Decriminalization of the Law Makers - The Deepening Crisis in Indian Democracy

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"***Politics and diapers must be changed often, and for the same reason***." – **Mark Twain**

The Parliamentary form of government is the outcome of the British political history. The struggles between the King and the Church, and the growing consciousness of the rights and privileges of then evolving new classes - bourgeoisie and the middle classes have led ultimately to a form of participatory democracy in England providing for most important pressure groups. The English educated growing middle classes in India in the late 19th century and early 20th centuries, which have got acquainted with these forms of governance, either through direct experience in Britain or through their abused versions in India fought for freedom and dreamt of establishing a system of governance on the Westminster model. After protracted discussions and serious deliberations in the Constituent Assembly through 1946 and 1949, "*We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation: in our Constituent Assembly*" on 26th November, 1949 have adopted the Indian Constitution with a form of Parliamentary system. This form provides for elected representatives to the Parliament and State Legislatures, and governance of the State through them, which can be said as a definite growth in the organization of the State and Indian polity.

Parliaments (or any such body housing the people's representatives) are the supreme institutions in the scheme of many modern democracies, more specifically in the Indian Constitution. The State Legislatures are equally important places in the federal structure. They are the citadels of democracy. They deliberate on the issues of serious significance to the nation. Each house is normally reconstituted after every general election held periodically and is equated with the Constituent Assembly in the Constitutional law. The presumption is that they represent the mood and aspirations of the nation at a given point of time. Finally, the members of Parliament or State legislatures are law makers. They make '**the law**' for themselves and for the people. In Indian Constitutional scheme there are well defined contours and concepts of separation of powers for the Legislature, Judiciary and Executive, though the supremacy of the legislature is a well-accepted theory of State. The strength and the weakness of any democracy is this fundamental notion - supremacy of the legislators. By virtue of being people's representatives they exert enormous influence on the society and are vested with vast powers. The reasonable presumption is that they act in good faith. What happens to a nation if those law-making bodies are slowly dominated by self-interest of its members, and they themselves are involved in nefarious relations with certain domineering classes, and their conduct is shrouded with serious criminal allegations? What happens to the aspirations of the millions of the commoners if those Houses are insidiously and surreptitiously start housing the interests of the rich and powerful sections? Can they still be considered as representing the people? Is there any alternative or solution if these kinds of tendencies intensely challenge the very fabric of the polity?

The freedom fighters, since they were fighting against an imperial and colonial government during those days, were naturally implicated in cases criminal in nature on the charges of 'waging or attempting to wage war or abetting the waging of war against the State', 'conspiring to commit certain offences against the State', 'concealing the intent to facilitate a design to wage war', or of committing certain acts with 'the intent to compel or restrain the exercise of any lawful power,' 'sedition', 'aiding escape of rescuing or harboring a prisoner', or 'offering any resistance to the recapture of such prisoner', 'abetment' of certain crimes against the State, or 'conspiracy', 'offences against the public tranquility' etc. The persons who were arrested, tried, and convicted, and who suffered the incarceration for many such crimes during the independence struggle were great persons with passion for this motherland. They sacrificed their lives, and the interests of their family members. They were later celebrated as 'heroes' calling them 'the freedom fighters. The system honored many of them with the membership in the Constituent Assembly, and later in the Parliaments and the State Legislatures. The society knew well that though they were accused of certain crimes, they were not the '**criminals**', in the sense it is understood in the normal parlance.

Post-independence, both the Constitution of India and the laws made there under treaded a cautious path anticipating such contingencies (implicating the political activists in crimes against the State) even in free India on the premise that political leadership is always prone to such charges. In the Post-Second War social order, civil and political rights formed the original and main part of international human rights agenda. They occupied an important position in the Universal Declaration of Human Rights 1948 and International Covenant on Civil and Political Rights, 1967. In his fiery pamphlet wrote way back in 1774, ***A Summary View of the Rights of British America,*** Thomas Jefferson contended that "a free people [claim] their rights as delivered from the laws of nature, and not as the gift of their chief magistrate." The people appealed to the natural law, *jus naturale*, or the divine law when challenged by the man-made law. But, now people in modern democracies look towards the duly elected people's representatives for the momentous challenges or turn to the Constitutional Courts when the bureaucracy or political executive infringes their rights. This legalistic approach has both its own advantages and drawbacks.

The Constitution provided for certain Fundamental Rights to its citizens. For various reasons, however, the free Indian State retained many draconian laws of the colonial era having great potential to suffocate political struggles in independent India also in the form of Sections 121, 121A, 122, 123, 124A, 153A and 153B IPC. These crimes are still considered as detrimental to the State's security and to the tranquility in the society and prejudicial to the national integration. According to National Crime Records Bureau, a total of 571 cases of offences are registered against the State under these sections during 2015, showing an increase of 11.5 % over previous year 2014. A total of 1,179 persons (consisting of 1,154 male and 25 female) were arrested in connection with such offences committed. This is the part of Indian law which is threatening civil, political and human rights activists in India, and many groups and institutions connected with civil liberties at the international level.

But there is simultaneously a growing trend of a deepening nexus between the politicians, criminals, the rich and the powerful, the underworld dons in the film and sports, and this phenomenon had become more and more preponderant in post-Globalized India. Earlier the business interests of the capitalists and the status quo rights of the feudal classes were sought to be achieved through backdoors, by influencing or controlling certain specific peoples' representatives or some intermediary power brokers. But globalization has deepened the crisis and brought it out into open. The remote-controlled

democracy has become unnecessarily cumbersome and costly for these sections, and they slowly started entering direct politics. The law has to balance the free play of protecting the genuine political activity in order to realize the civil and political rights of the citizens and at the same time prevent the entry of and punish the criminals from invading the institutions meant for governing the nation.

The question is: how do we balance the interests of genuine political activity and simultaneously reduce the influence of these nefarious politicians' hand-in-glow with other anti-democratic forces? The New Indian Express[1] published the important features of the report of the Association for Democratic Reforms [ADR]. 83% of India's Lok Sabha Members (MPs) are crorepathis. 430 of the 521 sitting MPs in the Lok Sabha have assets worth over Rs. One Crore. Over half of them are BJP MPs [227 of 521], 37 from Congress, and 29 from AIDMK [let us also note that AIDMK has only 37 MPs]. The average assets of sitting MPs in the Lok Sabha is Rs. 14.72 Crores, calculated on the basis of their self-sworn affidavits [and we are not oblivious of the sanctity of these self-sworn affidavits!]. Only two members have assets worth less than Rs. 5 Lakhs. 33% of sitting MPs have criminal cases. 106 of them have declared serious criminal cases such as murder, attempt to murder, creating communal disharmony, kidnapping and crimes against women. 14 MPs have declared cases relating to causing communal disharmony of which 10 are from BJP. One of the regular defenses offered by these politicians has always been that they are fixed in false cases by their political rivals. Even after giving some discount for this argument these figures are alarming. Our common experience shows that if one is in the party in the power at that point of time, even setting in motion the criminal justice system becomes very difficult in India.

The Members of the Parliament have enormous powers, privileges, and immunities [Article 105 and 106] but to the limited extent of anything said or any vote given in Parliament or any committee thereof. There are provisions for disqualification of the Members [Articles 190 and 191] which empowered the Parliament to make law to that end, and the nation is looking forward for a longtime for such proactive action from political leadership. We also have anti-defection law; however, the power of decision making is left to the Speaker or the Chairman of the House as the case may be. There is bar of jurisdiction of Courts in the same Schedule, and the system is already witnessing the burden of the maladies. We are witnessing defection of elected members every day to those parties which they opposed till yesterday, contested against them, condemned the policies and the leadership of those parties, and suddenly, overnight switching over to the same parties with a glee, and the opponent inviting them with a shawl and bouquet with equal delight. We know how much concern these turncoats have for ideological issues. The system is witnessing this entire drama dumb fold, but then what is that the anti-defection law doing?

We have Election Commission which is vested with the powers of superintendence, direction and control of elections, and there is a bar against interference by Courts in electoral matters. We have the Representation of the Peoples Act 1951 providing for qualifications and disqualifications of Members of the Parliament and the State Legislatures. Persons convicted for an offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language etc., or of bribery, or of undue influence or of impersonation at an election, of offences relating to rape, offences of cruelty towards women, offences of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or religious

[1] The New Indian Express, Hyderabad Edition, 29th March 2019

ceremonies, offences provided in the Protection of Civil Rights Act, 1955 which provides for punishment for the preaching and practice of 'untouchability', offence of importing or exporting prohibited goods, offence of being a member of an association declared unlawful, offences in the Foreign Exchange (Regulations) Act, the Narcotic Drugs and Psychotropic Substances, TADA, POTA, the Religious Institutions (Prevention of Misuse) Act, booth capturing, removal of ballot papers, offence of conversion of places of worship for prohibited purposes, offences of insulting the Indian National Flag or the Constitution of India, National Anthem, for hoarding or profiteering, adulteration of food or drugs, dowry prohibition, commission of Sati, a person convicted of any offence and sentenced to imprisonment for not less than two years etc.

The Act also deals with 'corrupt practices and electoral offences. The definition of "corrupt practices" is very lengthy and covers many instances including 'bribery', 'undue influence' etc. Similarly "electoral offences" are defined to include 'promoting enmity between classes in connection with elections', 'prohibition of public meetings during period of forty-eight hours ending with hour for conclusion of poll', 'disturbances at election meetings', etc. The officers etc., at elections are not to act as agents for candidates or to influence voting. Penalties are provided for misconduct at the polling station, for illegal hiring or procuring conveyance etc. But the rider in sub-section 4 of Section 8 almost makes its realization very difficult. The section says: "***Notwithstanding anything … a disqualification under … shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court***." The experience of an ordinary litigant in Indian courts reminds us the famous description of **Dickens** in **Bleak House** what it means becoming involved in a lawsuit like: '*being ground to bits in a slow mill; it's being roasted at a slow fire; it's being stung to death by single bees; it's being drowned by drops; it's going mad by grains.*' Law is only one of the several options available to citizens in a modern democracy, but Indian intelligentsia suffers from excess obsession with law and legislation. The provisions are aplenty, but the procedures are cumbersome, and the reality is disappointing.

Due to certain new developments in the electoral processes and, ingenuity and inventive capacity of law breakers, two important legislative interventions were necessitated by the beginnings of the 21st century. By an Amendment in 2002 Section 125-A was introduced providing for a penalty of imprisonment for a term which may extend to six months or with fine or both for filing 'false affidavits. The menace of 'pre-poll surveys' and 'exit polls', which have a potential influence in molding the opinion of the voters and changing the outcomes of elections, especially through 24X7 News Channels, run by big Corporates, with direct and indirect collusion with political parties, and thereby defeating the contemplative free choice of the voter based on election manifestos, performance of elected government, deeds and misdeeds etc., prompted the State to introduce provisions restricting publication and dissemination of result of exit polls imposing certain restrictions on them.

Despite this enormous law (or because of it either!), activism of several public-spirited persons, and intervention of higher echelons of judiciary time and again, the menace has assumed monstrous proportions. Since the election dispute of Indira Gandhi of 1971 General Elections, the monster has been growing in colossal proportions. We cannot have Raj Narayans always. Raj Narayan had contested the said elections against Indira Gandhi in the Rai Barally Lok Sabha Constituency, and he lost. He challenged Indira's election on the ground of corrupt electoral processes. On 12 June 1975, Justice

Jagmohanlal Sinha of Allahabad High Court found Indira Gandhi guilty of electoral malpractices and declared her election as 'null and void'. The cases finally ended in Supreme Court in the cases State of Uttar Pradesh v. Raj Narain[2], in Indira Nehru Gandhi (Smt) v. Raj Narayan & anr[3] and in Indira Nehru Gandhi v. Shri Raj Narayan & Anr[4] giving some relief to Indira Gandhi. This judgment of Justice Jagmohanlal Sinha and many other factors led to the imposition of the 'Emergency' on 25 June 1975. Many have even jurisprudents and scholars critically examined the flip-flops of the Supreme Court. And the rest is history!

By early 1980s this rare phenomenon of election malpractices, the unholy alliance of the politics, bureaucracy, crime, business houses, feudal lords, underworld dons, and celebrities of the film and sports world has reached its flashpoint of no return. Almost all the concerned citizens are deeply worried. Elections have gone beyond the possibility of an honest man to even to think of contesting, leave about any distant idea of winning it. Acrimonious gestures, vituperative attacks, blatant lies and promises, violations of every election law and code, total disregard to public morality and ethics, and open corruption, expenses beyond the means of honest politicians, and the preeminence of persons with criminal records of even heinous crimes etc., changed the contours of the debate. **What is to be done?**

In the recent past public-spirited persons repeatedly knocked the doors of the Supreme Court of India, as it still offers a ray of hope, for the persons seriously concerned with the survival of healthy democracy in India. Association for Democratic Reforms (ADR) is trying to function as a pressure group by invoking Public Interest Litigation (PIL) as its weapon. The National Election Watch (NEW) is making a nationwide campaign for collecting data from the affidavits filed by the aspiring candidates and bringing them to people's notice. There are several NGOs and public-spirited persons working on this area. But the scope of any radical change as on now appears to be bleak!

The Public Interest Foundation recently approached the Apex Court in W.P (C) No. 536 of 2011[5] and sought judicial intervention to refer the matter of de-criminalization of politics and electoral reforms to the Law Commission. The Court, after observing that the Government vide its Note dated 16.01.2013 had already desired the Law Commission to consider and examine the issue of 'Electoral Reforms', requested "the Law Commission to expedite consideration on two issues, namely, (**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 Cr.PC and (**2**) whether filing of false affidavit 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?"

The same matter was heard again on 10.03.2014 [6] and the Court observed with great satisfaction that the Law Commission has prepared its recommendations in the form of **244th Report**

[2] 1975 AIR SC 865

[3] AIR 1975 SC 1590

[4] AIR 1975 SC 2299

[5] Public Interest Foundation & others v. Union of India & Another 2014 (1) SCC 616: CDJ 2014 SC 1117

[6] Public Interest Foundation & others v. Union of India & Another 2015 (11) SCC 433: CDJ 2014 SC 547

titled '**Electoral Disqualifications**' and found the need for legislative changes in respective Acts and provisions. Pending such action from Parliament, the Court directed the Courts below for speedy trial of matters relating to sitting MPs and MLAs and in any case not more than one year from the date of the framing of charges, that the trial to be conducted on day-to-day basis, and in case of some extraordinary circumstances to submit periodical reports to the Chief Justice of the Respective High Courts. But the possibility of an effective law is still elusive.

Finally the matter has been placed before the Constitutional Bench along with other WP(C)s 800 of 2015 with Criminal Appeal Nos. 1714-1715 of 2007, WP (Cr) No.208 of 2011 which disposed of the matter on 25.09.2018[7], upon consideration of the entire law on the subject matter. The Court held that on perusal of Article 102 (1) (e) and Art 191 of the Constitution it is clear that as regards disqualification for being chosen as member of either House of Parliament or for being member of the Legislative Assembly or Council of the State, **law has to be made by Parliament**, and **that Parliament has exclusive legislative power to lay down disqualification for membership**, that Election Commission has to act in conformity with law made by Parliament, and it cannot transgress the same. Thus, it opined that answering question referred to in affirmative would be in teeth of doctrine of separation of powers and would be contrary to provisions of Constitution and to law enacted by Parliament. The Court held out a hope: "***We are sure, the law-making wing of the democracy of this country will take upon itself to cure the malignancy. We say so as such malignancy is not incurable. It only depends upon the time and stage when one starts treating it; the sooner the better, before it becomes fatal to democracy. Thus, we part***."[8] Now the ball is back in the court of the Parliament about the members of which we are deeply contemplating as to how to decriminalize them!

The question that needs re-questioning is - how far law alone suffices in cleansing the law makers. If the law makers form an oligarchy of their own, and either refuse to or apply breaks on legislative options, what alternatives the civil society can explore? H.L.A. Hart[9] offers a critique of the then prevalent concepts of law in the West, i.e., Austin's 'law as command' backed by threat of punishment and in that process of the critique invokes an allegory of the case of a gunman ordering the bank clerk – "Hand over money or I will shoot"[10] to demonstrate the inadequacy of that theory. Though temporarily the gunman's is an order or command backed by threat of punishment and fulfills all the definitional requirements of 'law' in command theory, it is no law. It's an exception; but what happens if exception becomes a norm? Ronald Dworkin[11] says: "In a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even though he would like some of them changed. … But this general duty cannot be an absolute duty, because even a society that is in principle just may produce unjust laws and policies, and a man has duties other than his duties to the State. A man must honor his duties to his God and to his conscience, and if these conflict with his duty to the State, then he is entitled, in the end, to do what he judges to be right. …" This was also the considered opinion of many philosophers, but expressed in different ways - Marx, Gandhi, or Lohia.

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[7] CDJ 2018 SC 990

[8] Para 119, ibid

[9] H.L.A. Hart, The Concept of Law, © Oxford University Press 1961, 2012

[10] p.19, ibid

[11] Ronald Dworkin, "Taking Rights Seriously", Universal Law Publishing Co. Pvt. Ltd, New Delhi © 1977, 1978 by Ronald Dworkin, p.186

A time has come in India, which is witnessing the threatening macabre of the power, avarice, unethical capital, feudalism, crime, glamour, and communalism - all together in rich chorus, for its citizens to demonstrate, individually and collectively, their will against this disorder, by exploring all the legally available means, including NOTA or even refraining from voting consciously and by declaring it openly. We need to tell the oligarchy obstructing the legislative options that the days of silent suffering is not a characteristic approach of a common Indian, that it is no new phenomenon for the people of this land to declare that we do not 'bend … knees before insolent might', and that we have several paths at achieving the end of cleansing the stables, and decriminalizing our representatives if they fail to correct themselves on the sane advice of the Apex Court or of the wisdom.

The notion of 'people' sometimes appears to be uncertain and amorphous. There are instances in the human history when this undefined people instantly responded to the call of a leader. Buddha, Jesus, Marx, Gandhi … demonstrated with absolute sincerity on a larger canvas that this 'amorphous people' are always ready to walk along with the leader. "***Yad yad aacarati sreshtas tad tad evataro janah / sa yat pramanam kurute lokas tad anuvartate***"[12] [Whatever action a great man performs, common men follow. And whatever standards he sets by exemplary acts, all the world pursues]. Generally, the leaders lead people by setting standards, the people follow. If the leadership fails, the people fail. Who failed the people? It is the leaders of the society – political, intellectual, academic etc., and the institutions – Parliament, Legislatures, Courts, Universities etc., who failed to guide the common people or rather, misguided them. Intellectual exercise has divorced itself from the commoners. The disconnect between the leader and the led is so humongous in India that we have to reconstitute ourselves as to where we are leading the society to. People are always ready to be guided, but when the guide disowns them?

A word of caution: I would like to end this discussion on 'criminalization of politics' or rather 'decriminalization of politics with a note of caution. In the world history, in the past, we have seen some instances where the criticism of Parliaments or people's representatives had led to the dictators occupying the space created out of the frustration of the ordinary man, exploiting their disgruntlement, with the promises of some unknown wonder lands. We have the classic case of Hitler, whose meteoric rise in German politics owe to his bitter ridicule of the Parliaments, which had ultimately led to fascism. Bernard Crick[13], the British political theorist and democratic socialist in his – "**In Defense of Politics**" cautioned the impatient younger generations about the dangers of the decline of political thinking when he said: "But the salient thing about the *practice* of politics is that no door is ever completely closed, and about the *theory* of politics is that it arises when closed societies are found unworkable or intolerable."[14] He further said: "… The truth is that there is nothing, in this world at least, above politics. Politics is freedom. …"[15] We need to theorize and also practice politics instead of giving space grudgingly to more dangerous dictators. Good politics are always better than bad politics, and bad politics can also be tolerated for some time with a hope for changing it to good in future. But apolitical behaviors, absolute condemnation of all politics, and conversations of '**no politics**' etc., are the breeding grounds for the dictators in waiting.

[12] Bhagvad Gita 3.21 Karma Yoga

[13] Bernard Crick, "In Defense of Politics", Continuum, © Bernard Crick, First South Asian Edition 2007

[14] ibid, p.91

[15] ibid, p.161