

# **Combating Criminalization of Politics Through Disclosures – An Assessment**

by

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## I. Background

Over the past two decades, the Indian political arena saw increasing presence of criminal elements in its midst. From time to time, the Election Commission wrote to the Government of India (GOI) urging it to make necessary changes to the Representation of the People Act, to make it difficult for persons with criminal record to seek elective office, but the governments of the day chose not to act.

In the absence of a legal framework to prevent criminalization of politics, many citizen groups, newspapers and magazines have been conducting informal surveys over the years. In various elections conducted to the State Assemblies and Parliament, Lok Satta launched an “Election Watch” movement for screening of candidates with criminal antecedents. In the 1999 and 2004 elections to the State Assembly and Parliament, Lok Satta released a list of candidates with criminal record, which evoked a tremendous response all over the country. In AP, over the past few years, overt criminalization of politics has come down to some extent due to the public pressure generated by Lok Satta’s campaign. While established politicians with criminal records continue to be nominated, major parties are now desisting from nominating new candidates with criminal records. Media exposure, civil society activism, and public scrutiny have certainly made a significant impact. One telling illustration is the withdrawal of nomination of a notorious faction leader by major party in 2000, for the office of Zilla Parishad Chairmanship in Kurnool.

Based on Lok Satta’s work, Association for Democratic Reforms (ADR), comprising a few alumni of IIM Ahmedabad, filed a writ petition in the Delhi High Court in 1999 seeking a directive to the EC to disclose the antecedents of candidates in the electoral arena. The Delhi High Court gave a judgment in November 2000, directing the Election Commission (EC) to seek and disclose the criminal and financial antecedents, along with the educational qualifications of all contesting candidates. The Union of India filed an appeal in the Supreme Court (SC) in 2001. PUCL, a Delhi based organization joined as a co-petitioner in this case. The SC in turn delivered a landmark judgment on May 2, 2002, disposing of the Union of India’s (UOI’s) appeal, and directing the EC to seek information from the candidates about their criminal record, financial details and educational qualifications. **The court further declared that “in a democracy, the citizen has a fundamental right to receive information about candidates seeking to represent them” and ruled that such a right to information is a part of the fundamental right to freedom of speech guaranteed under Art 19 (1) of the constitution.**

The EC wrote to the GOI asking it to make the necessary changes in law to comply with the SC judgment. When the GOI failed to act, the EC on 28<sup>th</sup> June issued an order under Art 324, in line with the SC directive, and directed that all candidates shall file an affidavit along with their nominations, with all the details. The UOI introduced a Bill in the 2002 monsoon session, which sought to nullify the financial disclosure provisions of the EC’s order. When the Parliament

didn't take up the Bill for consideration in the monsoon session, the Union cabinet approved an Ordinance and sent it to the President for promulgation.

Several activists and civil society initiatives formed a broad coalition under "National Campaign for Electoral Reforms" (NCER) and launched a campaign in support of the Supreme Court judgment and candidate disclosures. They mobilized public opinion in favour of the disclosure norms and made a representation to the President urging him to refer the Ordinance to Supreme Court for its opinion under Art 143, as some of the provisions clearly violated the citizen's right to information and, as such, are unconstitutional. In the meantime, the Congress party wrote to the government expressing its full support to the SC judgment and disclosures; it stated that its opposition was limited to the power vested by the EC in the Returning Officer to reject nomination paper on the grounds of incomplete or false information. Bowing to public opinion, the President referred the Ordinance back to the cabinet for reconsideration. The cabinet reiterated its recommendation to the President citing political unanimity, and the President didn't have much of a choice but to promulgate the Ordinance, **which was later converted into Representation of the People (3rd Amendment) Act, 2002 (Amendment Act)**". Lok Satta, along with ADR and PUCL, challenged this legislation in the Supreme Court.

### *Supreme Court Judgment*

On March 13, 2003, Supreme Court (SC) gave a verdict on candidate disclosures, which declared Section 33B of the "*Representation of the People (3rd Amendment) Act, 2002 (Amendment Act)*" illegal, null and void, and reiterated its earlier judgment on May 2, 2002. On May 2, the SC held that citizens have the fundamental right to know the antecedents of candidates for elective office, as part of freedom of expression guaranteed under Article 19(1) of the Constitution. But Section 33A of the Amendment Act provided for disclosure of only a part of the criminal record. No other disclosure, including assets and liabilities of candidates, was required.

Section 33 (B) specifically sought to nullify the Court judgment of May 2, by declaring, "Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or another 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". It is this provision whose constitutionality was challenged. The Supreme Court, on March 13, 2003,<sup>1</sup> declared that obtaining relevant information about the candidates is indeed a fundamental right under Article 19 (1), and as the Parliament had no power to make a law abridging fundamental rights [Article 13 (2)], such a law is void.

With the final judgment of the Supreme Court in place, disclosures are now mandatory and irreversible. The Election Commission issued a revised notification removing the power of Returning Officers rejecting nominations on grounds of false information, and during recent

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<sup>1</sup> The key provisions of the judgement include candidate's disclosure of his/her:

1. Criminal antecedents
2. Assets and liabilities
3. Educational qualifications

Assembly and Parliamentary elections (2004) all the candidates contesting elections had to disclose details pertaining to their criminal antecedents, assets and liabilities, and educational qualifications.

## **II. Judiciary vs. Legislature**

In the immediate aftermath of the Supreme Court judgment of March 13, 2003, mandating disclosure of candidate details, many questions about the unwarranted judicial activism were raised. Did the Supreme Court of India overstep its constitutionally mandated jurisdiction by giving this judgment? It is the SC's duty to interpret fundamental rights and review laws and executive actions in the light of those rights. In this case, the Supreme Court merely declared the citizens' right to know about the candidates as fundamental right, and held the law which abridged such a right unconstitutional and void. Clearly, the Court acted within its jurisdiction.

The SC has, time and again, drawn the boundaries of judicial review. The Court often has cautioned against interference in policy matters. For instance in an earlier judgment (Nalla Thampy Terah vs Union of India, 1985), the Court refused to hold explanation 1 under Section 77 of the RP Act, 1951, unconstitutional. This provision of law states that all election expenditure incurred by a political party or a third person shall not be counted as election expenditure for the purpose of expenditure ceiling imposed by law! Though this exemption clearly makes a mockery of law, the Court refrained from interfering on the ground that as long as the constitution is not violated, " we cannot negate a law on the ground that we do not approve of the policy which underlines it". In respect of disclosures, the law sought to abridge the fundamental right of citizens to know about candidates, and therefore, the Court held the law null and void.

True, there were earlier decisions of the Court through which it may have encroached on the legislative or executive jurisdiction. For instance, the Court decisions to the effect that only SC will decide on the appointments to higher judiciary are highly questionable. In no functioning democracy does the judiciary appoint itself. In several countries, there are institutional mechanisms to prevent arbitrary appointments. In the US, all such appointments should be approved by the Senate, and in certain States, the subordinate judges are even elected directly by the people.

Similarly, in their anxiety to promote what they considered to be sound policies, courts sometimes tended to make policies. For instance, the efforts to prescribe fee structure in private educational institutions, the direction to close down all industries en masse in a locality, and the decision to impose a certain fuel limits for vehicles are all highly questionable and contentious. By such decisions, the judiciary became vulnerable to accusations of usurpation of legislative and executive authority.

The executive and legislature lacked the moral authority and courage to counter such tendencies, because their credibility in the public eye was seriously eroded. Certainly there is a case for corrective action to redress such imbalances. For instance many jurists themselves have advocated a National Judicial Commission to advise on appointment and removal of judges of higher courts.

In the early years of the American republic, there were instances of judicial encroachment into executive sphere. Thomas Jefferson rejected such excesses, and correctly held that while on matters of adjudication, interpreting the Constitution and upholding the fundamental rights, the Court's authority was final, on purely executive matters and policies, the President's decisions were final. Such a stand requires clarity, credibility and moral courage.

Unfortunately, several parties and politicians had used the wrong case to attack the SC. By all means, we should restore the Constitutional balance among the three organs of state, and ensure effective checks and balances. But we cannot violate the citizens' fundamental rights in the process. The Parliament, the government and the Courts are meant for the service of the citizens, and people are the ultimate sovereigns in a democracy. No amount of sophistry, obfuscation, and defense of the indefensible will convince people otherwise. Another important that we need to answer is, whether the Supreme Court judgment mandating disclosure of candidate details is unique. The answer would be a definite No.

### **III. Best Practices In Other Democracies**

In most of the western democracies, the candidates themselves voluntarily disclose all relevant personal information as soon as they decide to contest for public office. The presence of a vibrant and active media, coupled with strong civil society presence, makes it unthinkable for any candidate to refuse to divulge all necessary personal information, which will enable the voter to exercise an informed judgment. Therefore, most of the Western democracies do not mandate disclosures by law, but get them as a custom. However in the US, the code of ethics of both the Congress and the Senate make it mandatory for any candidate who declares an intent to contest for public office to file a personal financial disclosure statement within one month of declaring so. Non-compliance of this code is unthinkable in the US. Any breach of the code is promptly censured by the legislature disregarding partisan politics. Members are even expelled for serious breach of ethics. Even censure is often enough to put an end to otherwise promising careers of prominent politicians. The withdrawal of Robert Toricelli from the Senate race in New Jersey state after censure by the ethics committee is a good illustration.

### **IV Disclosure and Disqualification**

It should be remembered that the Supreme Court judgment was about disclosure and not about disqualification. It was about the inalienable fundamental right of the people to know antecedents of the candidates that they are electing. Does this mean that the candidates with terrible track records should be allowed to contest elections? Obviously, the solution lies in disqualifying persons facing criminal charges from contesting elections. But such blanket disqualification is opposed on two grounds. First, the person is presumed innocent until proven guilty. Disqualification of a person against whom charges are framed would be unfair denial of his rights. But there are two arguments to counter this line of thinking. First, disqualification is not conviction or pronouncement of guilt. Right to contest for elective office is only a legal right of a citizen, and not a fundamental right. The citizen can always contest after charges are cleared against him. And if he does not contest during trial, there is no irreversible damage to him in the form of violation of fundamental rights. Public office is nobody's birthright. Second, in matters of election and representation, people's rights are fundamental. If there is a clash between

people's right to have good representation, and an individual's right to represent the people, then the society's right should have precedence. Rights argument clearly fails.

But there is a second, more serious objection to blanket disqualification of all candidates facing charges. Our criminal justice system is far from perfect. Often trumped-up charges are leveled against innocent rivals. Crime investigation is not always professional or impartial. If we start disqualifying candidates on the basis of malicious charges or political vendetta, we will have reduced our democracy to the level of Pakistan or Iran. Given the state of our politics, policing and justice delivery, such blanket disqualification is both unwise and dangerous.

Does that mean murderers and mafia dons can continue to be elected, browbeat witnesses, pressurize police and governments, escape scot-free, and hijack our democracy? Obviously, we must find a realistic solution between the two extremes of disqualification for all pending charges, and even a murderer enjoying the right to contest until he is convicted. The law now is so absurd that the murderers of Rajiv Gandhi had the right to contest elections between 1991 and 1998, when they were convicted. Clearly, such a position is untenable.

Happily, a fair resolution is possible. In the wake of the May, 2002 Supreme Court judgment mandating disclosure of candidate antecedents, the Union government drafted a Bill providing for disqualification of persons against whom charges concerning heinous offences have been framed by competent courts in two separate criminal proceedings. Obviously, it is laughable that a person is eligible to contest if he committed one murder, but is not eligible if there were two murder charges pending! That absurdity apart, a sincere (though it failed for want of consensus) effort was made to disqualify persons facing extremely grave charges. These heinous offences listed were: waging war against India (section 121 IPC); murder (section 302); abduction with an intention to commit murder or for ransom (sections 364 and 364A); rape (section 376); dacoity with or without murder (sections 395 & 396); offence under section 18 and 20 of Narcotics Act, 1985; and section 3 of POTA. The last one is irrelevant now. But the other offences listed are extremely grave, and honourable citizens are unlikely ever to face such charges. Remember, disqualification applies only when a court frames charges after preliminary evidence, not when an FIR is lodged, or when police file charge sheet.

The Parliament needs to act now to disqualify persons facing such grave charges. No minor or political offence comes in this category. The EC recently recommended a far stricter norm of disqualifying all those facing charges. But at the current juncture, if people facing these grave charges are disqualified, we can purge our politics of some of the most undesirable elements.

Of course, such disqualification does not address the core issues – poor justice delivery, highly politicized policing and prosecution, and a perverted electoral system which makes hardened criminals with money and caste power “winnable” candidates. But this could be the first step in our quest to decriminalize politics.

## **V. Impact of disclosures on Criminalization – Role of Civil Society**

Did the disclosures have an impact on the way candidates are nominated by major parties and the way people voted? Cynics claim that disclosures of antecedents of political candidates was anyway known to the voters in constituency, and hence the Supreme Court judgment did not

make any material difference. However, Lok Satta's Election Watch experience in AP brings out a different dimension to the disclosure issue – its effect on the behaviour of political parties.

Lok Satta's experience in 1999, when it launched a massive media campaign soliciting information from the public about criminal antecedents of potential candidates, had a telling effect on the behaviour of political parties. While its campaign couldn't stop established politicians with a criminal past from getting tickets, the parties did desist from nominating new candidates with a criminal record. As has been pointed out, in the local government elections in A.P (2000), Lok Satta's campaign forced a major party to change the candidate for Kurnool Zilla Parishad chairmanship on grounds of history of violent politics, factionalism and criminal record. Though the party had a clear majority in Zilla Parishad, the public pressure generated by disclosures made by LOK SATTA movement forced the party to change the candidate against the wishes of all its legislators and ministers in the district. This is the first time in India's electoral history that civil society pressure through disclosures could force a change of candidate at such a senior level. Such is the power of disclosures.

Lok Satta's subsequent efforts in 2002 during the Municipal Corporation of Hyderabad (MCH) polls reiterated the effect of disclosures. There were hardly a handful of candidates with criminal record, who got nominated and subsequently only one of them got elected as a corporator. In fact, no major party has nominated any candidate with criminal record in a city, which is notorious for criminalization of politics. It showed that, thanks to disclosures by citizen activism, the resultant public support for decriminalization of politics, the active efforts of several political functionaries, and the strong media support for cleansing our political process, all parties responded positively and refrained from nominating persons with known criminal record. 32 candidates with criminal record were nominated by the leading political parties in AP in 1999 Assembly/Parliamentary elections. The number came down dramatically by 2002 local government elections. Moreover, in the elections to MCH, there was only one candidate with any criminal record (charges framed under section 498(A) and 499 of IPC). This illustrates how disclosures and public pressure force the parties to change their behaviour, and alter the political landscape.

In 2004, as opposed to the 1999 Election Watch effort, when Lok Satta collected information on candidates nominated by major parties, this time Lok Satta had to start the process by identifying who the potential candidates are going to be. Drawing information from a variety of sources, Lok Satta prepared a list of 1500 prospective candidates from major parties, and from them identified approximately 150 candidates suspected of having a criminal/corrupt record. In addition to soliciting information from public, media and other reliable sources were also tapped for collecting information on these potential candidates. Information was received in respect of 74 prospective candidates from a variety of sources including the public, political parties, media and the police. Extreme care and caution have been observed to ascertain the facts and to ensure accuracy and unbiased documentation. Lok Satta constituted a screening committee comprising of eminent jurists, former bureaucrats, and members from civil society, which met on the 12th of March to evaluate the information received on prospective candidates. The Supreme Court in its judgment on May 2nd 2002, which attained finality on March 13th, 2003, through another judgment, directed that information on whether the candidate is convicted/acquitted/discharged of any criminal offence in the past should also be disclosed. After thorough deliberation, the committee came to a conclusion that only grave charges ending in acquittal/discharge need to be



made public. Accordingly, 13 such names were included in the list. The committee, while reviewing the information available, deleted 22 names from the list, as it felt that the charges were not serious, or they may be politically motivated, or were related to political agitations. After a careful review, the committee came up with a list of 52 prospective candidates (25 Congress, 23 TDP, 1 BJP, 2 TRS and 1 Independent) with criminal records. Thereafter, the committee wrote to all the four major parties, i.e. Congress, TDP, BJP and TRS, attaching the list of prospective candidates with a criminal record. The parties were requested to present any information, which was more accurate and that could prove the committees' conclusions wrong (by 5 pm, 19th March 04). The parties were informed that if they were unable to counter the information presented by the committee, it would be presumed that the information was accurate.

One prospective candidate from TRS presented evidence to the committee to show that the cases filed against him were of a political nature, and the committee after due consideration removed his name from the list. None of the other parties responded. The screening committee met again on the 19th of March and finalized the list of prospective candidates with criminal antecedents, and record of acquittal/discharge after being tried for grave offences. The list, consisting of 51 names with the following party break-up, was made public on the 20th of March 2004:

TDP	25
Congress	23
BJP	1
TRS	1
Ind	1
<b>Total</b>	<b>51</b>

Of the 51 names cited in our list, 38 either had cases pending against them or had been convicted and sentenced by a court of law, or were listed as rowdy-sheeters or history-sheeters. Another 13 candidates had no cases pending, but were tried for crimes of serious nature (murder, attempt to murder etc.). The release of the list of prospective candidates with criminal antecedents by Lok Satta created a political storm in the state, and there was a huge public uproar. For almost ten days, the media attention and public discourse focused heavily on this topic and nothing else. None of the political parties questioned the authenticity of the information. The parties protested feebly that their hands were tied as they have to field only "winnable" candidates. There was also ferocious backlash from some of the politicians named by Lok Satta. In 1999, when the list of candidates with criminal record was released by Lok Satta, it did not affect their candidature as they had already secured the nomination of major parties. This time, years of sustained campaigning, and public outcry meant that many could lose party nominations, ending their political careers. Thanks to the overwhelming public protest, the major parties did respond and did not field approximately half the candidates whose names figured in Lok Satta's list. In the final tally, 25 candidates who figured in our list were nominated by the major parties and four candidates contested as independents, out of which only 11 candidates won the elections. Lok Satta's persistent efforts have made the of new criminal elements into politics an extremely difficult enterprise. Statistics show that Andhra Pradesh has a lower percentage (7.1%) of politicians with criminal records than the other states. This is in contrast with other populated

regions of India such as western states and northern states where a higher percentage of members, 31.3 % and 28.2 % respectively, have criminal records<sup>2</sup>.

It has been proven by Lok Satta's activism that civil society groups, with media support, by publicizing information and putting pressure on the political parties, can improve candidate choice in the long-term. Lok Satta's experience shows that major parties will refrain from nominating new candidates with criminal record, provided people's movements are strong enough to make candidate choice a key issue. However, financial disclosures will continue to be flawed, given the pervasive culture of black money. In a few glaring cases of suppression of information, the election should be challenged on grounds that the nomination is defective. Successful unseating of a couple of legislators on this ground will encourage truthful disclosures. In addition, civil society organizations should research disclosures on a sample basis and establish the accuracy of the information published. Such a sustained effort will eventually force better disclosure practices, and may even make a dent in our black economy. In other words, the real purpose of disclosures is not to alter the voting behaviour overnight. It is to focus searchlight on candidates' record and generate vigorous public debate on the criminal record and unaccounted and undisclosed wealth and income of some of the unscrupulous elements which are undermining the legitimacy of our political process.

## **VI. What more needs to be done?**

It has been pointed out that disclosure of candidate details helps in generating vigorous debate on criminalisation of politics. Is disclosure of candidate details panacea to the growing criminalisation of politics? Before, we move on to answer the question, we have to candidly answer why criminals in our society are in such great demand. The answer – there is a growing market demand for criminals in society. The justice system has become moribund and ineffective, no longer capable of resolving disputes or punishing criminals in a credible and speedy manner. With 25 million cases pending in courts, many of them for years and decades, most people have no faith in due process of law. More than the pendency of cases, the 'missing cases', which never reach courts for want of faith in judicial process, are increasing alarmingly. Most people swallow injustice, and suffer in silence. There is no reasonable chance of reparation for violation of rights or speedy and fair resolution of disputes. Therefore, going to courts makes no sense except in extreme cases, or when a litigant is rich or is actually seeking to delay a case. Such a climate breeds a class of criminal 'entrepreneurs' who are willing to provide rough and ready justice through real or implied use of force. The 'bhai log' or mafias or criminal gangs thrive primarily by settlements of disputes. They have become the undeclared but effective informal courts of law, with the capacity to enforce their 'diktats' by brutal methods. If you examine the antecedents of many criminals in politics, they started their careers as dispensers of rough justice, and flourished by 'settlement' of disputes for a price. Sadly, more criminal cases are pending in our courts, and for longer periods than civil cases. Nearly 18 million criminal cases are pending in India, which is about thrice the number of civil cases. Of these, nearly 5 million cases have been pending over for 10 years! Clearly, mafias and organized crime syndicates have no real fear of the law. Therefore, the criminal gangs operate with impunity.

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<sup>2</sup> Samuel Paul and M Vivekananda, "Holding a Mirror to the New Lok Sabha," Economic and Political Weekly, November 6<sup>th</sup> 2004. pp.4927-4934

Second, what motivates such 'successful' criminal entrepreneurs to enter politics? An incident recounted by a police official will answer the question. Some years ago, the leader of a criminal gang known for many murders began taking active interest in the affairs of the ruling party in a state at the local level. The then Home Minister who came to know of it asked the police official to introduce the criminal to him. A few days later, the minister and the official were participating in a public function in organizing which the criminal was prominent. The police official brusquely summoned the criminal and introduced him to the minister. The minister then put his arms around the criminal in a show of affection, and greeted him effusively! It is this protection which attracts criminals into politics. Once a criminal becomes a politician, the police, whose job it is to keep him under check and investigate his crimes, become his protectors. In India, traditionally crime investigation is under political supervision. This control is of two kinds: the political bosses determine transfers and postings of officials who are entrusted with all police functions – crime investigation, law and order, traffic control, VIP security etc; the government has the power to withdraw prosecution. Given this situation, it makes eminent sense for a criminal to become a politician in order to escape the clutches of law; indeed, to control the crime investigation process to his advantage.

Third, why do parties invite criminals to be their candidates? In a constituency-based first-past-the-post (FPTP) system of election, the local caste clout, and ability to bribe or browbeat voters, and resort to polling irregularities like bogus voting enhances chances of victory. Though many criminal gangs are initially 'secular', they soon split on caste or communal lines. They clearly take advantage of social cleavages and position themselves as protectors of their caste or community, thus provoking primordial loyalties. That is why many criminals enjoy fierce local support. With such caste clout, musclemen at their disposal, and money accumulated through crime, they have natural advantages in a local election. In our FPTP system, what matters is to garner more of the constituency vote than any of the rivals. The losing candidate's votes do not count. Therefore, in our system, there is fierce competition for the marginal vote that a candidate can bring, which often is the difference between victory and defeat. And the local electoral malpractices have little impact on a whole state or country. That is why politicians choose 'popular' criminals masquerading as caste or faction leaders as candidates. That is why sometimes mafia dons in jail win elections with ease.

If we are serious about decriminalization of politics, all these three problems need to be addressed. Justice must be made accessible, speedy and affordable; crime investigation must be insulated from the vagaries of partisan politics, and made accountable; and we must move towards better electoral systems like proportional representation with effective safeguards to ensure democratic choice of candidates and prevent fragmentation on caste lines. Public opinion needs to be mobilized on all these fronts. Opposition to individual politicians with criminal antecedents is necessary; but only deeper systemic reform can address the real crisis.

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