

ISAS Working Paper

No. 150 – 14 June 2012

469A Bukit Timah Road
#07-01 Tower Block
National University of Singapore
Singapore 259770
Tel: 6516 4239 / 6516 6179
Fax: 6776 7505 / 6314 5447
Email: isassecc@nus.edu.sg
Website: www.isas.nus.edu.sg



India's Electoral Laws, Political Corruption and the Supreme Court

Ronojoy Sen¹

There are two facts about Indian politics that merit urgent attention. First, the number of Members of Parliament (MPs) in the Lok Sabha or Lower House (which is directly elected by the people in a first-past-the-post system) with criminal records is striking. In the current Lok Sabha – which came into existence in 2009 – the number of MPs with criminal charges against them is 162, which work out to nearly 30 per cent of MPs having either criminal cases registered against them or pending in court. The more crucial figure is that 76 MPs, or 14 per cent of the total number of MPs, were charged with criminal cases that could attract imprisonment of five years or more. In the earlier (2004) Lok Sabha, the picture was not much better. There were 128 MPs with pending criminal cases against them, out of whom 58 had serious criminal cases registered against them.² This has led to the perception, as the Supreme Court puts it, that the ‘law breakers have become the law makers’.

Another significant feature of Indian politics is the number of extremely wealthy – or *crorepati* (multi-millionaire) to use common parlance – MPs in Parliament. Figures for the current Parliament reveal that as many as 315 of the 543 Lok Sabha MPs have wealth of over Rs 1 crore (roughly US\$217,000) or more, which represents a 102 per cent rise from the 2004 Lok Sabha. While wealthy MPs are by themselves not a problem, it reflects the real barriers

¹ Dr Ronojoy Sen is Visiting Research Fellow at the Institute of South Asian Studies (ISAS), an autonomous research institute at the National University of Singapore. He can be contacted at isasrs@nus.edu.sg. The views expressed in this paper are those of the author and do not necessarily reflect those of ISAS.

² Analysis of Criminal and Financial Details of MPs of 15th Lok Sabha (2009): A Report by National Election Watch and Association for Democratic Reforms, p. 3.

to running for elections and getting elected. There is evidence to suggest that higher the financial worth of candidates the more their chances of winning. In the 2009 elections, 33 per cent of the candidates who declared assets worth more than Rs 5 crore won as compared to less than 0.5 per cent for candidates with assets less than Rs 10 lakh (US\$21,700). Besides, there are many who believe that elected representatives misuse their office to make money. Indeed the average growth of assets of MPs who re-contested elections in 2009 was 289 per cent.³ While this is not in any way clinching evidence of misuse of office it has certainly fed into popular perceptions of corruption among politicians. A prominent political analyst Pratap Bhanu Mehta observes: ‘The corruption, mediocrity, indiscipline, venality and lack of moral imagination of the political class, those essential agents of representation in any democracy, makes them incapable of attending to the well-being of citizens.’⁴

The criminal records of MPs and their financial worth are easily available in the public domain, thanks to two landmark Supreme Court judgments in 2002 and 2003. In this essay, I examine these two judgments and the reasoning behind the Court’s efforts to impose transparency on the political system. But before doing so, I briefly look at the parts of Representation of the People Act, 1951 – the legislation which governs the conduct of India’s elections – related to electoral corruption and disqualification for corruption. I also look at reports by government-sponsored bodies – what they say about electoral corruption and their recommendations to curb it.

These provide not only the context for the court’s views but are also extensively quoted by the Supreme Court judges themselves. In conclusion, I argue that while the courts and commissions have had a positive impact in regulating the political environment in India, it is nowhere enough to stem electoral corruption. The political class and elected representatives have to be a part of the process and only sustained pressure, not just from courts and institutions like the Election Commission (EC), but also from voters can effect real change.

The Representation of the People Act

The Representation of the People Act (RPA) is the legislation, originally passed in 1951 but amended on several occasions, which along with Conduct of Election Rules, 1961 govern the organisation of elections in India. It runs into several pages and some 170-odd sections. Section 8, sub-sections 1 and 2, of the Act lists a whole set of offences, ranging from promoting enmity between different groups to committing rape, for which a person if convicted can be disqualified for contesting elections. If the person is sentenced with a fine, he shall be disqualified for six years from the date of conviction. If a person is jailed, he shall be disqualified from the date of conviction and for a further six years after release. Under

³ Analysis of Criminal and Financial Details of MPs of 15th Lok Sabha, p. 9.

⁴ Pratap Bhanu Mehta, *The Burden of Democracy* (New Delhi: Penguin, 2003), p. 18.

Section 8(3) a person convicted of any offence and sentenced to imprisonment for an offence – other than the ones listed under Sections 8(1) and 8(2) – for more than two years shall be disqualified from the date of conviction and shall continue to be disqualified for a further period of six years after release. However, for sitting Members of Parliament or state legislatures, Section 8(4) states that disqualification under sub-sections 2, 3, and 4 shall not take effect until three months have elapsed from the date of conviction or if within that period, an appeal has been made before a court.

Section 8A provides for disqualification on ground of corrupt practices. Section 123 of the RPA lists the various offences that are deemed ‘corrupt practices’ under the Act. The ‘corrupt practices’ under Section 123 of the Act are broadly classified under eight heads, many of which were added as amendments to the original Act. First, bribery which covers inducement offered by a candidate or his agent to a person to either contest or to withdraw from contesting elections. The same applies to a candidate receiving inducements to either contest or withdraw from elections. Inducements to a voter to either vote or to refrain from voting for a candidate also fall under bribery. Second, undue influence or interference with the free exercise of an electoral right of a person by a candidate or his agent. This would include physical threats as well as threats of social ostracism, excommunication or spiritual censure. Third, appeal by a candidate or his agent to any person to vote or to refrain from voting on the grounds of religion, caste, community or language. Appeal to religious symbols as well as national symbols to further the prospects of a candidate or to hurt the chances of a rival are prohibited under this sub-section. This includes attempts to promote enmity between different groups of citizens and the propagation or glorification of the practice of ‘sati’ (self-immolation by a bride on her husband’s death). Fourth, publication of untrue allegations about a rival candidate, which is likely to affect his electoral prospects. Fifth, restriction on the hiring by a candidate or his agent of any vehicle belonging to an elector. Sixth, spending money in contravention of Section 77 of the RPA which deals with expenses incurred and proper accounting during an election campaign. Seventh, any candidate or his agent taking the help of a government servant to further his electoral prospects. Finally, booth capturing, or taking control by force of a voting centre, by a candidate or his agent.

However, despite such an elaborate classification of electoral corruption that could potentially nullify the election of a candidate, electoral malpractice continues to flourish. Many of the provisions are extremely difficult to enforce despite an EC that has been very assertive since the 1990s and wields considerable power. However, the nature of electoral corruption has changed over the years. While electoral fraud such as booth capturing and casting of false votes have been drastically reduced by the electronic voting machines, an alert EC and a strong presence of the media, particularly the numerous television news channels, vote buying and unaccounted campaign expenditure continues unabated. A study by the Centre for Media Studies found that over the last decade, at least one-fifth of India’s

electorate was paid cash for their votes.⁵ Again private conversations leaked by WikiLeaks have revealed several instances of Indian politicians discussing voter-bribery. Besides, it is commonly accepted that the cap on campaign expenditure was being regularly breached by candidates.⁶ One of the reasons is that the various forms of electoral corruption are extremely difficult to detect and prove, given the size and scale of Indian elections. A second reason is election-related petitions are filed before the High Courts, which are inundated with pending cases. Though the RPA mandates that petitions be disposed of within a period of six months, in reality they can drag on for years, given the huge backlog of cases in courts. A former Chief Justice of India, K.G. Balakrishnan, recently admitted that there were 3.65 million pending cases in the High Courts and another 24.8 million cases in the lower courts. It's not surprising that election-related cases often remain unresolved for so long that it becomes time for the next elections and the petitions become meaningless.

On campaign expenditure, Section 77(1) of the RPA remains controversial. As it stands now, Section 77(1) states: 'Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by election agent between the date on which he has been nominated and the date of the declaration of result thereof, both dates inclusive.' However, in 1974 the Supreme Court in *Kanwarlal Gupta v. Amar Nath Chawla*⁷ had occasion to interpret Section 77 by asking whether the cap on campaign expenditure – which currently stands at Rs 40 lakh (US\$87,000) for a Lok Sabha constituency and Rs 16 lakh (US\$34,700) for an assembly seat – can be evaded by a candidate by accounting for his own money spent but leaving unaccounted money spent by the political party to which he belonged or by his supporters. The Court ruled: 'A party candidate does not stand apart from his political party and if the political party does not want the candidate to incur the disqualification, it must exercise control over the expenditure which may be incurred by it directly to promote the poll prospects of the candidate.'

The Indian Parliament responded by inserting Explanation 1 to Section 77 (1) which said that notwithstanding any order of the Court 'any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association' shall not be considered as campaign expenses. This effectively nullified the Court ruling. In subsequent court judgments, the Supreme Court has questioned the efficacy of Section 77(1). In *Gadakh Yashwantrao Kanakrao v. Balasaheb Vikhe Patil*,⁸ the Court emphatically said: 'The existing law does not measure up to the existing realities. The ceiling on expenditure is fixed only in respect of the expenditure incurred or authorised by the candidate himself but the expenditure incurred by the party or anyone else in his election campaign is safely outside the net of legal sanction.'

⁵ 'Offer Valid Till Votes Last,' *Tehelka* (New Delhi), 2 May, 2009.

⁶ 'Cash for votes a way of political life in south India,' *The Hindu* (Chennai), 16 March, 2011.

⁷ (1975) 3 SCC 646.

⁸ (1994) 1 SCC 682.

Two years later, ruling on public interest litigation, the Supreme Court in a 1996 judgment – *Common Cause v. Union of India*⁹ -- revisited the issue of campaign finance. A two-judge bench, headed by Justice Kuldip Singh, said that there was no accountability in general elections and the ‘naked display of black money’ could not be permitted. It ruled that ‘requirement of maintaining audited accounts by the political parties is mandatory and has to be strictly enforced’ under the relevant provisions of the Income Tax Act. Regarding Explanation 1 to Section 77(1), the Court sent mixed signals. It did not declare the clause illegal, but ruled, ‘The expenditure (including that for which the candidate is seeking protection under Explanation 1 to Section 77 of RP Act) in connection with the election of candidate – to the knowledge of the candidate or his election agent shall be presumed to have been authorised by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption in accordance with law and to show that part of the expenditure or whole of it was in fact incurred by the political party to which he belongs or any other association or body of persons or by an individual (other than the candidate or his election agent).’

It is in this background that several government-appointed committees have recommended measures in addition to the existing RPA provisions to regulate electoral corruption and to promote transparency. Among these are the Goswami Committee on Electoral Reforms (1990), the Vohra Committee Report (1993) and the Indrajit Gupta Committee on State Funding of Elections (1998). Here we examine two of the more recent reports which have had considerable influence on the Supreme Court’s reasoning: The Law Commission’s report on Reform of Electoral Laws (1999) and the National Commission to Review the Working of the Constitution (2002).

The Law Commission Report

The Law Commission has a long history going back to 1834. In independent India, the first Law Commission was set up in 1955 to make recommendations to revise and upgrade India’s laws. Since then it has prepared several reports. The 170th report of the Law Commission dealt specifically with reform of electoral laws.¹⁰ The report proposed some significant changes to the RPA. First, the commission recommended that Explanation 1 to Section 77 of the RPA (which has subsequently been amended) be deleted. Second, it recommended insertion of a clause – Section 78A – in the RPA which would make maintenance, audit and publication of accounts mandatory by political parties. Third, it resurrected the idea of state funding for elections, something that had been recommended by the earlier Indrajit Gupta

⁹ (1996) SCALE (3) 258.

¹⁰ Available at <http://www.lawcommissionofindia.nic.in/lc170.htm>.

committee. Though it was in favour of total state funding, it said ‘only partial instead of total state funding is feasible in the prevailing conditions.’

Finally, and most significantly, the commission recommended that a new clause, Section 8B, be introduced in the RPA to mandate that the mere framing of charges in respect to most of the offences mentioned under sub-section 1 of Section 8A, and not conviction as originally stated in the Act, should be enough to disqualify candidates. The disqualification shall be in place for a period of five years or till the acquittal of the accused, whichever occurs earlier. The logic for this radical amendment, which overturns the principle of ‘presumed innocent until proven guilty’, was spelled out by the commission: ‘The reason for this proposal was that most of the offences mentioned in sub-section (1) are either election offences or serious offences affecting the society and that the persons committing these offences are mostly persons having political clout and influence. Very often these elements are supported by unsocial persons or groups of persons, with the result that no independent witness is prepared to come forward to depose against such persons. In such a situation, it is providing (sic) extremely difficult to obtain conviction of these persons. It was suggested in as much charge (sic) were framed by a court on the basis of the material placed before it by the prosecution including the material disclosed by the charge-sheet, providing for disqualification on the ground of framing of the charge-sheet would be neither unjust nor unreasonable.’ The commission also recommended increasing the punishment for several of the offences mentioned in the RPA since they were of a ‘serious nature’.

The Law Commission framed its recommendations in the background of the Indian state, as it saw it, going ‘soft’ on lawbreakers. It said there was no respect for the law among common citizens as well as government servants. Further it said that corruption had become endemic. It recommended harsh legal measures to instil respect for the law: ‘Starting with the smallest of the offences like throwing litter in streets, parks and public places and not obeying the traffic rules to major offences like corruption, misappropriation of public funds and dacoity should all merit maximum permissible sentence, as a general rule. It is only by this weapon that that respect for law can be inculcated in the society and the administration. India must get out of the “soft state syndrome”.’

The National Commission to Review the Working of the Constitution

The National Commission to Review the Working of the Constitution (NCRWC), headed by a former Chief Justice of India, M.N. Venkatachaliah, was set up in 2000 and it submitted its report in 2002.¹¹ The Commission was expected to recommend changes, if required, to the Indian Constitution to make it more responsive the changing needs of governance and development in modern India. One of the subjects it examined was the electoral process in

¹¹ Available at <http://lawmin.nic.in/ncrwc/ncrwcreport.htm>.

India. Among other things it identified as problem areas the increasing cost of elections and criminalisation of the electoral process.

Regarding criminalisation of politics, the commission quoted the findings of the Vohra Committee which said: 'The nexus between criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country.' It made three recommendations on tackling this nexus. First, like the Law Commission, it said any person charged with a serious offence would be liable for disqualification. It said any person charged with an offence punishable with imprisonment for a maximum of five years or more should be disqualified from being elected for a period of one year from the date the charges were framed. Unless cleared of the charge within that deadline, he shall continue to be disqualified until the conclusion of the trial. This should apply to elected legislators too. A person convicted of an offence and sentenced to imprisonment for six months or more would remain disqualified until the sentence is served and for a further six years. Second, a person convicted for a 'heinous' crime like 'murder, rape, smuggling, dacoity, etc' should be permanently barred from contesting elections. Third, the commission recommended the setting up of Special Courts for dealing with criminal cases against politicians. Even potential candidates with criminal charges against them would have recourse to the special courts. These courts, constituted at the level of High Courts, should decide the cases within six months with the right to appeal decisions only before the Supreme Court. Similarly, regarding cases related to corrupt practices under the RPA, the commission recommended changing the procedure for hearing election petitions which are currently handled by the High Courts. It said special election benches should be constituted to dispose of election petitions quickly. Furthermore, it recommended that the President of India should decide the period of disqualification of guilty candidates on the advice of the Election Commission.

On the high cost of elections and the lack of transparency, the NCRWC, like the Law Commission earlier, first recommended that Explanation 1 to Section 77 be scrapped. It said: 'The existing ceiling on election expenses for the various legislative bodies be suitably raised to a reasonable level reflecting the increasing costs. However, this ceiling should be fixed by the Election Commission from time to time and should include all the expenses by the candidate as well as his political party or his friends and his well wishers and any other expenses incurred in any political activity on behalf of the candidate by an individual or a corporate entity. Such a provision should be the part of a legislation regulating political funding in India.' Second, the commission recommended that every candidate and political party be properly audited and their election expenses be cross-checked against their income tax returns. Finally, it recommended that candidates declare assets and liabilities along with that of 'close relatives' and this be made available to the public. Elected legislators should also be required to submit their financial assets and liabilities at the end of every year during their term in office. Both the reports by the Law Commission and the NCRWC had a considerable role to play in shaping the judicial discourse on regulating electoral corruption, which is discussed in the following sections.

The 2002 Supreme Court Judgment

In *Union of India v. Association for Democratic Reforms* (2002)¹² the Supreme Court had to decide on an appeal by the federal 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 the following: One, whether a citizen had the right to know the criminal record and financial details of an election candidate. Two, whether the EC 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 Vohra Committee and Law Commission reports, 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 RPA against criminality and corrupt practices. Another intervener, the Indian National Congress, submitted that the Constituent Assembly, the body that framed the Indian Constitution, had rejected the need for information regarding assets and educational qualification. The EC, which had also filed a counter affidavit in the case, suggested that candidates should give 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 EC 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 EC -- 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 EC can ‘cope with situation where the field is unoccupied by issuing necessary orders’. The Court referred to an earlier Supreme Court ruling, *Mohinder Singh Gill v. The Chief Election Commissioner*,¹³ to buttress its case. There the Court had said: ‘Two limitations at least are laid on its [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 EC to frame rules, where necessary legislation is lacking, has been reaffirmed in subsequent Court rulings.

¹² (2002) 5 SCC 294.

¹³ (1978) 1 SCC 405.

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 is contesting elections. It based its ruling on two arguments. 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*¹⁴ 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 ruled: ‘In our view, 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 are required to be well-informed and educated about contesting candidates so that they can elect proper candidate by their own assessment.’

Accordingly, the Court directed the EC 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: ‘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 thereunder.’ Not surprisingly, Section 33B was challenged by several NGOs, including People’s Union for Civil Liberties (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*,¹⁵ the Court upheld the challenge.

¹⁴ (1998) 4 SCC 626.

¹⁵ (2003) 9 SCC 490.

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 National Commission to Review the Working of the Constitution 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 criminalisation of politics'. Drawing on these reports, the Court concluded: 'It is apparent that for saving the democracy from the evil influence of criminalisation 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 favour 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 court's decision 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 colour' 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 following 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 an election 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: ‘To say that well educated persons such as those having graduate and post-graduate qualifications will be able to serve the people better and conduct themselves in a better way, inside and outside the House, is nothing but overlooking the stark realities.’

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 summarising 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.

Conclusion

The Supreme Court judgments have injected some transparency into the electoral system. First, voters now know much more about the candidates whom they are 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.¹⁶ Though we cannot be sure how many people actually access the EC website, the financial worth of candidates is widely reported in the India media.¹⁷ 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.¹⁸

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.¹⁹ Finally, Indian Parliament in 2003 enacted the Election and Other Related Laws (Amendment) Act. The ‘Statement of Objects and Reasons’ of the Act said that the government was ‘continuously exploring ways and means of bringing about

¹⁶ See http://eci.nic.in/eci_main/CurrentElections/ge2009/Affidavits_fs.htm.

¹⁷ See for example ‘Richest Politicians’, *India Today* (New Delhi), 23 February, 2009 and ‘Way to big money? An LS stint’, *The Times of India* (New Delhi), 5 May, 2009.

¹⁸ Analysis of Criminal and Financial Details of MPs of 15th Lok Sabha, p. 9.

¹⁹ E. Sridharan, ‘Parties, the Party System and Collective Action for State Funding of Elections: A Comparative Perspective on Possible Options,’ in Peter Ronald de Souza and E. Sridharan eds. *India’s Political Parties* (New Delhi: Sage Publications, 2006), pp. 321-322.

reforms in electoral laws with a view to making the electoral process clean, fair and free from corrupt influences'. It further said that 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 (US\$430) 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.²⁰

The Act amended Explanation 1 to Section 77 (1) of the RPA by making 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 weren't entirely plugged. The travel expenses of a 'recognised' party's top 40 leaders and a 'registered' party's top 20 leaders would be exempt for the campaign limit. Besides, spending by the candidate or his party on propagating the general message of the party would not be considered as part of a candidate's spending.

Though the Supreme Court judgments have clearly had some impact on cleansing the system, it is not enough. In the two general elections following the Court rulings in 2001 and 2002, the number of MPs with criminal records, as we saw from the figures cited earlier, has gone up rather than down. Regarding the financing of elections, too, there is a consensus that campaign spending beyond the mandated limit as well as bribing of voters still continue unabated. India's Chief Election Commissioner, S.Y. Quraishi, admitted as much in a recent interview when he said: 'There are two types of money, one is the ostensible expenditure which is accounted for, which we can monitor, but it is the other money which we cannot monitor...through envelopes, in cash.'²¹

In 2007, the fourth report of the Second Administrative Reforms Commission – chaired by a senior Congress party leader and until recently Federal Law Minister M. Veerappa Moily – which focused on 'Ethics in Governance' raised some of these issues. It said despite the measures taken 'improvements are marginal in the case of important problems of criminalisation, the use of money in elections, subtle forms of inducements and patronage...'²² Though it lauded the improvements brought about by the Election and Other Related Laws (Amendment) Act, the commission said there was a 'compelling case for state funding of election'. It recommended: 'A system of partial state funding should be introduced

²⁰ 'Incumbency good for parties' bottomlines,' *The Times of India* (New Delhi), 10 April, 2009.

²¹ *The Indian Express* (New Delhi), 19 April, 2011.

²² Second Administrative Reforms Commission, Fourth Report (New Delhi: Government of India, 2007), p, 11.

in order to reduce the scope of illegitimate and unnecessary funding of expenditure for elections.’

On the question of criminalisation, the commission reiterated the proposals made by the Law Commission and the NCRW. It noted that given the slow justice system in India, disqualification only after conviction was not sufficient. It came to the conclusion that ‘in cases of persons facing grave criminal charges framed by a trial court after a preliminary enquiry disallowing them to represent the people in the legislatures until they are cleared of charges seems to be a fair and prudent course’.²³ It however emphasised that candidates facing ‘charges related to political agitations’ should not be disqualified. It also approved of the EC suggestion that only cases filed six months before an election should lead to disqualification as a precaution against motivated charges.²⁴ Thus, the commission recommended: ‘Section 8A of the Representation of the People Act, 1951 needs to be amended to disqualify all persons facing charges related to grave and heinous offences and corruption, with the modification suggested by the Election Commission.’ Finally, the commission said the disposal of election petitions which often remain pending for several years must be expedited. Like the NCRWC, it recommended the setting up of two-member special election tribunals, staffed by a judge of the High Court and a senior civil servant which would ensure that election petitions are disposed of within six months. The recommendations by the commission have, however, not been taken up yet by the Parliament.

In conclusion, the interventions by the Supreme Court in the electoral process have had a beneficial impact. However, it raises the issue of the legitimacy of judicial forays – even when they are beneficial – into governance and policy issues at the cost of representative institutions. India has a long history of judicial activism and a leading legal commentator has pointed to the extraordinary role of the Indian Supreme Court in ‘making law’.²⁵ The activism of the court, as well as other unelected bodies like the EC, also has a strong appeal to the middle classes since it is seen as cutting through the messy democratic process and delivering quick solutions. Scholars Lloyd and Susanne Rudolph have noted: ‘As executives and legislature were perceived as increasingly ineffectual, unstable and corrupt, the Supreme and High Courts, the Presidency, and the Election Commission became the object of a middle class public’s hope and aspirations, only partially fulfilled, that someone would defend a government of laws and enforce probity and procedural regularity.’²⁶ But this does not come without its pitfalls. As academic Pratap Bhanu Mehta warned: ‘Representative institutions are, after all, the essence of democracy, and judges do not stand in the same relation to us as

²³ *Ibid.*, p. 14.

²⁴ See http://eci.nic.in/eci_main/PROPOSED_ELECTORAL_REFORMS.pdf

²⁵ Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (Bombay: N.M. Tripathi Ltd., 1985), p. 3.

²⁶ Lloyd I. Rudolph and Susanne Hoeber Rudolph, ‘Redoing the constitutional design: from an interventionist to a regulatory state,’ in Atul Kohli ed., *The Success of India’s Democracy* (Cambridge: Cambridge University Press, 2001), pp. 131-132.

legislators. It may be that we cannot trust representative institutions, but it would be stretching logic to pretend that guardianship which the courts exercise over policy is synonymous with democracy.²⁷

If India's elected representatives and Indian Parliament are to regain their moral legitimacy and not cede ground to unelected constitutional bodies, they must seek to initiate electoral reform on their own volition rather than at the prodding of the courts. The reluctance of Parliament to accept the provisions of election candidates declaring assets and criminal records was a good example of the legislature's stonewalling tactics. Again the insertion of Explanation 1 in Section 77 (1) of the RPA was an obvious ploy to keep election campaign finances opaque. A rethink has become even more imperative in the context of the Anna Hazare-led agitation against corruption and its strong rhetoric against elected representatives. Hazare and his core team have already stated that next on their agenda is electoral reform which they believe will root out 'corrupt' candidates. Some of the proposals that they want to take up is the right to cast a negative vote, something that already figures in the EC's recommendations, and the right to recall elected representatives, which was rejected by the Supreme Court in 2007 on the ground that it is for Parliament to decide on the issue.

If India's elected representatives do not want to see their credibility further eroded, either by the Court or populist agitations, they must debate and act on the merits of the numerous proposals of electoral reform in the public domain. There are instances like the passage of the Election and Other Related Laws (Amendment) Act where Parliament brought about much-needed reform in the electoral process. There are some signs that this is happening once again. The former Law Minister, Veerappa Moily, had in August 2011 seconded the proposal of the different commission reports mentioned above that candidates with serious charges against their name be barred from contesting elections and placed it before the federal Cabinet.²⁸ Some elected representatives have also begun talking of the loss of moral authority of politicians. But if the political class is to dispel such perceptions it must pro-actively embrace electoral reform instead of being seen as impediments to it.

.....

²⁷ Pratap Bhanu Mehta, 'The Rise of Judicial Sovereignty,' in Sumit Ganguly, Larry Diamond, Marc F. Plattner eds., *The State of India's Democracy* (Baltimore: The Johns Hopkins University Press, 2007), p. 117.

²⁸ *The Times of India* (New Delhi), 4 August, 2011.