965).

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In our multi-party democracy, every political party is a potential ruling party. So, every political leader is exposed to the danger of being hauled up for defamation and put out of the electoral process for long years. People of mature democracies must be able to enjoy humour without any fear. People must learn to laugh at themselves. Otherwise, we will always be busy sending people to jail.

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