BLACK MONEY AND THE FUNDING OF ELECTIONS

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Abstract

The institution of democracy thrives on the conduct of 'free and fair' elections. The political parties and the candidates require huge funds to build and sustain themselves, garner support and contest elections. The need to raise funds for election expenses paves the way for collecting and diverting huge amounts of money through illegal route and thereby turning politics into a "dirty business.''

In spite of the statutory limit on election expenditure, the elected members of the national and state legislatures blatantly violate the same and also undervalue their expenses in audit accounts to be submitted to the Election Commission. Due to absence of adequate and legal source of funding, the politicians tend to rely heavily on black money to fund their campaigns. Sumantra Bose has observed that "the culture of corruption is deeply intertwined with the ways in which power is won, exercised and retained in India's democracy."

For the 2014 elections, the election expenditure crossed the Rs. 100 billion mark. In this backdrop, this paper discusses the causes for the rising trend in financing of political parties and their elections. This paper is divided into three parts. The first part looks at the evolution of the regulatory regime governing election financing with respect to the amendments made in the Representation of People Act, 1951 and lifting of the ban on corporate donations. The second part traces its impact exposing the irregularities and flaws inherent in the system of electoral finances in light of various scams. The final part analyses the reforms in this area most notably, the proposal of partial state funding in opposition to private funding as incorporated by other democracies and the possibility of enhancing the powers of the institutional structure overseeing electoral reforms, the Election Commission of India.

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INTRODUCTION

Political financing is a vital aspect of the electoral process in any democracy. Money is a significant resource in elections as it provides support to the routine operations of political parties including the provision of services to citizens and party leaders, the training of party workers and the recruitment of candidates and volunteers. However, instead of deploying money for serving the just cause of elections, they are flagrantly misused to woo vote banks. It is believed that the excessive, illegal and illegitimate expenditure in elections is the root cause of corruption. The use of black money in election campaigns is rising to alarming levels and more and more scams are coming to light with each poll. The actual expenses incurred are often about 20 to 30 times the legal ceiling stipulated by the Election Commission. Despite the efforts of the Commission, they have not been able to stop this practice and cash flows unabated in election campaigns. As a result of this flawed electoral process, the public-spirited citizens are alienating themselves from the political and electoral arena. This matter is of grave concern as the health of democracy depends on well-functioning political parties and ultimately the representatives elected.

LAWS REGULATING ELECTION FINANCE

Historically, parties raised funds openly and legally from corporate donors and small contributions from members. The first major law to govern election funding was the Representation of People Act, 1951. Under the Act, limits were placed on the amount that could be spent on election campaigns. This was outlined in Section 77 of the Act. It reads as follows:

"77. **Account of election expenses and maximum thereof.** *Every candidate at an election shall either by himself or by his election agent keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both dates inclusive*."

The candidates who exceeded this limit would stand disqualified and their elections annulled. This provision was inserted to curb excess amount being spent on elections and thus ensure transparency and accountability.

In addition, corporate donations were legal but limited. Section 293 of the Indian Companies Act permitted contributions to political parties. Such contributions could be up to 5% of the profit with the approval of the Board of Directors and unlimited with the approval of the shareholders.[2]

During 1960's emergence of "Permit-License-Quota Raj" required the companies to get approval from the government for setting up plants and industries. In order to sanction licenses there was a competition in the corridors of power. This created a "nexus between black money and fundraising", which was also brought to notice of the government by the "Santhanam and Wanchoo Committees". Following this, in the year 1969, Indira Gandhi, the then Prime Minister of India brought a law banning all corporate funding of elections. However, the ban was unaccompanied by any other substitute in the form of State funding.

In 1974, the Apex court in *Kanwar Lal Gupta vs. Amar Nath Chawla*[3] stated that the party spending on behalf of a candidate should be included in calculating that candidate's election expenses. The Court observed:

"when the political party sponsoring a candidate incurs expenditure in connection with his election as distinguished from expenditure on general party propaganda, and the candidate knowingly takes advantage of it and participates in the programme or activity and fails to disavow the expenditure or consents to it or acquiesces in it, it would be reasonable to infer, say in special circumstances, that he authorized the political party to incur such expenditure and he cannot escape the rigours of the ceiling by saying that he has not incurred the expense, but his political party has done so."

In order to nullify the above judgment, the Parliament amended the Explanation 1 to Section 77(1) of the RPA such that the party and supporter expenditures not authorized by the candidate did not count towards the calculation of a candidate's election expenses. This rendered ineffectiveness of the law placing limits upon election expenses as only the direct expenses of a candidate were taken into account while the parties and supporters could spend without any limits.

[2] (http://www.loksatta.org/cms/documents/advocacy/ind%20elections.pdf)
[3] AIR 1975 SC 308

Another amendment took place in the Companies Act in 1985. According to Section 293A of the Act, corporate contributions to political parties are capped at five per cent of the company's average net profits during the three immediately preceding financial years. This was subject to approval by the board of directors and disclosure in the audited annual accounts of the company.

In 1990, the Dinesh Goswami Committee on Electoral Reforms recommended limited state funding for election expenses such as vehicle fuel, microphone hire, the issuance of voter identity slips and copies of electoral rolls. It further demanded the penalizing of unauthorized spending on behalf of a candidate and proposed for a ban on corporate donations.

Gradually, in 1993, the Confederation of Indian Industry (CII) task force proposed an election tax on corporate contributions or the creation of a shared pool of election fund by the industry to be managed by the state. It also talked about the requirement of shareholders confirmation of board decisions regarding political contributions.

In 1996, the Supreme Court delivered a noteworthy judgment in *Common Cause vs. Union of India*[4], where notices were issued to political parties upon their failure to file returns as required under the Income Tax and Wealth Tax Acts. The court also interpreted Explanation 1 to Section 77(1) of the RPA such that the election expenditures by political parties on behalf of a candidate would not be calculated in computing the election expenses so long as the parties had submitted annual audited accounts of its income and expenditures. This was a welcome move in ensuring transparency as the political parties were forced to disclose their annual incomes.

Further the government in the same year passed the RPA Amendment Bill on the basis of Goswami Committee's recommendations. It did not implement the ideas of public funding and spending limits but did facilitate the cost reduction by reducing the campaign period from 21 days to 14 days. In 1998, limited state funding was implemented but not in the form of cash, instead all political parties were given free airtime slots on government run electronic media.

On November 2, 2000, the Delhi High Court in *Association for Democratic Reforms vs. Union of India*[5] in response to a public interest petition had directed the Election Commission of India to collect data on criminal records of candidates, educational qualifications, assets and liabilities

[4] (1996) 6 SCC 593
[5] AIR 2001 Delhi 126

and make it available to the public. This judgment was reaffirmed in 2003 and the Election Commission issued an order dated March 27, 2003 making such declarations compulsory for all the candidates who wished to contest elections.

Similarly, the National Democratic Alliance passed a law namely the Election and Other Related Laws (Amendment) Act 2003, that made company and individual contributions to a party completely tax-deductible under Sections 80GGB and 80GGC of the Income Tax Act respectively, thus creating incentive for donors for open payment by check. It also made reporting of donations over 20,000 Rupees by parties compulsory to qualify for tax exemption. But these donations were tax deductible only if made to political parties and not to individual candidates.

The Election Commission of India (ECI) determines the ceiling on election expenditure by candidates from time to time. In 2011, the expenditure limit was raised from Rs 25 lakhs to Rs 40 lakhs for all the parliamentary constituencies except those in Goa, Arunachal Pradesh, Manipur and Sikkim. For the assembly constituencies, the poll expenditure limit had been raised from Rs. 10 lakhs to Rs. 16 lakhs which too varied according to the size of the States.[6]

IMPACT OF ELECTORAL FINANCING

The increasing role of money power in elections is quite well known. It has brought to the fore serious concerns involving the widespread prevalence of black money and corruption, increasing criminalization of politics and alienation of public spirited citizens from the political arena.

- ***Election funding and corruption : The conjoint twins***

Due to the inefficient and unworkable laws, there has been a upsurge in the demand for black money to finance election campaigns. The banning of corporate funding to political parties was not replaced by any other alternative, not even state funding. As a result, the parties and candidates heavily relied upon black money. The high tax rates led to tax evasion by many businesses and individuals, and due to the license and quota permit the politicians created a culture wherein they demanded kickbacks for granting authorization for any sort of economic activity.

[6] http://www.deccanherald.com/content/141669/govt-raises-ceiling-poll-expenses.html

Further the amendment to RPA in 1975 that led to the separation of the spending of parties and donors from the candidate's spending aggravated the situation .Without a limit on party spending and with a ban on corporate donations, money had to be raised somehow. It led to increasing dependence on black money. Even the lifting of the ban on corporate donations to political parties did not have much effect as it did not offer any tax incentives. Moreover the norm of public disclosure of political donations in a company's annual reports made it influencing for them to route it secretly through the use of black money in fear of being penalized by other political parties who were not favored.

It is relevant to quote the following excerpt of the Supreme court in *Gadakh Yashwantrao Kankarrao vs. E.V. alias Balasaheb Vikhe Patil & others*[7] :

"*The existing law does not measure upto the existing realities. The ceiling on expenditure incurred or authorised by the candidate himself but the expenditure incurred by the party or anyone else in his election campaign is safely outside the net of legal function. The spirit of the provision suffers violation through the escape route. The prescription of ceiling on expenditure by a candidate is a mere eye-wash and no practical check on election expenses for which it was enacted to attain a meaningful democracy. 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 be 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, accepting without any qualm the role of money power in the elections. This provision has ceased to be even a fig leaf to hide the reality.*"

Thus, given the limitations in RPA and poor or near absence of auditing of party funds and donations, the political parties and candidates tap funds from every available source which are mostly unaccounted and illicit sources.

The growing influence of black money in the outcome of election had been discussed by the N. N. Vohra Committee in July 1993 following the Mumbai bomb blasts in March that year to take stock of all available information about the activities of the crime syndicates/mafia organisations

[7] AIR 1994 SC 678

which had developed links with, and were being protected by Government functionaries and political personalities.

Such kind of 'criminal-politician-mafia' linkage was further vindicated from the Jain diaries which established the funding linkages between the politicians and Kashmir militants. The Hawala Scam revealed in 1996 was a major political corruption scandal where the well-known politicians accepted hefty bribes through four Hawala brokers, the Jain brothers. The bribery scandal was worth $18 million. The hawala system was a safe route for the politicians and business tycoons to transfer large sums of illicit money to their foreign accounts. It was also revealed in public that a large sum of the money was used to support the Kashmir based militant group Hizbul Mujahideen.[8]

Further, the special interest groups and individuals who contribute huge sums of money to parties and candidates see it as a kind of investment to reap a richer return. Once elected to power, these candidates raise more resources through preferential allocation of governmental favours to the vested interest groups (private sectors, black marketers, contractors etc.)

Sukh Ram, the telecom minister in P.V. Narasimha Rao's cabinet was indulged in irregularities in awarding telecom contracts. In 1996 the CBI seized Rs. 3.6 crores from his official residence.

In the infamous 2G spectrum scam, former telecom minister Mr. A. Raja, siphoned Rs. 1.76 lakh crore by evading the 2G licensing norms. He illegally distributed the 2G licenses at the price rate of 2001 instead of the increased rate in 2008. As a result, India lost an unbelievable huge amount of money and this might have severe effect on the country's economy. The Nira Radia tapes uncovered by the Income Tax Department also brought to light how the corporate bodies/ businesses and politics are intertwined to create mutual favours and unconscionable gains for each other.

[8] (http://www.chakreview.com/Current-Affairs-Politics/Hawala-system-The-Lifeline-of-political-corruption : Hawala system is an alternative money remittance system primarily practiced in South Asia, Middle East and North Africa. This informal fund transfer system is also addressed as Hundi and it operates via a large network of brokers. It has emerged as a popular process of money laundering, a method through which the black money earned from illegal sources are converted into white money. In short Hawala meaning is an undercover alternative banking method for global money transaction that is primarily based on trust. NGO's and Trusts are being used as safest method to do Hawala Transactions since money received by these organizations is tax free and no investigation is done. A recent study by the US Treasury Department revealed that the money laundered through Hawala system is the largest source of investment for human or drug trafficking and other ghastly crimes in India and Pakistan.)

According to the CAG (Comptroller and Auditor General) report on the Commonwealth Games Scam, it is estimated that out of the 7000 crores that was allocated to be spent on the Indian sportspersons, only half was spent. The investigation performed by Central Vigilance Commission revealed that various hefty payments were made in the name of non-existent parties and voluntarily delay was made in the preparation process which collectively led to wide misuse of the funds.

The report on coal scam in 2012 by the CAG (Comptroller and Auditor General) had accused the Government of India for illegally and irregularly providing our nation's coal deposits to private and state run entities instead of auctioning them in the public. In the period 2004-09, 142 coal fields were illegally allotted to the private and state run entities, instead of being auctioned. And this has resulted a loss of a whopping 1,86,000 crore rupees to our national treasury. There have been estimates released by the media that the actual loss was 10,60,000 crore rupees.[9]

In the 2009 Lok Sabha polls, Rs 10,000 crore was spent, one-fourth of it being black money. Major spends are as paid news and advertisement, hiring vehicles and aircraft, printing publicity material and salaries of party workers. A Congress party insider had said that an MLA in Punjab spent Rs 35 lakh on a single piece of paid news. Sometimes the candidates even pay off the rebels or other candidates. Money is sometimes attached to the daily newspaper and delivered; amounts range from Rs 500 to Rs 1,000. Centre for Media Studies, a Delhi-based think-tank, said that in the 2008 and 2009 polls, 33.6 per cent of voters in Tamil Nadu were offered money, while the figure was 13.4 per cent in Kerala and 4.4 per cent in West Bengal. In UP, voters received money orders from unknown senders, and, in Tamil Nadu, during the 2011 Assembly polls, envelopes stuffed with cash were pushed under doors at night. Speedpost, courier services, NGOs, pawn brokers, self-help groups and even students have been used to distribute money.[10]

Also most of the candidates tend to file false election returns or in some cases no returns are filed at all. Recently, BJP leader Gopinath Munde had publicly admitted to flouting election expenses norm having spent Rs 8 crore on his 2009 parliamentary election campaigns much beyond the

[9] http://www.chakreview.com/current-affairs-politics/How-Scam-gives-birth-to-social-problems : The IEA (International Energy Agency) had drawn out estimates and stated that India needs an investment of around $135 billion in order to provide 24/7 power supply to its entire population of 1.2 billion. Yes, $135 billion, still less than the loss acquired because of the Coal scam.

[10] http://syednazakat.wordpress.com/2012/06/03/black-money-in-indian-elections/

then permissible limit of Rs. 25 lakhs. The amount also exceeded his total declared assets of 62.25 million and was in stark contrast to his sworn declaration before the Election Commission that his election expenses came to only 1.94 million.

Mr. Ashok Chavan, former Chief Minister of Maharashtra, has also been accused of concealing his electoral expenses. He had said that he spent only Rs 5,379 on six newspaper ads during the 2009 Maharashtra assembly polls. However, it has been stated that there is a huge mismatch between the account's stated Rs. 5,379 and the dozens of full pages of news (which is now referred to as 'paid news'). The matter is being argued before the Supreme Court in *Ashok Chavan vs. Madhav Kinhalkar* (also known as the "Paid News" scandal). In this regard the Law Ministry has submitted that the power of the Election Commission to disqualify a person arises "only in the event of failure to lodge an account of expenses and not for any other reason, including the correctness or otherwise of such accounts."

However, the EC has asserted its powers to take action against a candidate for lodging false accounts of election expenditure within Rule 89(5) of the Conduct of Election Rules, 1961 and order disqualification under section 10 A of the Representation of the People Act, 1951. It has submitted an affidavit citing the ruling in the *Shivaramagowda vs P M Chandrasekhar*[11] thus stating that:

"*If a candidate incurs election expenses far above the ceiling prescribed, but shows incorrect account of election expenses to the EC, and there is no Election Petition filed against him, it will be preposterous to say that the EC cannot take any action in such cases, although the EC has evidence to the contrary that the election expense accounts so filed are untrue or incorrect and not based on facts. This will disturb the level playing field and impinge on conduct of free and fair elections.*"

It is distressing that in all these 66 years of our parliamentary democracy, the Election Commission has disqualified very few legislators. These include former Jharkhand Chief Minister Madhu Koda, Uttar Pradesh MLA Umlesh Yadav and BJP leader and minister in Madhya Pradesh Cabinet Narottam Mishra. It is interesting to mention that Umlesh Yadav

[11] *Shivaramagowda v. T.M.Chandrashekar* [1999 (1) SCC 666]

was then found guilty of suppressing an expenditure of Rs. 21,250 on an advertisement that had appeared in the disguise of a news item in the *Dainik Jagran* in the 2011 election.

It is also no surprise that when ADR sought information on the funding of twenty political parties during 2004-09, using RTI, all political parties with the exception of the CPI (M) responded that they were not bound to provide such information. The matter went before the Central Information Commission but major political parties denied it.

In many cases, the value of assets had soared considerably. The DMK's S. Jagathrakshakan showed an increase of Rs 64.5 crore in two years. In the same period, the NCP's Praful Patel showed an increase of Rs 42 crore and the Congress's Kamal Nath's assets went up by Rs 26 crore.[12]

In the local elections held in the southern state of Karnataka where counting was taken up on 8 May 2013, 179 incumbent legislators were in the fray. An analysis by a citizens' election watchdog established that assets of these lawmakers grew by 88% in the five years since the last polls in 2008. In absolute terms, average assets grew from an average of Rs. 93 million to Rs. 176 million in the years that they were legislators.[13]

The Election Commission has seized black money of over Rs 120 crore since 2011. This year, it has seized Rs 47.02 crore so far from the five Assembly elections - Rs 32.71 crore from UP, Rs 12.13 crore from Punjab, Rs 1.35 crore from Uttarakhand, Rs 47 lakh from Manipur and Rs 36 lakh from Goa. The week before polling day and the day itself see a huge flow of cash, liquor and drugs. Additional raids yielded, in Punjab, heroin worth Rs 200 crore, 2,696 kg poppy husk, 99.9kg opium, 3,793gm smack, 88,296 drug capsules and 9,94,075 tablets. In UP, the EC confiscated 2,23,120 litres of illicit liquor, 4,050 firearms and 6,290 cartridges.[14]

Thus the role of black money and corruption in elections is terribly high in our country. It is a serious threat to the parliamentary democracy and the mechanism of governance. To quote, Sri. N. Vittal, former Central Vigilance Commissioner, "*Black money is the oxygen for corruption*

[12] http://syednazakat.wordpress.com/2012/06/03/black-money-in-indian-elections/)
[13] http://asiancorrespondent.com/107395/india-karnataka-election-corruption/
[14] http://syednazakat.wordpress.com/2012/06/03/black-money-in-indian-elections/

and corruption is the oxygen for black money. A commitment to combat corruption should figure in any strategy to establish good governance in the country."

- ***Criminalization of Politics***

It is widely believed that there is a growing nexus between the political parties and anti-social elements, which is leading to criminalization of politics, where the criminal themselves are now joining election fray and often even getting elected in the process. Many of them have even adorned ministerial berths and, thus, law breakers have become law makers.

A large number of people, charged with serious crimes such as murder and rape, have won elections and gained political dividends. By one estimate in 1997, 700 of 4,120 elected members of 25 State-level assemblies had criminal records. Of these, some 1,555 were accused of heinous crimes such as murder, armed robbery, rape and the like.[15]

The 2004 national elections further presented several disturbing examples of this feature. In the district of Siwan, Bihar, the Rastriya Janata Party (RJD) candidate was one of the most dreaded offenders, Mohammad Shahabuddin. Criminal cases pending against him ranged from murder to extortion, kidnapping, violation of prohibitory orders, and theft. According to one report, as many as 32 candidates with pending charges contested the second round of general elections in Uttar Pradesh during May 2004. One candidate, Updesh Singh Chauhan, the Bahujan Samaj Party nominee from Jalesar, had as many as 68 criminal cases pending against him. Atiq Ahmad, with 38 cases, and Babloo Srivastava with 41 cases were two other known dangerous criminals contesting the elections in UP. Interestingly, a number of candidates—such as Kali Pandey of Gopalganj, Rajen Tiwari of Motihari, Munna Shukla of Vaishali, and Suraj Singh Bhan of Mokameh—were elected while in prison and spent their term in jail rather than the assembly since they were never released.[16]

Further the political parties and their candidates tend to adopt various sorts of electoral malpractices to gain the winning edge. There is the problem of increased Naxalite insurgency and the violence inflicted by them during elections. Booth capturing has been one such phenomenon. In 1957, repoll was ordered only in 65 booths, in 1989 it was ordered in 1670

[15] Verma Committee, 2005
[16] http://indiandemocracy08.berkeley.edu/docs/Verma-PolicingElectionsIndia.pdf

booths. Further in 1991, in Bihar alone repoll was ordered in 1046 booths and in 2173 booths in 1996. In the 1984 Lok Sabha elections thirty -three persons were killed. This figure rose to 130 in 1989 and 198 for the 1991 Lok Sabha Poll.[17]

Parties are actively recruiting candidates involved in serious criminal activity because they possess both the financial resources to self-finance as well as the connections necessary to contest elections successfully. According to an analysis done by the Association for Democratic Reforms (ADR) and the National Election Watch (NEW), among the elected members in 2009 elections, 30 per cent of sitting Lok Sabha MPs and 31 per cent of sitting MLAs have criminal cases registered against them. Of these criminal cases, 14 per cent in case of current Lok Sabha MPs and 15 per cent of the total sitting MLAs are registered under serious criminal charges.[18]

Meanwhile, the votes needed to win a seat have fallen to as low as 15 per cent. Criminal elements that once pulled in votes for party candidates are now getting voted to power themselves, gaining social respectability and public esteem in the bargain.[19]

Criminalization of politics has attained a stage, where it needs serious attention from the citizens, government and political parties as there is steady decline in values of all sections of our society. Today crime is the shortest access to legislature and parliament in India. It is now believed that the safest haven for criminals is politics and political parties have gone overboard in associating criminals with them more because of their muscle and money power to ensure victory in polls. It is quite evident that strong measures are required to arrest the upward trend of criminalization of politics and elections. In 2003, a law was introduced to prohibit the election of criminals to legislative bodies. Section 8 of RPA disqualifies persons from contesting elections only on their conviction by Court of law and is therefore limited.

The National Commission to Review the Working of the Constitution (NCRWC) paper has made a significant proposal with regard to the framing of charges in an offence that attracts a maximum punishment of five years or more. In such cases, the accused would be disqualified from being chosen as or from being a Member of Parliament or a State legislature at the expiry

[17] Law commission, 170th Report
[18] http://www.thehindu.com/news/national/over-30-of-mps-mlas-face-criminal-charges/article4938403.ece?ref=relatedNews
[19] http://www.thehindu.com/opinion/lead/striking-at-the-root-of-corruption/article4137685.ece

of two years from the time of framing of charges. The accused would continue to remain disqualified until the completion of the trial. Many politicians may reject the proposal on the grounds that it could be abused by a ruling party against political opponents. To allay such fears, the Commission's paper has proposed an amendment of the Code of Criminal Procedure, 1973, in such a way that the trial in such cases would be completed within two years.

The Commission is of the view that keeping a person, who is accused of serious criminal charges and where the Court is prima facie satisfied about his involvement in the crime and consequently framed charges out of electoral arena would be a reasonable restriction in greater public interests. The step taken by the Commission would go a long way in cleansing the political establishment from the influence of criminal elements and protecting the sanctity of the Legislative Houses.

- ***Preference for affluent candidates and alienation of righteous one***

One of the maladies of huge election expenditures is that it sometimes reduces the process of election into a mere farce by placing some privileged candidates with financial resources in a distinctly advantageous position as compared to other candidates. The result of such an election cannot reflect the true choice of the people. The system also sometimes deprives qualified and able persons of the prerogative to represent masses.

Electoral finance laws also lead political parties to prefer wealthy candidates, or those with the capacity to raise and distribute significant amounts of black money, thus increasing the chances of criminals obtaining party tickets. According to National Election Watch, in 2009, of 322 candidates who declared assets greater than Rs 50 million, one-third emerged victorious, whereas only 19 per cent of candidates with assets between Rs 5 and 50 million triumphed.

While more spending does not guarantee victory, the only detailed examination of actual election expenses by the Centre for the Study of Developing Societies in 1999 suggests that candidates need to spend above a minimum threshold to be competitive. Winners and runners-up in 1999 spent an estimated average of Rs 8.3 million and Rs 6.8 million respectively, far above the then expenditure limit of Rs 1.5 million.[20]

[20] http://www.indianexpress.com/news/the-costs-of-democracy/976243/0#sthash.zL2D7rv0.dpuf)

Moreover, wealthy candidates are not only contesting elections directly but they are also bankrolling entire political movements. For instance, the Reddy brothers (a sibling trio of mining magnates) from Karnataka have used their mining wealth to bankroll the BJP's rise to power in that state. As a reward, two of the three brothers received cabinet berths while the third was awarded directorship of a powerful State corporation.[21]

Fairness demands that the best candidate wins a poll, not the richest candidate. Democracy is all about representation. And that means every candidate should have a chance of contesting equally and not just those backed by money power.

ASSESSING ELECTORAL REFORMS

"*As the law stands in India today, anybody including a smuggler, criminal or any other anti-social element may spend any amount over the election of any candidate in whom such person is interested*."[22]

The existing electoral laws do not measure upto the realities of the situation. Political parties are routinely seen violating the statutory cap on the election expenditure which is highly unrealistic. The actual expenditure incurred by the candidate is almost 20-30 times the legal ceiling prescribed by the election commission. A parliamentary contest today means spending at least Rs 5 crore; that's the floor. The tragedy of our system is that the legal ceiling - Rs 40 lakh for parliamentary and Rs 16 lakh for assembly constituencies - is lower than the real floor![23]

The existing laws and the actual practice do not go hand in hand and this induces dishonesty, corruption and abuse of power. One of the major loopholes in the existing law is the de-linking of party spending and candidate's spending which has led to unaccounted donations on behalf of candidates.

Further as per law, political parties do not have to declare the source of a contribution under Rs 20,000. This loophole is used liberally by almost all parties. Between 2007 and 2009 the Bahujan Samaj Party got Rs 200 crore; not one rupee came in by cheque. In the same period, the Samajwadi Party received Rs 55 crore, of which Rs 50 lakh was by cheque. The BJP received Rs

[21] http://www.cgdev.org/files/1425795_file_Kapur_Vaishnav_election_finance_India_FINAL.pdf
[22] C Narayanswami vs. C. K Jaffer Sharief (1994 Supp. (3) SCC 170)
[23] http://articles.economictimes.indiatimes.com/2012-01-28/news/30673734_1_state-funding-parties-black-economy

297 crore, of which Rs 55 crore was by cheque, and the Congress got Rs 72 crore, of which Rs 35 crore by cheque.[24]

In a recent paper[25], M. V. Rajeev Gowda and E. Sridharan have discussed several consequences arising out of the present system of electoral laws.

First, the expenditure ceilings appear to invite evasion. Before 2003, party and supporters' expenditures were exempt from the purview of the expenditure ceiling, in effect ensuring that there were no real limits. After 2003, when party and candidate expenditures in support of candidates were brought within the limit, candidates seem to have resorted to incomplete and inaccurate expenditure statements. The low expenditure limits tend to induce such dishonesty, a profoundly unhealthy development for any democracy.

Second, the absence of public funding means that parties and candidates must raise and spend money on their own for each election. The combined effect of the ban on corporate donations in 1969 and the uncapping of expenditures in 1975 was an imperative to spend, without an adequate legal source of funds. This appears to have exacerbated dependence on black money and institutionalized corruption in the context of a highly regulated economy. Parties and candidates tend to use their term of office to accumulate war chests for future elections and for nursing their constituencies. There is evidence that they raise these resources through any means available, including through corrupt means such as kickback for regulatory and allocative favors while in office.

Third, the lack of any effective system of internal democracy, transparency, and accountability within parties reinforces corrupt fund-raising and the lack of financial accountability. In this respect, India stands in contrast to Germany, which regulates the internal affairs of parties. Parties in India have evolved to be top-down and often controlled by a founding family. Given the dependence of the system on large electoral expenditures, compared to the nominal spending limits, parties remain opaque in their fund-raising and electoral expenditures, as well as in their accounting and reporting of both.

[24] http://syednazakat.wordpress.com/2012/06/03/black-money-in-indian-elections/

[25] http://casi.sas.upenn.edu/system/files/Gowda-Sridharan,+ELJ+paper,+Reforming+India's+Party.pdf

Fourth, the Companies Act's limit on corporate political contributions to parties (5% of average net profit over the past three years) may worsen the problem with corruption, despite the 2003 law's introduction of tax deductibility of political donations. If companies were able to contribute more legally, we would expect candidates' and parties' reliance on black money to be reduced. It has been recently suggested by the spokesman of the Congress party that this 5% limit needs review, and it might be better to leave it to company management and boards to decide how much to contribute to parties. Also, contributions to individual candidates are not allowed under the current regulation. This may dampen corporations' incentives to make legal contributions, as their money is spread over an entire party rather than targeted toward favored candidates.

Fifth, under the current system, party leadership has no incentive to raise funds through large numbers of small-sum donations, given the large sums needed and the high transaction costs involved in raising many small contributions. It is far easier to raise the large sums needed in big tranches from a relatively small number of big donors, typically in unaccounted forms

- ***State funding of elections***

The concept of public funding came into picture in the second half of twentieth century, and gained momentum since then. State funding is the most widely used form of public funding used in democracies. All political parties in a democracy perform important public functions: depending on affiliation, either informing and educating the citizens about the policies and programmes of the government or pointing out their shortcomings and deficiencies. (issues)

Funding elections through the finances of the state is one of the most viable way to respond to the pertaining problem associated with financing the election of a candidate. It serves in the following ways[26] -

(a) As a measure to curb corruption and the pernicious influence of black money in the electoral process; and

(b) In order to reduce the exorbitantly high costs of elections and create a level playing field for all political parties.

[26] http://www.orfonline.org/cms/sites/orfonline/modules/issuebrief/attachments/Issue_47_1360754379618.pdf

Indrajit Gupta Committee Report (1998) sought partial, in-kind state funding of elections on legal and constitutional grounds and in larger public interest. The main objective was to facilitate the level playing field for the parties with lesser financial resources. The proposal of state funding was subjected to two conditions: the state funding is restricted to national and state parties; and state funding should be only provided in kind, in the initial phase to the recognized political parties and their candidates. This recommendation contradicts the objective of level playing field for elections. State funding merely for national and state political parties creates a bias against new and weaker political parties and moreover against the serious independent candidates who refrain to tag themselves against any political party. On the contrary, it would strengthen the position of established political parties by uneven distribution of resources. As a result it would render the purpose of state funding void, which is to strengthen democracy by enabling fair competition.

The Confederation of Indian Industry (CII) had recommended raising money through corporate contributions to a state-managed fund or a cess on excise duty. In January 2001, a Law Ministry advisory panel on electoral reforms suggested that individuals and corporate agencies be permitted to make contributions to the political parties up to a certain ceiling higher than the present 5 percent of profits and an incentive be provided in terms of tax concessions. The panel also asked the government to encourage the corporate bodies and agencies to establish an electoral trust, which should finance political parties on an equitable basis during elections.

As per the provisions of the Companies Bill, 2011, the cap on corporate funding to political parties shall be increased from 5% to 7.5% of the net profits preceding the last three years. The Companies Bill, 2011, while in favour of a resolution[27] passed by the Board of Directors vis-à-vis corporate funding even fails to elucidate the role of the shareholders or what is referred to as the “shareholders approval” in other countries, such as the United Kingdom.

Yogendra Yadav, a political activist (member of the Aam Aadmi Party) and Senior Fellow at the Centre for the Study of Developing Societies (CSDS), Delhi has urged that the solution for black

[27] Clause 182 of the Companies Bill, 2011 states that a private company may contribute any amount directly or indirectly to a political party provided such a contribution is authorized by a resolution passed at a meeting of the Board of Directors of the company. For more details on campaign finance vis-à-vis corporate funding, refer to The Companies Bill 2011, available at http://www.prsindia.org/uploads/media/Company/ companies%20bill%202011.pdf

money during elections is to unleash a barrage of white money into politics. He recommends that the government allocate Rs 100 per vote polled to every political party but transfer it into the bank accounts of the parliamentary and assembly constituency of the party. It will strengthen inner-party structures and democracy. As for independents, those with more than 2% of the votes polled are eligible for state support; those who poll less are usually the non-serious types. Mr. E. Sridharan and Mr. Yadav favour the scrapping of the Member of Parliament Local Area Development Scheme (MPLADS), which the former says is "wrong in principle and politically unfair". The monies thus freed up, the duo argue, would be the best way to finance the state funding of elections.

The Law Commission of India has also endorsed the idea of state funding, but maintains that total funding will not be possible given India's economic condition. The second Administrative Reforms Commission also speaks in the same vein. One of the biggest criticisms against state funding has been that it will reduce the necessity of the political parties to maintain their social base and generate funds through social mobilization and active work amongst their constituents. Such theory is proven in countries like Germany and Spain, where analysts have observed an inverse relationship between state funding of elections and social mobilization efforts of political parties.[28]

- ***Enhancing powers of the Election Commission***

The Election Commission of India should be bestowed with legal powers similar to those exercised by the Federal Election Commission (US), a body exclusively tasked with verifying disclosures of expenditures, penalizing defaulters, imposing stringent rules on reporting of such expenditures by political parties and overseeing public funding. It should exercise the duty to supervise that a company which receives state subsidy or has a decision or contract or license pending with government does not contribute, to verify and investigate the election expenses of the candidates and initiate legal action if they exceed the prescribed limits. All donations to a particular campaign should be allowed so long as they are audited and disclosed. The Election Commission could put up a website where all donations to political

[28] Makkar, Sahil, Not in favour of legal status for model code of conduct: Sampath, livemint.com (The Wall Street Journal), June 11, 2012, available at http://www.livemint.com/2012/06/11221313/Not-in-favour-of-legalstatus.html, last visited on July 5, 2012

parties above a certain minimum limit are declared, with heavy punishments for non-disclosure. Such a measure would strike at the very source of black money in politics and act as a disincentive to the unholy system of patronage that has come to define our democracy.

ADDITIONAL REFORMS

Following are some of the suggestions that could be implemented to fix the lacunae in the existing electoral laws:

(A) There shall be reasonable ceiling on election expenditure and the election commission shall revise it from time to time to keep pace with the need of the time. Explanation (1) to Section 77 of the RPA be deleted so that expenses incurred by the political party and the friends of a candidate are considered part of his or her election expenses.

(B) Barring corporate bodies or individuals from donating, against whom any decision or license or contract or claim of subsidy or concession of any nature is pending with the government.

(C) It shall be the duty of every political party and candidates to get the receipts and expenditure fully audited and make the same public for the financial year by sep 30.

(D) The audited statement of account should be made to the Election Commission and the Income Tax authorities in the prescribed Performa. On payment of nominal fee, it shall also be made available to any member of public by Election Commission.

(E) If a party does not furnish the audited statement of accounts, it should be penalized and the party shall be derecognized until the accounts are furnished.

(F) The election commission shall put a reasonable cap on the television, radio and newspaper advertisement and shall also give free television and radio time in state media.

(G) The election debates shall be telecasted and broadcasted live across all the electronic media.

(H) The Election Commission should be charged with fast-tracking criminal cases. Cases of criminal or corruption charges against elected MPs should be given top priority and heard

without break until completed. While the Commission has no power to prosecute anyone for non-election related criminal offences, it has a responsibility to ensure that India does not get heinous criminals as its MPs. The Commission has enormous constitutional powers, and in liaison with the Supreme Court can overcome all obstacles to early delivery of justice for MPs with criminal cases. A small budget of Rs. 20 crores for the Election Commission could go a long way to rid criminals from India's Parliament.

(l) The two-ballot system should be introduced in place of the first-past-the-post system that enables even a criminal to get elected just by securing a fraction of the total votes polled. The idea of introducing the two-ballot system is borrowed from a recommendation made by the Law Commission in its 170th report. Under this system, a candidate would not be declared elected unless he or she obtains the majority of the votes polled. If none of the contestants gets the majority, there will be a "run-off" election between the candidates in the first two positions.

CONCLUSION

The laws of India are designed today to preclude the possibility of good people joining politics. Mostly the corrupt are contesting elections. Since its inception as an independent body, the EC has now been subdued into a mere spectator to the use of black money and muscle power in elections and growing dominance of tainted politicians in electoral politics. We need a system where honest and capable people are able to contest for seats in the Parliament. We also need to make it difficult for people with criminal and corrupt background to reach Parliament. The Government should implement the various electoral reforms in this field and enact a comprehensive Electoral Reforms Bill which will also include provisions for putting a check on criminalization of politics and misuse of money and muscle power in elections.

It would be pertinent to mention the recent pronouncement of the Apex Court which is welcome as a part of electoral reforms to decriminalize politics. The Supreme Court in *Lily Thomas vs. Union of India*[29] held that an MP or MLA convicted of any criminal offence attracting a punishment of two years and above will be disqualified immediately and a person, who is in jail or in police custody, cannot contest election to legislative bodies. A two-judge bench of Justices A. K. Patnaik and S. J. Mukhopadhaya had declared as unconstitutional a provision in the Section 8(4) of Representation of the People Act that says a convicted legislator can continue in office if he or she appeals in a higher court within three months of the conviction.

This judgment is opposed to the earlier decision of the constitutional bench in *K Prabhakaran vs P. Jayarajan*[30] which had upheld the validity of section 8(4) after examining whether classifying sitting lawmakers as distinct from other citizens, who could not participate in elections if convicted, was reasonable and did not violate Article 14. The government justified the protective provision for elected member on the ground that the rate of acquittal in Indian judicial system is high and if the elected member is once disqualified on being convicted then his membership of the House cannot be restored after his acquittal. The government in its reply stated that the exception was created to prevent a reduction in the strength of the house and a member's party. It stressed that protection was given to the house and not to the members. In contrast, the two-judge bench read together the provisions of the Constitution and the

[29] (2013) 7 SCC 653
[30] *K. Prabhakaran v. P. Jayarajan* on 11 January,2005 (MANU/SC/0025/2005)

Representation of the People Act. The object of the provision was to keep the person with criminal background away from election. Declaring section 8(4) as ultra vires, it said it was not necessary to go into the validity of section 8(4) vis-a-vis Article 14 after it had already held that Parliament lacked the powers to make this law when a reading of Articles 101(1)(e) and 102(1)(e) stipulate that the disqualification clause for both a person to be chosen as a member of a House of Parliament or the State Legislature and for a person to continue as a member of Parliament or the State Legislature has to be the same.

The Supreme Court has refused to entertain any review petition of this verdict. It has however, stated that Parliament is free to amend law if it does not agree with the interpretation of law given by the Supreme Court. This verdict has stirred up a hornet's nest among the political class and could go a long way in cleansing the electoral process.