
ELECTORAL REFORMS THROUGH JUDICIAL INTERVENTION: AN ATTEMPT AT PRESERVING DEMOCRACY

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The notion of democracy draws value from the ideals of “free and fair elections and “good governance.” Inadequate and flawed electoral process is obstacle to democracy, justice and liberty. It results in absolute obliteration of public tranquillity and peace. Electoral reforms are therefore important to preserve democracy in its true spirit. In today’s world the two main pillars of democracy, that are, executive and legislature, have reduced to a sheer chimera, and thus, judiciary is the alternative left to the Indian democracy. In light of the debilitating Indian democracy, the paper critically analyses the recent judicial intervention through three instances of Supreme Court’s rulings in Chief Election Commissioner v. Jan Chaukidar, Lily Thomas v. Union of India, and People’s Union for Civil Liberties and Anr. v. Union of India, having a predominant impact on electoral reforms viz-a-vis the right to vote, decriminalization of politics and freedom of expression to voters.

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I. ELECTORAL REFORMS AND DEMOCRACY

Democracy involves two quintessential aspects “free and fair elections” and “good governance.” It espouses popular participation in public affairs and perpetual scrutiny of the governmental processes through free and fair elections. Elections are essential but not enough. If the elections are themselves flawed, it is worse than not having an election in the first place as it opens the floodgates for injustice, exploitation and authoritarianism. Electoral reforms are therefore crucial to preserve unfeigned democracy. Sudipta Kaviraj argues that the gradual process of democratic change has reinforced the groundwork of democracy in India. Jaganmohan Reddy, J. in Kesavananda Bharti v. State of Kerala, laid down that “Sovereign Democratic Republic” and “Parliamentary democracy,” are basic features of our Constitution.

The Constitution does not have an orthodox separation of powers, but endeavors to achieve a balanced separation of powers among the executive, the legislature and the judiciary. Wolfgang Friedman states that in a democracy there are various systems of checks and balances. Different groups in a democratic society have certain strengths and resiliencies which protect them against the strengths of other groups in the society. In a democracy one would expect the elected representatives of people to protect and preserve the rights of the persons whom they represent. Unfortunately, the perception in India is that the two main pillars of democracy, that is, legislature and executive do not perform and the judiciary seems to be the only recourse left. It has led to the emergence of a new field of jurisprudence in Indian Law, that of Public Interest Litigation, the origin of which lies in the need to protect the weaker sections of the society from exploitation. In view of the judiciary’s mentioned role, the Supreme Court passed three rulings in Chief Election Commissioner v. Jan Chaukidar, Lily Thomas v. Union of India, and People’s Union for Civil Liberties and Anr. v. Union of India, having a

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2 Id.
5 Rafique Dada, The Judiciary and Indian Democracy, in CHALLENGES TO DEMOCRACY IN INDIA, 65 (Rajesh M. Basrur ed., 2009) [hereinafter Rafique].
6 Wolfgang Friedman, LAW IN A CHANGING SOCIETY 7 (1972)
7 Rafique, supra note 5, at 67.
8 Rafique, supra note 5, at 66.
9 Rafique, supra note 5, at 68.
11 Lily Thomas v. Union of India (2013) 7 S.C.C. 653 [hereinafter Lily Thomas].
12 People’s Union for Civil Liberties and Anr. v. Union of India, 2013 (12) SCALE 165 [hereinafter PUCL].
II. RIGHT TO VOTE AND DEMOCRACY

In the case of *Chief Election Commissioner v. Jan Chaukidar*, the Court ruled that an individual who is confined in prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police is not entitled to vote by virtue of Sub-section (5) of Section 62 of the Representation of the People Act, 1951 (The 1951 Act). Hence, the individual is not an “elector” under Sub-section (c) (1) of Section 2 of The 1951 Act, which mentions that elector is a person whose name is entered in the electoral roll of the constituency for the time being in force and who is not subject to any disqualifications mentioned in Sec. 16 of the Representation of the People Act, 1950. Therefore, the individual is not qualified to contest elections to the House of People or the Legislative Assembly of a State because of the provisions in Sections 4 and 5 of The 1951 Act, which lay down the qualifications for membership of the House of the People and a Legislative Assembly respectively.  

Upon careful contemplation of the sections used by the court to arrive at the judgment, it will become evident that the given interpretation is flawed. The germane consideration for contesting the election as per Section 4 of the 1951 Act is whether an individual is an elector, that is, if one is registered in an electoral roll without being subject to any disqualification under Section 16. Thus sub-section (5) of Section 62 of The 1951 Act is not germane to be considered as it specifies the right to vote, and not disqualification from registration in an electoral roll. Therefore, an individual might not be entitled to vote under sub-section (5) of Section 62 of The 1951 Act because one is in prison or in police custody but that does not mean that one is not entitled to be on an electoral roll which is a prerequisite to qualification for membership of the House of the People.

The error lies in extrapolating the denial of voting rights under sub-section (5) of Section 62 of The 1951 Act to the disqualification of being on an electoral roll under sub-section (1) (c) of Section 16 of The Representation of People Act, 1950 to being an elector. While denying voting rights to under trials already contradicts the principle that a person is innocent until proven guilty, disenfranchising convicts will aggravate their alienation from society. Such an

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13 *Chief Election Commissioner*, supra note 10.
14 Section 4, The Representation of the People Act, 1951.
15 Section 2, The Representation of the People Act, 1950.
16 Section 4, The Representation of the People Act, 1951
interpretation provides a perverse incentive for temporarily incarcerating and consequently disqualifying honest candidates.18

This ruling can also be analyzed in respect of violation of human rights, thus obscuring liberty of individuals which would be antithetical to the ideals of democracy. In India, the Police have been provided with certain unbridled powers of arrest. In some cases, powers of the Police extend to arresting any citizen without a warrant from a magistrate.19 From surmising the relevant sections it can be deduced that in certain cases, law has left the determination of grounds for making the arrest at the discretion of a police officer.20 In light of this it is not surprising to find several instances of human rights violations under police custody.21 This can be corroborated by the rampant deaths in police custody22 which underscores this evil.

In the arena of Indian democracy, since leaders have seemed to be ambivalent about having a dialogue with their opponents, the preference has been to use repression to browbeat activists rather than to negotiate for the larger good. The current left wing extremism in Bihar and unrest in Northeast well affirm the above assertion.23 Unless there is reformation in the Police the current judgment will prove to be deleterious for the Indian democracy. It can deny any person the right to contest elections and escalate false imprisonments by the government in power which invariably rules the executive in India.

III. DECRIMALIZATION OF POLITICS AND DEMOCRACY

Democracy, in a way, could be understood as a procedure for taking decisions in a group, whereby all members have an equal right to have a say.24 But where a considerable body of men acts together, the check on a man is, in a great measure, removed; since a man is sure to be approved of by his own party, for what promotes their common interest, and he soon learns to despise the clamors of adversaries.25 If this interest is not checked and not directed towards the public, then a government formed of such men would result in disorder and tyranny.

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20 Arvind Verma, Police Agencies and Coercive Powers, in THE STATE OF INDIA’S DEMOCRACY 125 (Sumit Ganguly, Larry Diamond and Marc F. Plattner eds., 2007) [hereinafter Verma].
21 Id. at 126.
23 Verma, supra note 20, at xiv.
In the case of *Lily Thomas v. Union of India and Ors.*, the Court aims to decriminalize politics, which at present, is highly prevalent given the fact that political parties are increasingly working towards meeting their own self interests.

The Court’s ruling and its aim of decriminalization was deeply embedded in earlier electoral reforms. The National Commission to Review the Working of the Constitution was set up vide government Resolution dated 22 February 2000 and one of the suggestions in pursuance of electoral reforms was regarding entry of criminals in politics.26 Rapid criminalization of politics was mentioned as one of the dangers to free and fair elections in the Dinesh Goswami Report on Electoral Reforms.27 The importance of electoral reforms and obliterating criminalization of politics was again well elucidated in the Indrajit Gupta Committee Report.28

The Vohra Committee29 appointed by the Government had stated in strong terms that the nexus between crime syndicates and political personalities is very deep and has developed into a business partnership in various parts of the country. The Committee quoted that the Mafia network is virtually running a parallel government, pushing the State apparatus into irrelevance.30

The court in *Lily Thomas v. Union of India and Ors.* held that the affirmative words used in Articles 102(1)(e) and 191(1)(e) of the Constitution, confer power on Parliament to make one law, laying down the same disqualifications, for a person who is to be chosen as a member and who is a sitting member of either House of Parliament or as a member of the Legislative Assembly or Legislative Council of a State. Further, the words in Articles 101(3)(a) and 190(3)(a) put express limitations on powers of the Parliament to defer the date on which the disqualifications would have effect. Now Sub-section (4) of Section 8 of the 1951 Act carves out a saving in the case of sitting members of Parliament or State Legislatures from the disqualifications under Sub-sections (1), (2) and (3) of the Section or which defers the date on which the disqualification will take effect in the case of a sitting member of Parliament or a State Legislature. Clearly, enacting such a provision is beyond the powers conferred on Parliament by the Constitution. Parliament, therefore, has exceeded its powers conferred by the

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Constitution in enacting Sub-section (4) of Section 8 of the 1951 Act and accordingly this Section is ultra vires the Constitution.\(^{31}\)

From the analysis of criminal cases adduced to sitting Members of Parliament and Members of Legislative Assemblies, it was found that a total of 1460 out of 4807 (30\%) sitting MPs and MLAs have declared criminal cases against themselves in their self-sworn affidavits submitted by them to the Election Commission of India prior to contesting elections. Out of the total number of sitting MPs and MLAs analyzed, 688 (14\%) have declared serious criminal cases against themselves.\(^{32}\)

Political parties are essential for a democracy to function and their character determines the quality of the democracy in a country. A modern democracy cannot survive without political parties, thus they are not mere appendages but the foundation stone.\(^{33}\) According to James Madison, parties are inherently oppressive and must be thwarted by an elaborate system of separation of powers with checks and balances.\(^{34}\)

There has been unprecedented growth in the number of political parties. This proliferation of political parties is a matter of concern as with this increase in their numbers, the quality of candidates nominated by them has gone down.\(^{35}\) There are candidates with predominant and conspicuous criminal background, but due to their shear ability to bear the expenses of the election process they are nominated by the parties owing to the heavy expenses involved in election campaigns.

Earlier there was no deterrence for parties giving tickets to the candidates with pending criminal cases because even if any such candidate got convicted, they would appeal against the conviction and continue to be an MP or MLA. Now since the convicted representatives will immediately lose their seats, parties would be hesitant to give tickets to such candidates. This is a very significant judgment, as it would act as a deterrent to political parties from giving tickets to tainted candidates. Other logistical details could be finalized as criminal cases against politicians pending before Courts either for trial or in appeal must be disposed of speedily, if necessary, by appointing Special Courts.

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31 Lily Thomas, *supra* note 11.

32 Association For Democratic Reforms (ADR), *All India Analysis Of Criminal Cases On Elected Representatives*, (July 10, 2013), available at: http://adrindia.org/sites/default/files/All%20India%20Analysis%20of%20criminal%20cases%20on%20elected%20representatives.pdf.


34 James Madison, The *FEDERAL PAPERS*, No. 47 (1788).

35 Stefano Bartolini, *Challenges to contemporary political parties*, in *POLITICAL PARTIES AND DEMOCRACY* 327 (Larry Diamond and Richard Gunther eds., 2001).
IV. FREEDOM OF EXPRESSION TO VOTERS AND DEMOCRACY

Facts can be adduced from history and contemporary world that democracy may prove to be a direct antithetical to liberty and may give rise to an autocratic government, like despotism resting on a plebiscite is quite a natural form of democracy.\(^{36}\) The love of democracy for authoritarian regulation will be conspicuous\(^{37}\) when voters don’t have the right to express their choice fearlessly and freely in the absence of secrecy.

In the case of People’s Union for Civil Liberties and Anr. v. Union of India,\(^{38}\) it was held that maintenance of secrecy was a must in direct elections to the House of People or State Legislatures. Rules 49-O, 41-2 and 41-3 which treated differently a voter who decided not to cast his vote and allowed his secrecy to be violated,\(^{39}\) were arbitrary, unreasonable and violative of Article 19 of the Constitution and ultra vires Sections 79(d) and 128 of The 1951 Act. The mechanism of casting a vote through an Electronic Voting Machine and Rule 49-O of Conduct of Election Rules (the Rules) compromised on the secrecy of the vote as a neutral or negative vote was recorded by the presiding officer.\(^{40}\) Thus, Rules 41(2) & (3) and 49-O of the Rules were ultra vires Section 128 of the 1951 Act and Article 19(1) (a) of Constitution to the extent that they violate the secrecy of voting and as a result of which the voter’s right to freedom of expression in the polling booth was also violated.

In the case, the court drew a fine distinction between right to vote and freedom of voting as a species of freedom of expression.\(^{41}\) The court laid down that secrecy of vote was essential to espouse the cardinal principle of free and fair elections. The main impact of the judgment was that the court directed to introduce a “None of the Above [NOTA]” option into the Electronic Voting Machines.\(^{42}\) Its significance in the Indian scenario can well be gauged by the fact that over sixty lakh “None Of The Above (NOTA)” votes were cast in the sixteenth Lok Sabha elections, the first time that this option was given.\(^{43}\) The proportion of negative votes was higher than the national average in Chhattisgarh (1.9 per cent), Gujarat (1.8 per cent), Jharkhand (1.5 per cent), with the highest of all in the two ST constituencies in Meghalaya.\(^{44}\)

Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of

\(^{37}\) Id.
\(^{38}\) PUCL, supra note 12.
\(^{39}\) Rule 41 (2), Rule 41(3) and Rule 49 –O, Conduct of Election Rules (1961).
\(^{40}\) Id.
\(^{41}\) PUCL, supra note 12.
\(^{42}\) Id.
\(^{44}\) Id.
ascertaining popular will, both in reality and form, and are not mere rituals calculated to generate the illusion that mass opinion is being defended.\textsuperscript{45} Secrecy of ballot, undoubtedly, is an indispensable adjunct of free and fair elections. A voter has to be statutorily assured that he will not be compelled to disclose his vote by any authority so that he may vote without fear or favour.\textsuperscript{46} The right to vote freely for the candidate of one’s choice is of the essence in a democratic society.\textsuperscript{47} Since the freedom to vote naturally includes the freedom not to vote, it would be arbitrary to extend secrecy to one and not the other.\textsuperscript{48} Voting is a formal expression of will and such a right implies the right to remain neutral as well.\textsuperscript{49} So when the court held that secrecy of voting has to be maintained, it upheld the ideals of democracy and liberty by assuring that the voters will not be victimized in the event of them exercising their own free will in electing their representative and thus securing the essence of democracy.

\textbf{V. DEFENDING OF DEMOCRACY BY THE COURT}

One of the most important decisions to be made in a democracy is the choice of electoral reforms. The choice of electoral system in India was seriously deliberated upon, as evident by Jawaharlal Nehru’s views expressed in the constituent assembly about improving the democracy through electoral reforms.\textsuperscript{50}

In India, while adopting the Westminster system of Government, enormous powers were vested in the judiciary to maintain the system of checks and balances, which is the bulwark of our democracy.\textsuperscript{51} Today the courts are assuming more functions because of the failure or apathy of the administration in performing its duties and discharging its responsibilities.\textsuperscript{52}

The paradox in the party system is that while people have trust in the democratic form of governance, their trust in parties is low.\textsuperscript{53} The ruling of the Court in \textit{Lily Thomas v. Union of India and Ors.}\textsuperscript{54} could be an answer to the paradox. While the ruling in \textit{Chief Election Commissioner v. Jan Chaukidar}\textsuperscript{55} is detrimental to Indian democracy by vitiating the right to contest elections and a potential threat to the liberty of individuals having views contrary to the ruling party, the Court in

\textsuperscript{46} S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and Ors, (1980) S.C.C 53.
\textsuperscript{48} PUCL, \textit{supra} note 12.
\textsuperscript{50} Jawaharlal Nehru moving the Objective Resolution of the Principles (December 30, 1946). “We are aiming at democracy and nothing less than a democracy…In any event whatever system of government we may establish here must fit with the temper of our people and be acceptable to them. We may improve upon it.”
\textsuperscript{51} Krishnamurthy, \textit{supra} note 1, at 57.
\textsuperscript{52} Rafique, \textit{supra} note 5.
\textsuperscript{53} Krishnamurthy, \textit{supra} note 1, at 101- 103.
\textsuperscript{54} Lily Thomas, \textit{supra} note 11.
\textsuperscript{55} Chief Election Commissioner, \textit{supra} note 10.
People’s Union for Civil Liberties and Anr. v. Union of India\textsuperscript{56} has again protected secrecy and hence, the liberty of individuals. In light of the above three judgments, the Court has defended democracy by upholding the principles of liberty and freedom of expression of voters and decriminalizing politics which in turn preserves myriad ideals of democracy.

\textsuperscript{56} PUCL, supra note 12.