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**PUBLIC INTEREST FOUNDATION V. UNION OF INDIA: A SEVERE
BLOW TO CRIMINAL POLITICS?**

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Abstract:

In the case of **Public Interest Foundation vs. Union of India**², the Supreme court of India has taken cognizance on the matter of criminalization of politics. Although the constitutional bench hearing the case agreed that lawbreakers should not become lawmakers but refrained itself from making any laws by pleading separation of powers between judiciary and legislature and held that they are unable to intervene in the matters of the legislature so, the court cannot make laws to stop those who commit crimes and become members, but the parliament is exclusively responsible for making laws against the criminalization of politics. However, the bench issued certain guidelines with the aim of curbing criminalization of politics. The bench asked political parties to give a reason to the citizens for not choosing a candidate without any criminal background. The authors appreciate the efforts made by supreme court to highlight an important issue although Authors believe that the steps taken by the Supreme Court are not enough for curbing the criminalization of politics as the court has just outweighed itself, rather than solving the main issue. Still, there are many lacunas in the law regulating the disqualification of the candidates and members. Therefore, the authors have proposed certain measures that might help in filling the void in the law and curbing criminalization of politics from its roots.

Introduction:

India is a diverse nation, with variety of choices and opinions. Electing a candidate who can represent this diversity is itself an uphill battle. The universal adult suffrage that provides with

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² Public Interest Foundation Vs Union Of India, (2019) 3 SCC 224.

right to vote to all adult citizens also provides for fair representation as a matter of right. ³Use of money and force power to gain votes through illegal means seizes this right. As according to Supreme court there are 2500 sitting MLAs and MPs who have criminal charges against them⁴, so its high time that judiciary take its stance on the matter and curb political criminalisation, hence in Public Interest Foundation vs. Union of India, the Supreme Court recognized the issue of the uprising criminalization of politics in India. The court agreed that the participation of criminals is consistently increasing in politics and the lawbreakers are becoming lawmakers. But in this case judiciary rescued itself from making any laws regarding political criminalisation and said that parliament is the sole body who is responsible for making laws and it would be infringement of the doctrine of separation of power if judiciary intervenes in law making process.

However, witnessing the alarming situation where more than 40% of the elected representatives are having serious criminal charges against them. ⁵The court issued certain guidelines to bring out the criminal past of the candidate in public, at the time of election. This will increase the awareness about the criminal past of the candidate among voters, aiming that this will help in demoting criminalization the politics.

Background:

Since 2002, many attempts are made in order to demote or curb the criminalization of politics in India. The Supreme Court has not only recognized the issue of the criminalization of politics in India but also played an imperative role in the direction of curbing the same.

For the first time, in 2002, in the case of Union of India vs. Association for Democratic Reforms⁶, the apex court of India recognized the right to information (right to know the criminal past and assets) of the candidates is a fundamental right under Article 19(1)(a) ⁷the constitution of India.

Again, in 2003, in another case of People's Liberties vs. Union of India⁸, the apex court Union

³ INDIAN CONST. Art 326

⁴ The Wire. 2021. More Than 2,500 Sitting Mlas And Mps Face Criminal Cases, Supreme Court Informed. [Online] Available At: <<https://thewire.in/Law/Sitting-Mlas-Mps-Criminal-Cases-Data-Supreme-Court-Criminalisation-Politics>> [Accessed 28 November 2021].

⁵ The Wire. 2021. More Than 2,500 Sitting Mlas And Mps Face Criminal Cases, Supreme Court Informed. [Online] Available At: <<https://thewire.in/Law/Sitting-Mlas-Mps-Criminal-Cases-Data-Supreme-Court-Criminalisation-Politics>> [Accessed 28 November 2021].

⁶ Union Of India Vs. Association For Democratic Reforms, (2002) 5 SCC 294.

⁷ INDIA CONST. Art.19 §1 Cl. A.

⁸ People's Union Of Civil Liberties (PUCL) V. Union Of India, (2003) 4 SCC 399.

for civil ruled that apart from the criminal past of the candidate, other relevant information about the candidate also comes under the ambit of right to information under Article 19(1)(a) of the Constitution of India.

In 2013, in the case of Lily Thomas vs. Union of India⁹, the apex court of India held that a sitting MP or MLA, if convicted, for an offence whose punishment is two or more than two years would lose their seat, immediately.

Recently, after a series of petitions, the most important one was filed in 2011, by an NGO along with a BJP leader. The petitioners directly demanded the disqualification of the candidate as well as legislators against whom any serious criminal case is framed by any court of law.

Facts:

In 2011, a petition was moved in the Supreme Court, under Article 32¹⁰ of the Indian Constitution, to increase the scope of disqualification of Members of Parliament, Members of the legislative assembly, and the candidates. The petition was moved by an NGO - Public Interest Foundation and a BJP leader, Ashwini Upadhyay.

The petitioners were of the opinion that voters are not well aware of the criminal past of the candidate, as the information is not made public. The petitioners claimed that the lack of information among voters is the main reason responsible for promoting the criminalization of politics in India.

Hence, to demote the criminalization of politics, a petition was moved in the apex court to seek disqualification of candidates as well as legislators under the ambit of the 'Representation of people's act, 1951 (RP act).'¹¹ The petitioners asked the court to widen up the scope of section 8 of the act, which deals with disqualification on the basis of a conviction for certain criminal offences. But currently, there is no provision in section 8 to disqualify any candidate and legislator merely on the grounds of the formation of criminal cases against them.

Additionally, the petitioners requested to disqualify the candidates who have filed false affidavits at the time of nomination.

Initially, a 3-judge bench was hearing the case but later, in 2016, the case was referred to a constitutional bench, under article 145(3)¹² of the Indian constitution.

⁹ Lily Thomas V. Union Of India, (2000) 6 SCC 224.

¹⁰ INDIAN CONST., Art. 32.

¹¹ Representation Of People's Act, 1951 § 8, Act Of Parliament, 1951 (India).

¹² INDIAN CONST. 145 § 3.

Issues:

- 1) Whether the court entitled to lay down an additional ground of disqualification, apart from section 8 of RP Act and article 102(1)¹³ of the Indian constitution?
- 2) Whether filing of false affidavits leads to disqualification of the candidate under section 125(A) of the RP act¹⁴?

Contentions:**Petitioner's Arguments:**

As we have witnessed over the years the increasing number of candidates with criminal antecedents, it's high time that we restrict the lawbreakers to be lawmakers as it's not a Fundamental Right to contest elections. On the same path the petitioner argued the following contentions:

- In India the grounds for disqualification of a member are exceedingly limited, as of the 2018 report we have 42% candidates with criminal charges¹⁵, hence the petitioner argued that the grounds for disqualifications must be broadened so that the perpetrators were not able to be the rulers.
- Election commission of India, an independent body that was established to safeguard free and fair elections in the country, must confine the political parties from permitting tickets to a high number of independent candidates with criminal charges.
- It is the right of every voter to know about the genuine background of the candidate, as it will provide them with fair choice and better representation but there is a lack of information among the citizens about the real character of the contenders hence, there must be wide publicity of the criminal background of candidates.
- Makers of the constitution granted some responsibilities to the prime minister so that he can safeguard the cherished values of the democracy, as under Manoj Narula vs union of India¹⁶ case the court held that it is the discretion of the prime minister to appoint the ministers and it is expected from the prime minister to choose ministers wisely to protect the fundamentals of the constitution.

¹³ INDIAN. CONST. 102 §1.

¹⁴ Representation Of People's Act, 1951 § 125 Cl.A, Act Of Parliament, 1951 (India).

¹⁵ The Hindu. 2021. 43% Newly Elected Lok Sabha Mps Have Criminal Record: ADR. [Online] Available At: <<https://www.thehindu.com/Elections/Lok-Sabha-2019/43-Newly-Elected-Lok-Sabha-Mps-Have-Criminal-Record-Adr/Article27253649.Ece>> [Last Visited 28 November 2021].

¹⁶ Manoj Narula Vs Union Of India, (2014)9 SCC 1.

- It is the responsibility of the court to remind the duty holders of their roles towards the constitution, hence the court must not outweigh the matter but should instruct and recommend decriminalizing politics being under the boundaries of the constitution.
- The petitioners seek that the election commission shall not provide with the party symbol to those who have heinous criminal charges against them.

Respondent's Arguments:

No authority can exceed its power to go beyond the powers provided by the constitution, as the fundamental law is the constitution itself, on this basis, the respondent argued the following contentions:

- Separation of powers comes under the basic structure of the constitution, hence the judiciary can't intervene in the matters of the legislature, as correctly held in the case of Lily Thomas vs Union of India, that the parliament has sole powers to make laws for disqualification of members and the court can only recommend but cannot make laws.
- Article 102¹⁷ and article 191¹⁸ in every interpretation provides exclusive powers to the parliament to make laws relating to the disqualification of members.
- Article 142¹⁹ which provides the powers to the supreme court to do complete justice does not provide that the court can add anything to the existing laws.

Judgment:

The supreme court's five-judge constitutional bench comprised of Chief Justice Dipak Mishra, Justice RF Nariman, Justice A.M. Khanwkar, Justice D.Y. Chandrachud, and Justice Indu Malhotra unanimously held that the court is bound to the doctrine of separation of powers and hence unable to intervene in the matters of the legislature so, the court cannot make laws to stop those who commit heinous crimes and become members but the parliament is exclusively responsible for making laws against the criminalization of politics. As even under Article 142, in extended interpretation, does not allow the court to add anything to the existing laws. Although the court agreed to the petitioner that there is an upsurge in the criminalization of politics, and it needs to be addressed hence being under the boundaries of the constitution the court issued the following directions to overcome the lack of information among citizens about

¹⁷ INDIAN CONST. Art.102.

¹⁸ INDIAN CONST. Art.191

¹⁹ INDIAN CONST Art.142.

the criminal background of the candidate:

- The court directed to the candidates that they shall fill the election commission's form with everything mentioning clearly about their criminal records, and these criminal charges pending against him must be highlighted through bold letters under the duly signed forms.
- The court directed that it is of paramount importance that the complete information of a candidate shall be revealed before the respective party and hence the candidate shall notify the related political party about every criminal charge against him.
- The court directed that revealing information to the concerned political party itself would not be sufficient and hence the related political party shall display the criminal cases of the candidate on its official website so that it can be accessible to everyone.
- The court directed that there must be wide publicity of the criminal antecedent of the candidate and its related political party through newspapers and electronic media and the court clearly stated that wide publicity means publication at least three times during the campaign.

Critical analysis:

The authors believe that this case contains many vacuums and depicts the inconsistency of the court. The honourable supreme court outweighed an important matter that needs to be resolved with paramount urgency, some of its criticisms are:

The respective bench held that the court cannot add anything to the existing laws even under Article 142²⁰ which provides power to the honourable Supreme court to do complete justice, however court intervene in the matter where there is a legislative void, till there is no specific law made by the parliament.²¹ Hence, the argument of the court that parliament has the supreme and explicit power to fill that lacuna of law isn't valid, as the court is the guardian of the constitution can safeguard the fundamental basic structure of the constitution that aims to administrate India through the best representatives.

The court was silent on many contentions by the petitioner as the court did not say anything about the disqualification of the candidate through false affidavits under section 125(A) of representation of peoples act²² and this lacuna by the court is causing chaos in present times.

²⁰ INDIAN CONST. Art.142.

²² Representation Of People's Act, 1951 § 125 Cl.A, Act Of Parliament, 1951 (India).

The court stated that as section 7(b) of representation of peoples act ²³states that there can be no further grounds for disqualification except those which are mentioned under the act itself, hence there is no additional space to add any other ground for disqualification, as the act itself is very exhaustive for that matter, however, the doctrine of Repugnancy under Article 145 Indian constitution, which provides for the Rules of court, etc²⁴and many precedents of the court clearly expresses that the constitution is supreme over every act and hence if something is infringing the basic idea of the constitution than the constitution has the power to amend or repeal that act.

Equality is the basis of our constitution, the constitution provides with posts of bureaucrats like members of the Public Service Commission, Chief Vigilance Commissioner, etc for which the constitution assumes them to be trustworthy only when there is no charge against them, and framing of charges leads to disqualification, so why there are no such provisions for members of parliament? On what ground the Supreme Court can say that the representation of the people's act has exhaustive grounds for disqualification and there is no void in law that can be fill up by the court?

Will the directions provided by the court to make its citizens aware of the criminal antecedents of the candidate solve the issue of criminalization in politics? Will it decrease the number of candidates with criminal antecedents in political parties? Then the answer is far from an affirmative as the bench itself stated a study by Association for Democratic Reforms (ADR) where it was found that approximately double of the candidates with criminal records won the election than those who have a clear criminal background.²⁵

Authors believe that the right to contest elections and form associations under Article 19(1)(c) is not absolute as the supreme power in a democratic setup falls in the hands of its citizens and they deserve the best representation rather representation through criminals.

Steps Taken and Recommendations:

“Where there is a will, there's a way”, Although the directions provided by the court in the case of ‘Public Interest Foundation vs. Union of India’, are not pertinent to the current scenarios through amendments, these directions can be upgraded. The Supreme Court, in the case of

²³ Representation Of People's Act, 1951 § 7 Cl.B, Act Of Parliament, 1951 (India).

²⁴ INDIAN CONST. Art.145.

²⁵ The Economic Times. 2021. Lok Sabha Election: A Criminal Candidate Has Double The Chances Of Winning. [Online] Available At: <Https://EconomicTimes.Indiatimes.Com/News/Elections/Lok-Sabha/A-Criminal-Candidate-Has-Double-The-Chances-Of-Winning/Articleshow/68573567.Cms> [Accessed 28 November 2021].

Brajesh Singh vs. Sunil Arora, ²⁶has recently modified its directions and directed political parties to publish the criminal antecedents of the candidates within 48 hours of their selection, in this similar case, however, the court was again rescuing itself from making laws but made certain observations and provided directions to curb criminalization of politics, some significant directions are as follows:

1. Political parties must publish the information of the criminal antecedents of their candidate on the homepage of their website:

As the political parties confine themselves from the publication of the criminal background of their candidates and for the sake of publishing, they find alternatives and covertly disclose their information, The Supreme Court has provided a direction to these political parties to disclose the criminal antecedents of their candidates on the homepage of their website with an exclusive caption 'candidates with criminal antecedents'

2. Election commission of India should create a Mobile App:

The supreme court of India has directed the ECI to create a specific mobile application containing the published information about the criminal antecedent of the candidates. This App will provide easy access to information to the electorate.

3. Election Commission of India must spread awareness:

As most of the voters are of the candidates, their Right to be aware of the complete relevant information of the candidate so that they can exercise their Right to a franchise, it is very necessary to make them aware through various online and offline mediums.

4. Separate cell should be created by the Election Commission of India:

The political parties need to submit the compliance report within the stipulated time, to monitor the required compliances there should be a separate cell that will apprise the court on non-compliance to the court's orders.

These are the various modifications made by the court in its directions but, Are these amendments sufficient? Then the answer is certainly 'NO', as until and unless India has proper laws to curb the criminalization of politics, it cannot be abolished from the system of the government. We recommend amending the obsolete laws and solve the tussle between the

²⁶ Brajesh Singh V. Sunil Arora, 2021 SCC Online SC 605

concept of separation of power and the Concept of check and balances, and we expect the judiciary to take more steps towards curbing the criminalization of politics.

Conclusion:

The power of muscle and money can buy a seat, can elect a representative, can be a face of society but it always has susceptible roots that can ruin the society from tip to toe. The said judgment clearly stated the vulnerability of the judiciary and the power of the legislature. Although the court has exercised its power by rescuing itself through certain guidelines, we believe, this is not the solution to the issue. In India we have witnessed how people always have substitutes to law and hence when political parties were said to do publicity of the actual character of their candidates, they always choose a substitute for it and publish it for the sake of publishing and even if they provide wide publication then who can take the assurance that the criminalization in politics can be decreased. With the increasing number of perpetrators as rulers, the need of the hour is to amend the laws, it is of urgent need that we amend the obsolete representation of the people's Act and broaden the grounds for disqualification so that we can have better representation, and then the question arises who will make laws or amend laws? Judiciary has already surrendered and how can we expect parliament to make laws against its own members? The election commission being an independent body cannot interfere much as it does not contain that much power hence, we recommend making a completely separate vigilant body that can work as a watchdog on political parties and have powers to disqualify candidates if any discrepancy is found. In the ending lines of this case comment, we hope that one day our representatives were deserving candidates with full potential.