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CONTENTS

FOREWORD

It gives us great pleasure to present Issue 2 of Volume 4 of the Comparative Constitutional Law and Administrative Law Quarterly.

In the first article, ***Towards a Model of Judicial Review for Collegium Appointments: The Need for a Fourth Judges Case***, Hrishika Jain argues that the judiciary has been taking on an increasingly activist role, even acting as a "law-maker of last resort", however, this expansion in power has not been accompanied by a proportionate increase in accountability. This insulation from the other organs of the state, it is argued, is reflected in the process of appointment of judges and roster allocation. How can accountability of the judiciary be increased without compromising on its independence? The NJAC was one proposed solution, however, was criticized on the grounds that it would lead to interference by the executive. The solution the author proposes here is a novel one. The author suggests that appointment decision be subjected to internal judicial review. Through the course of the article, she provides instrumental and intrinsic justifications for this proposed mechanism, discusses the standard of review that would be applicable and offers solutions to possible logistical issues that may arise. This is an extremely relevant theme, in light of the much-discussed and unprecedented press conference addressed by four judges of the Supreme Court earlier this year.

In the second article, ***On Advance Directives and Attorney Authorizations – An Analysis of the Judgment of the Supreme Court in Common Cause (A Regd. Society) v Union of India*** Vini Singh discusses a recent judgment wherein the Supreme Court has enabled persons to draw "living wills" as to whether they would wish to discontinue treatment if they are terminally ill or in a permanent vegetative state. The author discusses the longstanding debate surrounding euthanasia, including the Aruna Shanbaug case and its aftermath. In her detailed analysis of the judgment in *Common Cause,* she examines the separate opinions rendered by each of the judges on the Bench with special reference to the international jurisprudence the Court relied on. Further, she elaborates on the procedures and safeguards laid down by the Bench for the issuance of these "living wills."

The third article, ***Electoral Reforms: Legitimizing the Election Machinery and Revamping the Indian Political Scenario*** by Pallav Gupta and Dhruv Thakur assumes special relevance as we approach the General Elections of 2019. The machinery in place for the conduct of elections in any democracy carries on its shoulders the burden of maintaining the very basis of this democracy. Procedural and administrative issues in the conduct of elections, while often ignored,

warrant discussion because of the tremendous repercussions they can have. The authors examine the structure of the election administration in India and further discuss various suggestions for institutional reforms, some of which have been recommended in reports by statutory and other bodies such as the Law Commission, to safeguard the independence of the electoral machinery, as well as to reduce electoral malpractices. They also make a case for the conduct of simultaneous elections.

I thank everybody in the editorial team for the immense effort they have put in to enable the publication of this issue. Akshay Sahay, Aashna Jain, Ankit Handa, Anmol Jain, Ayush Srivastava, Ankita Aseri, Aiswarya Murali, Gagan Singh, Kartavi Satyarthi, Subarna Saha, Shrestha Mathur, and Swapnil Srivastava have all been integral to this endeavor and I thank them for their initiative, enthusiasm and dedication. I also thank the authors for their contributions, and for their cooperation during the editorial process. We hope to continue providing a platform for debate on issues related to constitutional and administrative law. We hope that those who read this will share this issue amongst those who may be interested, so as to help us in our aim of reaching out to practitioners, scholars and students of the fields of constitutional and administrative law.

We are eager for feedback and look forward to hearing from readers, with respect to any suggestions they may have for this publication.

Ragini Gupta

(Editor-in-Chief)

TOWARDS A MODEL OF JUDICIAL REVIEW FOR COLLEGIUM APPOINTMENTS: THE NEED FOR A *FOURTH JUDGES' CASE*?

- **Hrishika Jain***

ABSTRACT

The Emergency marked a significant turning point in the development of the Indian Supreme Court's ['SC'] jurisprudence. Since the defining decision in *ADM Jabalpur* v. *Shivakant Shukla,*[1] the Court has worked towards progressively insulating itself from executive or legislative interference. In a similar vein, the SC has consciously shifted the self-conception of its role from a narrow positivism,[2] towards an expansive, natural law perspective.[3] The shift has seen the SC transforming from an enforcer and interpreter of the law, to a "good governance court",[4] often

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[1] ADM Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207 ['ADM Jabalpur'].

[2] *See* A.K. Gopalan v. State of Madras, AIR 1950 SC 27, in holding the Preventive Detention Act, 1950 constitutional, said that the phrase "procedure established by law" may be any procedure enacted by the Legislature, and is not subject to judicial review on grounds of fairness; *Also see* Shankari Prasad v. Union of India, AIR 1951 SC 458, holding that the term "law" in Article 13 does not include Constitutional amendments, and thus, Amendments abridging Fundamental Rights are valid; *Also see* ADM Jabalpur, AIR 1976 SC 1207, holding that the impugned Presidential order suspending the right to life and liberty under Article 21 and the writ of habeas corpus, is a valid exercise of Emergency powers.

[3] *See* Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295, holding that while the right to privacy is not guaranteed as part of Article 21 under the Constitution, it still remained a common law right and cannot be violated without appropriate authority; *Also see* Satwant Singh v. Assistant Passport Officer, AIR 1967 SC 1836, holding that the right to travel abroad is an essential part of the right to liberty granted under Article 21 of the Constitution; *Also see* I.C. Golaknath v. State of Punjab &Ors., AIR 1967 SC 1643, holding that constitutional amendments could not abridge the Fundamental Rights provided under Part III of the Constitution; *Also see* Kesavananda Bharti v. State of Kerala, (1973) 4 SCC 225 ['Basic Structure Case'], holding that the Constitution possesses a basic structure of principles and values that cannot be amended by the Parliament; *Also see* Maneka Gandhi v. Union of India, AIR 1978 SC 597, overturning the decision in *AK Gopalan v. State of Madras,* the Court held that "procedure established by law" under Article 21 must be just, fair and reasonable;S.P. Sathe, *Judicial Activism: The Indian Experience,* 6(29) WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 29, 40 (2001); Burt Neuborne, *The Supreme Court of India,* 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 476, 477 (2003).

[4] *See* N. Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court,* 8(1) WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW (2009); *Also see* P.B. Mehta, *The Rise of Judicial Sovereignty,* 18(2) THE JOURNAL OF DEMOCRACY 70, 73 (2007), states that "the Supreme Court, moreover, managed to legitimize itself not only as the forum of last resort for questions of governmental accountability, *but also as an institution of governance*." This conversion of the court into a "governance institution" is often seen as an alternative mechanism for socio-economic justice, and a strong counter-majoritarian force, *see* V. Sripati, *Towards Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000),* 14 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 413 (1998); *also see* U. Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,* 1985 THIRD WORLD LEGAL STUDIES 107, 132 (1985); However, the unelected nature of the Court has naturally raised concerns about accountability and democratic values, as will be dealt with in Part II of this paper. For an analysis of the debate, *see* Shubhankar Dam, *Lawmaking Beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analyzing the Nature of the Legitimacy of the Nature of Judicial Lawmaking in India's Constitutional Dynamic),* 13 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, 109 (2005).

acting as a law-maker of the last resort and a sanctuary from the transgressions and omissions of the other organs.

However, this progressive expansion of the SC's power has occurred without it taking on proportionate accountability and scrutiny. *Judicially*, this has manifested in increasing 'activism' and 'legislative-void jurisprudence'.[5] *Administratively*, this lack of accountability reflects best in the highly insulated process of judicial appointments[6] and roster-allocation in the SC.[7] This insulation from other organs of the state has had important implications for the internal integrity of the judiciary as an institution as well as for individuals within it - generating a long-standing credibility-crisis. The open letter from four senior SC justices to the Chief Justice of India ['CJI'] –alleging violation of SC conventions and arbitrariness in allocation of cases - marks the most recent chapter in the unfolding of this crisis.[8]

One of the central concerns raised in the open letter [hereinafter, referred to as the '*Four Judges' Controversy*'] was a 2-judge bench SC order in the case of *R.P. Luthra*v. *Union of India.*[9]The order rejected a challenge to the judicial appointments that were made pending the finalization of the Memorandum of Procedure ['MoP'],[10]but also recommended expedition of the finalization process. While the open letter primarily raised doubts regarding the composition of the bench,[11]it also criticized the order, stating that the Government's silence on the MoP is to be construed as

[5]Vishakha v. State of Rajasthan, AIR 1997 SC 3011, laying down guidelines for preventing sexual harassment at the workplace; *But see* Rajesh Sharma v. State of Uttar Pradesh, Appeal (Crl.) 1265 of 2017 (Supreme Court of India), laying down guidelines against the 'misuse' of S.498-A. These decisions reflect the absence of a necessary correlation between judicial lawmaking and liberal rights-jurisprudence, countering the most common argument in favour of judicial-activism.

[6] Supreme Court Advocates-on-Record Association v. Union of India, Writ Petition (Civil) 1303 of 1987 ['Second Judges' Case]; In re Principles and Procedures Regarding Appointment of Supreme Court and High Court Judges, (1998) 7 SCC 739 ['Third Judges' Case'].

[7]*Supreme Court to Examine PIL Challenging Roster Practice of Allocation of Cases by CJI,* INDIAN EXPRESS (April 13, 2018), *available at* http://www.newindianexpress.com/nation/2018/apr/13/supreme-court-to-examine-pil-challenging-roster-practice-of-allocation-of-cases-by-cji-1801043.html.

[8] Letter from J. Chellameswar and others, to CJI Deepak Misra (January 12, 2018), available at https://qz.com/1178370/full-text-of-the-letter-four-supreme-court-judges-write-to-the-chief-justice-of-india

[9]RP Luthra v. Union of India, 2017 SCC OnLine SC 1254.

[10]Supreme Court Advocates-on-Record Association v. Union of India, W.P. (Civil) 13 of 2015 (Supreme Court of India), ¶569 ['NJAC Case']. The Court directed that the Memorandum of Procedure, as laid down in the Second and Third Judges' Case, be revised in collaboration with the Government.

[11]*Supra* note 8. The 2-judge bench constituted of Justices U.U. Lalit, and A.K. Goel, neither of who were a part of the constitutional bench that heard the NJAC Case. The letter states, "When the Memorandum of Procedure was the subject matter of a decision of a Constitution Bench of this Court in Supreme Court Advocates-on-Record Association and Anr. vs. Union of India [(2016) 5 SCC 1] it is difficult to understand as to how any other Bench could have dealt with the matter."

acceptance, eliminating any need to direct an expedition. The order had already been recalled by a three-judge bench.[12] This recall, along with the statement in the open letter and the Government's continued position that there is no consensus on the MoP,[13]has thrown the status of the new MoP into confusion.

It is clear that there is an increasing recognition of the need for a balance between judicial independence and accountability in the appointments process. While the MoP is one means of creating external accountability, I argue that subjecting the appointment decisions to internal judicial review would further supplement the effectiveness of the MoP. The thesis of this paper is twofold -

First, the SC precedents can be interpreted to envisage the power of the Court to review the decisions of the collegium, even though such power was expressly eliminated in the *Second Judges' Case;*

Second, the standard for this review may be higher than the one for judicial review of executive action, though it must fall short of a *de novo* review.

The collegium's recent resolution to make its decisions and reasons thereof available as public record, in response to the aforementioned credibility-crisis, reinstates the viability of the implementation of the above argument.[14] As the collegium moves towards transparency of its deliberations, it becomes possible to question and challenge its decisions on the basis of information now made available. In this light, this thesis attains greater significance and relevance in the current reformative stage of the collegium system.

The *first* segment of my argument briefly analyzes the collegium system and its (un)constitutionality. The *second* segment deals with the *instrumental* justifications[15] for judicial reviews of appointments. The *third* segment, deriving its legitimacy from the above instrumental

[12]R.P. Luthra v. Union of India, 2017 SCC OnLine SC 1295.

[13]Jatin Gandhi, *MoP in Limbo as Govt, Top Judges Lock Horns,* HINDUSTAN TIMES (February 9, 2018), *available at* https://www.hindustantimes.com/india-news/memorandum-of-procedure-in-limbo-as-govt-top-judges-lock-horns/story-YDgHxTqFs2aq5D7Tza1iIO.html.

[14] Re:Transparency in collegium system, Minutes of Chief Justice of India, http://supremecourtofindia.nic.in/pdf/collegium/2017.10.03-Minutes-Transparency.pdf.

[15]By *instrumental* justifications, I mean arguments that are essentially consequential in nature - dealing with the implications of, and reasons for judicial review, that are external to the autonomous disciple of law.

justifications, lays down *intrinsic* justifications[16] for it. The *fourth* segment establishes the standard of review suitable for such decisions. *Finally*, I suggest some solutions to possible logistical issues and link them to past reform measures, outlining the road ahead.

THE THREE JUDGES' CASES AND CONSTITUTIONALISM

Due to the aforementioned transformation of the judiciary into a 'good governance court', the scope of SC's 'legitimate power' has now become a focal point of the debate on separation of powers.

The opinions of the SC in the *Second Judges' Case*, and the *Third Judges' Case* regarding judicial appointments form an important aspect of the SC's understanding of the above debate. The Court, briefly, ruled that the opinion of the CJI regarding judicial appointments and transfers in the higher judiciary, would be binding on the President.[17]The opinion of the CJI has to be formed in consultation with the four (earlier, two) other senior-most judges of the SC - leading to the establishment of the collegium system.[18] The Central Government may object to these recommendations only on producing positive material as reasons.[19] If, however, upon perusing the material, the other members of the collegium agree with the view taken by the CJI, the recommendation would become binding on the Government.[20]

In order to establish this system of appointments, the SC interpreted "consultation" with the CJI to mean "concurrence" with him/her, while also reading in the collegium as a consultative body.[21]This amounts to a constitutional amendment by a 9-judge bench of the SC and an encroachment on the "essential functions" of the Legislature,[22] as conferred on it by Article 368

[16] By *intrinsic* justifications, I mean arguments that are internal to the autonomous disciple of law. This segment will argue that judicial review isconsistent and compatible with the existing legal principles and frameworks in place, without looking at such review as a means (instrument) to certain goals (consequences).

[17]Third Judges' Case, (1998) 7 SCC 739; Second Judges' Case, W.P. (Civil) 1303 of 1987.

[18]*Id.*

[19]Per J. Verma, Second Judges' Case, W.P. (Civil) 1303 of 1987.

[20]*Id.*

[21] Second Judges' Case, W.P. (Civil) 1303 of 1987.This interpretive exercised pertained to Articles 124, 217 and 222 of the Constitution of India which provide for appointments to the SC, and High Courts and transfers between High Courts, respectively.

[22]Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 54 ['Jawaya'], holding that the 'essential' functions of an organ of the State may not be exercised by any other organ, as opposed to functions that are merely incidental.

of the Constitution of India ["Constitution"].[23]In fact, in order to depart from the text of the Constitution, the Court interpreted the "*Basic Structure*" of the Constitution[24]to include judicial independence - a doctrine that itself does not find full textual support in the Constitution.[25]

INSTRUMENTAL JUSTIFICATIONS FOR JUDICIAL REVIEW OF APPOINTMENT DECISIONS

The judges-appoint-judges system institutionalized by the above decisions is largely unique to India. The judges of the SC of the United States are nominated by the President subject to the Senate rejecting or confirming the nominee.[26] In the United Kingdom, the independent Judicial Appointments Commission[27] has significantly increased judicial autonomy in appointments.

[23]The SC's abovementioned interpretation was in violation of the intent of the Constitutional drafters. This is clear from the rejection of the "concurrence model" by Dr. B.R. Ambedkar, as it assumed the impartiality of the CJI's judgment by granting him a veto. Constituent Assembly Debates, 24th May, 1949, Vol. VIII, *as cited in*, Per J. Chelameswar, Supreme Court Advocates-on-Record Association v. Union of India, W.P. (Civil) 13 of 2015 (Supreme Court of India) ['NJAC Case']; M.E. Bari, *Collegium System of Appointment of Superior Courts' Judges Established in India by way of Judicial Interpretation and Aftermath: A Critical Study*, 2013 LAWASIA JOURNAL 1, 10 (2013).

[24] Basic Structure Case, (1973) 4 SCC 225.

[25]Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court,* 8(1) WASHINGTON UNIVERSITY GLOBAL STUDENT LAW REVIEW 1, 27 (2009); Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine, in* SUPREME BUT NOT INFALLIBLE 107, 108 (B.N. Kirpal et al. eds., 2000).*But see* S. Krishnaswamy, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009).

[26] Article II, Section 2(2), UNITED STATES CONSTITUTION, 1787. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and *by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, *Judges of the supreme Court*, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[27]Schedule VIII, ¶1(1), Constitutional Reform Act, 2005. Regulation 4, The Judicial Appointments Commission Regulations, 2013. "Composition of the Commission (1) Of the 14 other Commissioners—

(a)7 must be holders of judicial office,

(b)5 must be lay members, and

(c)2 must be persons practising or employed as lawyers.

(2) Of the 7 Commissioners who are appointed as holders of judicial office—

(a)1 must be a Lord Justice of Appeal;

(b)1 must be a puisne judge of the High Court;

(c)1 must be a senior tribunal office-holder member;

(d)1 must be a circuit judge;

(e)1 must be a district judge of a county court, a District Judge (Magistrates' Courts) or a person appointed to an office under section 89 of the Senior Courts Act 1981(4);

However, the Lord Chancellor still enjoys one opportunity to reject and one to direct reconsideration, after consultation with various politicians and judges whose opinion was sought by the Commission.[28] Therefore, in both these jurisdictions, judicial appointments are subject to checks and balances, albeit to differing degrees. Naturally, a mere deviation from general practices in other jurisdictions does not provide a justification for change in *status quo,* and is only intended to be a background for subsequent justifications.

The gradual strengthening of the SC has seen its encroachment into the domains of the legislature and the executive through 'public interest litigation' jurisprudence,[29] and 'legislative void jurisprudence'.[30]This encroachment must be seen in light of the rise of the SC as an autopoietic institution[31] and its complete insulation, *democratically* and *politically*. Political insulation is achieved through the exclusion of the legislature or the executive from the process of judicial appointments. The impact of this is multiplied through democratic insulation due to draconian contempt laws,[32] and loose norms on declaration of assets.[33]This has resulted in a SC that is self-regulating, and more or less immune from accountability or external criticism.

In such an activist but unaccountable SC, it may be pointed out that the administrative and the judicial functions of the Court cannot be easily divorced. This is because, as the SC takes on functions that are increasingly political or governance-based, [34] making the politics of the

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(f)1 must be a holder of an office listed in paragraph (3);

(g)1 must be a non-legally qualified judicial member…"

[28] Sections 28, 29, Constitutional Reform Act, 2005.

[29] Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India,* 33(169) BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 170, 176 (2015).

[30]AbhinavChandrachud, *The Insulation of India's Constitutional Judiciary,* 45(13) ECONOMIC AND POLITIC WEEKLY 38, 38 (2010).

[31] Ralf Rogowski, *Constitutional Courts as Autopoietic Organizations,* 1 (Working Paper 2013/04, University of Warwick, 2013). The author argues that "constitutional courts are autopoietic social systems guided by an underlying concern for autonomy and self-reproduction." While the author uses the German Federal Constitutional Court and the U.S. Supreme Court to illustrate his point, it can be generalized to Indian context, to a certain extent.

[32] V. Venkatesan, *Of Criticism and Contempt,* 19(6) FRONTLINE (2002), *available at* http://www.frontline.in/static/html/fl1906/19060270.htm.

[33]SamanwayaRautray, *Half of SC Judges have not made Assets Public 10 Years after Resolution,* ECONOMIC TIMES (October 9, 2017), *available at* https://economictimes.indiatimes.com/news/politics-and-nation/half-of-sc-judges-havent-made-assets-public-10-years-after-sc-resolution/articleshow/60998416.cms.

[34]This is true of a system where the Court exercises expansive powers to form guidelines and fill in for the omissions (and not just transgressions) of the executive and the legislature. A good example would be the Basic Structure Case, in which the SC decided what parts of the Constitution are '*essential*' to the document - a decision that is naturally political and determined by the specific political ideologies and interpretive schools the individual

individual judge on the bench critical, administrative decisions like appointments and roster-allocation heavily influence the specific form that SC jurisprudence takes.[35]

Given the above, the criticisms of opaqueness and unaccountability of the collegium system[36] pose important constitutional questions. In his dissent in the NJAC Case, Justice Chelameswar pointed out that "*the consultation between the Chief Justice of India and the Government, and the record of the consultation process is one of the best guarded secrets of this country,*" with even the other SC judges barred from accessing its records.[37]Retd. Justice Ruma Pal has also criticized the prevalence of nepotism and lobbying in the consultative process, enabled by this black-boxing of the collegium's deliberations.[38]

The collegium is not required to record "strong cogent reasons" for departing from seniority - as long as some positive reasons are stated for the recommended judge.[39]Justice A.P. Shah, one of the senior-most High Court judges, was bypassed for elevation, despite some landmark rulings including the legalization of homosexuality, and inclusion of the office of CJI under the Right to Information Act, 2005.[40]Another example is the transfer of Justice Jayant Patel 10 months before his retirement, preventing his appointment as the Chief Justice of the Karnataka HC. It is

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judges on the bench come from. It is not a logical leap to suggest, thus, that the process of appointing judges, as well as deciding the bench, becomes a decision with *political* implications.

[35]One of the well-known instances of this influence was the manner in which the first Lord Chancellor, Lord Hailsham used his administrative powers of bench allocation for the purposes of curtailing the progressive/reformist jurisprudence of Lord Atkin. A. Peterson, THE LAW LORDS, 11 (Springer, 1983); ArghyaSengupta, *A Question of Probity,* THE HINDU (November 15, 2017), *available at* http://www.thehindu.com/opinion/lead/a-question-of-probity/article20445800.ece. Another source of empirical validation for this proposition is the careful selection of U.S. Supreme Court judges keeping in mind their political ideologies, and the emphasis placed on the same for Senate confirmations, betraying a generally accepted connection between personal ideologies and the higher judicial roles. *See* J.A. Segal and others, *Ideological Values and the Votes of the U.S. Supreme Court Justices Revisited,* 57(3) THE JOURNAL OF POLITICS 812 (1995). "While we find that the ideological values of the Eisenhower through Bush appointees correlate strongly with votes cast in economic and civil liberties cases, the results are less robust for justices appointed by Roosevelt and Truman."

[36] V.R. Krishna Iyer,*Needed: Transparency and Accountability,* THE HINDU (February 19, 2009), *available at* http://www.thehindu.com/todays-paper/tp-opinion/Needed-transparency-and accountability/article16336871.ece.

[37]Per J. Chelameswar, NJAC Case, W.P. (Civil) 13 of 2015.

[38]SamanwayaRautray, *Judicial Secret out in the Open: Former Judges Skewers Appointment Process,* TELEGRAPH (November 11, 2011) *available at* https://www.telegraphindia.com/1111111/jsp/frontpage/story_14735972.jsp.

[39]Third Judges' Case, ¶44, (1998) 7 SCC 739.

[40]UtkarshAnand, *With Sense of Hurt, Chief Justice A.P. Shah, Author of Landmark Rulings Retires from HC,* THE INDIAN EXPRESS (February 12, 2010) *available at* http://indianexpress.com/article/news-archive/web/with-sense-of-hurt-chief-justice-a-p-shah-author-of-landmark-rulings-retires-from-hc/.

speculated that it was a political decision to punish him for his order of a CBI probe in the Ishrat Jahan case.[41]

A judicial review for decisions of appointment would be a first and critical step towards eliminating the abovementioned issues. *First,* a judicial review would dilute the concentration of discretion in the collegium, thus ensuring an internal check on arbitrariness or favoritism within the small collegium. *Second,* this internal check and the resultantly imposed transparency would ensure fairer and better reasoned decisions at the collegium stage itself. It would effectively compel the collegium to provide reasoning for its decisions for fear of reversal - which it is not obligated to do currently in the case of a rejection.[42]*Third,* a judicial review would make the MoP a more enforceable and binding process. Further, the recent collegium resolution to upload its reasoned decisions on the SC website[43] will gain actionable value due to the possibility of a review.

INTRINSIC JUSTIFICATIONS FOR JUDICIAL REVIEW OF APPOINTMENT DECISIONS

While the U.S. and U.K. have developed strong systems of checks-and-balances on the judiciary's composition by the other organs of the state, it must be recognized that the SC's strong self-regulatory jurisprudence[44] is likely to prevent any strong *external* check on the system.[45]In that light, a process of judicial review would be more compatible with the judiciary's self-regulatory precedents, and would thus have stronger justifications *intrinsic* to the jurisprudence.[46]

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[41] SpecialCorrespondent,*Justice Jayant Patel Resigns,* THE HINDU (September 26, 2017), *available at* http://www.thehindu.com/news/national/other-states/justice-jayant-patel-resigns/article19756361.ece; S. Yamunan, *Supreme Court Collegium should Explain why Justice Jayant Patel's Transfer was in Public Interest,* SCROLL (September 29, 2017) *available at* https://scroll.in/article/852239/supreme-court-collegium-should-explain-how-justice-jayant-patels-transfer-was-in-public-interest.

[42]While the collegium needs to record positive reasons for a recommendation, there is no such requirement where a senior judge is rejected.

[43]*Supra* Note 14.

[44] It is valuable to note that Article 141 of the Constitution effectively makes SC's jurisprudence 'law', thus providing it with considerable binding value.

[45]The effect of this self-regulatory jurisprudence was most expressly clear when the SC declared the National Judicial Appointments Commission Act, 2014 unconstitutional and the 99th Constitutional Amendment as in violation of the Basic Structure of the Constitution in its invasion on 'judicial independence'.

[46]This paper does not comment on the possibility that there might be better instrumental justifications for an external check on the appointments, like in the U.S. The limited point I have made is that there are significant instrumental justifications for an internal check in the form of judicial review; and that the intrinsic justifications, given the current SC jurisprudence, may be *significantly* stronger in favour of internal checks, as opposed to external ones.

However, the *Second Judges' Case* indicated that the need for judicial review is completely eliminated *merely* due to the transfer of primacy in appointments to the collegium, from the executive.[47] The *Third Judges' Case* further clarified that a judicial review could only probe whether or not the required consultations were done, and could not review the content or fairness of the same.[48] This is a part of the judiciary's self-insulation from scrutiny, under an assumption of the infallibility of a judge's integrity, straying from Dr. B.R. Ambedkar's rejection of this assumption in the Constituent Assembly Debates.[49]I argue that there are strong grounds that the current stated position of the SC on reviewability of appointments has considerably weakened in light of later precedents.

I. Legal Nature of the Judicial Appointments Function

In arriving at a conclusion regarding reviewability of the collegium's functioning, an enquiry into the nature of its functions is critical. The difference between quasi-judicial and administrative functions, though increasingly blurry, determines the scope of principles of natural justice and other grounds for review. Administrative functions, unlike quasi-judicial ones, are devoid of generality, and are only concerned with the particular facts of the situation. Further, administrative action is not subject to the collection of evidence, and weighing submissions made by parties. It does not adjudicate on a right, even though it may *affect* one.[50]

In *A.K. Kraipak*v. *Union of India*,the SC laid down the following factors that determine whether a certain function is administrative or quasi-judicial - "*nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised*."[51] The SC has further held that the functions of appointment and selection are *administrative* in nature.[52]Given that the *nature of the power* of appointment has itself been held to be administrative, in the absence of any precedent to the contrary, there is at least a presumption that judicial appointments be similarly

[47] Per J. Verma, Second Judges' Case, W.P. (Civil) 1303 of 1987.

[48] Third Judges' Case, (1998) 7 SCC 739.

[49]Constituent Assembly Debates, 24th May, 1949, Vol. VIII.

[50]I.P. Massey, ADMINISTRATIVE LAW, 48 (EBC, 2001).

[51] A.K. Kraipak v. Union of India, (1969) 2 SCC 262.

[52] National Institute of Mental Health and Neurosciences v. K. Kalyana Raman, 1992 Supp (2) SCC 481, holding that the Selection Committee's appointing NIMHANS professors was an administrative function; State of Andhra Pradesh v. S.M.K. ParasuramaGurukul, AIR 1973 SC 2237, holding that appointment of trustees to charitable and religious institutions is an administrative function.

classified. Moreover, I argue that mere facts that the power is conferred on judicial officers, or that the framework of law conferring it is constitutional do not, by themselves, lead us to a conclusion that the nature of the power changes to quasi-judicial from an administrative one. There are administrative functions that can be exercised by judicial officers (roster-allocation, for example), as well as conferred by the Constitution. The mere fact that the appointed officers are conferred with judicial functions also does not make the appointment itself a quasi-judicial function.

Regardless, however, decisions on judicial appointments do not require an adjudication of the *rights* of the candidate, as no right of appointment exists - making a strong case for the administrative nature of this function.

II. Procedural Fairness and the Right to a Judicial Review

Notwithstanding the absence of any right to be appointed to judicial office, there are certain rights to procedural fairness and natural justice that stem from the very nature of judicial appointments as 'administrative action'.[53] This would entail the imposition of a correlative 'duty' on the collegium,[54] and a simultaneous review process to enforce the duty/right.

SC has laid down the standard of judicial review for administrative action. In the *Barium case* pertaining to the administrative decisions of the Company Law Board, the Court held that it was insufficient for the Board to declare that there was *some* material to justify its opinion, to escape judicial scrutiny. The SC stated that the final decision was subjective and the "*sufficiency*" of the material forming the basis of such decision could not be reviewed. However, the SC would require objective proof of circumstances or material being *relevant* (even if not sufficient) to the inference reached.[55] This was upheld in the case of *Ram Dass* v. *Union of India,*[56] where it was held

[53]Maneka Gandhi v. Union of India, AIR 1978 SC 597, in holding that the Passport Office was bound by the *rule of audialteram partum* before impounding someone's passport, stated "Earlier, the courts had taken a view that the principle of natural justice is inapplicable to administrative orders. However, subsequently, there is a change in the judicial opinion. The frontier between judicial and quasi-judicial determination on the one hand and an executive or administrative determination on the other has become blurred. *The rigid view that principles of natural justice apply only to judicial and quasi-judicial acts and not to administrative acts no longer holds the field.*"

[54]David Lyons, *The Correlativity of Rights and Duties,* 4(1) NOUS 45, 46 (1970).

[55]Barium Chemical Ltd. v. Company Law Board, AIR 1967 SC 295 ['Barium Case']. The case involved a challenge to the Board's decision to order investigation against a company using discretion granted to it under Section 237 of the Companies Act, 1956. The Legislature "*could not have left to subjectivity both the formation of the opinion, and the existence of circumstances on which it is to be founded.*"

[56] Ram Dass v. Union of India, AIR 1987 SC 593.

that the Court could review an administrative decision against any extraneous considerations or irrelevant material.

This doctrine has been specifically upheld by the SC for administrative decisions of the judiciary, in its recent decision in *Indira Jaising* v. *Supreme Court of India.*[57]The petition challenged the legality of the appointment process for Senior Advocates on grounds of arbitrariness. The Court *struck down* the current process of secret ballot vote, citing *fairness and transparency*, laying down new, detailed procedures. The Court held that while there was no requirement for a hearing, there was a requirement for objective, relevant material basing the decision. Admittedly, on a plain reading, the case seems to support only the proposition that the procedure of selection is subject to review, and not the selection itself. However, on a full reading of the decision, the Court also approvingly cited its decision in *Sheonath Singh* v. *Appellant Assistant,*[58]which upheld the same standard of reviewing *particular* decisional outcomes as the *Barium* case. The citation provides conclusive approval of the reviewability of the judiciary's administrative decisions (in this case, appointments of Senior Advocates), *at par with other administrative decisions*.

In this light, the question of reconciliation of these decisions above with the SC's express rejection of judicial review of the collegium's decisions in the *Second Judges' Case*, arises. The only review allowed is whether the collegium was consulted at all, not extending to the functioning of the collegium itself.

One possible argument that could achieve reconciliation in favour of the *Second Judges' Case* may be found in the SC decision in the *Bommai Case,*[59]regarding the reviewability of the President's declaration under Article 356.The Court stated that the decision can be challenged only on two very limited grounds - *malafide,* or when it is *ultravires* Article 356 itself. It is often used as authority for the proposition that the standard of review in the *Barium Case,* cannot be held to be applicable to the exercise of constitutional powers.[60] However, an extension of this reasoning to the collegium's powers would run into several legal issues.

First, the rationale for rejecting the *Barium Case* standard was that Article 356 of the Constitution grants *extraordinary powers* to the Executive for grave emergencies and thus cannot be equated with powers in the ordinary administrative field. Further, the SC reasoned, it is not possible for

[57] Indira Jaising v. Supreme Court of India, W.P. (Civil) 454 of 2015 ['Senior Adv. Case'].

[58]SheoNath Singh v. Appellant Assistant, AIR 1971 SC 2451, *as cited in* Senior Adv. Case, W.P. (Civil) 454 of 2015.

[59] S.R. Bommai v. Union of India, AIR 1994 SC 1918.

[60]Per J. Chelameswar, NJAC Case, W.P. (Civil) 13 of 2015.

the judiciary to evolve metrics to review decisions that are essentially political. It is, thus, clear that the intention was not to make an exception for constitutional powers generally, but for those extraordinary powers that are of a fundamentally political nature - being beyond the expertise of the judiciary. None of these considerations apply to the collegium's appointment powers. The hesitance at replacing the executive's expertise with its own judgment, will not stretch to judicial appointments where the judiciary claims to be in the best position to assess candidates.[61]

Second, in the *Second Judges' Case*, the SC eliminated judicial review on the sole ground that it became dispensable due to the mere primacy of the judiciary in the process,[62] and did not make any link to the constitutional nature of the power, as was made in *Bommai.* Therefore, *Bommai* clearly does not aid in the reconciliation.

Further, this rationale that eliminates the *need* for a judicial review, merely due to the primacy of judicial members in the decision, has been unequivocally rejected by the SC in its decision in the *Indira Jaising Case*. Thus, I argue that the validity of the proposition in the *Second Judges' Case* has become questionable due to the invalidation of its supporting reasoning by the SC itself - making the proposition contestable in any future challenge.[63]Further, it must be noted that the process of judicial review would still be consistent with the primary *ratio* underpinning the *Second Judges' Case,* that is, the primacy of the judiciary, as it does not include any external check or interference.

Thus, constitutionally, it has been established that there are intrinsic justifications within the framework of existing precedents for the reviewability of collegium's decisions.

III. The Appropriate Standard of Review

Jurisprudentially, courts have evolved widely differing *standards* of review to reflect the appropriate amount of court intervention in a variety of situations.[64]The *de novo* standard,[65] a

[61] Second Judges' Case, W.P. (Civil) 1303 of 1987."It is obvious, that the provision for consultation with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced *because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior judge*."

[62] Per J. Verma, Second Judges' Case, W.P. (Civil) 1303 of 1987.

[63]Admittedly, the *Second Judges' Case* had a larger bench than the *Indira Jaisingh Case*. However, the limited argument that I make is that any subsequent challenge to the impugned proposition in *Second Judges'*stands on strong ground, due to the SC's rejection of the reasoning forming its basis - though it does not, and cannot amount to an automatic overturning.

[64] Daniel Solomon, *Identifying and Understanding Standards of Review,* GEORGETOWN UNIVERSITY LAW CENTRE 1 (2013).

"clearly erroneous" standard,[66]"arbitrary and capricious",[67]presence of *some* relevant material,[68] presence of *substantial/sufficient* material - may be some differing standards.[69] It may be noted that review may be of questions of fact, or only on questions of law with a bar on reassessment of facts. Enquiries into facts may be restricted solely to the records of the lower court, or may allow further evidence.[70]

The analysis of precedents in the previous section may indicate that the applicable standard would be the one laid down in the *Barium Case*. This would allow the SC to assess the relevance of the material relied on by the collegium, but would prohibit an examination of its sufficiency. However, the question of the adequacy of this standard deserves separate consideration.

However, it must be noted that the jurisprudential rationale for a very limited review of administrative decisions is the constraints imposed by the doctrine of separation of powers, and deference for the administrative body's expertise in that decisional area.[71]This rationale does not apply in cases of administrative decisions made by the collegium, as there is no question of

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[65]This is the standard usually employed in first appeals. It essentially confers, on the first appellate court, powers co-extensive with that of the trial court in India. In the USA, the *de novo* standard is employed by first appellate courts for questions of law, as well as mixed questions of law and fact. Lawrence v. Dept. of Interior, 525 F.3d 916 (9th Circuit, 2008); Janet Lewis v. USA, 641 F.3d 1174, 1176 (9th Circuit, 2001); Suzy Zoo v. Commissioner of Internal Revenue, 273 F.3d 875, 878 (9th Circuit, 2001).

[66]This standard, employed in the USA, is used for an appellate consideration of questions of fact decided by the trial court. It involves a certain degree of deference to the lower court, due to the simple fact that the trial court is best placed to assess and appreciate evidence, given the presence of the three essential elements - cross-examination, demeanour and oath. L.H. Tribe, *Triangulating Hearsay,* 87(5) HARVARD LAW REVIEW 957, 963 (1974). Courts have described a "clearly erroneous" standard to be that the review court may not reverse the findings of the trial court as long as they are *plausible,* even though the review court would have *weighed* the evidence differently. It is only complete implausibility that is a ground for reversal. Husain v. Olympic Airways, 315 F.3d 829, 835 (9th Circuit, 2002); Anderson v. City of Bessemer, 470 U.S. 564 (1985); Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 384 (9th Circuit, 1994).

[67]This standard would essentially require *some* rational link between the facts forming the material for the conclusion and the conclusion itself. Some grounds for reversal would be where relevant material has not been considered, or irrelevant/impermissible factors have been, or where the reasoning given is counter to the evidence on record. Siskiyou Regional Education Project v. United States Forest Service, 565 F.3d 545, 554 (9th Circuit, 2009); Arizona Cattle Growers Association v. United States Fish and Wildlife Services, 273 F.3d 1229, 1236 (9th Circuit, 2001).

[68] Barium Case, AIR 1967 SC 295. This is approximately similar to the way the "arbitrary and capricious" standard for reviewing agency decisions is defined in the US. This similarity is evidenced by the SC's decision in Rohtas Industries Ltd. v. S.D. Agarwal, AIR 1969 SC 707. "The authority must form the requisite opinion honestly and after applying its mind to the relevant materials before it… It must act reasonably and not *capriciously or arbitrarily.*"

[69]Marha S. Davis, *Standards of Review: Judicial Review of Discretionary Decision-making*2 JUDICIAL APPELLATE PRACTICES AND PROCESS 47 (2000).Some of them may roughly overlap with minor differences across jurisdictions.

[70] George Seefeld, Judicial Review of Administrative Decisions, 24(2) MARQUETTE LAW REVIEW 61, 62-63 (1940).

[71]*Id,* at 64.

encroachment on the executive's territory or its expertise. This makes a wider scope of review than was laid down in the *Barium* case jurisprudentially arguable - begging the questioning of the *desirability* of the same.

The policy considerations that must be kept in mind are conflicting. *First,* a full review would lead to undue delays and frivolous appeals, in a judiciary where large-scale vacancies are a major concern.[72] *Second*, a *de novo* review would amount to the replacement of the opinion of the collegium with that of the bench constituted for the review, which runs counter to the intent of the Constitution. Further, such a review would effectively amount to an appeal - which is not an inherent right, and must be statutorily vested.[73] *However*, a counter-consideration needs to be taken into account. There is a growing blurring of the "*bright line*" between the administrative and judicial aspects of Court due to the heavy role that the individual judges' politics and ideologies play in an expanding, activist judiciary - as opposed to in a judiciary that is merely involved in the technical application/interpretation of the law. This changing role of the judges means that decisions of appointments and roster-allocation can be (and have been in the past) tailored to suit certain outcomes.[74]

Thus, it is important to balance these countering considerations and institute a process of review that ensures transparency and merit-based selection, while also accounting for delays. In that light, I suggest that the power to review selection must be subject to the standard of "*clearly erroneous"*. Courts have described it as a standard of review prohibiting reversal of the findings of the trial court as long as they are *plausible*, even though the review bench may have weighed the materials-on-record differently.[75]This standard has been arrived at upon a consideration of other possible standards and a need to balance the conflicting concerns outlined above. While the wide

[72] *Appointment of Judges a Major Concern, Vacancies Affecting Court's Efficiency, says CJI Khehar,* THE HUFFINGTON POST (January 11, 2017), *available at* http://www.huffingtonpost.in/2017/01/11/appointment-of-judges-a-major-concern-vacancies-affecting-court_a_21652481/.

[73] Anant Mills Co. Ltd. v. State of Gujarat, AIR 1975 SC 1234 (Supreme Court of India); Ganga Bai v. Vijay Kumar, AIR 1974 SC 1126.

[74] *Infra,* at page 6. AbhinavChandrachud, *Does Life Tenure Make Judges more Independent: A Comparative Study of Judicial Appointments in India,* 28(297) CONNECTICUT JOURNAL OF INTERNATIONAL LAW 299, 321 (2013); Hon. Wayne Martin AC, J., *Court Administrators and the Judiciary – Partners in the Delivery of Justice,* 6(2) INTERNATIONAL JOURNAL FOR COURT ADMINISTRATION 3, 14 (2014); G.E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States,* 83 GEORGE WASHINGTON LAW REVIEW 1517, 1524 (2014).

[75] It is only complete implausibility that is a ground for reversal. Husain v. Olympic Airways, 315 F.3d 829, 835 (9th Circuit, 2002); Anderson v. City of Bessemer, 470 U.S. 564 (1985); Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 384 (9th Circuit, 1994); Daniel Solomon, *Identifying and Understanding Standards of Review,* GEORGETOWN UNIVERSITY LAW CENTRE, (2013), *available at* https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/Standards-of-Review.pdf.

de-novo standard is easily eliminated as argued above, the severe need for transparency in an activist-judiciary makes a strong case for a departure from the very limited scope of the *Barium* standard as well. Thus, the mere showing of presence of *some relevant material* would not be sufficient to pass the review.However, the bench will have no power to reassess the materials and come to its own conclusion under a "*clearly erroneous*" standard. Its scope will be limited only to the consistency and plausibility of the collegium's decision, and the bench will have to prove the implausibility of the outcome (as opposed to *insufficiency of the material,* which is an easier standard) to effect a reversal. Further, it is clear that in this standard, the reviewing bench will not have the power to compare the relative merits of different considered candidates, and will only restrict its review to whether there was any plausible reason for individual selections/rejections.

However, it is important for the SC to have an *in limine* standard for admission or rejection of applications for review, before it gets into the standard set out above, in order to prevent frivolous applications. I argue that the test for admission should be a *prima facie* case for patent unreasonableness of the outcome - bypassing of experience without ascribing of sufficient reasons in the minutes of the deliberations, selection of a judge with allegations of misconduct, or in cases of appearance of bias, or allegations of political influence. The exercise of admission would be a subjective exercise by the review bench, while the review itself on standards of "clearly erroneous" will require an objective assessment.

THE ROAD AHEAD

Through the course of this paper, I looked at the conflicted origin of the collegium system of judicial appointments, and argued that its functions fall squarely within the domain of what is known as "administrative action". The paper recognized that the "bright line" between the judiciary's administrative functions and its judicial role is increasingly blurring in an activist-judicial system. This is because appointments and roster-allocation determine the politics of the judges on the bench, and thus now determine the SC's jurisprudence. It is from this recognition that the paper's central thesis stemmed – that in order to render transparency and accountability to this 'political' process, the collegium's decisions must be subject to judicial review. However, this thesis needs to be put in the perspective of recent developments.

The present collegium bench, in a recent resolution, has stated that it will make available all its decisions regarding appointments/transfers on its website.[76] This step is an essential element

[76] *Supra* Note 14.

towards making judicial reviews of the collegium's decisions even possible. This is evidenced by the successful petition filed by the Helen Suzman Foundation in the Constitutional Court of South Africa, to mandate the release of full recording and transcript of the Judicial Service Commission's deliberations on proceedings under review. One of the grounds taken was that, in not allowing this, the JSC is curtailing a full and proper judicial review.[77]However, it is important to note that the online records provide the bare minimum of the deliberations - the final decision with bare reasoning. The resolution does not provide for disclosure of minutes of the meetings of the collegium - making it inadequate for a review, when compared to the comprehensive disclosure requirement in South Africa. However, a counter-consideration is the necessity to protect the confidentiality of the proceedings and the discussions about individual judges, in order to protect the judiciary's esteem.[78]Thus, balancing both considerations, I propose that the SC must disclose the full minutes of the collegium's deliberations on the challenged selection/rejection, to the aggrieved party, only once the review application is admitted upon the showing of the clear "*prima facie"* case.

Another logistical hurdle is reflected in the recent MCI Scam row, where CJI Deepak Misra overturned the orders passed by a bench headed by Justice Chelameswar that had ordered setting up of a larger bench, stating that the CJI was the master of the rolls and had sole power to allocate business, by established convention. This led to an uproar due to possibilities of conflict of interest, as there were rumors of allegations against Justice Misra himself.[79] This, admittedly, does call into question the viability of the review process of the collegium's decision, as the CJI would always be an interested party, while allocating the bench that would review his own decision as the head of the collegium. Thus, in deciding bench allocation for the review of the collegium's decisions, convention must give way to notions of substantive justice,[80] and the CJI's default power must be handed to the senior-most judge outside the collegium.

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[77] Helen Suzman Foundation v. Judicial Service Commission, Case CCT 298/16 (Constitutional Court of South Africa).

[78]This was the primary reason relied on by both Indian and South African Courts to oppose the publication of deliberations during appointment decisions. *See* The Helen Suzman Foundation v. Judicial Services Commission, Case No. 145/2015 (The Supreme Court of Appeal of South Africa). This decision was overturned by the Constitutional Court decision, but the concerns remain. Ajmer Singh, *'Transparency' can't trample 'Rights': Two SC judges tell CJI*, ECONOMIC TIMES (December 20, 2017) *available at* https://economictimes.indiatimes.com/news/politics-and-nation/transparency-cant-trample-rights-two-supreme-court-judges-tell-cji/articleshow/62141401.cms.

[79] Harish V. Nair, *MCI Scam Row: CJI DipakMisra Shows Who's the Boss amid High Drama in Supreme Court,* INDIA TODAY (November 11, 2017), *available at* http://indiatoday.intoday.in/story/mci-scam-cji-dipak-misra-high-drama-supreme-court/1/1087204.html.

[80]Sengupta, *supra* note 1.

Another last issue must be addressed. In order to protect against challenges to the validity of any Orders passed by the judge whose appointment is challenged, any application for review may be admitted only before any such Order is passed. Alternatively, the Orders can be held to be valid unless the grounds for review are materially linked to the judge's ability to pass that Order impartially and on merit.

The SC, today, has acquired the role of a governance court, stepping into the shoes of the Legislature, and the Executive very frequently. This not only makes it important for it to be democratically accountable, but also means that administrative decisions like appointments and business allocation have a deep influence on its jurisprudence. Court administration is today no longer divorced from adjudication and jurisprudence, and it is in this context that this paper's significance must be assessed.

ON ADVANCE DIRECTIVES AND ATTORNEY AUTHORISATIONS – AN ANALYSIS OF THE JUDGMENT OF THE SUPREME COURT IN *COMMON CAUSE (A REGD. SOCIETY) V. UNION OF INDIA*

- Vini Singh*

"Life sans dignity is an unacceptable defeat and life that meets death with dignity is a value to be aspired for and a moment for celebration."

- *Dipak Misra C.J.I.*

ABSTRACT

With the march of law, the concept of 'individual autonomy' has gained much significance. It has been recognized as an essential aspect of human dignity across various jurisdictions. The Supreme Court of India has also rooted it very firmly in the guarantee to life and personal liberty under Article 21, through the privacy-dignity-autonomy matrix propounded in the Puttaswamy judgment.

The recognition of individual autonomy as a facet of Article 21 is likely to have several implications that are already apparent. The recent judgment of the Apex Court in the case of *Common Cause (A Regd. Society) v. Union of India* is an ode to individual autonomy as it has enabled people to draw living wills and attorney authorisations that would be indicative of a person's choice to discontinue treatment if they are in a terminally ill or permanent vegetative state.

Relying on the principle of 'best interest of the patient,' the Court has provided stringent safeguards with respect to the execution of such wills and authorisations, to prevent any possible misuse. Further, by outlining the circumstances in which these wills can be executed, it has also attempted to balance the bioethical and societal concerns regarding euthanasia with individual autonomy. This paper seeks to analyse whether the Apex Court has been successful in its attempt to allay the various concerns regarding passive euthanasia, living wills and attorney authorisations.

INTRODUCTION

The term "euthanasia" is derived from the Greek terms '*eu*,' meaning good and '*thanatos,*' meaning death and pertains to the practice of ending a life to relieve pain and suffering.

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[1] However, the issue of euthanasia is not as simple as the literal translation of the term. The issue is not only contentious, but is also very complex, being one which involves several moral, ethical, societal and economic aspects. It has plagued humankind since ancient times and has occupied the centre-stage on the intersection between bioethics and law.[2]

While proponents of euthanasia bank on the right to self-determination and the futility of prolonging a life without meaning and dignity, the opponents of the practice believe that emphasis must be given to palliative care, and that legalising euthanasia would be violative of the principle of sanctity of life. Therefore, most jurisdictions have attempted to achieve an equilibrium between these viewpoints and have only permitted passive euthanasia i.e. withdrawal of life sustaining measures, with adequate safeguards for persons who are terminally ill or in a permanent vegetative state.[3]In addition to permitting passive euthanasia, many jurisdictions, such as U.K., Canada, Netherlands, Switzerland and Singapore also permit issuance of advance directives with requisite safeguards.[4]

In view of the international jurisprudence, the Supreme Court of India in the case of *Aruna Ramchandra Shanbaug v. Union of India*,[5] upheld the right to die with dignity and permitted passive euthanasia for persons who are terminally ill or in a permanent vegetative state. However, the ruling was silent on the mechanism by which an individual could exercise his/her right to bodily autonomy and express his/her wishes with respect to withdrawal of treatment. The Supreme Court received another opportunity to rule on the matter when a writ petition was filed before it by the NGO, 'Common Cause' seeking guidelines for execution and implementation of advance directives and attorney authorisations, in order to exercise the right to die with dignity.[6]The

[1]Edward J. Gurney, *Is There a Right to Die – A Study of the Law of Euthanasia,* 3 CUMB.-SAMFORD L. REV. 235 (1972).

[2]John D. Papadimitriou et. al, *Euthanasia and Suicide in Antiquity: Viewpoint of the Dramatists and Philosophers,* 100 (1) J.R.Soc. Med. 25-28 (2007).

[3]"Most jurisdictions have allowed passive euthanasia as opposed to active euthanasia which involves an overt act on the part of the physician such as injecting a lethal substance to the patient." Subhash C. Singh, *Euthanasia and Assisted Suicide,* 54(2) JILI 196-231 (2012).

[4] "An Advance Directive is a legal document explaining one's wishes about medical treatment if one becomes incompetent or unable to communicate." Vicki J. Bowers, *Advance Directives: Peace of Mind Or False Security,* 26 Stetson L. Rev. 678 -725 (1996).

[5] (2011) 4 SCC 454.

[6](2018) 5 SCC 1

Court upheld the said right in view of its ruling in the case of *Justice K.S. Puttaswamy v. Union of India*[7], wherein it explored the interrelationship between privacy, dignity and autonomy, and grounded the same in Article 21. Further, in order to prevent the misuse of these directives and authorisations by family members or physicians, the Court has issued detailed guidelines for their implementation and execution. This paper is an attempt to examine the issue of euthanasia in view of this judgment of the Apex Court and to analyse the guidelines issued in the same.

BACKGROUND TO THE JUDGMENT

The issue as to whether the right to die forms a part of the guarantee under Article 21 was first raised before the Apex Court in *P. Rathinam v. Union of India*[8], wherein a constitutional challenge was raised to Section 309 of the Indian Penal Code, 1860 ["**IPC**"], i.e. attempt to commit suicide. Relying on the judgment of *Maruti Shripati Dubal v. State of Maharashtra*[9], the Court held that since fundamental rights have both positive and negative content, the right to life would include the right to die and therefore, Section 309 of the IPC was unconstitutional.

Thereafter, in *Gian Kaur v. State of Punjab*[10], a challenge was raised to the constitutionality of Section 306 of the IPC, i.e. abetment to suicide. Herein, relying on *P. Rathinam*[11], it was argued that abetment to suicide could not be penalised as the abettor was only assisting in enforcement of a fundamental right. The Court set aside its ruling in *P. Rathinam*[12] and opined that all fundamental rights are not the same and hence the same standard must not be applied to them. Therefore, while the guarantees under Article 19 have a negative component,Article 21 cannot be read in a similar manner. Further, even if Article 21 is interpreted in such a fashion, suicide could notbe treated as a part of it, as it always involves an overt act by the person committing suicide. Thus, an unnatural termination of life could not be treated as a part of the right to life.

[7] *Justice K.S. Puttaswamy v. Union of India*(2017) 10 SCC 1, ['Puttaswamy'].

[8] *P. Rathinam v. Union of India*AIR 1994 SC 1844.

[9] *Maruti Shripati Dubal v. State of Maharashtra*(1986) 88 BOMLR 589.

[10] *Gian Kaur v. State of Punjab* (1996) 2 SCC 648.

[11] See *supra* note 9.

[12] *Id.*

However, the Court referred to the judgment of the House of Lords in *Airedale N.H.S. v. Anthony Bland*[13] and distinguished between "right to die" and "right to die with dignity". When a person is in permanent vegetative state or in a terminally ill state, the natural progression of death has already begun and death, without life support technology, is inevitable.

Thereafter, in *Shanbaug*[14], the Court, for the very first time, dealt with the issue of permitting euthanasia. Aruna Shanbaug was a nurse in KEM hospital, Mumbai when she was brutally raped and sustained injuries that left her in a permanent vegetative state. She was cared for by the hospital staff and nurses over a very long period of time, however there was no improvement in her condition. Pinki Virani, a social activist, filed a writ petition on her behalf seeking permission for euthanasia for Aruna Shanbaug, however, it was held that she had no locus to file the petition as she could not be given the status of a next friend. However, the two-judge bench proceeded to rule on the issue, and relying again on *Airedale*[15] and other international jurisprudence, it held that passive euthanasia may be allowed for terminally ill patients or patients in a permanent vegetative state provided that certain safeguards are followed. Recognising the autonomy of the patient, the Court held that if the patient is conscious and capable of giving consent, his or her opinion must be taken, otherwise at least the opinion of a next friend is required, who should decide as the patient would have. The matter would then go to the High Court, where a division bench would be required to constitute a board of three competent doctors to examine the patient. It further held that these guidelines should be followed till the Parliament legislates on the matter.

A BRIEF OUTLINE AND ANALYSIS OF THE JUDGMENT IN COMMON CAUSE V. UNION OF INDIA

I. Analysis of the concept of Euthanasia by the Bench

The issue of right to die with dignity was raised again before the Apex Court by an NGO, Common Cause, through a writ petition seeking legalisation of "advance directives and attorney authorisations" in order to enable people who are terminally ill and/or in permanent vegetative state, to exercise the right to die with dignity. The matter was referred from a three -judge bench

[13] *Airedale N.H.S. v. Anthony Bland*[1993] A.C. 789.

[14] See *supra* note 5.

[15] See *supra* note 14.

to a five-judge bench comprising Dipak Misra C.J., A.M. Khanwilkar, D.Y. Chandrachud, A.K. Sikri and Ashok Bhushan J.J.

The bench has derived the right to die with dignity from the privacy-autonomy-dignity matrix within the guarantee under Article 21 as expounded by the nine-judge bench of the Apex Court in *Puttaswamy.*[16]It upheld the right of an individual, who is capable of consent, to issue "advance directives and attorney authorisations" to allow for withdrawal of futile treatment or life support technology, if the patient is terminally ill or in a permanent vegetative state. [17]Additionally, the bench has issued guidelines in order to prevent any possible misuse of such directives and provided the manner in which such directives may be executed in order to ensure a balance between law and bioethics. [18]

All the judges have analysed the moral, ethical and jurisprudential issues regarding the concept of euthanasia and advance directives in significant detail, in order to derive a basis for the right to execute such directives and attorney authorisations. For instance, the opinion by Dipak Misra C.J. for himself & Khanwilkar J., commences with a philosophical discourse on the value of life, and the futility of a life sans meaning and dignity. He has cited various authors, poets and philosophers such as Epicurus, Hemingway and Tennyson, who have propounded the idea that death is not an enemy and in fact, a death with dignity, as opposed to an undignified continuation of life is a cause for celebration. He has also taken note of the societal aspects associated with this issue, such as, the stigma that may attach to doctors who withdraw life support and the possibilities of misuse of such a provision by unscrupulous relatives, thereby highlighting the importance of meticulous drafting of a law regarding advance directives.[19]Similarly, Sikri J. relied upon Gandhian principles, precepts of various religions regarding human dignity, various international instruments and Mill's conception of individual autonomy[20] to derive the right to die with dignity from Article 21. He classifies it as a "hard case"

[16] See *supra* note 7.

[17]See *supra* note 9, at ¶¶187 and 202, 629.5, 629.10.

[18]*Id* at ¶¶197- 203, 508 -509.

[19]*Id* at ¶¶176-179.

[20]JOHN S. MILL, ON LIBERTY, (1859).

as per Dworkin's conception, wherein several lawful choices are available and judicial discretion needs to be exercised in larger public interest.[21]

Further, Chandrachud J. has examined the issue of euthanasia in the context of the interrelationship between science, medicine, ethics and the constitutional principles of individual dignity and autonomy. He has emphasised the need to assess this right not only from an individual perspective but also from institutional, governmental and societal perspectives with a futuristic outlook.[22] Bhushan J. has also adopted a like approach and has traced the origin of the best interest standard, to be applied by medical professionals, in reference to the Hippocratic Oath and writings of Plato, and discussed various religious teachings as well regarding life and death.[23]

Further, all the members on the bench have examined the precedents set out by the Apex Court from *P.Rathinam*[24] to *Shanbaug*[25], in order to uphold the right to die with dignity. To illustrate, Misra C.J. has opined that the Apex Court in its previous rulings had distinguished between the "right to die" and "the right to die with dignity." While the former could not be considered to be a part of the guarantee to life and personal liberty under Article 21, the latter could be derived from it in a limited manner, i.e. only in the form of passive euthanasia and only for terminally ill and/or patients in permanent vegetative state. Likewise, Sikri J. has discussed the various forms of euthanasia and its philosophy, morality and economics in reference to the opinion of the Court in *Shanbaug.*[26] In addition, Chandrachud J. and Bhushan J. have analysed the opinions in *Gian Kaur*[27]and *Shanbaug*[28] to draw out the distinction between the "right to die" and the "right to die with dignity." Further, they have also drawn parallels with the Transplantation of Human Organs and Tissues Rules, 2014[29], that allow advance directives for transplantation of organs and

[21]RONALD DWORKIN, Law's Empire, (1986).

[22]*Supra* note 9, at ¶¶399 and 521.

[23]*Id* at ¶606.

[24]*Supra* note 9.

[25]*Supra* note 5.

[26]*Supra* note 5.

[27]*Supra* note 11.

[28]*Supra* note 5.

[29] § 24, Transplantation of Human Organs and Tissues Act, 1994.

the Mental Healthcare Act, 2017,that recognises advance directives for persons with mental illness and has specified the manner of recording and implementing such a directive, such as informed consent by the maker, the duties of the medical professional, the constitution of a medical review board, the appointment of representatives of the patient and the protection afforded to healthcare professionals. More importantly, the judges have leaned on the judgment in *Puttaswamy,*[30]wherein the Court had propounded the interrelationship between the concepts of dignity, privacy and individual autonomy to set the foundation for this right. They have focused on the concepts of value and quality of life that have been incorporated into our jurisprudence through several decisions of the Apex Court from *Maneka*[31]to *Puttaswamy*[32], to establish the same.

II. Comparative Jurisprudence referred to by the Bench

The bench has heavily employed international jurisprudence on the subject in order to bolster its conclusions. Following the footsteps of the bench in *Shanbaug*[33]*,* all the judges have dissected the ruling of the House of Lords in *Airedale*[34]*,* wherein the House of Lords has considered libertarian as well as utilitarian viewpoints in allowing passive euthanasia for patients in a permanent vegetative state. While ruling on the issue of whether or not to allow withdrawal of life support from a patient in permanent vegetative state, it is opined that, in cases where patients are unlikely to recover and are in such a state that a large number of medical professionals hold the view that prolongation of life is not in the best interest of the patient, then an exception can be made to the principle of sanctity of life. In fact, giving treatment to a patient who does not wish to continue it, and which confers no benefit upon him, would amount to invasive manipulation of such a patient's body. It is also emphasised that to prevent misuse, the opinion of the Court must be sought in cases of any medical disagreement, dispute between next of kin, or a disagreement of next of kin with the medical opinion or absence of next of kin to give consent. Further, it is observed that prolongation of life in such cases as a lose-lose situation and the skill, labour and money that would be utilised in prolonging the life of the patient could be fruitfully employed in improving the condition of other patients, who if treated, may be able to lead a healthy life. However, despite permitting passive euthanasia, it refrained from developing any law

[30]*Supra* note 7.

[31]*Maneka Gandhi v. Union of India,* AIR 1978 SC 597.

[32]*Supra* note 7.

[33]*Supra* note 5.

[34]*Supra* note 14.

with respect to the same and left the question for consideration with the Parliament. Further, reliance has also been placed by the bench on subsequent judgments with respect to assisted dying such as *R (on the application of Pretty) v. Director of Public Prosecutions*[35] that emphasised the utilitarian argument as well as the respect for patient autonomy. In addition, Chandrachud J. and Bhushan J. have considered the provisions of the Mental Capacity Act, 2005 enacted by the British Parliament that contains detailed provisions as to capacity to consent, appointment of guardian and medical opinion. [36]The guidelines propounded by Misra C.J. bear a close similarity with the provisions of this Act and it is interesting to note that the implementation of this Act has resulted into emphasis on better palliative care instead of withdrawal of treatment.

The bench has also extensively discussed the jurisprudence in the United States with respect to the right to refuse treatment and physician assisted suicide. However, the bench has only taken inspiration from the former and rejected the latter. Misra C.J., Chandrachud J. and Bhushan J. have discussed the provisions of the legislations in the States of Oregon, Washington, Montana and Columbia that provide for advance directives and safeguards with respect to their implementation. They have also referred to the decisions of the U.S. Supreme Court in *Cruzan v. Director, Missouri Department of Health*[37], wherein the Court upheld patient autonomy by declaring that in order to oblige the physician to end life support, the State would require a "clear and convincing evidence" of the patient's desire to do so. Further, Misra C.J. and Bhushan C.J. have relied on the ruling in *Vacco v. Quill*[38], wherein the Court upheld a ban on physician assisted suicide by the State of New York and distinguished between physician assisted suicide and allowing a patient to refuse life support, opining that the latter was permissible as a part of the common law right of bodily integrity and individual autonomy. Similarly, Chandrachud J. and Bhushan J. have discussed the opinion of *Cardozo* J. in the ruling by New York Court of Appeals in *Schloendorff v. New York Hospital Trust*[39], in order to hold that individual autonomy protects the right of an individual to direct removal of life support in cases of terminal illness.[40]

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[35]R *(on the application of Pretty) v. Director of Public Prosecutions*[2001] UKHL 61.

[36] See *supra* note 9, at ¶626.

[37]*Cruzan v. Director, Missouri Department of Health*497 U.S. 261 (1990).

[38]*Vacco v. Quill*521 U.S. 793 (1997).

[39]*Schloendorff v. New York Hospital Trust*211 N.Y. 125 (1914).

[40] See *supra* note 9 at ¶467.

Further, the bench has relied upon the jurisprudence in other jurisdictions such as Canada, Australia, Netherlands, Switzerland, Belgium and Singapore. For instance, Misra C.J. has cited the decision of the Supreme Court of Canada in *Carter v. Canada*[41], wherein physician assisted suicide was permitted in cases such as grievous and irremediable medical conditions, when such a wish was expressed in clear terms by an adult capable of consent. He has also discussed the safeguards of the Parliamentary Joint Committee appointed in 2016, for the purpose of providing substantive and procedural safeguards[42]. Hehas also borrowed from the same, and formulated safeguards for implementing advance directives in India. Additionally, he has reviewed the position in Australia, where advance directives and the right to refuse treatment have been considered as common law rights, and the best interest of the patient is the applicable standard to determine whether treatment can be withdrawn. For e.g. the High Court of Australia in *Secretary, Department of Health and Community Services (NT) v. JWB and SMB*[43], has held that common law protects the voluntary decisions of an adult person of sound mind as to what should be done to his/her body. In addition, he and Chandrachud J. have elucidated upon the rulings of the ECHR in *Pretty v. United Kingdom*[44], *Haas v. Switzerland*[45] and *Lambert v. France*[46].In these cases the Court observed that in 'end of life' situations the member States enjoy discretion, while striking a balance between the right to life and the autonomy of the patient, and permitting withdrawal of treatment. In such situations if sufficient safeguards are put in place, permitting passive euthanasia would not violate the obligations of the member States under the convention.

Further, the judges have mentioned the criteria set out by legislations in the Netherlands, Luxembourg and Belgium regarding the consent of the patient, i.e. the patient must have legal capacity, the medical state of the patient and his/her suffering, the presence of alternatives and the requirements of consulting other physicians etc.[47]These jurisdictions have prescribed these requirements very specifically and only allow euthanasia when any treatment is futile and the

[41]*Carter v. Canada*(2015) SCC 5.

[42] See, Hon. Kelvin K. Oglivie et al, *Medical Assistance in Dying: A Patient – Centered Approach: Report of the Special Joint Committee on Physician Assisted Dying,* PARL.CA ,https://www.parl.ca/Committees/en/PDAM.

[43]*Secretary, Department of Health and Community Services (NT) v. JWB and SMB*[1992] HCA 15.

[44]*Pretty v. United Kingdom*[2002] All E.R. (D) 286 (Apr.).

[45]*Haas v. Switzerland*[2011] ECHR 2422.

[46]*Lambert v. France*[2015] ECHR 545.

[47] See *supra* note 9 at ¶¶507 – 512.

suffering of the patient is unbearable and cannot be alleviated by other means. Furthermore, Bhushan J. has discussed the position in Switzerland wherein Articles 362 and 365 of the Swiss Civil Code, 1907 provide for execution and implementation of advance directives, and in Singapore, wherein the Advance Medical Directive Act, 1994 contains detailed provisions regarding the same.[48]

III. Procedure and Safeguards laid down by the Bench for the Issuance of Advance Directives and Attorney Authorisations–

In view of the abovementioned jurisprudence, Misra C.J. has rooted the right to die in dignity, as is found in Article 21. Considering it a matter of constitutional interpretation and therefore an obligation of the Court, he has laid down certain procedures and safeguards with respect to advance directives and attorney authorisations, that have been agreed upon and supplemented by other judges on the bench. The guidelines provide that only an adult of sound mind and ability to communicate, relate and comprehend the consequences of executing the document may voluntarily execute such a document after having full knowledge and information. The document must reflect informed consent clearly, and unambiguously instruct as to when medical treatment may be withdrawn or further treatment may not be given for prolongation of life. In addition, it should also contain a provision for revocation by the executor and must also disclose the name of a guardian who will give consent to refuse or withdraw treatment in accordance with the advance directive. The latest advance directive will be given effect in cases where there is more than one, however, the guidelines do not provide for situations where the directive is ambiguous. The presence of two attesting witnesses is required, who should preferably be independent, and the document must be countersigned by a Judicial Magistrate of First Class (hereinafter, JMFC) who is supposed to record satisfaction as to the voluntariness and informed consent of the executor. A copy of the document along with a digital one is to be preserved with the JMFC to prevent any future manipulation and another physical and digital copy is to be preserved with the Registry of the jurisdictional District Court. Further, a copy is to be preserved by the local authority as well i.e. municipality or panchayat as the case may be. If the family members are unaware, they are to be informed and where there is a family physician, he must be informed as well.[49]

[48] See *supra* note 9 at ¶ 625.

[49] See *supra* note 18.

The document can be given effect to at the instance of the doctor, only when the patient is terminally ill and after ascertaining the genuineness of the document from the JMFC. If the doctor has a conscientious or religious objection, then the hospital authorities are required to act. The doctor must inform the hospital authorities as to who will constitute a medical board consisting of the head of the treating department and three experts from various areas such as medicine, cardiology, nephrology etc. with experience in critical care and overall standing in the profession of atleast 20 years. The board shall then visit the patient in the presence of the nominated guardian and will certify whether or not the instructions in the document may be be carried out. If this preliminary opinion is in the affirmative, it will be communicated to the jurisdictional Collector, who will then constitute another medical board comprising of the Chief District Medical Officer as the chairman and three expert doctors from various fields such as cardiology, oncology, medicine etc. having a standing of atleast 20 years, except the doctors who were members of the previous board. If on visiting the patient, this board concurs with the opinion of the board constituted by the hospital, the decision will be communicated to the JMFC. The JMFC will then visit the patient at the earliest to authorise the implementation of the document. The executor is permitted to revoke the document at any stage prior to implementation by recording such revocation in writing. [50]

In cases where the medical board does not grant permission, it is open to the executor, or the relatives or even the doctor to file a writ petition under Article 226 before the High Court, and the Chief Justice of the said Court will be required to constitute a division bench to decide. It would be open to the High Court to constitute an independent medical board with the same qualifications as mentioned above and is also obliged to decide the matter expeditiously in the best interest of the patient. Further, there is no obligation to implement ambiguous directives.[51]Thus, the Court has provided comprehensive guidelines that will be applicable till the Parliament legislates on the subject.

In view of the experience in countries like the Netherlands[52] where advance directives have been permitted for a very long period of time, it is required to be seen that there is no lacuna in the implementation of these guidelines. In my opinion, the Court should have directed the

[50] *Id.*

[51] *Id.*

[52] See, Sofia Morrati et al, *Advance Directives in the Netherlands: The Gap Between Legal Regulation and Medical Practice,* in SELF DETERMINATION, DIGNITY AND END OF LIFE CARE: REGULATING ADVANCE DIRECTIVES IN INTERNATIONAL AND COMPARATIVE PERSPECTIVE, 287 – 298 (S. Negri ed., 2012).

constitution of an independent body consisting of judicial as well as medical experts to oversee the implementation of these guidelines in all cases. Afterall, considering the scarcity of resources and level of healthcare in India, there is definitely a risk of misuse of these directives and authorisations. Further, the directions do not provide any guidance as to when the "consent" of a person may be considered as an informed one. I believe the Hon'ble Court could have provided for mandatory psychiatric evaluation and counselling by medical practitioners before the person exercises his/her right to execute advance directives. Additionally, they do not prescribe a specific procedure for revocation of such directives and this may result in disputes as to whether or not the patient has revoked the advance directives. Ideally, a similar procedure could have been prescribed for the revocation of such directives. Furthermore, the Court has also opened an avenue for the misuse of this right by allowing the treating physician to approach the hospital authorities for constituting a medical board, in the absence of any directives or authorizations from a terminally ill patient with the informed consent of family members. Although the procedure specified by the Court would be followed in this case as well, taking such a step in the absence of such directives would be in contravention of the right to individual autonomy.

CONCLUSION

This judgment exemplifies the application of the doctrine of proportionality[53], wherein the Court has balanced two facets of the same right, i.e. the right to life under Article 21. While on one hand the right to life creates a compelling State interest in preserving human life, on the other hand it also assuresthe individual autonomy to take decisions with respect to his/her own body. The Court has carried out a measured analysis of the social, philosophical, ethical and economical aspects regarding this issue. Ithas carved out an exception to the principle of sanctity of life in cases where a person's life has lost any meaning and the prolongation of life is no longer in his best interest. Comparative jurisprudence has also been of much assistance to the Court while undertaking this exercise, an exhaustive examination of the international jurisprudence having been conducted by the members of the bench.

Taking cue from the judgment in *Visakha*[54], the Court has not only affirmed the right to die with dignity and to issue advance directives but has also provided detailed guidelines regarding the same.

[53] "Proportionality is a legal principle that requires balancing between competing values." See, *Supra* note 7.

[54] *Visakha v. State of Rajasthan,* (1997) 6 SCC 241.

ELECTORAL REFORMS: LEGITIMIZING THE ELECTION MACHINERY AND REVAMPING THE INDIAN POLITICAL SCENARIO

- Pallav Gupta[#] & Dhruv Thakur[*]

ABSTRACT

In India, given the high levels of literacy and political consciousness, there has been a tremendous change in the voting pattern of the people. Since independence, levels of political awareness and participation have risen among all segments of the population. Voting behavior is influenced by various factors such as religion, cast, community, language, class, money, personal charisma of leaders and also by certain unforeseen or accidental factors. The misuse of the aforementioned factors has resulted in a sine qua non increase in the malpractices in the recent times. These considerations greatly affect the quality of the decision that people make in terms of choosing their leaders.

This paper has been divided into three sections. The first section deals with the administration of elections in India and various structural and institutional reforms that are required within the ECI to make it truly independent and sacrosanct. The second part deals with certain areas requiring reforms to free the electoral process from malpractices. Further, an attempt has been made to provide various examples to show how malpractices vitiate the entire electoral process. The third part presents the case for conducting simultaneous elections to Parliament and State Legislatures which the authors firmly believe would go a long way in ensuring consistency, continuity and good governance in India.

INTRODUCTION

> "*In a democratic government, the right of decision belongs to the majority, but the right of representation belongs to all.*"
>
> -Earnest Naville, 1865

Citizen is the most elementary unit of a liberal political system. They participate in state affairs by means of political representation.[1] It can be said that the most important achievement of

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[1] MANOJ AGGARWAL, ELECTORAL REFORMS: A STEP TOWARDS GOOD GOVERNANCE 24 (2014) [AGGARWAL].

humanity is democracy, which provides the citizen with the opportunity to participate and choose a government of their choice. Democracy is one of the inalienable basic features of the Constitution of India ["The Constitution"] and forms part of its basic structure.[2] The concept of democracy as visualized by the Constitution pre-supposes the representation of the people in the Parliament and State Legislatures by the method of election.[3] Elections conducted at regular, prescribed intervals, are an essential part of the democratic system envisaged by the Constitution. The need to protect and sustain the purity of the electoral process that may take within it the quality, efficacy and adequacy of the machinery for the resolution of electoral disputes is also imperative.[4]

The Constitution ushered in a democratic republic for the free people of the country. The founding fathers of the Constitution devoted a special chapter to elections under Part XV of the Constitution, realizing its significance. Introducing draft Article 289 in the Constitution (which on adoption later became the present Article 324 in Part XV of the Constitution)[5] on 15 June 1949, Dr. B.R. Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly stated:

> "*...in the interest of purity and freedom of elections to the legislative bodies, it was of utmost importance that they should be freed from any kind of interference from the executive of the day….the whole of the election machinery should be in the hands of a Central Election Commission…..so that no injustice may be done to any citizen in India…*"[6]

The aforementioned excerpt explains the *raison d'etre* for vesting the conduct of elections in an independent Constitutional authority. It is inherent in a democratic set-up that the agency which is entrusted with the task of holding elections should be fully insulated so that it can function as an independent agency free from external pressures exerted by a party in power or the executive of the day.[7]

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

[3] NP Ponnuswami v. Returning Officer, Namakkal AIR 1978 SC 851.

[4]Kihoto Hollohan v. Zachillhu and Ors. AIR 1993 SC 412.

[5] VS RAMA DEVI & SK MENDIRATTA, HOW INDIA VOTES: ELECTION LAWS, PRACTICE AND PROCEDURE 176 (3rd ed. 2014) [DEVI &MENDIRATTA].

[6] ELECTION COMMISSION OF INDIA, DEBATE IN CONSTITUENT ASSEMBLY ON PART XIII- ARTICLE 289 7 (1996).

[7] TN Seshan Chief Election Commissioner v. UOI and Ors, (1995) 4 SCC 611.

PART I: ELECTION COMMISSION AND INSTITUTIONAL REFORMS

"Organizing free and fair elections is more important than the result itself"

-Fatos Nano

There are three basic characteristics of the Election Commission: Independence, Impartiality and Competence. Independence is essential in order to act in the best interests of all so that there is impartiality, which not only builds the confidence of voters, but also promotes the competence of the Election Commission.[8] A provision of administrative machinery for the conduct of elections has been elaborately dealt with under Part IV of the Representation of the People Act, 1951.[9]However, the Election Commission of India (Hereinafter, "ECI") remains at the apex.[10] In order to safeguard the core values of free and fair elections in this dynamic scenario, it is important to have a just and unbiased electoral process with greater participation of the people. Thus, the ECI has always remained active in finding out ways through which the purity and integrity of the election process remains preserved.[11] However, the ECI in itself is not free from administrative and procedural shortcomings. There are broadly two institutional reforms that need to be undertaken to maintain the sanctity of this constitutional body.

I. Empowering the Election Commission

The ECI is vested with the power of superintendence, direction and control of the preparation of electoral rolls for conduct of elections to the Parliament, State Legislatures and the offices of the President and Vice-President.[12] The Chief Election Commissioner (Hereinafter, "CEC") enjoys constitutional protection by virtue of the requirement of a parliamentary impeachment for

[8] P. RATHNASWAMY, HANDBOOK ON ELECTION LAW 18 (1sted. 2014) [SWAMY].

[9] Representation of the People Act, No. XLIII of (1951).

[10]DOABIA&DOABIA, LAW OF ELECTIONS AND ELECTION PETITIONS 663 (5th ed. 2016) [DOABIA&DOABIA].

[11] Election Commission of India, *Proposed Electoral Reforms*, HANDBOOK (Dec, 2016) http://eci.nic.in/eci_main/ElectoralLaws/HandBooks/proposed_electoral_reforms_01052017.pdf [PROPOSED ELECTORAL REFORMS].

[12] INDIA CONST. art. 324.

his removal from office.[13] When any other Election Commissioner (Hereinafter, "EC") is appointed, the CEC acts as the Chairman of the ECI.[14]

Article 324(5) of the Constitution provides that the CEC shall not be removed from his office except in the same manner and on the same grounds, as a judge of the Supreme Court but is silent in the matter of ECs. The other ECs can be removed from office only on the recommendation of the CEC.[15] The rationale behind not affording similar protection to the other ECs is inexplicable. The element of 'independence' sought to be achieved under the Constitution is not exclusively for an individual alone but for the whole institution.[16]

Thus, the independence of the Commission can only be strengthened if the ECs are provided with the same protection as the CEC.[17] To perform its tasks effectively, the EC has to be politically non-affiliated. In fact, it was visualized to be a non-committed institution which would conduct its task without attaching itself to or in any way being influenced by the political executive.[18]The present constitutional guarantee is inadequate and requires an amendment to provide the same protection and safeguard in matter of removability of ECs as available to the CEC.[19]

The Supreme Court in *T. N.Seshan v. Union of India and Ors.*[20] held that the CEC is not superior to the ECs. The Court observed that the provision for removal of the ECs only on the recommendation of the CEC does not make them subordinate to the latter, but is intended to ensure their independence and that they are not at the mercy of the political and executive bosses of the day.

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[13] INDIA CONST. art. 324(5).

[14] INDIA CONST. art. 324(3).

[15] *Supra* note 12.

[16]Akansha Jain, *ECI tells SC it has been seeking more Independence, Rule-Making powers since 1998*, LIVE LAW(April 12, 2018) http://www.livelaw.in/eci-tells-sc-seeking-independence-rule-making-powers-since-1998-read-affidavit/.

[17]PROPOSED ELECTORAL REFORMS. *supra* note 11, at 5.

[18]ManjariKatju, *Election Commission and Functioning of Democracy*, ECONOMIC AND POLITICAL WEEKLY, VOL. 41, NO. 17 (Apr. 29 - May 5, 2006), 1635- 1640 http://www.jstor.org/stable/4418140.

[19] *Election Commission's Powers: give more autonomy,*INDIA LEGAL(Feb. 24, 2018) http://www.indialegallive.com/constitutional-law-news/supreme-court-news/election-commissions-powers-give-more-autonomy-to-the-body-44684.

[20]TN SeshanChief Election Commissioner v. Union of India (1995) 4 SCC 611.

The Goswami Committee on electoral reforms (1990) recommended that the salaries, perks and other allowances of the CEC and other ECs should be similar to that of the CJI and the judges of the Supreme Court respectively.[21] The ECI also, in its report on electoral reforms in July 1998, reiterated in July 2004, recommended that the ECs be extended the same protection under the Constitution in the matter of their conditions of service and removability from office as is available to the CEC.[22]

In light of this, the current proviso to Article 325 is not only arbitrary but also irrational and should be suitably amended to bring the manner of removal of the ECs at par with that of the CEC. This would act as a safeguard against the executive's power to arbitrarily remove ECs, and hence strengthen the independence of the ECI.

II. Secretariat of the Election Commission

The ECI's headquarters at New Delhi consists of about 300 officers and staff at the levels of deputy ECs, director general, directors, principal secretaries, secretaries, under-secretaries, section officers, assistants, clerks, etc.[23] There are some officers and sections dealing with policies, planning, judicial and administrative matters and information systems on an all India basis, whereas others deal with the election work relating to specific states and union territories.[24] However, it is pertinent to note that the ECI does not have an independent secretariat like the secretariats of the Lok Sabha and the Rajya Sabha, which is important to give it autonomy in matters of appointments and promotions and other conditions of service of its officers.

The independence of the Commission can be strengthened if the secretariat of the ECI, consisting of officers and staff at various levels, is insulated from interference of the executive in matters pertaining to appointments, promotions etc.[25] To strengthen the independent functioning of the ECI, the Goswami Committee[26] recommended in 1990 that the ECI should also have an independent secretariat, for which suitable legislation was suggested along the lines

[21] MINISTRY OF LAW AND JUSTICE, GOSWAMI COMMITTEE REPORT ON ELECTORAL REFORMS, (May 1990) [GOSWAMI COMMITTEE].

[22] *Supra* note 17.

[23] DEVI &MENDIRATTA,*supra* note 5, at 4.

[24] *Id.*

[25] *Supra* note 17.

[26] GOSWAMI COMMITTEE, *supra* note 21, at 6.

of Article 98(2) of the Constitution.[27] The Constitution (Seventieth Amendment) Bill 1990, introduced in the Rajya Sabha on 30thMay 1990, sought to give effect to the above recommendation. However, the Government later withdrew the Bill, never to re-introduce it. Even the ECI had proposed setting up an independent secretariat for the Commission in the year 1998 and reiterated the same, in the proposals of 2004.[28]

The biggest test of any democracy is how well democratic institutions are able to represent the will of the people. The idea is to make the polity inclusive for people and this should be reflected in the decisions that are taken. An independent and autonomous secretariat will enable the electoral officers to carry out their functions without fear or favour. Since the ECI is entrusted with vital functions and is armed with exclusive and uncontrolled powers to execute them, it is of utmost importance that this august institution does not get swayed by the affluent and the powerful. A self-standing secretariat will allow the ECI to function without interference in its day-to-day operations and keep it away from the prying eyes of the executive. This will enable it to keep its functioning confidential and the trust of the people steadfast.

III. Administrative Expenditure of the Election Commission

The administrative expenditure of the ECI is not a 'charge' on the consolidated fund of India but is voted by the Parliament, unlike other constitutional bodies such as the Supreme Court, the Union Public Service Commission and the Comptroller and Auditor General.[29]The expenditure of the ECI should also be charged upon the consolidated funds of India as a charged budget would be a symbol of the independence and will secure its un-constrained functioning.[30]

The ECI and various other committees have time and again recommended this. The government finally accepted this proposal, and introduced the Election Commission (Charging of Expenses on the Consolidated Fund of India) Bill, 1994, in the Lok Sabha, but it lapsed without being passed on the dissolution of the House in 1996.[31] Thus, the expenditure of the Commission continues to be voted by Parliament, despite the reiteration of its proposal by the ECI from time

[27] INDIA. CONST. art. 98(2).

[28] *Supra* note 17.

[29] *Supra* note 23.

[30] *Supra* note 17.

[31] *Supra* note 23.

to time, the latest being in 2016.[32] In order to make theECI a truly autonomous body, capable of conducting the elections freely, the administrative expenditure incurred by it should be charged upon the consolidated fund of India instead of leaving it to the will of the Parliament.

PART II: NEED FOR REFORMS

> *"Elections and their corruption, injustice and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us…"*[33]
>
> -C Rajagopalachari

In a democracy, the sacrosanct and sacred nature of the electoral process must be preserved and maintained[34]so that it inspires confidence in the minds of the electors that everything has been above board.[35] However, the recent growth in electoral malpractices and the fact of non-implementation of electoral reforms have aroused political parties, and the public in general.[36]The history of electoral reforms over the last five decades has shown that political parties are unlikely to agree on any significant and fundamental changes to rid the system of several ills and malpractices.

Section 123 of the Representation of the People Act provides a list of practices which can make a candidate liable to be disqualified.[37] Nonetheless, these practices of booth-capturing, intimidation and impersonation of voters and other electoral malpractices continue to be rampant.[38] The role of money power in elections has become a standard concern in India,

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[32] *Supra* note 17.

[33] C RAJAGOPALACHARI, INDIA'S DATE WITH DESTINY: RANBIR SINGH CHOWDHARY FELICITATION VOLUME, (2006).

[34] DOABIA&DOABIA, *supra* note 10, at 5.

[35] P.R. Belagali v. B.D. Jatti (1970) 3 SCC 147.

[36] B Venkatesh Kumar, Critical Issues in Electoral Reforms, The Indian Journal of Political Science (Mar 2002), 73-88 http://www.jstor.org/stable/42743575 [BVENKATESH].

[37] Representation of the People Act, No. XLIII of 1951, § 123, (1951).

[38] MadhavGodbole, Constitution Review Commission: Some Reflections, Economic and Political Weekly, VOL. 37, NO. 39 (Sep. 28 - Oct. 4, 2002), pp. 4001- 4008 http://www.jstor.org/stable/4412659 [MADHAV G].

necessitating the setting up of various commissions to recommend ways and means to regulate the use and abuse of money in elections.[39]

Religion plays a great role in the politics of any country, even more so in Indian politics, considering the history of India and the plethora of cultures prevalent. A huge number of electoral malpractices occur during elections. In May, 2018 as many as five people were killed in the state of West Bengal, amid clashes over local body elections. Voter intimidation, violent attacks and booth capturing were also reported in several locations.[40] The contesting parties hurled accusations at each other for inciting violence and resorting to electoral malpractices. In some areas voters were injured, while one of the candidates was accused of threatening the polling agent.[41] In the recent Karnataka elections, more than Rs. 870 million in cash was seized by the authorities for violation of law, according to a statement issued by the Chief Electoral Officer of Karnataka.[42] The instances of malpractices were evident as more than 10,000 voter id cards were found in a flat in Bangalore, just three days before polling.[43]Creating communal tensions and riots to gain the votes of a particular religion or caste is one such malpractice. In this context, the recent judgment of *Abhiram Singh v. C.D. Commachen*[44]comes into play. This judgment attempts to do away with all such practices and aims for a more clear political scenario. The Supreme Court has, by a thin majority, held that the word 'his religion, race, caste, community or language' appearing in section 123(3) would mean the religion, race caste or community of the candidate or the voter/ elector and not that of the candidate contesting the election. A separate judgment was delivered by the then Chief Justice T.S. Thakur, in which he said that the election process is a secular activity and religion can have no place in it. It was held that any appeal in name of religion, race, caste, community or language will be regarded as a

[39] B. Venkatesh Kumar, Funding of Elections: Case for Institutionalised Financing, Economic and Political Weekly, VOL. 34, NO. 28 (Jul. 10-16, 1999), 1884-1888 http://www.epw.in/journal/2002/30/commentary/electoral-reform-billtoo-little-too-late.html.

[40] *Violence reported across West Bengal during panchayat polls*, THE ECONOMIC TIMES (MAY 14, 2018) https://economictimes.indiatimes.com/news/politics-and-nation/violence-reported-across-west-bengal-during-panchayat-polls/articleshow/64154349.cms.

[41] *Violence mars West Bengal panchayat elections: Key points*, THE TIMES OF INDIA (MAY 14, 2018) https://timesofindia.indiatimes.com/city/kolkata/violence-mars-panchayat-polls-in-west-bengal-10-points/articleshow/64154611.cms

[42] Chaitanya Mallapur, *Karnataka Elections 208: cash seized increases five-fold from 2013,*QUINT (MAY 19, 2018)https://www.bloombergquint.com/karnataka-2018/2018/05/19/karnataka-elections-2018-cash-seized-increases-five-fold-from-2013#gs.7Q3hGw4

[43]*Id.*

[44]Abhiram Singh v. CD Commachen, (2014) 14 SCC 382.

corrupt practice and will be reason enough to annul the election in which such an appeal was made. Thus, it was conclusively held that regardless of whether the appeal was in the name of the candidate's religion or the religion of the election agent or that of the opponent or that of the voters, it would be in violation of Section 123(3) of the said Act.

Putting up dummy voters is another such paramount electoral malpractice that has been denigrating the election process. Recently, around 10,000 voter IDs were discovered in a flat in Bengaluru around the time of elections after which countermanding was demanded from the ECI.[45] As previously mentioned, in a statement issued by the Chief Electoral Officer of Karnataka during the recent assembly elections, it was revealed that 87 crore rupees were seized by the authorities for violation of laws.[46]The need of an immediate overhaul of the electoral process is underscored by these corrupt practices, to free it from all the vitiating factors so that the citizens can truly decide by whom they shall be governed and call on those who govern to account for their conduct.

I. Neglected Issues

There are three major areas requiring electoral reforms, for which several proposals have been put forward in various forums and efforts that have been made to dignify the Indian political landscape.

a) Criminalization of Politics

Apart from the dark shadow of terrorism, prevailing social inequalities, communal tensions, severe economic disparities and the demon of poverty, the most serious problem being faced by the Indian democracy is the criminalization of politics.[47]Even the President of India, back in 1989, in his message to the nation conceded that the use of money and muscle power and the

[45] **EXPRESS NEWS SERVICE, *BJP CONGRESS TRADE CHARGES, ACCUSE EACH OTHER OF ELECTION MALPRACTICE*, INDIAN EXPRESS (MAY 10, 2018) HTTP://WWW.NEWINDIANEXPRESS.COM/STATES/KARNATAKA/2018/MAY/10/BJP-CONGRESS-TRADE-CHARGES-ACCUSE-EACH-OTHER-OF-ELECTION-MALPRACTICE-1812712.HTML.**

[46] ***KARNATAKA ELECTION: RS 87 CRORE IN CASH SEIZED BY GOVT OFFICIALS, OVER FIVE TIMES MORE THAN 2013 POLLS*, FIRSTPOST (MAY 19, 2018) HTTPS://WWW.FIRSTPOST.COM/INDIA/KARNATAKA-ELECTION-RS-87-CRORE-IN-CASH-SEIZED-BY-GOVT-OFFICIALS-OVER-FIVE-TIMES-MORE-THAN-2013-POLLS-4475199.HTML**

[47] MINISTRY OF HOME AFFAIRS,VOHRA COMMITTEE REPORT ON CRIMINALISATION OF POLITICS,(1993) [VOHRA COMMITTEE].

totally unacceptable practice of voters' intimidation and booth capturing offend the very foundations of nation's socio-economicorder."[48]

Since 2004, 18% of candidates contesting either National or State elections have criminal cases pending against them (11,063 out of 62,847). In 5,253 or almost half of these cases (8.4% of the total candidates), the charges are of serious criminal offences that include murder, attempt to murder, rape, crimes against women and cases under the Prevention of Corruption Act, 1988.[49]Criminal backgrounds are not limited to contesting candidates, but are found among winners as well. Of these 5,253 candidates with serious criminal charges, 1,187 went on to win the elections.[50]Former EC, Sri G.V.C. Krishnamurthy has pointed out that almost forty members facing criminal charges were members of the Eleventh Lok Sabha and seven hundred members having a similar background were in the State Legislatures.[51]

After a great delay, the Government finally appointed a committee headed by the then Home Secretary, Mr. M.N. Vohra which submitted its report on October 5th, 1993. It gave a very dismal picture of a parallel government run by the mafias, disclosing a powerful nexus between the bureaucracy and politicians with the mafia gangs, smugglers and the underworld.[52]

The NationalCommission to Review the Working of the Constitutionnoted that astage has now been reached when politicians openly boast of their criminal connections[53]and criminals are now seeking direct access to power by becoming legislators and ministers themselves.[54]The judgment of the Supreme Court in *Union of India v. Association for Democratic Reforms,*[55] which made the analysis of criminalrecords of candidatespossible,requiredsuchrecords to be disclosed by way of affidavit. It has given the public a chance to quantitatively assess the validity of such

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[48] *Id.*

[49] Ministry of Law and Justice, *244th Report of the Law Commission of India*, (2014), (Feb 15, 2018, 2:30 pm) http://lawcommissionofindia.nic.in/reports/report244.pdf [REPORT 244].

[50] *Id.*

[51] Dr.Sunaina, *Fast Track courts for Elected Representatives Bill:2014: an analysis,* INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES (Jan 12, 2016)http://ijlljs.in/wp-content/uploads/2016/07/Article-1.pdf.

[52] VOHRA COMMITTEE,*supra* note 47.

[53] B.P.C. Bose &MVSKoteswaraRao, *Criminalisation of Politics: Need for Fundamental Reform,* THE IJHSS(May, 2014) http://theijhss.com/may2014/35.HS1405-089.pdf.

[54] NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, A CONSULTATION PAPER ON REVIEW OF THE WORKING OF POLITICAL PARTIES SPECIALLY IN RELATION TO ELECTIONS AND REFORM OPTIONS (2002) [NCWRC REPORT].

[55] (2002) 5 SCC 294.

observations made in previous reports. The result of such analysis leads to considerable concern.[56]

In addition to political parties fielding candidates with criminal backgrounds,there is evidence to suggest that untainted representatives later become involved in criminal activities[57]The incidence of criminalization of politics is thus pervasive, making its remediation an urgent need.[58]

(i). EXISTING LEGISLATIVE FRAMEWORK TO CURB THIS MENACE

The qualifications of the Members of Parliament are listed under Article 84 of the Constitution, [59] while disqualifications can be found under Article 102. [60] Corresponding provisions for members of State Legislative Assemblies are found in Articles 173[61] and 191.[62] The Parliament enacted the Representation of the PeopleAct, 1951 (Hereinafter,"RPA") prescribing further qualifications and disqualifications. Section 8(1) enumerates a number of offences, convictions under which disqualify the candidate irrespective of the quantum of sentence or fine – which comprise of certain electoral offences, offences under the Foreign Exchange Regulation Act, 1973, the Narcotics Drugs and Psychotropic Substances Act, 1985, the Prevention of Corruption Act, 1988 etc. Section 8(2) lists other offences, convictions under which would result in disqualification if imprisonment is for six months or more.[63]

The right to know the antecedents of candidates is a part of the fundamental legal rights of the people and it is one of the fundamental principles of representative democracy.[64] The same is guaranteed under Sections 33A[65] and 125A[66] which make it compulsory for a candidate to

[56]REPORT 244,*supra* note 49.

[57] CHRISTOPHE JAFFRELOT, INDIAN DEMOCRACY: THE RULE OF LAW ON TRIAL 1(1) INDIA REVIEW 77(2002).

[58]REPORT 244,*supra* note 49.

[59]INDIACONST. art. 84.

[60]INDIACONST. art. 102.

[61] INDIA CONST. art. 173.

[62] INDIA CONST. art. 191.

[63] The Representation of the People Act, No. XLIII of 1951, § 8(2).

[64] SWAMY. *supra* note 8, at 293.

[65] The Representation of the People Act, No. XLIII of 1951, § 33A.

[66] The Representation of the People Act, No. XLIII of 1951, § 125A.

disclose whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed, or has been convicted of any offence and sentenced to imprisonment of one year or more.

Further, as per the Conduct of Election Rules, 1961 a candidate to Parliament or State Assembly election is required to furnish an affidavit disclosing information regarding his assets, liabilities, educational qualifications and criminal convictions.[67] Failure to furnish this information or concealing or giving false information is an offence under S. 125A of the Representation of People Act [Hereinafter "RPA"], 1951 and is punishable with imprisonment of up to six months. Since the offence is not listed under Sections 8(1) or 8 (2) of the RPA, conviction under Section 125 does not result in disqualification of a candidate.[68] Therefore, there is currently little consequence for the offence of filing a false affidavit, as a result of which thismalpractice is rampant.[69]

(i). JUDICIAL EFFORTS TO TACKLE THE PROBLEM

The Courts are well aware of the problem of criminalization of politics and have sought to introduce transparency in the electoral process, foster greater accountability for holders of public office and stamp out corruption in public life.[70]

In a landmark case of *Lily Singh v. Union Of India*[71] the Supreme Court held that Section 8(4) of the RPA, which allowed MPs and MLAs who were convicted while serving as members to continue in office till an appeal against such conviction is disposed of to be unconstitutional.[72]
In *Union of India v. Association for Democratic Reforms,*[73] the Apex Court directed the ECI to call for certain information on the affidavit of each candidate mandating them to disclose if they have been convicted/acquitted/discharged of any criminal offence in the past, and if convicted, the quantum of punishment; and whether prior to six months of filing of nomination, they have

[67] Conduct of Election Rules, 1961, http://aijel.com/cms/371/36148.adf.

[68] *Supra* note 66.

[69] REPORT 244,*supra* note 49.

[70] *Id.*

[71] Lily Thomas v. Union OfIndia (2013) 7 SCC 653.

[72] The Representation of the People Act, No. 43 of 1951, § 8(4).

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

been accused of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance has been taken by a court.

Further, in *People's Union of Civil Liberties v.Union Of India*[74] the Supreme Court struck down Section 33B of the Representation of People (Third Amendment) Act, 2002which practically limited the operation of the Supreme Court's earlier judgment in the *Association for DemocraticReforms*.[75] The effect of the said amendment was that the candidates were practically not required to disclose their assets and liabilities, educational qualifications and the cases in which they had been acquitted or discharged of criminal offences. The Supreme Court held that this violated the elector's right to know, thus obstructing their right of making an informed choice.

The Apex Court, acting as a guardian ofelectoral morality, has taken several steps for institutional reforms to severe the connection between crime and politics over years.

In the famous case of *VineetNarain v. Union OfIndia*[76] the Court issued a writ of mandamus to the Government, directing it to initiate a large-scale institutional reform in the vigilance and investigation apparatus of the country. It directed the Government to grant statutory status to the Central Vigilance Commission, laid down the conditions necessary for the independent functioning of the CBI, specified a selection process for its various officials, called for the creation of an independent prosecuting agency and a high-powered nodal agency to co-ordinate action in cases where a politico-bureaucrat-criminal nexus became apparent.[77]

(ii). PREVIOUS RECOMMENDATIONS AND REPORTS

The issue of electoral reforms has been the concern of several commissions and committees previously.[78] The Law Commission of India (Hereinafter, "LCI") in its 170th Report[79] recommended the addition of Section 8B in the RPA, making framing of charges against a person for serious offences (punishable with death or life imprisonment) sufficient grounds for

[74]PUCL v. Union of India (2003) 2 SCC 549.

[75]*Supra* note 73.

[76]Vineet Narain v. Union of India (1998) 1 SCC 226.

[77] *Id.*

[78]REPORT 244,*supra* note 49.

[79] MINISTRY OF LAW AND JUSTICE,170TH REPORT OF THE LAW COMMISSION OF INDIA, (1999), http://www.lawcommissionofindia.nic.in/lc170.htm, [REPORT 170].

disqualifying him from contesting elections. TheNational Commission to Review the Working of the Constitution [Hereinafter, "NCWRC"][80] also maintained the yardstick for disqualification as framing of charges for certain offences, punishable with maximum imprisonment of five years or more.[81]

Recently, the Justice J.S.Verma Committee Report on Amendments to Criminal Lawproposed insertion of a Schedule 1 to the RPA, enumerating offences under the IPC befitting the category of 'heinous' offences.[82] It recommended that Section 8(1) of the RPA[83] be amended to cover,*inter alia*, the offences listed in the proposed Schedule 1. It also recommended that the ECI should make it mandatory for the candidates against whom charges are pending to give progress reports in their cases every three months.[84]

Other than this, the Second Administrative Reforms Commission[85], the ECI and the Supreme Court in its various judgments[86] have elaborately deliberated on the issue of criminalization of politics. Recommendations have been made regarding de-recognition and de-registration of political parties which knowingly field candidates with criminal antecedents.[87]

(iii). THE NEED OF THE HOUR

The entry of criminals in politics, if not checked, will erode the system totally. The dearth of talented persons in politics may collapse the country internally as well as externally. The roots of the problem lie in the political system of the country. There is a lack of political will to combat the problem. The need of the hour is to suitably amend the RPA and implement the recommendations of the various committees and commissions, in the letter, as well as spirit of the law.

b) Electoral Funding- Risk of Corruption and Abuse

[80]REPORT 244, *supra* note 49.

[81] *Id.*

[82] VOHRA COMMITTEE, *supra* note 47.

[83] The Representation of the People Act, No. XLIII of 1951, § 8(1).

[84]*Supra*note 82.

[85] Fourth Report of the Second Administrative Reforms Commission, *Ethics in Governance* (2007) http://arc.gov.in/4threport.pdf. [2ND ARC REPORT].

[86] Ganesh Narayan v. Bangarappa (1995) 4 SCC 41. N.P. Ponnuswami v. Returning Officer, NamakkalConstituency, AIR 1952 SC 64.

[87] NCWRC REPORT, *supra* note 54.

The funding of political parties is a critical issue related to electoral reforms. Parties need funding in order to survive, compete and perform their democratic functions, both during and between election campaigns. Yet political finance and those who donate it are widely seen as problematic at times, even as a threat to democracy.[88] The ECI, in its guidelines issued in 2014, recognized that "*concerns have been expressed in various quarters that money power is disturbing the level playing field and vitiating the purity of elections.*"[89] Over decades, Indian politics has become extremely capital intensive. Ridiculously low ceiling limits on maximum permissible expenditure limits by candidates, have been observed more as a breach.

(i). THE NEED FOR REGULATING ELECTORAL FUNDING

Firstly, it is an undeniable fact that financial superiority translates into electoral advantage. Consequently, richer candidates and parties have a greater chance of winning elections.[90]Money is bound to play an important part in the successful orchestration of an election campaign. The availability of large funds does ordinarily tend to increase the number of votes a candidate will receive.[91] Money virtually controls the whole field of election and people are taken for a ride by such unscrupulous elements who want to gain the status of an MP or MLA by hook or crook.[92]Prescription of ceiling on expenditure by a candidate is a mere eye-wash and there is no practical check on election expenses.[93]

Secondly, inequality between richer and poorer candidates is a widely recognized issue. The Supreme Court in the *Kanwarlal Gupta*[94]case emphasized, "*it should be open to individual or any political party, howsoever small, to be able to contest an election on a footing of equality with any other individual or political party, howsoever rich and well financed it may be, and no individual or political party should be able to secure an advantage over others by reason of its superior financial strength.*" It is a harsh reality that only if one is prepared to expend money to unimaginable limits, would he be preferred to be nominated

[88] AGGARWAL, *supra* note 1, at 103.

[89]ECI, *Guidelines on Transparency and Accountability in Party Funds and Election Expenditure,* ELECTION COMMISSION OF INDIA (Aug 29, 2014) http://eci.nic.in/eci_main1/PolPar/Transparency/Guidelines_29082014.pdf.

[90] MINISTRY OF LAW AND JUSTICE, 255TH REPORT OF THE LAW COMMISSION OF INDIA, (2015) http://lawcommissionofindia.nic.in/reports/Report255.pdf. [REPORT 255].

[91]Kanwarlal Gupta v Amar Nath Chawla(1975) 3 SCC 646.

[92] Ashok Shankarrao Chavan v Madhavrao Kinhalkar(2014) 7 SCC 99.

[93]Gadakhyashwantrao Kankarrao v. BalasahebVikhePatil 1994 SCC (1) 682.

[94]*Supra* note 91.

as a candidate, as against the credentials of a genuine and deserving candidate.[95] These observations of the Apex Court are supported by a perusal of the data concerning the 2014 LokSabha candidates, that reveals that 27% of the candidates (16% in 2009) were "crorepati candidates," and the average assets of each of the 8163 candidates were worth Rs. 3.16 crores.[96]

Thirdly, the quantum of expenditure incurred by the candidates is in complete contravention of the various laws and ECI notifications.[97] The Supreme Court in *People's Union Civil Liberties v. Union Of India*[98] observed, "*The limits of expenditure prescribed are meaningless and almost never adhered to… the sources of some of the election funds are believed to be unaccounted criminal money in return for protection, unaccounted funds from business groups who expect a high return on this investment, kickbacks or commissions on contracts etc."*

(ii). EXISTING LEGAL FRAMEWORK REGULATING ELECTION EXPENDITURE

The Indian electoral law requires all candidates to disclose the correct amount of expenditure incurred in connection with the elections and that they are bound to submit the accounts between the day on which they have been nominated for election and the day of declaration of the result thereof.[99] Further, Section 123(6) makes incurring of excessive expenditure in elections a corrupt practice.[100]Until 1975, third party expenditure was not regarded as electoral expenditure within the meaning of Section 77 of RPA. However, this position changed with the landmark judgment in*Kanwarlal Gupta*[101] whereby, the Supreme Court held that the expenditure incurred by a political party should be included in the candidate's expenditure. The Court believed that the object of imposing individual expenditure limits would be frustrated if parties or supporters were free to spend without any limits. To utter revulsion, the RPA was amended in 1974 to nullify the effect of the above judgment by inserting an explanation to Section 77(1) to the effect that any

[95] Ashok Shankarrao Chavan v Madhavrao Kinhalkar (2014) 7 SCC 99.

[96] Association of Democratic Reforms, *LokSabha Elections 2014: Analysis of Criminal Background, Financial, Education, Gender and Other Details of Candidates*, (May 9, 2014) https://adrindia.org/download/file/fid/3684.

[97] REPORT 255, *supra* note 90.

[98] People's Union for Civil Liberties (2003) 4 SCC 399.

[99] The Representation of the People Act, No. XLIII of 1951, § 77.

[100] The Representation of the People Act, No. XLIII of 1951, § 123(6).

[101] *Supra* note 91.

third-party expenditure in connection with a candidate's election shall not be deemed to be expenditure incurred or authorized by a candidate.[102]

The state of governance in the country is such that political parties are so insensitive to public opinion and such is the utter disregard for the explicit orders of the highest Court.

The Supreme Court, through its various judgments, has exhorted the legislature and the ECI to supervise the maintenance of receipt and expenditure incurred by political parties and also disclose the funds received by them.[103]The ECI issued transparency guidelines on 29thAugust, 2014 making it mandatory that any election expenditure over Rs. 20,000/- should be made via cheque or draft and mandated that the books of accounts be audited and certified by qualified, practicing chartered accountants, submitted annually to the ECI, with a copy of the Auditor's Report.[104]

A significant source of political donations is through corporate funding, which is explicitly permitted under Section 182(1) of the Companies Act of 2013.[105]Section 29B of the RPA makes it clear that there is no limit on political parties accepting contributions from individuals or corporations, so long as the donor is not a government company, or the donation is not a foreign contribution.[106] The Government increased limits on corporate funding to political parties from 5 per cent to 7.5 per cent of the net profit[107], raising doubts regarding the motive behind this move. Recently, however, the Finance Act of 2017 removed this limit as well. Section 29C of the RPA regulates the disclosure of donations received by political parties and requires every party to prepare an annual report in respect of all contributions exceeding Rs. 20,000, received from any person or company, and submit the report to the ECI. In case of non-compliance, the party is not entitled to any tax relief under Section 29C(4) read with Section 13A of the IT Act.[108] Lastly, Section 182(3) of the Companies Act, 2013 regulates the disclosure of

[102]REPORT 255, *supra* note 90.

[103] C. Narayanswamy v. C.K. JafferSharief, 1994 (SUPP) 3 SCC 170; GadakhyashwantraoKankarrao v. BalasahebVikhePatil, 1994 SCC (1) 682; GajananBapat v. DattajiMeghe, 1995(5) SCC 437.

[104] Law Commission of India ,*Guidelines on* transparency *and accountability in party funds and election expenditure matter*, ECI (Aug 29, 2014) eci.nic.in/eci_main1/PolPar/Transparency/Guidelines_29082014.pdf.

[105] The Representation of the People Act, No. XLIII of 1951, § 182(1).

[106] The Representation of the People Act, No. XLIII of 1951, § 29B.

[107] The Companies Act, No. 18 OF 2013, § 182, (2013).

[108]S*upra* note 102.

donations made by companies, requiring every company to disclose the total amount of its contribution to a political party.[109]

(iii). REGULATING POLITICAL FUNDING

Party leaders, particularly in strongly disciplined Parliamentary systems, can establish personal monopolies over funding, enriching themselves, stifling intra-party debate, and putting extortionate pressure upon contributors. In established and mature democracies, influence markets emerge in which parties and politicians function as middlemen between private interests and decision makers and that too for a price. In this regard, preventing or revealing abuse becomes important.[110]

Against this background, the question that arises for consideration is whether the present system of funding of elections should continue or whether it should be replaced by state funding of elections. Both the Sanathanam Committee[111]and the Wanchoo Committee[112], recognize that the existence of large amount of black money is a major source of corruption, recommended for state funding of political parties.

The Indrajit Gupta Committee on State Funding of Elections backed this idea by stating that "*full justification, constitutional, legal as well as on grounds of public interest, for a grant of state subvention to political parties so as to establish such conditions where even the parties with modest financial resources may be able to compete with those who have superior financial resources."*[113]Such recommendations in one form or the other, were later approved by the LCI in 1999[114], the NCWRC in 2001 and the Second Administrative Reforms Commission in 2008.[115]

However, in the light of the economic conditions and the developmental problems of the country and given the high cost of elections, state funding of elections is not feasible.

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[109] The Companies Act, No. 18 OF 2013, § 182(3), (2013).

[110] AGGARWAL, *supra* note 1, at 104.

[111] MINISTRY OF HOME AFFAIRS, REPORT OF COMMITTEE ON PREVENTION OF CORRUPTION (1964).

[112] Direct Taxes Inquiry Committee, MINISTRY OF FINANCE (1972), http://www.worldcat.org/title/final-report-december-1971/oclc/576533912.

[113]GOVERNMENT OF INDIA, COMMITTEE ON THE STATEFUNDING OF ELECTIONS (Dec 1998).

http://lawmin.nic.in/ld/erreports/Indrajit%20Gupta%20Committee%20Report.pdf.

[114]REPORT 170, *Supra* note 79.

[115]2ND ARC REPORT, *supra* note 85.

Nevertheless, the existing system of giving indirect in-kind subsidies instead of giving money via a National Election Fund should continue.[116]

Despite the presence of strong corporate laws, companies still manage to squeeze out crores in bribes. There is a need for elaborate laws that can effectively monitor corporate donations, bribes and black money paid to political parties and check unlawful actions that companies manage to undertake with ease under current laws.[117]

A mechanism should be evolved to ensure proper maintenance of accounts by candidates and political parties. The NCRWC has noted that "the campaign expenditure by candidates is in the range of about 20 to 30 times the prescribed limits."[118] The flaw in the current law is that while under Section 77 of the RPA a candidate is to maintain an account of expenditures related to elections, the explanation to the section excludes the expenditure incurred by his political party on this account. Thus, the contesting candidates are easily able to show that they are within the prescribed limit, while their political parties incur massive expenditures on their election.[119] Suitable amendments should be brought about to remedy this defect.

All these proposed reforms should be seriously considered to identify the extent to which they can be incorporated to ensure that the proceeds of corruption do not worm their way into funding election campaigns.

c) *Internal Party Democracy- A Necessity*

It has to be admitted that, unlike in some other countries, the founding fathers of the Constitution failed to make suitable provisions in the Constitution to ensure public accountability, transparency and internal democracy in the working of the political parties.[120] Internal party democracy generally refers to the extent to which individual party members are able to express their opinion or participate in decision-making process. It is crucial that the entire decision-making process is not centralized in one organ or one person. Overall, a certain level of

[116] REPORT 255, *supra* note 90.

[117] AGGARWAL, *supra* note 1, at 108.

[118] Ministry of Law and Justice, *Chapter 4, Electoral Processes and Political Parties on "High Cost of Elections and Abuse of Money Power*, NCRWC REPORT (Feb 26, 2010), http://lawmin.nic.in/ncrwc/finalreport/v1ch4.htm [NCRWC REPORT].

[119] AGGARWAL, *supra* note 1, at 128.

[120] MADHAV G, *supra* note 38.

inclusiveness and a certain level of decentralization should be attained in order to democratize any political party.[121]

In modern democracies, political parties are intermediary institutions, which not only help in organizing Parliamentary majorities, but are also the main source and mechanism of candidate recruitment.[122] Political parties, being central actors in representative democracies,[123] play a crucial role in the consolidation of new and young democratic systems.[124]The uprightness with which the political parties are able to fulfill these functions, depends upon the level of internal-party democracy and its structural organization.

(i). SIGNIFICANCE OF INTERNAL PARTY DEMOCRACY

No electoral reforms can be effective without reforms in the political party system.[125] A democracy needs strong and sustainable political parties, that have the features of internal party democracy to reduce the increasing disconnect between the citizens and parties.[126]

Though our Constitution does not provide for the constitution and working of political parties,[127]introducing internal democracy and transparency is important to promote financial and electoral accountability, reducing corruption, and improve democratic functioning of the country.

To understand the importance of ushering in this reform, a reference can be made to the Article 21 of the German Constitution, which facilitates the regulation of the ideology and activities of political parties.[128]It recognizes that political parties themselves must function democratically

[121] HAZAN, REUVEN Y. AND RAHAT, GIDEON (2010): DEMOCRACY WITHIN PARTIES. CANDIDATE SELECTION METHODS AND THEIR POLITICAL CONSEQUENCES, OXFORD: OXFORD UNIVERSITY PRESS.

[122] SARTORI, GIOVANNI (2005): PARTIES AND PARTY SYSTEMS. A FRAMEWORK FOR ANALYSIS, COLCHESTER: ECPR.

[123]KITTILSON, MIKI CAUL AND SCARROW, SUSAN E., POLITICAL PARTIES AND THE RHETORIC AND REALITIES OF DEMOCRATIZATION. IN: CAIN(2003),PP.59-80.

[124] PRIDHAM, GEOFFREY (2011): POLITICAL PARTIES AND THEIR CONSOLIDATION IN POST-COMMUNIST NEW DEMOCRACIES. INDIRECT AND DIRECT IMPACTS FROM EU ENLARGEMENT. IN: LEWIS, P. AND MARKOWSKI, R. EDS.: EUROPEANISING PARTY POLITICS? COMPARATIVE PERSPECTIVES ON CENTRAL AND EASTERN EUROPE.MANCHESTER: MANCHESTER UNIVERSITY PRESS,PP. 44-68.

[125]NCRWC REPORT, *supra* note 116.

[126]AGGARWAL, *supra* note 1, at 100.

[127]REPORT 170,*Supra* note 79.

[128]REPORT 255, *supra* note 90.

before they can be expected to run the system democratically.[129]In Portugal, Article 51 of the Constitution regulates the functioning of the parties by prohibiting regional objectives and requiring internal democracy. [130] Moreover, in Spain, Article 6 read with Article 7 of the Constitution stipulates that the internal structure and functioning of political parties must be democratic; elections to governing bodies should be by secret ballot; and all elected leaders should be democratically controlled.[131]

In India, all the major political parties use highly restrictive methods of candidate and leadership selection. Power is centralized in the hands of a small number of party elites who only have the power to elect the national presidents.[132] The concept of 'high command' developed within parties has only resulted in systematic destruction of democratic structure of the parties.

(ii). DEMOCRATIZING THE POLITICAL PARTIES

While the ECI can ask for information from political parties, it does not have the power to issue guidelines for regulating their functioning. The LCI recommended that in order to bring a sense of discipline and order into the working of the political system and in the conduct of elections, it is necessary to provide by law for the formation, functioning, income and expenditure and the internal working of the recognized political parties both the national and state level."[133]

The political establishment has either not found the time or does not consider it important enough to deliberate upon these recommendations. In fact, they have been completely been put on back burner to cater to the needs of political convenience.[134] The 255th LCI Report has dealt with this issue in great detail and has opined that introducing internal democracy and transparency within parties is important to ensure electoral and financial accountability.[135] It is submitted that the same can be achieved by extending the powers of the ECI to regulate the action and not the ideology of political parties.

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[129]GRUNDGESETZ [GG] [BASIC LAW],http://www.gesetze-im-internet.de/englisch_gg/index.html.

[130]REPORT 255,s*upra* note 90.

[131] *Id.*

[132] AGGARWAL, *supra* note 1, at 100.

[133]REPORT 170, *Supra* note 79.

[134] AGGARWAL, *supra* note 1, at 100.

[135]REPORT 255,*supra* note 90.

PART III: PUTTING INDIA FIRST- A CASE FOR SIMULTANEOUS ELECTIONS

It will not be unreasonable to state that the Indian polity is perpetually in an election mode. Within a normal 5 year tenure of the Lok Sabha, the country witnesses, on an average, elections to about 5-7 State Assemblies every year.[136]

Besides Lok Sabha elections in 2014, polls to about 15 State Assemblies were held during March 2014 – May 2016. In some cases, elections to State Assemblies were announced within a month of concluding elections to other State Assemblies. Such frequent electoral cycles negatively impact administrative and developmental activities in the poll bound regions and the larger governance process in general as well.[137]

I. Concept of simultaneous elections

The term 'simultaneous elections' imply that election to all the three tiers of Constitutional institutions takes place in a synchronized and co-ordinate fashion. What this effectively means is that a voter will cast his vote for electing members for all tiers of the Government on a single day.[138]In such a scenario, a voter would normally cast his vote for electing members of the LokSabha and State Assembly on a single day and at the same time. To clarify further, simultaneous elections do not mean that voting across the country for Lok Sabha and State Assemblies need to happen on a single day but that they are conducted in a phase-wise manner as per the existing practice, provided voters in a particular constituency vote for both State Assembly and Lok Sabha the same day.[139]

II. Need for simultaneous elections

Simultaneous elections would not only help in keeping alive the enthusiasm of the voters, result in huge savings to the public exchequer, control the expenses of political parties but will also

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[136] Bibek Debroy and Kishore Desai, *Analysis of Simultaneous Elections: The "what", "why", & "how" A discussion paper,* NITI AAYOG (Jan 7,2017), http://niti.gov.in/writereaddata/files/document_publication/Note%20on%20Simultaneous%20Elections.pdf [BIBEK DEBROY].

[137]BIBEK DEBROY,*supra* note 136.

[138] *Id.*

[139]*Id.*

help in avoiding repeated enforcement of the Model Code of Conduct (MCC) which affects administrative actions of the government.[140]

The LCI in its report on Reform of Electoral Laws (1999) has suggested simultaneous elections to Lok Sabha and State Legislative Assemblies for the sake of stability in governance, wherein it observed that the same cycle of elections every year, and in the out of season, should be put an end to. The Report suggests that the citizens should return to the circumstance where the elections to Lok Sabha and all the Legislative Assemblies are held simultaneously i.e. holding of a different election to a Legislative Assembly ought to be an exception and not the rule. The rule ought to be one election once in five years for Lok Sabha and all the Legislative Assemblies.[141]
The key adverse impacts that the existing electoral cycle leads to can be broadly categorized as follows:

a) *Impact on development programs and governance due to imposition of Model Code of Conduct*

The Model Code of Conduct (MCC) lays down several dos and don'ts that political parties, contesting candidates and the party in power have to strictly abide by during election time.[142] Frequent elections lead to frequent imposition of the MCC, resulting in policy paralysis and governance deficit.[143] The Parliamentary Standing Committee in its 79th report observed that the imposition of the MCC puts the entire development program on hold and affects normal governance by curbing Government activities in poll bound states.[144]

b) *Recurring elections prompt massive expenditures by Government and other stakeholders*

Every year, the Central and the State Governments bear huge expenditures on account of conduct, control and supervision of elections. Candidates and political parties end up spending significantly more than the prescribed expenditure limits, which is one of the key drivers for corruption and black-money in the country. After winning elections, the politician-bureaucrat nexus indulges in "recovering the investment" and this marks the inception of corruption[145].

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[140] ELECTION COMMISSION OF INDIA, FIRST ANNUAL REPORT 1983.

[141] REPORT 170, *Supra* note 79.

[142] ELECTION COMMISSION OF INDIA, MODEL CODE OF CONDUCT FOR THE GUIDANCE OF POLITICAL PARTIES AND CANDIDATES 7 (2007).

[143] COMMITTEE ON PERSONNEL, PUBLIC GRIEVANCES, LAW AND JUSTICE , 79TH REPORT, FEASIBILITY OF HOLDING SIMULTANEOUS ELECTIONS TO THE HOUSE OF PEOPLE (LOKSABHA) AND STATE LEGISLATIVE ASSEMBLIES 3 (2015) [79TH REPORT].

[144] *Id.*

[145] BIBEKDEBROY, *supra* note 136.

Recently, the Honorable Prime Minister also observed that simultaneous elections are the indispensible to curb the influence of black money on elections[146]

c) *Engagement of security forces for significantly prolonged periods.*

Conducting elections is a mammoth, complex and time consuming activity. The ECI takes help of a significant number of polling officials as well as armed forces to ensure smooth, peaceful and impartial polls. For providing the requisite security arrangements, the ECI generally involves the Central Armed Police Forces (Hereinafter, "CAPF"). In the elections to the 16th Lok Sabha, the ECI deployed 1349 companies of CAPFs.[147] The role of such security forces starts much before polling and ends only after the counting of votes and declaration of results.

Considering that about two to five State Assemblies go to polls in every six months, the situation leads to a lock-in of CAPF and state police forces for prolonged periods of time. Simultaneous Elections would help in freeing up this crucial manpower,[148]enabling it to be better deployed for other internal security purposes – the basic responsibilities for which these forces were developed for.[149]

III. An appraisal of the critics of simultaneous elections

The key criticisms cited against holding simultaneous elections are-

a) *Operational feasibility:*

This covers constitutional and statutory challenges such as synchronizing the terms of the Assemblies/ Lok Sabha, extending or curtailing the existing terms of State Assemblies, adjudging the feasibility of conducting elections at such a massive scale – considering logistics, security and manpower resource requirements.

Critics have become more vociferous since the current government has braced the idea of simultaneous elections. [150] In response to these criticisms, the Union Minister of Urban

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[146] IANS, *Electoral Reforms necessary to curb black money: Modi,* BUSINESS STANDARD (June 27, 2016), http://www.business-standard.com/article/news-ians/electoral-reforms-necessary-to-curb-blackmoney-modi-116062701266_1.html.

[147] ELECTION COMMISSION OF INDIA, INDIA VOTES – THE GENERAL ELECTIONS 28-30, (2014).

[148]79TH REPORT, *supra* note 143.

[149] Prakash Nanda, Why *Simultaneous Election is a great idea,* UDAY INDIA(Oct. 22, 2017) http://udayindia.in/2017/10/22/simultaneous-elections-great-idea-2/.

[150]SuhasPalshikar, *Designing to Distort: Simultaneous Elections,* ECONOMIC AND POLITICAL WEEKLY (Mar. 17, 2018) http://www.epw.in/journal/2018/11/power-and-politics/designing-distort.html.

Development has noted that the fear that holding simultaneous elections would affect the federal nature of the Indian polity are completely unfounded and in fact would help in better coordination between the governments at the Centre and in various States.[151]

Former CEC, Dr. S. Y. Quraishi has also stated that as regards to logistical and administrative feasibility, simultaneous elections would be most convenient for the ECI since voters, polling personnel and polling booth are all going to be the same, it does not matter if the voter is casting his vote for one election or two or three.[152]

Further, precedents of simultaneous elections in other countries can be cited to show that the idea is not a utopian concept, incapable of implementation. In South Africa, elections to national as well as provincial legislatures are held simultaneously. In Sweden, election to National Legislature and provincial legislature/county council and local bodies/municipal assemblies are held on a fixed date.[153] Further, in Australia, the Constitution Alteration (Simultaneous Elections), 1977 referendum was held in the 1977 which sought to amend the Australian Constitution to ensure that elections for both the Houses of Parliament occur simultaneously.[154]

b) *Impact on voter behaviour:*

The primary hypothesis of this criticism is that voters are not mature and informed enough to differentiate between the voting choices for State Assembly and Lok Sabha. This situation could lead to – a) National issues impacting the electorate's behavior for voting in State Assembly elections; or b) State issues impacting the electorate's behaviour for voting in the Lok Sabha elections. As a result, voter behaviour is influenced and he may vote for the same political party, which in most cases may be larger national parties.[155]

This criticism does not hold ground, as the inherent democratic nature of the Indian governance framework does not make any politician a "permanent member" of a legislature. Every politician

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[151] M. Venkaiah Naidu, *Breaking out of Election mode,* THE HINDU (Mar. 10, 2016), http://www.thehindu.com/opinion/op-ed/Breaking-out-of-election-mode/article15422727.ece.

[152] Bhupender Yadav, *Should India have simultaneous elections?,* THE HINDU (Feb 02 2018), http://www.thehindu.com/opinion/op-ed/should-india-have-simultaneous-elections/article22625444.ece.

[153] 79TH REPORT, *supra* note 143.

[154] Australian Referendum 1977 (Simultaneous Elections).

[155] BIBEK DEBROY, *supra* note 136.

has to go back to the electorate once his term is over.[156] This inherent nature strongly ensures his accountability to the electorate.

Together, these aspects accentuate the need to evolve a mechanism to stop this cycle of multiple elections every year and present a strong case for holding simultaneous elections, which will ensure consistency, continuity in governance and reinvigorate the Indian politics.

CONCLUDING REMARKS

Elections in India are not a new phenomenon. Taking decisions to run affairs, whether at the family or the community level, collectively with the consensus of all concerned, has been a pervading philosophy in the Indian way of life.[157] Free and fair elections are the main springs of a healthy democratic life and a barometer of its strength and vitality.[158]A hard-core legal positivist like Hart believed that there is a minimum content of morality that a legal system must incorporate. However, this minimum morality vanishes when we enter the realm of politics. Over years, the Indian political scenario has observed a deep and distressing decline in the moral compass of political parties.

For India, to truly become a "Sovereign, Socialist, Secular and Democratic Republic", it is imperative that its political masters usher in an era of political reforms. The election administration must demonstrate respect for the law and be non-partisan and neutral. Electoral reforms are a dynamic and continuous process and all stakeholders must take strides in that direction incessantly. Electoral reforms are pre-requisite for all other reforms, and we cannot afford to ignore them. In fact, we should proceed further with renewed vigour to get these reforms implemented by building consensus among all stakeholders, be it political parties, political elites, the civil society and most importantly, our citizens.

[156] *Id.*

[157] DEVI &MENDIRATTA, *Supra* note 5, at 3.

[158] *Supra* note 2.