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**THE OMNIPRESENCE OF POLITICAL PARTIES IN INDIA'S
DEMOCRATIC LANDSCAPE: BUILDING A CASE FOR
FUTURE CONSTITUTIONALISATION**

RITWIK SHARMA¹ & MAYURI GUPTA²

Political parties have emerged as pivots to democratic governance and democratisation. In India, parties are not only vehicles to win elections or represent politically diverse views but also a bridge between the state and its people, coordinating between public opinion and the policies of the government. Unlike other democratic institutions, parties enjoy direct and simultaneous access to the people as well as the government. Employing their relations at both ends, parties prepare 'election manifestos', which are eventually put into practice by the party that comes into power. Although state capacity is essentially exercised by the government, its functioning is equally dependent on the ideologies of the party (or parties) forming the government. Considering that India follows a Westminster-style parliamentary system of government, the influence of party organisation and ideology never fades away. Opposition parties, on their part, act as watchdogs to keep the government and its policies in check.

Although democracy is unimaginable without parties, they have remained largely unregulated in India. Constitutional theory in India has maintained an implausible silence on parties. While their initial absence from the Indian Constitution can be attributed to influences of the British and American Constitutions, no subsequent legislative interventions were made until the introduction of the anti-defection law in 1985. The Tenth Schedule (India's anti-defection law) was inserted into the Constitution by the Fifty-second Amendment Act, 1985. This law, however, only gives indirect recognition to parties, regulating (if at all) defections by individual members of any house.

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¹ Ritwika Sharma is a Senior Resident Fellow at the Vidhi Centre for Legal Policy, Delhi and leads Charkha, Vidhi's Constitutional Law Centre.

² Mayuri Gupta is the Milon K. Banerji Research Fellow at Charkha.

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The primary focus of the statutory election law also continues to be individual candidates. Consequently, despite the multiple crises faced and caused by Indian political parties, a constitutional and regulatory vacuum continues with respect to them. With elections becoming alarmingly expensive, transparency in matters of party funding remains a cause for concern. Simultaneously, the absence of adequate intra-party democracy has, on certain occasions, prompted elected legislators to depart ways from the parties which fielded them as electoral candidates. Such movements have raised concerns about the efficacy of the anti-defection law, while also triggering wider conversations about enforcing discipline among political parties. Given the significant position of parties as institutions of democracy and their influential role in the exercise of state capacity, their regulation has become imperative. This article examines the role of parties in electoral democracy and their influence on democratisation and state capacity and it argues in favour of their constitutionalisation and regulation in India.

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INTRODUCTION

Historically, and especially since the end of the Second World War, political parties have remained crucial for democracies to function.³ Simultaneously, the workings of political parties as well as interactions between them are crucial to understanding how constitutions work or do not work.⁴ In Weimar Germany of the mid-to-late 1920s, the instability of the party system as well as the unfurling of its constitutional order are presumed to be the reasons for its inability to arrest the rise of fascism.⁵ Most modern

³ RUSSELL J. DALTON ET AL., POLITICAL PARTIES AND DEMOCRATIC LINKAGE: HOW PARTIES ORGANIZE DEMOCRACY, at 5-6 (2011).

⁴ Cindy Skach, *Political Parties and the Constitution*, 1 THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 874, 875-876 (2012).

⁵ *Id.* at 876.

democracies now witness the outsized role of political parties in representative governance, regardless of whether an electoral contest is underway. In fact, some European democracies that emerged after the Second World War, such as Spain, have explicitly identified parties as crucial instruments for the expression of “*political pluralism*”.⁶

India, of course, is no different. The dance of Indian democracy relies heavily on the tune played by political parties. With six recognised national parties⁷ and fifty-four recognised state parties,⁸ representative governance in India relies heavily on the institution of the political party. Parties are indispensable to the functioning of the political system in a democracy, a fact that has also been acknowledged by the Supreme Court of India.⁹ In recent times, however, rather paradoxically, while parties remain crucial to the working of the democratic system, they are simultaneously weakening as agents of democratic representation.¹⁰ Political parties present a puzzle – while parties are instrumental in democratising the state and society, they are themselves marred by dwindling internal democracy.¹¹

For any institution, assuming a pivotal position in a functioning democracy must come with its share of responsibilities. Other institutions in India that are crucial for the sustenance of a democratic order, such as the Parliament, the Cabinet, and the Supreme Court, find mention within the Constitution. They are products of intense deliberation among the drafters of the Constitution, with their composition and functions detailed within its text. These institutions exist within a carefully crafted constitutional scheme of

⁶ Ingrid van Biezen, *Constitutionalising Party Democracy: The Constitutional Codification of Political Parties in Post-war Europe*, 42(1) BR. J. POLIT. SCI. 187, 197 (2004) (“**Biezen I**”).

⁷ ELECTION COMMISSION OF INDIA, NO.56/2023/PPS-II (NP) <https://eci.gov.in/files/file/14999-commissions-main-notification-dated-15052023-containing-list-of-national-parties-their-symbols-and-addresses/>.

⁸ ELECTION COMMISSION OF INDIA, NO.56/2023/PPS-II (SP) <https://eci.gov.in/files/file/15000-commissions-main-notification-dated-15052023-containing-list-of-state-parties-their-symbols-and-addresses-english/>.

⁹ *Desiya Murpokku Dravida Kazhagam v. Election Commission of India*, (2012) 7 SCC 340 (India).

¹⁰ Biezen I, *supra* note 6, at 189. See also Ingrid van Biezen, *How Political Parties Shape Democracy*, UC IRVINE: CENTER FOR THE STUDY OF DEMOCRACY (2004) <https://escholarship.org/uc/item/17p1m0dx> (“**Biezen II**”).

¹¹ K C Suri, David Hundt & Carolyn Elliott, *Democracy, Governance and Political Parties in India: An Introduction*, 4(1) STUD. INDIA POL. 1, 6 (2016) (“**Suri I**”).

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checks and balances. Even the Election Commission of India (“ECI”), a crucial driver of the nation’s democratic health, is a product of the Constitution.¹²

It may, of course, be unfair and illogical to make similar arguments for constitutionally regulating political parties. Parties are, after all, characterised as private associations formed by the coming together of voluntary individuals. Given their relationship with the state and the functions they perform, parties effectively lie at the intersection of the public-private divide. This duality of their nature and existence cannot be reason enough to fully keep political parties outside the realm of constitutionalisation, especially given the challenges they currently face as well as pose to democratic governance in India.

Political parties have been the subject of consistent analysis in electoral studies but have rarely been studied as well in constitutional and public law.¹³ To that end, this article analyses the institution of political parties against the backdrop of the Constitution. The first part of this article begins with a description of the current scheme of the Constitution and the election laws in force and how they deal with political parties. This analysis is crucial to understanding who or what these laws intend to regulate – the conduct of individual candidates or the functioning of political parties. Following that, the second part delves into the role of political parties in democratic governance in India. Parties, the ones in power as well as the ones outside it, are pivotal to governance and policy-making in India. In a parliamentary system, the opposition serves as a watchdog by constructively criticising the policies and decisions of the government, both inside and outside of the Parliament, and holding the government responsible for its actions.¹⁴ Thus, in many ways, they are at the fulcrum of

¹² INDIA CONST. art. 324.

¹³ Mobrand rues the absence of political parties from studies in public law in Asia. See Erik Mobrand, *Constitutionalisation of Political Parties in East and Southeast Asian Democracies* (NUS Centre for Asian Legal Studies, Working Paper No. 18/05, 2018), <https://law.nus.edu.sg/wp-content/uploads/2020/04/CALS-WPS-1805.pdf>.

¹⁴ Devandra Kumar, *Role of Opposition in a Parliamentary Democracy*, 75(1) INDIAN J. POLIT. SCI. 165, 166-167 (2014).

how democracy is brought to life. An institution as crucial to democracy as a political party must carve a space for itself in the Constitution. The third part deals with the issue of constitutionalisation head-on. It starts with a comparative analysis of how certain European and Asian constitutions approach political parties. This part ends with certain principles that can throw a guiding light on how India can consider constitutionalising political parties. The article ends with a conclusion which summarises the findings and suggestions.

STATUS OF POLITICAL PARTY REGULATION IN INDIA

It would be naïve to think that political parties have been inadvertently left outside the purview of modern constitutional law, or beyond regulation generally. As mentioned earlier, parties inherently lie at the intersection of private law and public law. Despite being private associations formed by the voluntary coming together of individuals, parties can be categorised as a “*public utility*”, owing to the functions they perform.¹⁵ Consequently, parties continue to get pulled in multiple directions. For instance, as voluntary associations, parties remain entitled to certain freedoms, but simultaneously, their special ties with the state open them up to a certain degree of regulation.¹⁶ Recent academic scholarship has been geared towards identifying and conceptualising political parties as quasi-public bodies, primarily because of their closeness with the state.¹⁷ Needless to say, the extent of parties’ roles in the state’s performance of its functions has expanded over the decades.

Given the backdrop concerning political parties, it is imperative to glean over the scheme of regulatory framework — both constitutional and legislative — that political parties are currently subject to. This part commences with a brief description of what transpired in the Constituent

¹⁵ Biezen II, *supra* note 10, at 2.

¹⁶ Mobrand, *supra* note 13, at 15.

¹⁷ For a general discussion on this theme, see Udit Bhatia, *What’s the Party Like: The Status of the Political Party in Anti-Defection Jurisdictions*, 40(3) LAW & PHILOS. 305, 305-334 (2021); Udit Bhatia & Fabio Wolkenstein, *Freedom of Speech Within Political Parties*, 13(4) EPSR 431, 431-448 (2021).

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Assembly when political parties came up for discussion and is followed by a discussion of relevant constitutional and statutory provisions.

A. THE CONSTITUENT ASSEMBLY — WHERE DID THEY LAND ON POLITICAL PARTIES?

As mentioned earlier, after the Second World War, several nations recognised the relevance of political parties as vehicles of democratic governance and made express provisions in their constitutions concerning political parties.¹⁸ In fact, several European, Asian, and African Constitutions expressly mention parties in the text of their constitutions.¹⁹ Parties existed in India at the time of Independence — in fact, India experienced elections contested along party lines even before the Constituent Assembly was formed.²⁰ Thus, when the making of our Constitution began, the Constitution framers were aware of both the significance of political parties in a constitutional democracy as well as the intersection of political dynamics and constitutional arrangements.²¹ Political parties were mentioned several times in the Constituent Assembly, some instances of which merit attention.

Aradhya Sethia, a doctoral candidate at the University of Cambridge, has helpfully charted a constitutional biography of political parties.²² Sethia's work references a statement by Dr. Sachchidananda Sinha (the then-Provisional Chairman of the Constituent Assembly), which traced the

¹⁸ Biezen II, *supra* note 10, at 1.

¹⁹ See Biezen II, *supra* note 10; see also Mobrand, *supra* note 13.

²⁰ Indian National Congress, All India Muslim League, and All India Hindu Mahasabha were the three prominent political parties at the time of independence. Pre-independence elections to provincial assemblies in 1935 and 1946 were contested on party lines. Although elections were contested on party tickets before 1935 also, partisanship became more pronounced after the 1935 election. See A. Avasthi, *Political Parties in India*, 12(1) INDIAN J. POLIT. SCI. 6, 6–12 (1951); William Vanderbok & Richard Sisson, *Parties and Electorates from 'Raj' to 'Swaraj': A Historical Analysis of Electoral Behavior in Late Colonial and Early Independent India*, 12(2) SOC. SCI. HIST. 121, 121-142 (1988); Aradhya Sethia, *Where's the Party? Towards a Constitutional Biography of Political Parties*, 3(1) IND. L. REV. 1, 25 (2019).

²¹ Sethia, *supra* note 20, at 26.

²² Sethia, *supra* note 20.

legitimacy of the Assembly to its acceptance by political parties. In his opening statement at the first meeting of the Assembly, Dr. Sinha stated:

*“...the idea of a Constituent Assembly, as the only direct means for the framing of a constitution in this country, came to be entertained and accepted by the two major political parties in 1940.”*²³

The framers of the Indian Constitution were influenced by the prevailing historical trend in the constitutions of many common law democracies, such as the United States of America (“USA”) and Great Britain, that considered the rise of large political parties undesirable. This becomes evident from the mentions of the American and British systems on several occasions in the Constituent Assembly Debates.²⁴ While discussing the principle of separation of powers in the Assembly, K. Hanumanthaiya voiced his concerns on how political parties have altered the actual functioning of the American Constitution. He noted how the party system, dominated by two parties, had softened the rigour of the separation of powers (between the governmental organs).²⁵ So, despite the American Constitution advocating for a strict separation of powers, the working of the party system irons out potential conflicts that may arise between the three branches of government.²⁶ Essentially, Hanumanthaiya alluded to the fact that the strict separation principle in the USA, which was meant to keep the different governmental branches in check, can get undone by the practical functioning of political parties. If the same party is in majority in the executive as well as the legislature in the USA, their conflicts may get resolved at their respective party meetings, thereby reducing the scope of inter-branch conflict.²⁷ Needless to say, political parties and their conduct are crucial in determining the workings of any constitution itself.

²³ 1, LOK SABHA SECRETARIAT, CONSTITUTIONAL ASSEMBLY DEBATES, DEC. 09, 1946 *speech by SACHIDANANDA SINHA*, www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-09.

²⁴ 7 LOK SABHA SECRETARIAT, CONSTITUTIONAL ASSEMBLY DEBATES, DEC. 10, 1946, <https://www.constitutionofindia.net/debates/10-dec-1948/>.

²⁵ 7 LOK SABHA SECRETARIAT, CONSTITUTIONAL ASSEMBLY DEBATES, DEC. 10, 1946 *speech by K. HANUMANTHAIYA*, <https://www.constitutionofindia.net/debates/10-dec-1948/>.

²⁶ *Id.*

²⁷ *Id.*

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Further, recognising the relevance of political parties, Dr. B.R. Ambedkar, Chairman of the Drafting Committee of the Constitution, in his concluding remarks at the Assembly, distinctly stated that the working of the organs of the state depends on the people and the political parties they will set up.²⁸

In the end, however, the original text of the Constitution maintained silence on political parties and did not carry any provision for regulating them or laying down principles for their composition.

However, the existence of political parties was implicit in the nature of democratic government, which India had adopted under the Constitution.²⁹ Elections in India were always fought on party lines.³⁰ Why political parties found no mention in the constitutional text has remained difficult to answer.

The non-recognition of political parties in our constitutional text is now being taken up with curiosity due to the significance of the Constitution in creating a basic structure within which the political system of the country operates.³¹

B. TRACING POLITICAL PARTIES IN THE CONSTITUTION

Dr. Tarunabh Khaitan, in his analysis of political parties against constitutional theory, emphasises on the normative distinction between “*big-C*” constitutional codes and “*small-c*” constitutional statutes.³² In common parlance, while the big-C constitution refers to the formal, written

²⁸ 12 Lok Sabha Secretariat, Constitutional assembly debates, Nov. 25, 1949 *speech by* Dr. B.R. Ambedkar, www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25.

²⁹ Kanhiya Lal Omar v. R. K. Trivedi and Ors., (1985) 4 SCC 628 (India).

³⁰ V.S. RAMA DEVI & S.K. MENDIRATTA, HOW INDIA VOTES: ELECTION LAWS, PRACTICE AND PROCEDURE 443 (3rd ed. 2013).

³¹ ANIKA GAUJA, POLITICAL PARTIES AND ELECTIONS – LEGISLATING FOR REPRESENTATIVE DEMOCRACY 28 (1st ed. 2016).

³² Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73(1) CURRENT LEGAL PROS. 89, 90 (2020).

constitution of a nation, the small-c refers to the other sources of constitutional law, such as conventions, judicial precedents, constitutional statutes, and the like.³³ Although political parties emerged as prominent players in Indian polity, they found no mention in the Constitution (or the big-C constitutional code) of India.

In other words, political parties remained “*constitutional externalities*”³⁴ in India until the provisions regulating political defections were added as the Tenth Schedule to the Constitution in 1985.³⁵ The anti-defection law, introduced through the Constitution (Fifty-second Amendment) Act, 1985, made an incidental reference to political parties in the context of disqualification of defecting legislators³⁶. The Tenth Schedule was inserted as a reaction to the rise in political defections among elected members of the Parliament and members of state legislatures.³⁷ In 1967, the Parliament set up a “*Committee on Defections*”³⁸ under the chairmanship of the then Union Home Minister, Y. V. Chavan, consisting of representatives of political parties and constitutional experts “*to consider the problem of legislators changing their allegiance from one party to another and their frequent crossing of the floor in all its aspects and make recommendations in this regard.*”³⁹ To give effect to the recommendations of the Committee, the Tenth Schedule was inserted into the Constitution.

As per the amendment, an elected member of the House (either the House of Parliament or a State Legislature) may be disqualified in case they cross the floor in one of the following ways:

³³ *Id.* at 91.

³⁴ Sethia, *supra* note 20, at 27.

³⁵ INDIA CONST. sch. 10.

³⁶ INDIA CONST. sch. 10, § 1 cl.(b), §1 cl.(c), §2, §4, §5 and §8.

³⁷ *Constitution (Fifty-Second Amendment) Bill*, LOK SABHA DEBATES, https://eparlib.nic.in/bitstream/123456789/319/1/lcd_08_1_30-01-1985.pdf.

³⁸ MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA, REPORT OF THE COMMITTEE ON DEFECTIONS 1967 <https://indianculture.gov.in/flipbook/2558>.

³⁹ G.C. MALHOTRA, ANTI-DEFECTION LAW IN INDIA AND THE COMMONWEALTH 6 (1st ed. 2005).

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- (i) If a member of a House belonging to any political party voluntarily gives up membership of such party, or if they vote in the House against such party's whip;⁴⁰
- (ii) If a member elected as an independent candidate joins any political party after the election;⁴¹ and
- (iii) If a nominated member of a House joins any political party after the expiration of six months from their nomination.⁴²

The disqualification on grounds of defection, however, was not attracted in the cases of “*split*” and “*merger*” between political parties.⁴³

The anti-defection law makes only a peripheral reference to political parties to the extent of regulating defection by a sitting legislator who forms part of a party. Although the insertion of the Tenth Schedule marked the recognition of political parties under the constitutional text, it is at best an indirect recognition, granted only for the purpose of implementing the anti-defection law.⁴⁴ Thus, the amendment recognises political parties only within the framework of anti-defection, without reference to any other issue regarding their working.

The constitutional validity of the Tenth Schedule was challenged before the Supreme Court in 1992 in the case of *Kihoto Hollohan v. Zachillhu*.⁴⁵ A majority of judges in a five-judge bench of the Supreme Court upheld the validity of the anti-defection law while making pertinent observations on political parties. Speaking for the majority, Justice M.N. Venkatachaliah observed how a political party presents a programme to the electorate and sets up candidates for the election based on that programme.⁴⁶ The candidate, in turn, is elected by the electorate on the basis of the

⁴⁰ INDIA CONST. sch. 10, § 2 cl.(1)(a) and § 2 cl.(1)(b).

⁴¹ INDIA CONST. sch. 10, § 2 cl. (2).

⁴² INDIA CONST. sch. 10, § 2 cl. (3).

⁴³ INDIA CONST. sch. 10, § 3 & § 4. Paragraph 3, which dealt with “splits” within political parties, was omitted by the Constitution (Ninety-first Amendment) Act 2003.

⁴⁴ RAMA DEVI & MENDIRATTA, *supra* note 30, at 547.

⁴⁵ *Kihoto Hollohan v. Zachillhu*, (1992) Supp (2) SCC 651 (India).

⁴⁶ *Id.* ¶13.

programme of that party.⁴⁷ Observations like these signified how the Tenth Schedule marked an important departure in the constitutional position on representative democracy. The anti-defection law, arguably, marked a significant shift from the candidate-centred approach to democracy in the Constitution to a party-centred approach.⁴⁸ This was evident from how the anti-defection law was written about and conceived. A rather succinct instance of this occurs in the judgement of the Bombay High Court in *Narsinghbrao Gurunath Patil v. Arun Gujarathi, Speaker*.⁴⁹ When faced with competing concerns around the freedom of speech of elected legislators and the need to duly implement the Tenth Schedule, the High Court held thus:

*“...it is clear that the freedom of speech of a member is not an absolute freedom. The electorate essentially votes for a party and the legislature mainly consists of parties. It is the party which decides whether they sit on the Government side or opposition side. It is because of the party that the members are in the House. To abstain from voting when required by the party is to suggest a degree of unreliability. To vote against the party is disloyalty. To join with others in abstaining or voting for other side smacks of conspiracy. For legislator whose party is in the Government, to vote against the Government is to vote against the party; to rebel against the Government is to leave the party....”*⁵⁰

The National Commission to Review the Working of the Constitution also alludes to how candidates get elected on the basis of the party that gave them a ticket, and defections allow candidates to move away from that basis.⁵¹ Essentially, the view that has come to be established is that non-allegiance to one’s political party is to be penalised, even if it prejudices an individual legislator’s freedom of expression. The political party is vital to the formation of a government. Individual candidates become part of the government by virtue of their membership of a certain party. Essentially,

⁴⁷ *Id.* ¶13.

⁴⁸ Sethia, *supra* note 20, at 22.

⁴⁹ *Narsinghbrao Gurunath Patil v. Arun Gujarathi, Speaker*, (2003) 105 (3) Bom LR 354 (India).

⁵⁰ *Id.* ¶ 67.

⁵¹ MINISTRY OF LAW & JUSTICE, GOVERNMENT OF INDIA, Report of the National Commission to Review the Working of the Constitution, Electoral Processes and Political Parties, ¶ 4.18 <https://legallaffairs.gov.in/sites/default/files/chapter%204.pdf>.

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their foremost allegiance is to the party they belong to, and their individual freedoms remain subservient to the interests of the party.

C. WHAT LIES OUTSIDE THE CONSTITUTION

The Representation of the People Act, 1951 (“**RP Act, 1951**”),⁵² the statute governing election processes in India, was enacted much before the introduction of the Tenth Schedule in 1985. Although political parties were mentioned in several instances during the debate on the Representation of the People Bill, 1951, the statute by itself did not seek to explicitly regulate political parties.⁵³ This becomes clear from both the debates on the bill as well as its Statement of Objects and Reasons.⁵⁴

Till now, all disqualifications under the RP Act, 1951, whether it be disqualification from membership of Parliament or state legislatures⁵⁵ (such as disqualification for conviction under certain offences,⁵⁶ for corrupt practices,⁵⁷ for corruption to the state,⁵⁸ for entering into a subsisting government contract⁵⁹) or disqualification from voting⁶⁰ (on grounds of conviction for an offence and indulging in corrupt practices⁶¹), are aimed towards individuals. The RP Act, 1951, does not provide for the regulation

⁵² The Representation of People Act, 1951, No. 42, Acts of Parliament, 1951 (India).

⁵³ *Representation of the People (No. 2) Bill*, PARLIAMENTARY DEBATES, https://eparlib.nic.in/bitstream/123456789/760579/1/ppd_09-05-1951.pdf.

⁵⁴ Statement of Objects and Reasons of the Representation of the People Bill, 1951 reads thus: “*That the Bill to provide for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt and illegal practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections, as reported by the Select Committee, be taken into consideration.*”

⁵⁵ The Representation of People Act, 1951, Part II, Chapter 3, No. 42, Acts of Parliament, 1951 (India).

⁵⁶ *Id.* § 8.

⁵⁷ *Id.* § 8A.

⁵⁸ *Id.* § 9.

⁵⁹ *Id.* § 9A.

⁶⁰ *Id.* Part II Chapter IV.

⁶¹ *Id.* § 11A.

of political parties for electoral malpractice or any offences,⁶² or in relation to electoral finances and non-disclosure of electoral expenditure. This is reflected in Dr. Ambedkar's statement made in May 1951, while introducing the Representation of the People Bill before the Provincial Parliament, where he firmly asserted that only expenses made by political parties towards the advancement of any candidate(s) during the period of election shall become part of the election expenditure of such candidate(s).⁶³

Thus, the RP Act, 1951 only regulates expenses by an individual candidate.⁶⁴ Besides a few amendments concerning the registration of political parties with the ECI,⁶⁵ entitlement to accepting contributions,⁶⁶ declaration of donations above twenty thousand rupees,⁶⁷ and allocation of election symbols,⁶⁸ political parties have primarily remained outside the realm of regulation even under the small-c codes (which primarily refer to the RP Act, 1951) in India.

On its part, the Supreme Court of India has also recognised the relevance of political parties for representative democracy.⁶⁹ It has also taken note of the current regulatory scheme that governs political parties in India. In one such case, *Kanhiya Lal Omar v. RK Trivedi*,⁷⁰ the Supreme Court noted that the existence of parties was implicit in the nature of the democratic system that India adopted.⁷¹ The working parts of the political system, the Court

⁶² *Id.* § 123.

⁶³ B. R. Ambedkar, Provincial Parliament 8368-8369 (May 9, 1951) https://eparlib.nic.in/bitstream/123456789/760579/1/ppd_09-05-1951.pdf.

⁶⁴ The Representation of People Act, 1951, § 77, No. 42, Acts of Parliament, 1951 (India).

⁶⁵ *Id.* § 29A.

⁶⁶ *Id.* § 29B.

⁶⁷ *Id.* § 29C.

⁶⁸ The Election Symbols (Reservation and Allocation) Order, 1968, India Code, https://upload.indiacode.nic.in/showfile?actid=AC_CEN_3_81_00001_195143_15178_07327542&type=order&filename=Election%20Symbol%20Order,%201968.pdf.

⁶⁹ *Kihoto Hollohan v. Zachillhu*, (1992) Supp (2) SCC 651 (India); *Desiya Murpokku Dravida Kazhagam v. Election Commission of India*, (2012) 7 SCC 340 (India); *State NCT Delhi v. Union of India*, (2018) 8 SCC 501 (India).

⁷⁰ *Kanhiya Lal Omar v. R. K. Trivedi and Ors.*, (1985) 4 SCC 628 (India).

⁷¹ *Id.* ¶ 10.

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observed, are based on “*systematised differences and unresolved conflicts*” between parties.⁷²

While the Supreme Court alludes to the recognition of political parties by the Constitution, the fact remains that this recognition is in the specific (and limited) context of the anti-defection law. Also, several aspects of political party regulation have not been conclusively decided upon by the judiciary or await hearing. For instance, issues related to the regulation of political parties with respect to irrational campaign promises and the promise of distribution of electoral freebies,⁷³ disclosure of information under the Right to Information Act, 2005,⁷⁴ disclosure of the sources of party funding, transparency on matters concerning the sale of electoral bonds,⁷⁵ intra-party democracy,⁷⁶ and concerns surrounding the practise of bulk defections by legislators⁷⁷ are a few areas that have remained highly controversial in the absence of a strong judicial position.

Several aspects concerning political parties, which have a tremendous bearing on the sanctity of electoral democracy in the country, beg for answers. Despite serving as an inevitable link between the people and the government, political parties remain outside the purview of direct constitutional recognition in India. But why do political parties, which are voluntary associations, need regulation of some kind? The following part attempts to shed light on this concern.

⁷² *Id.* ¶ 10.

⁷³ Mayuri Gupta, *Freebies debate highlights the limits of judicial overreach*, THE LEAFLET (Oct. 10, 2022). <https://theleaflet.in/freebies-debate-highlights-the-limits-of-judicial-overreach/>.

⁷⁴ Jagdeep S Chhokar, *Saying “Political Parties Need Not Reveal Funding Sources” Kills the Spirit of RTI Act*, THE WIRE (Dec. 25, 2020) <https://thewire.in/rights/political-parties-public-interest-means-reversing-gains-made-rti-act>.

⁷⁵ *Id.*

⁷⁶ Indian National Congress (I) v. Institute of Social Welfare & Ors., (2002) C.A. Nos. 3320-3321 (India); see Deeksha Bhardwaj, *Delhi high court seeks EC's response on plea to regulate internal party polls*, HINDUSTAN TIMES (Oct. 29, 2021) <https://www.hindustantimes.com/india-news/delhi-high-court-seeks-ec-s-response-on-plea-to-regulate-internal-party-polls-101635476990841.html>.

⁷⁷ Jayashankara Gowda v. Chief Secretary, (1988) ILR KAR 1005 (India).

POLITICAL PARTIES AND DEMOCRATIC GOVERNANCE

A. POLITICAL PARTIES, STATE CAPACITY AND DEMOCRATISATION

Political parties have enjoyed a prominent status in Indian representative democracy since before Independence. This status was only enhanced when the framers of the Constitution adopted a Westminster-style parliamentary government for the nation. The parliamentary form inherently furthers a party-style government.⁷⁸ The executive remains directly accountable to the legislature, with the Prime Minister being directly elected by a majority in Parliament, the Prime Minister appointing their cabinet, and members of the cabinet being selected from among members of Parliament.⁷⁹

State capacity may be broadly understood as the ability of the state, as an institution, to preserve law and order, enact and enforce policies for welfare and development, and deliver certain necessary benefits and services to citizens.⁸⁰ Much of this function is performed through the instrumentality of the political party. It is through the agency of political parties that democratically elected governments realise their objective of governance.⁸¹ Scholarship in political science now considers the role of political parties as between citizens and the state as a given.⁸² In fact, in complex and heterogeneous societies, democratic government is made possible by political parties operating at their utmost.⁸³ It then becomes crucial for parties to deliver governance in a way that promotes democracy and civic well-being.⁸⁴ Some of the avowed aims of political parties can be summed up thus:

“...As part of this chain, political parties serve to reconcile and aggregate diverse and often conflicting interests in society; to provide an arena for citizen

⁷⁸ Sethia, *supra* note 20, at 9.

⁷⁹ *Id.*

⁸⁰ Francesca Refsum Jensenius & Pavithra Suryanarayan, *Fragmentation and Decline in India's State Assemblies: A Review: 1967-2007* 55(5) ASIAN SURV. 862, 863 (2015).

⁸¹ Suri I, *supra* note 11, at 1–2.

⁸² GAUJA, *supra* note 31, at 30.

⁸³ Kate O'Regan, *Political Parties: The Missing Link in our Constitution* 1(1) S. AFR. JUD. EDUC. J. 61, 65 (2018). In this article, O'Regan writes about political parties in South Africa.

⁸⁴ Suri I, *supra* note 11, at 7.

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*participation in politics; serve as vehicles for political communication; to recruit political elites through processes of candidate selection and once elected to the legislature, perform a governance function, to represent diverse and partisan interests in society, and through the mechanism of regular general elections, act as a conduit through which the government can be held accountable...*⁸⁵

Political parties are central to representative democratic systems. While strictly private in the way they are composed, parties perform largely public-facing functions. They are not just a vehicle to win elections or to represent politically diverse views; they also form a bridge between the state and its people, coordinating between public opinion on one hand and the policies of the government on the other. For this, every political party has a strong local cadre that maintains continuous interaction with the public.⁸⁶ Drawing upon these interactions with the electorate, parties prepare what Khaitan calls “*policy packages*.”⁸⁷ In order to form a government, they promote these policy packages to voters during their long (and oftentimes expensive and exhausting) election campaigns.⁸⁸

Unlike any other democratic institution, political parties enjoy direct and simultaneous access to the people as well as the government. Employing their relations at both ends, political parties prepare ‘election manifestos’ which reflect the policies that the future government will introduce if the party is voted into power. Given that when a political party is voted into power by the people, the actions and policies of the government largely aim to implement the policy promises made in the party’s election manifesto. This way, political parties strongly influence public policy and state capacity.

While state capacity is essentially exercised by the government, its functioning may be equally dependent on the ideologies of the political

⁸⁵ GAUJA, *supra* note 31, at 23.

⁸⁶ Rahul Verma, Cadres of Political Parties: The Unsung Heroes of Democracy, OUTLOOK (May 29, 2022), <https://www.outlookindia.com/magazine/national/cadres-of-political-parties-the-unsung-heroes-of-democracy-magazine-191473>.

⁸⁷ Khaitan, *supra* note 32, at 95–96.

⁸⁸ *Id.*

party (or parties) forming the government. The ideologies of the government, in turn, influence the state personnel (bureaucrats) who devise and implement policies at the level of different government agencies. Economist Stuti Khemnani explains that politics fundamentally shapes the culture of bureaucracies.⁸⁹ State capacity works within a series of interdependent “*principal-agent*” problems in which one type of actor, the agent, takes actions on behalf of, or at the behest of another, the principal.⁹⁰ Public policies are selected and implemented by the state within the following principal-agent relationships: (i) between citizens and political leaders, (ii) between political leaders and public officials who lead government agencies, and (iii) between public officials and frontline providers.⁹¹

Khemani mentions that politicians influence the day-to-day functioning of the numerous agencies within the bureaucracy.⁹² When the political culture revolves around the extraction of private benefits from public resources, it creates a culture of low performance in the bureaucracy, whereas when these political forces turn to deliver broader benefits from public resources, they improve the performance of bureaucrats.⁹³ An instance of this can be drawn from Bihar, a state which was infamous for its rampant lawlessness until the mid-2000s. The Janata Dal (United) contested the assembly elections in Bihar promising development, law and order, and social justice, and formed the government in 2005. This was done in coalition with the Bharatiya Janata Party (“**BJP**”), the product of which was the National Democratic Alliance (“**NDA**”). The government’s first move under the leadership of Chief Minister Nitish Kumar was to enforce law and order more effectively within the state. In the next three years, Bihar’s law and order took a sharp turn for the better, enabling a virtual rebuilding of the

⁸⁹ Stuti Khemnani, *What is State Capacity* (World Bank Development Research Group, Policy Research Working Paper No. 8734, 2019) <https://documents1.worldbank.org/curated/en/336421549909150048/pdf/WPS8734.pdf>.

⁹⁰ *Id.* at 6.

⁹¹ *Id.*

⁹² *Id.* at 3.

⁹³ *Id.* at 6-8.

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state on all fronts.⁹⁴ This rebranding was made possible by the same set of bureaucrats who ran the state before 2005.⁹⁵

In order to attract voters and win electoral contests, there has been a growing and palpable trend among political parties to promise free schemes (including the distribution of or making available free laptops, LPG cylinders, transportation, water, and electricity, among other things) during their election campaigns, which are to be introduced by the government out of public funds.⁹⁶ Governments are formed by political parties. After an election, the political party that forms the government exercises its powers through governmental routes to fulfil its election promises. These political parties use their positions to influence public policy when they come to power and form a government in the future. Evidently, political parties play a crucial role in democratic governance through the indirect exercise of state power and state capacity in India.

While members of the winning political party remain directly responsible, those who do not make the cut also partake in governance by keeping a check on the government's powers. Even parties in opposition hold a large cadre of party workers and supporters stationed throughout the country who can continue to interact directly with the voters. These parties gather information about the concerns and demands of the electorate, which they can periodically raise before the government. Thus, all parties that campaign and prepare "*policy packages*" are in a position to provide information to state institutions. Parties that do not form government (or become part of the government) are instrumental in reducing the information gap and the information cost for other democratic institutions.⁹⁷ They do this by revealing to the concerned institutions what combination of policies will be acceptable to what percentage of the population.⁹⁸ Moreover, political parties that remain out of the government

⁹⁴ RAJESH CHAKRABARTI & KAUSHIKI SANYAL, PUBLIC POLICY IN INDIA 11 (1st ed. 2017). Chakrabarti and Sanyal have explicitly referred to the case of Bihar.

⁹⁵ *Id.* at 11.

⁹⁶ Gupta, *supra* note 73.

⁹⁷ Khaitan, *supra* note 32, at 88.

⁹⁸ *Id.*

and form the opposition also act as watchdogs to keep a check on the government and its policies.

B. PARTIES AND THE STRUGGLE FOR SURVIVAL

As Indian electoral politics grew more complex, parties began to find it difficult to respond to the pressures of governance. Inter-party as well as intra-party dynamics impacted the working of the parliamentary system as well. Inter-party dynamics are manifested through the unit that helms a government – whether it is a single-party or a multi-party coalition. India has witnessed many coalition governments contest elections to the Lok Sabha. Since the 1990s, the Indian National Congress (“**INC**” or “**Congress**”) has not won an absolute majority in the parliamentary elections, and the years following witnessed three coalitions of parties forming the government, two of which could not complete their Lok Sabha terms.⁹⁹ The National Front,¹⁰⁰ for instance, brought together distinct parties (including regional parties and left parties) on the basis of a common manifesto.¹⁰¹ Owing to ideological incompatibility between the coalescing partners, the coalition soon unravelled, and the National Front government fell in 1991.¹⁰² While coalition governments can offset the authoritative tendencies of single-party-dominated governments, they can also cause instability in government formation. Trends may, of course, vary given how two successive coalition governments witnessed electoral successes at the end of the 1990s – the NDA and the United Progressive Alliance (“**UPA**”).

Needless to say, political parties continue to be intrinsic to representative governance in most modern democracies. However, parties in India are weakly institutionalised, which probably explains the frequent splits and mergers among them as well as politicians habitually resorting to monetary

⁹⁹ Eswaran Sridharan, *Coalitions and Party Strategies in India's Parliamentary Federation* 33(4) PUBLIUS 135 (2003).

¹⁰⁰ Formation of the National Front witnessed the coming together of Janata Dal, Telugu Desam Party, Dravida Munnetra Kazhagam Party, Asom Gana Parishad Party and Indian Congress (Socialist) Party.

¹⁰¹ Sridharan, *supra* note 99, at 139.

¹⁰² DH Web Desk, *Why do third fronts at national level fail?*, DECCAN HERALD (May 24, 2019), www.deccanherald.com/lok-sabha-election-2019/why-do-third-fronts-at-national-level-fail-735456.html.

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incentives for gathering electoral support.¹⁰³ On account of being in competition with each other to gain an electoral edge, political parties have attempted to gain access to state resources and distribute it to the constituencies they represent.¹⁰⁴ Between 1947 and 1967, the Congress dominated both politics and the party system and placed the state at the fulcrum of development. It has been argued that the Congress derived its electoral strength and patronage from the strength of the state.¹⁰⁵ As a developing state, the Indian government had a significant range of resources at its disposal. As a single party dominating the electoral realm, the Congress had access to goods and services that it could distribute to diverse social and political constituencies, thus keeping its electoral support base intact.¹⁰⁶ The relationship between the developmental state and the party system remained harmonious until the mid-1960s and early 1970s. In the decades that followed, the gradual retreat of the state from the economic sphere coincided with a crisis of political institutions, including that of political parties.¹⁰⁷ This was also the time when the one-party Congress dominance began to be replaced by subsequent non-Congress governments.

The rise of coalitions (and coalitional governments) has been explained through two primary themes in Indian politics – democratisation and decay.¹⁰⁸ As Indian voters became more assertive, India itself became more democratic and difficult to govern.¹⁰⁹ Simultaneously, the capacity of institutions, including political parties, to respond to these pressures dwindled.¹¹⁰ Especially for parties, the trends of democratisation and decay

¹⁰³ Suri I, *supra* note 11, at 5.

¹⁰⁴ V. Bijukumar, *Developmental State and Party Politics in India: From Consolidation to Crisis*, 9(2) REV. DEV. & CHANGE 163, 165 (2004).

¹⁰⁵ *Id.* at 165.

¹⁰⁶ *Id.* at 165–168.

¹⁰⁷ *Id.*; see also James Manor, *Parties and the Party System*, in INDIA'S DEMOCRACY: AN ANALYSIS OF CHANGING STATE SOCIETY RELATIONS (Atul Kohli ed., 1990), as cited in K.C. Suri, *Parties Under Pressure: Political Parties in India Since Independence* 20–21 (2005) (“Suri II”).

¹⁰⁸ Suri II, *supra* note 107.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

led to greater competition between them and increased instability, eventually leading to personalised control of parties in some instances.¹¹¹

This crisis within political parties and the party system has manifested itself in multiple ways. For starters, elections in India have become flagrantly expensive, bringing issues concerning party funding to the forefront. Election costs in India have increased manifold, which is attributable to factors such as growth in population as well as the size of constituencies and increased competition.¹¹² Issues concerning the procurement of funds through anonymous sources and their disclosure have remained at the fulcrum of much controversy. In the years gone by, the majority of electoral reforms initiated by the government have sought to protect the anonymity of donors and secure the interests of political parties.¹¹³ The electoral bonds scheme, which was introduced in 2017 and lowered the limit of anonymous donations from Rs. 20,000 to Rs. 2,000, is seen as meaningless without a cap being placed on the entire donation that can be received from anonymous sources.¹¹⁴

Another compelling concern plaguing the working of political parties in India is the constraints placed on intra-party democracy. Intra-party dynamics are instrumental to the functioning of parliamentary governments. India is one of the few democracies in the world to have adopted a legislation that penalises party-switching by elected legislators.¹¹⁵ The grounds under the Tenth Schedule, based on which an elected member may be disqualified for crossing the floor, were mentioned in a previous section of this article.

¹¹¹ *Id.* at 21.

¹¹² For a detailed account on the role and presence of money and crime in democratic processes, see MILAN VAISHNAV, *WHEN CRIME PAYS: MONEY AND MUSCLE IN INDIAN POLITICS* (2017).

¹¹³ SUCHINDRAN BASKAR NARAYAN & LALIT PANDA, *MONEY AND ELECTIONS: NECESSARY REFORMS IN ELECTORAL FINANCE 8* (VIDHI CENTRE FOR LEGAL POLICY, 2018), <https://vidhilegalpolicy.in/research/money-and-elections-necessary-reforms-in-electoral-finance/>.

¹¹⁴ *Id.*; at 10.

¹¹⁵ Kenneth Janda, *Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments* 4 (The Economic and Social Research Council, Working Paper 2, 2009), www.partylaw.leidenuniv.nl/uploads/wp0209.pdf.

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The purported disqualification of a member of the House on grounds of voting against the party whip has had implications for intra-party democracy. The anti-defection law seems to have muzzled free-flowing legislative debates on issues of national importance. An instance of this emerges from a vote in the Lok Sabha on Dec. 5, 2012, on the introduction of 51% foreign direct investment in multi-brand retail. Interestingly, while all members of Parliament belonging to the INC (then in power at the Centre) voted in favour of the policy, the members belonging to the BJP voted against it.¹¹⁶ Possibly to not attract the ire of the anti-defection law, all members of a certain party voted identically, even if they might have had contrary views on this issue of compelling significance.

More worrisome is the fact that, despite the existence of the anti-defection law, governmental instability has persisted. Given its complicated language, the Tenth Schedule gives rise to several interpretational concerns, especially the exception it gives to mergers between political parties.¹¹⁷ Paragraph 4 of the Tenth Schedule provides that when two-thirds of members of a political party agree to merge with another party, they are exempt from disqualification under the anti-defection law.¹¹⁸ In its current form, this provision has become a vehicle for bulk defections and does little to ensure discipline within parties.¹¹⁹ In the recent past, incumbent governments have fallen due to bulk defections by legislators in states such

¹¹⁶ *FDI in retail vote: SP & BSP abstain, propel UPA to victory*, THE ECONOMIC TIMES (Dec. 5, 2012),

<https://economictimes.indiatimes.com/news/politics-and-nation/fdi-in-retail-vote-sp-bsp-abstain-propel-upa-to-victory/articleshow/17493058.cms?from=mdr>.

¹¹⁷ Mayuri Gupta & Ritwika Sharma, *The anti-defection law - political facts, legal fiction*, THE HINDU (Jun. 30, 2022), <https://www.thehindu.com/opinion/op-ed/the-anti-defection-law-political-facts-legal-fiction/article65582855.ece>.

¹¹⁸ INDIA CONST. sch. 10, § 4 cl. (2).

¹¹⁹ The Hindu Bureau, *Vice President Venkaiah Naidu bats for reform of anti-defection law*, THE HINDU (Apr. 24, 2022), <https://www.thehindu.com/news/national/vice-president-m-venkaiah-naidu-bats-for-amending-anti-defection-law-to-plug-loopoles/article65351005.ece>.

as Madhya Pradesh (2020),¹²⁰ Karnataka (2019),¹²¹ and Arunachal Pradesh (2016).¹²² In Madhya Pradesh, for instance, 22 Members of the Legislative Assembly from the ruling Indian National Congress party rebelled against former Chief Minister Kamal Nath in March 2020. The rebellion toppled the government at a time when the COVID-19 pandemic had just hit, bringing governance to a grinding halt in the state.¹²³ Owing to the exception given to mergers between political parties, legislators defecting in bulk have rarely been disqualified under the Tenth Schedule.¹²⁴

These are only a few of the issues that impact the working of political parties as well as the health of democratic governance (which, in turn, is impacted by political parties). Is this the right place for the Constitution to intervene? How are modern democracies addressing concerns regarding political parties? The next part will delve into the same.

CONSTITUTIONALISATION AND REGULATION OF POLITICAL PARTIES

A. WHAT HAVE OTHER JURISDICTIONS BEEN UP TO?

Interesting perspectives are offered by a comparative assessment of modern democratic constitutions, vis-à-vis political parties. Article 21 of Germany's Basic Law, which deals with political parties, provides a good starting point for this discussion:¹²⁵

¹²⁰ Scroll Staff, *Madhya Pradesh crisis: 22 MLAs resign from Assembly after Congress's Jyotiraditya Scindia exits party*, SCROLL.IN (Mar. 10, 2020), <https://scroll.in/latest/955721/mp-political-crisis-jyotiraditya-scindia-quits-congress-19-other-mlas-also-resign-from-assembly>.

¹²¹ Amritananda Chakravorty, *Karnataka crisis focuses on loopholes in anti-defection law*, THE LEAFLET (Jul. 16, 2019), <https://theleaflet.in/karnataka-crisis-focuses-on-loopholes-in-anti-defection-law/>.

¹²² Jagdamba Mall, *Congress Collapsed in Arunachal Pradesh*, THE MORUNG EXPRESS (Sept. 28, 2016), <https://morungexpress.com/congress-collapsed-arunachal-pradesh>.

¹²³ Ritwika Sharma, *The Gradual Erosion of Democracy at the Hands of the Tenth Schedule*, VIDHI CENTRE FOR LEGAL POLICY (Aug. 19, 2020), <https://vidhilegalpolicy.in/blog/the-gradual-erosion-of-democracy-at-the-hands-of-the-tenth-schedule/>.

¹²⁴ Gupta and Sharma, *supra* note 117.

¹²⁵ GG, art. 21.

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“(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.

(3) Parties that, by reason of their aims or the behaviour of their adherents, are oriented towards an undermining or abolition of the free democratic basic order or an endangerment of the existence of the Federal Republic of Germany shall be excluded from state financing. If such exclusion is determined, any favourable fiscal treatment of these parties and of payments made to those parties shall cease.

.
.

(5) Details shall be regulated by federal laws.”

While more granular regulation is reserved for federal law, the top-level principles for the organisation of political parties are housed under Article 21. Evidently, adherence to democratic principles is constitutionally non-negotiable for political parties in Germany. Equally noteworthy is how the functioning of parties is expected to be in conformity with a “free democratic basic order”, and must not endanger the existence of the Federal Republic of Germany. Germany’s historical experiences with the Nazi regime are understood to have necessitated the mention of political parties in its Basic Law.¹²⁶ Among other things, the Nazi regime was characterised by the centralisation of political power. Through Article 21 of the Basic Law, the democratic organisation of political parties was enforced externally.¹²⁷ Simultaneously, such constitutionalisation is also considered a means to ensure popular control of the government.¹²⁸ Ingrid van Biezen, in her work on party constitutionalisation in Europe after the Second World War, explains that the German Basic Law’s insistence on

¹²⁶ GAUJA, *supra* note 31, at 26; Biezen I, *supra* note 6, at 9; O’Regan, *supra* note 83, at 70.

¹²⁷ GAUJA, *supra* note 31, at 26-27.

¹²⁸ *Id.*

democracy for party organisations is premised on a “substantive” rather than a “procedural” conception of the term, encompassing the need for participation and representation in electoral democracy.¹²⁹

The process of constitutional recognition for political parties gained traction in other European democracies as well, with Spain, Luxembourg, and Portugal emerging as examples of this trend. For most post-Second World War democracies, the process of constitution-making and nation-building marked a break in history. Recognition of political parties, in a way that ensured conformity to democratic norms, appears to have been a good starting point for constitutional reform. Further, given the interconnection between institutional designs and general political outcomes, the constitutional design of institutions carries significant implications.¹³⁰ In fact, the widespread recognition of political parties in Europe signifies the “*importance of the diffusion or transference of constitutional norms and principles in playing a key role in shaping the regulatory regime of nation-states.*”¹³¹ Their constitutional codification has tended to solidify their material position within the political system and made them intrinsic to democracy.¹³²

With democratisation and institution-building as key motivating factors, constitutions in many developing and transitional democracies outside of Europe have also recognised political parties within their texts.¹³³ In a study on party constitutionalisation in Asia, Erik Mobernd alludes to the Philippine Constitution of 1935 and the Taiwanese Constitution of 1947, both of which made references to political parties.¹³⁴ He also cites certain direct references to parties, such as those in the South Korean Constitution of 1948, which guaranteed the right to form political parties.¹³⁵ In fact, the Constitution of the Republic of South Korea categorically stated that “*Political parties shall be democratic in their objectives, organisation and activities, and shall have the necessary organisational arrangements for the people to participate in the*

¹²⁹ Biezen I, *supra* note 6, at 20.

¹³⁰ GAUJA, *supra* note 31, at 27.

¹³¹ *Id.*

¹³² Biezen I, *supra* note 6, at 24.

¹³³ GAUJA, *supra* note 31, at 27.

¹³⁴ Mobernd, *supra* note 13, at 7.

¹³⁵ *Id.*; DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 8 (S. Kor.).

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formation of the political will".¹³⁶ To balance out the freedoms given to political parties, a system of checks was also provided for. If the purposes or activities of a political party were to run contrary to the democratic basic order, the government was empowered to approach the Constitutional Court against the party, seeking its dissolution.¹³⁷

Japan, on the other hand, did not reference political parties within its constitution. Given that Japan is one of Asia's oldest democracies, Moberg attributes this omission to the influence of the American constitutional tradition, which "*may not have conceived of democracy in terms of parties*".¹³⁸ At a more general level, Asia has followed a tradition of understanding parties as subjects of some regulation, whatever the extent of that regulation may be.¹³⁹ Following this regulation, their position in the political system must be directly acknowledged.

B. CONSTITUTIONALISATION OF POLITICAL PARTIES IN INDIA – NEED AND DIRECTION

Discussions around the constitutionalisation of political parties in India should remain cognisant of their role in democratisation.¹⁴⁰ At a practical level, Sethia's work on the intersection between constitutional law and political parties in India provides important insights. On the role of political parties in a democracy, Sethia observes that the exercise of state power is crucially reliant on parties and party systems in a democracy, regardless of the scheme for the organisation of powers.¹⁴¹ The actual functioning of the organs that exercise power is constitutionally dependent on the internal and external operations of parties.¹⁴² Needless to say, party

¹³⁶ *Id.* at art. 8(2).

¹³⁷ *Id.* at art. 8(4).

¹³⁸ Moberg, *supra* note 13, at 6.

¹³⁹ *Id.* at 15.

¹⁴⁰ GAUJA, *supra* note 31, at 27-28.

¹⁴¹ Sethia, *supra* note 20, at 6.

¹⁴² *Id.* at 6-7.

dynamics are an important factor to be considered in the design of constitutions.

The constitutional organs Sethia refers to include the legislature, executive and judiciary, all three of which owe their existence, composition and functions to the text of the Constitution. Parties, of course, find limited mention. Besides underlining the importance of political parties in the Indian democratic landscape, it is imperative to fathom what difference constitutional recognition can make for an institution. For that, a useful example to consider would be that of local governments in India. Both urban and rural local bodies (in the form of Panchayats and Municipalities) had existed prior to the coming into force of the Constitution (Seventy-third Amendment) Act, 1992¹⁴³ and Constitution (Seventy-fourth Amendment) Act, 1992 (which inserted Part IX and Part IXA in the Constitution, respectively).¹⁴⁴ So, what difference did constitutional recognition make for these institutions? Economist Dr. Shubham Chaudhuri, in his work on the implementation of the Constitution (Seventy-third Amendment) Act, 1992 responds to this question by reposing faith in constitutional reforms, and how they “*lie at the top of the reform hierarchy in terms of their purported impact and degree of irreversibility.*”¹⁴⁵ Chaudhuri also outlines the importance of the consequences of non-compliance, which add to the sanctity of constitutional contracts.¹⁴⁶ Needless to say, there is some merit to arguing for constitutional recognition, and a certain degree of constitutionalisation of political parties. In fact, Khaitan argues that the concern is not whether to regulate political parties, but why and how.¹⁴⁷

The challenge, as Khaitan alludes to, is one of preserving parties’ ability to organise and channel popular will, while at the same time preventing them from threatening democratic governance.¹⁴⁸ While considering a

¹⁴³ INDIA CONST. *amended by* The Constitution (Seventy-third) Amendment Act, 1992.

¹⁴⁴ INDIA CONST. *amended by* The Constitution (Seventy-fourth) Amendment Act, 1992.

¹⁴⁵ Shubham Chaudhuri, *What Difference Does a Constitutional Amendment Make? The 1994 Panchayati Raj Act and the Attempt to Revitalize Rural Local Government in India*, in *DECENTRALISATION AND LOCAL GOVERNANCE IN DEVELOPING COUNTRIES: A COMPARATIVE PERSPECTIVE* 154, 198 (Pranab Bardhan & Dilip Mookherjee eds., 2006).

¹⁴⁶ *Id.* at 198.

¹⁴⁷ Khaitan, *supra* note 32, at 98.

¹⁴⁸ *Id.*

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framework for constitutionalising political parties, it is imperative to remember that a successful political party operates at three levels – within the party itself, within the broader community, and within the structures of government.¹⁴⁹ Simultaneously, it must be borne in mind that the character and role of parties in a democracy are also dependent on the nature of the electoral system.¹⁵⁰ India follows a first-past-the-post system, which is regarded as one of the simplest forms of electoral systems. Each voter gets a single vote, and a candidate wins if they receive the highest number of votes polled in a constituency.¹⁵¹ While it is true that candidates win or lose elections, their affiliation with specific parties remains decisive to the outcome of both national as well as sub-national elections.¹⁵² Independent candidates performing poorly in elections tend to indicate that the electoral contest in India is fought primarily between parties.¹⁵³

GUIDING PRINCIPLES FOR POLITICAL PARTIES	ASPECTS OF POLITICAL PARTY FUNCTIONING CONCERNED	LEVEL AT WHICH THE PRINCIPLE OPERATES
Democracy	<ul style="list-style-type: none"> ● Expression of dissent and differing points of view within the party ● Consensus-building before crucial decisions are taken 	<ul style="list-style-type: none"> ● Within the party

¹⁴⁹ O'Regan, *supra* note 83, at 65.

¹⁵⁰ *Id.* at 67.

¹⁵¹ Law Commission of India, 255th Report on Electoral Reforms (2015) 80, ¶ 4.2.

¹⁵² Pradeep Chhibber et al., *Political parties dominate India's national elections, not candidates*, THE PRINT (Mar. 25 2019), <https://theprint.in/opinion/political-parties-dominate-indias-national-elections-not-candidates/210932/>.

¹⁵³ *Id.*

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Representativeness	<ul style="list-style-type: none"> ● Periodic elections within the party ● Representation of diverse constituencies in positions of authority 	<ul style="list-style-type: none"> ● Within the party ● Within the broader community
Transparency	<ul style="list-style-type: none"> ● Disclosures in the context of party financing and election expenditures 	<ul style="list-style-type: none"> ● Within the party ● Within the broader community ● Within structures of government
Integrity	<ul style="list-style-type: none"> ● Prohibition on fielding candidates with criminal antecedents ● Non-procurement of funds from prohibited sources 	<ul style="list-style-type: none"> ● Within the party ● Within the broader community ● Within structures of government
<p>Forums for redressal of non-adherence to the principles</p> <ul style="list-style-type: none"> ● Election Commission of India (in the first instance) ● High Courts and the Supreme Court 		

Thus, establishing certain constitutional principles which guide the working of political parties becomes imperative. Drawing inspiration from the European tradition, these principles need not be detailed or prescriptive but rules to guide the formation and sustenance of parties. With broad principles outlined in the Constitution, detailed processes can be set out in the text of specific laws.¹⁵⁴

¹⁵⁴ It is worth noting that the Law Commission of India, in its 255th Report, recommended the insertion of Part IVC in the RP Act, 1951. The proposed Part IVC comprises certain basic principles concerning the constitution of political parties, voting procedures, the conduct of regular elections, and penalties for failure to contest elections, among other aspects. *See* LCI 255th Report, *supra* note 151, 77-79 (2015).

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The table that follows briefly mentions these proposed principles, what aspects of political parties they affect, and whom they face (the party itself, the broader community, or the government). It also mentions institutions through which non-adherence to any principles can be addressed. The role of the ECI becomes crucial, as it is well-placed to effectively regulate party organisation and internal structures as well as patterns of inter-party competition.¹⁵⁵

Constitutional principles to guide political parties: A starter pack

As mentioned above, this is a largely illustrative framework for what constitutional principles can guide political parties. The eventual shape of a constitutional provision that gives effect to these principles, can be the subject of further study and deliberation.

CONCLUSION

In India's specific context, political parties can be viewed through specific themes – through their role in modern party government, as defenders of democracy, and as public utilities. Each of these themes reflect a specific understanding of the place of political parties within democracy. It is imperative for research to focus on the interlinkages between “*democracy, governance and political parties.*”¹⁵⁶

A starting point for that can be the exploration of political parties against the backdrop of the Constitution. A comparative assessment of modern democracies around the globe presents interesting perspectives on constitutionalisation of political parties. After the Second World War, several democratic constitutions made express provisions recognising political parties within their constitutional text. Interestingly, several Asian Constitutions which were drafted around the same time as the Indian Constitution also made such express references.

¹⁵⁵ Suri I, *supra* note 11, at 6.

¹⁵⁶ *Id.*

Given the nature of political parties and their significance as institutions that influence public policy, some form of regulation becomes necessary. One approach could be to outline broad principles in the big-C constitutional code while leaving detailed processes to be set out in the text of specific laws or small-c codes. The illustrative framework provided in this article is a means to that end. The article shies away from a detailed and precise constitutional design that such a framework can take, but hopes to start a conversation on the need for constitutional recognition of political parties.