Election Reforms in India vis-a-vis Criminalization of Politics and Right to Reject- A Review

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“Democracy is a form of government that substitutes election by the incompetent many for appointment by the corrupt few” George Bernard Shaw

ABSTRACT

India being the world’s largest democracy is being observed as a role model by the new and emerging democracies in the world. The founding fathers of Indian Constitution opted for a Parliamentary democracy as an appropriate model for a large and diverse country like ours. There has been a growing concern over the years in India about several aspects of our electoral system. The criminalisation of our political system has been observed almost unanimously by various committees on politics and electoral reform. Criminalisation of politics has many forms, but perhaps the most alarming among them is the significant number of elected representatives with criminal charges pending against them. The topic of electoral reforms has been taken up by numerous government committees in the recent past, viz. Goswami Committee on Electoral Reforms, Vohra Committee Report, Indrajit Gupta Committee on State Funding of Elections, Law Commission Report on Reform of the Electoral Laws, National Commission to Review the Working of the Constitution, Election Commission of India - Proposed Electoral Reforms (2004), The Second Administrative Reforms Commission. Even the veteran social activist, Anna Hazare has constantly been advocating for the right to reject and right to recall. With a view to bringing about purity in elections, the Supreme Court recently held that a voter could exercise the option of negative voting and reject all candidates as unworthy of being elected. The voter could press the ‘None of the Above’ (NOTA) button in the electronic voting machine. The court directed the Election Commission to provide the NOTA button in the EVM. The Election Commission has included NOTA button in the EVMs to be used in five assembly elections in November/December 2013.

Key words:
Criminalization of Politics, Election Reforms, Right to reject Candidates, NOTA

INTRODUCTION TO CRIMINALIZATION OF POLITICS

The preamble of our constitution aims to provide ‘political justice’ to the people. When the criminal elements are becoming a part of the legislature, then securing any form of justice, be it social, economic or political, is a hollow promise. The sovereign of India is crippled by these criminal elements who uses threat, intimidation, violence and even sexual assault to win the election.

Everyone knows Raja Bhaiyya, the dreaded don from Uttar Pradesh who earned his first criminal case as a teenager and who has a symbiotic relationship with the prisons either as an inmate or as the minister tasked with running them. But ever heard of Bhaiyya Raja? A two-term former MLA from the Kama Sutra town of Khajuraho in Madhya Pradesh, 66-year-old Ashok Veer Vikram Singh aka Bhaiyya Raja has been an unchallenged don for decades. Arrested for murder in the 1990s, Bhaiyya Raja decided to fight his first election from prison. He won on a not-so-subtle slogan of Mohar lagegi haathi pe, Varna goli chhaati pe (Stamp the elephant or take a bullet on your chest), the elephant being his election symbol. On winning, he rode an elephant to the Assembly. On 31 May, he was sentenced to life imprisonment for the 2009 murder of a grandniece who he sexually exploited and forced to undergo an abortion. Is his political career over? No. Bhaiyya Raja’s wife, Asha Rani, is still a MLA (BJP), though she is accused of abetting a woman’s suicide at her home six years ago. She is currently free on bail. Jagmato Devi, an MLA in Bihar belonging to JD (U), had entered politics in 2005 after the murder of her husband. As her son, Ajay Singh, is charged in over two dozen cases of murder, kidnapping and extortion, he was denied a ticket. So he advertised for a wife. Only registered voters at least 25 years old and with voter ID cards were shortlisted. He married one of the two finalists a day before nominations began for the by-election to fill his mother’s seat. His wife Kavita, a political naïf, is still a MLA (BJP), though she is accused of abetting a woman’s suicide at her home six years ago. She answers her phone and runs her politics. Pradeep Mhto, a goon who became an MLA in Bihar in 2005 as an independent candidate, joined Chief Minister Kumar’s JD (U) before the 2010 election. Among other crimes, Mhto
India observed that “Criminalization of politics is the Supreme Court in Ankul Chandra Pradhan v. Union of she promptly took back the job. had been convicted. When the high court acquitted her, Jayalalithaa, who had to quit in a previous term in 2001 corruption cases. The list includes Tamil Nadu CM J situates in spite of being enmeshed in criminal and corruption cases. The list includes Tamil Nadu CM J Jayalalithaa, who had to quit in a previous term in 2001 after the SC ruled her appointment as CM illegal as she had been convicted. When the high court acquitted her, she promptly took back the job.

Supreme Court in Ankul Chandra Pradhan v. Union of India observed that “Criminalization of politics is the bane of society and negation of democracy. It is subversive of free and fair elections.” In the case of Dinesh Trivedi, M.P v. Union of India, Supreme Court dealt with N.N.Vohra Committee report, and its implementation, which addressed the problem of the growing nexus among politicians, bureaucrats and criminals and its effect on the civil society. The court further held that an independent body should be formulated to look into the matter and it should also be given necessary powers to investigate into these matters and if feasible establish special courts to take cognizance of such matters with the consent of Union government. In People’s Union for Civil Liberties v. Union of India, Supreme Court held that “the criminal antecedents of the candidates including their assets and liabilities should be available to the voters so that they can make a wise decision which serves their best interest.”

The criminalisation of our political system has been observed almost unanimously by all recent committees on politics and electoral reform. Criminalisation of politics has many forms, but perhaps the most alarming among them is the significant number of elected representatives with criminal charges pending against them. The topic of electoral reforms has been taken up by numerous government committees in the recent past, including but not limited to:

- Goswami Committee on Electoral Reforms (1990)
- Vohra Committee Report (1993)
- Gupta Committee on State Funding of Elections (1998)

The Vohra Committee Report on Criminalisation of Politics was constituted to identify the extent of the politician-criminal nexus and recommend ways in which the menace can be combated. The report of the National Commission to Review the Working of the Constitution, cites the Vohra report as follows: “The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country” and that “some political leaders become the leaders of these gangs/armed senas and over the years get themselves elected to local bodies, State assemblies, and national parliament.” This point becomes self-evident when one looks at the number of elected representatives with pending criminal cases against them at all levels in our federal system.
2. **OBJECTIVE OF THE STUDY**

This paper aims at providing background information on issues in our electoral process and outline electoral reform, in the past two decades, specially to tackle the menace of criminalization of the politics in symbiotic relation to right to reject candidates.

3. **RESEARCH METHODOLOGY**

The methodology involved is the collection of secondary data from the sources like leading newspapers, Election Commission of India's website, law commission of India reports, ADR website, Tehelka.com website and various committee reports and data was analyzed.

4. **DATA ANALYSIS**

The secondary data collected from leading newspapers, ADR website, Tehelka.com etc in past few months was analyzed. The analysis of facts is enumerated below:

- 30 percent of about 4,800 MPs and MLAs it investigated faced criminal charges.
- 189 of the 403 UP MLAs, i.e 47 percent face criminal charges. A whopping 98 are accused of murder or rape or both. That is nearly one in four of UP MLAs belonging to to the SP, the BSP, the Congress and the BJP face criminal charges.
- Nearly four in every five of Jharkhand’s 82 MLAs face criminal cases.
- In Bihar, their percentage is 54, with Chief Minister, Nitish Kumar’s JD(U) leading the way and his recently parted ally, BJP following a close second.
- Across the country, nearly one in three of the BJP MPs and MLAs have criminal cases against them. The Congress is marginally better at one in five.
- As evident from the declarations made by candidates in the 2009 general elections, 275 serious criminal cases were pending against 76 of the successful candidates in the 15th lok sabha elections.
- A recent analysis, of data for the five states going for poll in November/December 2013, by Association for Democratic Reforms has revealed that nearly half (43%) of the Delhi legislators are having criminal cases pending against them besides boosting for the largest number of Crorepati MLAs (about 69%).
- A total of 128 MLAs out of 607 (around 21%) from these five states are having pending Criminal cases against them.
4.1 Negative / Neutral Voting/ NOTA

Both the Election Commission and Law Commission of India recommend that a negative or neutral voting option be created. Negative/neutral voting means allowing voters to reject all of the candidates on the ballot by selection of a “none of the above” option instead of the name of a candidate on the ballot. In such a system there could be a provision whereas if a certain percentage of the vote is negative/neutral, then the election results could be nullified and a new election conducted. Even the veteran social activist, Anna Hazare has constantly been advocating for right to reject & right to recall.

4.2 Status pre & post Supreme Court Judgement

There was a provision in the Representation of the People Act, 1951, which allows MPs and MLAs/MLCs to retain their seats if they appealed their convictions within three months. This provision was struck down by the judges saying that the law was inconsistent with two constitutional clauses that barred convicted citizens from contesting elections. If a conviction was good to bar a hopeful, they said, it was good to unseat an incumbent. With a view to bringing about purity in elections, the Supreme Court recently held that a voter could exercise the option of negative voting and reject all candidates as unworthy of being elected. The voter could press the ‘None of the Above’ (NOTA) button in the electronic voting machine. The court directed the Election Commission to provide the NOTA button in the EVM. “For democracy to survive, it is essential that the best available men should be chosen ... for proper governance of the country. This can be best achieved through men of high moral and ethical values who win the elections on a positive vote.” Thus the NOTA option would indeed compel political parties to nominate sound candidates, said a Bench of Chief Justice P. Sathasivam and Justices Ranjana Desai and Ranjan Gogoi, while allowing a petition filed by the People’s Union for Civil Liberties. Writing the judgment, the CJI said: “Giving right to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval of the kind of candidates being put up by the parties. Gradually, there will be a systemic change and the parties will be forced to accept the will of the people and field candidates who are known for their integrity.” The Bench said the NOTA option “will accelerate effective political participation in the present state of the democratic system and the voters will in fact be empowered.” The right to cast a negative vote, “at a time when electioneering is in full swing, will foster the purity of the electoral process and also fulfil one of its objectives, namely, wide participation of people.” Backing the ruling as a step in the right direction, a few jurists, in fact, suggest that MPs and MLAs should be unseated earlier than conviction. The Echo of this ruling was being heard in all the corridors of power. The views expressed by eminent jurists, retired judges and politicians were:

- “Parliament should be freed of criminals and we know that our criminal justice system is slow,” says former Attorney General Soli Sorabjee. “The fact that they are facing criminal charges in serious offences, say, those carrying imprisonment of three years or more, should be enough to unseat them.”
- Gopal Subramaniam, former Solicitor General “If a court has taken cognisance of charges against a member of the House, he should be unseated.”
- Gurudas Dasgupta, an MP, CPI: “The government should make decriminalisation a national priority. There is a nexus of money and power in politics and the government and judiciary have to build safeguards against these.”
Prashant Bhushan, SC lawyer says “Although the SC ruling is welcome, not much will change unless real electoral reforms to check the influence of money is brought. Currently, parties collect crores of rupees and then claim that hundreds of donors each gave under Rs 20,000.”

Abhishek Manu Singhvi, Congress leader and senior lawyer says “No thought is given to restoration (to the seat in the House) in case a conviction is reversed by way of acquittal,”

Shiv Sena MP Sanjay Raut says - To be fair to the political parties though, the SC judgment runs the risk of throwing the baby out with the bathwater. “The Shiv Sena is a party of agitations. Often we take to the streets and storm government offices. At such times, our workers are booked under the sections for dacoity, theft, etc.”

NCP leader and Maharashtra’s PWD Minister Chhagan Bhujbal says“I agree that people with serious criminal charges against them should be kept out of politics. But if someone is convicted in a political case, they should not be disqualified.”

Former Chief Justice of India VN Khare says the SC judges who gave the ruling should have instead referred the case to a five-judge constitutional bench. “Finally, it is Parliament that has to take a role in framing the laws with the guidance of the SC to decriminalise politics in the country.,”

Union Law Minister Kapil Sibal says the ruling leaves grey areas. “If you were to take a position that nobody charged with an offence should enter politics, the systems in place on the ground are such that nobody charged with an offence should enter politics but if someone is convicted in a political case, they should not be disqualified."

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For the moment, the final word, if there can be one on this subject, goes to the irresistible former SC judge Markandey Katju. “We are passing through a very difficult, transitional period, from a feudal agricultural system to a modern industrial society,” he says. “The old society is uprooted and we are stuck in the middle. This difficult stage will remain for the next 15-20 years. History shows that only a long-drawn people’s struggle starts the process for reforms.”

5. RECOMMENDATIONS/LIMITATIONS

1. 30% of legislators have criminal cases pending against them (In the elections, since 2008, of the 4807 elected members (M Ps and M LAs) 1460 (30%) have declared criminal cases against them of which 688 (14%) have declared serious criminal cases.), and thus the recent judgement by Supreme Court in Lily Thomas v. Union of India is a progressive step towards the cleansing of the Indian political system.

2. The intention of Supreme Court behind the verdict is apt but it lacks on the following points:-
   I. It failed to explain what will happen to a legislators convicted by a lower court and who lost his seat, but is acquitted on appeal.
   II. It failed to discuss the relevance of Article 14 vis-à-vis present situation.
   III. The present judgement has clearly over looked the 2005 judgement of a Constitutional bench on the constitutionality of Section 8(4) of the RPA, 1951. 
   IV. It failed to explain why the 2005 judgement was an obiter dicta and not the binding ratio.
   V. It overlooked the decision of Government of Andhra Pradesh v. P. Laxmi Devi, in which court observed that invalidating an act of legislature is a grave step and be resorted to when that is the only possible view not open to rational question.

It is thus recommended that :

1. In case a legislator is convicted by the trial court, he should be allowed to continue his term but would be declared ineligible to contest in future elections if he fails to get an acquittal order for higher court. The present solution caters to the need of Section 8(4) as highlighted by Supreme Court in the 2005 case of K. Prabhakaran v. P. Jayarajan -
   I. To save the government in power if it is surviving on razor-edge thin majority.
   II. It would prevent the by-election which shall be futile if the convicted member is acquitted by the higher court.

2. The Division bench in the present case should have referred the matter to a larger Constitutional bench as the 2005 case was decided by a 5 judge Constitutional bench. Secondly, to strike at the root of the problem the Election Commission must use all the means at its disposal to spread awareness about the criminal track record of the candidates.

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