CHAPTER - IV

LEGISLATIVE AND JUDICIAL RESPONSE TO CRIMINALIZATION OF POLITICS
In the preceding Chapter the role of the Election Commission in conducting free and fair poll in India, its necessity for success of democracy and the role of the Commission in controlling criminalisation of politics in India has been discussed. It has been observed that the elections in India are not free from political and criminal vices. The nexus between the political parties and the criminals has become more pertinent and that has posed a great deal of difficulty and challenge in front of the Election Commission of India to hold free and fair elections in India.

In the present Chapter, therefore, an attempt has been made to analyse the role played by the Judiciary and the Legislative bodies to curb criminalisation of politics in India. The Parliament of India has enacted various laws and framed rules and regulations to curb criminalisation of politics but nothing seems to have worked till now. The question of criminalization of politics came to the forefront again in the 15th Lok Sabha elections and in the recently held elections in 5 states of Uttar Pradesh, Uttrakhand, Goa, Manipur and Punjab in 2012 and in Delhi, Rajasthan, Madhya Pradesh, Chattisgarh and Mizoram in December 2013. In all of these elections there are evidences of involvement of the criminals defying the existing laws of elections.
The Indian judiciary has always been in the epic of its stature. The role of Indian judiciary can never be denied of, ever since the independence of India the judiciary has always stood the test of time. The Judiciary being the guardian of the Constitution is entrusted with the responsibility of safekeeping of the Constitutional ideals, and as such the Judiciary has on different times showed great concern over the issues and problem concerning the rights of common men and society including criminalisation of politics. In the present Chapter an attempt has been made to examine the various judicial pronouncements and the role of judiciary concerning criminalisation of politics in India.

There is a crisis of legitimacy in our political system. While we have outstanding men and women in public life, a flawed electoral process is increasingly alienating public-spirited citizen from the political and electoral arena. The persons best equipped to represent people find it impossible to be elected by adhering to law propriety. On the other hand, a person with a criminal and corrupt record getting elected to legislatures seems to have become the norm. The problem of criminalisation goes well beyond the political fate of few individuals.

The impact of criminalisation of politics in India has reached such an alarming stage that if it continues in such an unprecedented way then in the near future the entire governmental machinery will collapse.

Under the Indian legal system there are various laws, which directly or indirectly deal with the entire political process of the country. The Constitution of
India also contains various provisions relating to the conduct of electoral process in the country. India has a comprehensive structure of laws to administer and conduct its elections. The formal legal framework for all these elections rests on certain provisions of the Constitution, The Representation of the People's Act 1950, The Representation of the People's Act 1951, and the various rules and regulations framed and orders issued under these statutes largely control the electoral poll process of the country. In addition, certain provisions of the Indian Penal Code and a few other Acts are relied upon to provide for punishment as well as disqualification of candidates and members of the two Houses of Parliament of India and State Legislatures.

The important articles of the Constitution of India relating to elections are.¹

(1) Articles 54-58, 62, 66-68 and 71, which prescribe the terms of office and manner of electing the President and the Vice-President,

(2) Articles 80-83 lay down the composition and duration of the Rajya Sabha and the Lok Sabha.

(3) Article 84 prescribes the minimum qualification for a Member of Parliament in terms of citizenship and age.

(4) Article 101 states that no person can be a member of both Houses of the Parliament or of the Parliament and a State Legislature.

¹ See, the relevant Articles of the Constitution of India. (i) M.P. Jain, Constitution of India, Eastern Book Company, Lucknow, 2003
(5) Article 102 lays down disqualification for membership of Parliament of India.

(6) Articles 168-173 and 190-192 contain similar provisions for the Constitution, composition, duration and qualifications and disqualifications for membership of State Legislatures.

(7) Article 324 provides for the establishment of the Election Commission and its functions.

(8) Article 326 provides that elections to the House of the People and to the Legislative Assemblies of the States shall be on the basis of adult suffrage i.e. citizens of minimum 18 years of age.

(9) Article 329 lays down a bar to interference by Courts in electoral matters in as much as any law relating to delimitation of constituencies or allotment of seats cannot be questioned in a Court of law and no election to a House of the Legislature can be called in question except by an election petition.

The Indian Penal Code, 1860 is used to categories certain actions in connection with elections as punishable offences. There are two sets of disqualification envisaged:

(i) The first is a disqualification for six years from the date of conviction for certain offences.

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2 The voting age was reduced from 21 to 18 years by 61st constitutional amendment in 1988.
(ii) The second set of disqualification, when convicted for certain other listed offences is also for a period of six years from the date of the release of the person from such conviction. In addition, any person convicted of any offence and sentenced to imprisonment for not less than two years also attract a six year disqualification from the date of release from such conviction.

Similarly, the relevant provision of the Representation of People’s Act, 1951 are:

1. Sections 3-6, which deals with qualification of candidates for Parliament as well as State Legislative Assemblies and Legislative Councils.

2. Section 7-11 deals with disqualification of candidates on grounds of their being convicted for certain offences under the Indian Penal Code or some other Acts of Parliament, electoral offences like impersonation, bribery as well as on grounds of corrupt practices and for failure to lodge account of election expenses.

3. Sections 19-25 provide details of the administrative machinery for conducting elections.

4. Section 29A deals with the registration of political parties.

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3 See, the Bare act of Representation of Peoples Act, 1951 (cf www.manupatra.com).
5. Section 58A empowers the Election Commission for suspension of a poll or for countermanding of elections.

6. Section 77 lays down that an account of all expenditure by the candidate and his election agent is kept but explanation (1) excludes expenditure made by his political party or any others from such account.

7. Section 79-122 lay down the procedure for dealing with electoral disputes and disposal of election petitions.

8. Sections 123-136 specifies in detail corrupt practices and electoral offences and punishments prescribed for the same.

However, the Representation of People's Act (section 8 (4)) provides that if this conviction is against a Member of Parliament or a Member of Legislative Assembly in any State, the disqualification shall not take effect for three months or within this period if there is an appeal, then till the appeal is disposed of by the Court.

The Representation of the People's Act 1950 and Representation of the People's Act 1951, between them provide for the allocation of seats, delimitation of constituencies, and preparation of electoral rolls and conduct of elections. Some of the important provisions of the Act are.  

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4 Ibid.
1. Sections 13A – 13CC which deal with the electoral organization at the State and district level.

2. Section 14-25 provide for the preparation of electoral rolls for each constituency under the supervision, direction and control of the Election Commission and cover the qualifications and disqualifications for registration of an elector and other conditions applicable to the preparation and revision of the electoral rolls.

3. Section 32 deals with punishment in case of breach of official duty in connection with the preparation of electoral rolls.

**Administration of elections**

With regard to the administrative machinery required for the elections, each State has a Chief Electoral Officer (CEO) under the supervision, direction and control of the Election Commission. These CEOs in turn have District Election Officers in each district. The Election Commission may nominate an observer to watch the conduct of elections in a constituency or a group of constituencies. For every constituency, for every election to fill a seat or seats in the Rajya Sabha and for every election by the members of the Legislative Assembly of a State to fill a seat or seats in the Legislative Council of the State, the Election Commission, in consultation with the Government of the State, designates or nominates a Returning Officer who is an officer of Government or of a local authority. The Election Commission may also appoint Assistant Returning Officers and subject them to the control of the Returning Officer. Conducting the election is the duty of
the Returning Officer. In addition, the Election Commission requisitions from the State government staff for appointing as Presiding Officers at polling stations and polling officers to assist these Presiding Officers. In fact, the persons deployed for elections not only consists of employees of Central Government and the State Government but also of local authorities, autonomous bodies, Government Companies, etc. All these staff including the Returning Officers are deemed to be on deputation to Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election and accordingly such officers are during that period, subject to the control, superintendence and discipline of the Election Commission.5

**Representation of People Act, 1951**

The Representation of people's Act, (RPA) 1951 contains various grounds for the disqualification of persons contesting an election which falls within the ambit of this Act. The Supreme Court of India in *Y.K. gadakh v Balasaheb vikhe patil*6 has also given various guidelines, which the person contesting the election has to follow. But in spite of all these laws, rules, guidelines and various committee reports we cannot say that the problem of criminalisation of politics has been solved to some extent.

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5 P.D.T. Achary, *Elections law and Practice*, Bharat publication, New Delhi, 1st edn, 2004
6 AIR (1994) SC 678.
The entry of criminals into the political arena of the country is a matter of great concern. The Vohra Committee had strongly stated that the nexus between crime syndicates and political parties was very deep and wide. Although under the Indian criminal justice system there are some Acts and rules, which cover the area relating to the election procedure and conduct of elections but these Acts with their various provisions have not been able to stop this growing menace of criminalisation of politics. There were grave incongruities in the existing provisions of the Representation of People’s Act 1951, especially in section 8 of the Representation of People’s Act 1951.  

Section 8(A) of the Representation of People’s Act 1951 provides for disqualification on the ground of corrupt practices. The current practice is that once the High Court hands out the judgment on an election petition holding the candidate guilty of corrupt practices, the case goes to the Secretary of the concerned State Legislature or Secretary General Lok Sabha or Rajya Sabha, as the case may be. It is then forwarded to the President of India who in turn forwards it to the Election Commission. Only then does the EC get the jurisdiction to tender its opinion to the president based on which the disqualification order is issued. The Vohra Committee has strongly recommended for the amendment of the said provision, thereby giving the power to the President to determine the period of


8 See, Section 99 of RPA 1951.
disqualification under section 8(A) on the direct opinion of the Election Commission and avoid delay currently experienced. This can be done by resorting to the position prevailing before the 1975 amendment to Representation of Peoples Act, 1951.\footnote{Report of the NCRWC, Ministry of Law, Justice and Company affairs, Government of India, 2002}

It is not as if there is no law to prevent criminals from contesting elections. The election law specifically provides for disqualifying convicted criminals from contesting elections. It is time that the Representation of People Act is amended suitably. For this purpose distinction is to be made between disqualification of a candidate and unfitness of a candidate. The former would mean, as defined in the Representation of People’s Act, 1951 being disqualified for being chosen as, and for being a member of either house of Parliament or of the Legislative Assembly or Legislative Council of a state. The latter will permit a candidate to contest the election and it will be left to the people to decide, on the basis of full information about the candidate, whether to elect him as their representative even after knowing his criminal background. The Representation of People’s Act, 1951 makes a distinction between the offences for disqualification of a person. Thus, for certain offences, disqualification runs for a period of six years from the date of conviction. For example, people who have been found guilty of committing any of the following criminal offences by a competent Court is disqualified for a period of six years from the date of conviction. In certain other cases the disqualification is
from the date of such conviction and person continues to be disqualified for a further period of six years after his release. These distinctions need to be reviewed.  

Offences under section 8(1) of the Representation of People's Act on the basis of which a person can be disqualified are:-

(i) Promoting enmity and inciting hatred between members of different religious and linguistic groups;

(ii) Offences related to rape;

(iii) Practicing and/or preaching untouchability

(iv) Involving in bribery or corruption;

(v) Offence of undue influence or personation at an election

(vi) Section 3 (offence of committing terrorist Acts) or section 4 (offence of committing disruptive Activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(vii) Beating one’s wife;

(viii) Insulting the National Flag and preventing the singing of the National Anthem;

(ix) Offences related to drug trafficking;

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10 R.N Choudhury, op.cit, p. 8
(x) Importing or exporting prohibited goods;

(xi) Offences related to illegal transactions in foreign currency;

(xii) Misusing places of worship;

(xiii) Electoral offences like booth capturing, taking away ballot papers from the booth, and,

(xiv) Fraudulently defacing or destroying ballot papers and

(xv) Offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860);

(xvi) Section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991\textsuperscript{11} or,

(xvii) Section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971)\textsuperscript{12},

(xviii) 4[(/)] The Commission of Sati (Prevention) Act, 1987 (3 of 1988)\textsuperscript{13};

\textsuperscript{11} Ins. by Act 42 of 1991, s. 8 (w.e.f. 18-9-1991). RPA 1951.

\textsuperscript{12} Ins. By Act. 42 of \ s. 3, (w.e.f. 1-8-1996). RPA 1951.

\textsuperscript{13} Ins. by Act 9 of 2003, s. 2 (w.e.f. 7-1-2003). RPA 1951.
If a person has been convicted of the following offences and sentenced to a prison term of not less than six months he/she will be disqualified from the date of being found guilty and for a further period of six years from the date of release from prison-

(1) Offences related to dowry taking or giving;

(2) Adulterating food and medicines and

(3) Hoarding and profiteering illegally.

In case of a person who has been dismissed from government service on charges of corruption is disqualified for a period of five years from the date of dismissal. If a candidate has not filed details about the money spent on elections by him/her the Election Commission can disqualify such a person for three years.

Furthermore if a person has been found guilty of committing any criminal offence other than those mentioned above and have been sentenced to prison for a term of two years or more he/she will be disqualified from the date of such conviction and for a further period of six years after release from prison. This provision in the election law covers grave offences like murder, kidnapping, dacoity, arson and indulging communal riots. A glaring anomaly is in respect of Section 8 (4) the Representation of People’s Act 1951, which gives incumbent legislators, limited immunity from disqualification. If an incumbent is convicted for an offence, disqualification does not come into effect for three months and if during that period, he appeals against the conviction, then disqualification will not
come into effect until the appeal is disposed off. The intention of lawmakers is evidently to prevent a needless vacancy and by-election if the legislator is eventually acquitted. Such immunity, however, cannot be given to the incumbent for the next general election, when he is a candidate. The law should be amended to make it clear that a convicted legislator will stand on the same footing as any other convicted person in respect of the election after the expiry of his term.  

In *Lily Thomas v. Union of India*, the Supreme Court of India has recently strike down section 8(4) as violative of the constitutional provisions. Now even if appeal is preferred against the order of conviction it would not have any effect on disqualification and the person shall stand disqualified.

Illustrating this further, in case relating to a rapist, convicted and sentenced to ten years imprisonment, being disqualified only for six years under subsection (1) and while not be able to vote, being free to contest elections even while serving the last four years of his sentence in prison.

Further in this regard the Law Commission of India has advanced some suggestions to remove the difficulties and to curb the problem of criminalisation of politics, they are.

15 [http://www.pucl.org/Topics/Law/2013/vote_none.pdf](http://www.pucl.org/Topics/Law/2013/vote_none.pdf) accessed on 11/01/2014(Saturday) at 9:33 p.m
(1) There has been mounting corruption in all walks of public life. People are generally lured to enter politics or contest elections for getting rich overnight. Before allowing people to enter public life, the public has a right to know the antecedents of such persons. The existing conditions in which people can freely enter the political arena without demur, especially without the electorate knowing about any details of assets possessed by the candidate are far from satisfactory. If is essential by law to provide that a candidate seeking election shall furnish the details of all his assets (movable/immovable) possessed by him/her, wife/husband and dependent relations, duly supported by an affidavit.

(2) In view of the recommendations of the Law Commission for debarring a candidate from contesting an election if charges have been framed against him by a Court in respect of offences mentioned in the proposed section 8-B of the Act, it is also necessary for a candidate seeking to contest election to furnish details regarding criminal case, if any, pending against him, including a copy of the FIR complaint and any order made by the concerned Court.

(3) In order to achieve, the aforesaid objectives, it is essential to insert a new Section 4-A after the existing Section 4 of the Representation of the People’s Act. 1951, as follows:
[4A. Qualification for membership of the House of the People, the Council of States, Legislative Assembly of a State or Legislative Council]:

A person shall not be qualified to file his nomination for contesting any election for a seat in the House of the People, the Council of States Legislature Assembly or Legislative Council of a State unless he or she files —

(a) A declaration of all his assets (movable/immovable) possessed by him/her, his/her spouse and dependent relations, duly supported by an affidavit, and,

(b) A declaration as to whether any charge in respect of any offence referred to in Section 8B has been framed against him by any Criminal Court”

Basically, the existing disqualification provisions under Section 8 only apply to cases of conviction. The real problem is that criminal cases are taking an interminably long time for disposal; once an accused is elected during the trial period, he has the advantage of twisting the arms of the police and prosecution to dilute the case or he pressurizes the government to withdraw charges against him. This is the chief reason why a political office is very attractive to persons with criminal antecedents. Obviously, the solution lies in disqualification persons facing criminal charges from contesting elections. But such blanket disqualification is opposed on two grounds:

1. The person is presumed innocent until proven guilty.

2. 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, the people’s rights are fundamental. If there is a clash between the people’s right to have good representation, and an individual’s right to represent the people, then the society’s right should have precedence. Such as the right to privacy, which is subjected to public interest that is when public interest is bigger than the individual’s right to privacy, then such right must be exercised keeping in mind the interest of the society.

But there is a 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 politically motivated charges, we will have reduced our
democracy to the level of Pakistan of Iran. Given the state of our politics, policing and justice delivery such blanket disqualification is both unwise and dangerous. It means murderers and mafia dons can continue to be elected, pressurize police and governments, escape scot-free, and undermine the principles of 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. Happily, a fair resolution is possible. In the wake of the May 2002 Supreme Court judgment\(^\text{18}\) 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 has committed one murder, but is not eligible if there were two murder charges pending! That absurdity apart, a sincere effort was made to disqualify persons facing extremely grave charges. These heinous offences listed were.

1. Waging war against India (section 121 IPC);
2. Murder (section 302);

\(^{18}\) Ibid.
3. Abduction with an intention to commit murder or for ransom (sections 364 and 364A); rape (section 376);
4. Dacoity with or without murder (sections 395 & 396)
5. Offence under section 18 and 20 of Narcotics Act, 1985; and
6. Section 3 of POTA

The offences listed are extremely grave, and citizens are unlikely ever to face such charges. Disqualification applies only when a Court frames charges after preliminary evidence, not when an FIR is lodged, or when police file a charge sheet.

Under section 8A of Representation of People’s Act 1951 each case of disqualification on the grounds of corrupt practices is required to be referred to the President for determination and, if so for what period. This seems unnecessary. The Act itself should provide disqualification for a specified period. Disqualification for dismissal for corruption for disloyalty of a state or central government servant is for a period of (5) five years from the date of dismissal. It is not clear why in such cases the period is shorter as compared to disqualification under other sections of the Act.

Whereas country is facing the problem of criminalisation of polities in which criminals, that is person convicted of criminal offences are entering into election fray and contesting as candidates and where as section 8 of the Representation of People’s Act, 1951 lays down the condition under which a
person would be disqualified on grounds of conviction for contesting election for Parliament and Legislature of the state, and, where as any person convicted of any offence listed under sub-section (1) of section 8 of the Representation of Peoples Act, 1951 shall be disqualified for a period of six years from the date of such conviction and whereas, a person convicted for the contravention of any of the laws listed under sub section (2) of section 8 of Representation of People’s Act, 1951 and sentenced to ten years of imprisonment then for not less than six (6) months shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six (6) years after his release and whereas under sub section (3) of section 8 of Representation of People’s Act, 1951, a person convicted of any other offence and sentences to imprisonment for not less than 2 years shall be disqualified from the date of such conviction and shall continue to be disqualified for further period of six (6) years since his release. And whereas under sub-section (4) of section 8 of Representation of People’s Act 1951, states that none of the above disqualification will take effect in case of a person who on the date of such conviction is a member of Parliament or State Legislature, since three months have elapsed from the date or, within that period an appeal and application for revision is brought in respect of conviction or sentence, until that appeal or application is disposed off by the Court and where as it is often been observed that even those persons who are not sitting members of Parliament of State Legislature on the date of such conviction contest election if they have filed an application for revision and have been granted bail during pendency of such
appeal/revision and whereas the Election Commission has carefully considered and examined the question whether such persons who have been convicted of offences mentioned in the said section 8 of the Representation of Peoples Act 1951 can contest election during the period when they are released on bail pending disposal of their appeals and application for revision and whereas the Commission has observed that this very question has come to be considered by several Hon’ble High Courts and they have taken the view that release on bail does not wipe off the disqualification under section 8 of the Representation of People’s Act, 1951.19

The question is now of the effect of the suspension of the sentence by the appellate Court. Section 389 of Criminal Procedure Code gives this power to the first Court till filing of appeal and the appellate Court enables the suspension of execution of sentence or order appealed from, it is only the execution which is suspended and nothing more with the result that the sentence awarded is not suffered during the pendency of the appeal and even though it subsists and the appellant is released on bail. There is no inclination in section 8 (2) of the Representation of People’s Act, 1951 that the disqualification there under remains in abeyance during the pendency of the appeal against conviction on the other hand, section 8 (4) gives the contrary indication by laying down an exception only in case of a sitting member. Suspension of execution of the sentence or order or

grant of bail U/S 389 Criminal Procedure Code has only the effect of avoiding the
sufferance of sentence pending appeal, but then in order to attract the
disqualification under section 8(2), it is not necessary to suffer any part of the
sentence awarded. The above views have been upheld by the Supreme Court of
India as well as Various High Courts in India and, therefore, the Election
Commission has after taking due note and paying due regard to the Various
judicial pronouncements of the Hon’ble Supreme Court and Hon’ble High Courts
come to the considered view that the disqualification under section 8 of the
Representation of the People’s Act, for contesting election to Parliament and State
Legislature, on conviction of offences mentioned therein, takes effect from the date
of conviction by the trial Court irrespective of whether the convicted person is
released on bail or not during the pendency of the appeal {subject to the exception
in the case of the sitting members of Parliament and State Legislature under
subsection 4 of the said section 8 of the Representation of Peoples Act}
accordingly the Election Commission has in exercise of its power of
superintendence, control and direction of election to Parliament and State
Legislature vested by article 324 of the Indian Constitution hereby directs that all
the Returning Officers at the time of scrutiny of nomination must take note of the
above legal position and decide about the validity of the candidature of contestants
disqualified under the said subsection 8 of the Representation of People’s Act
1951.20

20 Ibid.
This shows that the provisions of the Representation of People’s Act, 1951 needs to be examined afresh in the light of the experience of the working of democracy in the last 65 years, without such vigilance, democracy in India may remain only in form and on paper. The Parliament needs to act now to disqualify persons facing such grave charges. No minor or political offence comes in this category. The Election Commission 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 like 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.

The early signs of criminalisation appeared after Section 77 of the Representation of People’s Act was amended in 1974 to provide that expenditure incurred by political parties and others shall not form part of the election expenditure of a candidate, thereby paving the way for unrestricted spending in elections. The Commission has suggested the deletion of Explanation (1) to Section 77 of the Representation of Peoples Act 1951 so that expenses incurred by the political party and the friends of a candidate are considered part of his or her election expenses. It has also suggested that the Election Commission be vested
with legal powers to supervise, verify and investigate the election expenses of candidate and initiate legal action if they exceed the prescribed limits. State funding of elections, with sufficient safeguards, will help to those seeking to contest elections without money power.

There has been widespread concern in India over a period of time about the growing menace of criminal elements entering the political arena. Parliament itself has been conscious of the alarming deterioration of ethical norms in public life during the past 60 years. At the special session of Parliament on the occasion of the Golden Jubilee of Independence celebrated during August-September 1997, the Lok Sabha adopted a resolution which urged, among other things, that "Continuous and proactive efforts be launched for ensuring greater transparency, probity and accountability in public life so that the freedom, authority and dignity of the Parliament and other Legislative bodies are ensured and enhanced; that more especially, all political parties shall undertake all such steps as will attain the objective of ridding our polity of criminalisation or its influence."\(^{21}\)

Since this golden pledge, there have been two rounds of elections to the Lok Sabha. Soon after coming to power in 1998, the Bharatiya Janata Party and its allies in the National Democratic Alliance (NDA) released the National Agenda for Government, which was presented as "a joint commitment, an assurance given to the entire country". In that solemn declaration, the NDA gave a categorical assurance: "We will introduce necessary electoral reforms on the basis of

recommendations of the Goswami Committee so as to deal with the malaise of defections, corruption and criminalisation of politics and to end electoral malpractices. "Unfortunately, that government fell in April 1999.\textsuperscript{22}

The Law Commission had proposed 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 when the trial is pending, provided the charges have been framed against him by a competent Court. The Commission said that this would help to cleanse the political establishment from the influence of criminal elements and protect the sanctity of the Legislative Houses. The counter view to the proposal is based on the doctrine that a person is presumed to be innocent until proved guilty.

The Commission said that the law should be amended to provide that a person cannot contest from more than from one constituency at a time. It added that in case the legislature was of the view that the provision facilitating contesting from two constituencies was to be retained, then there should be an express provision in the law requiring a person who contests and wins election from two seats, resulting in a by-election from one of the two constituencies, to deposit an amount which would match the expenditure for holding the by-election. The amount could be Rs. 5 lakhs for the State Assembly and Rs. 10 lakhs for the Lok Sabha election.

\textsuperscript{22} \textit{Ibid.}
Favoring negative or neutral voting, the Commission recommended that the law should be amended. “For this purpose, Rules 22 and 49B of the Conduct of Election Rules, 1961 may be suitably amended adding a proviso that in the ballot paper and the particulars on the ballot unit, there shall be a column ‘None of the above’ to enable a voter to reject all the candidates,” it said it also wanted the political parties to publish their accounts annually for the information and scrutiny of the public for which purpose the maintenance of accounts and their auditing were a pre-requisite.23

On opinion and exit polls, The Commission favored some restrictions for a specified period on their publication, in the wider interests of free and fair elections.24

Criminalization of politics and the politicisation of crime is a theme that has been endlessly debated in India, yet no effective practical solution is in sight. The idea of doing something drastic to put away ‘anti-social’ and ‘criminal’ elements and prevent those ‘behind bars’ from contesting elections thus have its attractions for middle class mind. However, it comes up against basic tenets of the rule of law, above all the principle that a person is legally innocent unless found guilty by a Court. This is not to underestimate the social and political importance of waging a determined campaign to cleanse politics of unsavory elements,


including those who capture polling booths, register fraudulent votes, terrorize voters, use firearms in electioneering, unleash caste oppression, indulge in communal hatred, spend unaccounted money to buy votes, and break the election and general laws in various other ways.

The Law Commission of India recommended in its 170th Report, submitted in May 1999, that The Representation of the People Act should be amended authorizing the courts in framing charges for electoral disqualification. The Report justified the change proposed by asserting that most of the relevant offences were committed by "persons having political clout and influence" and frequently enjoying the backing of anti-social elements, with the result that "no independent witness [was] prepared to come forward to depose against such persons." The report itself called attention to the scope for misusing the criminal justice system because of corruption "at certain levels" and the politicization of the process of appointing public prosecutors. Interestingly, when the Law Commission invited responses to its proposal, two eminent men of the law registered their firm opposition. According to the report, Justice V.R. Krishna Ayer, the former Supreme Court judge, "strongly opposed the amendment of section 8, observing that the state should not resort to "any shortcuts even for achieving desirable goals. The then Minister for Law and Justice, Ram Jethmalani, also cautioned the Law Commission that the proposed change would provide plenty of scope for political mischief. There is no alternative to plugging the big holes in law enforcement, reforming and speeding up the criminal justice system, and mobilizing democratic
public opinion to put pressure on political parties not to field mafia dons, goons and other unsavory characters either as candidates or campaigners. Until this is done, the phenomenon of criminalization of politics will not go away.²⁵

The Judiciary too in India has tried to cleanse the political system from criminal elements through the pronouncements of various judgments which either directly or indirectly has put on an impact on the issue of criminalization of politics but much to its own amazement nothing much has been achieved. The various cases that have been decided by the Supreme Court and various High Courts have been discussed in brief below:

The Supreme Court of India replying to a writ petition filed by the Association for Democratic Reforms²⁶ took note of the increased criminalisation of politics in India, has held that the voter has every right to know the social, economical and educational background of a candidate in an election to Parliament or State Legislature. Further, the Supreme Court of India directed the Election Commission of India to issue a notification to all the aspiring candidates to make available information’s regarding education, assets, liabilities and criminal antecedents for the benefit of the voter.

But the Parliament of India in order to negatived the order of the Court and notification of the Election Commission of India amended the electoral law (Representation of People’s Act) against this amendment the Peoples Union for

²⁵ Ibid.
²⁶ AIR (2002) SC 2112
civil liberties filed a writ petition in the Supreme Court of India alleging that the amendment is violative of people's right to know under Article 19(1) (a) of the Constitution of India. The amended Representation of People's Act provided that only candidates who are elected were required to give details of their assets and liabilities to the concerned presiding officers of the Houses, and not the MPs who are not elected. The Supreme Court of India reacting to the amendment has held that the Parliament cannot declare the law declared by the Court is not binding. The court further said that the amended Representation of People's Act was a 'half hearted attempt' by the government to fight the use of money and muscle power in elections.

The Supreme Court of India has also affirmed this view in the case of Common Cause a registered Society v Union of India wherein the court explaining the power of the Election Commission has said that The Commission has under Article 324(1) of the Constitution of India to ask for details of expenses incurred by the candidate in an election in order to bring more transparency, accountability and to avoid involvement of black money in elections.

Time and again the Supreme Court drew the attention of Parliament to damage done to the purity of the process of elections by this atrocious piece of

27 PUCL v. Union of India op.cit
28 For detail concerning this point see Article 19(1) of the Constitution of India.
30 [(1996) 2 SCC 752].
31 For detail concerning this point see Article 324(1) of Indian Constitution.
legislation. In *G. Y. Kanakkarrao*\(^{32}\) the Supreme Court observed: "The prescription on the ceiling on expenditure by a candidate is a more eyewash. This lacuna in the law is, however, for the Parliament to fill, lest the impression is reinforced that its retention is deliberate for the convenience of everyone. If this is not feasible, it may be advisable to omit the provision to prevent the resort to indirect methods for its circumvention and subversion of the law. This provision has ceased to be even a fig leaf to hide the reality."

Again, in *C. Narayanaswamy vs. Jaffer Sharief*\(^ {33}\) the Supreme Court recorded its dissatisfaction: "As the law stands today, anybody including a smuggler, criminal or any other anti-social element may spend any amount over the election of any candidate to whom such person is interested, for which no account is to be maintained or to be furnished and any such expenditure shall not be deemed to have been expenditure in connection with the election under Section 77(1), so as to amount to corruption.

In *Jawahar Singh v. Election Commission of India & Others*\(^ {34}\) the Supreme Court of India dealt with the issue of participation of criminals in elections and whereas a person can contest an election who is released on bail in a criminal offence pending appeal section 8(3) of the Representation of People’s Act deals with disqualification of a candidate pending an appeal in a criminal offence. The Supreme Court while dealing with this issue has in the case of *Sharat Chandra*\(^ {32}\) AIR (1994) SC 678.\(^ {33}\) [AIR (1994) 3SCC 170].\(^ {34}\) AIR (1999) ALL 1821.
Rabha v Khagendra Nath\textsuperscript{35} has held that suspension of sentence does not wipe out the conviction and sentence. It was held that a reprieve is a temporary suspension of sentence. The effect of remission is to wipe out the remaining part of the sentence, which has not been served, and thus in practice, the sentence is reduced to that which is already undergone. In law, remission does not touch the order of conviction by the court and the sentence passed by the court. If suspension of sentence during the pendency of an appeal does not have the effect of wiping it out, it is difficult to accept the contention that the disqualification U/S 8 (2) remains arrested or in abeyance during the operation of the suspension order pending appeal against the conviction and sentence. This is more so when in section 8 (3) gives contrary indication. Thus in the instant case, the sentence of three years imprisonment is not affected and the appellant remains disqualified although he may not have to undergo the full sentence. The Hon’ble High Court of Allahabad also took the similar view in the case of Sachindra Nath Tripathi v. Doodnath\textsuperscript{36} while declaring the election as void of Shri Doodnath who stood convicted by the trial for the offence u/s 302 and 307 I.P.C and who stood released on bail on the election period, held that — "the disqualification which is a automatic effect of conviction, springs up right at the time of pronounce of conviction, which findings is yet to be reserved or set aside.\textsuperscript{37}

\textsuperscript{35} AIR (1961) SC 334.

\textsuperscript{36} 84th Election Law Reports, p 46.

\textsuperscript{37} Refer to, Indian Penal Code, section 302 & 307.
Jayalalitha's case in view of the Representation of People Act, 1951

The incongruities in Section 8 of the Representation of Peoples Act, 1951 (RPA) came into focus in "the Jayalalithaa disqualification case". The Supreme Court's Constitution Bench ruled that she was ineligible to hold the office of Chief Minister of Tamil Nadu following her conviction and disqualification under Section 8(3) & Section 8(1) of the RPA.39

According to section 8(3) of the Representation of the People Act 1951, a person convicted of any offence and sentenced to two years imprisonment or two years or more shall be disqualified from electoral contests for a period of six (6) years from the date of conviction. Jayalalitha was convicted and sentenced to two years and three years imprisonment relating to different cases by trial Court. But the sentences were later on stayed by the Madras High Court. Jayalalitha filed her nominations from four constituencies- Krishnagiri, Andipatti, Bhuvanagiri and pudukottai. The Returning Officers rejected her nominations on two grounds. The first ground was that she has been convicted and sentenced to two years' and three years' of imprisonment in two cases of corruption against her, and so Section 8 (3)of the Representation of the People's Act disqualifies her from contesting. The 1997 order states that disqualification under RPA for conviction for offences mentioned in the Act “takes effect from the date of conviction by the trial Court, irrespective of whether the convicted person is released on bail or not during the

38 'Politics after disqualification', Frontline (2000, JUNE).
39 Refer to Sec 8(3) & 8(1) of the RP Act 1951.
pendency of appeal\(^{40}\) her papers were rejected also on the ground that Section 33 (7) (b) of the RPA bars candidates from filing nominations from more than two constituencies.

The controversy was finally subsided when Chief Election Commissioner Dr. M.S. Gill on April 30 concurred with the decisions taken by the Returning Officers both in Tamil Nadu and Kerala. He said that the Election Commission’s order dated August 28, 1997 had legal backing and the Returning Officers had correctly interpreted.\(^{41}\) The law was “clear” on the exemption given to sitting MLAs like Balakrishna Pillai. Section 8 of the Representation of People’s Act had been upheld by two separate orders of the Madras High Court, he said.

The six-page Order said, :Now, therefore, the Election Commission has after taking due note and paying due regard to the above judicial pronouncements of the Hon’ble Supreme Court and the Hon’ble High Court come to the considered view that the disqualification under Section 8 of the Representation of the People Act, 1951 for contesting elections to Parliament and State Legislatures, on conviction for offences mentioned therein, takes effect from the date of conviction by the trial Court, irrespective of whether the convicted person is released on bail or no during the pendency of appeal (subject, of course to the exception in the case of sitting members of Parliament and State Legislature under sub-section (4) of the

\(^{40}\) Refer to, Sec 8(3) of the RPA, 1951.

said section 8 of the Representation of the People Act, 1951). Accordingly, the Election Commission, in exercise of its powers of superintendence, direction and control of elections to Parliament and State Legislatures vested by Article 324 of the Constitution, hereby directs that all the Returning Officers, at the time of scrutiny of nominations, must take note of the above legal position and decide accordingly about the validity or otherwise of the candidature of the contestants disqualified under the said section 8 of the Representation of the People Act, 1951.\textsuperscript{43}

Again the Supreme Court of India in \textit{Y.K Gadakh v. Balasaheb Vikhe Patil}\textsuperscript{44} has laid down certain guidelines relating to disqualification of person from contesting the election, which the person has to follow. The obvious intention of the courts in India is to prevent a person who is accused of serious crimes and a court is prima facie satisfied about his involvement in the crime, he should be kept out of the electoral arena as it would be a reasonable restriction in the interest of the public.

The recent judgement of the Supreme Court in \textit{Lily Thomas v. Union of India}\textsuperscript{45} changed the above mentioned position the Supreme Court of India in this case has held that if a sitting MP or MLA is convicted (not only charged), he/ she

\textsuperscript{42} Representation of Peoples Act, 1951, sub-sec (4) of the Sec. 8.

\textsuperscript{43} For detail concerning this point see, Article 324 of the Indian Constitution. Also see, Sec 8 of the Representation of Peoples Act, 1951.

\textsuperscript{44} AIR (678), SC, 1994.

\textsuperscript{45} Writ Petition (CIVIL) NO. 490 of 2005, Supreme Court of India.
would be immediately disqualified and the seat declared vacant. This judgement has also clarified another issue relating to disqualification by affirming that if certain criteria stop a person from contesting in elections, then the same criteria also hold for sitting MPs and MLAs hence they cannot continued to be a member of the Parliament or State Legislature. The Court has also said that the Parliament does not have powers to make different laws for the disqualification of a person based on whether he is a contesting candidate or a sitting member of the Parliament and State Assemblies as it is against the provisions of the Constitution. The above mentioned judgment has raised a lot of debates among the politicians, administrators, statesmen and the common people alike. It also creates again a controversy to clip the power of the legislators by the judiciary.46

It is clear that the observations of the Supreme Court are genuinely meant to protect the conduct of elections from the evils of money power and criminalization. The court fully recognized its own limitation and left it to Parliament to make suitable legislation. It will be unfair to raise the bogey of usurpation of legislative power by the court.

Although there are laws to regulate these unlawful Activities and from time to time various recommendations were made by the various commissions, but still there has no worth noticing work has been done by the Parliament till date. A comparison with American Constitution will show us that the American law on

corrupt practices is the presence of broad rules in the Constitution of many states that elections must be free and equal which not only means free exercise of right to vote but also the equal influence of each and every vote. This prevents the legislature to pass laws, which violate free and fair elections. If purity of election is the essence of democracy and providing for invalidation of an election on the ground of commission of any corrupt practice is the object of enacting these provisions, it cannot be accepted that the election scene having degenerated over the years, appreciation of evidence for determining the commission of a corrupt practice must be made liberally. If the rule of law has to be preserved as the essence of the democracy of which purity of election is a necessary concomitant, it is the duty of the Courts to appreciated the evidence and construe the law in a manner which would sub serve this higher purpose and not even imperceptibly facilitate acceptance, much less affirmance, of the falling electoral standards. For democracy to survive, rule of law must prevail, and it is necessary that the best available men should be chosen as people's representatives for proper governance of the country. This can be best achieved through men of high moral and ethical values who win the elections on a positive vote obtained on their own merit and not by the negative process of vote of elimination based on comparative demerits of the candidates. It is also necessary that the impact of money power should also be minimized from electoral contest otherwise many men of undoubted ability and credibility for want of requisite financial support should be able to re-enter the field to make the people's choice meaningful. This can be achieved only if
elections are contested on a positive vote and the comparison between the merits and abilities of the contestants without the influence of power and pelf and not between their comparative demerits and the support of money power. Apart from the other adverse consequences, the growing influence of money power has also the effect of promoting criminalisation of politics.

Real education of the electorate contemplates informing them of the past achievements and future plans of the political party on a positive note and its candidate's qualifications to serve that purpose compared with those of the other political parties and their candidates and not a projection of the comparative greater demerits of the opponents. This is with a view to emphasize that the functioning of the democracy depends on the quality of the men chosen for the governance of the country. This is the need, which the election campaign is meant to serve in an election based on party lines, the qualifications of the candidates being material for this purpose. The right to education act can make a vital contribution in this regard by making the illiterate voter literate so that the voter can exercise his astuteness more effectively while exercising his right to vote because he will be in a much better position to understand the power and the value of his vote.

The duty at the top echelons of leadership at the state and national levels of all political parties is to set the trend for giving the needed information to the electorate by adopting desirable standard so that it percolates to the lower levels

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and provides a congenial atmosphere for a free and fair poll. A contrary trend of speeches by the top leaders tends to degenerate the election campaign as it descends to the lower levels and at time promotes even violence leading to criminalisation of politics. The growth of this unhealthy trend is a cause for serious concern for the proper functioning of the democracy and it is the duty of the top leaders of all political parties to reverse this trend to enable movement of the functioning democracy in the proper direction.

Against this background, it is time that the Representation of People’s Act, 1951 is amended suitably. For this purpose, distinction needs to be made between disqualification of a candidate and unfitness of a candidate. The former means, as defined in Representation of People’s Act, 1951 being disqualified for being chosen as, and for being a member of either house of Parliament or of the Legislative Assembly or Legislative Council of a state. The latter will permit a candidate to contest the election and it will be left to the people to decide, on the basis of information as above, whether to elect him as their representative even after knowing his criminal background.

The Representation of People’s Act makes a distinction between offences for the purpose of disqualification of a person. Thus for certain offences, disqualification is for a period of six (6) years from the date of conviction. In certain other cases disqualification is from the date of such conviction and the person continues to be disqualified for a further period of six (6) years after his release. The distinction needs to be reviewed. Under section 8A of the
Representation of People's Act in each case of disqualification on the ground of corrupt practice is required to be referred to the President of India for the determination of the question as to whether such person shall be disqualified and, if so, for what period. The Act itself should provide disqualification for a specified period.⁴⁸

In a recent judgment of the case *PUCL v. Union of India*⁴⁹ the Supreme Court of India giving its verdict requested the Election Commission to include a new choice of preference besides the contesting candidates “none of the above” in the EVM machines. Such a provision will help the voters to reject all the candidates who are not of their choice. This has been for the first time practised in the last assembly elections of five states of India. It is certain that the inclusion of such a provision would definitely have some contribution to combat criminalisation of politics, since the provision itself acts as the most effective instrument to check the entry of the criminals in Indian politics.

From the above analysis it is seen that at the higher level in government in general and legislatures and Judiciary in particular, the problem of criminalisation of Indian politics has attracted attention from time to time, and, committees and commissions have been set up to deal with the problem. Institutional devices to remedy the defects of the political system are of particular relevance for the developing countries. In the western democracies non legal institutions like the

⁴⁹ PUCL op.cit 105
political parties, the press and the public opinion have been traditionally exercising influence over the political system. They have also developed their own internal norms and political ethics. They have been able to work fairly effectively to ensure that political system really serves the public purpose. By contrast, the developing countries like India to combat criminalisation of politics need strong political will and a steady development of political infrastructure. From of all this, it may be said that legislative and judicial response to combat criminalisation of Indian politics cannot said to be effective. It is true that both the two institutions have taken some measure which may be of mere cosmetic value and not of real worth.