

SIXTH GUTTA SRI RAMA RAO MEMORIAL LECTURE
ELECTORAL REFORMS IN INDIA

Mr. James Michael Lyngdoh
Former Chief Election Commissioner of India

It gives me great pleasure to be here to talk to you on electoral reforms in India, and I thank the Gutta Sri Rama Rao Endowment and the NALSAR University of Law for having me do so.

Against the discouraging backdrop of a fundamentalist and acrimonious partition of the subcontinent, a hasty knocking together under one sovereignty of former British-administered provinces and barely assimilated erstwhile princely States, and one of the most outrageously hierarchical societies in the world, India bravely chose a secular, universal adult suffrage democracy to have everyone participate in governance, in preserving an uniquely diverse social ethos, and most of all, in keeping the country together.

For most of the last sixty years the Indian Constitution has had remarkable success in achieving its objectives. Especially significant is the enthusiastic involvement in politics of the underprivileged, the least among them through reserved constituencies, this being the first opportunity in aeons for upward social and economic mobility. But of late the middle class, the very class that is educated in and is in sympathy with the mores of democracy, that won India's independence, that drafted the constitution and that dominated Parliament for decades, has virtually abdicated electoral politics, considering it too rough and dirty. Too much education weakens a representative's stomach for launching and intercepting missiles as part of legislative business or transacting a conscience vote in defiance of a tedious party whip. Even worse many political parties and their surrogates, uninhibitedly fundamentalist and opportunistic to secure as many seats as possible, have been wrecking the country's secular and plural society. Subsequent prosecution, so dilatory and loop-holed, has not been a deterrence. Obviously therefore we need the kind of reforms that would secure

more healthy practices, and more ethical, socially responsible and inclusive political parties.

When we talk of electoral reforms we normally refer to recommendations for amending the electoral law made by the Election Commission and Committees and Commissions such as those of the Goswami and Indrajit Gupta Committees, the Law Commission and the National Commission for Review of the Working of the Constitution. I shall deal with the more important ones having a direct bearing on better political parties, representatives, and electoral practices. Obviously I cannot leave out the recommendations on making Indian democracy more representative. The recommendations are:

- Debarring, until cleared by the court, persons charge – sheeted by a court in offences punishable with 5 years imprisonment or more;
- Permanently debarring persons convicted of heinous crimes like murder and rape;
- Restoring Section 77 of the Representation of the people Act 1951 to its original position so as to disallow a candidate's attributing all the expenditure to his party and friends;
- Annually auditing the accounts of political parties and publishing them;
- State funding of elections;
- The Election Commission and not the Speaker of a House to decide if members of the House have defected, and the President of India or Governor of the State, depending whether Parliament or a State legislature is concerned, to disqualify them;
- Regulating by law the process of democratization in the internal workings of political parties;
- Deregistering errant political parties;
- No surrogate advertisements in the print media after elections have been announced. Similarly no government-sponsored advertisements and no political advertisements on TV and Cable networks;

- Restrictions on opinion and exit polls so as to prevent them from influencing the voting;
- A mixed system of first-past-the-post and proportional representation;
- 50% of the votes polled +1 to be made a requirement for a candidate to win an election under first-past-the-post.

I will deal with the recommendations in the order in which I have stated them.

Representatives with a criminal record are a serious matter in Indian politics. In the 2004 general elections 18.18% of the winners to the Lok Sabha carried a criminal record. The corresponding figures for the 2006 Bihar Assembly elections, 2007 U.P. Assembly elections and 2006 Tamil Nadu Assembly elections are 49%, 38.30% and 32.91% respectively.

Little wonder then that the law on keeping criminals out of elections has not changed. To disqualify a person from being a candidate he has to be convicted – and convictions are hard to come by – of the offences mentioned in Section 8 of the Representation of the People Act. There are three classifications in descending order of repugnance when associated with a representative. Under the first classification are offences relating to enmity between different sets of people, foreign exchange, narcotics, insulting the national flag or Constitution of India and personation. Against these offences a conviction is enough. In the second category which relates to hoarding or profiteering, adulteration of food or drugs and dowry, a conviction and a sentence of imprisonment of not less than 6 months are necessary. In the third category concerning other offences, the requirement is a conviction and a sentence of imprisonment of not less than 2 years.

However the disqualification does not apply to anyone who is already a sitting MP or MLA. He was allowed the immunity as long as he remembered to file an appeal or revision petition within 3 months of the date of conviction, and the

matter had not been finally disposed of. However, in 2005 the SC held that this immunity expired with the term of the house of which the petitioner was a member.

The mockery of the permissive electoral law on criminals by politicians has been very pithily expressed by the media when showing Bihar representatives running extremely efficient poll campaigns from jail with a set of mobile phones.

The irritation of the Election Commission with the stagnancy of the electoral law on criminals is reflected in the first affidavit it required every candidate to file containing details of his involvement in criminal cases. Subsequently civil society groups went to court, and the result is the candidate now also has to file particulars on his assets and liabilities, including his dependents', as well as his educational qualifications. With so many eager beavers around, it is now difficult for the candidate to suppress information on his involvement in criminal cases. His previous underestimation of his own assets used to be quite laughable; the present trend is demonstratively brazen. Some civil society groups, in their study of this aspect, have even found major escalations in the values of assets held, between succeeding elections without the faintest attempt at an explanation. The assumption, of course, is that the voter will not vote for a candidate with a dubious record. This does not always hold good, as in the badlands of north India and Andhra Pradesh, a candidate pronouncedly criminal and corrupt would be considered to be a much better patron and a more effective protector of the interest of a voter, especially an underprivileged one.

There is a strong justification for accepting the recommendation that a candidate convicted of murder, rape etc. be disqualified permanently. Similarly, that a candidate charge-sheeted by a court in an offence punishable with 5 years imprisonment or more be disqualified until the matter is cleared in his favour.

The expenditure limit for a candidate for the Lok Sabha is Rs.25 lakhs, and for the Assembly of a major state, Rs.10 lakhs. Everyone knows the actual expenditure per candidate, even for an Assembly election, now runs into several crores. In other words, most of the candidates would seem to have committed a corrupt practice under the electoral law, and the elections of the winners are apparently liable to be set aside on appeal to the High Court. However, election expenditure observers drawn from the Revenue Department, Government of India, who are required to compute the likely expenses of each candidate, have been quite ineffective. Therefore the Election Commission needs to consider hiring experts for the purpose. The Commission also has to put all its expenditure computations and the candidates' expenditure returns on the web well before the stipulated 45 days after the announcement of election results to enable substantive election petitions to be filed before the High Courts.

It may make visitors from advanced democracies wonder why India makes such a fetish of excess expenditure when Obama clearly spent much more than McCain, and no one made a fuss about his advantage over his opponent. Unfortunately Indian voters are also wined and dined by candidates, this amounting to a corrupt practice and rendering the election liable to be set aside. Since official election observers have not been able to detect this sort of electoral hospitality, the Commission could use moles to prevent such malpractices.

The Law on expenditure has been amended again, so the candidate can no longer attribute his expenditure to the benevolence of friends and party. But there is a snag. Travel expenses of 40 national leaders on behalf of the candidate of a national or regional party are now excluded from his election expenses. For other registered parties the travel expenses of 20 national leaders per candidate are to be excluded from his expenses. The expense on helicoptering these national leaders alone would run into crores. So changing the law does not reduce election expenses, but increases them. That this is a

permissive step is confirmed by the Revenue Department's instructions allowing donations to political parties complete tax exemption.

If not attributed to the candidate, all these crores must be coming from the party, and Election Commission observers still need to keep an account of it. This is specially important in the context of the recommendation on the annual auditing of the accounts of political parties, and the publication thereof. Actually, ruling parties are in clover, since most of their money comes from skimming off funds from government schemes and projects, but this obviously cannot be declared. The Representation of the People Act needs to be amended to formally enable the Election Commission to question a party whose expenses, including travel expenses on campaigning national leaders in all the contested constituencies is in excess of the funds indicated in the annual audit, and to take action if necessary for the deregistration of the party.

The Election Commission has already provided for state funding of elections in the shape of free time given by Doordarshan and AIR to political parties. The allocation of time is on the basis of whether the parties are recognized national or regional parties as well as on their percentages of the votes polled in the previous elections. State funding is therefore no longer a serious point.

It is imperative to have the Election Commission and not the Speaker of a House to decide if some Members have defected, as we have seen partisan and demurring Speakers – as in UP some years ago.

The Law on defections is still permissive. It no longer allows splitting a political party for forming a new party, but splitting for merging with another party is still permissible if two-thirds of the party representatives are involved.

Most Indian political parties are inherently undemocratic. Historian Ramachandra Guha traces dynastic politics in India to Nehru's one weak moment

when he allowed Mrs. Gandhi one term as Congress President. While making a round of the political parties Guha sarcastically says the RJD should be known as Lalu, Mrs. Lalu and Co., the Janata Dal (Secular) as H.D. Deve Gowda and Sons; the National Congress Party as Sharad Pawar and Daughter Inc..... He adds that perhaps a dozen parties have become family firms.

Even when no clear dynastic strain can be located, autocratic office-bearers cheerfully dismiss each other on the slightest pretext, splitting the party and then asking the EC to determine which splinter group is the real party.

Most of all, there is no room for dissent, and this applies across the board. Dissenters have to leave the party, and almost invariably begin another party. Part of the reason why there are so many parties in India.

The majority of parties do not even have a list of their members, or details of contributions from members, if any. There were previously no office-bearers' elections. Now the parties report periodic elections and their outcomes as required under the newly-inserted Section-29A of the Representation of the People Act, 1951. But one suspects that many of these elections are rigged. It would be helpful therefore if there is a regulation by law on the process of democratization within political parties. The law would need to stipulate the appointment of independent observers for the necessary transparency in the process. The regulation could also include democratizing the process of selection of candidates. At present the candidates are mostly family members of the caucus, influential criminals and highest bidders.

Under the Symbols Order 1968, a party's registration is a precondition to its recognition. It is recognized as a national or regional party on the basis of its showing in the general elections, that is, in terms of its percentage of the votes polled in many States or just one or two States respectively. An errant political party's recognition cannot be withdrawn except where this is also warranted by

its performance in the previous elections. This has been set out in the Election Commission's order of 1992 on a petition from the Congress seeking deregistration and de-recognition of the BJP and Shiva Sena on the ground that these parties had indulged in religious activities opposed to the principles of secularism. In the same order the Election Commission held that it had no powers to deregister a party in the absence of a specific provision in the Representation of the People Act. Since an appeal before the Supreme Court was dismissed in limine, the only remedy is an amendment in the law specifically providing for a party's deregistration by the Election Commission for malpractices like inciting one group against another, exciting religious feelings etc. The amendment must provide for a bar on re-registration for, say, a period of five years. Deregistration is the only potentially effective penalty as for the period of deregistration, the party would be in a coma, and its candidates would have to contest as independents with whatever symbols they can get.

Surrogate advertisements, government-sponsored advertisements and political advertisements are not allowed by the Code of Conduct for political parties, and therefore the corresponding recommendations are superfluous.

Exit and opinion polls have been notoriously inaccurate, and so not very credible. Besides, they are relevant only to the middle class, and the present stipulation by the court that details like sample size, methodology etc. be disclosed, adequately meets the requirement.

Two inter-related recommendations remain- proportional representation for half the seats in Parliament and the State assemblies, and the existing first-past-the-post for the remaining 50%; and that under first-past-the-post a candidate, to win a seat, must secure 50% + 1 of the votes polled. The bane of first-past-the-post is that the winning candidate, even if he has secured one vote more than his closest rival, in a manner of speaking gets everything, while the other gets nothing. In a sense therefore, the rival's voters go unrepresented. The portion

given to proportional representation by contrast would ensure representation to most political parties, and even to important groups and opinions. This is essential for a general sense of participation in a plural society such as ours. It is worth noting that Nepal, which has just emerged from civil war and is composed of several ethnic groups, has stolen a march over us by not only opting for proportional representation in a majority of its seats, but by actually implementing it.

By insisting on 50% of the votes polled + 1 for the winning candidate, one is investing him with greater legitimacy. But that is the lesser point. What is capital is that this requirement would forever throw vote-bank politics out of the window. Because of a multiplicity of political parties, poor quality candidates and the liberal use of money to bolster such candidates, many candidates need only 30% of the votes polled or even less to win an election. Since this would usually translate to about 15% of the electorate, 85% of the electorate goes unrepresented. Every candidate, in striving for this 30% and keeping his flock intact for the elections, thrives on fractioning society, finding his own fraction and setting the bits and pieces at war with each other. It is a wonder the country is still together with every dirty trick used in fomenting election-time communal wars – religious, linguistic, regional, ethnic and so on. To secure 50% + 1 of the votes polled political parties would have to eschew divisive politics and field much better human beings appealing to a wider cross-section of society, as candidates. Better political parties and candidates would automatically take care of the problems of money, criminality and defections in politics. These last two recommendations therefore are the crucial ones to be pursued.

Electoral reforms through the legislative route have raised many hopes and provided much fodder for debate over the years, but have virtually not materialized. By contrast, contributions to electoral reforms by the Election Commission, the Judiciary and civil society have been very significant but except by the initiated, have gone almost unnoticed.

The Constitution and Representation of the People Acts 1950 and 1951 until 1989 took no cognizance of political parties, though one cannot think of a democracy without them. The Election Commission filled the vacuum with elaborate regulations on the creation and conduct of political parties which partook of the nature of subordinate legislation. One set relating to the registration and recognition of political parties is incorporated in the Election Symbols (Reservation and Allotment) Order 1968. The second set relates to the Model Code of Conduct. Initially just a list of dos and don'ts agreed upon by political parties at a time when politicians were less devious, it is now an electoral mower for reducing the governments of the day to the level of its competitors. Once elections are announced, governments are not allowed to make new appointments and transfers and postings, to take up new projects and to bring out self-embellishing advertisements. It also prohibits ministers from electioneering in the guise of official tours. Stripped to being a mere citizen, a minister cannot be met by local officialdom, use official transport or even government rest house accommodation unless he is next in the queue of applicants. There is a particularly close monitoring of the journeys of government aircraft and ministers have found it simpler to hire private helicopters.

The Election Commission's other major contribution to an electoral level playing-field aforementioned has been the free time given to political parties on Doordarshan and AIR, a significant example of state funding of elections.

Frustrated by not being able to secure any electoral reforms to filter out contestants with a criminal background, the Commission imposed the first affidavit on the candidate, requiring him to declare on oath details of his involvement or non-involvement in criminal cases.

With the requirement of 5 million personnel just to man polling stations in a general election, the Election Commission perforce has to use the state

machinery. How then does it ensure impartiality in the elections? By having its representative or the Chief Electoral Officer in each state. The CEO was not contemplated in the original scheme of the Representative of the People Act but was an improvisation subsequently recognized in the 1956 amendment of the Act. Gradually the Commission won the right to make the appointment of the CEO in consultation with the State Government, and not vice versa.

In the 1980s booth-capturing had become so rampant, especially in Bihar, that a small time politician who met me in office when I was Commissioner, Darbhanga, boasted he knew at least two hundred ways to capture a booth. The then CEC, T.N. Seshan realized that elections without impartial observers and substantial police and paramilitary forces from outside the state, had become a farce. But such personnel were not contemplated by the electoral law. So Seshan leaned on the State Governments and Government of India to provide them. They both played at being cute, each referring him to the other. He then decided on no more elections until the matter was settled. It went to the Supreme Court which compelled the Government of India to provide the Commission with observers and police forces. But police forces were still wasted, being put in the wrong places, until the CEOs and District Election Officers were involved in the detailed disposition of such forces. In the Jammu and Kashmir 2002 elections the Election Commission refused to have formal foreign observers, but in effect encouraged foreign diplomats to function as informal observers, to very good effect.

In very unusual circumstances, even polling parties, wholly or partially, have been imported from outside. Half of them in the Jammu and Kashmir 2002 elections came from UP and Punjab.

Combating electoral malpractices, the Commission also had to bring in technological innovations. The electronic voting machine was an outcome of a specific demand placed with the Electronics Corp. of India Ltd., in 1977. The

present version comes for about Rs.10,000/- is virtually tamper proof, and the most effective in the world. It has done away with the fiddling of ballot papers, especially at the time of counting, and reduced counting from days to hours.

To check impersonation, the Commission introduced the System of electoral photo identity cards. This has helped, but it is difficult to maintain the momentum of generation of cards to keep up with the ever-increasing number of new voters. The ID card will not be complete proof against impersonation until it has the voter's thumb impression on it, and each polling station is equipped with a machine to check each voter's thumb impression. In the Jammu and Kashmir elections, since the mass generation of ID cards would have put voters at the risk of being targeted by militants, voters were allowed to bring their photographs to be affixed on specially made ID Cards.

As long as the trouble in Jammu and Kashmir lasts, there cannot be a proper election without confining to barracks ex-militants who are the property of the police and are used to eliminate anyone the police or the government do not like. The Commission found its own way to identify these ex-militants. Evidently the Commission will in future have to deal similarly with threatening violent communal groups.

The Court's main contribution to electoral reforms has been in encouraging the Election Commission to innovate where there are no legal signposts to indicate its jurisdiction and the limits thereof. This is well set out by the Supreme Court in Mohinder Singh Gill versus Chief Election Commissioners (1978) I SSC 405 "-----
----- Once the appointment is made by the President, the Election Commission remains insulated from extraneous influences, and that cannot be achieved unless it has an amplitude of powers in the conduct of the elections – of course in accordance with existing laws. But where these are absent, and yet a situation has to be tackled, the CEC has not to fold his hands and pray to god for divine inspiration to enable him to exercise his functions and to perform his duties

or to look to any external authority for the grant of powers to deal with the situation. He must lawfully exercise his power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly, in a free and fair manner.....”.

Though the legality of the Code of Conduct and Symbols order were often contested, the petitions were not allowed. Similarly, Election Commission directives transferring questionable officers on the eve of elections have often been challenged, but have never been allowed to sustain. Reference has already been made to how the Supreme Court intervened and got the Commission its observers and necessary police forces. On petition from civil society the court also added some more items to the affidavit filed by candidates.

Civil society has taken the burden of adding items to the candidate's affidavit. It has been particularly alert about making the contents available to the voters before polling, and analyzing the contents and comparing affidavits filed in succeeding elections for long-term academic study. It has also initiated the thorough scrutiny of the electoral roll, ward by ward and village by village, the roll being consistently manipulated by parties in power.

As we have seen, the yield from reforms requiring amendment of the law is not worth mentioning. Nevertheless, the vital reforms needed can only come about by this route. There is a limit to the willingness, no matter how strong the provocation, of a responsible judiciary within a system of checks and balances, to legislate on behalf of the legislature. And the Election Commission has just about exhausted its capacity for creative encroachment on no-man's land within the over all boundaries of the law. But governments and legislatures, which are meant to check each other invariably unite to avoid electoral reforms. In the circumstances, it is left to civil society to press for the reforms. The Indian Constitution does not provide for a formal referendum. But no-one can prevent

an informal referendum through modern electronic means. If the outcome is millions behind electoral reforms, politicians would have to give in.
