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Criminalisation of Politics: A Judgement towards Descency in Politics

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I. INTRODUCTION:

"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."

- Dr Rajendra Prasad,President, Constituent Assembly of India, 26th November, 1949 before putting the motion for passing of the Constitution on the floor.

Expressing concern about the "alarming increase" in number of persons with criminal backgrounds being elected Members of Parliament and Legislative Assemblies of states, the Supreme Court in Contempt Petition (C) No. 2192/2018 Ram Babu Singh Thakur V. Sunil Arora , bench of Justices Rohington Nariman and S.Ravindra Bhat on 13.02.2020 passed directions to compel political parties to "explain" why such candidates are given tickets.

The apex court has now made it mandatory for all political parties to publish all details regarding pending criminal cases against their chosen candidates, not only in local newspapers, but also on party websites and social media handles. Along with the details of pending cases, the parties will also have to publish "the reasons for such selection, as also as to why other individuals without criminal antecedents could not be selected as candidates".

The details have to be published in one local vernacular language newspaper and one national news - paper.In addition, the Supreme Court has made it clear that the "reasons" given for selection of the candidates have to be "with reference to the qualifications, achievements and merit of the candidate concerned, and not mere 'winnability' at the polls".

A four-page judgment was passed on Thursday by a bench of Justice RF Nariman and S Ravindra Bhat, in a contempt of court case filed against the Chief Election Commissioner of India.

The petition claimed the ECI had failed to take any steps to ensure the implementation of a 2018 judgment of the bench, which had made it mandatory for political parties to declare and publish all criminal cases pending against their candidates.

The petitioners argued that parties were "circumventing" the 2018 judgment by publishing the details of their candidates' criminal background in "obscure and limited circulation newspapers" and "making the webpages on their websites difficult to access".

They sought contempt proceedings against the ECI for failing to ensure that information was publicised among the voters.

"It appears that over the last four general elections, there has been an alarming increase in theincidence of criminals in politics. In 2004, 24% of the Members of Parliament had criminal cases pending against them; in 2009, that went up to 30%; in 2014 to 34%; and in 2019 as many as 43% of MPs had criminal cases pending against them."

In the recently-concluded Delhi assembly elections, as many as 104 candidates declared criminal cases pending against them, with 36 candidates having cases of crimes against women, and four with hate speech charges pending against them.

That's according to data released by the Association for Democratic reforms, a watchdog NGO.

"Political parties offer no explanation as to why candidates with pending criminal cases are selected as candidates in the first place," the Supreme Court said on 13.02.2020.

The Supreme Court has said the details must be published within 48 hours of the selection of the candidate or within two weeks before the first date for filing of nominations, whichever comes first. The compliance report will have to be submitted to the ECI within 72 hours of the selection of the candidate.

"If a political party fails to submit such compliance report with the Election Commission, the Election Commission shall bring such non-compliance by the political party concerned to the notice of the Supreme Court as being in contempt of this Court's orders/directions," the bench said.

Democracy as a form of governance was the central plinth of the constitutional scheme envisaged by the framers of the Constitution of India. The ultimate aim, as evidenced in the Constituent Assembly debates and gleaned from their personal writings, was the empowering of each and every Indian citizen to become a stakeholder in the political process. To this end, the citizen was given the power to elect members of the Parliament and their respective State Legislative Assemblies through the exercise of their vote, a system that the framers believed would ensure that only the most worthy candidates would be elected to posts of influence and authority. Representative government, sourcing its legitimacy from the People, who were the ultimate sovereign, was thus the kernel of the democratic system envisaged by the Constitution. Over time, this has been held to be a part of the 'basic structure' of the Constitution, immune to amendment, with the Supreme Court of India declaring, that "It is beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of Constitution, it is that India is a Sovereign Democratic Republic." [1]

Thus, inherent in the model of representative government based on popular sovereignty is the commitment to hold regular free and fair elections. The importance of free and fair elections stems from two factors— instrumentally, its central role in selecting the persons who will govern the people, and intrinsically, as being a legitimate expression of popular will. Stressing the importance of free and fair elections in a democratic polity, the Supreme Court held in Mohinder Singh Gill v. Chief Election Commissioner, [2]that :

"Democracy is government by the people. It is a continual participative operation, not a cataclysmic periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions… It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more."

To ensure free and fair elections, and give impetus to the vision of the framers, Parliament enacted The Representation of the People Act, 1951 (hereinafter 'RPA') which inter alia provides qualifications and disqualifications for membership of Parliament and State Legislatures, lays down corrupt practices that are punishable by law, creates other offences in connection with such elections and for the resolution of disputes arising out of or in connection with them. The underlying rationale for the legislation is thus to create a systemic framework conducive to free and fair elections. Implicit in this framework is the need to prescribe certain qualifications and disqualifications, which are deemed to be respectively essential or unsuitable for holders of public office.

It is a truism that criminal elements of society, i.e. those accused of breaking the laws that their predecessors have given the force of law, and which they are themselves entrusted with enforcing being MPs and MLAs, would be antithetical to the vision of the framers, the nature of Indian democracy and the rule of law. The Supreme Court held as such in K Prabhakaran v. P Jayarajan[3]where it said,

"Those who break the law should not make the law. Generallyspeaking the purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent persons with criminal background from entering into politics and the house – a powerful wing of governance. Persons with criminal background do pollute the process of election as they do not have many a holds barred and have no reservation from indulging into criminality to win success at an election."

Dr. Rajendra Prasad, in his concluding address to the Constituent Assembly categorically said,

"A law giver requires intellectual equipment but even more than that capacity to take a balanced view of things to act independently and above all to be true to those fundamental things of life – in one word – to have character."[4]

A three Judge Bench of the Supreme Court in Centre for Public Interest Litigation v. Union of India[5] raised the standards of qualification for appointment to a public office. Holding it imperative for the members to uphold and preserve the integrity of the 'institution', it was laid down that not the desirability of the candidate alone but the "institutional integrity" of the office which should be the reigning consideration in appointments to a public office. The spirit of this judgment, applicable to all public offices, is that it is not only imperative for the candidate for such office to have the highest standards of integrity, but independently that the integrity of the institution must be preserved. Having criminal elements in politics, no matter whether they are convicted or not, indubitably tarnishes the latter, if not the former as well.

THE EXTENT OF CRIMINALISATION IN POLITICS

Despite the best intentions of the drafters of the Constitution and theMembers of Parliament at the onset of the Indian Republic, the fear of a nexus between crime and politics was widely expressed from the first general election itself in 1952. In fact, as far back as in 1922, Mr C. Rajagopalachari had anticipated the present state of affairs twenty fiveyears before Independence, when he wrote in his prison diary: "Elections and their corruption, injustice and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us…"[6]

Interestingly, observers have noted that the nature of this nexus changed in the 1970s. Instead of politicians having suspected links to criminal networks, as was the case earlier, it was persons with extensive criminal backgrounds who began entering politics.[7] This was confirmed in the Vohra Committee Report in 1993, and again in 2002 in the report of the National Commission to Review the Working of the Constitution (NCRWC). The Vohra Committee report pointed to the rapid growth of criminal networks that had in turn developed an elaborate system of contact with bureaucrats, politicians and media persons. [8] A Consultation Paper published by the NCRWC in 2002 went further to say that criminalswere now seeking direct access to power by becoming legislators and ministers themselves.[9]

Since the judgment of the Supreme Court in Union of India v. Association for Democratic Reforms, [10] which made the analysis of criminal records of candidates possible by requiring such records to be disclosed by way of affidavit, the public has had a chance to quantitatively assess the validity of such observations made in the previous reports. The result of such analysis leads to considerable concern.

In the years since 2004, 18% of candidates contesting either National or State elections have criminal cases pending against them (11,063 out of 62,847). In 5,253 or almost half of these cases (8.4% of the total candidates analysed), the charges are of serious criminal offences that include murder, attempt to murder, rape, crimes against women, cases under the Prevention of Corruption Act, 1988, or under the Maharashtra Control of Organised Crime Act, 1999 which on conviction would result in five years or more of jail, etc. 152 candidates had 10 or more serious cases pending, 14 candidates had 40 or more such cases and 5 candidates had 50 or more cases against them.[11]

The 5,253 candidates with serious cases together had 13,984 serious charges against them. Of these charges, 31% were cases of murder and other murder related offences, 4% were cases of rape and offences against women, 7% related to kidnapping and abduction, 7% related to robbery and dacoity, 14% related to forgery and counterfeiting including of government seals and 5% related to breaking the law during elections.[12]

Criminal backgrounds are not limited to contesting candidates, but are found among winners as well. Of these 5,253 candidates with serious criminal charges against them, 1,187 went on to winning the elections they contested i.e. 13.5% of the 8,882 winners analysed from 2004 to 2013. Overall, including both serious and non-serious charges, 2,497 (28.4% of the winners) had 9,993 pending criminal cases against them.

In the 2014 Lok Sabha, 30% or 162 sitting MPs have criminal cases pending against them, of which about half i.e. 76 have serious criminal cases. Further, the prevalence of MPs with criminal cases pending has increased over time. In 2004, 24% of Lok Sabha MPs had criminal cases pending, which increased to 30% in the 2009 elections[13]. In the current Lok Sabha 43% sitting MPs have criminal cases pending against them.233 MPs out of 539 winning candidates have criminal charges. In new Lok Sabha nearly 29% of the cases are related to rape, murder, attempt to murder or crime against women. There is an increase of 109% in the number of MPs with declared serious criminal cases since 2009.

The situation is similar across states in 2014 with 31% or 1,258 out of 4,032 sitting MLAs with pending cases, with again about half being serious cases.[14] Some states have a much higher percentage of MLAs with criminal records: in Uttar Pradesh, 47% of MLAs have criminal cases pending.[15] A number of MPs and MLAs have been accused of multiple counts of criminal charges. In a constituency of Uttar Pradesh, for example, the MLA has 36 criminal cases pending including 14 cases related to murder. [16]

The Centre has informed the Supreme Court that 1765 MPs and MLAs are facing criminal trial in 3045 cases. The total strength of lawmakers in the Parliament and Assemblies is 4896. The highest number of cases against lawmakers is in UP followed by Tamil Nadu, Bihar and West Bengal.

From this data it is clear that more than one-third of elected candidates at the Parliament and State Assembly levels in India have some form of criminal taint. Data elsewhere suggests that one-fifth of MLAs have pending cases which have proceeded to the stage of charges being framed against them by a court at the time of their election. [17] Even more disturbing is the finding that the percentage of winners with criminal cases pending is higher than the percentage of candidates without such backgrounds. While only 12% of candidates with a "clean" record win on average, 23% of candidates with some kind of criminal record win. This means that candidates charged with a crime actually fare better at elections than 'clean' candidates. Probably as a result, candidates with criminal cases against them tend to be given tickets a second time.[18] Not only do political parties select candidates with criminal backgrounds, there is evidence to suggest that untainted representatives

later become involved in criminal activities.[19]The incidence of criminalisation of politics is thus pervasive making its remediation an urgent need.

THE ROLE OF POLITICAL PARTIES

Political parties are a central institution of our democracy; "the life blood of the entire constitutional scheme."[20]Political parties act as a conduit through which interests and issues of the people get represented in Parliament. Since political parties play a central role in the interface between private citizens and public life, they have also been chiefly responsible for the growing criminalisation of politics.

Several observers offer explanations of why parties may choose candidates with a tainted background. As discussed above, studies show that candidates with criminal records have fared better in elections and that criminals seem to have an electoral advantage. [21] Since electoral politics is a combination of several factors, often issues like ethnicity or other markers of the candidate may overcome the reputational loss he suffers from the criminal records.

Further, electoral politics is largely dependent on the money and the funding that it receives. Several studies by economists estimate that candidates and parties in the 2009 general elections alone spent roughly $3 billion on campaign expenditures. [22] Huge election expenses have also resulted into large-scale pervasiveness of so-called 'black money'.[23] The Law Commission has earlier also expressed the concern of election expenses being far greater than legal limits.[24] Therefore, campaign funding is one of the most important concerns for political parties. Since candidates with criminal records often possess greater wealth, the negative effect of the stigma of criminal charges can be overcome by greater campaigning resources.[25] Thus, even if a candidate has any criminal record, he may fare well in elections due to the positive effect of the other markers. Thus, overall a candidate with a criminal record can prove beneficial to political parties in several ways. Not only does he ensure greater inflow in money, labour and other advantages that may help a party in successful campaign, but also possess greater 'winnability'. [26] Many studies have consequently highlighted the direct relationship between the membership of local criminals and inflow of money intothe coffers of political parties. [27]This is dealt with in detail later in the report.

Further, candidate selection procedure is another factor for parties declaring candidates with criminal records. Since political parties in India largely lack intra-party democracy and the decisions on candidature are largely taken by the elite leadership of the party, the politicians with criminal records often escape the scrutiny by local workers and organisation of the party.[28]

Thus, the crime-politics nexus demands a range of solutions much broader than disqualification or any other sanctions on elected representatives. It requires careful legal insight into the functioning of the political parties and regulating the internal affairs of parties. This report will also suggest the reforms for regulating the organisational posts of political parties.

The Law Commission of India, in its 170th report quoted in Subhash Chandra Agarwal, [29]by the Central Information Commission ("CIC") has made certain observations which are very pertinent to describing the position of political parties in our democracy:

"It is the Political Parties that form the Government, man the Parliament and run the governance of the country. It is therefore, necessary to introduce internal democracy, financial transparency and accountability in the working of the Political Parties. A political party which does not respect democratic principles in its internal working cannot be expected to respect those principles in the governance of the country. It cannot be dictatorship internally and democratic in its functioning outside".[30]

Additionally, under Section 29A(5) of the Representation of People Act, 1951, which currently regulates the functioning of political parties, the political parties are required to bear "true faith" and "allegiance to the Constitution" of India as by law established. [31] Further, in order to reach to the conclusion that political parties are public authorities, the CIC also referred to several constitutional provisions which accord rights and obligations to political parties.[32] Thus, political parties are not merely any other organisation, but important institutions having constitutional rights and obligations.

The NCRWC highlighted similar concerns on the functioning of political parties and recommended a separate law for regulating some of the internal affairs of political parties in order to deal with the crime-politics nexus.[33] It also opined that in case of conviction on a criminal charge, apart from disqualification of the representative, a political party should be held responsible and be sanctioned in some way, for example, by de-recognition of the party.

Though the RPA disqualifies a sitting legislator or a candidate on certain grounds, there is nothing regulating the appointments to offices within the organisation of the party. Political parties play a central role in Indian democracy. Therefore, a politician may be disqualified from being a legislator, but may continue to hold high positions within his party, thus also continuing to play an important public role which he has been deemed unfit for by the law. Convicted politicians may continue to influence law-making by controlling the party and fielding proxy candidates in legislature. In a democracy essentially based on parties being controlled by a high-

command, the process of breaking crime-politics nexus extends much beyond purity of legislators and encompasses purity of political parties as well.

Thus any reform proposal must include relevant recommendations for political parties since the need for reform is crucial in this context as well. It is suggested that political parties should refrain from appointing or allowing a person to continue holding any office within the party organisation if the person has been deemed to lack the qualities necessary to be a public official. Therefore, the legal disqualifications that prevent a person from holding office outside a party should operate within the party as well. For holistic reform, this recommendation must be taken into account.This is to be dealt with in a detailed manner in the report to be submitted to the Government of India on all issues relating to the Consultation Paper.

EXISTING LEGAL FRAMEWORK

Legally, the prevention of the entry of criminals into politics is accomplished by prescribing certain disqualifications that will prevent a person from contesting elections or occupying a seat in Parliament or an Assembly. Qualifications of members of Parliament are listed in Article 84 of the Constitution, while disqualifications can be found under Article 102. Corresponding provisions for members of State Legislative Assemblies are found in Articles 173 and 191.

Article 102 states that a person shall be disqualified from being chosen, and from being a member of either House of Parliament if he holds an office of profit, if he is of unsound mind and so declared by a competent court, if he is an undischarged insolvent, if he is not a citizen of India and if he is disqualified by any other law made by Parliament.

Parliament through the RPA has prescribed further qualifications and disqualifications for membership to Parliament or to a Legislative Assembly. Section 8 of the Act lists certain offences which, if a person is convicted of any of them, disqualifies him from being elected, or continuing as, a Member of Parliament or Legislative Assembly. Specifically, Section 8(1) lists a number of offences, convictions under which disqualify the candidate irrespective of the quantum of sentence or fine – these include certain electoral offences, offences under the Foreign Exchange Regulation Act, 1973, the Narcotics Drugs and Psychotropic Substances Act, 1985 the Prevention of Corruption Act, 1988 etc. Section 8(2) lists other offences, convictions under which would only result in disqualification if imprisonment is for six months or more. Section 8(3) is a residuary provision under which if a candidate is convicted of any offence and imprisoned for two years or more, he is disqualified.[34] Disqualification operates from the date of conviction and continues for a further period of six years from the date of release.

The scheme of disqualification upon conviction laid down by the RPA clearly upholds the principle that a person who has conducted criminal activities of a certain nature is unfit to be a representative of the people. The criminal activities that result in disqualification irrespective of punishment under S. 8(1) are either related to public office, such as electoral offences or insulting the national flag, or are of grave nature, such as offences under terrorism laws. S. 8(3), on the other hand, envisages that any offence for which the minimum punishment is two years is of a character serious enough to merit disqualification. In either case, it is clear that the RPA lays down that the commission of serious criminal offences renders a person ineligible to stand for elections or continue as a representative of the people. Such a restriction, it was envisaged, would provide the statutory deterrent necessary to prevent criminal elements from holding public office, thereby preserving the probity of representative government.

However, it is clear from the above account of the spread of criminalisation in politics that the purpose behind S. 8 of the RPA is not being served. The consequences of such criminalisation and the possible reform measures that may be considered shall be discussed in the following chapters.

With respect to the filing of affidavits by candidates, a candidate to any National or State Assembly elections is required to furnish an affidavit, in the shape of Form 26 appended to the Conduct of Election Rules, 1961, containing information regarding their assets, liabilities, educational qualifications, criminal convictions against them that have not resulted in disqualification, and cases in which criminal charges are framed against them for any offence punishable with two years or more.

Failure to furnish this information, concealment of information or giving of false information is an offence under S. 125A of the RPA. However, the sentence under S. 125A is only imprisonment for a period of 6 months, and the offence is not listed under S. 8(1) or (2) of the RPA. Therefore, conviction under S. 125A does not result in disqualification of the candidate. Neither is the offence of false disclosure listed as a corrupt practice which would be a ground for setting aside an election under Section 100.

Therefore, there is currently little consequence for the offence of filing a false affidavit, as a result of which the practice is rampant.

SUPREME COURT JUDGMENTS INTERPRETING THIS FRAMEWORK

The judiciary has sought to curb this menace of criminalisation of politics through several seminal judgments and attendant directions to the government and the Election Commission primarily based on the aforesaid provisions. Specifically, orders of the Supreme Court seeking to engender a cleaner polity can be classified into three types: first, decisions that introduce transparency into the electoral process; second, those that foster greater accountability for holders of public office; third, judgments that seek to stamp out corruption in public life. The discussion below is not meant to be an exhaustive account; it merely illustrates the trends in Supreme Court jurisprudence relating to the question of de-criminalisation of politics.

In Union of India v. Association for Democratic Reforms [35](hereinafter 'ADR')the Supreme Court directed the Election Commission to call for certain information on affidavit of each candidate contesting for Parliamentary or State elections. Particularly relevant to the question of criminalisation, it mandated that such information includes whether the candidate is convicted/acquitted/discharged of any criminal offence in the past, and if convicted, the quantum of punishment; and whether prior to six months of filing of nomination, 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 a court. The constitutional justification for such a direction was the fundamental right of electors to know the antecedents of the candidates who are contesting for public office. Such right to know, the Court held is a salient facet, and the foundation for the meaningful exercise of the freedom of speech and expression guaranteed to all citizens under Article 19(1)(a) of the Constitution.

Again in People's Union for Civil Liberties v. Union of India[36](hereinafter 'PUCL') the Supreme Court struck down Section 33B of the Representation of People (Third Amendment) Act, 2002 which sought to limit the ambit of operation of the earlier Supreme Court order in the ADR case.Specifically it provided that only the information that was required to be disclosed under the Amendment Act would have to be furnished by candidates and not pursuant to any other order or direction. This meant, in practical terms, that the assets and liabilities, educational qualifications and the cases in which he is acquitted or discharged of criminal offences would not have to be disclosed. Striking this down, the Court held that the provision nullified the previous order of the Court, infringed the right of electors' to know, a constituent of the fundamental right to free speech and expression and hindered free and fair elections which is part of the basic structure of the Constitution. It is pursuant to these two orders that criminal antecedents of all candidates in elections are a matter of public record, allowing voters to make an informed choice.

At the same time, the Supreme Court has also sought to foster greater accountability for those holding elected office. In Lily Thomas v. Union of India[37] the Court held that Section 8(4) of the RPA, which allows MPs and MLAs who are convicted while serving as members to continue in office till an appeal against such conviction is disposed of, is unconstitutional. Two justifications were offered — first, Parliament does not have the competence to provide different grounds for disqualification of applicants for membership and sitting members; second, deferring the date from which disqualification commences is unconstitutional in light of Articles 101(3) and 190(3) of our Constitution, which mandate that the seat of a member will become vacant automatically on disqualification.

Again in People's Union for Civil Liberties v. Union of India[38](hereinafter 'NOTA'), the court held that the provisions of the Conduct of Election Rules, 1961, which require mandatory disclosure of a person's identity in case he intends to register a no-vote, is unconstitutional for being violative of his freedom of expression, which includes his right to freely choose a candidate or reject all candidates, arbitrary given that no analogous requirement of disclosure exists when a positive vote is registered, and illegal given its patent violation of the need for secrecy in elections provided in the RPA and widely recognised as crucial for free and fair elections.Thus by allowing voters to express their dissatisfaction with candidates from their constituency for any reason whatsoever, the Supreme Court order has a significant impact in fostering greater accountability for incumbent office-holders. When its impact is combined with the decision in Lily Thomas, it is clear that the net effect of these judgments is to make it more onerous for criminal elements entrenched in Parliament from continuing in their positions.

Third, the Supreme Court has taken several steps for institutional reform to sever the connection between crime and politics. In VineetNarain v. Union of India[39] a case concerning the inertia of the Central Bureau of Investigation (CBI) in investigating matters arising out of certain seized documents known as the 'Jain diaries' which disclosed a nexus between politicians, bureaucrats and criminals, who were recipients of money from unlawful sources, the Supreme Court used the power of continuing mandamus to direct large-scale institutional reform in the vigilance and investigation apparatus in the country. It directed the Government of India to grant statutory status to the Central Vigilance Commission (CVC), laid down the conditions necessary for the independent functioning of the CBI, specified a selection process for the Director, Enforcement Directorate (ED), called for the creation of an independent prosecuting agency and a high-powered nodal agency to co-ordinate action in cases where a politico-bureaucrat-criminal nexus became apparent. These steps

thus mandated a complete overhaul of the investigation and prosecution of criminal cases involving holders of public office.

Addressing the problem of delays in obtaining sanctions for prosecuting public servants in corruption cases, VineetNarainalso set down a time limit of three months for grant of such sanction. This directive was endorsed by the Supreme Court in SubramaniumSwamyv. Manmohan Singh,[40]where the Court went on to suggest the restructuring of Section 19 of the Prevention of Corruption Act such that sanction for prosecution will be deemed to have been granted by the concerned authority at the expiry of the extended time limit of four months. In these and other cases,[41] the Supreme Court has attempted to facilitate the prosecution of criminal activity, specifically corruption, in the sphere of governance.

The Supreme Court, through its interpretation of statutory provisions connected with elections as well as creative use of its power to enforce fundamental rights, has made great strides towards ensuring a cleaner polity, setting up significant barriers to entry to public office for criminal elements as well as instituting workable mechanisms to remove them from office if they are already in power. The Commission appreciates that these decisions demonstrate the need for the law itself to be reformed on a dynamic basis taking cognizance of latest developments. The same view is echoed by the several committees and commissions in the past which have recommended fundamental changes to laws governing electoral practices and disqualifications. A brief survey of such reports is undertaken in the section below.

PREVIOUS REPORTS RECOMMENDING REFORMS

The issue of electoral reforms has been the concern of several Commissions and Committees previously. This part surveys the key findings and recommendations of these bodies with a view to incorporating relevant suggestions in this Report.

In the year 1999, Law Commission in its 170th report recommended the addition of Section 8B in the RPA. This section included certain offences (electoral offences, offences having a bearing upon the elections viz. S. 153A, 505 of IPC and serious offences punishable by death or life imprisonment), framing of charges with respect thereto was sufficient to disqualify a person from contesting elections. The proposed provision further stipulated the disqualification to last for a period of five years from the framing of charges or till acquittal whichever event happens earlier. It also recommended mandatory disclosure of such (and other) information with the nomination paper under Section 4A in the RPA. This suggestion has already been incorporated by inserting Section 33A in RPA with effect from 24 August 2002.

The National Commission to Review of the Working of the Constitution (2002) also maintained the yardstick for disqualification as framing of charges for certain offences (punishable with maximum imprisonment of five years or more). There were however certain modifications in its recommendations. First, the Commission proposed that this disqualification would apply from one year after the date of framing of charges and if not cleared within that period, continue till the conclusion of trial. Secondly, in case the person is convicted of any offence by a court of law and sentenced to imprisonment of six months or more, the period of disqualification would apply during the period of sentence and continue for six years thereafter. Thirdly, in case a person is convicted of heinous offences, it recommended a permanent bar from contesting any political office. Fourthly, it recommended that Special Courts be set up at the level of the High Courts (with direct appeal to the Supreme Court) to assess the legality of charges framed against potential candidates and dispose of the cases in a strict time frame. Finally, it recommended de-registration and de-recognition of political parties, which knowingly fielded candidates with criminal antecedents.

The Election Commission of India has also made several recommendations from time to time to reform election law. In August, 1997, it mandated filing of affidavits disclosing conviction in cases covered under Section 8 of the RPA. In September 1997, the Commission in a letter addressed to the Prime Minister recommended amendment to Section 8 of RPA, to disqualify any person who is convicted and sentenced to imprisonment for six months or more, from contesting elections for a period totalling the sentence imposed plus an additional six years. In 1998, the Commission reiterated its above suggestion besides recommending that any person against whom charges are framed for an offence punishable by imprisonment of five years or more should be disqualified. The Commission admitted that in the eyes of law a person is presumed to be innocent unless proved guilty; nevertheless it submitted that the Parliament and State Legislatures are apex law-making bodies and must be composed of persons of integrity and probity who enjoy high reputation in the eyes of general public, which a person who is accused of a serious offence does not. Further, on the question of disqualification on the ground of corrupt practice, the Commission supported the continuation of its power to decide the term of disqualification of every accused person as uniform criteria cannot be applied to myriad cases of corruption- ranging from petty to grand corruption.

Further, taking note of the inordinate delays involved in deciding questions of disqualification on the ground of corrupt practice, the Commission recommended that the Election Commission should hold a judicial hearing in this regard immediately after the receipt of the judgment from the High Court and tender its opinion

to the President instead of following the circuitous route as prevalent then. Recommendations to curb criminalisation of politics were made again in the year 2004. It reiterated its earlier view of disqualifying persons from contesting elections on framing of charges with respect to offences punishable by imprisonment for five years or more. Such charges, however, must have been framed six months prior to the elections. It also suggested that persons found guilty by a Commission of Enquiry should also stand disqualified from contesting elections. Further, the Commission suggested streamlining of all the information to be furnished by way of affidavits in one form by amending Form 26 of the Conduct of Election Rules, 1961. It also recommended the addition of a column for furnishing the annual detailed income of the candidate for tax purpose and his profession in the said form.

To tackle the menace of wilful concealment of information or furnishing of false information and to protect the right to information of the electors, the Commission recommended that the punishment under Section 125A of RPA must be made more stringent by providing for imprisonment of a minimum term of two years and by doing away with the alternative clause for fine. Additionally, conviction under Section 125A RPA should be made a part of Section 8(1)(i) of the Representation of People Act, 1950.

The Second Administrative Reforms Commission in its fourth report on Ethics in Governance (2008) deliberated upon the fallouts of disqualifying candidates on various grounds. It recommended that Section 8 of RPA needed to be amended to disqualify all persons facing charges related to grave and heinous offences (viz. murder, abduction, rape, dacoity, waging war against India, organised crime, and narcotics offences) and corruption, where charges have been framed six months before the election. It also supported the proposal of including filing of false affidavits as an electoral offence under Section 31 of Representation of the People Act, 1950 as recommended by the Election Commission in the year 1998.

Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013) proposed insertion of a Schedule 1 to the Representation of People Act, 1951 enumerating offences under IPC befitting the category of 'heinous' offences. It recommended that Section 8(1) of the RP Act be amended to cover inter alia the offences listed in the proposed Schedule 1. It would then provide that a person in respect of whose acts or omissions a court of competent jurisdiction has taken cognizance under section 190(1)(a),(b) or (c) of the Cr.P.C. or who has been convicted by a court of competent jurisdiction with respect to the offences specified in the proposed expanded list of offences under Section 8(1) shall be disqualified from the date of taking cognizance or conviction as the case may be. It further proposed that disqualification in case of conviction shall continue for a further period of six years from the date of release upon conviction and in case of acquittal, the disqualification shall operate from the date of taking cognizance till the date of acquittal.

The Committee further recommended that the Election Commission must impose a duty forthwith on all candidates against whom charges are pending, to give progress reports in their criminal cases every three months. Further it recommended that in case of conviction under Section 125A of the RPA, disqualification must ensue to render the seat vacant. Moreover, the Commission suggested amendment to the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 to allow a deeper investigation of assets and liabilities declared at the time of filing a nomination paper or, as soon as may be practical thereafter. It recommended the scrutiny of assets and liabilities of each successful candidate, if not all contesting the elections to the Parliament and State Legislature by the CAG.

The elaborately researched and clearly articulated reports of the committees and commissions in the past have greatly informed our recommendations made in this report. Primarily, the reports are testimony to the need for a change in the law, a need which was felt as early as 1999. This, when seen in the context of the data demonstrating the growing prevalence of criminalisation of politics, Supreme Court judgments responding to this growth, the recalcitrance of political parties to take decisive action to prevent it and compared to the overarching democratic and constitutional need for free and fair elections, makes reform of the law not only imperative but an urgent necessity. The contours of such reform relating to the two questions referred to the Law Commission by the Supreme Court are dealt with in turn below.

The 244th Law Commission Report in 2014 makes the following recommendations on the two issues considered in this report in accordance with the directions of the Hon'ble Supreme Court in its order dated 16th December, 2013 in Public Interest Foundation & Ors. V. Union of India and Anr, (W/P Civil No. 536 of 2011):

I. Whether disqualification should be triggered upon conviction as it exists today or upon framing of charges by the court or upon the presentation of the report by the Investigating Officer under Section 173 of the Code of Criminal Procedure? [Issue No. 3.1(ii) of the Consultation Paper]

1. Disqualification upon conviction has proved to be incapable of curbing the growing criminalization of politics, owing to long delays in trials and rare convictions. The law needs to evolve to pose an effective deterrence, and to prevent subversion of the process of justice.

2. The filing of the police report under Section 173 Cr.P.C. is not an appropriate stage to introduce electoral disqualifications owing to the lack of sufficient application of judicial mind at this stage. 3. The stage of framing of charges is based on adequate levels of judicial scrutiny, and disqualification at the stage of charging, if

accompanied by substantial attendant legal safeguards to prevent misuse, has significant potential in curbing the spread of criminalization of politics.

4. The following safeguards must be incorporated into the disqualification for framing of charges owing to potential for misuse, concern of lack of remedy for the accused and the sanctity of criminal jurisprudence:

i. Only offences which have a maximum punishment of five years or above ought to be included within the remit of this provision.

ii. Charges filed up to one year before the date of scrutiny of nominations for an election will not lead to disqualification.

i. The disqualification will operate till an acquittal by the trial court, or for a period of six years, whichever is earlier.

ii. For charges framed against sitting MPs/ MLAs, the trials must be expedited so that they are conducted on a day-to-day basis and concluded within a 1- year period. If trial not concluded within a one year period then one of the following consequences ought to ensue:

- The MP/ MLA may be disqualified at the expiry of the one-year period; OR

- The MP/ MLA's right to vote in the House as a member, remuneration and other perquisites attaching to their office shall be suspended at the expiry of the one-year period.

5. Disqualification in the above manner must apply retroactively as well. Persons with charges pending (punishable by 5 years or more) on the date of the law coming into effect must be disqualified from contesting future elections, unless such charges are framed less than one year before the date of scrutiny of nomination papers for elections or the person is a sitting MP/MLA at the time of enactment of the Act. Such disqualification must take place irrespective of when the charge was framed.

II. Whether filing of false affidavits under Section 125A of the Representation of the People Act, 1951 should be a ground for disqualification? And if yes, what mode and mechanism needs to be provided for adjudication on the veracity of the affidavit? [Issue No. 3.5 of the Consultation Paper]"

1. There is large-scale violation of the laws on candidate affidavits owing to lack of sufficient legal consequences. As a result, the following changes should be made to the RPA:

i. Introduce enhanced sentence of a minimum of two years under Section 125A of the RPA Act on offence of filing false affidavits

ii. Include conviction under Section 125A as a ground of disqualification under Section 8(1) of the RPA.

iii. Include the offence of filing false affidavit as a corrupt practice under S. 123 of the RPA.

2. Since conviction under Section 125A is necessary for disqualification under Section 8 to be triggered, the Supreme Court may be pleased to order that in all trials under Section 125A, the relevant court conducts the trial on a day-to-day basis

3. A gap of one week should be introduced between the last date for filing nomination papers and the date of scrutiny, to give adequate time for the filing of objections to nomination papers.

G. **THE SUPREME COURT OF INDIA JUDGEMENT ON DATED 13.02.2020 IN CONTEMPT PET. (C) NO. 2192 OF 2018 IN W.P. (C) No. 536 OF 2011 RAMBABU SINGH THAKUR V. SUNIL ARORA & ORS.**

This contempt petition raised grave issues regarding the criminalisation of politics in India and brings to attention before the Supreme Court of India, a disregard of the directions of a Constitution Bench of the Supreme Court on dated 25.09.2018 in Public Interest Foundation and Ors. v. Union of India and Anr.

In this judgment, the Court was cognisant of the increasing criminalisation of politics in India and the lack of information about such criminalisation amongst the citizenry. In order to remedy this information gap, this Court issued the following directions on dated 25.09.2018:

"116. Keeping the aforesaid in view, we think it appropriate to issue the following directions which are in accord with the decisions of this Court:

116.1. Each contesting candidate shall fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein.

116.2. It shall state, in bold letters, with regard to the criminal cases pending against the candidate.

116.3. If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her.

116.4. The political party concerned shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents.

116.5. The candidate as well as the political party concerned shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that the same shall be done at least thrice after filing of the nomination papers."

On a perusal of the documents placed on record and after submissions of counsel, the Supreme Court observed that over the last four general elections, there has been an alarming increase in the incidence of

criminals in politics. In 2004, 24% of the Members of Parliament had criminal cases pending against them; in 2009, that went up to 30%; in 2014 to 34%; and in 2019 as many as 43% of MPs had criminal cases pending against them.

The Court also noted that the political parties offer no explanation as to why candidates with pending criminal cases are selected as candidates in the first place and therefore issue the following directions in exercise of Constitutional powers under Articles 129 and 142 of the Constitution of India:

1). It shall be mandatory for political parties [at the Central and State election level] to upload on their website detailed information regarding individuals with pending criminal cases (including the nature of the offences, and relevant particulars such as whether charges have been framed, the concerned Court, the case number etc.) who have been selected as candidates, along with the reasons for such selection, as also as to why other individuals without criminal antecedents could not be selected as candidates.

2). The reasons as to selection shall be with reference to the qualifications, achievements and merit of the candidate concerned, and not mere "winnability" at the polls.

3). This information shall also be published in:

(a). One local vernacular newspaper and one national newspaper;

(b). On the official social media platforms of the political party, including Facebook & Twitter.

4). These details shall be published within 48 hours of the selection of the candidate or not less than two weeks before the first date for filing of nominations, whichever is earlier.

5). The political party concerned shall then submit a report of compliance with these directions with the Election Commission within 72 hours of the selection of the said candidate.

6). If a political party fails to submit such compliance report with the Election Commission, the Election Commission shall bring such non-compliance by the political party concerned to the notice of the Supreme Court as being in contempt of this Court's orders/directions.

II. CONCLUSION:

The Supreme Court of India on dt. 13.02.2020 ruled that political parties should publish details of criminal proceedings against their candidates on websites and social media accounts before polls.

The apex court of the country also ruled that the parties should be able to justify choosing a person with criminal records, local news networks reported.

This comes soon after the Delhi legislative assembly elections were held, where some highly-polarizing instances of hate speech and mud-slinging were recorded across the Indian capital. According to the Association for Democratic Reforms (ADR), 43% of the candidates elected in India's 2019 general election had faced criminal charges. Close to 30% of the winners had criminal records including serious crimes such as kidnapping, rape, murder, attempt to murder and others, a report by the non-governmental organization stated.

The supreme court expressed concern over an increased "criminalization of politics" over the past four general elections in the country, as it announced that "winnability" could not be the only factor taken into consideration by parties while choosing candidates to field in elections. The details of pending cases and the criminal history of each candidate should be up on the party's website and social media accounts, as well as in newspapers, within 48 hours of the announcement, the court added.

As a part of the judgement, the bench said that all details of compliance have to be reported to the Election Commission within 72 hours, beyond which failure to do so will be considered contempt of court. In such a case, the court may hold the president of the party liable. If such directives are not followed, there is even a chance of the party being de-registered.

The Indian judiciary and civil society have made numerous attempts to move against increased criminalization in the political realm. A recent example would be a 2018 & 2020 verdict that asked the country's parliament to devise legislation to push political parties into not choosing candidates with criminal records.

This is a landmark judgement and it will not just act as a moral barrier, but also help in reducing hate speech, which has become a common tool for gaining attention during the run-up to elections. This may be a step towards bringing decency back into politics in our country.

The direction of SC to legislate parliamentary legislation to curb criminalisation of politics may help to deliver constitutional governance.

FOOT NOTE:

[1]. Indira Gandhi v. Raj Narain and Others, 1975 Supp SCC 1, 252 para 664.
[2]. (1978) 1 SCC 405, 424 at para 23
[3]. (2005) 1 SCC 754, 780 para 54
[4]. Vol. XI, C.A.D. (November 26th, 1949).
[5]. (2011) 4 SCC 1.

[6]. Per C Rajagopalachari in Kishor Gandhi, India's Date with Destiny: Ranbir Singh Chowdhary Felicitation Volume, 1st Ed. (Allied Publishers, 2006) 133.
[7]. Milan Vaishnav, 'The Market for Criminality: Money, Muscles and Elections in India' (2010) accessed 14 January 2014.
[8]. Government of India, 'Vohra Committee Report on Criminalisation of Politics, Ministry of Home Affairs' (1993) < http://indiapolicy.org/clearinghouse/notes/vohra-rep.doc> accessed 13 January, 2014.
[9]. National Commission to Review the Working of the Constitution, 'A Consultation Paper on Review of the Working of Political Parties Specially in Relation to Elections and Reform Options' (2002) accessed 13 January, 2014.
[10]. (2002) 5 SCC 294.
[11]. Association for Democratic Reforms, 'Press Release - Ten Years of Election Watch: Comprehensive Reports on Elections, Crime and Money' (2013) 1, accessed 14 January, 2014 TrilochanSastry, 'Towards Decriminalisation of Elections and Politics', Economic & Political Weekly, 4 January, 2014.
[12]. TrilochanSastry, 'Towards Decriminalisation of Elections and Politics', Economic & Political Weekly, 4 January, 2014.
[13]. Association for Democratic Reforms, 'National Level Analysis of Lok Sabha 2009 Elections' (2009) accessed 13 January, 2014.
[14]. ADR,(n.11).
[15]. Association for Democratic Reforms, 'Press Release – Analysis of Criminal, Financial and other details on Newly Elected MLAs of the Uttar Pradesh Assembly Elections, 2012', (2012) < http://adrindia.org/download/file/fid/2668> accessed 13 January, 2014
[16]. Id
[17]. Vaishnav, (n.7), 10
[18]. Sastry(n.12), 3
[19]. Christophe Jaffrelot, 'Indian Democracy: The Rule of Law on Trial'(2002) 1(1) India Review 77
[20]. Subhash Chandra Agarwal v. Indian National Congress and Others, [2013] CIC 8047 accessed on February 4, 2014
[21]. B. Dutta & P. Gupta, 'How Do Indian Voters Respond to Candidates with Criminal Charges: Evidence from the 2009 Lok Sabha Election' (MPRA Paper Series 38417, 2012)
[22]. Timmons, Heather and Hari Kumar, 'India's National Election Spreads Billions Around', THE NEW YORK TIMES (May 14, 2009).
[23]. Background Report on Electoral Reforms, Ministry of Law and Justice (2010).
[24]. Background Report (n.23)
[25]. Dutta & Gupta, (n.21).
[26]. Dutta & Gupta, (n.21).
[27]. Vaishnav, (n.7).
[28]. Vaishnav, (n.7).
[29]. Subhash Chandra Agarwal (n. 20).
[30]. "Reform of Electoral Laws", 170thReport of the Law Commission of India, 1999.
[31]. Sec. 29A(5), The Representation of People Act, 1951.
[32]. Schedule X, The Constitution of India, 1951.
[33]. Chapter 4, Vol. I, 'National Commission to Review the Working of the Indian Constitution' at accessed February, 4, 2014.
[34]. Section 8(4), which existed previously, was struck down by the Supreme Court in Lily Thomas v. Union of India, (2013) 7 SCC 653.
[35]. (2002) 5 SCC 294.
[36]. (2003) 2 SCC 549.
[37]. (2013) 7 SCC 653.
[38]. (2013) 10 SCC 1.
[39]. (1998) 1 SCC 226.
[40]. (2012) 3 SCC 65.
[41]. See, for example, V.S. Achuthanandan v. R. Balakrishna Pillai, (2011) 3 SCC 317 on the issue of delay in trial of corruption cases involving public servants.