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EDITORIAL NOTE

Can The State's Financial Capability Regulate the Conduct of Free & Fair Elections? Perspectives on an Emerging Tension

A few recent developments in Indian election and constitutional law have led to the emergence of a distinct tension: one between the conduct of free and fair elections and the financial burden borne by the State exchequer in arranging the same. In other words, the constitutional puzzle is whether financial capability of the State or availability of resources can determine and control the conduct of free and fair elections.¹ Further, if it does, to what extent can this regulation stretch? What is the role of State institutions in solving this conundrum?

The following recent judicial pronouncements will serve as illustrations for this conundrum. In *Subramanian Swamy v. Election Commission of India*² the petitioner, Dr. Swamy, prayed for the introduction of Voter Verifiable Paper Audit Trail ('VVPAT') alongside the Electronic Voting Machines ('EVMs'). It was argued that the paper trail would be the only way of con-

¹ Although there are judicial pronouncements which lay down that the enforcement of civil and political rights is independent of financial resources, this issue deserves special consideration because: a) the right to vote, contest, and enjoy free and fair elections imposes significant positive duties on the state, and b) it is unclear whether these rights have the status of fundamental rights.

² WP (C) No. 11879 of 2009, decided on January 17, 2012 (Del).

firming one's vote since EVMs were not transparent enough. In other words, the VVPAT would act as proof that the vote was correctly recorded. Even though the Delhi High Court rejected the petition, it also rejected the argument of the Election Commission (a respondent in the case) that the proposition for inclusion of the VVPAT is untenable due to the enormous expenses which would be incurred, and noted that costs and finances *cannot* be a *deterrent* to free and fair elections. On appeal, the Supreme Court (in *Subramanian case*³) overturned the Delhi High Court judgment and directed the installation of VVPAT system along with all EVMs in all future elections. It held that VVPAT is "indispensable" for free and fair elections. Therefore, the inference is that both the Delhi High Court and the Supreme Court have acknowledged that the State's financial capability cannot be a deterrent to free and fair elections.

In *People's Union for Civil Liberties v. Union of India*⁴, otherwise known as the "NOTA" case, the Supreme Court directed that all EVMs must henceforth include a "None Of The Above" ('NOTA') button, in recognition of a voter's right to cast a neutral vote (noted in the judgment as the right "not to vote"). Since the Court had held that "[t]he decision taken by a voter after verifying the credentials of the candidate either to vote or not is a form of expression under Article 19(1)(a) of the Constitution", some had argued for the recognition of a right to *reject*⁵. This is a step further from the right to cast a neutral vote (NOTA) recognized in the case – no matter how many votes the NOTA button receives, no legal implications arise. Even if there is a high proportion of NOTA votes polled, it will only apply moral pressure on the candidates and their political parties. Recognition of a right to reject, however, would entail the holding of re-elections in case a certain threshold of voters decides to reject all candidates. Some scholars questioned the feasibility of the recognition of this right on the grounds that the holding of re-elections would prove to be a heavy burden on the exchequer.⁶ Admittedly, considering that budgetary allocation and policy making primarily lies in the domain of the government, the allocations may be done according to the government's prerogative, but in accordance with and respectful of its constitutional obligations. But even after the Supreme Court has expressly recognized a voter's right to electoral choice as a fundamental right, recognizing a right to cast a positive vote, as well as a right to record a neutral vote⁷, can budgetary policy based on the State's financial burden restrict the very content and essence of the right?

³ (2013) 10 SCC 500.

⁴ (2013) 10 SCC 1.

⁵ For example, see Vasujith Ram & Samyak Sibasish, *Case for the Right to Reject*, THE STATESMAN, October 31, 2013 at 16.

⁶ For example, see S.Y. Quraishi, *Election: Is Right to Reject Feasible?*, THE ECONOMIC TIMES, October 2, 2013.

⁷ Note that Supreme Court has also recognised a right to know the antecedents of the candidates in *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399 and *Union of India v. Assn. for Democratic Reforms*, (2002) 5 SCC 294. This would logically entail a right to

The Supreme Court will have to adjudicate on a similar issue in an ongoing PIL in *Voters Party v. Union of India*⁸, where the petitioners have challenged the constitutionality of sub-sections (6) and (7) of Section 33 as well as Section 70 of the Representation of the People Act, 1951. The petitioners have argued that these two provisions - sub-sections (6) and (7) of Section 33 which allows for a candidate to file up to four nomination papers from two constituencies, and section 70 which mandates that a person can hold only one seat from one constituency in the House of the People or the House of Legislature of a State—has been misused by politicians.⁹ If the politicians file their nominations successfully from two constituencies and win in both, they have to vacate one of the seats as per the terms of Section 70. The argument is that by-elections must be held in the vacated constituency, imposing a huge burden on the exchequer. Therefore the petitioner has primarily prayed that these provisions be struck down as unconstitutional, allowing for filing of nomination only from a single constituency. Alternatively, if the provisions are upheld, the petitioner has prayed that the vacating/winning candidate must be directed to bear the entire expenses of holding by-elections in that particular constituency (See *Voters Party Case*¹⁰).

The litigation in the said matter raises several issues. At the fore is a rights – policy conflict. One may view the case from the perspective of the right to contest. Limiting the number of constituencies a candidate can contest from, it is argued, will curb the right to contest. However, it is counter-argued that making this judicially directed legislative change will not annul any right, since the essence and content of the right remains even if the change allows contestation only from one constituency.¹¹ It is argued that this limit on constituencies, if made, falls within the discretion of the State as long as the essence of the right is unscathed. This particular counter – argument will be reasonably valid if the point being argued is the first prayer. Note the alternative prayer mentioned above. If the Court does not strike down the provision as unconstitutional, but instead allows the second prayer - holding that the vacating candidate has to pay for the expenses of holding by-elections - would this not violate the essence of the right to contest? Let us assume that a poor

use that information – assume a hypothetical situation where the voters are not happy with all the candidates after carefully perusing their antecedents. Can they be denied a right to reject?

⁸ WP (C) No. 205 of 2014.

⁹ The logic behind allowing the candidate to contest from two constituencies seems to be that mass leaders can canvass effectively and mobilise voters, thereby promoting the interests of the political party. However, there is no logical basis provided for restricting it to two constituencies. In other words, the policy has no intelligible differentia and rational nexus to the state object, and is arbitrary in nature. It appears to be a legislative compromise—since many leaders were contesting from more than three seats without any objective material to back the legislation. However, no challenge on the basis of Article 14 has been made in this case.

¹⁰ See *Supra* note 7.

¹¹ Suppose the Court strikes the provisions down as unconstitutional, the legislature will have to frame a new law wherein candidates can contest only from one seat.

candidate wants to invoke sub-sections (6) and (7) of Section 33 and contest from two constituencies. If he does win in both constituencies, would it be “fair”, and consistent with the essence of his right to contest, if it is mandated by law that he deposit money for the expenses of conducting the by-elections?¹² If this second prayer is accepted, it will also effectively deny the impoverished substantive equality rights. This virtually amounts to putting a financial or property qualification in order to contest from two seats.

One may argue that in developing countries like India, acute resource limitations mean that even something as fundamental as holding of free and fair elections can be compromised by a concern for finances. Perhaps this challenge will take a different turn when we examine the nature of a) our right to have free and fair elections, b) our right to vote and c) our right to contest. With reference to free and fair elections, there has been a series of Supreme Court rulings including Constitution bench Judgments in *Indira Nehru Gandhi v. Raj Narain*¹³, *Kihoto Hollohon v. Zachillhu*¹⁴, as well as more recent judgments like *People’s Union for Civil Liberties v. Union of India*¹⁵, and *NOTA case*¹⁶, where the Apex Court has held that free and fair elections, being an intrinsic part of democracy, is a part of the basic structure of the Constitution. With regard to the right to vote, the latest authoritative ruling came in *NOTA case*¹⁷, where the Supreme Court held that the right to vote is a statutory right whereas the choice expressed by a voter in the polling booth is a fundamental right. Keeping in mind Part XV (“Elections”), Constitutional Articles such as Article 81 (“...the House of the People shall consist of- (a) not more than 530 [five hundred and thirty members] chosen by *direct election* from territorial constituencies in the States...”) [*emphasis supplied*] and Article 19(1)(a), the only logical and tenable interpretation seems to be that while the substantive right of choosing a candidate in an election is fundamental, the modalities and procedures like the age, time, eligibility and place of voting may be governed by statute.¹⁸ In case of any other interpretation, a repeal of a statute providing for the right to vote would *indirectly* take away a fundamental right, i.e., the freedom of choice in voting, and violate constitutional provisions mentioned above, which is impermissible according to *Bennett Coleman & Co. v. Union of India*¹⁹. In other words, the statute here is only *operationalizing* the fun-

¹² The Election Commission of India’s 2004 document on “Proposed Electoral Reforms” suggests that “[t]he amount could be Rs 5,00,000 for State Assembly and Council election and Rs 10,00,000 for election to the House of the People.

¹³ 1975 Supp SCC 1.

¹⁴ 1992 Supp (2) SCC 651.

¹⁵ (2003) 4 SCC 399.

¹⁶ (2013) 10 SCC 1.

¹⁷ (2013) 10 SCC 1.

¹⁸ See generally *PUCL v. Union of India: The Supreme Court and Negative Voting*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, September 28, 2013, <http://indconlawphil.wordpress.com/2013/9/28/pucl-v-union-of-india-the-supreme-court-and-negative-voting/>.

¹⁹ (1972) 2 SCC 788.

damental right. The same would apply for the right to contest. Right to vote would be effectively nullified without a full right to contest. Electoral democracy cannot run without contestants. Therefore, by interpretation, even the right to contest is a fundamental right, although the Supreme Court has not yet expressly declared so. However in cases such as *Jyoti Basu v. Debi Ghosal*²⁰ the Supreme Court has placed the right to contest on the same pedestal as the right to vote. Applying the above interpretation, even the substantive right to contest is fundamental whereas the modalities can be regulated by statute. Considering the above rulings, where free and fair elections is a part of the basic structure of the Constitution, and the right to vote and right to contest are essentially fundamental rights, it would be unconvincing to argue that concern for the exchequer can *trump* the realization and working of the essence and content of the rights.²¹

It is generally recognized that while a margin of appreciation may be allowed in case of Directive Principles of State Policy, considering the financial capability (or “available resources”) of the State, in case of fundamental rights the financial capabilities of the State must not be a deterrent or barrier in the full realization of these rights.²² In the international rights jurisprudence as well as the jurisprudence on constitutional law, rights under the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) (containing the “positive rights” or “welfare rights”) are subject to a leeway granted for the States’ obligation to “respect, protect and fulfil” the rights based on availability of resources (Article 2(1)), whereas the rights under the International Covenant for Civil and Political Rights (‘ICCPR’) (also known as “negative rights”²³) have protection with no such leeway based on financial capability. In addition, while the ICESCR Committee in its General Comment No. 9 has noted that mere administrative remedies may be adequate, and that the judicial role may be necessitated only when administrative remedies fail, the ICCPR promises and guarantees eventual judicial remedy (Article 2(3)(b)). Clearly the right to

²⁰ (1982) 1 SCC 691.

²¹ Of course, rights need not be absolute. Factors like the burden on the exchequer may shape the actualisation and operationalization of the rights. However, the essence and content of the right—which are evolved by interpretation by taking into account various constitutional and societal factors (incidentally, it may include the financial situation of the State)—cannot be violated. Note that the Constitutional rights may also have reasonable restrictions—which allows for some transgression of the right. But certainly, the essence and the core remains.

²² Note however, that the Indian Supreme Court has not accepted poor finances as a excuse even in cases of realization of directive principles. For example, see *Ratlam Municipal Council v Vardichan*, (1980) 4 SCC 162, where Justice Krishna Iyer held, “the plea of poor finance will be poor alibi when people in misery cry for justice”. This issue will not be dealt with in the note.

²³ The traditional distinction between “positive” and “negative” rights has been used to differentiate civil and political rights from the socio-economic rights. However such an assumption has been questioned by several scholars in the recent years. For an elaborate discussion, see HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY* 35 (1996) & STEPHEN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 35-48 (1999).

vote, contest, and have free and fair elections find a place in the ICCPR, and is universally recognized as a civil and political right, and is hence not considered to be subject to the availability of resources.²⁴

A strong argument has been presented above that that financial burden on the exchequer cannot be a barrier to the full realization and working of the rights. However, a further question remains - to what extent then, does the government have discretion in policymaking? This theme deserves some elaboration. Governmental wisdom reigns supreme as long as the essence and content of fundamental rights is well respected (in line with the theory of separation of powers). Within these limitations of means prescribed in the fundamental rights, the government can pursue its goals.²⁵ Therefore a concern for the exchequer can direct government policy as long as core content of the right is not endangered.

Likewise, suppose in a particular instance, different alternatives of government policy could have better served the operationalization or actualisation of the right to vote. Is this challengeable? A general principle is that such a prayer cannot be dealt with by the Court, as long as the government explains the reasoning behind the policy with rationality and objectivity. Only if a Court is able to point out a constitutional flaw, say in the form of violation of essence and core of the fundamental rights, it may adjudicate on the issue. (see for example, adjudication on Issue no. 1 in *Manushi Sangathan v. Govt. of Delhi*²⁶

The *Voters Party case*²⁷, offers a thought provoking situation. The petitioner in this case is praying for a remedy claiming that the government should have pursued different and alternative policies, considering, *inter alia*, the strain on the exchequer. The remedies prayed for are, as previously noted, twofold: a) that sub-sections (6) and (7) of Section 33 be struck down as

²⁴ *Id.* (In fact, one of the prime examples given to argue that the positive rights-negative rights dichotomy is an unsustainable concept is that the conduct of free and fair elections requires substantial positive action, including significant budgetary allocation and arrangement of electoral mechanisms, by the State. Therefore scholars conclude that even civil and political rights imposes positive duties on the State).

²⁵ This point is incisively elucidated in *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625. ("To destroy the guarantees given by Part III [fundamental rights] in order purportedly to achieve the goals of Part IV [Directive Principles of State Policy] is plainly to subvert the Constitution by destroying its basic structure... just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal is human freedoms... The goals [the ends] set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III"). For a scholarly enunciation on this issue, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22-25 & 82-88 (2005). Dworkin argues that principles trump over policies. Arguments about principles are essentially arguments about rights.

²⁶ (2010) 168 DLT 168.

²⁷ WP (C) No. 205 of 2014.

unconstitutional) or alternatively, b) make the vacating candidate pay for the cost of by-elections in the vacated seat, considering the burden on the exchequer. For the purpose of analysis, let us distinguish the grounds for both the prayers. For the first prayer, the grounds are reduction of the burden on the exchequer as well as violation of rights. With respect to violation of rights, we can expect a two pronged argument. First, that vacating a seat distorts the faith of the electorate, who have placed their trust in the vacating candidate, thereby affecting representative democracy and fair elections. Second, that this right to contest in two constituencies has created a bias in favour of powerful leaders which may distort “fairness” in elections for local candidates.²⁸ With respect to the second prayer, the grounds are only based on the strain on the exchequer. The counter that seems to be available to the government is essentially a policy or outcome based argument—that contestation for two seats allows mobilization of voters and broader canvassing by mass leaders of a political party, furthering the interests of representative democracy. In addition, in response to the second prayer, the government could argue that it will violate the right to contest as well as the right to equality, as noted previously. In the light of the above situation, it will be interesting to see if the Court will defer to legislative wisdom (note that this two constituencies rule is actually a *restriction*. It was introduced by a 1996 amendment to the Representation of the People Act – possibly as a compromise since politicians used to contest from even four-five seats), or direct the implementation of an alternative policy. Applying the above principles, if the government is able to explain its policies rationally and objectively, and show that there is no violation of the core of the rights, the Court cannot step in to direct alternative policies. This is because the *means* prescribed by the fundamental rights have been followed, and the only other ground, that of financial strain on the exchequer, is something that lies in the domain of the government and is an issue that cannot be dealt with by the judiciary. Time is once again ripe to stir up a debate on the role of the judiciary in our Constitutional democracy.²⁹

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On Behalf of the Editorial Board

²⁸ An argument of violation of Article 14 due to the arbitrariness in the policy has not been taken in the petition. Note that this policy does not seem to have any intelligible differentia or rational nexus with the State object.

²⁹ This is precisely what the Allahabad High Court held in *Raja John Bunch v Union of India*, 2014 (105) ALR 17. The petition prayed for striking down Section 33(6) and 33(7) as ultra vires Article 101, and alternatively to issue a mandamus for the recovery of expenses in the by-poll from the vacating candidate. The Court found no evidence of unconstitutionality and declined to issue the mandamus since it opined that it is a matter of legislative policy.