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A DISTURBING EXAMPLE OF THE NORMALISATION OF LAWFARE

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Protesting the disqualification of Mr. Gandhi, in New Delhi | Photo Credit: ANI

The word “lawfare” is a portmanteau of “law” and “warfare”. It refers to the weaponisation of law, and of legal systems, in order to intimidate, harm, or delegitimise an opponent (often, a political opponent). In thriving constitutional democracies, judiciaries are often alert to the possibility of powerful political figures deploying lawfare against their rivals, and are quick to turn back such attempts.

However, the conviction of the now former Congress Member of Parliament from Wayanad, Rahul Gandhi, for criminal defamation by a court in Surat, and his subsequent disqualification from the Lok Sabha, represents a disturbing example of the normalisation of lawfare in India.

Let us first take the criminal defamation case. Proceedings against Mr. Gandhi were initiated in a court in Surat, for a political speech he had made at Kolar, Karnataka, in 2019. Legal experts have already pointed out the many surprising features about the process, which involved the complainant getting a year-long stay on the case that he himself had initiated, a different judge, and the sudden acceleration, and atypically quick decision in the case, over the last one month.

Leaving all that aside, however, it is evident that the judgment itself is legally unsustainable. Mr. Gandhi was prosecuted for the following remark: “how are the names of all these thieves ‘Modi, Modi, Modi’ … Nirav Modi, Lalit Modi, Narendra Modi.” The prosecution was based on the complaint of Purnesh Modi, a Bharatiya Janata Party leader, who claimed that by virtue of his surname, he, along with all other people bearing the surname “Modi”, had been defamed by Mr. Gandhi’s remark.

If this sounds like an absurd argument, it is because it is an absurd argument. To prevent people from being dragged to the courts in frivolous proceedings, the law of defamation is clear that if references are made to an indefinite “class” of people, an individual cannot claim that they are a member of that class, and have, therefore, been defamed. For example, if I say that “all lawyers are thieves”, a lawyer cannot come to court and say that they have been defamed, unless they can show a specific imputation identifying them, directly.

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The “class of all persons in the world bearing the surname Modi” is a similarly indefinite and indeterminate group. Not only that, Mr. Gandhi’s remark did not even insinuate that every person bearing the surname “Modi” was a thief, by virtue of that surname. How, therefore, an individual was able to prosecute the case on the claim that he had been personally defamed by Mr. Gandhi’s remark, is extremely bewildering; and the fact that the trial court was willing to entertain the claim, even more so.

While the fact of conviction is one thing, the quantum of the sentence is another. Criminal defamation has a maximum penalty of two years’ imprisonment. This ‘maximum penalty’ is very rarely awarded, on the understanding that defamation is a pure speech offence, and that, ideally, people should not be imprisoned for lengthy periods purely on the basis of something they said. There are almost no recorded instances of courts awarding the maximum sentence, two years, in a criminal defamation case. While sentencing is discretionary, and guidelines for sentencing are rare, the court’s decision to award the maximum possible penalty is another strange feature of this case.

It has not escaped public attention that, indeed, the quantum of sentence was exactly that which was needed to attract an MP’s disqualification from Parliament. Indeed, immediately after the judgment was delivered, the Lok Sabha Secretariat served a disqualification order upon Mr. Gandhi; at that point, the judgment had not even been translated, and, as legal experts have pointed out, it was doubtful whether the Lok Sabha Secretariat had accessed a certified copy.

The disqualification proceedings are another example of lawfare. The Constitution authorises the disqualification of a Member of Parliament insofar as it is provided for under law. The Representation of the People Act, the relevant law, stipulates that if a person is convicted of any offence and sentenced for a period of not less than two years, he shall stand disqualified from the legislature for the period of his sentence, and for a further period of six years after his release.

Until 2013, the Representation of the People Act also stated that the disqualification would not take effect for a period of three months from the conviction, or if an appeal or a revision was brought within that period that appeal or revision had been disposed of by a court. The intent behind this proviso was evident: disqualifying an elected member of a legislature is an extremely serious action in a parliamentary democracy that is founded on the principle of representation. Not only does this deprive the people of their choice of representative, but also, upon disqualification, leaves them without representation until such time that a by-election is announced and the seat is filled. For this reason — and given that we have a hierarchy of courts for precisely the reason that judges are human, and can make mistakes — the Representation of the People Act kept a parliamentarian’s disqualification in abeyance until at least one appellate body could scrutinise the initial order of conviction and sentence.

However, in 2013, acting on a public interest litigation brought by Lily Thomas, the Supreme Court of India struck down this part of the section as unconstitutional. As the lawyer, Paras Nath Singh, points out, in Lily Thomas it was expressly argued that striking down this grace period would leave politicians at the mercy of frivolous court judgments, but was given short shrift by the Supreme Court. The Supreme Court reasoned that the convicted politician could always move the appellate court for a stay upon their conviction. However, not only does this interpretation concentrate more power in the hands of courts when it comes to the political process but it is also naive from the perspective of lawfare: as the case of Mr. Gandhi has shown, when the Lok Sabha Secretariat issues the disqualification order before even a translation of the judgment was available, and before the convicted individual’s lawyers have had a feasible chance to move for a stay, the protection the Court thought was available is nothing more than a chimera.

Indeed, the Lily Thomas judgment is just one of many examples where, acting on so-called "public interest litigation petitions", the Supreme Court has intervened in the political process. This has ostensibly been with a view to "purifying" the process and removing criminal elements; what it has done, however, has been to make lawfare easier. The case of Mr. Gandhi highlights that amply.

For these reasons, the conviction and disqualification of Mr. Gandhi represents another signpost in a concerning drift towards the normalisation of lawfare as a political tactic. It is concerning because one crucial component of the legitimacy of courts is their reputation for impartiality between contending political forces. Recent examples from Poland and Hungary have shown how quickly that reputation can be lost. It is for the judiciary to ensure that what could also happen here, does not happen here.

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