ILS Law College, Pune

CENTRE FOR PUBLIC LAW'S

PUBLIC LAW BULLETIN

VOL. XV

SATURDAY

AUGUST 15, 2020

THEME: ELECTION LAWS AND OUR DEMOCRACY

Public Law Bulletin

CENTRE FOR PUBLIC LAW AT ILS LAW COLLEGE,
PUNE

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A. MESSAGE FROM THE EDITOR

Date: 15th August 2020

Dear all,

It gives me great pleasure to present this issue of PLB on the theme **"Election laws and our democracy".** With some disappointment, we are releasing this issue having missed the deadline of 15th August. Apart from articles on this dedicated theme, I am also happy to kick-start a new vista of research with commencement on a series of articles on "Public Law and Legal Theory". The first article n the series revolves around **"Interface of Pure Theory of Law with Public Law: Special focus on Indian Constitution."** I congratulate the student editors and the student authors of invited articles at a when Constitutional Law of India is going through turbulence with the raging conflict between freedom of speech and expression and contempt of courts. As students of Constitutional Law, our responsibility has raised multiple folds.

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B. INTERFACE OF PURE THEORY OF LAW WITH PUBLIC LAW: SPECIAL FOCUS ON INDIAN CONSTITUTION

AUTHORED BY: DR SANJAY JAIN, EDITOR-IN –CHIEF, PUBLIC LAW BULLETIN

We are extremely happy to kick start a new vista of research as part of Public Law Bulletin. We aim to identify and analyze the interface of legal theory with public law. It is the first piece in this series grappling with connections and disconnections of Kelsen's Pure theory with the Indian Constitution.

At the outset let me clarify that no legal theory, i.e. a theory of law or theory about the law can be made or invoked as a full proof touchtone/barometer to fit in any particular law including 'Constitution of a state/nation'. An Indian constitution is no exception to this rule. It would be erroneous to equate Indian Constitution fully with sociological jurisprudence nor it would be profitable to regard Indian Constitution as a formal and positive law document to be read as a set of clearly defined rules nor can anybody claim that despite having identified and assigned central meaning to most of the concepts underlying it, Indian Constitution does not have the penumbra. Nor any scholar can claim with certainty that every rolled up expressions in the Constitution has a definite baseline/level of generality. In fact to quote Philip Bobbitt, "Constitution of nation/state is a canvass which is painted with several colors, i.e. to decipher and to decode a general document like Constitution; it would be too hazardous a process to adopt a particular interpretative strategy". The truth is that the hermeneutics of the constitution is beyond any particular canon of Interpretation. To comprehend it, and to keep it in dialectical mode, courts have to invoke multiple such cannons.

Thus having briefly set out the enormity of the enterprise of understanding the constitutional law of the nation/state, the complexity involved in its interpretation and

cautioning against the adoption of any particular canon or theory of interpretation for its analysis, let me now engage in the quest of how and to what extent Kelsenian pure theory of Law has any relevance in unpacking the genera of Indian constitution.

DETOUR OF KELESONIAN PURE THEORY OF LAW

Professor Christoph Keltzer in his treatise ' The idea of a Pure theory of Law', has downsized the complex ideas of Kelsen into six canonical doctrines.

1. The doctrine of normativity (semantic anti-reductionism). Roughly, the claim that law is normative and that it is not explicable in factual terms only.

2. The doctrine of the double purity of legal theory. The claim that in studying the law we have to make sure that we keep the law strictly separate from both morality and sociology.

3. The doctrine of the basic norm. - The claim that in referring to the law we have always already presupposed the basic norm.

4. The doctrine of the complete legal norm. The claim that the only norm that is complete is the one that gives all conditions of the lawfulness of an act of force.

5. The doctrine of the hierarchical structure of the legal system. - The claim that the content of the law is created dynamically by a series of legal acts progressively individuating the conditions of the lawfulness of the use of force.

6. The doctrine of alternative authorisation. - The doctrine that, in authorising the annulment of certain laws, the law has thereby stipulated the (provisional) legality of unlawful law.

According to him, although these doctrines do provide the larger picture of Kelsonian pure theory of Law, they constitute a mere periphery of his complex ideas. He,

therefore, purports to find and discover, the central thesis/core underlying the Pure theory of law.

- The law is an order of force or violence:- It is a particular perspective on the evolution of law and competes with other schools of jurisprudence. According to this perspective, Law is a normative structure regulating societal ordering by authorizing resort to use of force or violence through systematizing the interpretation of force or violence.

Testing this part of the Kelsenian core, it is very clear that at least part of Indian constitution draws and sustains on the pure theory of law. Thus, the right to life and personal liberty is guarded against any private assault and monopoly to use force/ violence against subjects is afforded to the State. However, to resort to the same, the State has to form the judgement based on systematized interpretation. For systematized interpretation, the constitution has evolved processes and institution, i.e. judicial processes and Courts, investigation machinery etc. based on the constitutional mandate. Of course, it would be a hasty conclusion to infer from the same that force and violence is both necessary and sufficient condition for the effectiveness of Indian constitution or for the idea that Indian constitution is generally recognized by subjects as a binding set of rules.

SUPERIORITY OF STANDPOINT

Kelsen while proposing his theory claims that it is superior to all other standpoints of Law. However, one has to be careful here in engaging with the idea of superiority. Superiority to ones claim does not at all mean that arguments proffered by or positions were taken by the other scholars by way of different schools of thought are either completely wrong or absurd. Put simply, a superior standpoint rather than being dismissive of other standpoints represents and includes them. Thus to quote

Christopher, "The superior standpoint thus has in view both everything that the other standpoint sees and also the other standpoint itself.". This approach is predominantly adopted by famous German philosopher Kant. Thus, seeking normativity of law through force or violence though may not be defended as an exclusive claim by being dismissive about the other schools of jurisprudence it can certainly be regarded as a better view or an effective rationale.

E.g. attribution of Latitude to the judgement of executive in the formation of opinion about the state of emergency may be legitimized as one of the aspects of systematized interpretation of force and violence during expediencies.

THE PURITY OF PURE THEORY

We have to avoid the confusing wrong question, what is the concept of Law with the right question how is the law of a specific quality possible? Thus law becomes the production of humans if we don't understand it in terms of metaphysics, or contentious abstract claims. We have to simply assume that Law is fully human, and so the nature of obligations has to be explained exclusively from the law itself. Drawing from this, can't we assign purity to the Indian constitution? Can't we argue that all obligations and interpretation to be legitimate have to be rooted to it and sourced to it ? in fact can't we trace the fundamental notion of unconstitutionality assuming that Indian constitution being the product of humans, it cannot be depured or defiled by anything but it?

THE PRIMITIVE FUNCTION OF LAW

One of the fundamental notions of Pure theory of law is to locate law in a single function to assume or envisage at the foundation of law a monolith. Such a picture negates the plurality of sources of law. E.g. in India personal laws do not stem from the Constitution. It merely recognizes their existence and enforces them subject to certain conditions. Same is the case with fundamental rights which are merely recognized and

enforced by the Constitution, but whose existence is pre-legal or non-legal. Legal is always preceded by non-legal.

Reductionist methodology to identify the centre /foundation of law in the basic norm, whose foundation is everything but human makes the Kelesonian pure theory skeptical. By no means it is possible to perceive the surface of law to be flat or confine it to conceptual pedigree in the postcolonial and postmodern socio-political scenario. Indian constitution is indeed a multisource document and conception and cannot be reduced as an integrated whole like the basic norm.

LAW AS COMMANDS

It is difficult to perceive the Indian Constitution as a set of prescriptions backed by sanction or reduce it to merely a group of commands backed by force. There are many areas in the Constitution which are aspirational like Part IV and Part IV A, Directive principles and Fundamental duties. There are certain provisions like Articles 245, 246 and 246 A, whose address is not being subjects, they are merely institution regulating rules. There are many areas in the Constitutions which are merely procedural e.g. legislative process or declaratory like holding of Parliamentary sessions, or qualifications of constitutional authorities. Such nuances in the Constitution cannot be characterized either prescriptions or commands simpliciter. Present era advocates the culture of justification i.e. to say every rule has to be justified, every action has to be reinforced by reasons, every punishment has to be supported by the circumstances.

LAW AND MORALITY

Even if it is assumed that there is a distinction between law and morality, there is no gainsaying the fact that law itself may embrace morality as one of the criteria of validity/reasons for action. E.g. number of freedoms guaranteed by Article 19(1) can be reasonably restricted on the ground of morality. Courts often invoke the notion of

constitutional morality as a justification to preach politicians for the observance of respect for values underlying constitution.

GOOD AND NON-GOOD LAW

Kelsonian perspective, of course, provides stability to law because under this model law is never invalid. Every rule has to derive itself from the higher rule and to stop infinite regression, it is halted at the stage of a basic norm. However, in the actual scenario, can we not distinguish between the good constitution and bad constitution? Was the 39th amendment not bad amendment, were by Mrs Gandhi virtually arrogated the entire constitution unto herself. ? She very callously aborted the judgment of Allahabad High Court, declaring her election as Member of Parliament as illegal by resorting to the amendment of the constitution? It was the classic case of the use of public power for private purposes. Of course in Kelesonian sense, as long as the process laid down in the constitution is followed, its byproducts are to be deemed as valid. But such as result is everything but adherence to Principles and values underlying the Constitution. Unfortunately, Supreme Court while declaring the part of the 39th amendment to be unconstitutional, adopted a very fragmented approach and merely procedurally declared the assumption of judicial power by the parliament to be unconstitutional, thereby giving rise to the vital question whether the court was morally reading the Constitution?.

BASIC STRUCTURE OF THE CONSTITUTION

Assuming for the sake of argument that the Indian constitution is a grund norm in Kelesonian sense, how can we justify its interpretation. Can the Constitution be divided into a basic and non-basic structure from the standpoint of Kelesonian perspective? The answer has to be clear, in negative. As the conception of the basic norm is the byproduct of reductionism, the role assigned to it plays a singular function of making entire legal order functioning. However, on the other hand, the constitution of any state

is far from being a singular functioning document, it has to play multiple functions. Some of such functions may go to the root of its existence, thereby worthy of being guarded as a basic structure of the constitution. At any rate, at the level of formation of the Constitution, its justification through the lens of the pure theory is inexplicable, however, when the constitution is in action, in many of its area Kelesonian rationale play a pivotal role. E.g. norms dividing the functions of the organs of the state, norms demarcating the spheres of union and states, the idea of delegated legislations, etc. are the classic examples articulating the significance attached to the hierarchy of norms. Even the fundamental ideas like the government of limited powers or doctrine of intra virus can be justified through Kelesonian lens.

Thus, to sum up, Kelsonian pure theory of law may not provide or furnish as a necessary and sufficient condition for the effectiveness of Indian constitution but its core that without the permission of law force and violence is unauthorized is indeed the pivotal to public law. Ideas like separation of powers, distribution of powers and doctrines such as the supremacy of the Constitution are no less supportable under Kelsonian lens, as by the under strands of Jurisprudence.

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C. VITAL CONSTITUTIONAL QUESTION: CONSTITUTIONALITY OF THE ELECTORAL BOND SCHEME

-AUTHORED BY: BHARGAV BHAMIDIPATI (IV BA LL.B)

Political accountability and transparency towards people are the foundations of a democracy. The Electoral Bond Scheme was introduced by the Finance Act 2017 which aims at reducing the extent of use of unaccounted money in political funding.[1] But in explicit terms, the scheme allows individuals and companies to purchase 'electoral bonds' of denominations ranging from one thousand to one crore issued by the State Bank of India and donate the bonds to any political party registered under the Representation of People's Act 1951. Neither the donor nor the receiving political party needs to reveal the amount received and the identities of donors donating vis-à-vis the electoral bonds.

The Electoral Bond Scheme, consequently, was challenged in the Supreme Court which delivered its interim order in 2019 by not striking down the scheme but directing all political parties to reveal details of funds received by electoral bonds to the Election Commission.[2] The article primarily intends to explore the Petitioner's arguments on

[1] See generally for Electoral Bond Scheme, <https://www.business-standard.com/about/what-is-electoral-bond> last accessed on 3rd August 2020

[2] See, interim order in Association for Democratic Reforms and Anr. v. Union of India and Ors. In Writ Petition (Civil) no. 333 of 2015 in the order dated 12th April 2019, <https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-359920.pdf> last accessed on 7th August 2020

whether the Finance Act 2017 is unconstitutional in as much as it was introduced as a money bill, whether the Electoral Bond scheme reeks of manifest arbitrariness and lastly, whether the scheme is violative of voter's 'right to know' under Article 19(1) as recognized by the Supreme Court.

FINANCE ACT 2017 AS MONEY BILL – IRREGULARITY, ILLEGALITY OR UNCONSTITUTIONALITY?

The Finance act was introduced in the Lower House as a money bill, which needs to be passed only in the Lok Sabha and reduces the participation of Rajya Sabha to only giving recommendations.[3]A money bill, according to Article 110(1), deals with matters of taxation, expenditures, credits, consolidated funds, and such other matters given in sub clauses (a) to (f). The clause specifically uses the phrase, "dealing with" which demands a narrower exhaustive interpretation as opposed to terms of wider interpretation like 'related to'.[4]But the Act amends provisions from multiple legislations like the section 182 of the Companies Act 2013, 29C of the Representation of People's Act 1951 and section 2(j)(vi) of the Foreign Contribution (Regulation) Act 2010, which fall outside the scope of Article 110 and cannot be classified as money bill.

The concept of money bill is based on the system of the Westminster model and derived from the British Parliament Act.[5] But the Indian system of money bill is exclusive in its application as they have no protection against judicial review post 1974.[6]Thus, the assignment of a bill as money bill is not a discretionary act like the other procedural functions of the Speaker of the Lower House. Such discretion cannot exist especially when money bills override the federal structure of the nation which is manifested by

[3] See for Money Bill and other Bills, <https://www.prsindia.org/theprsblog/money-bills-vs-other-bills>

[4]Justice K.S. Puttaswamy (Retd) v. Union of India, 2018 SCC OnLine SC 1642

[5] S. 3, British Parliament Act, 1911

[6]Kesavananda Bharathi v. State of Kerala, (1973) 4 SCC 225

the existence of the Rajya Sabha as a part of the basic structure of our Constitution.[7] Thus, without a doubt the assignment of the bill as money bill cannot be passed on as a procedural irregularity.

Even if courts do not intervene in parliamentary procedures, in cases of an illegality of the action, the courts can be able review it. When a speaker declares that a bill is a money bill when in fact it is not, it would amount to illegality by violating Article 110 of the constitution.[8] Irrespective, the procedure adopted by either Houses are subject to the provisions of the Constitution, except certain meagre irregularities.[9] Thus, in the present matter the court can very well review the assignment of the Act as a money Bill and strike down the provisions which fall outside the exhaustive scope of Article 110.

MANIFEST ARBITRARINESS: IS THE ELECTORAL BOND SCHEME ANTITHETICAL TO THE INTENTIONS OF POLITICAL TRANSPARENCY AND ACCOUNTABILITY?

In the exemplary opinion of the R.F. Nariman J in the *ShayaraBano decision*, can be found the articulation of the concept of manifest arbitrariness.[10] The court questioned, "*if something is capriciously done capriciously, irrationally, without adequate determining principle, excessively and disproportionately, why cannot it be struck down as manifestly arbitrary?*". Nariman J found the Muslim Personal Law (Shariat) Application Act1937, in so far as it recognized and enforced Triple Talaq, as violative of fundamental rights because Triple Talaq was instantaneous, irrevocable and could be exercised without cause. The court cut through the *McDowell's case* and explicitly imprinted the threshold

[7] Kuldip Nayar v. Union of India, AIR 2006 SC 3127

[8] Ramdas Athawale v. Union of India, AIR 2010 SC 1310

[9] Article 122, Constitution of India; Raja Ram Pal v. Hon'ble Speaker of India (2007) 3 SCC 184

[10] ShayaraBano v. Union of India, AIR 2017 SC 4609

of manifest arbitrariness established through the *Indian Express case*, *Khoday Distilleries case*, and the *Sharma Transport case*.[11]

Thus, the threshold of Article 14 can no longer be compartmentalized into the theory of classification only. But what is it that is being claimed to be manifestly arbitrary in the Finance Act 2017 or the Electoral Bond scheme? It is the inherent dissonance in what the legislation seeks to do and what it does. This is to say that the changes brought to the Companies Act permits a loss-making company or even a shell company to donate through the electoral bond scheme anonymously. This not just allows for a direct benefit to the ruling party candidates but also allows for increased corruption as it opens channels to direct unaccounted money to political parties without any scrutiny. The ruling party deriving maximum benefit and the clear redirection of unaccounted money evidenced by the fact that 91% of the amount received was by bonds worth 1 crore rupees has been observed after the scheme became operational.[12]

Though the electoral bond scheme aimed to improve transparency in political funding, the amendments have weakened the mechanisms of transparency in the status quo. The introduction of proviso and explanation to Section 29C to the Representation of the People Act does not require disclosure of names addresses and electoral bonds.[13] The

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[11] State of Andhra Pradesh and Ors. v. McDowell & Co. and Ors. 1996 SCC (3) 709; Indian Express Newspapers (Bombay) and Ors. v. Union of India and Ors. 1985 SCR (2) 287; Khoday Distilleries v. State of Karnataka 1995 SCC (1) 574; M/S Sharma Transport v. Government of A.P. and Ors, Appeal (civil) 4998 of 2000.

[12] See for the referred statistics on the Electoral Bond scheme by ORF think tank, <https://www.orfonline.org/expert-speak/decoding-indias-electoral-bonds-scheme-58260/>

[13] **[29-C. Declaration of donation received by the political parties**. — (1) The treasurer of a political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely: —

amendment to section 29C is, thus, a retrograde step. The said amendment contributes to electoral bonds outside the ambit of Constitution Report mandated under S. 29C of the Act.

These provisions are thus antithetical to the intentions of the Finance Act and thus reek of manifest arbitrariness in so far as it permits gigantic anonymous donations, anonymous foreign contributions, reduces transparency, increases corrupt practices and legalises channels of redirecting unaccounted money to political parties. The legislation thus rightly falls within the court's jurisprudence on manifest arbitrariness and, the court may strike down such a legislation.

THE SCHEME AND VOTER'S 'RIGHT TO KNOW'

The primary controversy revolving around the Electoral Bond Scheme and at the heart of the petitioner's claim in the challenge is that the scheme violates the voters' 'right to know', enshrined in article 19(1)(a) and developed through the various judicial decisions. The right protects the voters right to know the identity of the contributors to a political party. Disclosure of campaign contributions is necessary because it allows voters to better understand a candidate or party's position on important issues and

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a) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year;

b) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year:

[Provided that nothing contained in this sub-section shall apply to the contributions received by way of an
electoral bond.
Explanation—for the purposes of this sub-section, "electoral bond" means a bond referred to in the Explanation to sub-section (3) of Section 31 of the Reserve Bank of India Act, 1934.]

evaluate whether a candidate is 'too compliant' with the wishes of their contributors, argues Gautam Bhatia in his article.[14]

The idea behind the right is the concern that political funding may result in a 'quid pro quo' deal which the voter is unaware of this. This concern was brought about in the US Supreme Court which noted that this problem is beyond corruption and relates to the threat of politicians complying to contributor's wishes against the interest of their constituents.[15] Though freedom of speech is a negative right which cannot be violated, the SC has recognized a positive right to know information about electoral candidates.[16] The court observed, "Democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant".[17] The court has in another decision articulated that freedom of discussion culminates from the idea that citizens should be sufficiently informed while making choices that may affect them.[18]

These series of observations and decisions of Indian courts have resulted in mandatory disclosure of assets, educational qualifications and their involvement in criminal cases for voters to make an informed decision. Thus, the abridgement of the voter's right to know becomes quite intuitive. But, none of the eight reasonable restrictions apply as a justification to the scheme. Thus, the Finance Act 2017, so far as it relates to Electoral Bond Scheme, amounts to an

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[14] See, "Financing the General Elections: Electoral Bonds and Disclosure Requirements under the Constitution" by Gautam Bhatia, also available at: <https://indconlawphil.wordpress.com/2019/04/19/financing-the-general-elections-electoral-bonds-and-disclosure-requirements-under-the-constitution/>

[15] Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)

[16] Union of India v. Association for Democratic Reforms AIR 2002 SC 2112

[17] *Ibid*

[18] Romesh Thapar v. State of Madras, 1950 SCR 594

unreasonable and irrational restriction on information which not just create an environment of undemocratic practices in election, but also is a severe blow to the existing norms that enable voters to make an informed choice.

The government's response to this challenge was to the effect that the Electoral Bond Scheme is a governmental policy which cannot be challenged in the Supreme Court for its imperfect application. But the policy was implemented by the amending provisions of the Finance Act 2017. The term law in Article 13(2) includes the legislation enacted by the Parliament, as well as the Government.[19] The SC, in *Directorate of Film Festivals v. Gaurav Ashwin Jain*, held that "Legality of the policy is the subject of judicial review, which in itself is a fundamental right".[20]Thus, the government's defence is incompatible with the jurisprudence of the Supreme Court.

CONCLUSION

At the heart of the Constitution lies the fact that India is a thriving democracy with a palpable aspirational value. But this aspiration may not actualize in the absence of strong institutional guarantee of transparency and accountability from political parties. The influence of the Indian religious, social and caste demographic on its political arena, has already pushed the mainstream narrative to be more and more majoritarian. The Electoral Bond Scheme does nothing but fossilizes this trend with allowing economic strength to also exercise the same influence in more channelized ways.

The Electoral Bond Scheme without doubt has become the new today of political funding in India, irrespective of these observations of the author. The Court's interim order establishing a status quo which does not detriment the operation of

[19] Art. 12, the Constitution of India

[20](2007) 4 SCC 737

the scheme has been termed as 'Judicial Evasion' by some.[21] The scheme has opened door to a large number of channels for the influence of money in the political landscape. This has also allowed for foreign economic influence over domestic parties. But from the perspective of legality and constitutionality, the author is convinced that the policy overrides constitutional norms and provisions on three levels – principled devaluation of democracy, procedural illegality and abridgment of substantial fundamental right.

[21] See, Gautam Bhatia's article on Judicial Evasion by the Supreme Court in the matter, <https://indconlawphil.wordpress.com/2019/04/13/judicial-evasion-and-the-electoral-bonds-case/>

D. INTERSECTION OF PUBLIC LAW

IN PURSUIT OF FAIRNESS: ELECTION COMMISSION OF INDIA

-Authored by: Samraggi Debroy (III BA LLB) & Dewangi Sharma (III BA LLB)

INTRODUCTION

History has been a fascinated onlooker of the 'most recklessly ambitious experiment', as Ramachandra Guha would describe independent India. The overwhelming rise of political parties across ideologies wielding Orwellian power was a direct consequence of the country's independence. In order to keep a check on the combined torque of 'muscle' and 'men',[22] the Election Commission was set up in 1951. The Commission, till date, continues to enjoy high regard by the Indian masses and academicians for serving as an effective 'bulwark of free and fair elections.'[23] Overcoming India's public sector paradox famously termed as 'flailing state' by Lant Pritchett, the Election Commission as an exception performs highly complex tasks with relative efficacy.[24] The cornerstone of the ECI's mandate is Article 324 of the Indian Constitution that grants it the authority over 'superintendence, direction and control of the preparation of the electoral rolls' for

[22]S.H. Rudolph and L.I. Rudolph, "New Dimensions in Indian Democracy" 13(1) *Journal of Democracy* 52 (2002).

[23]*Id*.

[24]L. Pritchett, "Review of In Spite of the Gods: The Strange Rise of Modern India by Edward Luce" 47(3) *Journal of Economic Literature* 771 (2009).

all elections to the parliament, state assemblies, presidency and vice-presidency.[25] It was held in *Mohinder Singh Gill v. Election Commissioner of India*[26]thatPart XV of the Constitution is a Code in itself, thus providing the entire groundwork for enacting the appropriate laws and setting up a suitable machine for the conduct of elections. In the same case, the dichotomy of the Commission's administrative and judicial power was held obsolescent[27] within the 'leading strings of natural justice'. The idea behind natural justice is participatory justice in the process of democratic rule of law.[28] Elections in India are crucial since people's faith in the democratic process is hypersensitive. Thus, natural justice principles like *audi alteram partem* ensure fairness in the administrative procedures.[29] The Courts have, more often than not, assured the application of these principles over the years. It is in the light of such limitations and checks that the judicial powers of the Election Commission namely - the *regulation of electoral speech* and *allotting symbols to recognised and registered political parties*, have been analysed and valued in the succeeding sections.

REGULATING ELECTORAL SPEECH

In a secular and democratic nation, there is no place for elected representatives to indulge in speeches that spread communal violence, hatred or appeal for votes on the lines of caste and religion. Inflammatory or propagandist speeches having the potential to vitiate the will of the people should be strictly regulated. It is here that the role of the

[25]Gilmartin and Moog, "Introduction to 'Election Law in India'" 11(2) *Election Law Journal* 138 (2012).

[26]AIR 1978 SC 851.

[27]AIR 1978 SC 851; *A. K. Kraipak v. Union of India* AIR 1970 SC 150.

[28]AIR 1978 SC 851.

[29]*In the Judicature of Madras High Court v. the Chief Election Commission of India* W.P. (Civil) no. 7955 of 2014.

Election Commission of India (ECI) becomes significant, as the sole constitutional body in charge of ensuring the conduct of 'free and fair' elections.

The Indian election law prohibits political leaders from making appeals in the name of caste, religion, community, race or language[30] or spreading enmity or hatred between different communities[31]. Under the Model Code of Conduct (MCC), political parties or individual candidates are prohibited from aggravating existing differences or creating mutual hatred between different religions, castes and communities[32]. The Code is not legally binding but enjoys a strong moral force during elections.[33] The restrictions on electoral speech may seem to run counter to the fundamental right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. But, according to the doctrine of *'election law exceptionalism'*, election speech must adhere to higher standards and heavier regulations, as opposed to political speech, because of its special sociological and political relevance in a democracy.[34] The harmful consequences of extreme speech can compromise the right of voters to make informed decisions and can normalise exclusion or legitimise a divisive narrative and thus, jeopardise public order and morality. The test under Article 19(2) of the Constitution allows for the *reasonable* restriction of speech in the name of public order *etc*. The use of 'hate speech' by politicians and leaders to amass votes has the potential to prejudicially affect the

[30]The Representation of People Act, 1951, s. 123.

[31]The Representation of People Act, 1951, s. 123(3A).

[32]Model Code of Conduct for the Guidance of the Political Parties and Candidates, part I(1); The Representation of People Act, 1951, s.125.

[33]Vikramaditya Jha, "Moral or Model Code of Conduct? The Election Commission's powers to ensure free and fair polls", *Bar and Bench*, 13 April 2019, *available at*<https://www.barandbench.com/columns/moral-or-model-code-of-conduct-the-election-commissions-powers-to-ensure-free-and-fair-polls> (last visited on 8 August 2020).

[34]Robert Post, "Regulating Election Speech Under the First Amendment" 77 *Texas Law Review* 1837 (1999).

election of any candidate. Therefore, it is important to keep a check on such campaigning to maintain the sanctity of the democratic process and the secular atmosphere of democratic life.

The Election Commission acts as a ***quasi-judicial body*** in its capacity when it passes orders against political parties and candidates for violating the election rules. In *Harpreet Mansukhani v. Election Commission of India*[35], the Commission argued that the power of the EC is circumcised in these matters as it can only issue advisories to the concerned candidates or parties, file an FIR and commence criminal proceedings only after repeated violations. The political parties and its spokespersons are also able to get away with illegal speech made on television or digital platforms.

The Supreme Court has consistently and graciously attempted to widen the scope of power of the Commission. In *Abhiram Singh*[36], the Court brought the agents or any person who indulges in 'corrupt practices'[37] with the consent of the candidate under the purview of the Act. The Court also held that any invocation of religion or caste during election campaigning is proscribed under the Act. Despite this, the Commission has been largely unsuccessful in regulating speech during election campaigns as it does not have any stringent or immediate penalising power in its armour. The Model Code of Conduct does not enjoy any legal sanction and reduces the Election Commission to a 'moral' force at times.

ECI'S INCONSISTENT APPROACH AGAINST 'HATE SPEECH'

[35]W.P. (Civil) no. 364 of 2019.

[36]Abhiram Singh v. C.D. Commachen&Ors. (1996) 3 SCC 665.

[37]*Supra* note 30.

In the run-up to the 2019 elections, the Election Commission of India had to face multiple attacks of acrimonious bias in responding to complaints of hateful, divisive or illegal campaign speech. It faced serious allegations as it took a passive stance on Prime Minister Modi and BJP President Amit Shah's speeches which appealed to the public in the name of religion and armed forces.[38] According to news reports, the EC dismissed as many as four complaints against Prime Minister Modi for his speeches wherein he succumbed to identity politics and took jibes against Rahul Gandhi for contesting from a constituency where Muslims were in Majority. Surprisingly, the EC mentioned no special reasons (as is usual and necessary) for dismissal of these complaints. In another case, the Election Commission imposed a 72-hour campaign ban on Yogi Adityanath for using an 'Ali-Bajrangbali' refrain to divide voters on religious lines. Azam Khan was ordered a 48-hour Campaign ban because of his *ad hominem* attacks on Mr Modi and use of sexist language. While some leaders like Maneka Gandhi were barred from campaigning for 48 hours for appealing specifically to Muslim voters, Giriraj Singh was just 'censured' and 'warned' for using similar language and violating the MCC. Clearly, there was no set standard for giving punishment or any culture of justifying its orders.

Further, the Election Commission had to be nudged by the Supreme Court to take actions against the clearly communal and divisive speeches of Yogi Adityanath and Mayawati as a response to a petition highlighting the casual use of communal language and identity politics during the elections.[39] Realising its failure to control and regulate

[38]Krishnadas Rajagopal, "ECI has turned a blind eye to Modi, Amit Shah's hate speeches, says Congress in plea", *The Hindu*, 29 April 2019, *available at* <https://www.thehindu.com/news/national/eci-turns-a-blind-eye-to-pm-modis-hate-speeches-evocation-of-dead-soldiers-in-lok-sabha-poll-campaign-congress-to-sc/article26978416.ece> (last visited on 8 August 2020).

[39]Meera Emmanuel, "ECI hauls up Yogi Adityanath, Mayawati for communal speeches, temporarily bars them from campaigning", *Bar and Bench*, 15 April 2019, *available at*

campaign speech as per the laws and rules, the Court called the election body apparently 'toothless'[40]. In response, the Election Commission conceded that it does not have any hard power to take action against violation of the MCC and Election rules.

THE WIDE AMBIT OF THE EC THROUGH ITS QUASI-JUDICIAL POWERS

The Election Commission of India has, since its inception, been witness to the political bedlam in the country. From mushrooming of 'non-serious' political actors to frequent splits and mergers, the political scene in India has been a colourful picture of chaos and disorder. Allotting symbols to political parties began in the first general elections in 1951-52 to cater to the critically illiterate masses of a newly independent country. With every passing election, rule of law declined and the EC gained new roles. By the late 1960s, the EC became increasingly involved in settling issues relating to splits and mergers of various political parties with fragmentations and realignments of political parties.[41] This led to the issuance of the Election Symbols (Reservation and Allotment) Order, 1968. The power of the Commission on adjudicating on matters of allotting symbols to parties after mergers or splits has not been textually established by statutory law. However, it has been almost consistently upheld by the Apex Court.[42] Orders

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<https://www.barandbench.com/news/eci-temporarily-bars-yogi-adityanath-mayawati-electoral-campaignaing> (last visited on 8 August 2020).

[40]PTI, "SC unhappy with poll body's action on hate speech violations amid Mayawati-Adityanath issue", *The Print*, 15 April 2019, *available at* <https://theprint.in/judiciary/supreme-court-demands-explanation-after-ec-bans-mayawati-adityanath-from-campaigning/221871/> (last visited on 8 August 2020).

[41]B. Venkatesh Kumar, "Power to Allot Symbols." 35(38) *Economic and Political Weekly* 3387 (2000).

[42]Rashmi Sharma, "The Evolution of the Election Commission of India: Political Context and Institutional Design" 53(3) *Economic and Political Weekly* (2018).

passed by the EC in such issues is subject to judicial review that ensures no prejudice to any party.

Closely related to this is the power to recognise and register political parties. The EC's adjudicating power in matters of recognition of political parties and allotment of election symbols is drawn from Article 324 of the Indian Constitution[43] and Rule 5 of the Conduct of Election Rules, 1961.[44] In 1988, Section 29A was added to the Representation Of The People Act, 1951 that laid down the conditions necessary for registering a political party in India. Despite the serious looseness in the conditions prescribed under the section, it authorises the EC to issue necessary orders regulating registration and deregistration of political parties.[45]

One of the earliest issues related to symbols arose after the Indian National Congress split into Congress (Organisation) and Congress (Requisitionists) in 1969, the former led by K. Kamaraj and Morarji Desai and the latter by Indira Gandhi. The two bullocks in the symbol of the erstwhile INC became the bone of contention between two factions. The issue was famously litigated in *Sadiq Ali &Anr. v. Election Commission of India and Ors.*[46] The principle that was laid down, in this case, states that the numerical strength of the legislature should be the sole criteria determining the legitimacy of a group after the fragmentation of the parent body. The Court noted that it is not permissible to dissect the symbol as is not a property that can be divided between co-owners. The symbol was eventually restored to Congress (O). The Bench went on to assert that the

[43]The Constitution of India, art. 324.

[44]The Conduct of Election Rules, 1961, rule 5.

[45]Election Commission of India, "Election Reforms: Views & Proposal" (1968).

[46]AIR 1972 SC 187.

Commission *'has been clothed with plenary powers by the Conduct of Election Rules in the matter of allotment of symbols.'*

In *All Party Hill Leader's Conference Shillong v. W. A. Sangma*[47]the Supreme Court held that the Election Commission ***is a tribunal*** for purposes of Article 136 of the Indian Constitution while deciding disputes relating symbols for purposes of election or with respect to adjudication upon disputes of recognition of political parties. The Court clarified that this is not an administrative but a judicial power of the EC. However, the EC while exercising its quasi-judicial powers must act *bona fide* and must have a fair play in action[48] since election is the most important aspect of the democratic set up of the country. Another judgment that furthered the Commission's position was *V. R. Sree Rama Rao v. Telugu Desam*[49] that held the EC to be the only authority either to register a political party and allot a symbol to it or refuse to do so. The EC derives its power from S. 29A(8) of the R. P. Act, 1951 that expressly provides that the decision of Election Commission with respect to the registration of a political party shall be final.[50] Further, A. 324 read with Rules 5 and 10 of the Conduct of Election Rules, 1961 and the Election Symbols (Reservation and Allotment) Order, 1968, confers the authority to allot symbols to political parties and to decide disputes in such matters to the EC.

BJP's lotus symbol case[51] and AIADMK's two leaves symbol row[52] also ended in the consolidation of previously held principles and arguments. Political rows entailing

[47]AIR 1977 SC 2155.

[48]Anand Kafaltiya, "Election Administration and its jurisdictional limitations: The Election Commission" *AIRJournal* 208 (1999).

[49]AIR 1984 AndhPra 353.

[50]The Representation of the People Act, 1951, s. 29A(8).

[51]Arjun Singh v. BJP &Anr. 1992

bifurcation of parties or mergers of various political parties has gained considerable tempo over the last few decades, and the Commission has been a decent if not an extraordinary performer in adjudicating these matters.

STRENGTHENING THE ELECTION COMMISSION

Despite faring decently in various aspects, the ECI needs to be strengthened by making it more accountable. Last election year, the ECI suffered from another controversy: Ashok Lavasa's appeal to make his dissent opinion public on the 'clean chit' given by the Commission to certain BJP leaders was overruled.[53] This brings to light the lack of transparency in the functioning of the Commission. The apex court dictates that even *quasi-judicial* bodies need to follow the principles of Natural justice in their judicial process.[54] However, The EC did not make its order public or present any reasoning for dismissal or acceptance of complaints. The principles of *audi alteram partem*, equal opportunity of representation, etc. were hardly followed by the Commission when regulating campaign speech. It is not as if the Commission has a special designation that allows it to adjudicate cases outside the purview of 'Natural Justice'. As can be understood from the discussion above, that EC mandatorily observes 'fairness' when exercising its judicial functions over matters related to election symbol disputes.

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[52]FP Research, "Lok Sabha Polls 2019: Party Symbols and Recognition: how election Commission decides on related matters" *Firstpost*, 7 April 2019, *available at* <https://www.firstpost.com/india/lok-sabha-polls-2019-party-symbols-and-recognition-how-election-commission-decides-on-related-matters-6403161.html> (last visited on 8 August 2020).

[53]Pheroze L. Vincent, "How to pluck Election Commission thorn in Modi's side" *The Telegraph*, 16 July 2020, *available at* <https://www.telegraphindia.com/india/how-to-pluck-election-commission-thorn-in-modis-side-bank-assignment-beckons-hounded-future-poll-boss/cid/1786447> (last visited on 8 August 2020).

[54]Canara Bank and others vs. Sri Debasis Das and others AIR 2003 Supreme Court 2041

Apart from this, the gaps in the legislative texts ruling the electoral proceedings must be fixed. A simple declaration and application u/s 29A of the R. P. Act 1951, motivates non-serious political parties to get registered.[55] With over 600 registered parties, the Commission has the serious onus on itself to restore the decorum of the political spectrum. However, employing a fair tone to conclude, the Commission despite its several glitches and shortcomings has displayed dynamism in its role and actions. It is hoped that it becomes an integral part of the poll body. Only then would Indian democracy truly come of age.

[55] *Supra* note 41.

E. THE CONSTITUTIONAL CRISIS CASE STUDY: RAJASTHAN

- AUTHORED BY: AARZOO GUGLANI AND VISHAKHA PATIL (BOTH III BA LL.B)

INTRODUCTION (BACKGROUND)

On July 14, Rajasthan Deputy Chief Minister Sachin Pilot along with other 19 MLAs received notices under paragraph 2(1)(a) of the Tenth Schedule for disqualification, by the Speaker of the Rajasthan Legislative Assembly, C.P. Joshi on a plea filed by the Congress chief whip (Mr Mahesh Joshi), on account of their absence from two consecutive Congress legislature parties meetings and a "conspiracy to bring down the government". This piece seeks to highlight certain important legal issues that were brought before the bench and tries to cut through the political drama surrounding the entire event.

IS ABSENCE FROM PARTY MEETINGS EQUIVALENT TO VOLUNTARILY GIVING UP MEMBERSHIP OF THE HOUSE?

This disqualification notice was challenged in the Rajasthan High Court. According to paragraph 2(1)(a) of the Tenth Schedule, *a member of a house belonging to any political party shall be disqualified for being a member of the house if he voluntarily gives up his membership of such political party.*

Addressing the contention of voluntary giving up of the membership has happened or not, Mr Kamat one of the counsels for the Respondents stated that the absence of the petitioners from the meetings conducted by the party whip, concludes the violation of the notice by INC whip which clearly stated *"Any failure to participate without providing valid and adequate reasons in advance in writing to the undersigned, it will be deemed to be clear and categorical evidence of your intention to disassociate from the Indian National Congress and its ideology and will invite action as per the relevant statute and the Constitution of India"* and thus the Speaker in their view had concluded on material evidence that the members have voluntarily given up their membership of the party, thereby accruing disqualification in terms of the Tenth Schedule, which cannot be reviewed and evaluated in the writ petition by relying on the case of *ShrimanthBalasahib Patil Vs. Karnataka Legislative Assembly*[56].

The petitioners argued that none of them expressed or implied conduct that indicated to the members of their constituencies and/or public at large of their intention to voluntarily give up their membership of the Indian National Congress Party. They further contended that mere expression of disagreement with certain decisions by some members of the party does not amount to acting against the interest of the party or indicate any intention of deliberately destabilizing the elected government nor amount to voluntarily giving up his membership. Every member has a right to dissent against the working of the Chief Minister and asks for a change of leadership within his political party. Such a right flows primarily from the provisions of Article 19(1)(a) of the Constitution.

Among the various issues which the Hon. High Court laid out in this case, one crucial question in consonance with the other questions was "*Whether the dissenting opinion against the leadership of the party leading to disqualification under the scope of 'voluntarily*

[56](2020) 2 SCC 595

giving up of the membership'?". Where various times in the past the Court has treated this issue as a "side effect" of such experimental legislation. There have been different interpretations of "voluntarily giving up of the membership" throughout the history, it was first elucidated in *Ravi S Naik v Union of India*[57]where the Supreme Court mentioned that the phrase has a wider meaning than only 'resignation'. Even in the absence of a formal resignation, an inference can be drawn from the conduct of the member that he has voluntarily given up his membership. And thus, in the present case, the said contention of the phrase is being raised as an issue. Also, the Supreme Court in '*Rajendra Singh Rana vs Swami Prasad Maurya'*[58]and *'Dr Mahachandra Prasad Singh vs Chairman, Bihar Legislative Assembly*[59]*'* has held that it is not always necessary for an express resignation to prove that a member has given up the membership of his party. The same can also be inferred from his conduct.

IS THERE A DIRECT NEXUS BETWEEN THE RIGHTS OF 19(1) (A) AND XTH SCH?

Petitioner put forth that freedom of speech and expression is an integral part of Part III (Article 14, 19 and 21) as well as the basic structure of the constitution. The expression "voluntarily giving up membership of a political party" cannot be so widely construed so as to jeopardise the fundamental right of freedom and religion and expression. Mere expression of dissatisfaction or even disillusionment against the party leadership cannot be treated to be a conduct falling within paragraph 2(1)(a). If such an expression of views and opinions is treated as a part of Para 2(1)(a), it should be considered as ultra vires of the basic structure of India. According to Counsel for the Petitioners, Harish

[57](1994) Supp (2) SCC 641 [11]

[58]Appeal (civil) 765 of 2007

[59]Writ Petition (civil) 322 of 2004

Salve; with reference to the case of *KihotoHollohon Vs. Zachillu*[60] and others, it was decided in light of the relevant situation of the year 1992 where the basic doctrine was understood without considering the provisions of Article 19. The Tenth Schedule falls under anti-defection laws. In order to prove this, there has to be evidence of conduct indicating 'crossing of floor'. Mere expression of 'Dissent' or not attending two-party meetings convened by the Congress does not fall within the purview of Paragraph 2(a) of the tenth schedule.

With petitioners' prayers for declaring 2(1)(a) of the tenth schedule as unconstitutional and against the basic structure of the constitution of India, respondents' huge contention relied on the case of *KihotoHollohon Vs. Zachillu* where the court has substantially rejected the idea of the Tenth Schedule being unconstitutional, by stating:

"..... The contention that the provisions of the Tenth Schedule, even with the exclusion of Paragraph 7, violate the basic structure of the Constitution in they affect the democratic rights of elected Members and, therefore, of the principles of Parliamentary democracy is unsound and is rejected."

The very ground of freedom of speech and expression, the right to dissent and principle of intra-party democracy urged on behalf of the petitioners were expressly considered at length and already rejected by the Hon'ble Supreme Court in the case of Kihoto Hollohan.

The Hon. Supreme Court also previously in Hollohan case, explained its stance on honest dissenters and conscientious objectors as something as "plus and minus" and said that-

[60]1992 SCC Supp. (2) 651

"*In these areas, the distinction between what is constitutionally permissible and what is outside it is marked by a 'hazy grey line' and it is the Court's duty to identify, 'darken and deepen' the demarcating line of constitutionality…".* And while continuing to assume the provisions of 10th schedule as perfect, the court also has claimed, "*That the Paragraph 2 of the Tenth Schedule of the Constitution is valid. Its provisions do not suffer from the vice of subverting democratic rights of elected members of the Parliament and the Legislatures of the States. It does not violate their freedom of speech, freedom of vote and conscience as contended."*

While on a brighter note, the Judiciary has always said to protect the very fabric of Indian democracy from certain threatening behaviours of political actions and conspicuous disregard for political morality. Hence, the position of such a question in the court of law again after 30 odd years explains how the political scenario today needs basic amendments for its further smooth functioning. The mere recognition of this issue by the Court labels it "no more hazy grey lines".

IS IT MANDATORY TO FOLLOW RULES OF PROCEDURE FOR DISQUALIFICATION OF MEMBER? (7 DAYS NOTICE PERIOD)

The Rajasthan Legislative Assembly Members (Disqualification on the Grounds of Defection) Rules, 1989 mandate that the Speaker must provide a 7 days' notice to each member to the show cause notice, which was violated by the show cause notice dated 14.07.2020 which called upon members to file their responses on or before 17.07.2020.

The petitioners expressed that the notice has been given with mala fide intentions to disassociate the petitioners from the INC without providing adequate and valid reasons in advance.

Per Contra, respondents counsel argued that a sufficient time of three days was provided for the petitioner to appear before the speaker and submit their comments. A

simple reading of the rule of 1989 signifies nowhere to provide a time period of 7 days for filing responses whatsoever.

WHAT TO EXPECT?

Rajasthan High Court has directed the assembly speaker to not take any further action on show-cause notices until further notice. At the same time, the Court has framed 13 issues that need to be addressed in further discourse and admitted the petition challenging the constitutional validity of paragraph 2(1)(a) with reference to the basic structure and Article 19, along with the ambit of provision and whether when read with Article 191 be declared void.

The BJP-Shiv Sena coalition, despite crossing the majority mark, were unable to form the government after the 2019 Maharashtra assembly elections because there was disagreement on the power-sharing by the two-party leaders as Shiv Sena Leader, Uddhav Thackeray was allegedly denied the promise of Chief Ministership for half the tenure. The disputes over CM-rotation deal lead to dissolvement of BJP-Shiv Sena alliance, and when the Governor of Maharashtra,Mr. Bhagat Singh Koshiyari called upon BJP to indicate 'willingness and capability' to form the government, they did not have the required number of seats. At the same time, Shiv Sena was not given adequate time to furnish letters of support from other parties to express their willingness. NCP too was not given sufficient time to stake claim to form the government resulting in the Governor recommending the President's rule in the state. The Parliament took over the state assembly's role, but the President's rule was revoked at 5:47 am in the morning when former Chief Minister Mr. Devendra Fadnavis was sworn in as the Chief Minister along with Mr. AjitPawar as the Deputy Chief Minister. But, within 3 days Ajit Pawar resigned from his post, to join hands with his former party NCP, Congress and Shiv Sena, who were able to show a majority in the floor test and ended up forming the government.

This was observed in the state of Madhya Pradesh too, where the Congress government was toppled when party member Jyotiraditya Scindia along with other MLA's quit, to join BJP which formed the new government led by Shivraj Singh Chauhan.

Till the case remains under sub-judice, Sachin Pilot stands dismissed from the position of Deputy Chief Minister and Rajasthan Pradesh Congress Committee however he remains an active member of the House till disqualification proceedings are re-initiated against him. As the assembly session is expected to start from August 14, it is likely that the Ashok Gehlot led government will face the floor test. Without the support of the disqualified MLAs the Congress party may not be able to have the required numbers. If the disqualified members end up supporting BJP along with the Rashtriya Loktantrik Party, BJP will have reached the halfway mark.

Despite, there being other incidents in the state of Karnataka and Goa too, the anti-defection laws remain silent allowing the MLAs to destabilise the governments for their better perspectives. But, the case in Rajasthan brings to light a different issue regarding the nexus between the right to dissent and voluntarily leaving the party.

F. THE STATUS OF THE LARGEST DEMOCRACY- SUSPENDED?

-AUTHORED BY AMOL G. KALE, II LL.B

Amidst the period of multiple catastrophes, from COVID-19 to economic mayhem, from reverse migration to 'Galvan valley' standoff with China. Our Parliament, as we describe it as one of the strongest pillars of our democracy, alleged to be paralyzed. The question arises whether the executiveis avoiding the parliamentary system of government?[61]

The apex court recognizes the parliamentary system as one of the basic structure of the constitution.[62] The Founding Fathers have chosen the Parliamentary System not only because our constitutional tradition became Parliamentary under British Rule but also foreseeing its benefits such as 'ensuring harmonious relations and cooperation between the legislative and executive organs', 'it establishes a responsible government', 'it prevents despotism of the executive as they are responsible to the Parliament' and most important of all it 'provides the representation to all sections and regions in the government'.

CHALLENGES AND IMPACTS:

The budget session of Parliament, considering the public health emergency, adjourned sine die on March 23, 2020. Since then several decisions and notifications have been

[61]The Constitution of India, arts. 74, 75, 163, 164.

[62]Jaganmohan Reddy J., in *His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala and Another,* (1973) 4 SCC 225

passed by both the Central and the State governments through the bureaucracy, bypassing the constitutional way of debates in the legislatures.

Some of those will impact the future of the Indian Republic significantly.

- COVID-19 outbreak and danger to public health: The count of the patients due to the pandemic has crossed a number of 20 lakhs in India.[63] The inadequate planning and coordination of the COVID-19 response e.g. inordinate reliance on lockdowns, low emphasis on testing, and contact tracing. The dead-bodies lying in open wards of the hospitals, proper cremation is also being denied it shows the violation of the Fundamental Right to die with the Dignity.[64] Most of the patient are being denied the treatment due to inadequacy of the facilities at the healthcare centers, which is again the disrespectful towards the Directive Principles.[65]
- Diminishing labor laws: The states of Uttar Pradesh, Madhya Pradesh, Gujarat, and Himachal Pradesh selectively suspended the labor laws for about three years.[66] The benefits of such hasty suspension of still unknown. There is grave suspicion that in the absence of obligatory laws the business lobby will prosper at the cost of the workers. By absconding from the responsibilities the state governments are directly creating the inequality by denying the economic security to a particular section of the society.
- Environment Impact Assessment Notification: The Ministry of Environment, Forest and Climate Change notification will allow enterprises to do away with the system of the prior requirement of environment clearances for industrial projects.[67] It allows the *post facto* clearances, it means the permissions can be obtained after the

[63]https://www.mohfw.gov.in

[64]*Common Cause (A Regd. Society) v. Union of India and Others,* (2018) 13 SCC 440.

[65]*Bandhua Mukti Morcha v. Union of India,* AIR 1984 SC 802.

[66]https://www.mondaq.com/india/employment-and-workforce-wellbeing/935398/suspension-of-labour-laws-amidst-covid-19

[67]http://environmentclearance.nic.in/writereaddata/Draft_EIA_2020.pdf

construction and commencement of the projects. Industries can bypass the earlier system of prior clearances and the public hearing amongst who would be impacted by a project.

- Galwan valley standoff: On 15th June Twenty Indian Army soldiers were killed in a lethal attack by Chinese troops in eastern Ladakh's Galwan Valley. Since there's no parliament session going on the demand for the meeting of the Parliamentary Standing Committee is requested by the opposition. The COVID-19 situation does not absolve the government from its duty to encourage transparency in vital matters like national security.
- Right to education is being curtailed: The COVID-19 situation has threatened the Right to Education, as the new academic year starts, many educational institutions have started the classes via online mode. A large section of students have no access to any means of modern technology, like the internet, computers amongst others. It is the responsibility of the State and institutions to provide the basic amenities to bring all students under equal access to education. Financial assistance should be provided to encourage education from primary to higher.
- New Education Policy 2020: The central government announced a new education policy which will replace the 1986 policy. The subject of education is under both the State and the Concurrent lists,[68] and the unilateral announcement by the Union government will be a violation of the Constitution. The policy alleged to be betraying the question of access and the right to education for all, e.g., the policy is silent on children in distress and in conflict with the laws, children of tribal, nomadic and migrant sections. Considering the long term implications of the policy the Parliamentary debate and discussions amongst the stakeholders were vital. The role of the state governments in implementation of the new policy is crucial for its success.

[68]The Constitution of India, sch. Seventh

And denying the necessary discussion with all these stakeholders is against the principle of the cooperative federalism. The issue of policymaking is totally under the ambit of the executives but the parliament has the function to give an effect to it.

THE IMPORTANCE OF THE MULTI STAKEHOLDER CONSULTATION:

The Founding Fathers have chosen the responsible government on the lines of the Westminster model. By the way of healthy debates the opposition can guide the government to implement its decisions more effectively. The strength of opposition is not that important factor to consider but it is the voice of the opposition that represents the vast civilized society and which ultimately keeps the democratic breathing of the parliament.

Be it openness regarding the COVID-19 outbreak or Chinese intrusion and attack on our soldiers the only way of communication seems to be social media or news channels. But news channels cannot replace the Constitutional authority of the parliament. The muzzling of media which is criticizing the government for its failure to implement its decisions, is denying the right of freedom of the press. The Council of Ministers, which derives its authority through the Parliament, is ultimately answerable to the Lower House particularly and to the Parliament generally[69] and in case of state executive it is responsible towards the State Legislative Assembly.[70] In any case, its responsibility is not replaceable by any other institution. Members of Parliament represent their people in the parliament, the plight of local becomes the voice in the parliamentary debates.

THE WAY FORWARD:

When the British Parliament can apply an innovative solution of 'hybrid parliament' allowing the participation to the most of the MPs to the house directly and some

[69]The Constitution of India, art. 75(3).

[70]The Constitution of India, art. 164.

through the online meeting platforms. When the global bodies conduct the meetings via online media. And even the campaign for Bihar Assembly elections is happening with the help of digital media. Why should the Indian government shy away from applying such measures? The experience shows that the Indian Parliament was in session amidst 1962 war with China and while liberating Bangladesh in 1971. It was in session the very next day after the terrorist attack of 2001. Parliament sessions are crucial for debate, to exchange ideas and consensus-building. Its decisions are vital for directing the country in these challenging times brought about by the COVID-19 pandemic and an aggressive China.[71]

The Monsoon session, which usually commences from July, being delayed. The Indian constitutional scheme won't allow the recess of more than six months.[72] It was held therein that Article 85 of the Constitution of India, is to give effect the collective right of the House which represents the nation, to be called whenever the situation demands. The President must summon the session by the first week of this September to abide by the prescribed limit.

It appears that the Government and the opposition have chosen the debates on important issues on social media and news channels. According to Article 79 of the Indian Constitution, the parliament will be regarded as a permanent institution, though there may be changes in the Houses.[73] The Parliament, which is considered as one of the pillars of democracy, is suspended following which the state legislatures also halted functioning. The executives, principally the Prime Minister and the Chief Ministers have implemented decisions through the bureaucracy bypassing the parliamentary oversight.

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[71]https://www.prsindia.org/media/articles-by-prs-team/modi-govt-can't-put-monsoon-session-anymore-india-needs-its-mps-house

[72]*Indira Nehru Gandhi v. Raj Narain,* AIR 1975 SC 2299

[73]*PurushottamanNamboodri v. State of Kerala,* AIR 1962 SC 694

In *Ramakant Pandey v. Union of India,*[74]it was observed that for a strong vibrant democratic Government, it is necessary to have a parliamentary system which involves a majority as well as minority, so there may be a full-fledged debate on controversial issues on the floor of the House. The parliamentary system of the government does not mean government by parliament but a government by the Cabinet, subject to the control and criticism of the parliament.

Dr. B. R. Ambedkar clarified that the prime minister is by far the most powerful man in the country but he is the 'Prime Minister and not the President of India'.[75] The presidential style of working through the bureaucracy is not allowed by our Constitution and hence the government should apply the prescribed procedure of wide discussion and criticisms while performing its power of decision making.

[74](1993) 2 SCC 438

[75]VIII, *Constituent Assembly Debates,* 908

G. A LOST ELECTORAL BATTLE THAT ALTERED THE INDIAN HISTORY: INDIRA GANDHI V. RAJ NARAIN

-AUTHORED BY: DEBHARGHA MUKHERJEE (II BA LL.B)

"*Courage is the most important of all the virtues because without courage, you can't practice any other virtue consistently*" as quoted by the famous internationally acclaimed American author cum Civil Activist Maya Angelou, reminiscences one of the greatspirited judges of the Indian judiciary whose judgments altered the discourse of the existing Indian Politics. Seldom does a Court's verdict change the course of history in a country. The case of *Indira Gandhi v. Raj Narain* [76]was certainly an exception. The 12th of June, 1975 manifested a 258-page verdict delivered by Hon'ble Justice Jagmohan Sinha of the Allahabad High court[77] which unseated a sitting Prime Minister and subsequently, sent the nation hurtling into the blackhole of an 'emergency'. Justice Sinha held Mrs. Indira Gandhi guilty of misusing Government Machinery as a Government Employee herself; declared the Election verdict in the Rae Bareilly constituency 'null and void' and barred her to hold elected office for a term of six years;although dismissing charges of bribery against her. Mrs. Gandhi thereafter appealed before the Hon'ble Supreme Court of Indiaagainst the verdict of the Allahabad High Court, which granted a conditional stay of execution of the verdict on 24th June, 1975.Lastly, the Supreme Court formally overturned the conviction as on 7th November, 1975.

The *Indira Gandhi v. Raj Narain* case, famous for the first and solitary instance in the history of Independent India, wherein the election of a Prime Minister was set

[76]Indira Gandhi v. Raj Narain, AIR 1975 SC 2299. (Raj Narain)

[77]Raj Narain v. Uttar Pradesh, AIR 1975 UP 865.

asidewhich in turn led to retrospective amendment of Electoral Laws to validate the annulled election of the Prime Minister[78].Whilst the case was before the Supreme Court, the Parliament passed the 39thConstitutional (Amendment) Act, 1975 and introduced a new Article viz. 329-A to the Constitution of India with retrospective effect, whereby the election of the Prime Minister and the speaker was accorded immunity from being challenged in any court of law, save and except committee formed by the Parliament.TheAmendment so passed post the decision of the Allahabad High Court in the matter and during pendency of the appeal before Supreme Court, aimed to satisfy the political exigencies in reversing the High Court's verdict which invalidated the election of Mrs. Indira Gandhi from the Rai Bareilly Constituency. The amendment was however challenged before the Hon'ble Supreme Court which unanimously struck down the 39th Constitutional (Amendment) Act, 1975 owing to the same being violative of the Basic feature of the Constitution as earlier propounded in the Kesavananda Bharati case[79] (1973). The case of*Indira Gandhi v. Raj Narain*[80] impacted the Indian politics in an immense way, wherein subsequent elections post emergencywiped out the Congress party in totality, paving way for the first Non-Congress Government at the Centre.However, the Government collapsed within a short span of time, owing to its lack of coordination and infighting amongst leaders of various coalition parties[81].

The Judgment resulted in the Parliament attempting to immunize Constitutional Amendments from Judicial Scrutiny. The 42nd Constitutional (Amendment) Act, 1976 was passed, which inserted a couple of clauses in Article 368. Nevertheless, the Amendment had been emasculated by the Hon'ble Supreme Court itself, striking them down on the ground of being violative to the Basic Features of the Constitution. The

[78]*Prashant Bhushan, TheCase That Shook India (Penguin Random House).*

[79]Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

[80]Supra Raj Narain.

[81] *Supra Prashant Bhushan..*

judiciary was able to overcome the restrictions of power put forth by the 42nd Amendment, by virtue of the 43rd andthe 44th Constitutional Amendments. The subsequent Judgment in Minerva Mills case[82]added with the redeeming quality of the Indian judiciary ensured that theGovernment ought not attempt to dilute the Right of the Courts for judicial Review in future, which has been one of the Basic Features of the Constitution.The Supreme Court applying the Basic Structure doctrine during that phase protected the Constitution from malevolent attempts of interested beneficiaries; proving the triumph of 'Rule of Law' and not the 'supremacy' of Parliament.

A struggle between the two organs of Statewas orchestrated, as to the supremacy in accordance with the Constitution,post the judgments at various intervals in Golaknath's case[83], bank nationalisation case[84] and the privy purses case[85] verdict, wherein the Executive/Legislative decisions had been overturned by the Judiciary. Further, the Central Government attempted hard to craft a committed Judiciary comprising of the Judges favouring the Government/Executive action. However, in such a backdrop, Carl Schmitt's radical understanding of Constituent Power, appears to have been encompassed in the majority decision in Kesavananda Bharati v. State of Kerala[86], where if it be deemed that the Constitution has been made in exercise of the constituent power,the Legislature cannot exercise powers which would fundamentally supersede the constituent power of which they are the product. In context of the case of Indira

[82]Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.

[83]I.C. Golaknath v. State of Punjab, AIR 1967 SC 1643.

[84]R.C. Cooper v. Union of India, AIR 1970 SC 564.

[85]H. H. Maharajadhiraja Madhav Rao v. Union of India,AIR 1971 SC 530.

[86]Supra Kesavanand.

Nehru Gandhi v. Raj Narain[87], eminent legal scholar, Upendra Baxi has made the following comment:

"*Nowhere in the history of mankind has the power to amend a Constitution thus been used*."[88]

In this case, taking advantage of the emergency situation, the Central Government introduced the 38th amendment which shielded from judicial review any laws adopted during the emergency that might conceivably impinge upon fundamental rights. In essence, the constituent power as an expression of the sovereign will of the people, was all-embracing with the three wings i.e. Judicial, Executive, and Legislative, whereas the Parliament was of the view that it rested fully in the Legislature.

India is the largest democratic country in the world and the essence of the same lies in the conduct of free & fair elections. The attempt to amend the Constitution to validate an election which was declared invalid was stalled, as it would have otherwise resulted an aggrieved person/ candidate being stripped off his legal right to remedy of challenging an unfair election. The Apex court of the Indian judicial system in the turmoil of the Emergency, did not bend its position out of fear, fervour to uphold the supremacy of law against political as well as societal pressures in pronouncing a verdict against the mighty of the ruling central government. The Court held that democracy is a basic feature of the Indian Constitution and the Parliament is not empowered to pass a retrospective law validating an invalid election, which if permitted would tantamount to exercising despotic use of unrestrained and unfettered power. The Constitutional Amendment also sought to transfer such determining powers to the Parliament, ignoring the fact that a legislative body cannot find adjudicative facts like a judicial

[87]Supra Raj Narain.

[88]Upendra Baxi, Courage Craft and Contention: The Indian Supreme Court in The Eighties, 70 (Bombay: NM Tripathi Pvt. Ltd., 1985).

body and the bench thus opined that the impugned amendment was nail in the coffin of democracy.[89]

The decision of the court emphasized that it is not in favour of making any change in the constitutional scheme for election and would not tolerate any attempt to destroy the basic structure of the Constitution without any emphasis on the political consequences of its verdict. The decision followed several other decisions of the Supreme Court in the matter of election reflecting the social commitment of the Judiciary and its role of protector of the noble values of democracy, be it in imposition of Government rule, issues related to Anti-Defection law, role of Assembly Speakers etc. Post the judgement, the Court entertained numerous petitions under Representation of Peoples Act, 1951 challenging the election and corrupt practices therein[90].

The judgement also indirectly brought certain electoral reforms over the years, as it paved way for the legislature to entertain and adjudicate election petitions to ensure free and fair election. Though the conviction of the High Court was finally overturned by the Hon'ble Supreme Court, one of the infructuous allegations with regard to misuse of position of public servant during election campaign indeed had a pressing impact, which is evident even after forty five years of the judgement wherein the Election Commission as a watchdog keeps strong vigil over acts of the Candidate and their expenditures during Electoral Campaign.

In view of plethora of cases filed by unsuccessful and unscrupulous individuals, the Supreme Court had also laid down the test and emphasized that the grounds of corrupt practice and the facts necessary to formulate a complete cause of action needs to be

[89]Supra Raj Narain.

[90]Sardar Harcharan Singh Brar v. Sukh Darshan Singh, AIR 2005 SC 22.

stated properly for entertaining election petitions. The principles emanating from Raj Narain[91] case *inter alia*necessitates:

i. pleading in an election proceeding should receive a strict construction;
ii. the charge of corrupt practice in an election petition being very serious charge ought to be proved;
iii. in the event the allegations made in an election petition regarding a corrupt practice do not disclose the constituent parts of the corrupt practice alleged, the same neither should be allowed to be proved nor those allegations cannot be amended after the period of limitation for filing an election petition.

The decision of the Court in Indira Nehru Gandhi v. Raj Narain clearly establishes that in India, the guardian of democracy is not the legislative wisdom but the wisdom of the highest court of the land. The principles of separation of powers which enshrine 'checks and balances' in the democracy to prevent any sort of encroachment and overstepping was upheld. The Constituent Assembly Debates makes it evident that the Independence of Judiciary was considered to be sacred by the founding fathers of the Constitution. The optimism of the government viz. the judiciary will also kneel down and abandon its duty to uphold Constitutionamidst an Emergency, turned otherwise. The Supreme Court even after forty-five years of the verdict still continues to guard our democracy and solemn values as enshrined in the Constitution. This significant judgement would continue to hail all across the world as a great triumph of an independent judiciary in India, upholding the basic feature of the Constitution and the democratic ideology '*of the People, by the People, for the People*' of our Country!

[91]Supra Raj Narain.

H. EXPANDING HORIZONS OF THE ELECTION COMMISSION: A CRITICAL APPRAISAL

-AUTHORED BY: MUDIT AHUJA AND RAMKRISHNA PANIGRAHI (VTH B.A.LL.B)

INTRODUCTION

It is fundamental for every democracy to regularly hold free and fair elections, wherein eligible citizens are conferred with the right to vote. Although there remains a conundrum, i.e. democracy forms a part of the basic structure of our Constitution but, the right to vote is still not affirmed to be a fundamental right and remains a mere secondary right, However, our democracy is strictly particular about conducting free and fair elections. Our Constitution provides a special chapter on elections to ensure the same. The commission is set up as a permanent body under Article 324(1)[92]. It is an all-India body, the *raison d'être*behind thisis to avoid any sorts of discrimination if the states were to have their own Election bodies. In this short piece we elucidate the expansion of powers of the Election Commission (EC) over the course of time as elaborated in landmark judgments.

DISCERNING THE POWERS OF THE EC AND THE RELEVANT JUDGMENTS

1. ENSURING INDEPENDENCE

Since the EC plays a vital role in the conduct of elections, it is pertinent to ensure that it does so impartially and without any bias or favours. To ensure this our Constitution by way of Article 324 provides immunity to the Election Commissioners. The makers while drafting the constitution drafted this article with the objective of ensuring that the Election Commission should be outside the control of the Executive bosses of the

[92]The Constitution of India, art. 324.

dayand should be irremovable by amere executive *fiat*.[93] The Supreme Court (SC) in the case of *T.N Seshan*[94]held that in addition to the stringent procedure for removal by way of Article 324(5), "*the EC's and the other Regional Commissioners have been assured independence of functioning by providing that they cannot be removed except on the recommendation of the CEC*." Further, the Court added that such a recommendation must be based on 'intelligible and cogent' reasons. The principle behind this is to ensure a partial insulation of the EC's from the CEC.

2. POWERS OF THE EC

For an efficient functioning, it is paramount that the EC is provided with enough powers. The EC plays a pivotal role in the electoral mechanism of the country. It primarily exercises several administrative functions but it also has some legislative and judicial functions. The powers of the EC flows directly from the Constitution itself under Article 324. Article 324(1) delegates two pivotal functions which are; (i) The superintendence, direction and control of the preparation of the electoral rolls for all elections to Parliament, State Legislatures, offices of the President and the Vice-President; (ii) Conduct of all these elections.

The phrase '*superintendence, direction and control of elections*' first came in consideration in the case of *Kanhiya Lal Omar*[95], wherein the Court held that the expression 'superintendence, direction and control' shall be construed liberally so that the object for which the power is granted is effectively achieved. It was also observed that the ECcould further issue executive orders as well. The SC has however cautioned that under Article 324(1), the EC does not exercise untrammelled powers otherwise it will

[93]VIII, *Constitutional Assembly Debates*, 36.

[94]*T.N Seshan, Chief Election Commissioner v. Union of India*, 1995 (4) SCC 611.

[95]*Kanhiya Lal Omar v. RK Trivedi,* (1985) 4 SCC 628.

become an *imperium in imperio*which no one is under the Indian Constitution. Ultimately it is for the Courts to decide what powers can be read into Article 324(1). Further, while considering whether the EC can cancel an election and direct re-polling in the case of *Mohinder Singh Gill*[96], the constitutional Bench of the Apex Court observed that the powers under Article 324 operated in an *'area left unoccupied by legislation'* and that the provision is *'wide enough to supplement the powers under the Act'* but subject to the several conditions set out in the law i.e. the powers have to be read in the light of the constitutional scheme and the Representation of the People Acts, 1950 and 1951. The SC further affirmed this in the case of *Association for Democratic Reforms*[97].

In addition, the EC repose plenary powers including but not limited to reviewing its decisions on the expediency of holding the poll on a particular date[98], postponing elections in light of disturbed conditions in the State[99], rescinding the elections[100]. The EC under Article 324, read with the Election Symbols (Reservation and Allotment) Order, 1968 has the power to allot symbols for purposes of elections to political parties and to adjudicate disputes with regard to recognition of political parties and rival claims to a particular symbol for purposes of elections.[101] In *Common Cause – A Registered Society v. Union of India*[102], the SC observed that under Article 324, the commission can issue suitable directions to maintain the purity of the election. It was

[96]*Mohinder Singh Gill v. Chief Election Commissioner,* (1978) 1 SCC 405.

[97]*Union of India v. Association for Democratic Reforms,* (2002) 5 SCC 294.

[98]*Mohd. Yunus Saleem v. Shiv Kumar Shastri*, AIR 1974 SC 1218.

[99]*Digvijay Mote v. Union Of India,* (1993) 4 SCC 175.

[100]*N. Kristappa vs. Chief Election Commissioner and Others*, AIR 1995 AP 212

[101]M.P Jain, 1 *Indian Constitutional Law* 1159 (Kamal Law House, Calcutta, 5th edn., 1998).

[102](1996) 2 SCC 752.

further observed that "*the Constitution has made comprehensive provision under Art. 324 to take care of surprise situations and it operates in areas left unoccupied by legislation.*"

The SC in *Subramaniam Balaji v. State of Tamil Nadu*[103], observed that the EC will not have any authority to regulate acts which are done before the announcement of the Election date. However the Court made an exception and directed the Commission to frame guidelines governing election manifestos as they are directly related to the election process.

Further in the exercise of its functions, the Commission also frames a 'Model Code of Conduct' to be observed by the candidates and parties during elections. However, the Code does not trace itself to any constitutional provision and is less a legally enforceable chapter and more a set of behavioural guidelines for electoral candidates.[104] But, its efficacy is substantial considering the demands from various political quarters to review the Model Code.[105] The EC after the consolidation of its power in the 1990's has been reluctant to push for a legislated Model Code as this would open up space of executive action on which the Election Commission hitherto had exclusive control, to be occupied by a statute.[106]

The power exercised by the EC albeit vast has been channeled by the SC in the course of its judgments. The Apex Court has held thatArticle 324 is "reservoir of powers" and

[103](2013) 9 SCC 659.

[104]Sujit Choudhary, Madhav Khosla, *et.al* (eds.), *The Oxford Handbook of the Indian Constitution* 242 (Oxford University Press, UK, 2014).

[105]Ujjwal Kumar Singh, "Between Moral Force and Supplementary Legality: A Model Code of Conduct and the Election Commission of India" 11(2) *Election Law Journal* 149 (2012).

[106]*Id. at 159.*

empowers the commission to take decisions on its own rights where the law is silent.[107] In the landmark case of *A. C. Jose vs. Sivan Pillai&Others*[108], the SC observed that the EC could not change the voting system as this matter fell within the domain of Parliament. The Court went on to state the Article 324 only confers executive and not legislative powers. Furthermore, in the case of *N. Krishnappa*[109], the SC laid down the four propositions as regards the power of the Commission under Article 324; (a) When there is no law or rule made under the law, the Commission may pass any order in respect of the conduct of election; (b) When there is an Act and rules made thereunder, it is not open to the Commission to override the same and pass orders in direct disobedience to the mandate contained in the rules or the Act; (c) Where the law or the rules are silent, the Commission no doubt has plenary powers under Article 324 to give any direction in respect of the conduct of elections; (d) In the absence of any specific provision to meet a contingency, the EC can invoke its plenary power under Article 324.[110] The SC in *Indian National Congress (I) v. Institute of Social Welfare*[111], restricted the powers of the EC under Section 29A of the RP Act to 'quasi-judicial' and observed that it did not have the power to review its registration i.e. de-register a political party. It has been affirmed by the SC "*that the directions issued by the Election Commission, though binding upon the Chief Electoral Officers, cannot be treated as if they are law, the violation of which could result in the invalidation of the election*"[112]

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[107] *Supra* note 94.

[108] 1984 SCR (3) 74

[109] *N. Krishnappa v. Chief Election Commissioner*, AIR 1995 AP 212.

[110] *Supra* note 99 at 1155.

[111] (2002) 5 SCC 685.

[112] *Lakshmi Charan Sen v. A.K.M. Hussain Ujjaman*, AIR 1985 SC 1233.

The SC while observing wide powers of the EC conferred by Article 324 has time and again observed the importance of harmonious interplay with the powers of the Parliament. EC stands as an independent body and the topmost machinery to look after the election of the Legislative Houses, President, Vice-President etc. The powers of the EC do extend to legislating on subjects of electoral importance i.e. by framing guidelines only when there is a legislative vacuum. However, the guideline jurisdiction has to be exercised within the confines of dicta of the SC and the EC cannot supplant a new law in itself. The framers had ensured that the prime ombudsman and organiser of elections occupies an elevated constitutional status free from any pressure from the present day executive bosses in order to uphold free and fair elections which constitute the very essence of any democracy leave alone the Constitution.

I. 45 YEARS SINCE INDIRA GANDHI V RAJ NARAYAN AND ITS CONTEMPORARY RELEVANCE

-Authored by: Harshal Kshirsagar and Shubhangi Zite (II BA LL.B)

India is a vibrant democracy and since its independence, it has witnessed many elections. During its 74 glorious years of independence, which we, the people of India, adopted as the way of governance of our country, has moved from strength to strength. India is now regarded by the international community as one of the most stable democracies in the world. Elections and subsequently the body which regulates them i.e. the Election Commission of India, has played a fundamental and critical role in the evolution of Indian democracy. In order to preserve the sanctity of democracy voting, Adult Franchise and subsequently elections are ineludible.

"Elections belong to the people. It's their decision. If they decide to turn their back on the fire and burn their behinds, they will just have to sit on their blisters" such as the solemn and wise words of President Abraham Lincoln. Truly, elections are an inevitable part of democracy. As a renowned jurist, Ram Jethmalani says, "Democracy is a swimming pool, if you don't change the water periodically, it becomes a cesspool" and thus elections become a measure to prevent democracies from stinking. In any country, elections determine the fate of democracy. And if elections are corrupt then democracy based on those elections is nothing but inutile.

VALIDITY OF ELECTIONS:

The principle of free and fair elections is an essential postulate of democracy which in turn is a part of the basic structure of the constitution. Democracy can indeed function upon faith that elections are free and fair and not rigged and manipulated, that they are

effective instruments of ascertaining popular will in reality and are not merely rituals calculated to generate the illusion of defence to mass opinion.[113]

As up to the ever increasing dissension between the judiciary and the executive, the question remains, Who should have the authority to decide whether an election held is free, fair and valid on the grounds prescribed by the law ?

It is often argued that election disputes are not merely a dispute between two contending parties but rather they involve the right of the whole electorate, as well as the public interest. And to support this reasoning the proceedings in various renowned democracies are cited. As it is there in the 'British House of Common' election disputes are adjudicated by the executive itself And therefore it is often propounded that election disputes should also be decided by the executive itself[114]. But it is often forgotten that the position of Britain is different due to historical reasons. After gradual evolution, the parliament in Britain has become supreme and sovereign.

In India, the situation is a bit different. In our parliamentary system, the party who wins the election and comes into power immediately gains control of two of the three wings of the government, namely executive and legislative. The postulate of democracy is that the continuance of that party in power should depend on the continued support of the people. And this can only be ensured by free, fair and periodical election. For the election to be free and fair it is necessary that some third party who has no axe of its own to grind, be there to preserve the purity of election. Thus the judiciary as a third party becomes an inevitable part in deciding election disputes of legislation.

[113]AIR 975 SC 2299

[114]Prashant Bhushan, 'The case that shook India', 156, 166 (Penguin Books, India, April 2017).

REPRESENTATION OF PEOPLE'S ACT, 1951:

Elections to Parliament and legislatures of the states are regulated in two ways by law. The first relates to the conduct of the elections by the Election Commission and the second to the personal conduct in it of the candidates. The Representation of People Act, 1951 (hereinafter referred to as RPA) is legislation in this regard. Section 8 of RPA provides for disqualification of candidates on the grounds of corrupt practices. While section 123 enlists those activities which are deemed to be corrupt practices and any candidate is found to be involved in any of these practices is liable to be disqualified.

Corrupt practices include misuse of the government machinery during the election by a candidate, excessive expenditure, threatening of election officers, the publication of false statements in affidavits, hiring of vehicles and vessels, bribery, undue influence, appeal on the ground of religion, race, caste, community or language and the use of appeal to religious or national symbols, promotion of enmity or hatred between different classes of citizens on the ground of religion, race, caste, community or language.

INDIRA GANDHI V RAJ NARAYAN:

If there is one significant decision that meticulously exercised the law established under Representation of peoples act 1951, it has to be the **Allahabad High Court verdict in Indira Gandhi vs. Raj Narayan[115].**

A team of Mavericks put aside an election of the most powerful person of the country only by using the legal system of this country. Justice Sinha very judiciously chose two out of seven alleged corrupt practices to set aside the election of Mrs Gandhi and those were:

[115]1975 AIR 865, 1975 SCR (3) 333.

i] That she had procured the assistance of the District Magistrate and Superintendent of Police by getting rostrums constructed and loudspeakers installed for her election meetings.

ii] That she has procured the assistance of Yashpal Kapoor while he was still a gazetted officer in the service of the government.

Before the elections were announced Mrs Gandhi was in power holding the office of the Prime Minister, it was facile for her to manipulate the government machinery for her own benefits during election campaigns. And while doing so Mrs Gandhi procured the assistance of many government servants, gazetted officers and eventually, that became the reason for Justice Sinha to set aside her election on the grounds of corrupt practices.

The role of Yashpal Kapoor in the controversial election of Indira Gandhi in 1971 is a living example of what repercussions a candidate may face if he obtains services of government servants during elections. But it does not appear that anything has changed thereafter. Identical instances can be traced in contemporary period also where high courts set aside elections of a winning candidate over procuring assistance of government servants by manipulating government machinery for their own prospects.

Such as in **Ashwinbhai Kamsubhai Rathod vs. BhupendraSinhManubhaChaudasama and others**[116]. Gujarat High Court held state minister Chaudasma guilty of corrupt practices under section 123 (7) of RPA 1951, where he manipulated the vote counting with assistance of returning officers for the furtherance of his prospects. The High Court observed that the accused committed all sorts of illegalities and falsified the record of the election and thus he committed breach of mandatory instruction of the election commission of India.

[116]Ashwinbhai Kamsubhai Rathod vs. Bhailalbhai Kalubhai Panda vBhupendraSinh Manubha Chaudasama and others; C/ EP/3/2018, GH3.

Chaudasama who holds charge of multiple departments including education, law and justice was elected from the Dholka constituency after defeating the congress candidate by a margin of 327 votes in 2017 assembly polls. It was alleged that Chaudasama with the assistance of the returning officer rejected 429 votes received via postal ballet. As the number of rejected votes was more than the victory margin the High Court was satisfied that the election was materially affected by the Returning Officers decision.

Thus one pattern can be observed from this case law that manipulation of the government machinery by procuring the assistance of government servants, gazetted officers is mostly exercised by candidates belonging to the ruling party.

It is not only a moral responsibility over candidates to restrict themselves from attaining any sort of assistance from government servants or gazetted officers for the furtherance of the prospects of that candidate but also it is an interdiction on part of the government servants to not to take part in politics and elections.[117]

Since the government servants have a pivotal role in the public administration and in the implementation of policies made by the ruling party, a government servant should not take part in any election campaign or canvassing and that he should take scrupulous care not to lend his name, official position or authority to assist one political party or candidate as against any other.

COMMUNAL CAMPAIGNING- AN OVERLOOKED CORRUPT PRACTICE:

Over the years ambit and scope of corrupt practices have been shrunken and kept limited to monetary malpractices. This has led a passage for communal campaigning during the elections - which is also considered as a corrupt practice under section 123 of Representation of People's Act, 1951 has been consistently overlooked by the Election Commission.

[117]Rule 5(1), Central Civil Services (Conduct) Rules, 1964

India being a diverse country with at least 12 religions, over 300 castes, nearly 4000 sub-castes, over 100 major languages and more than 300 dialects, the only way politicians and political parties think to manage them is by targeting specific groups. Everyone stands for their community, state but not for the nation as a whole.

Two aspects of communalism focused by political parties contesting for elections is:

1. Religion

2. Caste

These caste and religion are the soul of Indian Politics. Religion being a prominent one because India is a Hindu dominated population with a considerable amount of Muslims, Christians and Buddhist etc. Political parties tend to exploit the religious sentiments of people for achieving their political goals. Many parties form the base for their party by administering such propagandas. It is well said by Mahatma Gandhi that "**those who say Religion has nothing to do with politics do not know what it is".**

Politicians do not use caste or religion carefully instead they go on full role and then it leads to rioting, communal violence and other crimes. More than fifty politicians who hold elected office in the Lok Sabha and state assemblies face charges in criminal cases related to inciting religious violence or stroking communal hatred and according to HT's analysis of more than 50,000 candidates who contested elections in the past five years.[118]

There are various laws in our constitution to keep check upon these practices but they aren't implemented properly leading to generation of various loopholes. Laws against striking communal violence and offending communal sentiments are contained in sections 153A, 153B, 295, 295A, 505(1)(c), 505(2), and 505(3) of the Indian Penal Code, as

[118]Harry Stevens, 'Let's talk about hate: In Indian politics, candidates who stoke communal hatred thrive', July 27, 2017.

well as in section 125 of the Representation of the People Act, which criminalizes the promotion of "feelings of enmity or hatred" between communities in connection with an election.

There are various examples where some politicians used religion or caste in their election campaign and it led to widespread violence[119'120].

Section 123 of Representation of People's Act says that endorsement of communal propaganda in election campaigns shall be considered as a corrupt practice. In **P C Thomas vs P M Ismail and others[121],** the High Court of Kerala held Shri P C Thomas guilty of engaging in communal campaigning where he sought support on religious grounds.

CONCLUSION:

The social matrix of the Indian society is deeply embedded in the complex Indian caste-structure. Communalism in India has been a long-standing problem. Keeping in view the traditional background of Indian socio-political set-up, we must confess that religion, caste or community has continued to play its role in electoral politics. Various castes and communities are becoming more and more self- conscious as well as assertive and accordingly organised. Though, the elections have familiarised the masses with the technique of ballot-box democracy but they have also provided the masses with the increasing prominence of communalism and casteism as a political factor, and with the means for asserting their interests and demands. The emergence of new elites through the means of elections presents new challenges to the working of the Constitution.

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[119]. A.I.R 1994 SC 1918

[120]1996 AIR 1113, 1996 SCC (1) 130

[121]P C Thomas vs. Adv P M Ismail and ors, PA no. 5033, 20006

Many issues like education, good infrastructure, better health care have lost their field from elections and intercommunal incitement have reached such a proposition that it is no longer possible to dial back. In this regard, the election commission has failed completely. Not only has it not taken enough measures to immune election campaigns from bigotry, but also it has allowed blood shredded antecedents and criminal history which is a clear violation of RPA 2002 (Amendment).

Even though there are grey areas, verdicts such as *Indira Gandhi v Raj Narayan* shows courage and independence of our judiciary which keeps a check on the executive. If an attempt can be made to save the election of one candidate by guarding such elections against judicial review, they can possibly be made to validate every other candidate's election[122]. It is important to observe that given the quantum of Indian Election at which it takes place, it is very difficult to detect each and every stance of electoral malpractice but it can definitely be controlled and can be brought to a much better level. With the kind of hue and cry surrounding the election commission during the last Lok Sabha election recently it is very important for the election commission to prove its credibility as an independent and strong constitutional body. But our courts have meticulously exercised the doctrine of '**Basic structure**' which includes judicial review and have saved this democracy from tyrants and way wards.

[122]The Constitution (39th) Amendment Act, 1975.

J. PUBLIC LAW IN THE NEWS

-COMPILED BY: SOHAM BHALERAO (V B.A.LL.B)

SUPREME COURT IN THE NEWS

1) SRI MARTHANDA VARMA & ANR. V. STATE OF KERALA &ORS.[123]

The Supreme Court upheld the rights of erstwhile royal family of Travancore in the administration of SreePadmanabha Swamy temple at Thiruvananthapuram. Allowing the appeal filed by members of the Travancore family, a bench of Justices UU Lalit & Indu Malhotra reversed the finding of the High Court of Kerala that the rights of family ceased to exist with the death of the last ruler of the Travancore in 1991. The death of the last ruler will not result in escheat of the rights in favour of the government.

2) ARYAN RAJ V. CHANDIGARH ADMINISTRATION.[124]

The Supreme Court has observed that people suffering from disabilities are also socially backward and are thus entitled to the same benefits as given to the Scheduled Castes/ Scheduled Tribes candidates. While considering an appeal against a Punjab and Haryana High Court order, the bench headed by Justice Rohinton Fali Nariman said that it is 'following' the principle laid down in the Delhi High Court's judgment in Anamol Bhandari (Minor) through his father/Natural Guardian v. Delhi Technological University 2012 (131) DRJ 583.

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[123]**Sree Padmanabha Swamy Temple Case : SC Upholds 'Shebait' Rights Of Erstwhile Royal Family Of Travancore** https://www.livelaw.in/Top-Stories/Sree-Padmanabha-Swamy-Temple-Case-Sc-Upholds-Rights-Of-Erstwhile-Royal-Family-Of-Travancore-159797

[124]**Disabled Entitled To The Same Benefits As Given To SC-ST Candidates: SC** https://www.livelaw.in/top-stories/disabled-entitled-same-benefits-as-sc-st-candidates-159793

3) **KUNJUNMUHAMMED V. MARIYUMMA.**[125]

The Supreme Court reiterated that a High Court cannot allow Second Appeal without having formulated a substantial question of law. "A mere mention about the question having been formulated in the memorandum of appeal is not enough", said the bench comprising Justices AM Khanwilkar, Dinesh Maheshwari & Sanjiv Khanna while setting aside a Kerala High Court judgment.

4) **RAJEEV SURI V. UNION OF INDIA.**[126]

The Supreme Court allowed the filing of a writ petition under Article 32 of the Constitution challenging the Environmental Clearance granted on June 17 for the construction of a new Parliament building as part of Union Government's ambitious Central Vista Project. A bench headed by Justice A M Khanwilkar told Senior Advocate Shyam Divan that his clients will be given a week's time to file the writ petition, thereby expanding the scope of the hearing to include the issue of Environmental Clearances granted on June 17. This will be in addition to the issue surrounding the legality of the change in land use which is already under the consideration of the top court through two petitions pending before it.

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[125] **HC Cannot Allow Second Appeal Without Formulating Substantial Question Of Law, Reiterates SC**https://www.livelaw.in/top-stories/hc-cannot-allow-second-appeal-without-formulating-substantial-question-of-law-160271

[126]**[Central Vista Project] SC Allows Filing Of Writ Petition Against Environmental Clearance Granted To New Parliament Building; Expands Scope Of Hearinghttps://www.livelaw.in/top-stories/central-vista-project-sc-allows-filing-of-writ-petition-against-environmental-clearance-granted-to-new-parliament-building-160681**

5) **ARUSHI JAIN V. UNION OF INDIA**.[127]

The Centre on Friday informed Supreme Court that Delhi, Punjab, Tripura, Karnataka & Maharashtra - have not made timely payment of salaries to healthcare workers despite the Centre' Notification under National Disaster Management Act which lays down strict penal action for non-payment. A bench of Justices Ashok Bhushan, MR Shah & R. Subhash Reddy told the Centre to do the needful so as to ensure that salaries to frontline healthcare workers battling Covid19 are effectuated timely. The bench was hearing an IA filed on behalf of United Residents and Doctors Association in a plea filed by Udaipur-based Doctor Arushi Jain seeking suitable accommodation and quarantine facilities for medical workers who are involved in treating of COVID-19 patients.

6) **JANHIT ABHIYAN V. UNION OF INDIA &ORS**.[128]

The Supreme Court referred a batch of writ petitions, challenging the 10% quota for Economically Weaker Sections (EWS) introduced by 103rd Constitution Amendment passed by the Parliament last year, to a five-Judge bench. A bench comprised of Chief Justice SA Bobde, Justice Subhash Reddy & Justice BR Gavai said that the matter involves "substantial questions of law" that should be considered by Bench of five Judges.

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[127]**"Doctors Mandatorily Quarantined Not Being Paid Dues" : SC Directs Centre To Ensure Payment Of Salaries To Covid-19 Frontline Warriors** *https://www.livelaw.in/top-stories/doctors-mandatorily-quarantined-not-being-paid-dues-sc-directs-centre-to-ensure-payment-of-salaries-to-covid-19-frontline-warriors-160792*

[128] **[EWS Quota] Can Posts Be Reserved Only On The Basis Of Economic Criterion? Is 50% Ceiling Absolute? : SC Refers Substantial Questions Of Law To 5-Judge Benchhttps:**//www.livelaw.in/top-stories/can-posts-be-reserved-only-on-the-basis-of-economic-criterion-is-50-ceiling-absolute-sc-161022

7) **HARE KRISHNA MANDIR TRUST V. STATE OF MAHARASHTRA**.[129]

The right to property is still a constitutional right and a human right, reiterated the Supreme Court while allowing an appeal filed by Hari Krishna Mandir Trust in the matter of a land dispute with the Pune Municipal Corporation. The bench comprising Justices Indu Malhotra & Indira Banerjee observed that the right to property includes any proprietary/ hereditary interest in the right of management of a religion endowment, as well as anything acquired by inheritance.

HIGH COURT IN THE NEWS

1) **NATIONAL ALLIANCE FOR PEOPLE'S MOVEMENT &ORS. V. STATE OF MAHARASHTRA &ORS**.[130]

Division bench of Chief Justice Dipankar Datta and Justice Madhav Jamdar refused to quash the decision of the High Power Committee constituted by the State for decongestion of prisons due to the threat of Covid-19, to classify categories of prisoners who will be released on emergency parole.

However, the Court reiterated that the amended parole rule which states that convicts whose maximum sentence is above 7 years shall be considered for release on emergency parole if the convict has returned to prison on time on last 2 releases is applicable only if the convict has been released on parole or furlough two times.

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[129] **Right To Property Is A Constitutional As Well As Human Right, Reiterates SC**: *https://www.livelaw.in/top-stories/right-to-property-constitutional-human-right-sc-161136*

[130] **Bombay HC Refuses To Quash High Power Committee's Decision Classifying Categories Of Prisoners For Temporary Release Due To Covid-19** https://www.livelaw.in/news-updates/bombay-hc-refuses-to-quash-high-power-committees-decision-classifying-categories-of-prisoners-for-temporary-release-due-to-covid-19-read-judgment-161055

2) PRAMOD PANDEY V. STATE OF MAHARASHTRA.[131]

Division bench of Justice SJ Kathawalla and Justice RI Chagla quashed and set aside a condition in two government resolutions issued by the State of Maharashtra barring actors above the age of 65 years from remaining present on Film/TV sets calling it discriminatory. The GRs were issued after a nationwide lockdown was imposed to combat the threat of Covdi-19.

"*The learned Advocate for the State had to be reminded that the actors performing small roles are required to go to the studios and request for work to enable them to have their two meals, and no Producer/Director is going to shoot their role via Facetime, Zoom, Skype etc.,*" the Court had previously observed.

3) **LT. COL. P.K. CHOUDHARY V. UNION OF INDIA &ORS**.*[132]*

While dismissing a petition challenging the ban on army officers using social media, the bench comprising Justices Rajiv SahaiEndlaw and Asha Menon observed that scope of judicial review over matters concerning defence and security is limited.The Court noted that modern-day warfare is not just limited to accession of territory, but also extend to

[131]**Barring Only 65-Yr-Old Actors/Film Crew On Movie/TV Set Is Discriminatory; Bombay HC Quashes State Govt's GR:** https://www.livelaw.in/top-stories/breaking-barring-only-65-yr-old-actorsfilm-crew-on-movietv-set-is-discriminatory-bombay-hc-quashes-state-govts-gr-read-judgment-161130

[132]**No Interference With Govt Conclusion That Use Of Social Media By Army Personnel Enables Enemies To Gain Edge: Delhi HC https://www.livelaw.in/news-updates/no-interference-with-govt-conclusion-that-use-of-social-media-by-army-personnel-enables-enemies-to-gain-edge-delhi-hc-161018**

influencing economy and political stability of the enemy country by inciting civil unrest and influencing the political will of citizens.

4) **NISHANT KHATRI & ORS. V. UNION OF INDIA &ANR.**[133]

The single-bench of Justice TashiRabstan issued notices to the Union Ministry of Home Affairs and the UT Administration on a petition challenging 100% domicile reservation in public employment, prevalent in the UT."*100% reservation on the basis of domicile or residence is unambiguous violation of the law as it would render the guarantee of equal opportunity contained in Articles 16(1) and 16(2) wholly meaningless and illusory. Supreme Court has time and again made it clear that the reservations contemplated in Article 16 should not exceed 50%. Hence, 100% reservation for domicile of Union territory of J&K is clear cut violation of law laid down by Supreme court,*" the plea states.

5) ***AV Badra Naga Seshayya v. State of Andhra Pradesh.***[134]

The bench of Chief Justice JK Maheshwari and Justice B. Krishna Mohan observed that the option of NOTA cannot be made available when there is a single candidate contesting in the elections, and the candidate shall be declared as unanimously elected. "*During deliberations, while discussing on the nomenclature of NOTA, it clearly reflects that this contingency applies in case where there is contest of election*", iterated the bench.The Court was hearing a PIL to declare the action of the State Election Commission in not

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[133]**Jammu & Kashmir HC Issues Notice To Center In Plea Against 100% Domicile Reservation In Public Employment In The UT** https://www.livelaw.in/news-updates/jammu-kashmir-hc-issues-notice-to-center-in-plea-against-100-domicile-reservation-in-public-employment-in-the-ut-read-order-160947

[134]**NOTA Applies In Case Of "Contest Of Election", Not Where There Is Only Single Candidate In Fray: AP HC** https://www.livelaw.in/news-updates/nota-applies-in-case-of-contest-of-election-not-where-there-is-only-single-candidate-in-fray-ap-hc-160584

conducting any election to a post in a local governing body where there is only a single candidate in the fray in any territorial constituency, thereby depriving the electors of their right to vote in the form of NOTA against such single candidate, as being violative of the Fundamental, Constitutional and other statutory rights of electors.

6) **CHIRAG CHANAI&ORS. VS UNION OF INDIA &ORS.**[135]

While hearing a batch of PILs and intervention applications that initially sought inclusion of lawyers into the list of essentials services, the Division bench of Chief Justice Dipankar Datta and Justice Sarang Kotwal observed that the State must not be ignorant that access to justice is now recognised as a Fundamental Right and advocates and their staff constitute an integral part of the entire system, which is dedicated to "delivery of justice".The Court thus directed the State government to submit its order regarding representation made by petitioners seeking for directions to exempt lawyers and their staff from lockdown restrictions. The next date of hearing is August 7.

7) **NEERENDRA SINGH RANA V. STATE OF MADHYA PRADESH.**[136]

"*The petition in the nature of habeas corpus should be filed in those cases where the corpus is in illegal confinement/custody of the respondents. In order to settle the civil disputes of the parties, the writ of habeas corpus cannot be entertained and it is a clear misuse of (the) lawful authority of this Court*," observed the bench of Justice GS Ahluwalia.The Court thus dismissed a petition where a husband had moved a habeas corpus petition on behalf of his wife, who had gone to her parental house and informed that she does not want to come back.

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[135]State Must Not Be Ignorant That Advocates, Their Staff Constitute An Integral Part Of The Justice Delivery System: Bombay HC https://www.livelaw.in/news-updates/advocates-their-staff-constitute-an-integral-part-of-the-justice-delivery-system-bombay-hc-160834

[136]For Settling The Civil Disputes of the Parties, The Writ Of Habeas Corpus Cannot Be Entertained; Madhya Pradesh HC https://www.livelaw.in/news-updates/for-settling-the-civil-disputes-of-the-parties-the-writ-of-habeas-corpus-cannot-be-entertainedmadhya-pradesh-hc-160550

8) **JITIN MOTHUKIRI V. STATE OF MAHARASHTRA**[137]

"*There cannot be a straight jacket formula as to how a woman will react to an act of outrage by a male,*" remarked the bench of Justice Bharati Dangre in an order granting bail to a 24-yr-old rape accused. The observation was made while negating the insinuation of victim's 'consent' imputed by the applicant's counsel."*All women are borne into diffierent circumstances in life, go through different things and faces, experience and react differently and necessarily each woman would turn out to be different from the other. The concept of consent of the victim or as to at what stage the consent was revoked and the act of physical indulgence was attempted to be restrained is a matter of trial,*" the bench added.

9) **PARAMJIT KAUR &ANR. V. STATE OF PUNJAB &ORS.**[138]

"*Even though gay marriage is not yet legitimate as per the applicable marriage laws in the country*", and therefore, "*live-in relationships*" are becoming common, observed the single-Judge bench of Justice Arun Monga while granting police protection to two females, residing as a live-in couple, apprehending threat to their life and liberty from their families.

"*Assuming, they were living simply as friends together, even then they are constitutionally entitled to live in peace*", the bench proceeded to observe, adding that "*legitimacy of their relationship with each other, therefore, is of no consequence viz-a-viz their right to life and liberty*".

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[137]There Cannot Be A Straight Jacket Formula As To How A Woman Will React To An Act Of Outrage: Bombay HChttps://www.livelaw.in/news-updates/there-cannot-be-a-straight-jacket-formula-as-to-how-a-woman-will-react-to-an-act-of-outrage-bombay-hc-read-order-160442

[138]**"Legitimacy Of Relationships Is Of No Consequence Viz-a-viz Their Right To Life And Liberty": P & H HC Grants Police Protection To Same-Sex Live-in Couple** https://www.livelaw.in/news-updates/p-h-hc-grants-police-protection-to-same-sex-live-in-couple-160319

10) **IMRAN MOHD. SALAR SHAIKH V. STATE OF MAHARASHTRA &ORS.**[139]

Division bench of Justice SS Shinde and Justice Madhav Jamdar rejected the criminal writ petition filed by an advocate seeking declaration of services rendered by lawyers as essential service and thus exempt lawyers from restrictions imposed with regard to movement of traffic during lockdown.

The bench concluded that it was within the exclusive domain of the state legislature to legislate on which services will be included in the list of 'essential services', keeping in view paramount interest of the community.

[139]**Bombay HC Rejects PIL Seeking Inclusion Of Services Rendered By Lawyers In The Category Of "Essential Services"** https://www.livelaw.in/news-updates/bombay-hc-rejects-pil-seeking-inclusion-of-services-rendered-by-lawyers-in-the-category-of-essential-services-159989

K. OBJECTION YOUR HONOUR: RAJBALA AND OTHERS V. STATE OF HARYANA AND OTHERS: A LOST OPPORTUNITY TOWARDS PARTICIPATORY DEMOCRACY.

AUTHORED BY: NIHAR CHITRE, V BA LL.B

Before we begin with this article, let us be clear- a lot of have been written on this judgment. This is just another feeble attempt to critique it. As we enter, the 73rd year of Independence, it is necessary to reflect the lost opportunity which the court had.

BACKGROUND OF THE CASE

The Haryana Panchayati Raj Act ("the Act") was enacted in the year 1994. The S. 175 of the act stipulates certain disqualification to be a member of Gram Panchayat, Panchayat Samiti and Zilla Parishad. In 2015, the Haryana State Assembly introduced an amendment to section 175 adding five more categories of disqualification: (i) persons against whom charges are framed in criminal cases for offences punishable with imprisonment for not less than ten years, (ii) persons who fail to pay arrears, if any, owed by them to either a Primary Agricultural Cooperative Society or a District Central Cooperative Bank or a District Primary Agricultural Rural Development Bank, (iii) persons who have arrears of electricity bills, (iv) persons who do not possess the specified educational qualification and lastly (v) persons not having a functional toilet at their place of residence.

Here it is pertinent to note that Art 243F (1) of the Constitution of India provides for disqualification of membership to the Panchayat. The Constitution empowers the state legislature under art 243f (1) (b) to add other additional disqualifications.

Therefore "the act" was enacted in 1994 and the impugned amendment was introduced in 2015.

The petitioner under art 32 of the filed a writ petition challenging the additional grounds added through 2015 amendment. The Petitioner contended that the disqualifications mentioned in the impugned act were arbitrary and inconsistent with the basic structure of the constitution thus violating art 14 of the constitution. Further, qualifications stated under S. 175 creates a classification among a homogeneous set of people, not based on intelligible differentia and does not have a rational nexus with the object sought to be achieved. Lastly, to clarify whether the right to vote and right to contest is constitutional rights and whether there is a legal distinction between the words qualification and disqualification under the constitution.

CRITIQUE OF THE JUDGMENT

Since ancient times, the gram panchayat has been the fundamental unit of administration. The village gram sabha is the atom of democratic setting in India. The residents of the village come together to discuss, deliberate and solve the issues faced by them. The Gandhian idea of *'Gram Swaraj* 'was envisaged in art 40 of the Constitution of India. Based on this philosophy the Government of India constituted the Balwant Rai Mehta Committee in 1957 to examine whether the Gandhian idea is feasible? The recommendations of Balwant Rai Committee of three tiers Panchayati Raj system received legislative backing through state acts. The 73rd amendment to the Constitution of India backed and brought uniformity in the *Panchayati Raj*.

For any democracy to thrive the participation of the masses is paramount. Decentralization of governance is the hallmark of democracy. Democracy works when it is inclusive and vibrant and is based on the rule of law. Exclusion of citizens due to the introduction of additional disqualifications turns democracy into feudal and oligarchic society.

As mentioned before, the petitioner challenged the impugned amendment on the ground of arbitrariness and did not have rational nexus with the objective sought in the act.

The apex court rejected the argument that it can declare a statute as unconstitutional on the ground of arbitrariness unless it violates any express constitutional provision. The enactment of such qualifications comes under the "legislative wisdom". The divisional bench relied heavily on State of A.P. v. McDowell and Co[140].

The bench did not rely on the principle laid down in the E.P. Royappa v. State of T.N.[141]:

"...Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. Equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strikes at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be a denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal

[140] (1996) 3 SCC 709

[141] (1974) 4 SCC 3

radiations emanating from the same vice; the latter comprehends the former. Both are inhibited by Articles 14 and 16."

The Ajay Hasia case[142] further cleared this position and Bachan Singh although dealing death penalty this position.

In Malpe Vishwanath Acharya[143] v State of Maharashtra and Mardia Chemicals v. Union of India[144] a statute was struck down on the ground of arbitrariness. If the Supreme Court has already set a precedent, how can wit divulge away from it?

The second argument that the petitioner had argued was that there was an unreasonable classification. In Anwar Ali Sarkar v. State of West Bengal[145] the Supreme Court has laid down the classification test:

(i) That the classification must be founded on an intelligible differentia which distinguishes those that are grouped from others and;

(ii) That that differentia must have a rational relation to the object sought to be achieved by the Act.

In the present case, the bench examined each of the impugned clauses and concluded that the classification was based on intelligible differentia and had a rational nexus with the object of the act. Before we go into how the court arrived at this conclusion, it is pertinent to know the arguments and counter-arguments. This impugned amendment creates an unreasonable classification for the same set of class. The state contended that the object of the act is to enable the administrative efficiency of local self-government.

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[142] (1981) 1 SCC 722

[143] (1998) 2 SCC 1

[144] (2004) 4 SCC 311

[145] AIR 1952 SC 75

While examining the clause (v) of S. 175 which prescribed minimum educational qualifications for Panchayati raj elections. The Court observed that only education allows a person to differentiate between right and wrong.

The Court did not follow its precedent in Union of India v. Association for Democratic Reforms[146]where it held that no legislation could curtail the voter's right to determine whether the education of the candidate is significant. Under its international obligation under art 25 of International Covenant on Civil and Political Rights[147].

Both clause (t) and (u) of S. 175 debar a candidate from standing for elections who have arrears of amount for electricity and cooperative banks. There is a difference between indebtedness and insolvency. Insolvency is a procedure and has to be declared by a competent court. The court drew an analogy with the disqualification of members of parliament and State Legislatures. If it is so then, in Thampanoor Ravi v. Charupara Ravi [148] the Supreme Court held that an MLA may not be disqualified on the ground of insolvency unless declared by the competent court. Then the same analogy should be followed in this case too?

CONCLUSION

The Constitution of India guarantees equality before the law and the rule of law. This judgment along with other disappointing judgments of the Supreme Court goes in as a dark spot in judicial history. A sincere relook at the judgment is the need of the hour.

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[146] (2002) 5 SCC 294

[147] Article 25: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (6) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country

[148] (1999) 8 SCC 74

L. MESMERIZING QUOTES

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"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election".

-Justie O. Chinnapa Reddy.

(Joyti Basu and Ors v. Debi Ghosal)

"The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution."

-Chief Justice Y.V Chandrachud

(ECI v. A.K.M Hassan Uzzaman&Ors)

"A healthy convention must develop in the country to respect the directions issued from time to time by the Election Commission. In order to effectuate the wishes of the people of India, who solemnly resolved to constitute a democratic republic, it has to be remembered that the office of the Election Commission is one of the most sacred institution under the Constitution since the democracy can only be achieved through proper functioning of the said institution."

-Justice S. Ali Ahmad

(Kanhaiya Prasad Sinha v. Union of India &Ors)

"Democracy's ceremonial, its feast, its greatest function, is the election".

-H.G Wells

"Voting is the expression of our commitment to ourselves, one another, our country, and this world".

-Saron Salzburg

"Voting is the foundational act that breathes life into the principle of the consent of the governed."

-DeForestSoaries

"The good thing about democracy is that every vote counts. The problem with democracy is that every vote counts." -CharbelTadros

M. PUBLIC LAW ON OTHER BLOGS

COMPILED BY: ASHOK PANDEY IV BA LL.B

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