THE LAW AND POLITICS OF ELECTORAL REFORMS

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Introduction

Criminalisation of politics is a serious issue for any democratic polity and more so for a developing democracy such as India. The growing influence of mafia over every constitutional institution and the growing need of unlimited amounts of money for fighting an election are some of the most worrying factors, which presently threaten the very purpose of electoral democracy and representative governance. If law does not prevent the entry of lumpen elements and ill-gotten money it will not be possible to protect the fabric of democracy and rule of law as envisaged by our Constitution.

Criminalisation of politics occurs in two ways: First, when criminals become legislators by finding free ingress into politics and legislatures and second, when legislators become criminals. However, the root causes of both kinds of criminalisation are not dramatically different and often they feed into each other.

A large body of investigative evidence shows that criminalisation is not just a matter of perception and belief. The Vohra Committee constituted by the Government had stated in strong terms that the nexus between crime syndicates and political personalities was very deep. According to the Central Bureau of Investigation (CBI) report to the Vohra Committee: "all over India, crime syndicates have become a law unto themselves..... Even in the smaller towns and rural areas, muscle men have become the order of the day. Hired assassins have become part of these organizations. The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country"[1]. The Committee quoted other agencies to state that the Mafia network is "virtually running a parallel government, pushing the State apparatus into irrelevance"[2]. The report also says, "in certain States like Bihar, Haryana and Uttar Pradesh, these gangs enjoy the patronage of local politicians cutting across party lines and the protection of the functionaries. Some political leaders become the leaders of these gangs/armed *sena* and over the years get themselves elected to local bodies, State assemblies and national parliament"[3].

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1 *Vohra Committee (of the Government of India, Ministry of Home Affairs) Report* para 6.2 as quoted in *Union of India v. Association for Democratic Reforms* (2002) 5 *SCC* 294 at p. 301.

2 The CBI Report to Vohra Committee as quoted by National Commission for Review of Working of Constitution, para 4.12.1.

3 Supra n. 1.

Similar confirmations are found in judicial pronouncements. In the *Mohinder Singh Gill* case[4], Justice Krishna Iyer observed that fair elections were being hijacked by 'mob muscle methods and subtle perversions. In *Union of India v. Association for Democratic Reforms*[5] the apex Court highlighted the nexus between money, muscle and power at all levels of governance. The apprehensions of the Supreme Court have found confirmation from a statement of the Election Commission (hereinafter referred to as EC) in 1997. According to the EC, forty per cent of the members of Parliament were involved in criminal cases, whose trial was pending. The EC further revealed that at least 700 out of 4072 legislative members of different states were also facing the trial[6].

There are three aspects, which fill the politics with criminals:

1. Absence of any checks at the entry point.
2. Nothing to prevent the role of money power
3. Absence of any mechanism to disqualify sitting members after being charged with crimes, or for amassing disproportionate assets.

Every person is entitled to contest elections except convicts with two years of imprisonment or more as confirmed by the final appellate court. This formulation allows even a convicted person to contest provided there is an appeal pending. Further a person only charged with an offence can, of course, contest. Participation of criminal elements in election also takes place because political parties in no way hinder the entrance of the persons with suspect antecedents, the leaders of these parties desire easy money and muscle power, which can be ensured by these history-sheeters.

Though there are normal legal restrictions, politicians have conveniently subverted them. The provisions are so interpreted as to allow any amount of money to be spent on elections. None of the political parties is interested in periodically disclosing the assets to a legal authority.

This process of degeneration calls for law reform. To that end it is necessary to critically examine the existent legal provisions, the various reform initiatives and the government's response to them. This paper is an effort in this direction.

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4 *Mohinder Singh Gill v. Union of India AIR* 1978 SC 851.

5 Supra n. 1.

6 "The Statement of Election Commission" as reported in *The Tribune*, Chandigarh, August 21, 1997.

II

Candidates with Criminal Antecedents

The process of reform in this arena was triggered by the MP High Court in *Purushottam Kaushik v V. C. Shukla*[7], when it ruled that mere filing of an appeal or revision by a convicted person did not prevent the operation of disqualification under Section 8 of the *Representation of People Act, 1951* (hereinafter referred to as *RPA*). This proposition was not reversed by the Supreme Court.

The EC, however, did not stop at suggesting amendments to Section 8. In 1997, it came up with an order whereby convicted persons, regardless of pendency of appeal were prohibited from contesting elections. Thus the Commission added new disqualification even though Section 8 of the *RPA* was silent with regard to the position of the convicted candidates if an appeal against the conviction was pending. The Election Commission also directed the states and union territories and chief electoral officers that the disqualification of candidates under Section 8 of the *RPA* would commence from the date of conviction even if the person was out on bail. The EC further sought information from contesting candidates with regard to the nature of offence, date of conviction and punishment imposed thereof, on affidavit.

i. Special Courts for Speedy Trial: The Required Remedy

The National Commission for Review of Working of Constitution (hereinafter referred to as NCRWC), a commission which had been set up by the government in the face of tremendous opposition, also suggested that the criminal cases against politicians pending before Courts either for trial or in appeal must be disposed of speedily. If necessary, Special Courts may be established for this purpose. A potential candidate against whom the police have framed charges may take the matter to the Special Court. This court should be obliged to inquire into the matter and decide in a strictly time bound manner. The function of this Special Court basically should be to decide whether there is indeed a *prima facie* case justifying the framing of charges. The Special Courts should be constituted at the level of High Courts and their decisions should be only appealable to the Supreme Court. The Special Courts should decide the cases within a period of six months. For deciding the cases, these Courts should take evidence through Commissioners. Unfortunately, there are no takers for these suggestions.

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[7] *AIR* 1981SC 547.

ii. Period of Disqualification

The Election Commission highlighted some of the peculiar consequences arising from imposing a disqualification from contesting only for six years on convicts. Taking as an example the case of a person convicted for rape and punished with imprisonment for ten years, the Commission raised the following questions. Can such a convict contest an election after serving six years of the term? Or should he be asked to complete full term before he can be permitted to stand for election? The EC suggested that disqualifying period of six years under Section 8 should start to run only after the prison sentence is completed. This suggestion alone was accepted and the Government proposed to bring an amendment to that effect.

The NCRWC had also recommended that the *RPA* be amended to provide that any person charged with any offence punishable with imprisonment for a maximum term of five years or more, should be disqualified for being chosen as, or for being, a member of Parliament or Legislature of a State on the expiry of a period of one year from the date the charges were framed against him by the court in that offence and unless cleared during that one year period, he shall continue to remain so disqualified till the conclusion of the trial for that offence.

In case a person is convicted of any offence by a court of law and sentenced to imprisonment for six months or more the bar should apply during the period under which the convicted person is undergoing the sentence and for a further period of six years after the completion of the period of the sentence. If any candidate violates this provision, he should be disqualified. Also, if a party puts up such a candidate with knowledge of his antecedents, it should be derecognised and deregistered. These suggestions of the NCRWC were not incorporated in the election reforms legislation.

iii. Voter's Right to Information

It is needless to state that democracy is a part of the basic structure of our Constitution. And the rule of law and free and fair elections are basic features of democracy[8]. The people of the country have a right to know every public act, everything that is done in a public way by the public functionaries. Members of Parliament or Members of the Legislative Assembly are undoubtedly public functionaries. Public education is essential for functioning of the process of popular government and to assist the discovery of truth and for strengthening the capacity of an individual in participating in the decision-making process. The decision-making process of a voter includes his right to

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[8] *Kihoto Hollohan v. Zachillhu*, (1992) Supp 2 SCC 651 para 179 at p. 741.

know about public functionaries who are required to be elected by him. Right to know is part and parcel of the concept of 'freedom of speech and expression'[9].

The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves[10]. In *Secretary, Ministry of Information and Broadcasting, Govt of India v Cricket Association of Bengal*[11], the Supreme Court dealt with citizen's right to freedom of information and observed: "In modern constitutional democracies, it is axiomatic that citizens have a right to know the affairs of the Government which, having been elected by them, seeks to formulate sound policies of a governance aimed at their welfare. ....Democracy expects openness and openness is a concomitant of a free society. Sunlight is the best disinfectant"[12].

Earlier in 1988 in the Hawala case[13] the Supreme Court observed that Members of Parliament should disclose their assets, and explained that such a measure would pave the way for obtaining evidence of illegal gains obtained in office by civil servants, ministers or politicians seeking re-election.

In two recent decisions, the Supreme Court has dealt with the question of criminal antecedents of candidates by situating the issue in the voter's right to information. The right was recognized in the first decision and reiterated in the second one. This saga of voter's right to information was initiated by a group[14], who in a public interest petition asserted that electors had right to know the antecedents of political parties and their leaders. Strangely, the petition was opposed by the Election Commission as 'undemocratic'. Accepting the contention of the petitioners, the Delhi High Court directed the Election Commission to make necessary arrangements for providing voters the criminal

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9 *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294 para 30 at p. 314 and *State of UP v. Raj Narain* (1975) 4 *SCC* 428 at p. 453.

10 *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* (1985) 1 *SCC* 641 para 68 at pp 685-86.

11 (1995) 2 *SCC* 161 para 16 at pp. 313-14.

12 Id. at pp. 313-14.

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14 *Association for Democratic Reforms v. Union of India, AIR* 2001 Del 126.

background of candidates contesting elections. The Delhi High Court ruled that for electors to make an informed choice they have a right to know along with their financial position and educational qualifications, the criminal antecedents of the candidates[15].

The Election Commission appealed against this order. However, the Supreme Court upheld the order of the Delhi High Court in this case popularly known as the *ADR Case*[16]. "The little man may think over before making his choice of electing law breakers as law makers" said the Bench comprising Justice M.B. Shah, Justice Bisheswhar Prasad Singh and Justice H.K. Sema, as "votes cast by uninformed voters in favour of candidate would be meaningless[17]". Sir Winston Churchill used the expression of 'little man', while explaining the pervasive philosophy of democratic election: "At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper- no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point". Referring to Churchill's remarks the Supreme Court added: "If we may add, the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods or subtle perversion of discretion by men 'dressed in little, brief authority'. For 'be you ever so high, the law is above you'[18].

The Election Commission, the Court further ruled[19], would be well within its constitutional authority in asking candidates for disclosure of their assets and liabilities, educational qualifications and criminal records.

Such right to information of the voter, the Supreme Court found to be a part of the fundamental right to freedom of speech and expression. Further in a parliamentary democracy, free and fair election is part of the basic structure of the Constitution. This requires that the voters be informed about the

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15 Judgment of Delhi High Court, dated November 2, 1999 in WP No 7257 of 1999. *AIR* 2001 Del 126.

16 Supra n. 1

17 Supra n. 1, para 46 (7) at p.313.

18 Supra n. 1, para 24 at p.310.

19 Supra n. 1, para 22.

antecedents of the candidates. In realization of this right to information the Court directed the EC to seek information from the candidates on affidavit about their criminal record, assets and liabilities, and educational qualifications as a necessary part of the nomination paper[20]

iv. The Power and Duty of Election Commission

Referring to Article 324 which gave a general power to conduct fair election, the Bench emphasized that 'to maintain the purity of elections and in particular to bring transparency in the process of election the Election Commission can ask the candidates about the expenditure incurred by the political parties. Further this transparency in the process of election would include transparency of a candidate who seeks election or re-election.

In the absence of parliament-made-law on disqualification and disclosure the EC's executive directions were criticized as being beyond jurisdiction and hence invalid.

By Article 324 of the Constitution the EC is vested with the power to pass orders for all contingencies not already provided for in an enacted legislation. This position was reiterated by the Supreme Court in the *Mohinder Singh Gill* case[21]. The Supreme Court in *A. C. Jose v. Shivan Pillai* in 1984[22] and the Symbols Order *(Kanhiya Lal Omar v. R.K. Trivedi)* case in 1985[23] again confirmed this residuary power of the EC. These judicial decisions establish that the EC was free to issue rules and take steps for the smooth

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20 The Supreme Court asked for the following information:

i) "Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past – if any, whether he is punished with imprisonment or fine?

ii) Prior to six months of filing his nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so details thereof.

iii) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of dependants.

iv) Liability if any, particularly whether there are any overdues of public financial institutions or government dues.

v) The educational qualifications of the candidate." On July 2, 2002 the Uttaranchal State Government through *The Uttaranchal (the Uttar Pradesh Nagar Palika Adhiniyan, 1916) (Amendment) Ordinance, 2002* incorporated the additional disclosure required under the Election Commission Order.

21 Supra n. 4.

22 (1984) 2 *SCC* 656.

23 *Kanhiya Lal Omar v. R.K. Trivedi* (1985) 4 *SCC* 628.

conduct of elections. A power which includes issuing necessary orders to fill the gaps left by the legislature.

In further contravention of the contention that the only Parliament had power to make necessary amendments to the election law, the Supreme Court in the *ADR* case[24], asserted that "if the field meant for legislature and executive is left unoccupied detrimental to public interest, this court under Article 32 read with Articles 141 &142 of the Constitution can issue necessary directions to the executive to subserve public interest".

Another important legal question that arises from the decision is whether the Supreme Court or Election Commission had valid authority to order disqualification of the contestants. Even in the *ADR* case[25] the Supreme Court desisted from prescribing a disqualification. When it issued orders authorising returning officers to reject the nomination of candidates who fail to give an elaborate affidavit disclosing their criminal, financial and educational record, did the EC assume more powers than intended by the Supreme Court to read into its constitutional powers?

Especially, another clause incorporated in the order of the EC says "furnishing of any wrong or incomplete information or suppression of any material information by any candidate in the affidavit may also result in rejection of his nomination paper". Would it be practically possible for a returning officer to verify the contents of affidavit within one day? The order stated that only such information shall be checked 'as is capable of easy verification by the returning officer with reference to documentary proof adduced at the time of scrutiny of nominations. This obviously means a hurried decision on contentious questions of veracity. The political parties apprehended that such an order would lead to forfeiting of elections in constituencies where their candidates have been disqualified for filing defective or deficient affidavits. Further would the EC have the time and resources to undertake such an authentic scrutiny in such short period? As no fresh nominations would be accepted at that advanced stage their right to participate in elections would be severely compromised.

The Supreme Court in its March 2003 decision[26] has reiterated that EC has no authority to deprive the candidates from contesting for not furnishing sufficient information. The apex court tried to explain in so many words that it was primarily upholding the right of information about the antecedents rather

[24] Supra n. 1.
[25] Supra n. 1.
[26] *ADR and others v. Union of India* 2003 (3) *Supreme* 93.

than prescribing a new disqualification or empowering the EC to reject the nominations on new grounds.

Even if the non-furnishing of information will not lead to disqualification, at least, the concerned authorities under the *Prevention of Corruption Act* or the *Income Tax Act* should verify the disclosures regarding assets in the sworn affidavits and their source. Such consequential provisions to consider the disclosures should form part of a comprehensive legislation based on the newly derived voter's right to information about the antecedents and assets of contestants. The lawmakers instead of making such legislation, preferred not to respond to Supreme Court's well considered suggestions. The demand for accountability did not find endorsement from the political parties. In a rare show of unanimity, all the 21 parties rejected EC's Order and Supreme Court's directives. As further reinforcement, ruling party moved a legislation, which virtually blanked out the information duties imposed by the Supreme Court.

v. *The Rejected Draft:*

The Government, however, proposed to disqualify those candidates who six months prior to filing their nominations had been charged by a competent court of having committed two heinous crimes, in separate transactions, from a list specified in the draft bill. The heinous crimes included violent crimes such as rape, murder, kidnapping and dacoity. White-collar crimes such as *hawala*, financial fraud, charges under *Foreign Exchange Management Act*, charges under *Prevention of Corruption Act* have not been included. If the Bill had become law, this would have given rise to a ridiculous position that a person charged with two heinous crimes in the 'same' transaction would be permitted to contest, while those charged with such crimes in different transactions, be prohibited. Even persons charged with listed heinous crimes can contest election provided that those crimes were not committed 6 months before filing of nomination on when only one heinous crime was committed in this period. Fortunately, this draft which validated criminalisation, was not made into an ordinance or Act.

vi. *The Impugned Amendment:*

The Ruling Party coalition could not resist the pressure from the court, society, media and growing opinion for voter's right to information. Despite the earlier attempts to avoid disclosure of information by candidates, the

Government came out with an Ordinance, which allowed for disclosure at the nomination stage. However, all other directions from the Supreme Court were specifically rejected. It was, however, different from the draft discussed above. Ironically in making this legislative reform the government did not just reverse the decisions of the Supreme Court. It also ignored the suggestions of NCRWC.

That Ordinance was replaced by an Act in 2002[27], contains a disclosure clause which added a new Section 33A to the *RPA*. It says:

(1) "A candidate shall apart from any information which he is required to furnish, under this Act or the Rules made thereunder, in his nomination paper delivered under sub-section (l) of Section 33 also furnish the information as to whether:

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction.

(ii) if he has been convicted of an offence (other than any offence referred to in sub-section (l) or sub-section (2) or covered in subsection (5) of section 8), and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall at the time of delivering to the returning officer the nomination paper under subsection (1) of Section 33 also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in Subsection (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit delivered under subsection (2) at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered".

vii) Protection from disclosure of assets and liabilities:

The Ordinance totally protected the candidates from disclosing the assets and liabilities at the time of nominations. It added Section 33B with a

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[27] The *Representation of Peoples' Amendment Act, Ordinance 2002* published in *The Gazette of India* August 24, 2002, which was later replaced by the *Representation of Peoples' (Amendment) Act, 2002.*

direction that it will have retrospective effect that is 2nd of May, 2002 the date on which the Supreme Court in pronounced judgement in the *ADR* case[28].

> 33B. Notwithstanding anything contained in any judgement, decree or order of any court or any direction order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.

The effect of this section will be that except for information on criminal accusations no other information with regard financial standing or educational background need be given. Another positive feature of the Ordinance is that the rule, which was earlier indicated in the code of conduct, has now been made a legal provision Chapter VIIA under headline "Declaration of Assets and Liabilities" is added with Section 75A. Though the voters have been denied the information, at least, the assets disclosure code has became a legal rule.

ADR, Lok Satta and PUCL filed a writ petition[29] challenging the constitutionality of the Ordinance[30]. First, the petitioners contended, that the requirements of disclosure arose from the rights of voters guaranteed by Article 19 (1) (a) of the Constitution, which was negated and hence Section 3 of the impugned Ordinance has clearly hit by Article 13.

Second, the impugned Section 3 was violative of Article 324 of the Constitution, which vests the power to conduct elections with the Election Commission. This has been held in several cases including the *ADR* case[31], and *Common Cause (A Registered Society) v. Union of India*[32].

Petitioners also contended that the Ordinance violated principles of parliamentary democracy which required free and fair elections. The Supreme Court has held in *ADR* case[33], *Keshvanand Bharati v. State of Kerala*[34], *P.V. Narasimha Rao v. State*[35], *Kihoto Hollohan v. Zachilluu and Others*[36], that

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28 Supra n. 1.
29 Supra n. 26.
30 The ordinance is replaced by the legislation and the petitioners amended the petition to challenge the constitutional validity of the new Act.
31 Supra n. 26.
32 (1996) 2 *SCC* 752.
33 Supra n. 1.
34 (1973) 4 *SCC* 225.
35 (1998) 4 *SCC* 626.
36 1992 Supp (2) *SCC* 651.

Parliamentary Democracy and free and fair elections were basic features of the Constitution.

They also contended that the impugned section was illegal since it sought to expressly nullify and set side a judgement of a court, without altering the basis of the judgement. A procedure found unacceptable by the Supreme Court in *Janapadha Sabha v. Central Provinces*[37], when it ruled that: "It was open to the Legislature within certain limits to amend the provisions of an Act retrospectively. However it was not open to the Legislature to say that a judgement of a properly constituted court rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court".

The Supreme Court struck down the amendments as unconstitutional. The Bench comprising Justice M.B. Shah, Justice P V Reddy, and Justice D Dharmadhikari questioned the Parliament's legislative competence to ask the state or its instrumentality to disobey the court's orders. The legislature the court ruled could not declare that the law declared by the Supreme Court was not binding. The amended *RPA* can be described as a 'half-hearted attempt' of the Government to fight the use of money and muscle power in elections. The Parliament with all varieties of political parties almost unanimously passed this Act which has invited an adverse response from the Supreme Court. The court was correct in nullifying the controversial Section 33B and striking down the provisions, which deny the voter's right to information.

The Bench allowed that a legislature was entitled to retrospectively change the law with which formed the basis of a judicial decision. This power was however subject to constitutional provisions. Therefore, the legislature could not enact a law which was violative of fundamental right. The voter had a fundamental right to know the antecedents of a candidate and this right was independent of statutory rights under the election law.

As the amended Act was found to curtail the right of the people to know about their candidates, the court directed a prospective rectification. The Bench further held that Section 33B on the face of it was beyond legislative competence, as the Supreme Court had earlier held that voters had a fundamental right to know the antecedents of the candidates. Further the Act did not entirely cover the directions issued by the court. On the contrary it

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[37] (1970) 3 *SCR* 745.

provided that candidates would not be bound to furnish certain information which the court required to be submitted.

The bench posed a question whether there was any necessity to keep the voters in the dark about any murder, dacoity or rape committed by a candidate or about his ill-gotten money, which could be used for elections. Justice Shah said that the judgment was aimed at cleansing democracy of unwanted elements and giving the country a competent legislature. Justice Shah observed that members of a democratic society should be sufficiently informed so that they might cast their votes intelligently in favour of persons who were to govern them. He said the right to vote would be meaningless unless citizens were well informed about the antecedents of a candidate. Supreme Court said that a blanket ban on the dissemination of information by candidates at the time of filing their nominations was impermissible. The right to information should be allowed to grow. Exposure to public scrutiny was one of the known means for getting clean and less polluted persons to govern the country. The voter must have necessary information so that he could intelligently decide in favour of a candidate.

The Supreme Court has taken a major step in the history of electoral reforms with regard to voter's right to be informed about the antecedents of candidate. These directions need to be appropriately consolidated in a duly amended *RPA*.

III

High Cost of Elections and Abuse of Money Power

There is a very strong nexus between criminalisation of politics and the ever increasing electoral expenditure. Increasing costs of electioneering and election prevents the good and the honest to enter legislatures. The NCRWC has rightly observed that such high expenses create a high degree of compulsion for corruption in the political arena.

> This has progressively polluted the entire system. Corruption, because it erodes performance, becomes one of the leading reasons for non-performance and compromised governance in the country. The sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc. No matter how we look at it, citizens are directly affected because apart

> from compromised governance, the huge money spent on elections pushes up the cost of everything in the country. It also leads to unbridled corruption and the consequences of wide spread corruption are even more serious than many imagine. Electoral compulsions for funds become the foundation of the whole super structure of corruption[38].

In *Common Cause*[39] case in 1996 the Supreme Court took judicial notice of the fact that political parties spend over Rs 1000 crores on elections and that nobody discloses the source of the money. According to a survey it is the money that drives the politics. The study commissioned by the Center for the Study of Developing Societies- CSDS in New Delhi found that 98 per cent of the winning candidates in its sample of 25 constituencies belonged to categories: super rich, very rich and rich. Fifty eight per cent of all candidates also belonged to these categories[40].

i. The Legal Limits on Election Expenditure

The Election Law prescribed punishments for several corrupt practices which include exceeding the limits of expenditure by the candidate contesting election for any legislative house. Section 123 (6) of the *RPA* makes the 'incurring or authorizing of expenditure in contravention of Section 77 of the *Representation of People's Act, 1951* is a corrupt practice'. Section 77 makes it mandatory for every candidate at an election to keep a separate and correct account of all expenditure incurred or authorised by him or his election agent, between the date on which he was nominated and the date of declaration of the result of election both dates inclusive. The total of the said expenditure shall not exceed such amount as may be prescribed under Section 77 (3). Rule 90 of the *Election Rules, 1961* prescribes varying limits of election expenditure for parliament and assembly constituencies in each of the state and union territories.

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[38] Report of National Commission for Review of Working of the Constitution, para 4.14.1 p. 89.

[39] Supra n. 32.

[40] Anjali Mody, "Ganging Up Against the People", *The Hindu*, July 21, 2002 pp16-17 (According to CSDS the average, visibly verifiable cost of elections is placed at Rs 70 lakhs per Parliamentary constituency and the real cost at nearer Rs Seven Crores by Loksatta. So long as they can satisfy EC that they have personally spent only the stipulated Rs 15 lakhs they have no hitch in contesting election).

In *Kanwar Lal Guptha v. Amarnath Chawla*[41], the Supreme Court explained that the object of limiting expenditure is twofold. First, it should be open to any individual or any political party, howsoever small, to be able to contest an election on a footing of equality with any other individual or political party, how so ever rich and well financed it may be. Second, it is required to eliminate the influence of big money in the electoral process.

The Election Law had been amended in 1975 providing that the election expenditure of a candidate was now to be accounted for the period starting with the date of the nomination and ending with the date of declaration of result[42].

In *Hans Ram v. Hari Ram*[43] the Supreme Court had held that the expenditure must be by the candidate himself. Any expenditure made in his interest by others except the agents was not to be taken note of[44]. The Supreme Court has provided a reasonable interpretation of Section 77(1) in *Kanwar Lal Guptha v. Amarnath Chawla*[45]. The court ruled that when political parties sponsoring a candidate incurred expenditure in connection with his election as distinguished from expenditure on general party propaganda, and the candidate knowingly takes advantage of it or fails to disallow it or acquiesces in it, then ordinarily it would be reasonable to infer that he implicitly authorised the expenditure. He cannot escape the rigour of the ceiling by saying that he has not incurred the expenditure but his political party has done so. The same reasons should be extended to the expenditure incurred by friends or supporters in connection with the election of a candidate.

The expenses incurred by the agent of the candidate became a bone of contention. Consequently, when Mr. Raj Narain filed an election petition against Mrs. Gandhi alleging that she had exceeded the expenditure ceiling, Section 77(1) was hurriedly amended by promulgating the *Representation of People's (Amendment) Ordinance, 1974*, by insertion of an explanation to the effect that

> Notwithstanding any judgment, order or decision of any decision of any court to the contrary, any expenditure incurred or authorized in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual

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41 *AIR* 1975 SC 308.

42 As per Section 77 (1) as amended by *Election Laws (Amendment) Act 1975.*

43 40 *ELR* 125.

44 In this case the Congress Committee had arranged a Jeep, which was not treated as an agent's expenditure.

45 Supra n. 41.

(other than the candidate or his election agent) shall not be deemed to be, and shall not ever deemed to have been, expenditure in connection with election incurred or authorized by the candidate or by his election agent for the purpose of this subsection.

This Ordinance was later replaced by The *Election Laws (Amendment) Act, 1974*. Despite this amendment, Mrs Indira Gandhi lost her election case on several grounds including that of misuse of power by a public servant and excess expenditure by the public servant which being part of the expenditure of the candidate contesting election led to contravention of Section 77(1). Mrs Indira Gandhi preferred an appeal to Supreme Court. Before the appeal came up for hearing, another amendment was brought in with great haste.

ii. Another Amendment

Another Explanation was added to Section 77(1) by *Election Laws (Amendment) Act, 1975* as Explanation III to the effect any expenditure incurred in respect of any arrangements made, facilities provided or any other act or thing done for any candidate by any person in the service of the Government, in the discharge or purported discharge of his official duty, shall not be deemed to be expenditure incurred or authorized by the candidate or his election agent. This change helped the candidates holding positions in the Government, as it allowed expenditure to be incurred by public servants on the election of those candidates, whom the public servants were serving in their official capacity. This amendment was introduced to nullify the effect of the Allahabad High Court Judgment[46] which found fault with expenditure incurred by public servants. The Supreme Court allowed for this effect by upholding Mrs. Gandhi's election in *Indira Nehru Gandhi v. Raj Narain*[47].

According to Explanation 1 to Section 77(1) of the *RPA*, the amounts spent by persons other than the candidate and his agent, are not counted in his election expenses. This means that there can never be any violation of expenditure limits. All extra expenditure, even when known and proven, can be claimed to have been spent by the party or by friends and thus remains outside enforceable limits. In view of the increasing cost of election campaigns, the NCRWC felt that it is desirable that the existing ceiling on election expenses for the various legislative bodies be suitably raised. Further the Election Commission should be required to revise this ceiling from time to time. In

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47 *AIR* 1975 SC 2299.

fixing the ceiling the EC should include all the expenses incurred whether by the candidate, his political party or his friends and his well-wishers. It should also take into account any other expenses incurred in any political activity on behalf of the candidate by an individual or a corporate entity. Such a provision should be incorporated in legislation regulating political funding in India. Further the Commission recommended that consequently Explanation 1 to Section 77(1) of the *RPA* should be deleted.

Transparency in the context of election means both the sources of finance as well as their utilization as are listed out in an audited statement. If the candidates are required to list the sources of their income, this can be checked by the income tax authorities.

The NCRWC recommended that the political parties as well as individual candidates be made subject to a proper statutory audit of the amounts they spend. These accounts should be monitored through a system of checking and cross-checking through the income-tax returns filed by the candidates, parties and their well-wishers. At the end of the election each candidate should submit an audited statement of expenses under specific heads. The EC should devise specific formats for filing such statements so that fudging of accounts becomes difficult. The audit should be mandatory and its observance enforced by the Election Commission.

iii. Declaration of Assets and Liabilities of Candidates

Expenditure and disclosures have a close link. Both are connected with making elections free from money power. Almost every Committee or Commission suggested[48] that there should be limits on spending and need for revelation of assets and earnings.

The sum and substance of these suggestions is as follows:

1. It should be made mandatory for every candidate to declare one's property and income at the time of nomination; the declaration should be made public and false declaration should be made punishable

2. The legal provisions regarding the ceiling on electoral expenses should be modified to provide for:

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[48] The Goswami Committee on Electoral Reforms (1990); The Indrajit Gupta Committee on State Funding of Elections (1998); The Law Commission's report on Reform of the Electoral Laws (1999) and National Commission for Review of Working of Constitution (2002).

a) upward revision of the ceiling to allow for expenditure at Rs 2 per elector in the constituency and regular revision of this ceiling

b) all expenditure, including that of parties and friends should be included in calculating the expenditure; the 1974 Amendment to Section 77 should be annulled

c) publicity of the returns filed by the candidates in the local press and their regular verification and auditing should me made mandatory

In line with the above body of suggestions the NCRWC also recommended that every candidate at the time of election must declare his assets and liabilities along with those of his close relatives. Every holder of a political position must declare his assets and liabilities along with those of his close relations annually. Law should define the term 'close relatives'. All candidates should be required under law to declare their assets and liabilities by an affidavit and the details so given by them should be made public. Further, as a follow up action, a special authority created specifically under law for the purpose should audit the particulars of the submitted assets and liabilities. Again, the legislators should be required under law to submit their returns about their liabilities every year and a final statement in this regard at the end of their term of office.

Parliament and several state legislatures, including that of Andhra Pradesh framed a code of ethics incorporating a condition that every elected representative shall declare his assets and liabilities immediately after getting elected and every year thereafter. There are no consequences for wrongful disclosures nor provision made for scrutiny of the revelations. When all the political parties could unite for opposing a specific direction of the apex court, it is futile to expect strict adherence to a toothless code of conduct. At least, the lawmakers must be ready to create a statutory obligation of periodical declarations of assets and liabilities in the form of affidavit with provisions for verification by lawful authorities.

Conclusion

Several Commissions[49] have studied and made very valuable suggestions to stop criminalisation, reform the poll process and provide for a real democracy with free and fair opportunity to voters to elect their representatives. However the legal actions of the government and the opposition

[49] Supra n. 1.

shows a singular lack of interest in the reform process. Whether ruling or opposition, all political parties are one in protecting the defects in the electoral law and practices be it disclosing their financial assets or liabilities, or preventing criminals from entering legislative houses. The need is not mere cosmetic changes but a comprehensive legislation that can reform and strengthen the process of democratic elections. Electoral malpractice originates in the fact that intermediary political institutions and the institutions of the civil society fail to perform their functions. Consequently the institution of election has acquired a centrality it must not have in a healthy democracy. Legislative acts of electoral reforms can become meaningful and effective only if they become a part of a wider movement of democratic consolidation in the arena of civil society and politics.

There is a need for all political parties to come together and rise above petty political consideration and make a comprehensive law consolidating the right of voters to information on the lines suggested by the Supreme Court in its two judgements.

If people are not vigilant and the media not vibrant, opinions would not consolidate into pressures and develop into social movements to effectively manage democracy. In this country with illiteracy, poverty and exploitation, people cannot afford to be dormant, inactive or reluctant. Freedom and Democracy have to be protected by every one. They cannot be left with groups of persons with vested interests, called political parties. The voters are expected to draw their information from the manifestos and commitments made by political parties and insist on their realization. Instead of blaming only politicians and political parties for the present state of affairs, people should exercise their right to know and question the actions of criminal politicians. Only with the support of efficient groups and systems such as active citizenry, watchful media, effective legal framework, efficient enforcement mechanism and responsive judiciary it is possible to achieve a reformed electoral system.

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