

# THE OFFICIAL ACTION SO FAR: TOO LATE, TOO LITTLE

## What Expert Reports Tell Us

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In The New York Times bestseller 'Behind the Beautiful Forevers,' author Katherine Boo describes the troubling relationship between the Corporator Subhash Sawant, a politician and Annawadians, his constituents: "They understood Subhash Sawant to be corrupt. They assumed he'd faked his caste certificate. "But he alone comes here, shows his face," Annawadians said. Before each election, he'd used city money or tapped the largesse of a prominent American Christian charity, World Vision, to give Annawadi an amenity: a public toilet; a flagpole; gutters; a concrete platform by the sewage lake, where he usually stood when he came."

The book seems to suggest that candidates with criminal reputation have takers in the

Indian democracy. The lack of information about politicians linked to crime is certainly not a deterrent for voters who are often economically bereft and socially divided.

### Crime and Politics: A History

The links between criminals, politics and the resultant corruption runs deep. The crime-politics nexus is also a multi-epochal phenomenon. Way back in the 4<sup>th</sup> century B.C, Indian philosopher Chanakya noted: "Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat at least a bit of the King's revenue."

According to commentators, when the modern Indian State

was established in 1947, the first three general elections were largely free of criminal elements.<sup>1</sup> However, as Milan Vaishnav, senior fellow and director of the South Asia Program at the Carnegie Endowment for International Peace, points out, in the immediate post-independence period, politicians would rely on variety of criminal elements such as strongmen, thugs, mercenaries for controlling and influencing different aspects of electoral process.

But by all accounts, problems began to surface from the 1967 General Election onwards when one witnesses a change in the rules of engagement between politicians and their erstwhile criminal lackeys. From the late 1970s and early 1980s, the phenomenon of criminals contesting in elections becomes common.

Various committees have spoken about the perils of criminals being in public office, and have laid down roadmaps to combat this malaise. This article discusses the recommendations made by several such Law Commissions and other committees/commissions, including legislative measures and policy remedies to counter the idea of a criminal-politician.

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## **Dinesh Goswami Committee on Electoral Reforms (1990)**

This committee was set up to examine some of the suggestions made by an inter-political party meeting convened under the chairmanship of former Prime Minister Vishwanath Pratap Singh on January 9, 1990. Chaired by the then Law Minister, Dinesh Goswami, this committee gave its recommendations on a broad range of topics, such as the constitution of the Election Commission, securing its independence and appropriate management of electoral rolls, among other things.

The commission probed ways in which criminalisation of politics manifests in the Indian democracy, including booth capturing, rigging, violence, misuse of official machinery and increasing menace of non-serious electoral candidates.

The focus of this report, like its predecessors such as the Tarkunde Committee Report (1974), was to keep the established framework of elections clean through regulation. There was little focus on individuals or criminal groups who were already entering the political fray. Instead, the committee worked towards ensuring ways to keep the election apparatus corruption free.

## **N.N. Vohra Committee Report (1993)**

The 1993 blasts resulted in mayhem and destruction not just

in ground zero Mumbai, but also across the country. It served as a moment of public reckoning for the political elite to take stock of the nefarious links between the existing political order, government agencies and Mafia/Crime Syndicates.

In July, 1993, a committee was formed just four months after the blasts, under the chairmanship of the newly appointed Union Home Secretary, N.N. Vohra. The objective of this committee was to take into account all the information which alluded to links between governmental agencies/officials, political functionaries and criminal syndicates. In addition, its goal was to take cognisance of how a nexus of quid pro quo favours and political patronage allowed this anomaly to sustain and flourish.

On the basis of the committee's recommendations, the government was supposed to determine the need, if any, to constitute an organisation which would collect information on such matters and pursue further investigations.

The Vohra Committee exposed the increased linkages between political elite, bureaucracy and criminal syndicates. As part of the Committee, senior officers of major investigative agencies such as the directors of Intelligence Bureau (IB) and Central Bureau of Investigation (CBI), gave candid responses to the problem at hand. They highlighted how this tangled network cannot be addressed by a single agency. Rather, there's need for

cooperation between district, state and central authorities in order to come up with a remedy. The example of Iqbal Mirchi and his rise from a merchant of contraband goods in the late 1980s to the alleged right hand-man of Dawood Ibrahim, was cited.

The Committee ultimately agreed to set up an independent nodal agency under the aegis of the Ministry of Home Affairs, presided over by the Home Secretary. Its objective was to collate and compile all information regarding crime syndicates and terror networks operational in India and/or targeting India, from other investigative and non-investigative agencies across the country.

However, in a surprising turn of events, the government decided against making the complete report public. The reason was apparent. In the report annexures, the committee had stated the names of multiple politicians and bureaucrats who had developed close linkages with organised crime syndicates and even terror networks. These functionaries had also played a crucial role in helping them operate in India. As a result, the report was published without annexures.

A petition challenging this was filed by Rajya Sabha Member, Dinesh Trivedi who demanded the release of the complete findings of the committee for public scrutiny. The Supreme Court decreed the report was complete by itself and

the release of supporting documents forming the basis of the Vohra Committee Report would in fact act against public interest.<sup>2</sup> Instead, it directed the establishment of a body which would assess the Committee's findings and have the power to prosecute the accused in specially designated courts. Not surprisingly, governments of all political complexion have failed to act on the Supreme Court's directions.

### **The Law Commission of India: Report on Reforms of the Electoral Laws (1999)**

Post the Vohra Committee Report release, the Ministry of Law & Justice made representations to the Law Commission of India (LCI) to review election petitions in 1995. This in turn led to a thorough review of the Representation of People Act (RPA), 1951 and the suggestions made were presented as part of the LCI's 170<sup>th</sup> Report. The objective was to ensure a fair, transparent and equitable electoral process. The report also aimed to reduce deviations creeping into the Indian electoral system.

The Law Commission recommended the inclusion of Section 4-A to RPA in an attempt to diminish the presence of contestants whose reputations are under the scanner. The suggested amendment would enable the electorate to know about a candidate's movable and immovable assets, or those possessed by their spouse or

any other dependent relation. Additionally, a secondary classification would be about the disclosure of any criminal antecedent, regarding any of the offences mentioned under a proposed Section 8B of RPA. While declaration of criminal antecedents of candidates has long been a part of the Form 2E under the Conduct of Election Rules, 1961, it was the Supreme Court ruling in the case of *Union of India v. Association of Democratic Reforms & Ors.* that it became mandatory. It also became an essential part of the voter's right to know as well as a requirement for valid nomination under Section 33(1) & 33A of the RPA,<sup>3</sup> read with Form 4A and 26 under the Conduct of Election Rules, 1961.

The proposed section 8B would list out a set of offences and if any charges were framed on these grounds, it would lead to the individual's disqualification. While a new provision was not created, the LCI suggestions were included within the confines of Section 8 of RPA.

### **The National Commission to Review the Working of the Constitution (2002)**

With the Indian Constitution turning 50 in the year 2000, a commission was set up to assess how the Constitution can deal with the changing demands of the new millennium by ensuring an efficient system of governance and continued socio-economic development. Any

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recommended changes to the Constitution were required to be done without interfering with its basic structure.

One of the addressed issues related to election system in India. Split across two volumes, the committee report builds on the work of the Vohra Committee as well as other committee reports preceding it, to present a historical narrative on the problems plaguing the Indian electoral process.

The commission recommended an amendment to Section 8 of the RPA on the criminal candidates issue. It cited certain incongruities with the provisions of sub-sections (1), (2) and (3) of the said Section 8 of the RPA. These were illustrated through the example of a convicted rapist who had been sentenced to 10 years. As per the current provision laid down under Section 8 of the RPA, the convicted person would be disqualified for contesting election for the first six years of his sentence as per sub-section (1) of Section 8, but would also be eligible to contest elections, even in prison, while serving the last four years of his sentence.

To address this issue, the commission recommended the

amendment of Section 8. This should read that any individual who has been convicted of an offence punishable with an imprisonment of five years or more, should be disqualified from his being chosen or being a member of Parliament. This should happen upon the expiry of a period of one year from the date on which the charges were framed against him by the court.

If the charges are not cleared in this intervening period of one year, the candidate should remain disqualified till the conclusion of trial for that particular offence. In the event that the candidate has a sentence of six months or more, he/she should be debarred from contesting elections for a period totalling the sentence imposed, along with an additional six years. If any candidate violates this provision, he/she should be disqualified.

In addition, it was recommended that any individual convicted of serious offences like rape, murder should be permanently barred from contesting office. The Commission also suggested that candidates be allowed to take the issue of framing charges against them before a Special Court. The court would then be required to determine whether there was a *prima facie* case, justifying the framing of charges in a time bound fashion. This was done so as to prevent disqualification of candidates on the basis of dubious charges.

The commission however provided an exception to

incumbent parliamentarians and Legislative Assembly members, recommending that no disqualification will come into effect for three months. Also, if an appeal is filed in the case in the meanwhile, no action is to be taken till its disposal.

There was a suggestion to set up a multi-tier mechanism to streamline a candidate's disqualification process. The President, would then determine the period of disqualification under Section 8A, based on the opinion of the Election Commission.

### **The Election Commission of India: Proposals on Electoral Reforms (July 2004)**

The EC in its primary recommendation stated that the law should be amended so that any person who is accused of an offence punishable by imprisonment for five years or more should be disqualified from contesting elections, even if the trial is pending. The proviso here was that charges have been framed against him/her by the competent Court. The Commission having made a similar recommendation in 1998, stated that such an initiative would go a long way in cleansing the political establishment of the influence of criminal elements, and thus, maintain the sanctity of the Legislative Houses.

In addition to the above, the Election Commission recommended that an amendment of Section 125 of

RP Act, 1951 should be made, so as to impose a stronger punishment on individuals found concealing or providing wrong information with respect to Form 26 of Conduct of Election Rules, 1961. The commission suggested a minimum period of imprisonment of two years as well as the removal of imposing a fine upon the candidate. The recommendation also stated that Form 26, must be amended to include a column, which will require the candidates to disclose their annual declared income for tax purpose and their profession.

### **The Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice: Report on Electoral Reforms (Disqualification of Persons from contesting Elections on framing of charges against them for certain offences) (2007)**

This Committee took cognisance of the crime-and-politics bonhomie only when the Election Commission expressed its concerns on the possibility of criminals like Dawood Ibrahim and Abu Salem contesting elections. The Standing Committee's beef was with the lacunae in the existing legislative set-up regulating election candidates. It was also apprehensive about how this set-up could be misused by

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individuals to gain eligibility for elections to the Houses of Parliament as well as the state legislatures.

The proposal before the Committee was largely to review the Election Commission's long-standing position on disqualifying candidates charged with offences carrying or exceeding five years of jail term (as iterated in their 2004 and 1998 proposals). According to Committee member Advocate Prashant Bhushan, the disqualification criteria is not adequate.

The Commission ultimately decided against moving forward with the EC's proposal. According to it, the jurisprudence on Section 227 and 228 of Code of Criminal Procedure, 1973 (CrPC) showed that a judge is not required to make a detailed assessment of the matter before framing the charges. This is not the same standard of assessment which is employed when a judge makes a decision on whether a criminal act has been committed by the accused.

However, the committee decided to create an exception. It recommended that an amendment be made to the RPA. This will result in a proclaimed absconder, declared so under Section 82 of the CrPC, who

is wilfully absconding for a reasonable period of time, being barred from contesting elections. Here 'reasonable' denotes one year prior to the date of revision of electoral rolls. In such cases, the absconder would be regarded as intentionally contributing to the delay in the framing of charges or for the trial to proceed.

The committee further recommended that term of an absconder should clearly be defined and the conduct for which the alleged absconder is to be disqualified, is to be proved beyond reasonable doubt. It should also be made clear to the individual disqualified that the punishment imposed is for the act of absconding and not for the offence with which he has been charged (and not convicted). The committee felt that individuals absconding for a period exceeding one year should have his/her name deleted from the electoral list. However, in the event of such an act, due process should be followed by issuing a show cause notice to the concerned individual. This would give him/her the right to contest the deletion of their name from the electoral roll.

Expedient disposal of cases was also stressed upon. It recommended that when a criminal case charge sheet is to be filed in court against a political person, the case should be transferred to a fast track court with a six-month-timeline for judgment. In order to ensure a stringent timeline compliance, hearings should be held on a

daily basis, till the case is finally disposed of.

## **The Second Administrative Reforms Commission: Report on Ethics in Governance (2007)**

This Commission was formed to review the functioning of the Indian public administration machinery. The criminalisation and corruption in politics were attributed to excessive and largely unregulated inflow of money into political parties. The commission emphasised on remedies like partial state funding of elections, after examining positions of other countries in this regard. Its recommendations also came in the wake of studying legal regulations in India.

It also held that the practice of disqualifying candidates before contesting is symptomatic of dictatorial regimes. According to the commission, the right to elect representatives should rest with the public. However, recognising the dire circumstances, it recommended disqualification for all candidates who have been charged with heinous offences.

It also supported the proposal of considering false declarations made to the Returning Officer, Electoral Officer, Chief Electoral Officer or the Election Commission an electoral offence under Section 31 of RPA. At the time of this report and even at present, the offence is only restricted to making false

declarations relating to electoral rolls. However, the above mentioned expansive suggestion has not been included as part of the existent legislation.

Additionally, the commission recommended that a new legislation be enacted under Article 102 (e), which will comprehensively lay down circumstances (other than the ones mentioned under Article 102(e)) under which Members of Parliament can be disqualified.

Disposal of election related petitions within six months has been a constant refrain. Its recommendation included the establishment of tribunals under Article 323B of the Constitution, chaired by a High Court Judge and a senior civil servant who has at least five years of experience in conducting elections. This suggestion appears to be stuck in limbo as well. While the Supreme Court took cognisance of this matter by issuing tentative guidelines and other directions to the government on ways to proceed on the fast track court suggestion, it appears that the implementation of this scheme has still some way to go.<sup>4</sup>

### **Justice J.S. Verma Committee Report on Amendments to Criminal Law (2013)**

In the aftermath of the Nirbhaya rape incident of December 2012, numerous post facto actions were undertaken by the government to curb sexual violence against

women, including setting up of a committee to review the existing criminal justice legislation. Chaired by former Chief Justice of India, J.S Verma, this committee's objective was to review the existing criminal justice framework and make recommendations.

It has been surmised that the Nirbhaya incident was similar in its impact on the criminalisation of politics discourse (as a concomitant issue to safety of women) as was the murder of political activist, Naina Sahni in 1995. The latter made the disclosure of the Vohra Committee Report to the public a matter of national interest.<sup>5</sup> In a similar vein, this incident, while not featuring accused who are politicians or involved with them, resulted in a serious debate on criminal acts committed by politicians.

The constituted committee felt that electoral reform within India was integral to the achievement of gender justice and the prevention of sexual offences against women. Without reforms, there would be question marks on the integrity of the legislative process on the reform of the criminal justice system. These doubts creep in primarily because law reformers on occasion, have criminal backgrounds to begin with.

One of the recommended amendments to the RPA included the insertion of Schedule 1, which would enumerate offences under IPC befitting the category of 'heinous' offences. Taking

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off from this amendment, the committee had the following recommendations.

Any candidate, convicted by a court with respect to any of the offences stated within the expanded list under Section 8(1) of RPA, would be disqualified on the date of taking cognisance or conviction. The ensuing disqualification is set to continue for six years i.e. from the date of release upon conviction. In case of an acquittal, the disqualification will operate from the date of the matter being taken into cognisance by the court till the date of the acquittal.

Recognising the long timeline of the courts to frame charges, the commission recommended the disqualification of the candidate against whom a charge sheet has been filed and cognisance taken by the court. It also suggested the creation of a publicly accessible database of candidates whose offences have been taken cognisance of by the courts. Onus was placed on the candidate to provide progress reports to the Election Commission every three months on cases pending against him/her.

Other propositions were communicated as well. When

a candidate is making any statement through an affidavit, he/she must get a certificate from the Registrar of the concerned High Court, in the context of his/her pending case status. This is to facilitate a mechanism to verify the candidate's pronouncements related to their criminal antecedents.

The commission also recommended an amendment to the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971, regarding the assessment of a candidate's assets/liabilities. Its objective was to carry out an in-depth investigation of the assets/liabilities declared at the time of filing nominations. If it is not possible to carry out this exercise for all candidates, then it should at least be done for all successful candidates.

According to the commission, a certificate issued from the office of the Comptroller and Auditor General of India would attest to correct asset declaration by candidates.

The Commission recommended a code similar to the UK's Political Parties, Elections and Referendums Act, 2000, in the context of regulation of political parties. This code intended to implement certain principles on the criteria of admission into parties, ensuring internal democracy, transparency in receiving donations, among other things. This was aimed to include political parties in the process of weeding out criminal candidates.

As a final note, the committee made an impassioned plea to all elected members of the Parliament and state legislatures, with pending heinous criminal cases to vacate their seats as a mark of respect to the Parliament and the Constitution.

### **The 244th Report of the Law Commission of India (2014)**

The commission felt that if at the stage of framing of charges, adequate levels of judicial scrutiny are present, coupled with legal safeguards to prevent its misuse, it would serve as an adequate shield against criminalisation in politics.

Some of the suggested safeguards were:

- A) Inclusion of offences which had a maximum punishment of five years or above.
- B) Charges which have been filed up to one year before the date of scrutiny of nominations will not lead to disqualification.
- C) The disqualification will operate till the acquittal of an individual by the trial court, or for a period of six years, whichever is earlier.
- D) For charges against sitting MPs/MLAs, the trials must be expedited so that they are conducted on a day to day basis and must be concluded within a one-year period. If the above does not happen, then the MP/MLA may be disqualified on the expiry of the one-year period.

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Alternatively, the MP/ MLA's right to vote in the House as a member, remuneration and other perquisites attached to their office shall be suspended.

- E) The above-stated manner of disqualification would also apply retroactively. There would be only one exception to this rule. It would apply unless the charges have been framed less than one year before the date of scrutiny of nomination papers at the time of the Act's enactment.

Additionally, the commission recommended certain amendments to the RPA. To begin with, a minimum sentence of two years should be included under Section 125- A. Apart from this, a conviction under Section 125- A i.e. the offence of filing false affidavits, should serve as grounds for disqualification under Section 8(1) of RPA.

There were other remedial measures prescribed. Since a conviction under Section 125 A is necessary for disqualification under Section 8, the Commission recommended that the Supreme Court should order all trials under Section 125A to be conducted on a daily basis.

A gap of one week was given between the last date of filing nomination papers and the date of scrutiny, so that adequate time can be given for filing objections to nomination papers.

Lastly, it was suggested that the offence of filing false affidavits be included as a corrupt practice under Section 123 of RPA.

## Conclusion

Recommendations pushed forward by expert committees on ways to tighten the noose around criminal politicians are momentous but they are just the beginning of the path to a clean legislature. Investigators have consistently suggested measures and definitive policy remedies to reform the system, but there is still a long way to go in terms of implementation. In addition, they have red flagged concomitant issues, including election financing, transparency in disclosure of criminal antecedents by electoral candidates and assessment of a candidate's assets/liabilities.

However, the tragedy of democracies being vulnerable

to corrupt and criminal lawmakers continue. In tandem, institutional failings to check epidemic levels of criminality in national and state legislatures are disappointing. Even the stance of the judiciary with respect to this issue is puzzling. The 2018 judgment by the Supreme Court in the *Public Interest Foundation* matter seems to suggest that the Court is tip-toeing around the issue of criminalisation of politics.<sup>6</sup>

Although the SC's judgment appeared to be a diatribe against criminals entering politics, there was little there to bring about a change in status quo.

Even if such a decision is constitutionally prudent, it fails to recognise that a Parliament, composed of individuals with criminal records, is unlikely to pass any effective Criminal Law Amendment reform.<sup>7</sup>

The recourse perhaps then lies with a public-spirited uprising, that is not restricted to a set of advocacy groups or civil society organisations, to fight for the quality of representation.

## (Endnotes)

1. The National Commission to Review the Working of the Constitution, Vol. 2, Book 1 (2002)
2. *Dinesh Trivedi, M.P & Ors. v. Union of India* (1997) 4 SCC 306
3. *People's Union for Civil Liberties and anr. v. Union of India* WP (C) 490 OF 2002. Subsequent to this case, the Election Commission issued a notification order no. 3/ER/2003/JS-II, dated 27th March, 2003 making details about a candidate's criminal antecedents (i.e. disposed and active charges) along with details of their assets to be made public. Prior to this, in 2002 an amendment was made to the RP Act, 1951 which led to the inclusion of Section 33 A.
4. *Ashwini Kumar Upadhyay v. Union of India & Anr.* WP(C) No(s). 699/2016, D.O No. 29079/2016 Order 14-Dec 2017
5. The accused in that matter, Sushil Sharma was an MLA representing the Congress Party.
6. *Public Interest Foundation and Ors. v. Union of India and Anr.* WP(C) No. 536 of 2011
7. By 2014 the numbers had risen to 34% and 21% for MP's & MLA's, respectively.