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Criminalization of Politics and Voters' Exploitation : The Judicial Response

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Abstract

It is well accepted fact that huge election costs are the major cause of corruption in India. A candidate spends a lot of money to get elected and even if he gets elected, the total salary he gets during his term as a legislator will be meager compared to his election expenses. However, criminal activities help in generating a huge amount of money to fund the elections. Around one third members of the current Parliament have criminal cases filed against them. The judiciary in India has, therefore, taken some commendable measures to reform the electoral process so that the quality of candidates contesting elections must be improved for better governance.

Keywords: Criminalization, Voter, Judicial response, Politics, Representation of People Act.

Introduction

It is commonly seen, now a days, that the criminals are taking part or contesting elections in Parliamentary, legislative and even Panchayat elections. This is happening because of the nexus between the criminals and the few top politicians. The Vohra Committee Report in 1993, and the report of the National Commission to Review the Working of the Constitution (NCRWC) in 2002 confirmed that there has been a growing trend of persons with extensive criminal backgrounds entering politics. Politicians have been usually offered to win elections seeking certain undue benefit from them. These kind of practices have been described as corrupt practices under Section 123 of the Representation of People Act, 1951. In order to root out these practices, the court, many a times, has played an important role discussed as under.

Objective of the Study

The main objective of the study is to make an analysis of judicial efforts made so far in order to eradicate the criminalization of politics and to create a positive atmosphere for free and fair elections in India.

Review of Literature

A book entitled, "Criminal Behaviour – A Psychological Approach", fifth edition, 2012 has been authoured by Curt R. Bartol and published by Prentice Hall Inc., U.S.A. This literature was extremely helpful in understanding the human nature and criminal theories, which explain the phenomenon of criminalization of politics.

Recently in the year 2017 a book written by Dr. R. K. Upadhyay and Dr. (Mrs.) Sangita Upadhyay under the title Corrupt Practices In Indian Electoral System : A Socio-Legal Analysis published by Mohit Publications, New Delhi. In this book the authours have tried to make an analysis of the legal provisions and judicial behavior on the issues of corrupt and ill-practices prevailing in elections. The authours have given various suggestions for the eradication of ill-practices in elections. They have written categorically at page 341 of their book that criminalization of politics is affecting not only democratic and political process but also interfering in the administration of criminal justice. To avoid criminals in politics, unless urgent and drastic steps were taken to break the nexus between politicians and criminals the very existence of democracy will be at stake. The need of the hour is to have value based politics. This book is helpful to create a legal awareness among the common man, academicians, and lawyers on the corrupt practices in election including criminalization of politics and to give solution to these ill-practices.

Method of the Study

To accomplish the present study analytical method has been used with the help of relevant case laws and literature available in the form of report, journals, commentaries, and cases against the criminalization of

politics in election so that a free and fair elections may be conducted in India.

Role of Judiciary

The judiciary has sought to curb this menace of criminalization of politics through several seminal judgments and attendant directions to the government and the Election Commission primarily based on the aforesaid provisions. Specifically, orders of the Supreme Court seeking to engender a cleaner polity can be classified into three types: *first,* decisions that introduce transparency into the electoral process; *second*, those that foster greater accountability for holders of public office; *third*, judgments that seek to stamp out corruption in public life. The discussion below is not meant to be an exhaustive account; it merely illustrates the trends in Supreme Court jurisprudence relating to the question of de-criminalization of politics. In *Manoj Nurula* v. *Union of India*[1] the Supreme Court held that no directions can be issued to the government on the expectations of good governance by people of India but Prime Minister and Chief Ministers are constitutionally advised to avoid choosing persons as Ministers who have criminal antecedents, especially those facing charges in respect of serious or heinous criminal offences or offences pertaining to corruption.

In *Union of India* v. *Association for Democratic Reforms*[2] the Supreme Court directed the Election Commission to call for certain information on affidavit of each candidate contesting for Parliamentary or State elections. Particularly relevant to the question of criminalization, it mandated that such information includes whether the candidate is convicted/acquitted/discharged of any criminal offence in the past, and if convicted, the quantum of punishment; and whether prior to six months of filing of nomination, the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by a court. The constitutional justification for such a direction was the fundamental right of electors to know the antecedents of the candidates who are contesting for public office. Such right to know, the Court held is a salient facet, and the foundation for the meaningful exercise of the freedom of speech and expression guaranteed to all citizens under Article 19(1)(a) of the Constitution.

Again in *People's Union for Civil Liberties* v. *Union of India*[3] *(hereinafter 'PUCL')* the Supreme Court struck down Section 33B of the Representation of People (Third Amendment) Act, 2002 which sought to limit the ambit of operation of the earlier Supreme Court order in the ADR case. Specifically it provided that only the information that was required to be disclosed under the Amendment Act would have to be furnished by candidates and not pursuant to any other order or direction. This meant, in practical terms, that the assets and liabilities, educational qualifications and the cases in which he is acquitted or discharged of criminal offences would not have to be disclosed. Striking this down, the Court held that the provision nullified the previous order of the Court, infringed the right of electors' to know, a constituent of the fundamental right to free speech and expression and hindered free and fair elections which is part of the basic structure of the Constitution. It is pursuant to these two orders that criminal antecedents of all candidates in elections are a matter of public record, allowing voters to make an informed choice.

At the same time, the Supreme Court has also sought to foster greater accountability for those holding elected office. In *Lily Thomas* v. *Union of India*[4] the Court held that Section 8(4) of the RPA, which allows MPs and MLAs who are convicted while serving as members to continue in office till an appeal against such conviction is disposed of, is unconstitutional. Two justifications were offered — first, Parliament does not have the competence to provide different grounds for disqualification of applicants for membership and sitting members; second, deferring the date from which disqualification commences is unconstitutional in light of Articles 101(3) and 190(3) of our Constitution, which mandate that the seat of a member will become vacant automatically on disqualification.

Again in *People's Union for Civil Liberties* v. *Union of India*[5] (hereinafter 'NOTA'), the court held that the provisions of the Conduct of Election Rules, 1961, which require mandatory disclosure of a person's identity in case he intends to register a no-vote, is unconstitutional for being violative of his freedom of expression, which includes his right to freely choose a candidate or reject all candidates, arbitrary given that no analogous requirement of disclosure exists when a positive vote is registered, and illegal given its patent violation of the need for secrecy in elections provided in the Representation of People Act and widely recognized as crucial for free and fair elections. Thus by allowing voters to express their dissatisfaction with candidates from their constituency for any reason whatsoever, the Supreme Court order has a significant impact in fostering greater accountability for incumbent office-holders. When its impact is combined with the decision in Lily Thomas, it is clear that the net effect of these judgments is to make it more onerous for criminal elements entrenched in Parliament from continuing in their positions.

The Supreme Court has taken several steps for institutional reform to sever the connection between crime and politics. In *Vineet Narain* v. *Union of India*[6] a case concerning the inertia of the Central Bureau of Investigation (CBI) in investigating matters arising out of certain seized documents known as the 'Jain diaries' which disclosed a nexus between politicians, bureaucrats and criminals, who were recipients of money from unlawful sources, the Supreme Court used the power of continuing mandamus to direct large-scale institutional reform in the vigilance and investigation apparatus in the country. It directed the Government of India to grant statutory status to the Central Vigilance Commission (CVC), laid down the conditions necessary for the independent functioning of the CBI, specified a selection process for the Director, Enforcement Directorate (ED), called for the creation of an

independent prosecuting agency and a high-powered nodal agency to co-ordinate action in cases where a politico-bureaucrat-criminal nexus became apparent. These steps thus mandated a complete overhaul of the investigation and prosecution of criminal cases involving holders of public office.

Addressing the problem of delays in obtaining sanctions for prosecuting public servants in corruption cases, *Vineet Narain* also set down a time limit of three months for grant of such sanction. This directive was endorsed by the Supreme Court in *Subramanium Swamy* v. *Manmohan Singh*[7], where the Court went on to suggest the restructuring of Section 19 of the Prevention of Corruption Act such that sanction for prosecution will be deemed to have been granted by the concerned authority at the expiry of the extended time limit of four months. In these and other cases[8], the Supreme Court has attempted to facilitate the prosecution of criminal activity, specifically corruption, in the sphere of governance.

In *Krisnamoorthy* v. *Sivakumar*[9] the validity of election was called in question on the sole ground that Appellant had filed a false declaration suppressing the details of cases pending against him and therefore, his nomination deserved to be rejected, since such disclosure was made mandatory by a notification bearing S.O. No. 43/2006/TNSEC//EG dated 01.09.2006. Election Tribunal had already declared his election null and void and decision was uphold by Madras High Court. Krisnamoorthy came to the Supreme Court in appeal challenging the same. The judgment was delivered by division Bench of Justice Dipak Misra and Justice Prafull C Pant. The Supreme Court held that suppression or non-disclosure of information about serious crimes by a candidate at the time of filing nomination interferes with the voters' right to make an informed choice and the election of such a candidate is liable to be set aside. The apex court, while dismissing the appeal by Krishnamurthy said that :

As a candidate has the special knowledge of the pending cases against him where cognizance has been taken or charges have been framed and there is non-disclosure on his part, it would amount to undue influence. Therefore, election is to be declared null and void by the Election Tribunal under Section 100(1)(b) of the Representation of People's Act, 1951 is valid. Concealment or suppression of this nature deprives the voters to make an informed and advised choice as a consequence of which it would come within the compartment of direct or indirect interference or attempt to interfere with the free exercise of the right to vote by the electorate, on the part of the candidate[10].

Supreme Court Asked To Government : Frame Law to Stop Practise

Recently, in *Public Interest Foundation* v. *Union of* India[11] the Supreme Court on 25th September, 2018 left it to Parliament to "cure the malignancy" of criminalization of politics by making a law to ensure that persons facing serious criminal cases do not enter the political arena as the "polluted stream of politics" needs to be cleansed. Holding that criminalization of politics is an "extremely disastrous and lamentable situation", the apex court said this "unsettlingly increasing trend" in the country has the propensity to "send shivers down the spine of a constitutional democracy". It said the nation was "eagerly" waiting for such legislation as the society has legitimate expectation to be governed by proper constitutional governance and citizens in a democracy cannot be compelled to stand as "silent, deaf and mute spectators" to corruption by projecting themselves as helpless. The Court said that a law should be made by Parliament which make mandatory for political parties to remove leaders accused of "heinous and grievous" crimes.

Criminalization of Politics: Fatal to the Democracy

A five-judge Constitution bench headed by Chief Justice Dipak Misra said malignancy of criminalization of politics was "not incurable" but the issue was required to be dealt with soon before it becomes "fatal" to the democracy. Passing a slew of directions aimed at decriminalization of politics, giving citizens an "informed choice" and infusing a culture of purity in politics, the bench said that increasing trend of criminalization of politics tends to disrupt constitutional ethos and strikes at the very root of our democratic form of government. "A time has come that the Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream," said the bench, which also comprised Justices R F Nariman, A M Khanwilkar, D Y Chandrachud and Indu Malhotra. "We are sure, the law making wing of the democracy of this country will take it upon itself to cure the malignancy," it said. It also recommended that Parliament bring out a "strong law" whereby it would be mandatory for the political parties to revoke membership of persons against whom charges were framed in heinous and grievous offences and not to set up such persons in elections for Parliament as also State Assemblies.

The bench directed that each contesting candidate will have to fill up the form provided by the Election Commission of India and he or she will have to state "in bold letters" about the criminal cases pending against the candidate. "If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her," it said, adding that "the concerned political party shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents". The Apex Court also directed that candidate and the concerned political party will have to issue a declaration in widely circulated newspapers in the locality and in electronic media about his or her antecedents. "When we say wide publicity, we mean that the same shall be done at least thrice after filing of the nomination papers," it said.

A Nation Agonized

The bench said that complete information about criminal antecedents of the candidates forms the "bedrock of wise decision-making and informed choice by the citizenry" as informed choice was the cornerstone to have a pure and strong democracy. "The voters cry for systematic sustenance of constitutionalism. The country feels agonized when

money and muscle power become the supreme power," it said. "Substantial efforts have to be undertaken to cleanse the polluted stream of politics by prohibiting people with criminal antecedents so that they do not even conceive of the idea of entering into politics. They should be kept at bay," the bench said. It was imperative that persons who enter public life and participate in law making should be above any kind of serious criminal allegation, the bench said. The apex court also said that criminalization of politics was never an "unknown phenomenon" in Indian political system but its presence was seemingly felt in its "strongest form" during the 1993 Mumbai bomb blasts which was the result of a collaboration of a diffused network of criminal gangs, police and customs officials and their political patrons. Taking note of the submissions of Attorney General K K Venugopal that the court should not cross the laxman rekha vis-a-vis the separation of powers, the bench said it cannot enter into legislative arena to provide disqualification for candidates who are facing serious criminal cases. However, it said the nation eagerly waits such legislation and the lawmaking wing of the democracy should take upon itself to come out with a law to address this.

The verdict was pronounced on a batch of pleas raising a question whether lawmakers facing criminal trial can be disqualified from contesting elections at the stage of framing of charges against them. According to the prevalent law, the lawmakers and candidates are barred under the Representation of Peoples Act, 1951 from contesting elections only after their conviction in a criminal case.

Divergent Views

The Centre had contended that the judiciary should not venture into the legislative arena by creating a pre-condition which would adversely affect the right of the candidates to participate in polls as there was already the R. P. Act which deals with the issue of disqualification. Referring to the concept of presumption of innocence until a person is proven guilty, the Centre had argued that depriving a person from contesting elections on a party ticket would amount to denial of the right to vote, which also included the right to contest. It had said that the courts will have to presume innocence in view of the fact that in 70 per cent cases, accused are being acquitted. Venugopal had said that Parliament has made a distinction between an accused and a convict and there has been a provision for disqualification in the Representation of Peoples Act upon conviction of a lawmaker. The Election Commission of India had taken a view which was apparently opposite to the Centre and said that the recommendations for decriminalizing politics were made by the poll panel and the Law Commission back in 1997 and 1998, but no action was taken on them. It exhorted the court to issue the direction in the matter besides asking Parliament to make the suitable law.

Conclusion

Today in the Indian politics both money land muscle power play a vital role in capturing political power. The result is the politicians began to rely upon persons with criminal antecedents to mobilize support during election for their success. Dependence of politicians on criminals slowly paved the way for the criminals themselves entering into politics. Criminalization of politics is affecting not only democratic and political process but also interfering in the administration of criminal justice. To avoid criminals in politics, unless urgent and drastic steps were taken to break the nexus between politicians and criminals the very existence of democracy will be at stake. The need of the hour is to have value based politics.

The Supreme Court, through its interpretation of statutory provisions connected with elections as well as creative use of its power to enforce fundamental rights, has made great strides towards ensuring a cleaner polity, setting up significant barriers to entry to public office for criminal elements as well as instituting workable mechanisms to remove them from office if they are already in power. It is appreciable that these decisions demonstrate the need for the law itself to be reformed on a dynamic basis taking cognizance of latest developments. The Supreme Court said, *first,* that the political parties must reject ticket to criminal elements in both parliamentary and assembly polls, *second,* candidates should disclose their criminal cases against them to the Election Commission in BLOCK LETTERS as well as to their respective political parties, *third,* political parties must publish the pending criminal cases of their candidates online etc. The same view is echoed by the several committees and commissions in the past which have recommended fundamental changes to laws governing electoral practices and disqualifications.

Keeping in view the above judicial verdicts, it can be said that a law to prohibit candidates who are charged for heinous crimes will need a broad consensus across the party lines. More fast-track courts to try the cases dealing with serious charges against the candidates are the need of the hour. To reduce money power and to create the level playing field a provision for state funding of elections is also the need of the hour. Election Commission should be given more power to deal with corruption cases. Most important is that the inner party democracy needs to be improved.

Endnotes

1. *(2014) 9 SCC 1.*
2. *(2002) 5 SCC 294.*
3. *(2003) 2 SCC 549.*
4. *(2013) 7 SCC 653.*
5. *(2013) 10 SCC 1.*
6. *(1998) 1 SCC 226.*
7. *(2012) 3 SCC 65.*
8. *For example, V.S. Achuthanandan v. R. Balakrishna Pillai, (2011) 3 SCC 317 on the issue of delay in trial of corruption cases involving public servants*
9. *AIR 2015 SC 1921.*
10. *Ibid., per Justice Dipak Misra.*
11. *AIR 2018 SC 4550*