CRIMINALISATION OF POLITICS IN INDIA: DID THE SUPREME COURT MISS THE OPPORTUNITY?

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ABSTRACT

Criminalisation of politics has been a perennial problem that Indian democracy is facing. Though various committees have recommended various measures including amendment in the Representation of Peoples Act, 1951, the government with different political ideologies have not taken any steps to decriminalise the politics. In 2024, the election of the biggest democracy will again face a similar challenge where people with criminal records of heinous offences may not only contest elections but may also become ministers. This paper will inquire into the problem of the unholy nexus of politics with crime and try to propose possible solutions to the problem.

Keywords: *Political Ideologies, Peoples Act, Perennial problem, democracy,*

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I. Introduction

इमदेवा असपत्रं सुवध्यं महते क्षत्राय महते जयेष्ठाय महते जानराज्यायेंद्रस्येदाय

[यजुर्वेद (9/40) अर्थात 'राजा का निर्वाचन प्रजा इसी प्रयोजन से करती है कि सब प्रकार की विपत्तियों से वह प्रजा की रक्षा करें, वह सबसे ज्येष्ठ हो अर्थात सर्वोपरि हो, उसके नेतृत्व में जनता का प्रभुत्व कायम रहे। [people choose their king with the purpose that he will secure the people from all difficulties, he will be senior or supreme, in his leadership the sovereignty of people will be established]

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The establishment of a government by rule of law is supposed to be the best form because it is against the cruel and rigid use of the power and favourable to the just use of freedom. This is the gist of democracy. Condition precedent for a democracy is free and fair election. The aims and aspirations of common people glimpses through elections. They elect their representatives who create legislature. Therefore, election is the means by which the rule by the people, for the people and of the people is ensured. In our country we the people have been in power since the last seven decades. This is something we need to be proud of. This may be treated as the biggest achievement for India because the baton of democracy is lighting the path of civilisation without any hindrance though India has to face various adverse and defeating circumstances. This is more important in the light of the fact that the light of democracy in our neighbouring countries does not repose much confidence. The electoral process or democratic values in Pakistan, Myanmar, China, Afghanistan, Nepal etc were subject to various undemocratic forces. On the other hand India, as the biggest democracy has emerged as a source of inspiration. As no system can be perfect so is our electoral process. One of the biggest challenges to our electoral process is that it is still driven by those people who have hold over politics, or money, or media or mussel power. Biggest threat to the electoral process and democracy is criminalisation of politics. "Criminalization of politics means the "participation of criminals in the electoral process."[1]

II. Different committees

In order to deal with the menace of crime and politics various committees and commissions have dedicated their time, energy and expertise. In the time of Lal Bahadur Shastri as Home Minister Santham committee (1964)[2] was first to examine the gravity of the menace of corruption. However, it was not exclusively on criminalisation of politics. In 1970, a parliamentary committee was constituted but it could not survive because of dissolution of Lok Sabha. In 1974, Tarkunde Committee was also set up. However, the committee that earned the name for proposing solid

[1] Administrative Reforms Commission, "Second Administrative Reforms Commission" 77 (2008), *available at:* https://darpg.gov.in/sites/default/files/Second_AR_Summary.pdf (last visited on March 22nd, 2023).

[2] Government of India, "Report of the Committee on Prevention of Corruption" (Ministry of Home Affairs, 1964), *available at:* https://www.cvc.gov.in/sites/default/files/scr_rpt_cvc.pdf (last visited on Jan. 26, 2023). The Report of the Committee on Prevention of Corruption, popularly known as the Santhanam Committee, is a 304-page report which inquired about the efficacy of laws to deal with corruption (last visited on March 22nd, 2023).

reforms in the electoral process was the Dinesh Goswami committee (1990).[3] The relationship between politics and crime was now manifest and the politicians could be found defending their soft approach to criminalisation of politics. In 1993, NN Vohra committee[4] disclosed that the relationship between them is not only sweet but is very intimate. Indeed, a parallel regime of *mafia* was running in the government and social sector. Indrajit Gupta Committee Report on State Funding of Elections (1998) supported state funding to check the dominance of money and mussel power. One of the members was Dr Manmohan Singh who became prime minister two times but no step could be taken. The huge investment and practical difficulties seem to be the reason beside lack of strong will. Law Commission Report No. 170 - was on the Reform of The Electoral Laws, 1999.[5] The National Commission to Review the Working of the Constitution (2002) in its first volume considered the issue of criminalisation and suggested permanent prohibition of contesting elections if someone is convicted of heinous offences[6] and Second Administrative Reforms Commission (2008) also submitted its report on issues of ethics in governance.[7] In 2014, the Law Commission of India submitted its report on "Electoral Disqualification" and in 2015 on "Electoral Reforms".[8]

III. Legal Status

Now the question is what is the law regime on criminalisation of politics. When can a person be disqualified from becoming a member of legislature be it central or State. Article 102 and 191 of the constitution and section 8 of the Representation of People Act, 1951 [RPA] are relevant here. Section 8 deals with "disqualification on conviction for certain offences". It covers three categories of persons who can be disqualified:

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[3] Government of India, "Report of the Committee on Electoral Reforms" (Ministry of Law and Justice, 1990), *available at:* https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf (last visited on March 22nd, 2023).
[4] Government of India, "Vohra Committee Report" (Ministry of Home Affairs, 1993), *available at:* https://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT_0.pdf (last visited on Jan. 26, 2023).
[5] Law Commission of India, "170th Report on Reform of the Electoral Laws" (May, 1999).
[6] National Commission to Review the Working of the Constitution, "Report of the National Commission to Review the Working of the Constitution" (2002), *available at:* https://legalaffairs.gov.in/sites/default/files/chapter%204.pdf (last visited on March 22nd, 2023). Point 4.12 is on "Criminalisation".
[7] Second Administrative Reforms Commission, "4th Report on Ethics in Governance" (2007), *available at:* https://darpg.gov.in/en/arc-reports (last visited on Jan. 26, 2023).
[8] *Available at:* https://lawcommissionofindia.nic.in/cat_ELECTORAL_REFORMS/ (last visited on March 22nd, 2023).

First categories contain certain types of people like -

(1) Those convicted for offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language
(2) Those convicted for certain offences concerning elections
(3) Those convicted for the Protection of Civil Rights Act, 1955

Second category covers those who have been convicted for an offence with punishment of two years or more, third category contains those who are convicted for corrupt practices during elections. The first and third category of people are disqualified for six years after he is released from prison serving his sentence of punishment while the second category are disqualified for five years.

IV. Analysis of section 8 of Representation of People Act

The biggest drawback of this law is that this law activates when the person is convicted and punishment is declared as mentioned earlier. The people who contest elections are resourceful. They are able to linger on the matter for years and decades. When a chargesheet is filed against ministers, the trial continues for years and years. The judicial process is tunnel of torture and *bhulbhulaiya* of law. The proviso to section 8 of RPA is more problematic, and has been declared unconstitutional in the case of *Lily Thomas* v. *Union of India*.[9]

This provision needs to be removed completely by the Parliament. As per section 8(4) if a person is already a member of a legislature when he is declared convicted, then the disqualification is still not applicable if his appeal is accepted in the high court. In other words, if a present member of the Parliament cannot be disqualified until he is convicted of certain offences which generally takes many years. Even if he is convicted for a criminal offence, he cannot be disqualified. The only thing he is required to do is to appeal in the higher court against his conviction. His appeal will go from trial court to high court and then to the Supreme court. Meanwhile he can continue to remain as a member of Parliament or legislative assembly. Indeed, he can be a minister. If at the time of conviction, he is a candidate for election for MP and MLA his election is declared void.

[9] (2013) 7 SCC 653 (hereinafter *Lily Thomas*).

V. Relevant Decisions

Criminalisation of politics has been addressed by the Supreme Court in a few decisions which are widely discussed by academia and media. It is desirable to highlight those cases which has skipped the attention but exhibit its significance for the issue being discussed. First significant case is *Rakesh Singh* v. *Himachal Pradesh*.[10] In June, 1978 a murder was committed in Himachal Pradesh. The District and Sessions Judge has convicted Rakesh Singh for murder. After his conviction Rakesh Singh became the member of legislative assembly of Himachal Pradesh, but his election was declared cancelled. Had he been convicted for murder after winning the election for MLA, he could have continued as legislator. He could have continued till all his appeals from all courts were disposed of finally. One need not be a genius to understand the time it would have taken to decide the case conclusively. *Rakesh Singh* case was decided by the Supreme court in 1996 *i.e.,* eighteen years after the incident of murder. Had Rakesh Singh been MLA prior to the judgement of the trial court, he could have been an MLA, and would have decided the laws to be made for the public. He could have been a minister and a senior politician. *Arun Shauri* in his various articles have highlighted the problem. In such a situation it is essential that something should be done to check this unhealthy practice which has the potential to weaken democratic values. Those people against whom charges of three cases of heinous offences like murder, kidnapping, rape etc [where punishment is seven years or more] are framed by the court, ought to be stopped to contest elections. In ancient days the people expected the king to secure him from all types of menaces. However, the criminalisation of politics has posed a situation where certain politicians, MPs or MLAs have themselves become a menace to the democracy and the society. Though a number of committees and commissions were made to address the issue of criminalisation of politics and the political parties have also expressed its concerns, no concrete step has been taken either at the level of political parties or by the Parliament or the executive. Fortunately, in *Lily Thomas*, the Supreme court has addressed the concern as under:

> 19. The result of our aforesaid discussion is that the affirmative words used in articles 102(1)(e) and 191(1)(e) confer power on Parliament to make one law laying down the same disqualifications for a person who is to be chosen as member of either House of Parliament or as a member of the Legislative

[10] AIR 1996 SC 3173; 1996 (1) Suppl. SCR 101; 1996 (3) SCALE 346 (hereinafter *Rakesh Singh)*

> Assembly or Legislative Council of a State and for a person who is a sitting member of a House of Parliament or a House of the State Legislature and the words in articles 101(3)(a) and 190(3)(a) of the Constitution put express limitations on such powers of the Parliament to defer the date on which the disqualifications would have effect. Accordingly, sub-section (4) of Section 8 of the Act which carves out a saving in the case of sitting members of Parliament or State Legislature from the disqualifications under sub-sections (1), (2) and (3) of Section 8 of the Act or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature is beyond the powers conferred on Parliament by the Constitution.

This judgement of *Lily Thomas* was one of the turning points in the march of de-criminalisation of politics. Since then, many political powers, *viz.*, J. Jayalalitha, Lalu Prasad Yadav, etc. have been disqualified. Supreme Court in the case of *Public Interest Foundation* v. *Union of India*[11] requested the Law Commission of India to examine the possibilities of decriminalisation of politics, *viz.*, "Whether disqualification should be triggered upon conviction as it exists today or upon framing of charges by the court or upon the presentation of the report by the Investigating Officer under section 173 of the Code of Criminal procedure?"

Dr. Arun Shourie has rightly pointed out the case of *Rama Narang* v. *Naresh Narang*[12] to show a way out to deal with the issue. The issue before the court was, if the managing director [MD] of a company was found guilty of moral turpitude or corruption does he ceases to continue as MD? Whether such conviction disqualifies him from holding the post of MD. It was argued that the conviction is not final and on appeal his conviction can be set aside. He should be granted the benefit of appeal where he can restore his innocence. Once he files his appeal, the disqualification must be ineffective. The Supreme court declined to honour this argument because this will frustrate the very purpose of making it effective. The observation of Ahmadi, J. and RS Sahai, J. is very pertinent and therefore reproduced here:

[11] 2014 (3) SCALE 563; W.P. (Civil) 536 of 2011, Order dated 16.12.2013,

[12] 1995 (1) SCR 456; 1995 (2) SCC 513; 1995 (1) SCALE 276; 1995 (1) JT 515.

> The law considers it unwise to appoint or continue the appointment of a person *guilty of an offence involving moral turpitude* to be entrusted or continued to be entrusted with the *affairs of any company* as that would not be interests of the share-holders or for that matter even in public interest. As a matter of public policy the law bars the entry of such a person as Managing Director of a company and insists that if he is already in position he should forthwith be removed from that position.
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> The purpose of [..the law..][13] is to protect the interest of the shareholders and to ensure that the management of the affairs of the company and its control is not in the hands of a person who has been found by a competent court to be guilty of an offence involving moral turpitude and has been sentenced to suffer imprisonment for the said crime. In the case of a Director who is generally not in-charge of the day to day management of the company affairs, the law is not as strict as in the case of a Managing Director who runs the affairs of the company and remains in overall charge of the business carried on by the company. Such a person must be above board and beyond suspicion.

After referring to the case of *Rama Narang, noted* journalist and distinguished author Arun Shauri questions whether the above arguments are less justifiable and weak in case of representatives. If the above principles of probity in public life are applicable to the managing director of a hotel company, are not they applicable with greater force and weight to a minister? Therefore, the legislator, who have themselves procured this facility that even if they were convicted of a heinous offence, if an appeal is pending and till he is convicted conclusively by the court, he can remain as the representative of the people. It is better to remove such a protective umbrella. In cases of moral turpitude, a manging director has to leave his post mandatorily but a representative of the people can stay like MP or MLA even if he is convicted of murder or rape etc.

[13] The Companies Act, 1956 (Act No. 1 of 1956), s. 267.

VI. When should a person be debarred or disqualified

There may be three stages when a person can be prohibited to become or continue as our representative in case of criminal law. It can be (i) when an FIR is registered (ii) when charges are framed by the court (iii) at first conviction by any court.

(i) when an FIR is registered -

This is a very ideal proposal but practically very difficult to enforce. As per the constitution bench judgement of *Lalita Kumari* v. *Government of UP* [2014] it is mandatory to register FIR if facts disclose the commission of any cognizable offence. In politics there are great rivalries. FIR will be misused as a weapon to stop political opponents especially by the party State. Concocted story can be made in such a fashion that the judicial process can also be abused to direct the police to register an FIR in some cases. Number of FIRs in each district will increase multiple times and these will be challenged in the high courts and the Supreme court. The burden of courts will also be enhanced and each case will be of urgent nature. However, experts like Arun Shauri suggest that FIR is the right time when a politician should be stopped from entering into an electoral battle or disqualified as a legislator. He argues forcefully that if FIR becomes threshold, the legislators will make laws so that the abuse of wrong FIR can be minimised. They will ensure that the law is not enforced in such a way that innocent persons are implicated in false cases. This will lead to the greatest lobby for reform in the criminal justice system. This view is ambitious and idealistic but not acceptable for the reasons afore-stated.

(ii) at first conviction by any court- This has already been discussed earlier.

(iii) when charges are framed by the court -

When an FIR is registered the police officer begins investigation and concludes it. He may reach the conclusion that there is no prosecutable evidence against the accused] or it may find sufficient evidence to prosecute. If the Police finds sufficient evidence against the candidate the trial court frames the charges. In framing charges, the court applies judicial mind. At this stage, he may be stopped to contest the election or disqualified. This may be done only in heinous offences like murder, rape, fraud, forgery, abduction, corruption etc. The Election Commission of India in

1997,[14] and the Law commission of India in 1999 in its 170th report recommended the same.[15] Similar proposal was made by the National Commission to Review of the Working of the Constitution (2002),[16] The Second Administrative Reforms Commission in its fourth report on Ethics in Governance (2008),[17] and in 2014 the Law Commission in its 244th report has also supported this proposal,[18] though every committee or commission has a couple of caveats. This is high time the proposal of the Law Commission be made a law by the Parliament. If Parliament fails to do so, someday the Supreme Court will interfere and make similar law.

VII. *Manoj Narula* case[19]

Criminalisation of politics at a higher level was raised in the case of *Manoj Narula* v. *Union of India*.[20] When a person becomes Prime Minister or the Chief Minister he chooses his ministers. The Union council of ministers (on March 24, 2006 when the petition came for hearing) consisted of ministers who were suspected in serious and heinous crimes. According to article 75 (1) of the Constitution of India, "The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister." It was found that persons with heinous criminal cases have been chosen as ministers by the PM because of political compulsions and electoral benefits.[21] It was argued before the constitution bench of the Supreme Court that the Government ought to be directed not to make such persons as ministers. For this purpose, the Supreme Court should interpret article 75(1) as "ministers with no criminal background". It was also argued that there are implied limitations and it is not constitutionally permitted to suggest the name of a person who is facing a criminal trial and in whose case charge/charges have been framed. Supportive argument to the above was that:[22]

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[14] Law Commission of India, "170th Report on Reform of the Electoral Laws" 24 (May, 1999). https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081612.pdf at 24 (last visited on March 22nd, 2023).

[15] *Id.* at 23.
[16] *Ibid*.
[17] *Id.* at 25.
[18] *Id*. at 52. A proposed amendment under PCA has also been made for incorporation of section 8B.
[19] Anurag Deep, "Interpretation of Statute" 50 Annual Survey of Indian Law 767-769 (2014). This part of the discussion is credited to the work of learned author of *Annual Survey of Indian Law*.
[20] (2014) 9 SCC 1. The case was unanimously decided by a constitution bench comprising of Dipak Misra, R.M. Lodha, Sharad Arvind Bobde, Kurian Joseph, Madan B. Lokur. Justice Dipak Misra delivered the judgement.
[21] Editorial, "Mr PM, Taslimuddin is a shame" *The Times of India*, Nov. 10, 2004, *available at:* https://timesofindia.indiatimes.com/india/mr-pm-taslimuddin-is-a-shame/articleshow/918425.cms (last visited on March 22nd, 2023).
[22] *Supra* note 20, at para 26.

> purposive interpretation of the Constitution ... can preserve, protect and defend the Constitution regardless of the political impact. ...if a *constitutional provision is silent* on a particular subject, this Court can necessarily issue directions or orders by interpretative process to fill up the vacuum or void till the law is suitably enacted. The broad purpose and the general scheme of every provision of the Constitution has to be interpreted, regard being had to the history, objects and result which it seeks to achieve.

However, the Supreme Court declined to interpret it in this manner. The court rejected the argument of *purposive interpretation*, doctrine of implied limitation and principle of constitutional silence.

The counter argument was to decline the idea on the basis that in foreign jurisdiction there are express provisions for it. The relevant passage is as under:

> Mr. Andhyarujina has further submitted that section 44(4)(ii) of the Australian Constitution puts a limitation on the member of the House which travels beyond conviction in a criminal case, for the said provision provides that any person who has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer, would be incapable of being chosen or of sitting as a senator or a member of the House of Representatives. Learned counsel has commended us to Lane's Commentary on the Australian Constitution, 1986 to highlight that this is an exceptional provision in a Constitution which disqualifies a person from being a Member of Parliament even if he is not convicted but likely to be subject to a sentence for the prescribed offence, but in the absence of such a provision in our Constitution or in law made by the Parliament, the Court cannot introduce such an aspect on the bedrock of propriety.

The position in Britain was narrated as under:

> U.K. Representation of Peoples Act, 1981 which provides that a person who is sentenced or ordered to be imprisoned or detained indefinitely or for more than

> one year is disqualified and his election is rendered void and the seat of such a member is vacated.

The Supreme Court examined these arguments and counter arguments. It addressed this issue as under:

> ..we are of the convinced opinion that when there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election*, by interpretative process, it is difficult to read the prohibition into article 75(1)* or, for that matter, into article 164(1) to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. In the absence of any constitutional prohibition or statutory embargo, such *disqualification,* in our considered opinion, *cannot be read into article 75(1) or article 164(1) of the Constitution*. [Emphasis Added]

On the point of the principle of constitutional silence or abeyance(when the constitution is silent the court may interpret) the constitution bench acknowledged the significance as under:[23]

> The next principle that can be thought of is constitutional silence or silence of the Constitution or constitutional abeyance. The said principle is a progressive one and is applied as a recognized advanced constitutional practice. It has been recognized by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest.

The court, however, declined to apply this principle as under:

> The question that is to be posed here is whether taking recourse to this doctrine for the purpose of advancing constitutional culture, can a court read a disqualification to the already expressed disqualifications provided under the

[23] The court illustrated *locus standi* for the purpose of development of Public Interest Litigation, procedural safeguards in the matter of adoption of Indian children by foreigners in the case of *Laxmi Kant Pandey* v. *Union of India*, *D.K. Basu*, *Vishakha* where the court applied the principle of constitutional silence.

Constitution and the 1951 Act. The answer has to be in the inevitable negative, for there are express provisions stating the disqualifications and second, it would tantamount to crossing the boundaries of judicial review.

VII. Concluding Remarks

The Manoj Narula case was an opportunity for the Supreme Court to check criminalisation of politics. It is basically the constitutional business of the legislature to make necessary changes in law. However, the Parliament did nothing to check the menace of criminalisation of politics which is against rule of law, democratic values, and probity in public life. In such a situation it was the responsibility of the Supreme Court to take charge of the situation as the other wings of the State *i.e.,* legislature and executives are not interested to address the menace. A number of reports have suggested modifications in the Representation of People Act, 1951 especially section 8. But the Parliament remained unmoved. It was the *Lily Thomas* case which declared section 8(4) as unconstitutional. The same approach was not followed in the *Manoj Narula* case. Unlike these two wings (legislature and executive) it is the Supreme Court which is the guardian of the Constitution. It is obliged to act as the carrier of the intention of the architects of the Constitution. The architects never thought that the people with murder and rape charges would be minister at union and state level. The intention of the architect of the constitution can be traced from the speech of Dr Rajendra Prasad on November 26, 1949 that "If the people who are elected are capable and men of character and integrity, then they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country."[24] 2014 onwards has witnessed a sea change in the policy of the government. The NDA government has taken unprecedented decisions for the better interest of India. It has also exhibited its commitment towards the policy of zero tolerance against crime at higher level and corruption. Hope that electoral reforms in the form of decriminalisation of politics as suggested by various committees will take a kick start. If the reforms are not taken up, it will be an open invitation to the judiciary to pass judicial legislation.

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[24] Constituent Assembly Debates on Nov. 29, 1949 *available at:* https://eparlib.nic.in/bitstream/123456789/763285/1/cad_25-11-1949.pdf (last visited on March 22nd, 2023).
; See also Law Commission of India, "244th Report on Electoral Disqualifications" 12 (2014).