

# ROLE OF PARLIAMENT AND JUDICIARY IN CURBING THE MENACE OF CRIMINALIZATION OF INDIAN POLITICS

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“If the people who are elected are capable and men of character and integrity, then they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them...It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas...We can only hope that the country will throw up such men in abundance.”

The entry of criminals in Indian politics has been a very serious problem. If it goes unchecked, it would wreck the entire electoral system. From time to time, the Parliament, the Election Commission of India, Judiciary and various Commissions and Committees had taken measures to curb this menace. In this article, an attempt has been made to discuss some of the steps taken by the Parliament and Judiciary to fill the gaps in the present system of electoral laws.

## Role of Parliament

Article 327 of the Constitution of India empowers the parliament to make provisions with respect to all matters, relating to elections to legislatures. In exercise of this power, Parliament has enacted the Representation of People Act, 1950 and 1951. To prevent the entry of criminals, provisions have been added in this Act: Under Sections 8(1), 8(2) and 8(3) a person convicted under offences mentioned in these sections or any other offence shall be disqualified for a period of six years from the date of such conviction.

But under Section 8 (4) of the Act, none of the above mentioned disqualification will take effect in case of a person who on the date of conviction is a Legislator, till three months have elapsed from the date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of the court. It means that on account of the sub-section (4), the criminal can contest election and enter legislature and become a member of Council of Ministers. Through here, the intention of lawmakers is to prevent a needless vacancy and a by-election.

Finally, in 2003, the Parliament of India enacted the Election and Other Related Laws (Amendment) Act with a view to making the electoral process clean, fair and free from corrupt influences. The Act took into account the recommendations of many of the government-appointed committees such as the Goswami Committee on Electoral Reforms, the Indrajit Gupta Committee on State Funding of Elections and the Law Commission's report on Reform of Electoral Laws. First, it introduced substantial changes to election law, particularly with regard to campaign and party finance. It made company and individual contributions to political parties fully tax deductible, putting in place an incentive for open donations. It also made disclosure of donations over Rs 20,000 mandatory if the party wished to enjoy exemption from income tax. This, along with the Common Cause judgment, has resulted in most political parties filing annual income tax returns.

The Act made it mandatory for candidates to declare their campaign expenses as well as the money spent by their party and supporters. However, the loopholes in Section 77 were not entirely plugged.

## Proactive Role of Judiciary

The judiciary has also played an important role to debar the anti-social elements from entering the legislatures by giving verdicts in context with different cases brought before it from time to time. The judiciary is aware of the fact that the representative democracy should be represented by reputed representatives, otherwise with the entry of non-serious and anti-social elements the whole system would be degenerated.

The Judiciary is well aware of the menace of criminalization of politics hence brought a major electoral reform through its revolutionary pronouncements. In *Deepak Ganpat Rao Salunke vs State of Maharashtra*. The Deputy Chief Minister of Maharashtra in a public meeting made the statement that if Republican Party of India supported the Shiv Sena-BJP alliance in the Parliamentary Election he would see that a member of Republican Party of India was made Deputy Chief Minister of the State. It was held by the honorable court that the above statement did not amount bribery as defined under section 171 B as the offer was made not to an individual but to RPI with the condition that it should support BJP-Shiv Sena alliance in the election. Thus seeking support of a political party in lieu of some share in the political power does not amount gratification under Section 171-B of the Penal Code. In *Raj Deb V Gangadhar Mohapatra* a candidate propagated that he was Chalan Vishnu and representative of Lord Jagannath himself and if any one who did not vote for him would be sinner against the Lord and the Hindu religion. It was held that this kind of propaganda would amount to an offence under Section 171 F read with Section 171C. In *T.R. Balu V S. Purushthoman* it was alleged in the election petition that the returned candidate had a bigamous marriage and it was admitted by him through an affidavit submitted at the time of filing the nominations. Hence, his election should be declared null and void. Madras High Court upheld the election on the ground that the returned candidate was never prosecuted nor found guilty or punished for it. In the case of *Association for Democratic Reforms* the judiciary brought about a major electoral reform by holding that a proper disclosure of the antecedents by candidates in election in a democratic society might influence intelligently the decisions made by the voters while casting their votes. Observing that casting of a vote by a misinformed and non-informed voter, or a voter having a one sided information only, is bound to affect the democracy seriously, the Honorable court gave various directions making it obligatory on the part of candidates at the election to furnish information about their personal profile, background, qualifications and antecedents. Hence the principle of transparency was established. In *K. Prabhakaran vs. P. Jayarajan* the Court considered numerous issues. It took note of the question whether for attracting disqualification under Section 8(3), the sentence of imprisonment for not less than two years must be in respect of a single offence or the aggregate period of two years of imprisonment for different offences. The respondent was found guilty of offences and sentenced to undergo imprisonment. For any offence, he was not awarded imprisonment for a period exceeding two years but the sentences were directed to run consecutively and in this way the total period of imprisonment came to two years and five months. On appeal, the session court directed the execution of the sentence of imprisonment to be suspended and the respondent be released on bail during the hearing of the bail. During this period, he filed his nomination paper for contesting election from a legislative assembly seat. During the scrutiny, the appellant objected on the ground that the respondent was convicted and sentenced to imprisonment for a period exceeding two years. The objection was overruled and nomination was accepted by returning officer on the ground that although respondent was convicted of many offences but he was not sentenced to for any offence for a period not less than two years. The High Court also took the similar view but the Supreme Court by majority took the different view. Chief justice Lahoti speaking for the majority held that the use of the adjective —any with —offence|| did not mean that the sentence of imprisonment for not less than two years must be in respect of a single offence. The court emphasized that the purpose of enacting Section 8(3) was to prevent criminalization of politics. By adopting purposive interpretation of Section 8(3), the Court ruled that its applicability would be decided on the basis of the total term of imprisonment for which the person has been sentenced. It is interesting to note that Supreme Court in *Vidyacharan Shukla V Purushottam Lal* had taken an enigmatic view; Vidya Charan Shukla was convicted and sentenced to imprisonment exceeding two years by the Sessions Court on the date of filing nomination but the returning officer unlawfully accepted his nomination paper. He also won the election although conviction and sentence both were effective. The defeated candidate filed an election petition and by the time when it came before the High Court, the Madhya Pradesh High Court allowed the criminal appeal of Shukla setting aside the conviction and sentence. While deciding the election petition in favour of the returned candidate, the court referred to *Mannilal Vs Parmaila* and held that the acquittal had the effect of retrospectively wiping out the disqualification as completely and effectively as if it had never existed. However, *Vidya Charan Shukla* which had the effect of validating the unlawful action of the returning officer and encouraging criminalization of politics was overruled by Prabhakaran. The Supreme Court observed: Whether a candidate is qualified or not qualified or disqualified for being chosen to fill the seat has to be determined by reference to the date for the scrutiny of nomination... The returning officer cannot postpone his decision nor make it conditional upon what may happen subsequent to that date. In *People's Union for Civil Liberties & Anr. vs Union of India & Another*. it was wisely observed by the court that, "Democracy being the basic feature of our constitutional set up, there could be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The 'fair' denotes equal opportunity to all people. Universal

adult suffrage conferred on the citizens of India by the Constitution has made it possible for these millions of individual voters to go to the polls and thus participate in the governance of the country. For the survival of democracy and proper governance of the country, it is essential that the best available person should be chosen as people's representatives. This could be best achieved through men of high moral and ethical values, who win the elections on a positive vote. Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which would indeed compel the political parties to nominate a worthy candidate. This situation palpably tells us the dire need of negative voting.

In a landmark judgement in *B. R. Kapur vs. State of Tamil Nadu and Others*, a constitutional bench comprising of S. P. Bharucha, B. Pattanaik, Y. K. Sabharwal, Ruma Pal and Brijesh Kumar, JJ; had held that a person who is convicted for a criminal offence and sentenced to imprisonment for a period not less than two years and whose conviction has not been suspended could not be appointed the Chief Minister under Article 164 (1) (4) and could not continue to function as such. This pronouncement was in reaction to decision by the winning candidates of AIADMK to appoint Ms. Jayalalitha as Chief Minister. When the majority party elected her as Chief Minister being their leader in the legislature, the Governor Smt. Fatima Bibi appointed her Chief Minister for a period of six months under Article 164(1) (4) of the Constitution. But the appointment was declared null and void by the judiciary.

#### The 2002 Supreme Court Judgment

In *Union of India v. Association for Democratic Reforms (2002)* the Supreme Court had to decide on an appeal by the union government against a High Court judgment ordering election candidates to furnish details about their financial assets as well as their criminal records, if any. The two questions before the three-judge bench of the Supreme Court, headed by Justice M.B. Shah, were: One, whether a citizen had the right to know the criminal record and financial details of a contesting candidate. Two, whether the Election Commission had the authority to issue directions as ordered by the High Court. On both these questions the Supreme Court answered in the affirmative.

Let us first have a look at the arguments put before the court. The petitioner, Association for Democratic Reforms, going on the reports of Vohra Committee and Law Commission, argued for barring a candidate from contesting elections if criminal charges had been framed against him. It also argued for the declaration of assets by candidates. On behalf of the government, the Solicitor-General argued that there were enough safeguards in the Representation of People Act against criminality and corrupt practices. The Indian National Congress, another intervener, submitted that the Constituent Assembly, the body that framed the Indian Constitution, had rejected the need for information regarding assets and educational qualification. The Election Commission, which had also filed a counter affidavit in the case, suggested that candidates should provide information regarding any criminal convictions and any pending case against them for an offence which is punishable with imprisonment for two years or more. It also suggested that candidates be asked to disclose all their financial assets and liabilities as well as their educational qualifications.

On the question of whether the Election Commission was empowered to issue directions regarding elections, the court referred to earlier interpretations of the scope of Article 324, which deals with the powers vested in the Election Commission, and said in areas unoccupied by legislation 'superintendence, direction and control' as well as 'conduct of elections' must be construed in the broadest terms. It ruled that the Election Commission could 'cope with situation where the field was unoccupied by issuing necessary orders'. The Court referred to an earlier ruling of the Supreme Court, *Mohinder Singh Gill v. The Chief Election Commissioner*, to buttress its case. There the Court had held that two limitations at least were laid on the Election Commission's plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent, Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election.' The power of the Election Commission to frame rules, where necessary legislation was lacking, had been reaffirmed in subsequent Court rulings.

On the issue of whether voters had the right to know details of the criminal record as well as financial details of candidates, the Court interpreted the right to freedom of speech and expression, well entrenched in the Indian Constitution, to cover the right to get information regarding a candidate who was contesting elections. It based its ruling on two counts. One was that elected legislators were 'public functionaries' and the citizens had the right to 'know every public act, everything that is done in a public way by the public functionaries'. It cited several earlier rulings, including *P.V.*

Narasimha Rao v. State where the Court had said of legislators: 'It is difficult to conceive of a duty more public than this or of a duty in which the State, the public and the community at large would have greater interest.' Second, it said 'public education' was essential for the decision-making process of a voter. The Court held that this Court would have ample power to direct the Election Commission to fill the void, in absence of suitable legislation, covering the field and the voters were required to be well-informed and educated about contesting candidates so that they could elect proper candidate by their own assessment.'

Accordingly, the Court directed the Election Commission to exercise its powers under Article 324 to seek the following information from candidates intending to contest elections to Parliament and the state legislatures as part of the nomination process: whether the candidate had been convicted or acquitted of any criminal offence in the past; whether he had any pending case against his name for an offence punishable by imprisonment of two years or more; declaration of his financial assets as well as those of his spouse and dependents; declaration of financial liabilities; and his educational qualifications.

#### The 2003 Supreme Court Judgment

Subsequent to the 2002 Supreme Court judgment, the Representation of the People (3rd Amendment) Act was notified. Section 33B of the Act provided that candidates furnish information only under the provisions of the Act and its rules. It stated that notwithstanding anything contained in any judgment, 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 there under.' Not surprisingly, Section 33B was challenged by several NGOs, including PUCL and Association for Democratic Reforms, on the ground that all the directions of the Court in the 2001 judgment had not been incorporated in the amendment to the RPA. In PUCL v. The Union of India, the Court upheld the challenge.

Right at the outset, the three-judge bench, headed by Justice M.B. Shah, clarified that though parts of its earlier judgment had been implemented in the amended Act, the provisions regarding the candidate's criminal record, disclosure of assets and liabilities and educational qualifications had not been incorporated. The court referred in some detail to the recommendations of the Law Commission, the NCRWC and the Indrajit Gupta Committee which had called for an 'immediate overhauling of the electoral process whereby elections are freed from evil influence of all vitiating factors, particularly criminalization of politics'. Based on these reports, the Court concluded: 'It is apparent that for saving the democracy from the evil influence of criminalization of politics, for saving the election from muscle and money power, for having true democracy and for controlling corruption in politics, the candidate contesting the election should be asked to disclose his antecedents including assets and liabilities. Thereafter, it is for the voters to decide in whose favor he should cast his vote.'

In addition, the Court responded to three points raised by the respondents. One was the contention that Section 33B had complied with some of the directions of the Court, thereby filling the gap in legislation. The Court rejected this by saying it was a well-settled legal position that the legislature did not have the 'power to review' court rulings and it could not declare that the decision of the court was not binding. Further, the Court held that Article 19 (1) (a), which provides for freedom of speech and information, encompasses the right of the voter to know the antecedents of the candidate. Fundamental rights under Article 19 (1) (a) can only be abridged under exceptional circumstances which did not apply in this instance. Second, the respondents argued that since there was no specific fundamental right for the voter to know about the antecedents of a candidate, the right was a derivative one, which could be nullified by the legislature. The Court, however, ruled that the fundamental rights had no fixed content and it was up to the Court to give 'meaning and color' to it. Third, it was contended that right to elect or be elected was a statutory right and not a fundamental right, which meant that the voter did not have a fundamental right to know about the antecedents of a candidate. The Court ruled that the 'right of a voter to know bio-data of a candidate is the foundation of democracy' and that this right was independent of statutory rights under the election law. It said that any legislation that abridges the fundamental right to freedom of speech and expression would be invalid.

Thus the Court declared Section 33B of the amended Act 'illegal, null and void' on the grounds: it is not within the legislature's rights to declare that the Court's decision is not binding; the voter has a fundamental right to know the antecedents of a candidate; and a voter's fundamental right to know the background of a candidate is independent of

statutory rights under election law. Subsequently, later that year the EC issued an order making declarations of financial assets, criminal records and educational qualifications by candidates mandatory.

Interestingly there was a separate judgment by Justice P. Venkatramana Reddi since he had 'a limited area of disagreement on certain aspects, especially pertaining to the extent of disclosures that could be insisted upon by the Court'. Justice Reddi commented on the 'right to information' which he said had been spun off from Article 19 (1) (a) of the Indian Constitution. He referred to a 1975 Supreme Court judgment (*State of U.P. v. Raj Narain*) which he believed was the first to explicitly state the right to information as a fundamental right. There the Court had said: 'In a Government of responsibility like ours, where all the agents of public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.'

According to Justice Reddi, the Court in the *Association for Democratic Reforms* judgment had brought for the first time the right to information about an election candidate under the ambit of Article 19 (1) (a). This, he said, was 'qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though to a certain extent, there may be overlapping'. He felt that the *Association for Democratic Reforms* case should rightly have been referred to a Constitution Bench since the right to freedom of information about a contesting candidate was being elevated to a fundamental right. He, however, said that the 2001 judgment was on a firm footing because 'the availability of proper and relevant information about the candidate fosters and promotes the freedom of speech and expression both from the point of view of imparting and receiving the information'.

Justice Reddi also had minor disagreements regarding other aspects of the judgment. He said that though knowledge about the financial position of a candidate was a good thing, it would not enable the public to ascertain whether unaccounted money played a part in the election. He pointed to Explanation 1 to Section 77 (1) of the RPA saying that as long as that clause stood, it wasn't possible for a voter to verify the source of the candidate's funds. Finally, Justice Reddi disagreed with the utility of disclosing educational qualifications, which he said was not an essential component of the right to information. Justice Reddi's qualified 'dissent' was interesting because it sought to interrogate whether the right to information about election candidates could be classified as a fundamental right. He did not seem to think so but he still agreed with the majority judgment since it aided freedom of speech and expression and promoted the 'integrity of the electoral process'. Justice Reddi also questioned whether the right to vote was a fundamental right in view of earlier Court rulings which had said that the right to elect was a 'statutory' right. He, however, concluded: 'freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom.' It should be noted that the availability of information on candidates, especially their financial records, is in keeping with the practices of other mature democracies. In the United States, for example, after the enactment of the Ethics in Government Act, 1978 all members of the Congress are required to file an annual disclosure of financial information. All members of Congress as well as candidates must file Financial Disclosure Statements summarizing financial information concerning themselves, their spouses and dependent children. Among other information, the statements must disclose outside compensation, investments and assets, and business transactions. The disclosures are made available to the public for six years. In the case of unsuccessful candidates, the disclosures are made available for a year.

To curb the criminalization of politics the Supreme Court of India had issued a few directives are as follows:

(i) The Supreme Court of India issued a directive to the Election Commission in 2002 to the effect that rules must be framed to get candidates seeking election to parliament or a state legislature to file affidavits on any criminal activity, so that "the little man may think over before making his choice of electing lawbreakers as law maker."

(ii) On May 2, 2002 the Supreme Court of India gave a historic ruling following a Public Interest litigation (PIL) by an NGO. It ruled that every candidate, contesting an election to Parliament, State legislature or Municipal Corporation have to furnish certain necessary information to the Election Commission,

(iii) Before filing their nomination papers. Details of wealth and property, liabilities, amount of public debt, educational qualification apart a candidate was supposed to disclose whether any criminal records was pending against his name.

(iv) According to Supreme Court's judgment on 13 March 2013, the voters had the fundamental right to know in advance, all the details about the life of the candidates and that voters right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. This is essential to bring transparency to the electoral process and to dissociate itself from the use of muscle and money power.

(v) On 10 July 2013 the Supreme Court had held that charge-sheeted Members of Parliament and Legislative Assemblies, on conviction for the offence, would be immediately disqualified from holding membership of the House without being given three months time for appeal, as was the case before.

(vi) The Supreme Court judgement on 11 July 2013 which stated that persons in lawful custody – whether convicted in a criminal case or otherwise could not contest election.

(vii) The Supreme Court on 13 September 2013 came up with a new set up electoral reforms which would go a long way in curbing criminalization of politics. According to the Supreme Court pronouncement made by a bench of Chief Justice P. Sathasivam and Justices Ranjana P. Desai and Ranjana Gogoi, no one could contest elections without making a full and honest disclosure about his / her assets and educational and criminal antecedents. It directly implied that columns in the affidavit filed with maintain papers demanding the information related to assets, educational and criminal antecedents could not be left blank.

Following this, the court authorized Returning Officers (ROs) to demand relevant details and reject nomination papers if the details were not furnished despite reminders.

#### Conclusion

The Supreme Court judgments had injected lot of transparency into the electoral system. First, voters now know much more about the candidates whom they were expected to vote into office. The affidavits, detailing financial assets and liabilities and criminal records if any, filed by candidates along with their nomination papers are uploaded onto the Election Commission website and can be accessed easily. Though we cannot be sure how many people actually access the Election Commission website, the financial worth of candidates was widely reported in the India media.

Second, there is evidence to suggest that given a choice, voters tend not to elect candidates with criminal charges against them. In constituencies where there was only one 'tainted' candidate with criminal charges, 83 per cent of the constituencies chose 'clean' candidates or those without a criminal record. In constituencies where there were two 'tainted' candidates, 67 per cent of them chose 'clean' candidates, However, the percentage sharply dropped to 35 per cent when there were five or more 'tainted' candidates contesting elections from one constituency.

Following the 1996 Common Cause judgment and the different panel reports there were some significant changes made to electoral law. First, an amendment to the RPA passed in 1996 shortened the election campaign period from 21 to 14 days on the assumption that campaign cost would be reduced. Second, the national parties and the major state parties were allocated free air time on television and radio.