

# Legislative Brief

## The Representation of the People (Second Amendment and Validation) Bill, 2013

The Bill was introduced in the Rajya Sabha on August 30, 2013 by the Minister of Law and Justice, Mr. Kapil Sibal.

It was referred to the Department related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (Chairperson: Mr. Shantaram Naik) on September 26, 2013.

An Ordinance was approved by the Cabinet on September 24, 2013. On October 2, 2013, the Cabinet withdrew the Ordinance and decided to withdraw the Bill.

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### Highlights of the Bill

- ◆ The Supreme Court struck down Section 8(4) of the Representation of the People Act, 1951 that deferred the disqualification of a convicted legislator by three months. The Bill replaces that provision of the Act.
- ◆ The Bill provides a 90 day period to a convicted legislator to appeal and obtain a stay on his conviction or sentence.
- ◆ If a stay on the conviction or sentence is obtained within the 90 day period, the disqualification will not take effect.
- ◆ Until the appeal is decided by the court, the legislator may participate in proceedings of Parliament or state legislatures, but he is not entitled to vote or draw a salary and allowances.

### Key Issues and Analysis

- ◆ Section 8(4) of the Act was struck down by the Supreme Court in 2013 for violating the Constitution as (i) it provided different grounds for disqualification of legislators and candidates, and (ii) deferred the date on which the disqualification of sitting legislators would take effect. The Bill could also be challenged on the same grounds.
- ◆ In a 2005 judgment, the Supreme Court permitted differential treatment of legislators. It had said that this was in order to protect the House, especially when the government had a slim majority. The Bill takes away a convicted legislator's right to vote, including in a no confidence motion. Consequently, the justification for differential treatment may not apply.
- ◆ The 2013 Supreme Court judgment states that a stay on conviction must be obtained in order to defer the disqualification of a convicted legislator. However, the Bill states that a stay on sentence is sufficient to do so.
- ◆ The Bill lays down the conditions that would operate upon obtaining a stay on conviction or sentence. It is unclear whether such conditions may be imposed by Parliament through a legislation, or if this is the exclusive prerogative of the courts.

## PART A: HIGHLIGHTS OF THE BILL<sup>1</sup>

### Context

The Constitution lays down grounds for the disqualification of candidates and sitting legislators in Article 102(1) and Article 191(1). It also states that additional grounds for disqualification may be provided for, through a law made by Parliament. The Representation of the People Act, 1951 lists some of these grounds.

The Act provides for the conduct of elections, qualifications and disqualifications for membership of legislatures, and offences and disputes related to elections.<sup>2</sup> Sections 8(1), 8(2), 8(3) of the Act list various offences that are valid grounds for disqualification, and apply to both candidates and sitting legislators. Section 8(4) stated that in case a sitting legislator was convicted in a criminal case, his disqualification would not take effect till three months from the date of conviction. If he filed an appeal within that period, he would continue to hold office until that appeal was decided by the courts. This provision was applicable to sitting legislators only.

Several court judgments have examined whether Section 8(4) violates the Constitution in terms of differential treatment between candidates and sitting legislators, and have differed in their observations.<sup>3</sup> In July 2013, the Supreme Court struck down Section 8(4) of the Act for violating the Constitution, stating that Parliament had exceeded its legislative competence in enacting this provision.<sup>4</sup> The government filed a review petition. It also introduced an amendment Bill to substitute Section 8(4) of the Act, and overturn the Supreme Court judgment. Subsequently, the Supreme Court rejected the application for review.<sup>5</sup> On September 24, 2013, the Cabinet approved an Ordinance to give effect to the provisions of the Bill. However, on October 2, 2013, the Cabinet withdrew the Ordinance, and decided to withdraw the Bill.<sup>6</sup>

### Key Features

The Bill replaces Section 8(4) of the Act (which was struck down by the Supreme Court) with a new Section 8(4). The following table provides a comparison of the two provisions.

**Table 1: Comparison of Key Features between the Act and the Bill**

Feature	Section 8(4) of the Act	Section 8(4) of the Bill
Time period for which disqualification is deferred for sitting MPs and MLAs	Three months from the date of conviction.	90 days from the date of conviction.
Action to be taken during the window period	The filing of an appeal within the three month window period from the date of conviction, postpones the effect of disqualification till the decision on the appeal.	An appeal must be filed within the 90 day period, and a stay on either the conviction or sentence must be obtained within that 90 day period. This would postpone the disqualification until the decision on the appeal.
Limitations on rights as an MP or MLA during a pending appeal	None	<ul style="list-style-type: none"> <li>▪ No voting rights</li> <li>▪ No salary and allowances</li> </ul> [However, permitted to participate in proceedings of Parliament or state legislatures. This implies, for example, that the legislator may ask questions in 'Question Hour', raise issues in Zero Hour, and speak in all debates.]

Source: The Representation of the People Act, 1951; The Representation of the People (Second Amendment and Validation) Bill, 2013; PRS.

## PART B: KEY ISSUES AND ANALYSIS

### Constitutional validity of Section 8(4)

The constitutional validity of Section 8(4) of the Act has been examined against (i) Articles 102 and 191 which lay down grounds for disqualification of contesting and sitting legislators, for Parliament and state legislatures respectively, and (ii) Article 14, which lays down the right to equality and equal treatment. The constitutional validity of the Bill could also be tested against the same provisions.

#### Differential treatment between sitting legislators and candidates

In July 2013, in the Lily Thomas case, the Supreme Court interpreted Article 102(1)(e) of the Constitution to state that Parliament cannot make different laws for the disqualification of sitting legislators and candidates. It also interpreted Article 101(3)(a) to state that the seat would become vacant as soon as a sitting legislator was

disqualified. This implies that if a member is convicted under any of the offences listed under sections 8(1), 8(2) or 8(3) of the Act, there can be no deferring of the disqualification as the seat immediately falls vacant.

Based on these two interpretations, the Supreme Court struck down Section 8(4) of the Act, which applied to sitting legislators only and deferred their disqualification by three months.

Given that the amendment proposed in the Bill is similar to the provision in the Act that was struck down, Section 8(4) of the Bill could also be challenged before the court on similar grounds.

### Differential treatment and the Right to Equality

In a 2005 judgment, the Supreme Court examined whether providing for differential treatment between sitting legislators and candidates violated the right to equality under Article 14.<sup>7</sup> This Article provides for equal treatment to all, but the courts have interpreted this to include that differential treatment may be made if there are valid grounds that serve public interest.<sup>8</sup>

In light of this, the Court justified the differential treatment provided to sitting legislators that exempted them from immediate disqualification. It reasoned that this differential treatment was to protect the existence and continuity of a democratically constituted House. Further, in circumstances of a “razor thin majority”, immediate disqualification of a legislator before appeal could cause the government to fall.

The Bill differentiates between sitting legislators and candidates, by providing the convicted legislator a 90 day period to obtain a stay by the courts. However, during this period he cannot vote on any motion until the appeal is decided. Consequently, even in case of a no confidence motion, where the continuity of the government is in question, he will be disallowed from voting. Thus, the Supreme Court’s rationale for permitting differential treatment between sitting legislators and candidates may not apply to the Bill.

### Stay on conviction versus stay on sentence

The Supreme Court, in its 2013 judgment, has held that a convicted legislator is required to obtain a stay on the conviction, for the disqualification to not take effect. When the court stays the order of conviction, the conviction will not operate until the matter is decided by an appellate court. Various court decisions have clarified that such power to grant a stay on conviction should be exercised only in exceptional circumstances.<sup>9</sup>

However, the Bill states that for the disqualification of a convicted sitting legislator to not take effect, it is sufficient to obtain a stay *either* on the conviction *or* on the sentence. When an appellate court grants bail to a convicted person, it is suspending his sentence. This is granted more frequently than a stay on conviction.

### Bar on voting and salary; permission to participate in proceedings

The proviso to Section 8(4) of the Bill lays down certain conditions that would operate, if a stay on the conviction or sentence is obtained by a convicted sitting legislator, within 90 days from the date of his conviction. The conditions state that the legislator may not (i) exercise his voting privileges, or (ii) draw a salary or allowances, but may participate in proceedings of Parliament or state legislatures.

It is unclear whether Parliament has the power to lay down such conditions. One view on the matter is that it is only the appellate court’s prerogative to grant a stay, and consequently the conditions under which the stay would operate.<sup>10</sup> However, it may also be argued that the Parliament may legislate upon any matter, subject to the provisions of the Constitution.<sup>11</sup>

#### Notes

1. This Brief has been written on the basis of the Representation of the People (Second Amendment and Validation) Bill, 2013, which was introduced in the Rajya Sabha on August 30, 2013.

2. Statement of Objects and Reasons, the Representation of the People (Second Amendment and Validation) Bill, 2013.

3. Election Commission of India vs. Saka Venkata Rao, AIR 1953 SC 210; K. Prabhakaran vs. P. Jayaraman, 2005(1) PLJR 278.

4. Lily Thomas vs. Union of India, W.P. (Civil) No. 490 of 2005.

5. “Will not review disqualification order on MPs, says Supreme Court”, The Indian Express, September 4, 2013.

6. “Cabinet decides to withdraw Ordinance and Bill relating to Representation of People’s Act”, Cabinet, Press Information Bureau, October 2, 2013.

7. K. Prabhakaran vs. P. Jayaraman, 2005(1) PLJR 278.

8. Test laid down in State of W.B. vs. Anwar Ali Sarkar, AIR 1952 SC 75; Continued assertion in Motor General Traders vs. State of A.P., (1984) 1 SCC 222,229; Prabodh Verma vs. State of U.P., (1984) 4 SCC 251; Raj Pal Sharma vs. State of Haryana, 1985 Supp SC 72,75.

9. Ravikant S. Patil vs. Sarvabhooma S. Bagali, Appeal (Civil) 5034 of 2005; K.C.Sareen vs. CBI, Chandigarh, [2001] 6 SCC 584.

10. K. Parasaran, “Measure for unconstitutional measure”, The Hindu, October 2, 2013.

11. Parliament may legislate on any item in List 1 or List 3 of the Seventh Schedule, provided it does not contravene any fundamental rights or any other provision of the Constitution.

## Annexure 1: Highlights of key Supreme Court judgments

In several earlier cases, the Supreme Court has interpreted the law related to the issues in the Bill. We list some of the key positions of law laid down by the Supreme Court in some of these judgments.

**Table 2: Relevant highlights of key Supreme Court judgments**

Year	Case law	Relevant Highlights of the Judgment
2013	Lily Thomas vs. Union of India (Two judge bench)	<ul style="list-style-type: none"> <li>▪ Any law on disqualification cannot differentiate between candidates and sitting legislators [A. 102(1)(e) of the Constitution]</li> <li>▪ The moment an MP or MLA is convicted, his seat becomes vacant [A. 101(3)(a) of the Constitution]</li> <li>▪ The SC did not examine this question on the basis of Article 14 of the Constitution.</li> <li>▪ Therefore, Section 8(4) of the Act was struck down.</li> </ul>
2007	Navjot Singh Sidhu vs. State of Punjab (Two judge bench)	<ul style="list-style-type: none"> <li>▪ On appealing under Section 389 of the Code of Criminal Procedure, 1973, the conviction and sentence of Mr. Sidhu were suspended, and the conviction would not operate till the decision of the appeal.</li> <li>▪ Thus, Mr. Sidhu could contest elections until his appeal had been decided upon by the courts. [Mr. Sidhu was a sitting MP at the time of conviction, but had resigned at the time of filing an appeal.]</li> </ul>
2005	K. Prabhakaran vs. P. Jayarajan (Five judge bench)	<ul style="list-style-type: none"> <li>▪ Section 8(4) of the Act operates as an exception, based on the factor of membership of a House. The purpose of carving out an exception between sitting legislators and candidates is not to confer an advantage on any person; the purpose is to protect the House.</li> <li>▪ The government in power may be standing on a razor thin majority where each member counts significantly and disqualification of even one member may have serious consequences on its functioning.</li> <li>▪ Therefore, it was permissible to distinguish between candidates and sitting MPs under Article 14 of the Constitution.</li> <li>▪ The SC did not examine this question on the basis of Article 102(1)(e) of the Constitution.</li> </ul>
1995	Rama Narang vs. Ramesh Narang and others (Three judge bench)	<ul style="list-style-type: none"> <li>▪ The SC held that a conviction and sentence can both be suspended only in circumstances where the non-granting of a suspension of conviction would result in damage. It was also necessary to show that this damage caused could not be undone if ultimately the decision was reversed.</li> <li>▪ The SC was examining the matter of disqualification of a person holding the position of a Director of a company. Her conviction would have rendered her ineligible to continue to hold that post.</li> </ul>
1975	Indira Nehru Gandhi vs. Raj Narain (Single Judge Vacation Bench)	<ul style="list-style-type: none"> <li>▪ The SC examined the question of whether a stay could be granted on an election petition matter that had disqualified Mrs. Gandhi from her role as a Member of Parliament, and as Prime Minister.</li> <li>▪ The conditions under which the stay was granted were that (i) she would be entitled to attend the sessions of the legislature and sign the Register; (ii) but would not take part in the proceedings of the House or vote or draw any remuneration as an MP.</li> <li>▪ This stay would not affect her rights in her capacity as Prime Minister, and as a Minister, including drawing a salary and addressing Parliament.</li> </ul>

Sources: Lily Thomas vs. Union of India (W.P. (Civil) No. 490 of 2005); Navjot Singh Sidhu vs. State of Punjab (Appeal (crl.) 59 of 2007); K. Prabhakaran vs. P. Jayarajan (2005(1) PLJR 278); Rama Narang vs. Ramesh Narang and others (1995 SCC (2) 513); Indira Nehru Gandhi vs. Raj Narain (1975 SCC (2) 159.); PRS.

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