

**A NOTE ON THE REPRESENTATION OF THE PEOPLE
(AMENDMENT) BILL, 2002**

by

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I. Background

Over the past 2 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 RP 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 citizens 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 elections to the State Assembly and Parliament, LOK SATTA released a list of 45 candidates with criminal record, which evoked tremendous response all over the country. In AP, over the past three 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 for the office of Zilla Parishad Chairmanship in Kurnool in 2000 by a major party.

Based on this work of LOK SATTA, 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 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 SC in 2001. PUCL, a Delhi based organization joined as a co-petitioner in this case. The SC in turn delivered a land mark judgment on May 2, 2002 disposing off 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, on 28th June the EC has 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 has introduced a Bill in the monsoon session, which sought to nullify the financial disclosure provisions of the ECs 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 have 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 have 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 violate 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 ground of incomplete or false information.

Bowing to the public opinion, the President has 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. The current RPA Amendment Bill, 2002 introduced in the winter session of the Parliament on 26th November, 2002 seeks to incorporate the provisions of the Ordinance into a law.

Meanwhile, a number of civil society organizations led by LOK SATTA, ADR and PUCL have filed an appeal in the SC challenging the constitutional validity of the Ordinance. The hearings were concluded and judgment is expected any time.

II. Key features of the RPA (Amendment) Bill, 2002

1. The Bill provides for disclosure of information relating to all pending charges framed by a magistrate, provided such offences are punishable with imprisonment for 2 years or more. The Bill also provides for disclosure of information relating to all convictions for which the sentence is imprisonment for an year or more. These disclosures of criminal record as provided by the Bill, while they deviate from the more sweeping orders of the Supreme Court, are quite reasonable. The Supreme Court directed disclosures by affidavit of all cases in which charges are framed, or cognizance is taken by the court.
2. The Bill provides for disclosure of financial details (movable and immovable assets, liabilities if any to any public financial institution or to the state or central governments) of the winning candidates to the presiding officer of the house within 90 days of taking oath of office.
3. The Bill explicitly states that irrespective of any court judgment or instruction of the EC, **NO** candidate shall be liable to disclose any information not required under this law or rules.
4. For either false disclosure or non-disclosure the Bill provides for a punishment with imprisonment up to 6 months or with a fine or with both.

III. What does this Law Mean?

1. The law provides for reasonably satisfactory criminal disclosures, which is a significant improvement from the current position.
2. The financial disclosure provisions are applicable only after the election and do not apply to spouses and dependants – this is clearly violative of the SC judgment.

3. The law specifically prevents any further future disclosures, which is unconstitutional as it impinges on the citizen's fundamental right to information.

IV. Disclosure vs Disqualification

Disclosure is not about disqualification. The government brought in the issue of disqualification of those charged by a magistrate with two 'heinous' offences, in two separate cases. This is in consonance with the larger principle enunciated by the Law Commission and Election Commission, that serious criminal charges pending against a person should be a ground for disqualification until the verdict is delivered. But, irrespective of the merits of this disqualification, the Supreme Court judgment (May 2), EC's order (June 28), are not about disqualification, but about disclosures.

ECs order vests discretionary powers with Returning Officers to reject nominations on technical grounds. The Election Commission's order (Para 14(4)) is clearly meant to enforce truthful disclosures, and not to act as a judge and jury before the election. There are enough safeguards provided in the order. The Commission's past record shows that nominations are not rejected on frivolous grounds, and acceptance is the norm. However, when parties say that they cannot trust officials posted by their own governments, they must be saying that for some good reason. In a way it is an extraordinary admission of politicization of bureaucracy habitually resorted to by them, and complete subversion of rule of law. Happily, in electoral matters this subversion has been substantially contained, thanks to the independence and impartiality of the Election Commission.

However, one should respect the genuine concerns of the political parties. The Returning Officers' power to verify the details furnished can be removed by amending Rule 4 of Conduct of Election Rules, 1961. Only non-disclosure can be made a ground for rejection, and false disclosure can only be ground for subsequent prosecution and/or election petition or disqualification. Therefore the alleged discretion in the hands of Returning officers cannot be used as an alibi for undermining disclosure provisions.

V. Impact of disclosures on criminalization

In the current debate on disclosures of antecedents of political candidates, one of the arguments put forth was that the voters in a constituency know everything about the candidates and hence there is no further need for disclosures.

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.

In the recent local government elections in A.P., 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. However, 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.

This only proves that disclosures can be very effective in changing the behaviour of political parties. **Financial disclosure can also do the same thing as criminal disclosures.** The public debate generated about the candidates antecedents, the comparison between the lifestyles and known assets on the one hand and what they disclose as candidates on the other hand will force political parties to look for candidates with clean financial record.

In other words, the real purpose of disclosures is not to alter the voting behaviour overnight. It is to focus search light 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.

Political parties have an onerous task of choosing candidates for public office, and running governments. Many decent and honourable politicians are paying a heavy price in personal terms to sustain our democratic process. Their reputations are sullied by a few unscrupulous elements. Equally, at the local level when candidates are chosen, the decent elements are helpless in resisting candidates with unaccounted money power and criminal record.

Once financial disclosures are in place along with disclosures of criminal record, party leaderships and upright politicians will find it easy to marginalize unsavory elements, and rescue the political process from being hijacked for personal gain.

VI. Impact of financial disclosures

The heart of the problem is not disclosure of criminal records. Nor is disclosure of educational qualification the key or relevant issue. Disclosure of assets and liabilities is the heart of the problem. Parties and politicians are forced to spend vast sums for elections. Most of this expenditure is undisclosed, unaccounted and illegitimate. Parties and candidates are sucked into a vicious cycle and are afraid of the consequences of public exposure.

It is widely reported that in Saidapet Assembly byelection in Tamil Nadu several crores of rupees were spent recently. In Kankapura Lok Sabha byelection, it is widely believed that a sum well in excess of Rs 10 crores was spent. In Andhra Pradesh, byelections to State Assembly in Vuyyur, Medak and Siddipet cost over 2 – 3 crores each. Excess expenditure to buy votes, distribute liquor, hire hoodlums and bribe officials is increasingly the norm in elections in many pockets of India. Parties feel helpless because they see no way out. Therefore they are compelled to nominate candidates with unlimited amounts of unaccounted, and often ill-gotten, money as the chief, if not the sole, criterion of selection. Disclosure of assets and liabilities will expose this shameful practice – while candidates disclose modest means, their life styles, visible assets, and benami holdings give away the truth to people.

Financial disclosure does not seek to embarrass the honest elements who have legitimate sources of income and accountable wealth. In fact, disclosures will reveal many anomalies. The honest tax payers and those with legitimate sources of income will be revealing their assets, though their life styles are frugal. Those with endless supplies of cash and lavish styles will reveal very few assets, and show practically 'nil' incomes. The revelation is not the issue; the key is the gap between what is disclosed, and what is perceived as their sources of income and lifestyles. Eventually this public disclosure will reflect very well on those who disclose their assets as they have nothing to conceal; and those who suppress the information, but cannot conceal their real assets from public gaze.

Already there are many comments in the media about disclosure of sizeable (by Indian standards) assets of known honest politicians, and minimal assets and incomes declared by politicians with lavish lifestyles and benami 'assets'. It is such comparison which will force transparency, and slowly make a dent in the culture of undisclosed transactions and black money. Also over time, the parties will change their behaviour by trying to co-opt those candidates with clean financial record.

Obviously real improvement is possible only with more far reaching electoral funding reforms and a change in the electoral system. Happily, a reasonably good funding reform Bill is now before Parliament. The Congress party's initiative for funding reform in the wake of Tehelka Expose spurred this legislation, and it enjoys bipartisan support. But full disclosures and transparency are the starting points of any meaningful reform to strengthen our electoral process and rejuvenate our democracy.

VII. 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 recent withdrawal of Robert Toricelli from the Senate race in New Jersey state after censure by the ethics committee is a good illustration.

VIII. Judiciary vs Legislature

This issue is also not about judiciary vs legislature. Every right thinking citizen and democrat stands by Parliament in upholding its sanctity and asserting its legislative supremacy. The legislature comprises of our chosen representatives and any dishonour to that august body is a dishonour to us, as a people.

But this is the wrong case and time to assert legislative supremacy. This is a case where the Supreme Court merely interpreted the citizen's right to know about candidates as a fundamental right enshrined in Article 19 of the Constitution and as a natural right flowing from the very concept of democracy. It is Supreme Court's bounden duty to interpret the fundamental rights of citizens and safeguard them. Common sense and basic democratic postulates tell us that the Court is right on this issue, and no amount of quibbling can persuade fair-minded citizens that people in a democracy should vote blindly.

There are many citizens in this country, who are concerned about the excesses of the judiciary. The courts' insistence on final say in matters of judicial appointments, the increasing instances of judicial corruption and malfeasance, the failure of the impeachment process provided under Art 124, the near-total absence of judicial accountability, many erratic and arbitrary pronouncements, excessive enthusiasm in intervening in areas which are the executive prerogative, lack of vigour in dealing with judicial delays, huge pendency of cases in courts, lukewarm support for procedural reforms – all these are sources of great concern for all thinking citizens. Nowhere in democratic world do we have such judicial unaccountability to the elected representatives. Such a situation needs immediate and vigorous redressal. The answer to the excesses of judiciary lies in the creation of a national judicial commission and a clear definition of the basic features of the constitution, along with comprehensive reform of judiciary and simplification of procedural laws. The case of disclosure of candidate record is one of natural right of voter flowing from the

very concepts of democracy and people's sovereignty, and should not be treated as a battle ground to assert legislative supremacy. Such an attitude will do irreparable damage to our democratic fabric, and further undermine the credibility of our institutions.

IX. Primacy of Political Process

This whole debate on disclosures and electoral reforms is most emphatically not about a clash between people and politicians. All true democrats respect the political process, and understand the severe constraints under which politicians function. It would be untrue and immature to treat politicians as people's enemies. True politics is a noble endeavor, and should remain so.

It is equally vital that politicians should respect the wishes of the people whom they seek to represent. Nobody can deny that in a democracy the public opinion is everything. We all say 'Janata Jaanardan', 'Vox Populi, Vox dei', 'People are the sovereigns'. The faceless people all over the country are now saying, 'we have a right to know about our candidates'.

In AP LOK SATTA has conducted a people's ballot between the 27-30th of October to gauge the public demand on the disclosure issue and received an overwhelming response. **8,54,554 people participated in this ballot which was conducted across the state in 500 centres and 8,38,199 (98.09 %) of them voted "Yes" saying that we want full disclosures.** 5,921 (0.69 %) votes were invalid and 10,434 (1.22 %) of the votes were cast "No". People from all cross-sections, well beyond expectations, enthusiastically supported this exercise.

If parties' claim of respecting public opinion have any value, let them simply disclose, and make legal provisions for that. Legal nitpicking and quibbling is merely camouflaging the real issue.

X. What more needs to be done?

We need to improve electoral rolls and make voter verification and registration simple, easy, locally accessible and citizen-friendly. Local post-office can be the nodal agency for the purpose. We need to implement measures to curb polling irregularities and fraudulent voting. We need to strengthen political parties and make them accountable and democratic in their functioning.

We need a proper funding law to help parties and politicians raise legitimate resources for political action. We also should provide tax incentives for political funding. There is a decent Bill pending in the Parliament which deserves to be debated and supported.

Finally, we should seriously examine methods to enhance legitimacy of representation, measures to promote fairer and less-costly elections based on a party's platform.

Despite many flaws, our elections are a remarkable exercise, and they are a testimony to our democratic spirit. Politicians are struggling against odds to sustain and deepen democracy in our country. We need to make this task easier through reform process. Anti-political approach is detrimental to democracy. Equally, status quo is clearly unsustainable and counter-productive.

The parties would be wise to listen to the public opinion and seize this opportunity to usher in a change which could prove to be decisive in the evolution of Indian democracy. The least that the parties can do is to refer the Bill to a select parliamentary committee, which will give the members a chance to study the issue in detail and get the benefit of expertise available with various civil society initiatives. Any hasty effort to legislate the Ordinance which forecloses financial disclosures by candidates is not only harmful to our democracy, but will be resisted fiercely by the people. Never before during peace time have people of all cross sections united as one on any issue as they have on the issue of candidate disclosures. Parties will do well to heed the people's voice and respond to their urges for peaceful, democratic reforms.

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