IS CLEAN PARLIAMENT A PIPE DREAM?

Why is the Court Reluctant to Legislate?

Swapna Jha*



"When the Rashtriya Janata Dal announced its candidates for the first phase of the Lok Sabha polls in Bihar Friday, its allies were left scratching their heads about the choice of Vibha Kumari from Nawada. It later came to light that she is the wife of Raj Ballabh Yadav, an MLA who was convicted for raping a minor girl and is currently in jail,"[1] begins a recent article in ThePrint, lamenting how criminals and dons in Bihar have been able to preserve their political prominence by propping up their wives or kin.

It's apparent that the friendship between crime and politics in the world's largest democracy is alive and thriving. Indian lawmakers also seem to be comfortable with the idea of crime lubricating the electoral machinery. In response to the Common Cause petition seeking appropriate directions for combating the criminalisation of politics, the Supreme Court judgment of September 25, 2018 did go on to say that "criminalization of politics is the bane of society and negation of democracy and is subversive of free and fair elections which is a basic feature of the Constitution," but the Parliament is still not in a mood to enact a law to address this malaise.

That keeping criminals out of polls is essential to a vibrant democracy is an uncontested truth. It is also the reason why Common Cause along with

* *Swapna Jha is a Senior Legal Consultant with Common Cause*

other petitioners approached the Supreme Court in 2011 for respite. It sought to espouse the fundamental right of millions of voters to have free and fair elections, thus ensuring a clean democratic polity.

When the judgment was delivered seven years later in 2018, there seemed to be hardly any effective relief granted. The wait for a clean legislature seemed to stretch for eternity, despite the Chief Justice of India Dipak Misra taking cognisance of the unsettling state of affairs. He said: "The constitutional functionaries, who have taken the pledge to uphold the constitutional principles, are charged with the responsibility to ensure that the existing political framework does not get tainted with the evil of corruption. However, despite this heavy mandate prescribed by our Constitution, our Indian democracy, which is the world's largest democracy, has seen a steady increase in the level of criminalization that has been creeping into the Indian polity. This unsettlingly increasing trend of criminalization of politics, to which our country has been a witness, tends to disrupt the constitutional ethos and strikes at the very root of our democratic form of government by making our citizenry suffer at the hands of those who are nothing but a liability to our country."

The CJI's views, as well as the unanimous ruling delivered by the Constitution Bench, came in the wake of a petition jointly filed by Public Interest Foundation, Common Cause, Transparency International and Gandhian Seva & Satyagraha Brigade in the Supreme Court under article 32 of the Constitution. It sought appropriate directions to arrest the rampant criminalisation of politics.

The main prayer in the petition was to disqualify persons charged with serious offences from contesting elections to Parliament and the state legislatures. At the insistence of Common Cause, a prayer for fast-tracking of pending criminal cases against sitting members of Parliament and state legislatures was also incorporated in the petition.

The prayers finally made in the PIL were as follows.

A. Lay down appropriate guidelines/ framework to ensure that those charged with serious criminal offences are unable to enter the political arena by contesting elections.

> ***"The friendship between crime and politics in the world's largest democracy is alive and thriving."***

B. Lay down a time frame of six months during which trial of such persons are concluded in a time bound manner.

C. Direct the Central Government to implement the directions passed by this Hon'ble Court in *Dinesh Trivedi, M.P. & Ors. v. UOI & Ors*. (1997) 4 SCC 306 in letter and spirit.

D. Direct the Government to consider the feasibility of enacting legislation to deal with the menace of criminalisation of politics and debar those charged with serious offences from contesting elections of any sort.

E. Declare the provisions of Sec. 8(4) of the Representation of People Act as ultra vires Art. 14 of the Constitution of India.

Ground Reality

Despite a clarion call for corrective action, the executive has done little more than twiddle its thumbs. In fact, it has failed to exercise its constitutional

> ***In today's times of coalition politics, where every vote in the legislature counts, criminal elements pervade every political party.***

obligation to frame appropriate legislation securing the exercise of fundamental rights as guaranteed under Part III of the Constitution. In today's times of coalition politics, where every vote in the legislature counts, criminal elements pervade every political party and exert enough influence to nullify integrity measures. Inevitably there's lack of political will to tackle this insidious threat.

This is amply reflected in the 18th Report of the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, and Law and justice on 'Electoral Reforms (Disqualification of persons from contesting Elections on framing of charges against them for certain offences).' It says, "... all the political parties feel that merely framing of charges by a competent court should not be the basis of denying a candidate the right to contest election."

Not surprisingly, the Standing Committee rejected the Election Commission's proposal of an amendment to the Representation of People Act, 1951 (RPA), under which candidates would stand disqualified from contesting elections when charges are framed against them. The rejection was cemented on the ground that during charge framing, the Court is not required to appreciate evidence to conclude whether the materials produced are sufficient for convicting the accused. It was also argued that prosecution in select cases is bound to be influenced by the party in power or by failure of system. There is a general sense of indignation among political parties that chances of candidates being framed with false and malafide charges by their political opponents are very real.

The Standing Committee's reasoning holds very little water, while its rejection of the amendment proposal on the grounds of misuse smacks of extreme indolence towards concrete action.

Journey of the PIL

While notice to the respondents, viz. the Union of India (UOI) and the Election Commission of India (ECI) had been issued on January 5, 2012, they failed to file their replies despite repeated reminders. The ECI eventually responded in February 2013, broadly supporting the prayers made in our PIL. The Commission reinforced its longstanding position on debarring persons charged with serious criminal offences from contesting elections to Parliament and state legislatures and endorsed our prayer for declaring Section 8(4) of the RPA as *ultra vires* the Constitution. Section 8(4) allowed convicted legislators to avoid disqualification merely by filing an appeal or revision petition.

On July 7, 2013, the Supreme Court delivered its judgment in the two writ petitions *Lily Thomas v. Union of India & Ors*. WP (C) 490/2005 and *Lok Prahari v. Union of India & Ors*. WP (C) 231/2005 . It declared Section 8 (4) as unconstitutional, which set different criteria for disqualification of an electoral candidate and an elected representative. The Court held that it was beyond the law making powers conferred by the Constitution on Parliament to make separate sets of rules for disqualification for persons. This took care of the last of the reliefs sought in our PIL.

On August 19, 2013, the Court passed the following order:

"2. Insofar as prayer (e) is concerned, we are informed that by a decision of this Court dated July 7, 2013 in Writ Petition (C) No. 490 of 2005 *Lily Thomas v. Union of India* and others and Writ Petition (C) No. 231 of 2005 - *Lok Prahari through its General Secretary S.N.*

Shukla v. Union of India and others, the said provision has been declared ultra vires.

3. We are also informed that a review petition has been filed by the Union of India seeking review of the judgment dated July 7, 2013.

4. Be that as it may, prayers (a),(b),(c) and (d) remain to be considered by this Court.

5. In its counter-affidavit filed by the respondent No. 2 Election Commission of India (for short "Election Commission"), it is stated that as early as on 16.09.1997, it had expressed its serious concern and anxiety in the matter of growing criminalization of politics to the then Prime Minister of India. Election Commission says that it has recommended that the law may be simplified by amending Section 8 of the Representation of People Act, 1951 (for short "the Act") that whoever is convicted of any offence by a court of law and sentenced to imprisonment for six months or more should be debarred from contesting elections for a period totaling the sentence imposed plus an additional six years. It is also the view of the Election Commission that where a person has been accused of serious criminal charges and the court is prima facie satisfied about his involvement in the crime and consequently, charges have been framed against such person, then in such cases, keeping them out of the electoral arena would constitute a reasonable restriction for serving the larger public interest. As a precaution against motivated cases, it is suggested that it may be provided that only those cases which were filed prior to six months before an election, may be considered for the purposes of disqualification as proposed. It is also the suggestion of the Election Commission that persons found guilty by a Commission of Enquiry should also stand disqualified from contesting election.

6. The views of the Election Commission have also been expressed before the Parliamentary Committee in its meeting held on 20.2.2007. The Parliamentary Committee in its 18th report is reported to have disagreed with the views of the Election Commission.

7. The counter-affidavit of Election Commission states that the matter is understood to have been under re-consideration by the Ministry of Law & Justice to consider

> ***"Tainted politicians have merely tightened their grip on the Indian democracy."***

disqualification of persons in cases where charges concerning heinous offences have been framed by the Court.

8. The views of the Election Commission are, thus, in accord with the recommendations made by the Law Commission of India relating to the above subject in its 170th Report wherein a recommendation has been made that Section 8B of the Act be enacted and the framing of charge (by court) in respect of election offences and certain other serious offences be made a ground of disqualification."

In an effort to buy time, the government informed the Court that the issue of electoral reforms had been referred in its entirety to the Law Commission. The issue was passed on `for consideration and examination with the aid of reports of various Committees in the past, the views of the ECI and other stakeholders, etc., and to suggest comprehensive measures for plausible changes in the law under reference'. During the hearing on November 25, 2013, the Court directed the

> ***Keeping criminals out of polls is essential to a vibrant democracy.***

government to file the reference made to the Law Commission, so that the judicial authority could shorten the area of debate.

Later, the apex court decided to cut down the time for concrete action. On December 16, 2013, it felt that the Law Commission may take a long time in filing a comprehensive report. Hence, it requested the Commission to expedite consideration, focussing on the following issues:

"(1) 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 [Issue No. 3.1(ii)of the Consultation Paper] and (2) whether filing of false affidavits under Section 125A of the Representation of People Act, 1951 should be a ground of disqualification? and, if yes, what mode and mechanism needs to be provided for adjudication on the veracity of the affidavit? [Issue No. 3.5 of the Consultation Paper]."

The Supreme Court on March 10, 2014 passed an interim order to the effect that trials in criminal cases against lawmakers must be concluded within a year of the charges being framed. The Court had also directed that in the event of inability of a lower court in completing the trial within a year, it would have to submit an explanation to the Chief Justice of the High Court concerned and seek an extension of the trial. This interim order of the apex court virtually granted the relief sought in Prayer B of the PIL.

In the February 17, 2015 hearing, the petitioners pressed for the effective implementation of the Court's landmark order of March 10, 2014 for time-bound disposal of pending criminal cases against sitting legislators. The Court was informed that the lead petitioners had requested the Registrars of the Supreme Court and the High Courts in June 2014 to lay down appropriate procedures and regulations with an in-built monitoring mechanism. This would ensure compliance of the Court's order by all the subordinate courts under its jurisdiction. Regrettably, these letters did not elicit any response.

Expectedly, the roles of the Parliament and the judiciary were kept distinct as well. With regard to the prayer for debarring persons charged with serious offences from contesting elections, the Court seemed disinclined to assume the legislative role of Parliament and referred the matter to the Constitution Bench on March 8, 2016.

It was evident at that point that none of the stakeholders were in a tearing hurry to complete criminal case trials against lawmakers. Since Common Cause had no way of ensuring the communication/compliance of this order, an application under RTI was sent to the Supreme Court and six High Courts. The response received from the SC reflected how cavalier the judiciary was in implementing the SC directions.

However, Common Cause played a pivotal role in using the information thus extracted to file an IA to seek specific, time-bound directions from the Supreme Court, for the implementation of its March 2014 order.

The Judgment

The much-awaited verdict on the fast-festering rot among Indian legislators came on September 25, 2018, when the Constitution

Bench led by Chief Justice Misra declined to grant relief sought in our petition. It simply left it to the Parliament to enact appropriate laws. Though the CJI was concerned with the criminalisation of politics and articulated the need for proactive steps, the Court declined to interfere in the legislative domain.

It sought shelter behind the doctrine of separation of powers and refused to cross the *Lakshmanrekha*. The buck was passed back to the Parliament, asking it to legislate on this issue but failed to notice how Parliamentarians did not budge an inch in the past even when mountains needed to be moved. Parties across lines have stood as one when it came down to opposing any law seeking to debar perpetrators of serious crimes, when the cases are pending.

The unanimous judgment, said:

"In a multi-party democracy, where members are elected on party lines and are subject to party discipline, we recommend that the Parliament establish a strong law whereby it is mandatory for the political parties to revoke membership of persons charged with committing heinous and grievous offences and not to set up such persons in elections, both for the Parliament and the State assemblies."

The Bench did however provide a slew of directions to the EC:

- While filing their nominations candidates must state in bold letters details of criminal cases pending against him or her.
- The candidate is required to inform the party about his/her pending criminal cases.
- The party has an obligation to put up on its website information of criminal cases filed against their candidates.
- The candidate as well as the political party shall issue a declaration in the widely circulated newspapers in the locality about his/her criminal antecedents while also giving wide publicity in the electronic media.

> ***"The executive has failed to exercise its constitutional obligation to frame appropriate legislation securing the exercise of fundamental rights as guaranteed under Part III of the Constitution."***

The bench emphasised this by stating "When we say wide publicity, the same shall be done at least thrice during the campaign." It also underscored that the Parliament must legislate on this matter. The Court lamented the present situation in these words "The citizens in a democracy cannot be compelled to stand as silent, deaf and mute spectators to corruption by projecting themselves as helpless. The voters cannot be allowed to resign to their fate."



However, it declined to pass directions to the EC as requested in the petition as it felt that the judiciary lacked this power. Thus, though our petition has been disposed of, the situation remains the same till the executive and legislature decides to clean up their acts.

Conclusion

The right to vote is a fundamental right and flows from Art. 14 and 19(1)(a) read with Art. 326 of the Constitution of India. Any other interpretation would render the entire tenet of Parliamentary democracy illusory. Without the right to cast a ballot, democracy would be rudderless and ineffective. Criminalisation of politics, a layered and extremely problematic social reality, suggesting a nexus between politicians, bureaucrats, police and criminals, strikes at the very root of the right to vote freely and without fear or favour. Arguments have been made in favour of criminals using their money and muscle power to influence election outcomes once they turn electoral candidates. When this happens, the rights of voters are completely negated. Judicial notice may be taken of the numerous cases of booth capturing, bribery and use of money in elections, which merely go a long way to strengthen the entrenched positions of criminal politicians in our legislatures.

According to a report[2] by Association for Democratic Reforms (ADR), 1580 MPs and MLAs have criminal cases registered against them. The SC seems to have exonerated them with its judgment. Efforts in the direction of severing the deep linkages between crime and politics have been minimal. Rather, tainted politicians have merely tightened their grip on the Indian democracy. This is amply reflected in a National Election Watch (NEW) and Association for Democratic Reforms (ADR) analysis of declarations made by candidates in the 2014 general elections. The analysis indicates that at the conclusion of 2014 parliamentary election, out of the 542 winners analysed, 185(34%) winners have declared criminal cases. With the steady stream of politicians with dubious backgrounds laying a claim to the legislative space, the provision of political justice as envisaged in the Preamble of the Constitution seems like a mirage.

(Endnotes)

1. Mishra, Dipak (2019, March 24). 'Bihar's dons are propping up their wives, sons and brothers to keep their political clout.' *The Print*. Retrieved March 25, 2019 from https://bit.ly/2JB09Kq

2. ADR (2018, November 19) 1580 MPs, MLAs are facing criminal charges. *India Today*. Retrieved April 6, 2019, from https://adrindia.org/content/1580-mps-mlas-are-facing-criminal-charges