HERACLES CLEANSING THE AUGEAN STABLES: A SAGA OF JUDICIAL SUPERVISION OVER THE DEMOCRATIC PROCESS IN INDIA

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"…the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods, or subtle perversion of discretion by men "dressed in little, brief authority".[1]

Abstract

Having adopted democracy as the creed of the Constitution, India unlike its neighbours, was able to continue to be democratic for over 70 years. The history of Indian democracy, however, was without tumult and tribulations. It faced many ups and downs, at times threatening its very existence due to the antidemocratic practices among the constitutional authorities and the unethical attitudes of the political parties which once culminated in the imposition of national emergency. Despite the presence of many such factors and forces inimical to the smooth functioning of democracy, India has been rated as a successful democratic state. Though many factors have contributed to the continuance of democracy, perhaps the most significant among them is the unique role of the judiciary, particularly the Supreme Court in this regard. The role played by the apex court in maintaining and upholding the democratic process in the Indian legal system is *par excellence*. Transcending all limitations, it has been invoking judicial power to strengthen the democratic fabric which culminated in its crusade against criminalization of politics. The Indian Supreme Court is virtually tired of cleansing the dirt and filth of the Indian democracy. Small wonder, history of democracy in India is the history of judicial innovation also.

I Introduction

POLISHED UP, democracy,[2] from the degenerated form of governance[3] to a political desideratum[4] leaves a long history behind it. For, democracy was not invented "once

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1 *M.S. Gill* v. *The Chief Election Commissioner, New Delhi* (1978) 1 SCC 405, 413 (Krishna Iyer J.)

2 "A form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation, as distinguished from monarchy, aristocracy, or oligarchy." See *Black's Law Dictionary* 432 (St. Paul Minn. West Publishing Co., 1990).

3 "Next – and next in the scale of general approval – is the one called oligarchy, a form of government filled with all sorts of evils. In contrast to oligarchy, and the form of government which arises next, is democracy. And then there is the wonderful institution of tyranny, standing head and shoulders above all the others, the fourth and last diseased state of the city." See. GRF Ferrari (ed.), Plato, *The Republic, Bk. VIII* 544 c d (Cambridge, 2003).

4 Jean Jacques Rousseau, *Discourse on Political Economy and the Social Contract* 101 (OUP, 1994). He observes, "If the term is taken in its strict sense, true democracy has never existed and never will."

and for all", but came through a long process of evolution.[5] History recorded its existence among the Phoenicians[6] long before the arrival of the celebrated city-state of Athens.[7] However, the conditions under which and the circumstances in which it evolved among different communities and civilizations were totally dissimilar.[8] And looking through the post-twentieth century telescope, it is doubtful whether democracies of the ancient world were genuinely democratic, for, a significant portion of the communities at that point of time was alien to the franchise on social, biological or economic factors.[9]

After the long interlude of the middle ages which, in acceptance of the doctrine of *iure divino*[10] and the feudal social order[11] witnessed the monarchical form of government, re-emerged the demand for democracy. But, the social and economic conditions created by the decline of feudalism followed by the emergence of capitalism and the presence of unmanageably large communities paved the way for replacing direct democracy by representative democracy.[12]

II Representative democracy

In the formalistic sense, the term representative denotes any ruler, even a hereditary monarch who acts for the society.[13] But, in the context of representative democracy, it

5 Robert A. Dahl, *On Democracy* 9-10 (Yale University Press, New Haven, 1998). For, "[O]ver the long period when human beings lived together in small groups and survived by hunting game and collecting roots, fruits, berries, and other offerings of nature, they would no doubt have sometimes, perhaps usually, developed a system in which a good many of the members animated by the logic of equality—the older or more experienced ones, anyway—participated in whatever decisions they needed to make as a group. That such was indeed the case is strongly suggested by studies of non literate tribal societies. For many thousands of years, then, some form of primitive democracy may well have been the most "natural" political system." (*Id.* at 10).

6 Brian S. Roper, *The History of Democracy -A Marxist Interpretation* 14 (Pluto Press, London, 2013).

7 Kurt A. Raaflaub, "Introduction" in Kurt A. Raaflaub, Josiah Ober *et.al.*, (eds.) *Origins of Democracy in Ancient Greece* 3 (University of California Press, Berkeley, 2007).

8 Temma Kaplan, *Democracy: A World History* 5 (OUP, 2015). She observes, "Ancient democracy depended on the ability of people to supplement hunting and gathering with farming, which required regular access to water." See also "If the prehistory of democracy undoubtedly took place around life-and-death issues such as the management of water, full-blown democratic institutions and practices flourished in ancient Greece, particularly in Athens." (*Id.* at 7).

9 Will and Ariel Durant, *The Lessons of History* 72 (Simon and Schuster, New York, 1968). See also, *supra* note, 6 at 49-50.

10 Otto Gierke, *Political Theories of the Middle Age* 30-34 (Cambridge, 1922).

11 *Supra* note 6 at 85.

12 The Federalist Papers No. 52 p. 273. (Liberty Fund *Indianapolis, 2001) "*The scheme of representation, as a substitute for a meeting of the citizens in person, being at most but very imperfectly known to ancient polity;…". See also, Hanna Fenichel Pitkin, *The Concept of Representation* 191 (University of California Press Berkeley, 1972).

13 Hanna Fenichel Pitkin, *The Concept of Representation* 45 (University of California Press Berkeley, 1972).

denotes the person who represents the general opinion of the nation or the variety of interests in society.[14] In the initial stages of representative democracy, representation was of the various interest groups in the society called 'estates' and not of the people.[15] Thus representation was given to barons, clergy, knights, lawyers and merchants.[16] In that sense, it was more akin to feudalism than democracy.[17]

The idea of government by representation perhaps evolved in the convergence of the attempt of the ruler to muster public support[18] and the practice of entrusting governance to a few due to paucity of time of the general public.[19] However, with the gradual fading away of the divine right theory, the mood of co-operation between the king and the representatives gave way for contest for the sovereign power.[20] Thereafter, violent revolutions and public revolt contributed to the gradual evolution and development of representative democracy[21] as a result of which the representatives of the people were accorded special status and were considered "sacred". This helped the representatives to claim insulation from any authority[22] which initially limited to the right to speak in the House,[23] was later extended to all aspects of the constitution and functioning of the House. As a result, matters relating to the procedure within and election of members to the House[24] were not to be reviewed by the Crown or by the courts. Thus till 1770, all disputes relating to the election of the members of Parliament were determined by

14 *Id.* at 61. Mirabeau has observed, "A representative body is for the nation what a map drawn to scale is for the physical configuration of its land; in part or in whole the copy must always have the same proportions as the original." (*Id.* at 62).

15 J. A. R. Marriott. *Mechanism of the Modern State; A Treatise on the Science and Art of Government* 177-178 (Oxford: Clarendon Press., 1927).

16 *Id.* at 178-181.

17 Jean Jacques Rousseau, *Discourse on Political Economy and the Social Contract* 127 (OUP, 1994).

18 Charles A. Beard and John D. Lewis, "Representative Government in Evolution" 26 *AM. Pol. Sci. Rev.* 223, 231 (1932).

19 Bernard Manin, *The Principles of Representative Government* 3 (Cambridge University Press, 1997).

20 *Supra* note 15 at 185-186. .

21 *Supra* note 6 at 88.

22 See, Rudolph von Gneist, *History of the English Parliament, its Growth and Development through a Thousand Years. 800 to 1887* 368 (W. Clowes and Sons London,1892).

23 See, Bill of Rights [1688] 1688 Chapter 2 1 Will and Mar Sess 2. "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament"

24 F.W. Maitland, *The Constitutional History of England* 291 (Universal, New Delhi, 2011). "The power of determining all questions as to contested elections, the House of Commons has not got into its own hand – and it jealously rents any interference by the king, the House of Lords, or the courts of law. Too often its decision is simply the result of party division."

the whole House of Commons and thereafter by committees which consisted of Members of the House.[25]

The American and French revolutions, followed by the democratic movements of the mid-19th Century created a surge of constitutionalism resulting in the acceptance of democratic form of governance by many states in Europe. Most of them adopted the parliamentary form of government evolved in Britain.[26] The legal systems that grafted the Westminster form of government incorporated the doctrine of parliamentary sovereignty,[27] its autonomy and conventions of parliamentary democracy[28] into their Constitutions. It is true that having evolved along with the growth of Parliament as a democratic institution, the concepts and features of parliamentary government played a pivotal role in the growth of the democratic process in England. But, it is not unlikely that dissociated from the circumstances in which they grew, such concepts and features, instead of facilitating democracy might adversely affect its smooth functioning and at times result in autocracy.[29]

III Democracy –Perspective of the Indian Constitution

The makers adopted parliamentary democracy as the creed of the Indian Constitution[30] both at the Union and state levels. All constitutional authorities except the Governor of the state are elected by the people or their representatives. The President is elected by the elected members of both Houses of Parliament and Legislative Assemblies of the States[31] and the Vice President is elected by the members of both Houses of

25 David Natzler and Mark Hutton (eds.), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 26 (Lexis Nexis UK, 2019). These dispute resolution mechanisms, defective as they were due to the presence of party considerations, partiality and incompetence, were replaced by vesting the power in courts by the Parliamentary Elections Act, 1868. (*Ibid.*).

26 C. F. Strong, *A History of Modern Political Constitutions* 42-43 (G. P. Ptnam's Sons, New York,1963).

27 "The doctrine of parliamentary sovereignty has long been regarded as the most fundamental element of the British Constitution….It is said that Parliament is able to enact or repeal any law whatsoever, and that the courts have no authority to judge statutes invalid for violating either moral or legal principles of any kind." Jeffrey Goldsworthy, *The Sovereignty of Parliament –History and Philosophy* 1 (OUP, 1999).

28 See, e.g. Malcolm Rowe and Nicolas Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" 98 *Can. Bar Rev.* 430, 431 (2020).

29 This is especially true of representative democracy in which the electorate does not have control over its representatives, who enjoy a wide discretion. (*Supra* note 19 at 167) notwithstanding the conflict in interests they represent. (*Supra* note 13 at 198).

30 Granville Austin, *The Indian Constitution – Cornerstone of a Nation* 145 (OUP, 2016). Explaining that the Indian Constitution is Anglo-Indian version of the Westminster model, Krishna Iyer J. observed with a quip, "Not the Potomac, but the Thames, fertilizes the flow of the Yamuna, if we may adopt a riverine imagery." (*Samsher Singh* v. *State of Punjab*, (1974) 2 SCC 831, 861).

31 The Constitution of India, 1950 arts. 54, 55.

Parliament.[32] Members of the upper house of Parliament[33] (Council of States) are elected by the elected members of legislative assembly of the states and those of the state legislature (state legislative council) are also elected by designated electorates.[34] Members of the lower house of Parliament (House of the People)[35] and the legislative assemblies of the states[36] are elected by the electorate. In order to ensure free and fair election, the Election Commission who enjoys security of tenure[37] is vested with the power to "superintendence, direction and control of elections".[38]

The speakers and deputy speakers of the House of the People[39] and legislative assemblies of the state,[40] the deputy chairman of the Council of States,[41] chairman and deputy chairman of state legislative councils[42] are elected by the members of the respective Houses.[43] Democracy has percolated to the grass root level as the administration of the village and municipality[44] as well as scheduled areas and tribal areas[45] are to be carried out by persons elected by the people. Apart from the above constitutional provisions, Parliament has enacted two statutes for making representative democracy meaningful.[46]

Evidently, the Constitution and the statutes have elaborately laid down the structure and procedure for the conduct of elections in a free and fair manner essential for democracy. Having adopted parliamentary democracy, the makers have stuffed many of its provisions with the customs and conventions of the Westminster form of government. The presence of the Council of Ministers headed by the Prime Minister to aid and advice the President, regulation of the sessions of Parliament, the right of

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32 *Id.* art. 66.

33 *Id.*art. 80 (4).

34 *Id.* art. 171 (3).

35 *Id.* art. 81.

36 *Id.* art. 170.

37 *Id.* art. 324 (5) Proviso.

38 *Id.* art. 324 (1).

39 *Id.* , art. 93.

40 *Id.*. , art. 178.

41 *Id.* , art. 89.

42 *Id.* , art. 182.

43 *Id.* , art. 89. However, the Vice President will be the *ex officio* Chairman of the Council of States.

44 *Id.*, parts IX A and IX B.

45 *Id.*, Part X, Schedules V and VI.

46 The Representation of the People Act, 1950 *inter alia* provides for the allocation of seats, delimitation of constituencies, qualifications of voters, preparation of electoral rolls for the conduct of election to the House of the People and the Legislatures of States. The Representation of the People Act, 1951 provides for the conduct of elections to the Houses of Parliament and the State Legislatures, qualifications and disqualifications for membership and corrupt practices and offences in connection with elections and lays down the procedure for the resolving the disputes arising out of or in connection with such elections.

the President to address the Houses of Parliament, the office and functions of the speaker, incorporation of parliamentary privileges, legislative procedure for passing of Bills and mutual non-interference between Parliament and judiciary are but some of them.[47] In contrast to such provisions which laid down "conventions which are determinable and amenable to description",[48] some provisions created "constitutional abeyances"[49] leaving gaps to be filled in by the wisdom of the future. Thus, while interpreting the powers of and the relationship between the President and the Council of Ministers, the Supreme Court held:[50]

> It was said that we must interpret Article 75 (3) according to its own terms regardless of the conventions that prevail in United Kingdom. If the words of the Article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed.

IV Democracy in India: A judicial redrafting

Experience taught us that blind adoption of the Westminster form of government in the Indian context would lead to exercising of powers by the constitutional authorities contrary to democratic principles. Small wonder, the history of Indian constitution is a history of judicial exegesis for reconciling its provisions with the principles of democracy. Such instances of judicial interpretation span from reviewing the invocation of constituent and legislative powers to exercising of administrative powers by the constitutional authorities. Such judicial exercises are unique to the Indian legal system

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47 The Constitution of India, 1950 art. 74, 75 reads: (Council of Ministers); art. 85 (sessions of Parliament, prorogation and dissolution); arts. 86, 87 (the right of the President to address Parliament); arts. 93, 94, 95 (office of the speaker and his functions); art. 105 (parliamentary privileges); arts. 107-117 (legislative procedure); arts. 121,122 (mutual non-interference by Parliament and judiciary) are some of them.

48 Interpreting art. 77, Krishna Iyer J. observed, "We have, in the President and Governor, a replica of a constitutional Monarch and a Cabinet answerable to Parliament, substantially embodying the conventions of the British Constitution – not a turn-key project imported from Britain, but an edifice made in India with the know how of British Constitutionalism. If this theory be sound, Government is carried on by the Ministers according to the Rules of Business and, the Governor no more than the Queen, need know or approve orders issued in his name. The core of the Westminster system is that the Queen reigns, but the ministers rule, except in a few special, though blurred, areas,…" *Samsher Singh* v. *State of Punjab* (1974) 2 SCC 831, 859-860.

49 Michael Foley, *The Silence of Constitutions-Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* ix (Routledge London, 1989).

50 *U.N.R. Rao* v. *Indira Gandhi* (1971) 2 SCC 63, 64.

in so far as the courts in the other legal systems have not ventured to examine such issues. How far the interpretive techniques adopted by the judiciary have been successful in reconciling the provisions of the constitution with the requirements of democracy is a question demanding close scrutiny.

Constituent power turning anti-democratic

The major premise of democracy is the sovereignty of the people.[51] Hence, in the countries where the process of democratization began before the 20th Century, people take part in the process of amending the constitution in one way or the other.[52] However, like many of the modern Constitutions, the Constitution of India does not envisage participation of the electorate in the process of amendment. It on the other hand is vested on the legislative bodies.[53] Vesting of constituent power on the legislature is contrary to the democratic concept that ultimate sovereign power is vested on the people.[54] Small wonder, apart from the challenges on the grounds of violation of fundamental rights[55] and irregularity of procedure,[56] constitutional amendments have been challenged on the ground of violation of principles of democracy.

It was in *Indira Gandhi* v. *Raj Narain,*[57] a sibling of *Indira Gandhi* v. *Raj Narain*[58] that the court examined the validity of the exercise of constituent power on the ground that it violated the democratic process. It was an appeal against the holding of the High Court of Allahabad that set aside the election of the appellant on the ground that she resorted to corrupt practises during the election in 1971. Pending the appeal, Parliament amended the Constitution[59] and incorporated article

51 K.C. Wheare, *Modern Constitutions*, 54-55 (Oxford 1966).

52 See, the Constitution of United States, (art. V); the Constitution of France, 1958 (arts. 11, 89); the Constitution of Canada 1867 (s. 38(1) (b)); the Constitution of Australia. 1900 (s. 128); the Federal Constitution of Swiss Confederation 1999 (art. 140).

53 The Constitution of India, 1950 art. 368, 2, 3.

54 "Western civilization, and the United States, not Europe, took the lead. The doctrine of popular sovereignty had an especially strong appeal to the inhabitants of the colonies in the latter half of the eighteenth century. The people were sovereign: it followed that they could make a constitution. Corollary to this, of course, they could revise and amend the document which they had adopted." See, Lester Bernhardt Orfield, *The Amending of the Federal Constitution* 1 (The University of Michigan Press Chicago, 1942).

55 *I.C. Golaknath* v. *State of Punjab*, AIR 1967 SC 1643; *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225.

56 See, e.g. *Shankari Prasad* v. *Union of India*, AIR 1951 SC 458; *Sajjan Singh* v. *State of Rajasthan*, 1965 AIR 845.

57 1975 Supp. SCC 1.

58 (1975) 2 SCC 159.

59 The Constitution (Thirty-ninth Amendment) Act, 1975.

329A[60] into it which ousted judicial review of the election of the Prime Minister and the Speaker.[61] Consequently, in order to fortify his case, the respondent challenged the validity of the amendment also on the ground that it was violative of free and fair election and democracy which after *Kesavananda Bharati*,[62] was an ingredient of the basic structure of the Constitution.

60 Constitution of India, 1950, art. 329A reads: It read, "Special provision as to elections to Parliament in the case of Prime Minister and Speaker.-(1) Subject to the provisions of Chapter II of Part V [except sub-clause (e) of clause (1) of article 102], no election-

(a) to either House of Parliament of a person who holds the office of Prime Minister at the time of such election or is appointed as Prime Minister after such election;

(b) to the House of the People of a person who holds the office of Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election, shall be called in question, except before such authority [not being any such authority as is referred to in clause (b) of article 329] or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.

(2) The validity of any such law as is referred to in clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(3) Where any person is appointed as Prime Minister or, as the case may be, chosen to the office of the Speaker of the House of the People, while an election petition referred to in clause (b) of article 329 in respect of his election to either House of Parliament or, as the case may be, to the House of the People is pending, such election petition shall abate upon such person being appointed as Prime Minister or, as the case may be, being chosen to the office of the Speaker of the House of the People, but such election may be called in question under any such law as is referred to in clause (1).

(4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election to any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).

(6) The provisions of this article shall have effect notwithstanding anything contained in this Constitution."

61 For a brief but pithy description of the political conspiracy and administrative plots behind the amendment, see, Granville Austin, *Working a Democratic Constitution – A History of the Indian Experience* 314-327 (OUP, 2008).

62 In *Kesavananda Bharati,* the court had accepted that the contents of the Preamble were indicia of the concept of basic structure. Being part of the Preamble, democracy also becomes a feature of the basic structure of the constitution.

Observing that democracy was an ingredient of basic structure of the Constitution,[63] the court held that an amendment violative of the principles of democracy would be unconstitutional. The judges observed that though the term democracy eluded precise meaning and comprehensive definition,[64] it included within its fold equality,[65]free, fair and periodic elections,[66] mechanism for settling election disputes[67] and sovereignty of the people.[68] The court held that as clause (4) of article 329A adversely affected the above aspects, it was violative of democracy, an aspect of basic structure of our Constitution.[69] Undoubtedly, the impugned amendment was an attempt to keep the election of the Prime Minister beyond judicial scrutiny, which if left undisturbed would strike at the root of the democratic process. *Indira Gandhi* is one of the epoch making decisions rendered by the Supreme Court that tries to uphold democracy in India.

It was 18 years after *Indira Gandhi* that validity of a constitutional amendment on the ground of violation of democratic principles came for judicial consideration, when the vires of the 52nd Amendment Act, enacted to combat political defections that "undermine the very foundations of our democracy and the principles which sustain it"[70] was challenged in *Kihoto Hollohan* v. *Zachillhu*.[71] It arose out of a batch of cases challenging the power of the Speaker/Chairman to disqualify the members of the House on the ground of defection under the X Schedule of the Constitution. The amendment was assailed *inter alia* on the ground that it violated the fundamental values and principles underlying the parliamentary democracy which is a feature of the basic structure of the Constitution, freedom of speech of the members of the House[72] and free and fair election which included independent and impartial machinery for adjudication.[73]

The impugned amendment stipulates that a member of the House who changes his political affiliation[74] or votes contrary to the direction issued by the party to which he belongs[75] will be disqualified to continue as such. It also provided that the decision of

63 *Supra* note 57 at 198 (Khanna, J.); at 119 (Mathew, J.) and at 255 (Chandarachud, J.).

64 See for instance, W. Friedmann, *Legal Theory,* Stevens and Sons 435 (1949), He observes: "A discussion of the principal legal values of modern democracy can be grouped around four themes of legal theory: (1) The legal rights of the individuals. (2) *Equality before the law.* (3) *The control of government by the people.* (4) *The rule of law."* (Emphasis supplied).

65 *Supra* note 57 at 256 (Chandrachud. J.)

66 *Id.* at 87 *(*Khanna J.)

67 *Id.* at 87-88 (Khanna, J.)

68 *Id.*at135 (Mathew, J.)

69 *Id.* at 87 (Khanna, J.); at 134 (Mathew, J.) and at 258-259 (Chandrachud, J).

70 See the Constitution (Fifty-second Amendment) Act, 1985, the Statement of Objects and Reasons

71 1992 Supp (2) SCC 651.

72 *Id.* at 672.

73 *Id.* at 675.

74 The Constitution (Fifty-second Amendment) Act, 1985, para. 2(1) (a).

75 *Id.*, para 2(1) (b).

the speaker/chairman of the House concerned on the question of disqualification will be final[76] and that the same cannot be reviewed by the judiciary.[77] The court held *per curiam* that democracy, an aspect integral to the basic structure of the Constitution[78] implies free and fair election and the machinery for fair adjudication of electoral disputes.[79]

However, the judges divided among themselves on the question whether the power vested on the speaker to disqualify members of the House on the ground of defection violated the requirement of machinery for fair adjudication which is an ingredient of democracy. The majority held that considering the high traditions of the office of the speaker, it would be unfair to hold that vesting of the adjudicatory power on him was violative of the basic feature of democracy.[80] The majority further held that though debate and discussion form the essence of the democratic process, the same cannot be dissociated from the policies of political parties,[81] and hence voting in the House contrary to the party directive was a sufficient ground to recall a representative. The majority further held that the anti-defection law is only a statutory variant of the power to recall and therefore held that paragraph 2 in the Tenth Schedule that empowers the speaker to disqualify the members on the ground of defection was not subversive of parliamentary democracy.[82]

The minority on the hand held that speaker being an authority within the House and his tenure dependent on the will of the majority of its members, determination of the question of defection by him does not satisfy the demand for fair adjudication required of democracy.[83] Though ratiocinated in opposite directions, both the majority and the minority of judges based their conclusions on democracy and held the power of the speaker under the Tenth Schedule subject to judicial review.[84] Undoubtedly, the holding of the court *per curiam* that the adjudicatory power of the speaker was subject to judicial

76 *Id*., para 6(1) and (2).

77 *Id*., para 7. It reads, "Bar of jurisdiction of courts.-Notwithstanding anything in this Constitution, no court shall have any jurisdiction in respect of any matter connected with the disqualification of a member of a House under this Schedule."

78 *Supra* note 71 at 681(Venkitachalaiah,J.) and at 741 (Verma and Sharma JJ.).

79 *Id*. at 681-682 (Venkitachalaiah J.), and at 741 (Verma and Sharma JJ).

80 *Id*. at 714.

81 *Id*. at 682.

82 *Id*. at 686-687.

83 *Id*. at 742.

84 The later developments testify that the apprehension of the minority rather than the high expectations of the majority was a constitutional reality. See, e.g. *Ravi S. Naik* v. *Union of India* 1994 Supp (2) SCC 641; *Balchandra L. Jarkiholi* v. *B.S. Yeddyurappa* (2011) 7 SCC 1.

review under articles 136, 226 and 227[85] is in tune with the requirement that fair adjudicatory process is an ingredient of a healthy democracy.[86]

Democratic federalism *vis-à-vis* undemocratic executive

It has been accepted that democratic infrastructure is a prerequisite for federalism which implies that disturbing the benign balance of powers of a federal system may damage its democratic nature also.[87] Though views are there that Indian constitution is not federal in the traditional sense, being the warp and weft of the fabric of the Indian Constitution, democracy and federalism have since been identified as features of its basic structure.[88] The Indian Constitution is designed on the platform laid down by the Government of India Act, 1935. Nevertheless, in the background of the provisions that carry within them the tendency to draw the states towards the centre, the Indian Constitution is considered to be akin to unitary than federal and is said to be quasi-federal *i.e.,* unitary with federal features. Euphemistically it has been identified to be a unique, original and centralized federal one,[89] *i.e.,* more unitary in nature. One of the aspects that gives unitary colour to the Indian Constitution is the nature of the office of the Governor.

Though as the head of the state executive he is entrusted with certain constitutional functions, absence of a democratically acceptable procedure for appointment, the wide discretion and variegated powers coupled with the absence of a procedure for his removal have been instrumental in identifying the office of the Governor as that of an agent of the centre which is against the federal nature of our constitution.[90] The office of the Governor is similar to that of the Governor under the Government of India Act, 1919 who, despite the introduction of certain democratic features had overriding powers and therefore could control even the ministers.[91] Undoubtedly, vesting of power on an

85 *Supra* note 71 at 708.

86 The court however, struck down para 7 of the X Schedule that barred the jurisdiction of the courts on the ground that being a provision that excludes judicial review, the same ought to have been complied with the procedural requirements of clause (b) of the proviso to art. 368 (2).

87 Amah Emmanuel Ibiam, "Federalism, Democracy and Constitutionalism: The Nigerian Experience" 53 *J.L. Pol'y & Globalization* 1 (2016).

88 See, e.g., *S.R Bommai* v. *Union of India* (1994) 3 SCC 1.

89 Louise Tillin, *Indian Federalism* 2 (OUP, 2019).

90 H.M. Seervai, (3) *Constitutional Law of India,* 3103 (Universal, India, 2008). He observes, "A difficulty however arises from the fact that the Governor holds his office during the pleasure of the President and can be removed by him. As the President acts on the advice of his Ministry, it may be contended that if the Governor takes action contrary to the policy of the Union Ministry, he would risk being removed from his post as Governor and therefore he would follow the advice of the Ministry. …The removal of the Governor under such circumstances would otherwise mean that the Union executive would effectively control the State executive, which is opposed to the basic scheme of our federal Constitution."

91 D.D. Basu, (1) *Constitutional Documents* vi-viii (S.C. Sarkar and Sons, Calcutta, 1969).

authority appointed through nondemocratic process so as to hold sway over the decisions of a democratically elected government of the state is a stain on the democratic fabric of the Indian Constitution.

In many cases, the role and the functions of the Governor have made it difficult for the state government to function democratically. Small wonder, there have been a few instances in which the apex court had to review the constitutionality of the gubernatorial action on the basis of whether the same violated the basic tenets of democracy. The most controversial among them is the exercise of the powers of the Governor under article 356. The provision has been worded so weirdly of a democratic set up as it empowers the President, on the basis of the report of the Governor that the government of the state cannot be carried in accordance with the provisions of the constitution, to assume the functions of the state government and declare that the powers of the democratically constituted legislature of the state be exercised by Parliament.[92] Like article 368, it has been a favourite tool in the hands of the successive union governments to toe the politically unfavourable state governments to its line. Small wonder, invocation of article 356 has been a source of profound political discussion and at times frustrating litigations, notwithstanding the expectation of the constituent assembly that "it would remain a dead letter"[93] and the traditional constitutional view that in a democratic process it is a matter of political expediency.[94] In one of the earliest litigations, the Supreme Court found article 356 as a provision in tune with the requirements of democracy as it facilitates periodic opportunity for electors to choose their representatives in the state legislature[95] and hence the role the judiciary has to play in reviewing the exercise of power under article 356 as very insignificant.[96]

However, of late, in the backdrop of the frequent dismissals of the state governments on the basis of the report of the governor under article 356, the Supreme Court examined

92 The Constitution of India, art. 356 (1).

93 *C.A.D. Vo. IX* 177.

94 The choice between a dissolution and re-election or a retention of the same memberships of the legislature or the Government for a certain period could be matters of political expediency and strategy under a democratic system. (*State of Rajasthan* v. *Union of India* (1977) 3 SCC 592, 614 (M.H. Beg C.J.).

95 *State of Rajasthan* v. *Union of India* (1977) 3 SCC 592. Approving the exercise of the power under article 356, M.H. Beg, CJ observed, "The Union Government proposes to act under Article 356 of the Constitution to give electors in the various States a fresh chance of showing whether they continue to have confidence in the State Government concerned and their policies…..One purpose of our Constitution and law is certainly to give electors a periodic opportunity of choosing their State's legislature and, thereby, of determining the character of their State's Government also." (*Id.* at 613-614).

96 *Id.* at 614.

the impact of the provision on the democratic functioning in *S.R Bommai* v. *Union of India*.[97] Overruling *Rajasthan*, the court held that political differences cannot be the ground to conclude that the government of a state cannot be carried on in accordance with the provisions of the Constitution as it destroys the democratic fabric of a pluralist society like ours. Hence, the democratic requirement for floor test cannot be supplanted by the individual assessment of the situation by any person, even by the Governor under article 356 as it is anathematic to democracy.[98] In short, (indiscriminate) invocation of article 356 (1) for dismissing a state government and dissolving its legislature constituted by popular mandate merely on the basis of the ideological differences between the parties frustrates than furthers democracy and hence is ultra vires of its objective.[99] In other words, the court has accepted the view that invocation of article 356 shall be geared to the requirements of the democratic process. Undoubtedly, *S.R. Bommai*, is a beacon that lights up the path of the Indian democracy for decades to come.

Notwithstanding *S.R. Bommai*, India witnessed an unprecedented constitutional complexity due to the invocation of the gubernatorial power that distorted the democratic fabric.[100] In *Rameswar Prasad*, even before the first meeting of the House after the elections, the Governor of the State of Bihar reported that there have been attempts to win over the elected representatives through "various allurements" and that such endeavours to "cobble a majority and stake claim to form a government would positively affect the constitutional provisions and safeguards built therein and distort the verdict of the people"[101] on the basis of which the President dissolved the legislative assembly.

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97 (1994) 3 SCC 1.

98 *Id.* at 119-120 (Sawant and Kuldeep Singh JJ.); at 210 (Ramaswamy J.); at 277-278 (Jeevan Reddy and Agarwal JJ.)

99 *Id.* at 79 "Therefore, the mere defeat of the ruling party at the Centre cannot by itself, without anything more, entitle the newly elected party which comes to power at the Centre to advise the President to dissolve the assemblies of those states where the party in power is other than the one in power at the Centre." (Ahmadi J.)

Id. at 103. "In view of the pluralist democracy and the federal structure that we have accepted under our Constitution, the party or parties in power (in case of coalition Government) at the Centre and in the states may not be the same. Hence there is a need to confine the exercise of power under art. 356(1) strictly to the situation mentioned therein which is a condition precedent to the said exercise." (Sawant J (for Kuldip Singh J. also)).

Id. at 191 "The motivating factor for action under art. 356(1) should never be for political gain to the party in power at the Centre, rather it must be only when it is satisfied that the constitutional machinery has failed. It is to reiterate that the federal character of the government reimposes the belief that the people's faith in democratically elected majority or coalition Government would run its full term, would not be belied unless the situation is otherwise (Ramaswamy J.).

100 *Rameswar Prasad* v. *Union of India* (2006) 2 SCC 1.

101 *Id.* at 69.

Examining the question whether dissolution of the state legislative assembly before the first meeting is mandated by article 174(2) (b),[102] the court discussed the role of the Governor under article 356. The court held that concomitant to the duty to preserve, protect and defend the Constitution and the laws, the Governor has an "obligation to preserve democracy and not to permit the 'canker' of political defections to tear into the vitals of the Indian democracy."[103] Reading the two provisions harmoniously, the court held that the power to dissolve the House cannot be exercised in an undemocratic manner. Inability of the majority to provide a stable government is one thing and garnering majority by illegal means is quite different. The Constitution envisages invocation of article 356 only in the former case and not in the latter. For, recommending dissolution of the House on the ground of good governance by cleansing of politics or maladministration is "against the democratic principles of majority rule" and that these are matters to be left to the wisdom of the opposition and the electorate.[104] In short, the court held that invoking the extra ordinary emergency power under article 356 on the ground of maladministration is unconstitutional.[105] Raising a warning signal against the invocation of article 356 to sanctify petty political benefits, *Rameswar Prasad* has been successful in harmonizing the invocation of the gubernatorial discretion spiced with non-democratic flavour in the democratic potpourri. Hence, the criticism[106] that the decision pulls the judicial venture of cleansing the political process in the reverse direction appears to be uncharitable.[107] For, vesting the Governor with the power to dissolve the democratically constituted body on the ground of impurity of the system is tantamount to its demolition.

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102 Constitution of India, 1950 art. 174 reads:

(2) The Governor may from time to time—

(*a*) …

(*b*) dissolve the Legislative Assembly."

103 *Supra* note 100 at 90.

104 *Id*. at 122.

105 *Id*. at 129.

106 M.P. Singh, *V.N. Sukla's Constitution of India* 1059 (Eastern Book Co., Lucknow, 2017).

107 It was accepted long back that exercise of discretion by the President and the Governor has to be in accordance with the advice tendered by the Council of Ministers, which tacitly accepts democratic tradition. *Samsher Singh* v. *State of Punjab* (1974) 2 SCC 831. "Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be,…the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Governor." (*Id.* at 841 *per* A.N. Ray C.J.).

This view was reinforced in *Nabam Rebia* v. *Deputy Speaker, Arunachal Pradesh Legislative Assembly*[108] in which the court held that the Governor who "is not an elected representative" but only "an executive nominee" holding the office "during the pleasure of the President" cannot have an overriding authority, over the representatives of the people, who constitute the House or Houses of the state legislature (on being duly elected from their respective constituencies) and/or even the executive Government functioning under the Council of Ministers with the chief minister as the head. Allowing the Governor to overrule the resolve and determination of the state legislature or the State executive, *would not augur with the strong democratic principles enshrined in the provisions of the Constitution*.[109]

Hence, it was held that before resorting to article 356, the Governor has to ascertain that the Council of Ministers has lost the confidence of the House for which he can require the chief minister to hold the floor test.[110]

The question of relationship between the Council of Ministers and the Lieutenant Governor of the National Capital Territory of Delhi (NCTD) came for judicial examination in *State (NCT of Delhi)* v. *Union of India*.[111] One of the issues examined in *NCTD* was the scope and extent of the discretion of the Lieutenant Governor of the Union Territory of Delhi. Article 239-AA which accorded special status to the Union Territory of Delhi stipulates that though there would be a Council of Ministers to aid and advice the Lieutenant Governor, in cases of difference of opinion between them "on any matter", the latter can refer the same to the President and act according to his decision.[112]

The court held that the constitution having envisaged a representative form of government for the NCTD,[113] with elected representatives accountable to the people,[114] the Lieutenant Governor does not enjoy independence in the decision making process. He has to act either "on the aid and advice of the Council of Ministers" or where he has referred a matter to the President, according to his decision.[115] The opinion tendered

108 (2016) 8 SCC 1. As a sequel to the political discord among the members of the ruling party, the Governor of the State of Arunachal Pradesh pre-poned the Session of the legislative assembly that was already scheduled to a later date even without the advice of the council of ministers. This according to the appellant was indicative of the Governor involving in political fraction of the state and was violative of articles 174 and 163 of the Constitution.

109 *Id.* at 162. (Emphasis supplied).

110 *Id.* at 165.

111 (2018) 8 SCC 1. (Hereinafter *NCTD*)

112 The Constitution of India, 1950, art. 239-AA (4).

113 *Supra* note 111 at 647.

114 *Id.* at 645.

115 *Id.* at 628, 648, 647- 648.

by the council of ministers is binding on the Lieutenant Governor,[116] as otherwise the council of ministers elected by and responsible to the people would be reduced to nullity.[117] It was also held that the Lieutenant Governor cannot refer any and every matter to the President and while referring the matters to the President, he has to keep respect for representative government.[118] For:[119]

> The difference of opinion must meet the standards of constitutional trust and morality, the principle of collaborative federalism and constitutional balance, the concept of constitutional governance and objectivity and the nurtured and *cultivated idea of respect for a representative Government.*

Evidently, in *NCTD*, while interpreting the provisions that accorded special status to the Union Territory of Delhi and vested wider discretion to the Lieutenant Governor, the court has been trying to bring out balance between the discretion of the Lieutenant Governor which is pregnant with undemocratic power and the requirement of the democracy to abide by the aid and advice of the council of ministers. In *S.R. Bommai*, *Rameswar Prasad, Nabam Rabia* and *NCDT* the apex court has been trying to attune the exercise of the discretionary power of the non-democratic authority resonant with undemocratic sound to the democratic notations.

Security of tenure of an office and the exercise of discretion by its holder are interconnected. Absence of security of tenure is likely to taint the exercise of discretion by the incumbent. Though as the head of the state executive the Governor is to act according to the aid and advice of the Council of Ministers,[120] unlike the President, he is enjoys a wide discretion in the administration of the state,[121] which therefore is potent enough to interfere with the democratic style of functioning of the state. Hence, it is not a matter of surprise that issues relating to the nature and tenure of the office of the Governor came up for examination of the Supreme Court.

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116 *Id.* at 791. (Ashokbhushan J.)

117 *Id.* at 738-740. (Chandrachud J.) has argued that leaving everything to the President would lead to a situation in which the council of ministers would be reduced to cipher. Hence, while referring a matter to the President he has to be conscious that the Council of Ministers which tendered advice to him was elected to serve the people and represents the aspirations and responsibilities of democracy. (*Id.* at 740).

118 *Id.* at 628, 648.

119 *Id.* at 633. (Emphasis supplied).

120 The Constitution of India, art. 163(1).

121 *Id.* arts. 200, 227 (3), 258A, 356.

In *Hargovind Pant* v. *Dr.Raghukul Tilak*,[122] observing that though appointed by the President and serves during his pleasure, considering the nature of functions and duties of his office, the Governor is not an employee of the Union,[123] the court held,[124]

> …it is impossible to hold that the Governor is under the control of the Government of India. *His office is not subordinate or subservient to the Government of India.* He is not amenable to the directions of the Government of India, nor is he accountable to them for the manner in which he carries out his functions and duties. *He is an independent constitutional office which is not subject to the control of the Government of India.*

In other words, as a constitutional functionary the office of Governor "is not an employment under the Government of India".[125] Later, in *B.P. Singhal* v. *Union of India*,[126] the court had to examine the scope and extent of the power of the President to remove the Governor for which no specific procedure is laid down by the Constitution. It was a public interest litigation filed under article 32 challenging the removal of the Governors of Uttar Pradesh, Gujarat, Haryana and Goa in 2004. Though the Constitution lays down the qualifications to be appointed as the Governor and the term of appointment, there is no reference in it as to the grounds and procedure for removal. The questions that came up for consideration of the court in *B.P. Singhal inter alia* included the status of the Governor under the Indian Constitution, whether his tenure of appointment is subject to the doctrine of pleasure and whether his removal was subject to judicial review. Observing that our Constitution is quasi-federal, the court held that Governor who has a dual role under the constitution holds a peculiar position. He is the constitutional head of the state and at the same time the vital link between the Union and the state. Janus faced as he is, the Governor has to harmonise these two roles. Apolitical while in office, the Governor is not an agent or employee of the Centre and has to be impartial and neutral when there is conflict between the views of the Union and the state governments.[127] Hence, he cannot be removed merely because he is not in "sync" with the policies of the Centre or because he does not subscribe to the ideology of a party or because the centre has lost "confidence" in him.[128] Because, unlike the minister and the attorney general who continue in their offices during the pleasure of

122 (1979) 4 SCC 458. The question that came up for consideration in this case was whether in view of art.319 (d) a person who was serving as a member of the Public Service Commission could be subsequently appointed as the Governor of a state.

123 *Id.* at 462-463.

124 *Id.* at 464. (Emphasis supplied)

125 *Id.* at 465.

126 (2010) 6 SCC 331.

127 *Id.* at 355.

128 *Id.* at 356.

the President, the Governor is neither part of a political team nor an employee of the Union Government.[129]

Hence, the court held that the President shall not be arbitrary, capricious or unreasonable in deciding to remove a Governor and the power shall be invoked only in very rare instances.[130] The court therefore concluded that removal of the Governor is a justiciable issue and notwithstanding article 74(1), the legitimacy of the removal of a Governor can be judicially reviewed. Moreover, In view of the decades-long practice of abrupt and indecorous termination of the service of Governors or transferring them indiscriminately, *B.P. Singhal* has far reaching constitutional significance. Vulnerable as the office of the Governor is, *Hargovind Pant* and *B.P. Singhal* that insulate and protect the Governors enabling them to be impartial and independent as required by the constitution are complementary to the *S.R. Bommai* quartet which stipulates that exercise of gubernatorial discretion has to be democratic compliant.

'Democratic' representatives and undemocratic practices

Undemocratic formation of democratic legislature

One of the evils of representative democracy is the conflict between the interests of the electorate reflected in the representatives and the personal interests of the representatives.[131] "Nothing is more dangerous than the influence of private interests in public affairs," it is said, "and the abuse of law by the government is a lesser evil than the corruption of the legislative body,…"[132] In a traditional parliamentary democracy, such issues are contained through ever evolving practices.[133] But in legal systems with written constitutions, where no constitutional conventions are formed, the same has to be regulated by laws enacted by the legislature. The issue of the conflict between the interests of the electorate and that of the representatives is two dimensional. For the first, there may be friction between the interests of the electorate and the interests of the political parties which in the modern age play a vital role in transmitting the popular preferences to policies of the state.[134] The party system has originated in the countries

129 *Id.* at 366.

130 *Id.* at 371-372.

131 "In the representative system, once the voter has delegated his political will to his representative by voting, power's center of gravity inevitably resides in the representatives and the political parties that subsume them, and no longer in the people. The political class soon forms an oligarchy of professionals who defend their own interests (the "New Class"), in a general climate of confusion and irresponsibility." See, Alain De Benoist, "Democracy: Representative and Participatory" *8 The Occidental Quarterly* 19, 20-21 (2008).

132 *Supra* note 4 at 101.

133 See, e.g. Donald Limon and W.R. McKay (eds.) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 361 *et.seq.* (Butterworths London, 1997).

134 S. C. Stokes, Political Parties and Democracy, 2 *Annu. Rev. Polit. Sci.* 243, 250 (1999)

with representative democracy by the seventeenth century for organizing the support for political policies from the electorate[135] and political groupings in the House.[136] However, there is a criticism that now-a-days parties give pride of place to their own interests over those of the public and the nation.[137] The hegemony of political parties in such a context sounds the death-knell of democracy. Does invoking the constitutional process to suit the benefits of a political party molest democracy? This question came up for judicial consideration *In the Matter of Special Reference No. 1 of 2002*.[138] In that case the Governor of the State of Gujarat, on the basis of the advice of the Council of Ministers prematurely dissolved the state legislative assembly. In the parliamentary form of government, the Council of Ministers that enjoys the confidence of the House can advise premature dissolution of the House and recommend holding of elections before the end of the term of the assembly. The ruling party recommended the conduct of the election so as to have the next session within six months as stipulated by article 174 (1).[139] However, the other political parties objected to the conduct of the election due to the communal violence that shook the state a few months back. The Election Commission after visiting the state also concluded that though article 174 mandates that six months shall not intervene between two sessions of the House, the conditions in the state were not conducive for holding the election. Hence, the President referred the matter to the Supreme Court under article 143 to examine *inter alia* whether the power of the Election Commission to conduct elections under article 324 was conditioned by and subject to the mandate of article 174 which stipulates that "six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session." The question before the court was whether the mandate under article 174 is applicable where the assembly is reconstituted after the general election. Reading down article 324 to article 174 is tantamount to giving primacy to convening of the Assembly over holding of the election in a free and fair manner.

Examining article 174 in the historical backdrop and explaining its words, the court held that the "six months rule" between two sessions was applicable only to live, existing

135 John H. Aldrich and John D. Griffin, *Why Parties Matter* 49 (The University of Chicago Press, 2018).

136 Justin Fisher, *British Political Parties* 2 (Prentice Hall London, 1996).

137 *Supra* note 134 at 250-251.

138 (2002) 8 SCC 237.(Hereafter the *Gujarat Election Case*)

139 Constitution of India, 1950, art. reads, 174**.** (1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

and functional assembly and not when it is dissolved.[140] The court held that article 324 that vests the plenary power to hold elections on the Election Commission and imposes a duty to hold "free and fair election" is not subject to legislative intervention.[141] Though as a matter of practice, the Election Commission has been holding elections so as to enable the new assembly to convene its first session within six months after the last session of the dissolved one,[142] the power, duty and responsibility of the Election Commission under article 324 is not conditioned by and subject to article 174.[143] In short, the court has read down article 174 to article 324.

Undoubtedly, in *The Gujarat Election Case*, by reading down the mandate under article 174 to the power of the Election Commission under article 324, the court has rightly given priority to the contemporary requirement of the Indian democracy over an aspect of the British democracy of the past. For, the stipulation of a specific period between two sessions of the legislature (period of recess) had been introduced in the background of the reluctance of the British kings to convene the parliamentary sessions at regular intervals unless there was need for money,[144] which after the adoption of the principle of "no taxation without representation"[145] is not as important as the concept of free and fair election.

The second instance of such conflict is the one between the interests of the electorate and the individual interests of the representatives of the people. When legislators make law in which they have a stake, it is not unlikely that the law is made to protect their private interests as against the interests of the electorate they represent. Such an issue of conflict between the interests they represent and their own personal interests came up for the examination of the Supreme Court in *Lily Thomas* v. *Union of India*.[146] The question that came up before the court was whether Parliament could lay down different criteria for disqualifying a member of the legislature to continue as such and for those who contest for elections. It was a public interest litigation challenging the *vires* of

140 The court expressed in pithy words thus, "…Article 174 contemplates a session i.e. sitting of an existing Assembly and not a new Assembly after dissolution and this can be appreciated from the expression "its last sitting in one session and its first sitting in the next session."…When the term "session or sessions" is used, it is employed in the context of a particular Assembly or a particular House of the People and not the legislative body whose is terminated after dissolution. Dissolution ends the life of the legislature and brings an end to all business. The entire chain of sittings and sessions gets broken and there is no next session or the first sitting of the next session after the House itself ceased to exist." (*Supra* note 138 at 274).

141 *Id*. at 288.

142 *Id*. at 289.

143 *Id*. at 291.

144 *Supra* note 24 at 177-178. There have been long interludes without any sessions, which went up to seven years (*Id*. at 248-250).

145 The Constitution of India, 1950, art. 265.

146 (2013) 7 SCC 653.

section 8(4)[147] of the Representation of People Act, 1951 which provided that if a legislator is convicted of the offences under section 8 (1), (2) or (3), the disqualification for continuing as a member of Parliament or state legislature shall not take effect for three months or if appeal or revision is preferred by him, till the disposal of the same. However, in the case of a non-member, disqualification will be operative from the date of conviction. In other words, conviction disqualifies a person from *being chosen* as a member of a legislative body at once while a sitting member will be disqualified *to continue* as such only after a period of three months from the date of conviction. Striking down the provision, the court held that the provisions that empower Parliament to lay down disqualifications for legislators[148] do not envisage: [149]

> the power …to make different laws for a person to be disqualified for being chosen as a Member and for a person to be disqualified for continuing as a Member….To put it differently, if because of disqualification a person cannot be chosen as a Member of Parliament or State Legislature, for the same disqualification, he cannot continue as a Member….

The court reasoned that this conclusion is revivified from the constitutional stipulation[150] that on disqualification, the seat of a member becomes vacant forthwith.[151] It therefore held that Parliament has exceeded its powers in enacting section 8(4) which therefore was *ultra vires* the Constitution.[152] Undoubtedly, *Lily Thomas* is a message to Parliament that in democracy, representatives do not enjoy any special privilege over those who are not.

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147 Representation of Peoples Act, 1951, S. 8(4) reads: Notwithstanding anything 8 [in sub (1), sub (2) or sub (3)] a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

148 The Constitution of India, arts. 102, 191.

149 *Supra* note 146 at 670.

150 The Constitution of India, arts. 101(3) (a) and 190 (3) (a)

151 *Supra* note 146 at 673.

152 However, the court has not examined some seminal issues relating to the constitutionality of s. 8 (4) of the Representative of People Act, 1951. The court was hesitant to examine whether the provision was violative of art. 14, in so far as the impugned law was struck down as beyond the legislative competence of Parliament. Similarly, the court has not examined the question whether the legislative provision for suspension of conviction is transgression into judicial powers. For, "…the power to suspend an order of conviction, apart from the order of sentence, …, should be limited to very exceptional cases. *Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance.*" (Emphasis supplied) See, *K.P. Sareen* v. *CBI, Chandigarh* (2001) 6 SCC 584, 589. See also *Ravikant S. Patil* v. *Sarvabhauma S. Bangali* (2007) 1 SCC 673.

How far the representatives represent the electorate has been an ever disturbing issue in representative democracy. The essence of representation is delegation of authority.[153] The electorate identifies a few from among them and entrusts them with administration on their behalf. Representation becomes genuine only when the representatives "reflex" the entire electorate,[154] for which majority, if not the entire members of the electorate shall take part in the election. It in other words means that the existence of healthy democracy depends on a high rate of voter turnout. However for various reasons only a small portion of the electorate has been taking part in elections. Till the last Century franchise was limited to the upper crest of the community,[155] while in the modern age, loss of trust in the institution of democracy contributed to the heavy decline in the participation of the voters in the election process.[156] One of the most important factors that contributed to the loss of trust in the democratic process is the political parties' practice of fielding candidates unacceptable to the electorate. It is in order to eliminate such a practice that many legal systems adopted the practice of negative voting.[157]

The issue of negative voting came up for judicial consideration in *PUCL* v. *Union of India,*[158] in which the petitioner challenged the constitutionality of the Conduct of Election Rules, 1961 on the ground that they violated the right to maintain secrecy of voting and prayed for directing the Election Commission to incorporate the right not to vote and maintain its secrecy as a constitutional right.[159] Accepting the proposition that secrecy of voting is integral to "free and fair election", the court held that denial of

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153 Joseph Tusmann, "The Political Theory of Thomas Hobbes" 117-118(unpubl. Dissertation., 1947), as cited in Hanna Fenichel Pitkin, *The Concept of Representation* 43 (University of California Press, Berkeley,1967).

154 *Supra* note 13 at 61.

155 *Supra* note 19 at 94-95.

156 Philippe Schmitter, "Diagnosing and Designing Democracy in Europe" in Sonia Alonso et.al. (eds.), John Keane Wolfgang Merkel with the collaboration of Maria Fotou, *The Future of Representative Democracy*, 191 (Cambridge, 2011). He observes, "The major generic problem of contemporary European democracy concerns declining citizen trust in the institutions of partisan representation, and declining participation in electoral processes." (*Id.* at 203).

157 Rahela Khorakiwala, "The Indian Electoral Process and Negative Voting" 8 *Law Rev. Gov't L.C.* 77, 83 (2014). Some legal systems make voting mandatory. See, e.g., Scott Bennett, Compulsory voting in Australian national elections, Research Brief, Department of Parliamentary Services, Parliament of Australia, 7.45. (Oct.31 2005), *available at:* https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/06SH6/upload_binary/06sh63.pdf;fileType=application%2Fpdf#search=%22library/prspub/06SH6%22 last visited on Feb.2022).

158 (2013) 10 SCC 1 (hereinafter *PUCL1*). It came by way of reference to a larger bench from *PUCL* V. *Union of India* (2009) 2 SCC 200. Though the Law Commission in its 170th Report on Reform of the Electoral Laws, 1999recommended inclusion of negative voting (Recommendation 9.29), no measures were taken for its implementation.

159 (2013) 10 SCC at 16.

the right was arbitrary, unreasonable and violative of article 19.[160] The court further reasoned that "[N]ot allowing a person to cast vote negatively defeats the very freedom of expression and the right to personal liberty ensured by Article 21."[161]

Observing that healthy democracy needs larger voter participation,[162] the court held that the conscientious and responsible voter shall have the option to abstain from voting which in parliamentary democracy is equal to exercising the right to vote. Such abstention may be for several reasons including the unworthiness of the candidates.[163] Turning down the argument of the Union of India that negative voting has no legal consequence,[164] the court held that it would enable the people to choose "men of high moral and ethical values."[165] It was also held that for effectively exercising this right without fear of reprisal, duress or coercion there shall be provision for NOTA button in electronic voting machines.[166] The court concluded that only in such a democratic framework, "the political parties will be forced to accept the will of the people and field candidates who are known for their integrity" which in due course will help "foster … the purity of electoral process and also fulfil one of its objectives, namely, wide participation of people".[167]

Free and fair election was the fulcrum of the holding in *PUCL1* that insisted on secrecy of voting and introduced NOTA. This is evidenced by the holdings in *Kuldip Nayar* v. *Union of India*[168] and *Shailesh Manubhai Parmar* v. *Election Commission of India*[169] which are complementary to *PUCL1*. In *Kuldip Nayar*, rejecting the contention of the petitioner to introduce NOTA in the elections to the Council of States, the court held that though a vital principle of free and fair elections, secrecy of voting shall not be insisted when

160 *Id.* at 23.

161 *Id.* at 27.

162 *Id.* at 27.

163 *Id.* at 24.

164 *Id.* at 27. The prognosis of the court that it is *not* without any legal consequence has turned to be true. The State Election Commission, Haryana has issued an order to the effect that NOTA shall be treated as 'Fictional Electoral Candidate' and that if "in any election, all the contesting candidates individually receive lesser votes than the 'Fictional Electoral Candidate' *i.e.,* NOTA then none of the contesting candidates will be declared as elected and that in such a case, there will be re-election" Para 7(i), (iii) and (iv) of Endst. No. SEC/1ME/2018/ 5833-5880 on Nov. 22, 2018, *available at:* https://www.secharyana.gov.in/web/assets/uploads/2017/02/order%20NOTA%20-%202018.pdf (last visited on Jan. 20, 2021).

165 *Supra* note 159 at 28.

166 *Id.* at 24, 28.

167 *Id.* at 28.

168 (2006) 7 SCC 1. The petitioners, inter alia challenged the amendments to the Representation of Peoples Act, 1951 by which election to the Council of States was to be conducted through "open ballot" on the ground that it was violative of the right of expression of the voter.

169 (2018) 9 SCC 100.

it becomes a source of corruption[170] or an attempt to defraud[171] the election process.[172] For, the higher principle is free and fair elections and its purity.[173] Similarly, in *Shailesh Manubhai Parmar*, examining the constitutionality of the circular issued by the Election Commission, making NOTA applicable to the elections to the Council of States, the court held that the object of the election law is eradication of corruption and stabilizing of democracy.[174] Contrasting with its holding in *PUCL1*, the court held that in the election to the Council of States in which the pattern of voting and value of votes are different and where party discipline is important, introduction of the option for NOTA would be anathematic to "the fundamental criterion of democracy" as it would tend to encourage defection which the constitution tries to prohibit.[175] Observing that in such a context NOTA would destroy the concept of representation and open the doors of corruption, the court succinctly concluded,[176]

> democracy garners its strength from the citizenry trust which is sustained only on the foundational pillars of purity, integrity, probity and rectitude and such stronghold can be maintained only by ensuring that the process of elections remains unsullied and unpolluted so that the citadel of democracy stands tall as an impregnable bulwark against unscrupulous forces.

Undoubtedly, *PUCL1* adorns an important place in the history of Indian democracy. Instead of limiting the right to maintain secrecy of negative voting as an instance of violation of fundamental rights, the court has ingeniously dovetailed it as a tool for free and fair election.[177] The court has propelled the right of negative voting from the cosmodrome of fundamental rights to the constitutional orbit of democracy. The court deserves kudos for its vision in developing secrecy of negative voting as an issue of fundamental right to an overarching constitutional conundrum.

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170 *Supra* note 168 at 159.

171 It was pursuant to the suggestion of the Ethics Committee of Parliament in 1998 that to avoid cross voting by the members of the Legislative Assembly in the elections to the Rajya Sabha and Legislative Councils that the impugned amendment has been passed. (*Id.* at 140-141).

172 *Supra* note 168 at138.

173 *Id.* at 159. The court held, "The secrecy of ballot is a vital principle for ensuring free and fair elections. *The higher principle, however, is free and fair elections and purity of elections*. If secrecy becomes a source of corruption then sunlight and transparency have the capacity to remove it. We can only say that legislation pursuant to a legislative policy that transparency will eliminate the evil that has crept in would hopefully serve the larger object of free and fair elections." (Emphasis original).

174 The court has distinguished *PUCL1* on the ground that it recommended negative voting as a message to political parties as to what voters think about the candidates and that the holding was applicable only to the direct election of "one man, one vote and one value."(*Id.* at 119).

175 *Id.* at 117-118.

176 *Id.* at 121.

177 *Id.* at 28.

Selection of ministers – A vestige of autocracy

In parliamentary government, the process of selecting members of the Council of Ministers has evolved through conventions acceptable to democratic process. Though those conventions were factored in the provisions dealing with the Council of Ministers, absence of specific criteria for selection of ministers in the Constitution has given rise to certain practices not acceptable to healthy democracy. Small wonder, the attention of the judiciary was drawn to such instances in which anti-democratic elements have crept in.

In the cabinet form of government, the members of political executive have collective and individual responsibility to the legislature.[178] This is to ensure their responsibility to the electorate.[179] In order to make the responsibility meaningful, there evolved a convention that the members of the cabinet shall be selected only from among the members of the legislature[180] "and that if they could not find seats, they would have to resign their offices."[181] When such conventions are stuffed into the provisions, the constitutions stipulate specific period within which ministers are to acquire the membership of the House. While interpreting such provisions, the court cannot be oblivious of the historical background in which the convention got evolved as otherwise the very objective of the provision will be lost enabling the representatives to gain undue personal benefits and spoil the very scheme of the representative democracy.

One of the instances in which such attempt to derive personal benefits from the constitutional silence came up for judicial consideration in *S.R. Chaudhuri* v. *State of Punjab*.[182] The question that came for judicial discussion in that case was the validity of reappointment of a minister who was not a member of the legislative house for six consecutive months under article 164 (4) which stipulates that a minister who is not a member of the legislature shall not continue as such.[183] The factual matrix reveals an attempt to circumvent the parliamentary convention that only a member of either of

178 Walter Bagehot, *The English Constitution* 12 (OUP 2001).

179 Hilaire Barnett, *Constitutional and Administrative Law* 36 (Cavendish UK, 2002).

180 John Alder, *Constitutional and Administrative Law* (Palgrave, UK 2015) "By convention a minister must be a Member of Parliament and most ministers, particularly those in major spending departments and the Treasury, must be members of the House of Commons. In principle any number of ministers can be appointed."(*Id.* at 331).

181 *Supra* note 24 at 369.

182 (2001) 7 SCC 126. One of the respondents, who was not an MLA was appointed as a minister in the State of Punjab. As he could not become a member of the House within six months, he submitted his resignation. After a break of about eight months, he was again sworn in as a Minister. Hence, the appeal from the petition for *quo warranto*, which was dismissed by the high court.

183 Constitution of India, 1950, art 164(4) reads: A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

the legislative houses can be a minister,[184] so as to make him accountable to the electorate. Observing that in a representative democracy the chosen members are accountable to the people, the court held that a minister who could not secure membership in the House within six months ceases to be a minister.[185] In such a context:[186]

> Reappointment of such a person, who fails to get elected as a member within the period of grace of six consecutive months, would not only disrupt the sequence and scheme of Article …but would also defeat and subvert the basic principles of representative and responsible government….To permit the individual to be reappointed during the term of the same Legislative Assembly, without getting elected during the period of six consecutive months, would be subversion of parliamentary democracy.

The court concluded that the framers who drafted the provision in the backdrop of in English Constitution, "did not visualise that a non-legislator can be *repeatedly* appointed as a minister for a term of six months each time, without getting elected because such a course strikes at the very root of parliamentary democracy."[187]

A similar but more serious issue having enduring repercussions on the Indian democratic structure arose in *B.R. Kapoor* v. *State of TN*.[188] It was a cluster of the petitions and appeals in which the appointment of J. Jayalalitha as the Chief Minister of the State of Tamil Nadu was challenged. In the 2001general elections to the assembly the nominations filed by J. Jayalalitha, were rejected on account of her disqualification under section 8(3) of the Representation of People Act, 1951 due to conviction under the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860. Though her disqualification extended for a period of six years, her party which secured majority of seats elected her as the leader of the legislative house. Accordingly, she was sworn in as the chief minister. It appears that her attempt was to continue as the chief minister for the whole term without getting elected as the member of the House.[189] The crux of the issue raised in these writ petitions and appeals was whether a person disqualified to be a member of the legislature could be appointed as a minister under article 164. Observing that the objective of article 164(4) was to meet a political exigency or not to deny the entry of

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184 See, e.g. Ivor Jennings, *Cabinet Government* 60 (Cambridge, 1959) where he observes,"It is well-settled convention that these ministers should be either peers or members fo the House of Commons."

185 *Supra* note 182 at 143.

186 *Id.* at 143-144. (Emphasis supplied)

187 *Id.* at 142. (Emphasis original)

188 (2001) 7 SCC 231.

189 This is clear from the fact that though she has appealed against the convictions that caused the disqualification to contest the election, she has not challenged the rejection of her nominations. *Id.* at 281-282.

an expert into the Council of Ministers solely on the ground that he is not a member of the legislature, the court held that it could not be invoked to circumvent the disqualifications laid down in article 173 and article 191.[190] Observing that appointment of non-member as a minister under article 164 (4) is to be read in the light of the power of the Governor to appoint ministers under article 164 (1) and the collective responsibility of the ministry under article 164 (2) and turning down the contention that disqualifications under articles 171 and 193,[191] do not prohibit appointment of "short-term Ministers" for not more than six months, the court held that under 164 (4) a non-member can be appointed as minister only if he does not suffer from the disqualifications under article 173 and 191.[192] Otherwise, the constitutional standards of disqualifications binding on ministers who are members of the legislature will not be applicable to a Minister who is not a member of the House.[193] The court has rightly observed that while interpreting the constitution, the court has to read "limitations based on its language and scheme and it basic structure," as otherwise the objective of the same will be defeated.[194] If *S.R. Choudhari* held that article 164 does not envisage re-appointment of a non-member as minister, *B.R. Kapoor* by prohibiting appointment of a person disqualified to be a representative of the people as Minister even for a short while has given clarity to the principle embedded in the provision.

Recently, in *Manoj Narula* v. *Union of India,*[195] the petitioner assailed the induction of persons tainted with involvement in certain heinous criminal cases into the council of ministers at the centre. The court held that in the absence of explicit provisions, implied limitations cannot be read into article 75(1) so as to restrain the Prime Minister from including persons against whom charges of heinous offences are framed in the council of ministers.[196] However, the court disposed of the petition with a strong note of caution that in a controlled constitution like ours, the Prime Minister "is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified".[197] The court expressed its hope that in view of the collective responsibility of the Council of Ministers and the trust reposed upon on him by the constitution, the Prime Minister "would consider not choosing a person with criminal antecedents against whom charges

190 Supra note 182, *id* at 290. Art. 173 stipulates the qualifications to be a member of the legislature while article 191 lays down the grounds for being a member of the House.

191 *Ibid.*

192 *Id.* at 293.

193 *Id.* at 290.

194 *Id.* at 293.

195 (2014) 9 SCC 1.

196 *Id.* at 45,46.

197 *Id.* at 55.

have been framed for heinous or serious criminal offences or charges of crorruption to become a Minister of the Council of Ministers"[198]

Evidently, in *Manoj Narula*, the court was in a labyrinth – whether to adhere to the literal interpretation which will leave the Prime Minister with unlimited discretion or to resort to a purpose-oriented exposition of article 75. In order to restrain the Prime Minister from inducting tainted persons into the council of ministers the court will have to read in disqualifications not laid down by the Constitution, which it cannot do. At the same time leaving the matter to the discretion of the Prime Minister would be a constitutional disaster as it may widen the avenues of criminalization of politics. It was in such a context that the court expressed the hope that in future the Prime Minister would refrain from inducting persons framed in the heinous offences into the Council of Ministers which opens leeway for judicial review. Undoubtedly, in *S.R. Choudhari*, *B.R. Kapur* and *Manoj Narula* the court has been trying to mould the constitutional provisions infused with the convention for appointing ministers, and made them flexible so as to "evolve [and] adapt in amoeba-like fashion to meet the constitutional needs of the time."[199] Undoubtedly, the torch lit up by *S.R. Choudhari* and focused to the future by *B.R. Kapoor* and *Manoj Narula* is a sure guide in the pathways of democracy already shrouded by criminalization of politics.

Parliamentary privileges turning anti-democratic

Bewildering though it sounds, yet another source of threat to democracy is the institution of parliamentary privileges which originated and grew with the growth of Parliament as a democratic institution. It is in the initial stages of democratization of the English legal system that privileges erected a "legal wall" around Parliament and its members to insulate them from the attack of the King and the judiciary. They came one by one to ensure non-interference by the Crown in the sessions of the House and extended immunity to the members participating in the debates.[200] Hence, in order to be free from the manipulations of other authorities, Parliament drew to itself the power to determine the scope of parliamentary privileges and the mode of their enforcement. The courts also accepted that they would not venture to examine issues involving parliamentary privileges.[201] However, invocation of parliamentary privileges evolved to buttress democracy in its formative stages, by a matured democratic legal system will

198 *Id.* at 56.

199 *Supra* note 179 at 37.

200 *Supra* note 25 at 242-254.

201 D.L. Keir and F.H. Lawson *et. al.*, *Cases in Constitutional Law* 255 (OUP, 1979). "…by conceding to the Houses of Parliament in their capacity of superior courts the right of committing for contempt without cause shown, the courts have really yielded the key of the fortress, by giving them the power of enforcing against the world at large their own views of the extent of their privileges."

disproportionately fortify Parliament against the people and sound the death knell of democracy.[202]

Such a conflict between the parliamentary privileges and democratic process came for judicial examination in *P.V. Narasimha Rao* v. *CBI*.[203] The case arose out of the appeal filed by the Members of Parliament who were prosecuted for accepting bribes to vote against the no-confidence motion. One of the questions considered by the court in *P.V. Narasimha Rao* was whether parliamentary privileges insulate a legislator from prosecution if the offence he has committed outside the House is associated with or correlating to voting or speech in Parliament. Appellants contended *inter alia* that acceptance of money for voting inside the House was protected by parliamentary privileges. The court *per curiam* held that interpretation of the provisions dealing with parliamentary privileges cannot be repugnant to the functioning of parliamentary democracy.[204] However the judges divided among themselves as to how parliamentary privileges go hand in hand with the democratic process. The majority[205] held that though by accepting the bribe the appellants have "bartered a most solemn trust committed to them by those they represented" thereby breaching the principles of democracy, the requirements of parliamentary participation demanded that immunity against judicial proceedings in respect of anything said or vote given in the House had to be extended to actions outside the House.[206] Hence, courts cannot prosecute the members who accepted bribe outside the House but voted inside, though Parliament can proceed against them for breach of privilege or contempt.[207] However, the benefit of the privilege and the consequential immunity from judicial proceeding cannot be availed of by the member who after accepting the bribe has not cast his vote and also by the member who has given the bribe.[208]Agreeing with the views of S.P. Barucha and S. Rajendrababu JJ., Justice G.N. Ray, held that the right to free speech as a privilege essential for the functioning of democracy, can be meaningfully exercised only if it is extended to actions

202 Josh Chafetz, *Democracy's Privileged Few Legislative Privilege and Democratic Norms in the British and American Constitutions* 4-10 (Yale University Press New Haven, 2007). He argues that unlike the transformative stages, after democracy has deeper roots in the society, the focus of privileges shall shift to "allow for checks on the House and a tighter nexus between Members and their constituents. (*Id.* at 4).

203 (1998) 4 SCC 626.

204 *Id.* at 673 (Agarwal J. (for himself and Anand J.) held that parliamentary democracy being a feature of the basic structure of the constitution, interpretation of the provisions dealing with parliamentary privileges cannot be repugnant to it.); at 729-730 (Barucha J. (for himself and Rajendrababu J.) held that privileges are to enable the members to speak or vote without fear in the House); at 704 (G.N. Ray, J., agreed with the views of Barucha J.).

205 S.P. Barucha, Rajendrababu and G.N. Ray JJ.

206 *Supra* note 203 at 730.

207 *Id.* at 732.

208 *Ibid.*

having nexus with the speech made or vote cast.[209] Tracing the development of law in United Kingdom., Australia and Canada, the minority[210] on the other hand held that extending parliamentary privileges "to claim immunity from prosecution in a criminal court for an offence of bribery in connection with anything said by him or a vote given by him in Parliament …would not only be repugnant to healthy functioning of but would also be subversive of the rule of law".[211] The minority therefore held that the criminal liability for accepting bribes is independent of the right to speech inside the House and cannot be insulated by parliamentary privileges[212] and can be prosecuted under the Prevention of Corruption Act, 1988.[213]

Though both the majority and the minority have interpreted the concept of parliamentary privileges in the light of democracy, they diverged on their conclusions. While extending the protection of parliamentary privileges to the offences outside the House, the majority was oblivious to the fact that the privileges formulated as a shield against the threat from the crown may not be meaningful in the age of democracy.[214] The view of the minority on the other hand tries to "promote the convergence of the will of the public with the actions of the state."[215]

Later, somewhat similar fact situation led to *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha*,[216] popularly known as *Cash for Query Case*. It arose out of certain video graphs telecast by private channels which revealed that some Members of Parliament demanded or accepted money for raising questions in the House and for including certain projects in the MP Local Area Development (MPLAD) Scheme. The chairpersons of the respective Houses referred the above matters to the committees for enquiry, which found the allegations true. The committees found that there was direct connection between acceptance of money and discharge of their function as Member of Parliament, that their behaviour was unethical to and unbecoming of the membership and therefore recommended their expulsion from the House. The members challenged the order of expulsion as unwarranted and contended that the power of the House under article 105 (3) did not include the power to expel a member.

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209 *Id*. at 703-704.

210 S.C. Agarwal and A.S. Anand JJ.

211 *Supra* note 203 at 673.

212 *Id*. at 676.

213 *Supra* note 203 at 702-703.

214 Moreover, insulating Members of Parliament from criminal liability by parliamentary privileges is violative of the concept of equality, a feature of basic structure. For, "freedom of speech in the House … is not a charter for corruption."(*Id*. at 653.).

215 *Supra* note 202 at 7.

216 (2007) 3 SCC 184.

Interpreting article 105 (3)[217] the court explained that the term "expulsion" refers to exclusion of a person qualified to be, but "unworthy" of membership of the House which will lead to vacancy in the House.[218] The court further held that articles 101 that provides for vacation of seats in the House and 102 that lays down the grounds of disqualifications of members do not exhaust the instances of arisal of vacancy of membership wherefore the power of the House under article 105 (3) was not controlled by and subject to those provisions.[219] Observing that the House can expel members in exercise of its power to punish[220] and remedial contempt power,[221] the court held that expulsion of a member from the House is not the decision of an individual but by the representatives of the rest of the country. Expulsion therefore cannot be considered as "capricious exercise of the House, but an action to protect its dignity before the people of the country", and "an integral aspect of our democratic set-up".[222] The court also held that it is "not contrary to" but "part of the guarantee of the democratic process."[223] The court however held that the same was subject to judicial review on the ground that prohibition of judicial interference under article 122[224] was limited to the irregularities of procedure and not on grounds of illegality and unconstitutionality.[225]

Though *P.V. Narasimha Rao* opened the discussion on the conflict between parliamentary privileges and democracy, there the court floundered, while in *Raja Ram Pal* it marched ahead holding that the concept of parliamentary privileges has to be explained in the light of and in accordance with the democratic process. In that sense, *Raja Ram Pal* is a breakthrough in the democratic jurisprudence.

Criminalization of politics – A threat to democracy

One of the internecine threats the Indian democracy has been facing since 1970's is criminalization of politics. Unlike the instances of candidacy of persons accused of or convicted in criminal cases, it denotes involvement of criminals in the election process and of the candidates or political parties seeking stealthy tie ups with mafias or criminal

217 Constitution of India, 1950, art. 105 (3) reads: In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, [shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.]

218 *Supra* note 216 at 284.

219 *Id.* at 285.

220 *Id.* at 304, 306.

221 *Id.* at 318.

222 *Id.* at 288.

223 *Id.* at 288-289. The court also held that fundamental rights do not ban the exercise of the power to expel a member from the House. (*Id.* at 289-290).

224 The Constitution of India, 1950 art. 122. It reads, 122**.** (1) The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

225 *Supra* note 216 at 359.

syndicates. It is the disharmony between the inadequacy of accounted money (available with the political parties) and the boundless requirement of wealth for electioneering that compel candidates and political parties to explore options for passing through political exercises inadmissible to democratic morality.

Though prophesied as early as 1920's, one finds reference[226] to the issue of criminalization of politics at the administrative level only in the Report of the Committee on Electoral Reforms, 1990 (the Goswami Committee), which however has not signified it in its elaborate and comprehensive recommendations. It was after the Bombay blasts in 1993 that a Committee (popularly known as the Vohra Committee) was constituted for specifically inquiring into the activities of crime syndicates and mafia organizations having benediction of political parties.[227] The committee reported that there existed crime syndicates with money and muscle power commanding social respectability and corrupting government machinery.[228] Yet, the government has neither revealed the materials relied upon by the Committee nor has taken its recommendations seriously. The Report of the Committee on State Funding of Elections, 1998 (the Indrajeet Committee) which alluded to the necessity of "overhauling of the electoral process whereby elections are freed from evil influence of all vitiating factors, particularly, *criminalization of politics*",.. "*money power and muscle power* …,"[229] it did not take the pains to suggest any remedy to cure the malady. Similarly, the Law Commission[230] could not recommend necessary amendments the Representation of People Act, 1951 to contain the peril of "criminalisation of politics and politicisation of crime", as some members expessed apprehansion of misuse of power by the ruling party.[231]

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226 It is observed, "The role of money and muscle powers at elections deflecting seriously the well accepted democratic values and ethos and corrupting the process; rapid criminalisation of politics greatly encouraging evils of booth capturing, rigging, violence etc.; misuse of official machinery, i.e. official media and ministerial; increasing menace of participation of non-serious candidates; form the core of our electoral problems. Urgent corrective measures are the need of the hour lest the system itself should collapse." (See the Report of the Committee on Electoral Reforms, 1990, para. 1.6).

227 It was constituted to "…take stock of all available information about the activities of crime Syndicates/Mafia organisations which had developed links with and were being protected by Government functionaries and political personalities. Based on the recommendations of the Committee, Government shall determine the need, if any, to establish a special organisation/ agency to regularly collect information and pursue cases against such elements:" See, the Vohra Committee Report, Ministry of Home Affairs, para 1.1, *available at*: https://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT_0.pdf (last visited on Jan 22, 2022)

228 *Id*., at para 10.1.(ii).

229 The Report of the Committee on State Funding, 1998 57 (Emphasis supplied).

230 Law Commission of India, "170th Report on Reform of the Electoral Laws", (May, 1999).

231 *Id*. para 5.2 – 5.4. Though the National Commission on the Review of the Working of the Constitution also found the gravity of the issue, it is doubtful whether the Commision has considered the issue with due seriousness. Its recommendations were limited to debarring of persons convicted of henious offences and constititon of special courts for trying criminal cases against the representatives. See, the Report of the NCRWC, paras 8.12.1 *et.seq*.

Be that as it may. It is the judiciary, not the legislature nor the executive that has addressed the issue of criminalization of politics. Over and above the cases dealing with electoral offences and consequential disqualifications, the Supreme Court had to grapple with the constitutional conundrum of criminalization of politics in *Dinesh Trivedi* v. *Union of India*[232] in which the petitioners prayed for directing the Union to publicize the reports of and background papers relied by the Vohra Committee.[233]

The court has moved a step ahead in *Anukul Chandra Pradhan* v. *Union of India*,[234] as it upheld the denial of the right of under trial prisoners to vote as a measure to guard the legal system from the grip of criminalization of politics which was held to be subversive of free and fair election and democracy.[235] *Union of India* v. *Association for Democratic Rights*[236] has made a giant stride in this regard. Considering the impact of criminalization of politics on democratic process, the court directed the Election Commission to require candidates to file the affidavit declaring the details of cases in which they were convicted, acquitted or discharged, the punishment if any, imposed upon them and their criminal antecedents along with the nomination.[237] Similarly, in *Manoj Narula* v. *Union of India*,[238] trepidation of the court that criminalization of politics corrodes democracy and constitutional governance silhouetted in its expectation that in future the Prime Minister would not include persons with criminal antecedents or facing criminal charges in the ministry.[239]

Judicial review reached newer heights in *Public Interest Foundation* v. *Union of India*,[240] as the prayer for issuing necessary directions for containing decriminalization of politics was disposed of by directing the Law Commission of India to consider whether framing of charges by the criminal court or presentation of report by the investigation officer shall be grounds for disqualification for candidates.[241] Accordingly, the Law Commission examined the matter and found that restricting the disqualification to contest election to conviction in offences was insufficient to curb criminalization of politics. Hence it recommended that framing of charges shall be a ground for disqualification, subject to judicial scrutiny, for a candidate. The Commission accordingly recommended for amending the Representation of People Act, 1951 for incorporating section 8-B.[242]

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232 (1997) 4 SCC 306.

233 *Supra* note 227.

234 (1997) 6 SCC 1.

235 *Id.* at 5.

236 *Union of India* v. *Association for Democratic Rights* (2002) 5 SCC 294.(*ADR*, for short).

237 *Id.* at 322.

238 (2014) 9 SCC 1.

239 *Id.* at 24.

240 (2014) 13 SCC 616. (*PIF 1*)

241 *Id.* at 619.

242 See, Law Commission of India, "244th Report on Electoral Disqualifications" 50 (Feb., 2014).

Later in *Krishna Moorthy* v. *Sivakumar*,[243] while invalidating the election of the appellant as the President of the local body the court considered the lamentable and anathematic impact of criminalisation of politics on constitutional democracy.[244]

A survey of the cases reveals that but for the judicial supervision, criminalization of politics might have had deeper roots in the Indian democracy. Amidst the indolent political parties and the *political* executive, the Supreme Court has rushed in with new techniques of judicial review and played a pivotal role in arresting the growth of criminalization of politics.

However, it appears that gradually the court also has come to terms with criminalization of politics as the enthusiasm of the court to eradicate the malady was gradually waning away. Having begun with the overarching constitutional issue of criminalization of politics and its impact on democracy as its focus in *ADR*, the attention of the court was slowly drifting towards the penumbral issues relating to electoral disqualification of criminals for which there are provisions in the Representation of People Act, 1951.[245] This twist in the judicial attitude is complete with *Ashwini Kumar Upadhyay* v. *Union of India*,[246] in which the court directed setting up of special courts for expeditious disposal of criminal cases pending against the elected representatives of the people. According to the court such an arrangement was essential,

> not only because of the rising wave of criminalization that was occurring in the politics in the country, but also due to the power that elected representatives (sitting or former) wield, to influence or hamper effective prosecution. Additionally, as legislators are the repositories of the faith and trust of their electorate, there is a necessity to be aware of the antecedents of the person that is/was elected. Ensuring the purity of democratically elected institutions is thus the hallmark of the present proceedings.

It is however doubtful whether the constitution of special courts will be as beneficial to decriminalization of politics as to the representatives as it in due course may help shift the focus of the legal system from decriminalization of politics to early disposal of cases against the representatives of the people. Moreover, such special treatment of the representatives, not available to the people whom they represent is contrary to the

243 (2015) 3 SCC 467.

244 *Id.* at 491-496.

245 See *Krishna Moorthy* v. *Sivakumar* (2015) 3 SCC 467.

246 2020 SCC OnLine SC 1044.

principles of democracy.[247] Nevertheless, the above decisions asseverate that sans judicial supervision it will be difficult for the legal system to weed out criminal elements from the legal system and win the battle against criminalization of politics. [248]

Transparency of the election process– the need of democracy

The *leitmotif* of the decisions dealing with criminalization of politics is the demand for transparency in the democratic process. Having identified criminalization of politics as a major threat to the democratic process in India, the court found that the opacity of the political system was the major reason for it. Transparency is the life blood of democracy[249] for it "cannot function unless the people are permitted to know *what their government is* upto."[250] Transparency in democratic process cannot be achieved without removal of opacity of the election laws, for only then the representatives become accountable to the electors.[251]

One of the main reasons for criminalization of politics is identified to be the demand for unaccounted money in the election process. Undoubtedly, illicit funding and clandestine linkage between goons and political leaders stain the free and fair process of election. Addressing this issue, the committees which recommended for lessening the financial burden of the candidates did not pay attention to the modalities for bringing transparency of the election process.

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247 Apart from the fact that it is violation of art. 14, constitution of special courts for certain categories of persons would give an impression of meting out special treatment to them. See, e.g. Krishnadas Rajagopal, Tamil Nadu High Court Panel Questions Setting up Special Courts to try MPs, MLAs, *available at:* https://www.thehindu.com/news/national/tamil-nadu/hc-panel-questions-setting-up-special-courts-to-try-mps-mlas/article33007311.ece last visited on Jan. 20, 2022. But, the court has clarified that the order for expeditious trials does not have bearing on criminal appeals pending before high courts against conviction of the representatives of the people and directed that appeals pending against conviction should be taken only when their turn comes. (Order dated Aug. 25, 2021 in *Ashwini Kumar Upadhyay* v. *Union of India*, Writ Petition(Civil) No.699/2016).

248 Recently, in the interim order issued on Aug. 10, 2021 the apex court in *Ashwini Kumar Upadhyay* v. *Union of India* 2021 SCC OnLine SC 629, as a measure for tightening its grip over the trend of criminalization of politics, the court has directed that "no prosecution against a sitting or former M.P./M.L.A. shall be withdrawn without the leave of the High Court" and that the judicial officers in the courts before whom such cases are pending shall continue until further orders.

249 Stephane Lefebvre, "A Brief Genealogy of State Secrecy" 31 *Windsor Y.B. Access Just.*95, 107 (2013).

250 Henry Steele Commager as quoted by Douglas J. in *EPA* v. *Mink*, 410 U.S. 73, 105 (1973) at p. 105**.** "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to, but even the Congress and, one suspects, the President [witness the 'unauthorized' bombing of the North last fall and winter] are kept in darkness."

251 Michael Halberstam, "Beyond Transparency: Rethinking Election Reform from an Open Government Perspective" 38 *Seattle U. L. REV*. 1007, 1008 (2015).

It was in *Common Cause* v. *Union of India*[252] that the issue of transparency in relation to the democratic process came up before the Supreme Court for the first time. It was a public interest litigation filed under article 32 to ensure transparency in the election funding so as to enable the voters to know the sources of expenditure incurred by the political parties and their candidates. The prayer of the petitioners was to implement the provisions of the Companies Act, 1956, Income Tax Act, 1961 and the Representation of People Act, 1951 to block all sources of black money in the election and also to require all political parties to file income tax returns so as to bring transparency in the election process. The court was astonished to note that many of the political parties have not been filing annual tax returns. Holding that a political party which does not maintain audited account of income and file tax returns could not claim the amount it has spent as the expenses incurred or authorized in connection with the election of its candidate,[253] the court directed the Union Government to inquire into the cases of defaulting political parties and to initiate penal action under the income tax law.[254] It was also held that the expression "Conduct of Elections" under article 324 vested plenary power on the Election Commission even to direct the political parties to submit details of expenditure incurred by them.[255]

But, in *Dinesh Trivedi* v. *Union of India*,[256] the prayer of the petitioners for publishing the report of the Vohra Committee that enquired into the nexus between the crime syndicate and political parties and the documents relied upon by it on the ground that such disclosure was essential for the maintenance of democracy was turned down by the Supreme Court.[257] The court held that though disclosure is essential "for the maintenance of democracy and ensuring that transparency in Government is maintained," certain disclosures will exert undue pressure on the government which may not be feasible.[258] The court however, directed the government to get the issues examined by an independent and impartial body. It appears that in *Dinesh Trivedi*, the court was carried away by the apprehension of the pressure the disclosure of the confidential documents would create on the government agencies than the impact of criminalization of politics on democracy.

Be that as it may, by the new millennium transparency of the election process has become a topic of legal and political discussion as it was accorded constitutional status by the judiciary. In *Association for Democratic Rights* v. *Union of India*,[259] the petitioners

252 (1996) 2 SCC 752.

253 *Id*. at 762.

254 *Id*. at 768.

255 *Ibid.*

256 (1997) 4 SCC 306

257 *Id*. at 310-311.

258 *Id*. at 316.

259 AIR 2001 Del. 126.

sought a declaration of "informed right of voting for the voters of this country based on information and knowledge about candidates seeking election to Parliament and State Legislatures" and also a direction to the Union of India to amend the Representation of People Act, 1951 in tune with the recommendations of the Law Commission of India as submitted in the 170th Report so as to make the electoral process transparent and free of criminalization.[260] As a measure for bringing transparency, the High Court of Delhi directed the Election Commission to ensure that the details necessary for judging the candidates are made available to voters including the criminal cases pending against them, their assets and educational qualifications.[261]

Astoundingly, the Union of India appealed against the decision in which many political parties joined as interveners. Observing[262] that it cannot issue directions for amending the law and the rules thereunder, the Supreme Court held that when the constitution or law is silent on a subject and the authority implementing the law is vested with the power, the court can issue necessary directions to by the judiciary to fill in the vacuum.[263] The court held that in a healthy democracy, voters have the right to elect a candidate on the basis of his antecedents and past performance for which his educational qualifications, assets and involvement in criminal cases shall not be suppressed from the voters.[264] It was also held that the right of a voter to know the antecedents of his representative is a right under article 19(1) (a) as democracy cannot survive without free and fair election for which there shall be fairly informed voters.[265] It was also held that the power of the Election Commission under article 324 was wide enough to hold the election in a free and fair manner.[266] Transcending the limitations of judicial review, *ADR* signals how the exercise of judicial power can be modulated according to the transforming constitutional requirements of democratic process.

ADR was followed by *People's Union for Civil Liberties* v. *Union of India* (*PUCL2* for short),[267] whose factual matrix reveals the reluctance of the Union of India to implement *ADR* in its letter and spirit. It arose out of the petition challenging the validity of section 33-B of the Representation of People Act, 1951, incorporated by the Ordinance issued in 2002 and later replaced by the Representation of People (Third Amendment) Act, 2002.[268] It lays down that notwithstanding any judgement or decree of a court or order

260 *Id.* at 128.

261 *Id.* at 138.

262 *Union of India* v. *Association for Democratic Rights* (2002) 5 SCC 294. (*ADR*, for short).

263 *Id.* at 309.

264 *Id.* at 309-310.

265 *Id.* at 317.

266 *Id.* at 321. For discussion of the case, see, V.R. Jayadevan, "Disclosure of Antecedents for Free and Fair Election: The Need to Widen Basic Structure Doctrine" *46 JILI* 563 (2004).

267 (2003) 4 SCC 399.

268 Representation of the People (Amendment) Ordinance, 2002 (4 of 2002). By the amendment, two provisions ss. 33-A and 33-B were incorporated into the Act.

or direction issued by the Election Commission, no candidate need disclose or furnish any information not required to be furnished or disclosed under the Act.[269] Reiterating the decision of *ADR*, the court held that well-informed voter is the foundation of a healthy democracy.[270] For, it[271]

> is the voter's discretion whether to vote in favour of an illiterate or literate candidate. It is his choice whether to elect a candidate against whom criminal cases for serious or non-serious charges were filed but is acquitted or discharged. He is to consider whether his candidate may or may not have sufficient assets so that he may not be tempted to indulge in unjustified means for accumulating wealth.

Turning down the contentions of the Union of India that the right to elect being a statutory one, knowing the antecedents of the candidates cannot be a fundamental right,[272]that if at all a fundamental right, it is only a derivative one which could therefore be nullified by legislation[273] and that insistence on the declaration of the assets of the candidates would be violative of their right to privacy,[274] the court struck down section 33-B.[275] The court held that the impugned provision by giving liberty to the candidates not to disclose the information contrary to the directions of *ADR* has gone beyond the legislative competence.[276] The court[277] ratiocinated that knowing the antecedents of the candidates being a fundamental right conducive to fair election process,[278] it cannot be abridged by a legislative exercise[279] wherefore it cannot be considered as violative of the right to privacy of the candidate.[280] The court also held that the right of the voters to know the antecedents of their representatives would supervene the rights emanating

269 Representation of Peoples Act, 2002 reads: s. 33B - Candidate to furnish information only under the Act and the rules. —Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."

270 *Supra* note 262 at 424-425.

271 *Id*. at 425. (Shah J.).

272 *Id*. at 445, 447.

273 *Id*. at 438.

274 *Id*. at 443-444.

275 *Id*. at 453.

276 *Id*. at 452-453.

277 All the three judges of the bench that decided the case (M.B. Shah, P. Venkatarama Reddi and D.M. Dharmadhikari JJ.) wrote separate judgments. All of them agreed on the main points, Shah J. and D. M. Dharmadhikari JJ. constituted the majority. P. Venkatarama Reddi J. expressed slightly different views on some issues.

278 *Supra* note 262 at 459.

279 *Id*. at 438, 447.

280 *Id*. at 443.

from the election law since the "exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures."[281]

The net result of *ADR* and *PUCL2* is that candidates have a duty to swear about his antecedents before the voters to enable them to take an informed decision. This, needless to say was welcomed neither by the government nor by the candidates. Small wonder, the measures of the judiciary to bring purity and transparency in the election process faced stiff resistance at institutional and political platforms. The aversion of the government to implement the judicial orders to ensuring transparency in the election process was complemented by the tactics adopted by the political parties and the candidates to evade them. One of such instances of non-compliance was revealed by an NGO sponsored survey of the affidavits filed by the candidates along with their nominations in the Punjab Legislative Assembly Elections, 2007. Many of the affidavits filed by the candidates were either blank, incomplete or contained false information. In view of the observation of the court in *PUCL2*,[282] the Election Commission expressed its inability to reject the nominations unsupported by proper affidavits. Consequently, the issue was brought to the notice of the Supreme Court in *Resurgence India* v. *Union of India*,[283] in which the petitioners prayed for issuing necessary directions to the Election Commission to ensure that the affidavits are complete in all respects and also to reject the nominations accompanied by incomplete or blank affidavits. Observing that filing of blank affidavits makes it nugatory,[284] the court held that in order to effectuate the fundamental right of the people to know guaranteed by article 19 (1) (a), the returning officer shall insist the candidate to furnish the necessary information failing which the nomination could be rejected.[285] The court clarified that *PUCL2* could not be contemplated to disallow rejection of nomination filed along with incomplete affidavits.[286] Undoubtedly, *Resurgence India* is a worthy successor to *ADR* and *PUCL2*.

The *ADR* trio – *ADR*, *PUCL2* and *Resurgence* – constitutes the bedrock of transparency of the democratic process in India. *ADR* introduced the right of the voters to know

281 *Supra* note 267 at 453.

282 M.B. Shah J observed, While no exception can be taken to the insistence of affidavit with regard to the matters specified in *ADR,* the direction to reject the nomination paper for furnishing wrong information or concealing material information and providing for a summary enquiry at the time of scrutiny of the nomiations, cannot be justified. (*Id.* at 451).

283 (2014) 14 SCC 189.

284 *Id.* at 200.

285 *Id.* 203.

286 *Id.* at 202. The court held, "Therefore, we hereby clarify that the abovesaid paragraph will not come in the way of the Returning Officer to reject the nomination paper if the said affidait is filed with blank columns. The candidate must take the minimum effort to explicitly remark as "NIL" or "Not Applicable" or "Not known" in the columns and not to leave the particulars blank, if he desires that his nomination paperbe accepted by the Returning Officer." (*Ibid.*).

the antecedents of their representatives and resurrected it as *sine qua non* of healthy democracy, *PUCL* vivified how, it would emanate as a fundamental right from the sheath of a statutory process while *Resurgence* vested the Election Commission with the necessary powers for ensuring the exercise of the right.They stand testimony to the efforts the apex court has taken to vouch the cause of the electorate to know about their candidates before casting their votes. Needless to say this is necessary for free and fair process of election.

Later, in *Krishna Moorthy* v. *Sivakumar*,[287] examining whether the validity of the election of the appellant as the President of the local body was affected due to non-disclosure of the details of the criminal cases pending against him, the court held that disclosure of the criminal antecedents of the candidates is a categorical imperative and that non-disclosure of an information within the special knowledge of the candidate would amount to interference "with the free exercise of the electoral right". Considering such non-disclosure as an instance of undue influence that vitiates free and fair election irrespective of whether it materially affected the process of election, [288] the court held:[289]

> A voter is entitled to have an informed choice. …The requirement of a disclosure, especially, the criminal antecedents, enables the voter to have an informed and instructed choice. If a voter is denied of the acquaintance to the information and deprived of the condition to be apprised of the entire gamut of criminal antecedents relating to heinous or serious offence of corruption or moral turpitude, the exercise of electoral right would not be an advised one. He will be exercising his franchise with the misinformed mind.

Noticeably, the constitutional authorities deliberatively ignored the directives of the Supreme Court that brought transparency in the election process while the political parties tried to circumvent them on delusory grounds. This has necessitated the court to issue certain directions which at first glance may appear to be strange., In *Public*

287 (2015) 3 SCC 467.The appellant as the President of a cooperative society was an arrayed as an accused on allegations of criminal breach of trust and falsification of accounts. Later, while filing nomination for the election of the President of the Panchayat, he did not mention the details of the criminal cases pending against him as required by the notification issued by the State Election Commission under the Tamil Nadu Panchayats Act, 1994. The Election Tribunal and the high court invalidated the election of the appellant on the ground that non-disclosure of the entire details as required by the notification amounted to undue influence and corrupt practice. Hence the appeal.

288 *Id*. at 523-524.

289 *Id*. at 519.

Interest Foundation v. *Union of India*,[290] observing that criminalization of politics is extremely disastrous and lamentable and reiterating that disclosure of antecedents of candidates is essential for protecting the right of the voter to informed choice, the court held that the right to know the antecedents of the candidates is paramount for democracy.[291] The court accordingly directed that the contesting candidates shall provide the details of the criminal cases pending against them to the Election Commission and the political parties have to post the information in their websites. The court also directed that the candidates and the parties shall issue a declaration in the newspapers in the locality and the electronic media about the antecedents of the candidates.[292] Having diagnosed criminalization of politics as a systemic disease of democracy in *Dinesh Trivedi*, the court prescribed holistic therapy for it in *ADR* and *PUCL*, symptomatic treatment in *Anukul Chadra Pradhan* and *Krishna Moorthi* and recommended prophylactic in *PIF1 and PIF2*.

However, candidates and the political parties continued neglecting the directions of *PIF2* which allegedly has contributed to an alarming increase of criminals in politics. It was in such a backdrop that in *Rambabu Singh Thakur* v. *Union of India*,[293] the Supreme Court directed all political parties to mandatorily upload detailed information about the candidates including the criminal cases pending against them and the reasons for identifying them as candidates. They were also to explain why persons with no criminal antecedents were not identified. The court also directed the political parties to publish the same in the local vernacular and national newspapers as well as in their official media platforms including Facebook and Twitter. The court stipulated that the same has to be published within 48 hours of the selection of the candidates or not less than two weeks of the first date for filing nominations whichever is earlier and to file the compliance report with the Election Commission within 72 hours of the selection of the said candidate, failing which they would have to face action for contempt of court.[294]

Thus, having begun as a fundamental right of the voters under article 19(1) (a), disclosure of the antecedents of the candidates has ended up as the duty of the candidates and the political parties, visiting its violation with an action for contempt of court. Evidently, stiff resistance of the political top brass and the upper echelons of power as well the

290 (2019) 3 SCC 224. (*PIF 2*). This arose out of the reference made from *PIF 1* to a larger bench. The question that came for consideration of was whether the court could lay down disqualifications beyond what is contained in Article 102 of the Constitution. The petitioner prayed for debarring of persons facing charges of serious nature from contesting election and also to direct the Election Commission to restrain a candidate charged with heinous and grievous offences from contesting under the symbol of a party.

291 *Id.* at 280.

292 *Ibid.*

293 (2020) 3 SCC 733.

294 *Id.* at 734-735.

indolence of political parties to bring transparency in the election process have stifled the Supreme Court. Small wonder, judicial efforts in this course have been slow and meandering. Nevertheless, in the present political scenario, withdrawal of judiciary will only help and hasten democracy due criminalization of politics.

Judiciary *vis-à-vis* the Indian democracy – A prognosis

The lesson that we learn from the history of democracy is that left to themselves, people through their representatives will destroy human rights and perhaps the democracy itself.[295] This is true of the democratic process in India also. Apart from the mistakes in drawing lessons from the history and the inherent infirmities of the constitution, substantial threat to the Indian democracy has come from the exercise of power by the constitutional authorities with feudal flavour and the unethical practices among the political parties.

In such a backdrop, Indian legal system cannot afford to narrow down the scope of, leave alone prohibit, judicial review. Surpassing all traditional limitations, the judiciary in India has been addressing the exercise of power by various authorities in a manner unacceptable to democratic process. Supervising the exercise of constituent power, regulating Union interference in state administration and modernising the concept of parliamentary privileges, the attempt of the apex court to fortify democracy reached its acme in its crusade against criminalization of politics. Though such exercise of judicial power is identified as the passage to judicial supremacy,[296] one has to accept that in the present constitutional scenario there is no alternative for such innovative judicial response. The decisions of the apex court on the democratic process are like the pieces in a jigsaw puzzle; read individually, they may not make much significance. Silhouette them against the socio-political thicket, there figures out the edifice of democracy.

Paradox as it may seem, judicial review often criticized as undemocratic[297] and at times condemned as anti-democratic[298] comes to the rescue of democracy and its processes. In the process of defending democracy, the court has adopted two techniques. Transcending all limitations on judicial review set by tradition, the apex court has been issuing directions to the Union of India, Election Commission and at times to political parties to keep the democratic pure and unsullied. Secondly, widening the scope of Article 324,[299] the court has strengthened the office of the Election Commission and

295 See Aharon Barak, *The Judge in a Democracy*, viii-ix (Princeton University Press, 2006)

296 See e.g. Shubhankar Dam, "Parliamentary Privileges as Facade: Political Reforms and the Indian Supreme Court" 2007 *Sing. J. LEGAL Stud.* 162,163. (2007).

297 See, e.g. Alexander M. Bickel, *The Least Dangerous Branch-The Supreme Court at the Bar of Politics* 16-17 (Yale University Press, 1962).

298 Mace, G., "The Antidemocratic Character of Judicial Review" *60 Calif. L. Rev.* 1140, 1148 (1972).

299 E.g. *Gujarat Election Case*, (2002) 8 SCC 237; *ADR*, (2002) 5 SCC 294; *PUCL1*, (2013) 10 SCC 1; *PIF* 2, (2019) 3 SCC 224.

ensured non-interference with its jurisdiction by any authority enabling it to hold election in a free and fair manner.

Not that the court has not erred, for it has faltered on occasions that demanded its support. Extending parliamentary privileges to offences committed beyond the walls of the House[300] and constitution of special courts for trying criminal cases in which the representatives of the people are involved are against the principles of democracy.[301] To err is human, but to correct is judicial. However, the court has risen up from the dust in *ADR* and strode like a giant colossus in *PUCL*, *Lily Thomas* and *Resurgent India*. Needless to say, in the prevailing socio-political background judicial reluctance to take up the role of sentinel on the *qui vive* may sound the death-knell of democracy in India. For, "without genuine representativeness and fairness in the electoral processes, democratic constitutionalism is hardly possible; and that if the legislature itself be unable or unwilling to police such matters, then the courts of necessity must intervene, if constitutional governance is not to disappear by default."[302]

300 *P.V. Narasimha Rao* v. *CBI* (1998) 4 SCC 626.

301 *Ashwini Kumar Upadhyay* v. *Union of India* 2020 SCC OnLine SC 1044.

302 Edward McWhinney, *Judicial Review in the English-Speaking World* 225-226 (University of Toronto Press, Canada, 1965).