EMOCRACY AND GOVERNANCE: AN ANALYSIS OF RECENT SUPREME COURT LED ELECTORAL REFORMS

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ABSTRACT

The recent spate of Supreme Court decisions on the electoral process has, in the span of a few months, changed the face of Indian politics. The first one, The Chief Election Commissioner etc. v. Jan Chaukidar (People’s Watch) and Ors., ruled that persons in policy custody may not contest elections, while the second, Lily Thomas v. Union of India and Ors., decided that those sitting members of the Houses of Parliament and the Legislative Assemblies who have criminal cases filed against them should be disqualified immediately. The third case, People’s Union for Civil Liberties v. Union of India, introduced the much discussed None of the Above (NOTA) button.

These decisions have questionable consequences, if not questionable reasoning, and have led to several debates on issues such as the criminalisation of politics, the importance of a speedy trial in a governance system and the legal principle that an accused is innocent until proven otherwise. These are the issues that this note will attempt to highlight.

Underlying and binding all of these decisions, though, is a common thread. This is the ideological conflict between governance and democracy that plays out in the reasoning and consequences of these landmark judgments, and it is this conflict that this note seeks to examine. In doing so, the author will look at the interplay between the expression of people’s political will and the purpose of an electoral process, and the effect that these decisions have had on the delicate balance that must be maintained between them.

Keywords: Indian Supreme Court, elections, democracy, NOTA, Jan Chowkidar

1. INTRODUCTION

The recent spate of Supreme Court decisions on the election process, viz. The Chief Election Commissioner etc. v. Jan Chaukidar (People’s Watch) and Ors., Lily Thomas v. Union of India and Ors. and People’s Union for Civil Liberties v. Union of India., has touched on several complex issues. This note will discuss several of them, including issues such as the criminalisation of politics, the consequences of an overburdened justice system and the legal tenet that an accused is innocent until proven guilty.
It will also examine the underlying thread that runs through all of these decisions. At the heart of them all is an ideological debate regarding the nature of governance and democracy in India, a debate which the author will attempt to discuss in the context of the reasoning and possible consequences of these landmark judgments.

2. JAN CHAUKIDAR AND THE CRIMINALISATION OF POLITICS

The first issue raised is that of the criminalisation of politics. This was discussed in the first two judgements, both decided on 10th July 2013, viz. The Chief Election Commissioner etc. v. Jan Chaukidar (People’s Watch) and Ors. and Lily Thomas v. Union of India and Ors. The two decisions were given by the same Division Bench of the Supreme Court on the same day, and therefore share certain common assumptions. However, while the judgement in Lily Thomas is fairly legally sound but may have significant negative repercussions, the reasoning adopted by the learned Judges Patnaik and Mukhopadhaya in Jan Chaukidar suffers from some serious defects.

In Jan Chaukidar, the question before the court was whether a person in police custody is disqualified from standing for elections. The court laid down that a person in police custody would be disqualified from being a voter as per section 62(5) of the Representation of the People Act, 1951 (hereafter called the 1951 Act). The section pertains to who is allowed to vote, and states that no person shall vote at any election if he is confined in prison or in the lawful custody of the police.

The conditions for disqualification from the electoral role are contained in sub-section (1)(c) of section 16, which states that a person shall be disqualified for registration in an electoral roll if he “is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.”

The problem in this decision arose when the Judges read section 62(5) into section 16. The Judges reasoned that since a person is not allowed to vote if he is in police custody under section 62(5), he is therefore disqualified from registration in the electoral role under section 16 as he is, “for the time being disqualified from voting under the provisions of any law…in connection to elections.” Thus, he cannot be an ‘elector’ for the purposes of voting, and is consequently not qualified to stand to be a member of the Lok Sabha or Legislative Assemblies. The judges finally concluded that the person, having lost the statutory right to vote “is not an elector and is therefore not entitled to contest the election to the House of the People or the Legislative Assembly of a State.

The error in this judgment lies in conflating sections 16 and 62(5); while section 16 deals with the conditions for contesting elections, section 62(5) deals with conditions for voting in...
elections. Furthermore, it is doubtful whether the words of section 16 that a person will not be registered on an elector roll if he is disqualified under any law regarding offences in connection with elections can be stretched to include all persons in police custody under section 62(5).

The words “other offences in connection with elections” seems to suggest that a person should have been convicted of an offence relating to elections, rather than been arrested under a law unrelated to elections, and subsequently disqualified under a law related to the election process. In other words, section 16 seems to suggest that the connection of elections must be with the offence the person is charged with or convicted, rather than the law under which he becomes disqualified from voting. Thus the judgment contains a serious logical defect, and the Supreme Court has rightly decided to review it since it was passed.

Apart from this, the judgment could also lead to some potentially troubling consequences. Since it disqualifies any person who is in police custody from even contesting elections, it has great potential for misuse by political actors who wish to prevent their competitors from standing for the election. It would hardly be a difficult matter to institute a false case against a person and have them temporarily arrested and hence disqualified.

3. LILY THOMAS AND THE INNOCENCE OF AN ACCUSED

This leads us to the second issue brought up by this series of cases. The instinctive worry over this issue stems from the core principle of any legal system that a person is innocent until proven guilty. The outcome of Jan Chaukidar offends this principle as it takes away a right (i.e., the right to contest elections), even when a person is only an accused and has been arrested temporarily. Thus the decision assumes that all accused are already guilty and, in a sense, convicts and punishes them without a fair trial.

Furthermore, since this disqualification would not apply to a person on bail, it favours the rich, for whom providing bail is much easier. This distinction between a person on bail and a person is physical custody is nebulous because it makes the assumption that the one on bail is somehow more innocent, which is an assumption that has no real basis.

The issue of the possible innocence of a person accused of a crime was also palpable in the case of Lily Thomas. In this case, the court struck down sub-section (4) of section 8 of the 1951 Act, which provided that in the case of a sitting member of either House of Parliament or of the Legislative Assemblies who had been disqualified from being a member by reason of conviction under any of the offences mentioned in section 8, the disqualification would not take place until three months had elapsed, or, if within that period, any appeal or revision against the conviction had been filed in a court, until such appeal or revision was decided.

The court held that the section was ultra vires the power of the Legislature to enact. The reason for this was twofold. Firstly, the court interpreted Article 101(3)(a) of the Constitution, which relates to the vacation of seats in Parliament, and the corresponding Article 190(3)(a), relating to the State Legislatures. These Articles state that if a member of either House of Parliament or of a State Legislature, becomes subject to any disqualifications, his seat “shall thereupon become vacant”.

It
The court decided that the word “thereupon” must be taken to mean that the disqualification would take effect immediately, and that therefore the Parliament was expressly prohibited from enacting any law that seeks to defer the date of disqualification of sitting members. The Court also observed that an amendment similar to sub-section (4) of section 8 was brought up during the Constituent Assembly Debates, but was not adopted.

Secondly, the court further observed that the section makes a distinction between sitting members of the House and those standing for elections to the House. It relied on the interpretation that had been given to Article 191(1)(e) in the earlier Constitution Bench judgment of Election Commission, India v. Saka Venkata Rao. This Article empowers Parliament to enact laws disqualifying a person “for being chosen as, and for being, a member of the Legislative Assembly”, and has the same wording as Article 102(1)(e), which does the same for the Houses of Parliament.

The Court in Saka Venkata Rao had laid down that the wording of Article 191(1)(e) makes it clear that the same set of disqualifications are to apply for a person being elected to, or for a person continuing in, the Legislative Assembly or Council of a State. The Justices Patnaik and Mukhopadhyaya in Lily Thomas transferred this interpretation to Article 102(1)(e) as well, and reasoned that this makes it clear that Parliament does not have the power to make different disqualifying laws depending on whether a person is a sitting member or is standing for elections.

The court in conclusion held that sub-section 4 of section 8 is in violation of these Articles, as it allows an already sitting member’s disqualification to be delayed, thus creating a disparity in the law that applies. Therefore, the court laid down that it was outside the powers of the Parliament to have enacted this section.

While this judgment, unlike Jan Chaukidar, appears to be legally sound, there are significant practical repercussions that arise from it. The reasoning of the apex court in the case of K. Prabhakaran v. P. Jayarajan, a case that was cleverly sidestepped by Justices Patnaik and Mukhopadhyaya in Lily Thomas, was that the distinction between sitting members and members contesting elections with regard to the date of effect of the disqualification is necessary in order to protect the House.

The Judges held that since this 2005 judgment had not decided the validity of the section in question, they were free to discard its reasoning. While this is legally correct in theory, it may have been more prudent for the court to refer the matter to a larger bench, as there was a five-judge Constitution Bench in Prabhakaran as opposed to the two-judge Division Bench that decided Lily Thomas. Furthermore, while it is true that the earlier decision did not decide the validity of section 8(4), it focused on and endorsed the rationale behind it.

This earlier judgment enumerated two consequences that would follow an immediate disqualification: first, it may destroy the majority of the ruling party, which may be “razor-thin” so that every vote counts, and second, it would lead to bye-elections, which could result in complications in the event that the person disqualified is later acquitted.
The Judges themselves have acknowledged the second consequence. At multiple places in the judgment of Lily Thomas, they have stated that when an appeal is preferred under section 374 of the Code of Criminal Procedure (hereafter the Code), the appellate court in exercise of its power under section 389(1) of the Code may stay the order of conviction. The High Court in exercise of its inherent jurisdiction may also stay the conviction under section 482.

This creates a problem as from the time of disqualification, until the time that the appellate court passes such an order, the seat will be vacant, during which time bye-elections may have to be held. If the appellate court then passes the order for stay of conviction and the member resumes his seat, and later his appeal is rejected, the whole process of bye-elections must start all over again. There is, therefore, potential for a great deal of confusion. This becomes especially apparent when we consider that about thirty percent of sitting members of both Houses of Parliament have criminal cases registered against them.

It has been pointed out by many people critiquing the judgment in Lily Thomas that this subsection would have been much less of an issue if speedy and reliable trials were the norm. The court made certain assumptions when it considers as problematic the delay in the coming into effect of the date of disqualification until an appeal against the conviction is disposed of. It assumed that the appeal would take a very long time, which is obviously a logical conclusion considering the current state of our court system, and that therefore the disqualification would, in reality, have no practical effect. There is statistical proof that this is, in fact, the case: out of 162 sitting Lok Sabha MPs against whom there are cases, 161 trials are yet to be completed.

Much of the problem with section 8(4) would be solved if a speedy trail were ensured. In such a scenario, the delay in coming into effect of the disqualification would be a reasonable period, instead of one so long that it amounts to negating the effect of the disqualification. This would also avoid the problems of confusion outlined above, wherein a person would be temporarily disqualified and bye-elections would be held, only for the bye-elections to become a pointless exercise if his appeal should be accepted.

This issue raises a larger question, one that is echoed in the People’s Union for Civil Liberties and Anr. v. Union of India and Anr. It raises a question about the purpose of the entire democratic process. Is the purpose of elections and of the Parliament to govern effectively, or is it to represent the people in the best manner possible? Or is it both? In other words, what is preferable, a government that functions smoothly but is rife with the criminal element and which may not contain the best candidates, or a government which is periodically thrown into chaos whenever a member faces a criminal charge?

4. DEMOCRACY, GOVERNANCE AND THE NOTA BUTTON

This question is closely tied to the concept of negative voting or neutral voting in elections, an issue that was raised in People’s Union for Civil Liberties v. Union of India. In this case, the constitutionality of certain rules under the Conduct of Elections Rules (hereafter called the Rules) in question. The combined effect of these rules means that persons who choose to abstain from voting after getting their names registered on the electoral roll are recorded as
having abstained. It was contended that this violates the secrecy of voting, which is fundamental to the process of free and fair elections.

The court spoke at length about the distinction between the right to vote and the right to freedom of voting as a part of the freedom of speech protected by Article 19(1) of the Constitution. It reaffirmed what had been held in two earlier decisions of the apex court, that the right to freedom of voting is a fundamental right, as it is a part of Article 19. The right to vote, however, is only a statutory right.

The court went on to emphasise the importance of secrecy in direct elections, and said that the act of not voting was just as much an exercise of the freedom of speech as the act of voting for a particular candidate. In the old ballot system, there was a system for secretly casting a neutral vote by simply not marking anything on the ballot paper. With the introduction of Electronic Voting Machines (EMVs), however, the mechanism of the machines makes it impossible for the voter to cast such a vote secretly, as there is no specific button for a neutral vote. The court therefore gave directions to introduce a button for 'None of the Above' (or NOTA) in the EVM machines so that the secrecy of the right to not vote as a facet of the right to freedom of speech and expression will be protected.

While the analysis of the connection between the right not to vote and the right to the freedom of speech and expression is substantially correct, it may be a slight stretch to say that it is integral to free and fair elections to ensure secrecy of neutral or negative voting. Naturally, a positive vote must be kept secret as it could lead to coercive methods being used by political parties to ensure votes. It is difficult to see, however, how the fact of a person having not voted for any candidate at all being public knowledge would affect the outcome of the election.

What, then are the consequences of the introduction of the NOTA button? The first effect of this button is on the voter turnout. The Supreme Court has also commented on this aspect in its judgment, expressing hope that it would increase participation of people in the electoral process. The thinking is that many people do not vote because they do not wish to vote for any of the candidates and that therefore the introduction of NOTA will encourage these people to exercise their right to vote. As the court commented, the no vote option “gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties.”

This leads us to the second effect of the NOTA button, which is the hope that it will make political parties more responsible and aware of the true feelings of the people towards the candidates that they have put forward. People have expressed the hope that it will lead to better candidates being brought forward by political parties.

Thus far, the NOTA button has been used in several State elections, with varying degrees of popularity. It garnered only 0.63 percent of votes in Delhi, the least number, though this was probably due to the debut of the Aam Aadmi Party, which attracted the majority of the “protest” votes. The response was similar in Mizoram where very few people used the button. In Chhattisgarh, however, 3.07% of the votes went to NOTA, with high numbers from the Left-Wing Extremist dominated areas of Bastar. It was also observed that the NOTA
button received a lot more votes from the tribal belts of Rajasthan than it did from the urban areas.

Yet, despite the button seemingly being used as a symbol of disenchantment in Rajasthan and Chhattisgarh, it is rather naïve to hope that it will motivate any change in politics in light of the fact that the NOTA button is not really any different from an invalid ballot. There is no effect of casting a NOTA vote; even if the majority of votes cast are neutral, it will not have the effect of cancelling out all the positive votes or of amounting to a rejection of all the candidates in the election. The candidate who garnered the largest number of positive votes would still win the election.

If the NOTA button is to be more than just a symbolic gesture or an expression of discontent, then the very nature of the election process must be changed to accommodate it. It is hoped that if, in a future election, there is an overwhelming majority of votes which are neutral, the button will no longer be merely a namesake and will result in a call for fresh elections with different candidates. However, any such change in the electoral process is not likely to happen in the near future. Experience with the process of amendments and reforms has proved that when reform needs to come from the Parliament, it is often slow; the Judiciary has been at the forefront of reforms in law in recent times.

Of course, before we enter into a debate on how to make a NOTA button effective, we must first determine what effect this will have, and whether such effect is desired. In considering whether a system of negative voting should be adopted, we are brought back the question of what the purpose of an election is. In a system of negative voting, after an election is conducted, it would determined whether the number of negative or NOTA votes outweigh the number of positive votes. If this is the case, it implies that none of the candidates who stood for the election have the support of the people. Therefore, the entire election process would be required to be held again with a fresh set of candidates.

5. CONCLUSION

We are thus brought back to our debate on democracy and governance, and must once again ask ourselves what the purpose of an election is. Is the purpose of an election to elect representatives swiftly and effectively, with the least chaos, so that the functioning of the government will not be impaired? Or is it to truly reflect the will of the people, no matter how chaotic that expression may become?

This question is ultimately the one that underlies all three of these decisions. In all of them, we must weigh on the one hand the desire that the will of the people be heard in a truly democratic way, and on the other the considerations of practicality and of the functioning of a government. It must be kept in mind that though the purpose of a democracy is to give a voice to the people, the purpose of elections is to select a governing body. Though it seems absurd to suggest that the two are contradictory, it is often difficult to find a path that balances them effectively.

The challenge, then, is to weigh the two ideals of democracy and effective governance in the Indian context. It is to determine which one should be sacrificed for the other, how much this
sacrifice can or should be without violating the spirit of the Constitution, and when such sacrifices are to be made. This is the challenge that must be considered when we talk about electoral reforms, and it is a challenge that the Supreme Court, unfortunately, often seems unable to meet.

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