Democracy

Decriminalizing Politics for sustaining Democracy- reflections on the Recent Supreme Court Decisions

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Decriminalizing Politics for Sustaining Democracy in India - Reflections on the Recent Supreme Court Decisions

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Constitution of India's adoption of democratic form of government has made India the world's largest democracy today. Democracy is a basic feature of our Constitution[1] and the purity of the electoral process has to be protected and sustained. Criminalization of politics has become a serious problem affecting the very foundation of democratic institutions[2]. Throughout India increasing number of members of the legislatures have criminal charges against them. According to Times of India report, 30% of Lok Sabha Members and 31% members of the State Assemblies have criminal charges and 14% of Lok Sabha members and 14% of members of state assemblies have serious criminal cases against them[3]. Persons with serious charges have even been ministers.

Free and fair elections have been recognized as basic feature of Indian Constitution[4]. Criminalization of politics is the bane of society and negation of democracy.[5] Times of India provided party wise sitting MPs and MLAs with criminal cases- JMM 82%; RJD 64%; Samajwadi Party 48%; BJP 31%; Congress

1 Kihoto Hollohon v Zachillu, AIR 1993 SC 412; S R Bommai v UOI, AIR 1994 SC 1918

2 KG Balakrishnan J, para 66 in K Prabhakaran v Jayarajan, MANU/SC/2694?2005

3 11 July 2013, p1

4 UOI v ADR, JT 2002(4) SC 501

5 Anukul Chandra Pradhan v Union of India, AIR 1997 SC 2814

21%[6]. Dr B R Ambedkar wisely forewarned: *By independence we have lost the excuse of blaming the British for anything going wrong. If hereafter things are going wrong, we will have nobody to blame except ourselves.*

Vohra Committee appointed by the government had strongly brought out the nexus between crime syndicates and political personalities[7]. Innumerable demands of electoral reforms in this regard by Law Commission, Election Commission of India, National Commission to Review the working of the Constitution, academic studies and conferences have been pouring in. The golden jubilee of Indian Independence (August 1997) saw the Parliament taking a pledge to carry out meaningful electoral reforms including ridding our polity of criminalization or its influence[8].

Yet, till date, no effective reforms have seen the light of the day. It is in this background that the judiciary's contribution becomes note worthy. Supreme Court of India recognized the right to know of the citizens and ruled that the Election Commission of India must make it mandatory for the candidates contesting elections to give details of conviction, acquittal, discharge of any offence, punishment, pending criminal charges along with assets, educational qualifications, liabilities and government dues[9]. It will be appreciated that the judiciary has used its craftsmanship to harness the right to information to achieve an extremely laudable social objective, viz., that of preventing criminalization of the Indian

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6 11 July 2013,p 10

7 Dinesh Trivedi v UOI, (1997) 4 SCC 306

8 parliamentofindia.nic.in

9 Supra n.4

politics[10]. It is pertinent to note that after this judgment the Parliament amended Representation of Peoples Act, 1951 and inserted Section 33A recognizing a limited duty of candidates to provide information only as to criminal accusations punishable with two years imprisonment or more where charges have been framed and certain convictions and sentence of one year imprisonment or more. Section 33B was inserted to specifically exclude any duty to furnish information other than that required under this Act or rules under it. Section 33B was to have overriding effect notwithstanding any judgment of court or Election Commission order. This strain of the Parliament only underlines the anti reform spirit of its members. Fortunately this section has been struck down by the court[11]

Recently the court has also directed the Election Commission of India to provide NONE OF THE ABOVE option in the ballot papers/ EVMs[12] so that the voters can choose NOTA while maintaining their right to secrecy. The court observed: the mechanism of negative voting serves a very fundamental and essential part of vibrant democracy[13]. Central Information Commission has held that recognized political parties receive several financial favours from government and therefore these are public authorities bound to give information under the Right to Information Act[14]These rulings in Public Interest Litigations have gone a long way to reinforce public faith in our democracy.

10 MP Jain, Indian Constitutional Law, Wadhwa, Nagpur, 2007 p.990

11 PUCL v UOI, AIR 2003 SC 2408

12 Peoples Union for Democratic Rights v Union of India, (2013) 10 SCC 1

13 Id at p 29

14 Subhash Chandra Agarwal v Parliament of India, www.indiankanoon.org

The purpose of this paper is to study two far reaching judgments of the Supreme Court rendered on 10th July 2013 holding that politicians cannot fight elections from jails and also that MPs, MLAs and MLCs would be disqualified the day they are convicted. The judgments were in Public Interest Petitions : Lily Thomas v Union of India, Lok Prahari v Union of India, Vasant Kumar Chaudhary v Union of India[15] and Chief Election Commissioner v Jan Chaukidar[16]. Both the judgments have been delivered by the same bench[17] of the SC. People of India rejoiced although there have been several critical views as well. This paper seeks to put the spotlight on these judgments to probe into the role of the judiciary in sustaining democracy in India.

Background for Lily Thomas and Jan Chaukidar Cases

Constitution of India clearly and categorically makes crime a disqualification to vote. Enacted under the Constitution[18], RPA makes conviction a disqualification to contest. That despite, people with criminal charges and convicts are members of legislatures. This is because **firstly**, till today, no person becomes disqualified on pending criminal accusations or on charges being framed by the court or even on trial commencing. A person could contest elections from jail. Weirdly a person in jail or police custody cannot vote[19]. This is against Article 326 of the Constitution

15 (2013) 7 SCC 653

16 MANU/SC/0689/2013

17 A K Patnaik J and Sudhansu Jyothi Mukhopadhaya J

18 Articles 102 and 173

19 S 62(5)

which identifies disqualification to vote only on grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice. Under trials are presumed innocent till the guilt is established; it is improper to deny voting rights to them[20]. The arbitrary arrests, illegal detentions and protracted delays in trials have demeaned the right to vote of the citizens while neither framing of charges nor detention can prevent any person from contesting elections.

There have been enormous voices suggesting that when charges are framed by a competent court the person should not be allowed to contest elections[21]. The streams of politics in the democratic elections are to be kept clean, so that India does not suffer the bane of criminalization of politics.[22]

Secondly, if a sitting member of Parliament is arrested and detained on criminal complaints for investigation or pending trial, no disqualification ensues till conviction. There has been a case were convicted MPs were flown from jail to vote in a trust motion.[23] Even conviction of a sitting MP, MLA or MLC will not bring in disqualification immediately. Section 8(4) of Representation of Peoples Act 1951(RPA) provides that if such sitting member files appeal or revision against the conviction within three months, then the disqualification on account of the conviction will not take effect until the appeal or revision is decided by the appropriate court. Conviction at the instance of the first court by itself takes a long

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20 See Anukul Supra n.5 where the supreme court has rejected this view.

21 See Election Commission of India, Report of the National Commission To Review the working of the Constitution, 2002, Volume 1, 4.34, Subhash C Kashyap, Blueprint of Political Reforms, 2003 p 129-130, Madhav Godbole, India's Parliamentary Democracy on Trial, 2011, p 246; Law Commission of India, 170th Report

22 PUCL, Supra n. 11

23 22 July 2008

time and the member has all the channels of appeals to exhaust before which the disqualification on conviction has no effect. By the time the law can catch up with the members they may complete not just their terms but even their political careers! There is also the danger that the cases against them fail due to political pressure on police, prosecution and even courts.

Jan Chaukidar Case

Public Interest petition was filed in 2004 before the Patna High Court by Jan Chaukidar in the wake of various malpractices in elections reported in the news papers in Bihar. The State accepted several media reports on absconders jumping bail and hoodwinking the court but participating in voting and campaigning and people in custody conducting electioneering and holding darbars and enjoying luxuries in public hospitals.

On 30.04.2004, the court considered the following and held that a prisoner cannot contest at elections-

1. the qualifications for membership of the house of people under S. 4(d) of RPA requires that a candidate for election has to be an elector
2. right to vote under S. 62(5) is not available to a prisoner except a person under preventive detention
3. an elector is a person legally entitled to vote.

"… over the passage of years the body politic is getting immunized by the presence of criminals in politics, and a person who should have been behind bars and could neither be a voter nor an elector, is on the election scene, as large as life. Those who are to keep the law look the other way. The Election Commission of India is yet to get strict and not get immunized itself or get used to the presence of criminals in politics…these persons are disenfranchised by law…. Parliamentary Democracy with such persons participating in it is endangered."[24]

24 Para 34

The ECI was asked to take such action as it decides on the basis of the interpretation of the court on an important public law. The SC concurred with the findings of the Patna High Court and dismissed the appeals filed against the HC order.

Jan Chaukidar reversed by amendment to RPA, 2013

The RPA (Amendment and Validation) Act, 2013 has quietly over turned the order of the SC to ban the people in custody or jail from contesting elections in just two months and 12 days. This amendment has received the presidential assent on 23 September 2013. The amendment has inserted a proviso after S. 62(5) –

Provided further that by reason of the prohibition to vote under this subsection, a person whose name has been entered in the electoral roll shall not cease to be an elector.

S. 4 of the amendment also ensures retrospective effect to this proviso thereby totally nullifying the ruling in Jan Chaukidar.

Lily Thomas v Union of India

The decision is the outcome of civil original writ petitions of 2005 filed by Lily Thomas and Lok Prahari in public interest challenging S 8 (4) of the RPA as ultra vires of Indian Constitution. Another PIL filed in 2004 for the same purpose by advocate Basant Kumar Chaudhary from Patna High Court was also heard and disposed off along with the earlier mentioned petitions.

The SC held S.8(4) of RPA unconstitutional and ruled as follows:

(1) Parliament's power to lay down disqualifications in respect of both Parliament and State Legislative Assemblies springs from Articles 102(1)(e) and 191(1)(e) of the Constitution and not from the residuary power under Article 248 and entry 97 of List I of Schedule VII

(2) Vacation of seats on being subject to disqualification is automatic and immediate because of the words "forthwith" used in Articles 101(3)(a) and 190(3)(a)

(3) S.8(4) which carves out a saving of sitting members of Parliament and State Legislatures from disqualifications under S8(1), (2) and (3) or which defers the date on which disqualification will take effect is clearly beyond the powers of the Parliament. The Parliament has clearly exceeded its powers in extending immunity to the convicted members.

(4) Prospective effect of the judgment- Sitting members who have already incurred disqualifications under S.8(1),(2)& (3) but have filed appeals or revisions which are pending are saved.

(5) If any MP or MLA or MLC is convicted for offences as laid down in S.8(1), (2) &(3) and suffers disqualification after the pronouncement of this judgment his/her membership will not be saved by S.8(4) notwithstanding any appeal or revision

The ruling in Lily Thomas removes the discrimination between an ordinary individual and an elected member in the matter of conviction and contesting elections.

Appraisal on the judgments in Lily Thomas and Jan Chaukidhar

The general people welcomed the decision and felt vindicated. Yet there were severe criticisms that the judgments are unjust and impractical. The Economic Times quoted former chief election commissioner S Y Quaraishi; "this judgment would have serious and far reaching implications for cleansing India's political system".[25] The judgment was so popular that the government was wary about commenting or taking corrective steps. They asked for legal opinion and maintained a low profile. The political parties also officially expressed happiness over the ruling[26]. Times of India in its editorial said that the ruling will go a long way in rescuing politics from the clutches of criminals.[27] The drama of the government's attempt to bring an ordinance to negative the effect of Lily Thomas

25 11 July 2013, p1

26 "..cautious welcome.." TOI, July 11,2013 p10

and Congress's Rahul Gandhi decrying it as rubbish and the subsequent abortion of the attempt may be recalled to understand the public support for the judgment.

Reviewing the verdict, it was candidly pointed out that as long as the court's own processes are so imperfect it cannot expect to impose order on democratic politics. No tidy lines separate the tainted and the blameless for which the judiciary has to bear a large share of responsibility. The cases of politicians snake on in courts and appeal processes are not speedy and efficient. Bails are routinely denied. Major turbulence can be caused if flimsy or cooked up cases against political opponents can bar them from electoral process.[28]

Swaminathan S Anklesaria Aiyar opined that without quick justice politics will stay criminalized. He fears that the judgments can keep honourable people as well out of elections; the judgments can set off an avalanche of political vendettas.SC must devise and enforce procedures for quick justice. We cannot truly reform politics until we reform the justice system.[29]

Manoj Mitta opined that the verdict by two judges is incorrect because it is contrary to the verdict by a five judge bench in K. Prabhakaran v P Jayarajan rendered in 2005[30] wherein the Supreme Court upheld S.8(4) as valid vis a vis equality protections. Considering the far reaching consequences of a majority government turning into minority by convicted members getting

27 12 July 2013 p 18

28 *Indian Express, AFTER YOU, p10, 13 July 2013*

29 Swaminomics, Sunday Times p 22, 14, July, 2014

30 Times of India p13, 12 July 2013

debarred, the SC said that the purpose of S. 8(4) exception was to protect the house and not to confer an advantage on any person.[31] This criticism is not well founded because, Lily Thomas found S.8(4) ultra vires Articles 102 and 191 and therefore did not consider it necessary to probe into the propriety vis a vis Article 14.

Abheek Barman opined that neither courts nor laws can clean up politics. All the rut is despite good protections in the Constitution and RPA; deep social, economic, caste, and gender fault lines run through the bed rock of our democracy. There is a need to overcome our prejudices.[32]

Economic Times has expressed fears that post these judgments there would be a flurry of arrests of political rivals; the court lacks expertise in the complex social dynamics that mediate political action and the noble desire of the court to rid politics of its ills would take it nowhere.[33]

Markandey Katju[34] submitted that the judgments strayed into the legislative terrain. Court should not declare a statute unconstitutional merely because such a view is possible.[35] Raju Ramachandran[36] finds no fault with Lily

31 MANU/SC/2694/2005

32 Economic Times, 11 July 2014, p 12s

33 13 July 2013 p 8

34 Former SC judge and the chairman of the Press Council of India

35 “Keeping the Statute quo”, Indian Express, 24 July 2013, p 10

36 Senior advocate, SC

Thomas. He said that the presumption of innocence is only till conviction and if any individual has to suffer it is a small price which we have to pay for the larger good. Yet he fears that Jan Chaukidar may lead to getting rivals arrested.[37]

Difficulties in these decisions

SC's ban on those in custody from contesting elections was definitely problematic. Political vendetta, lawful protests or authoritarian powers that be can put persons in custody and thus prevent good people from contesting elections; 2013 amendment to RPA has eased the situation.

Lily Thomas raises new questions: If a sitting member is convicted and his/her disqualification is 'automatic' is the President/Governor bound to declare it vacant immediately? Is ECI to step in immediately and fill in the seat? What happens if the member is acquitted or his/her conviction is stayed thereafter? In respect of loss to the individual member, one may say -the interest of the country should prevail. But what about the issue of stability of government? What about political vendetta against innocent?

Lok Sabha Committee on Absence of Members from Sittings of the House has given leave[38] ranging from 25-125 days to many members on the ground of judicial custody because Constitution stipulates that if a member absents for 60 days or more the seat will fall vacant[39]. No meaningful contribution can be expected from such representatives. Members have been flown to the house from jails to cast their votes on confidence motion.

37 Economic Times, 15 July 2013, p14

38 Lok Sabha Secretariat, Reports of the Committee

39 Article 101 (4)

A study in UP showed that 222 of the 958 politicians who were provided with protective cover by the state were history sheeters and under trials.[40] When Police salute such people it is in utter dismay that we expect the law to take its own course in such cases. The recent SC judgment asking the governments to establish a machinery within six months time to probe into all acquittals in order to identify lapses in investigation and prosecution is a new ray of hope[41]

People are outraged and are desperate to see reforms. Reforms require legislative efforts. Lack of political will is glaring in this matter. Politically enlightened citizenry can push for reforms and instill action in the inert system. The task of reforms should focus on speedy justice as well. Delay promotes criminalization of politics and so also of the entire society. Judiciary in all its righteous attempts cannot guarantee all that is required. But undoubtedly, Lily Thomas has shaken the government and the Parliament from a convenient slumber.

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40 Hari Jaisingh, "No, My Lord- A Window on India's Realpolitik", Siddarth Publications, New Delhi, 2005

41 State of Gujarat v Kishanbhai, judis.nic.in/supremecourt (January 2014)

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