

CHAPTER VI DEMOCRACY

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Political ideals that gain currency in a culture tend to become moribund with the passage of time and to suffer the fate of dogmas and dead metaphors: they lose the power they originally had to speak to us, to open up new pathways for thinking, and to inspire.¹

Democracy has been hailed as a *global phenomenon* and the most popular feature of modern political thought.² Several notable efforts have been made by the global community to promote and extend democracy to cover billions of people, with their varying histories, cultures, and disparate levels of affluence.³

In 2007, the United Nations General Assembly resolved to support the efforts of governments to promote and consolidate new or restored democracies. The GA in this regard stated that "democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. Also, while democracies share common features, there is no single model of democracy, and that democracy does not belong to any country or region, reaffirming further the necessity of due respect for sovereignty,

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¹ Paul Fairfield, *Why Democracy* 1666 (2008).

² The significant leap in the promotion and acceptance of democracy is said to be a resultant of six principles of sufficient universal acceptance; a) Democracy is an absolute good i.e., desirable for its own sake and an important component of individual and social welfare, b) higher levels of economic development are usually associated with increased democratization, c) free markets are a necessary and sufficient prerequisite for economic growth (and development) d) economic growth enhances social welfare, so that there is a positive feedback from free markets to democracy, via the growth and welfare enhancing effects of free markets, e) democracy is also growth, may be regarded as self-sustaining, f) democracy is an important impetus for marketisation, so democracy, growth and free markets may be regarded as constituting a virtuous cycle, each lending strength to the other.' See D.M. Nachane, Liberalization, Globalization and the Dynamics of Democracy in India, 25-56 *International Journal of Development and Conflict: Demo Issue* 26 (2010).

According to Nico Krisch, "In the early 1990's...the international sphere seemed to move from anarchy to order, with new institutions and courts structuring the emerging landscape and common values providing a principled framework for it. The spread of constitutional democracy at the domestic level seemed to be reinforced and secured by an increasingly robust and fair international legal order." See Nico Krisch, *Beyond Constitutionalism: Pluralist Structure of Postnational Law* 3 (2010).

³ Amartya Sen, "Democracy as a Universal Value", *Journal of Democracy* 10.3 (1999)

the right to self-determination, and territorial integrity.⁴ In 2005, the United Nations Democracy Fund was created to implement projects aimed at enhancing democratic practice, promoting human rights, encouraging participation of all groups in democratic processes.⁵

In contrast to its growing popularity, democracy has also been closely looked at with suspicion by experts- academic, political, and otherwise. The skeptics' sense reluctance on the part of the leaders, politicians, experts, theorists to define democracy on terms of what happens in a democracy.⁶ Skeptics assert "that the meaning of democracy is contested with no universal definition that is applicable."⁷

1. Defining Democracy

In the simplest of terms, democracy has been referred to as the rule of the people, or a form of government in which the 'demos'- the people, rule with power in the hands of many rather than just a few or one.⁸ In other words, *demos* can be translated as 'the people' and *kratos* as 'power'; democracy has a root meaning of the power of the people.⁹

⁴ UNGA, 62nd Session. Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/62/7 (Last visited 10.3.2012). In this regard, reference can also be made to the United Nations Universal Declaration of Human Rights (UDHR 1948) that states; the will of the people shall be the basis of the authority of the government. The International Covenant of Civil and Political Rights (ICCPR 1966) provides for the right to expression, right to participate in public affairs, right to association, and the right to vote.

⁵ UNDF- United Nations Democracy Fund. See <http://www.un.org/democracyfund/>

⁶ *Skeptics* is a general term referring to the scholars/experts who challenge the popularized notions of democracy. As often argued by the skeptics, the current political arrangements are leading to fragmentation of societies, and inflexible forms of decision making. See Will Kymlicka, "Citizenship in an Era of Globalization: Commentary on Held" in Ian Shapiro, Casiano Hacker (eds.), *Democracy's Edges* 112 (1999); James Bohman, *Public Deliberation: Pluralism, Complexity and Democracy* 1 (2000); Cherif Bassiouni, "The Future of Human Rights in the Age of Globalization", Vol. 40 No.1-3 *Denver Journal of International Law and Policy* 38 (2011-2012).

⁷ Michael Clarke, "The Contested Meaning of the International Norm of Democracy", Vol. 2 No. 2 *In-Spire Journal*, 2 (2008). Also available at www.in-spire.org (Last visited 10.12.2011).

⁸ A quick reference must be made to concept of direct democracy and indirect democracy. In the former, 'the political system in which the people directly make determining political decisions... An indirect democracy is a political system in which the people make the determining political decisions to an important extent directly at elections...with many of the decisions actually made by the elected representatives'. Tom Paine opined that ancient democracies increased in population, expanded in territory, for which direct democracy became inconvenient. A system of representation was a remedy for this. See Barry Holden, *The Nature of Democracy* 27-30 (1974).

⁹ Josiah Ober, "The Original Meaning of Democracy: Capacity to do Things, Not Majority Rule", 15 No. 1 *Constellations Volume* 3 (2008).

To preserve the power of the people, democracy is based on the values of liberty and equality. The components as 'free speech, political equality, liberty, toleration, empathy, efficiency'¹⁰ are crucial to the workings of a democracy.

The definitions of democracy often quoted reflect the evolving and significant character of democracy. The Office of the United Nations High Commissioner for Human Rights¹¹ states that the respect for human rights and fundamental freedoms and the principle of holding periodic and genuine elections by universal suffrage are essential elements of democracy.¹²

The United Nations Commission on Human Rights (replaced by the Human Rights Council in 2006) defines democracy in comprehensive terms as 'a system of governance that encompasses procedures and substance, formal institutions and informal processes, majorities and minorities, mechanisms and mentalities, laws and their enforcement, government and civil society'.¹³

¹⁰ Burt Neuborne, "Making the Law Safe for Democracy: A Review of the Law of Democracy Etc.", 97 *Michigan Law Review* 1578 (May 1999).

¹¹ 23 April 2003, Available at *UN Doc E/CN.4/2003/L.11/Add.4*. (Last visited 10.3.2012).

¹² The African Union's Charter on Democracy (concluded in 2007 but not yet in force), Elections and Governance includes as principles: 'Respect for human rights and democratic principles, Access to and exercise of state power in accordance with the constitution of the State Party and the principle of the rule of law; Promotion of a system of government that is representative; Holding of regular, transparent, free and fair elections; Separation of powers; Promotion of gender equality in public and private institutions; Effective participation of citizens in democratic and development processes and in governance of public affairs; Transparency and fairness in the management of public affairs; Condemnation and rejection of acts of corruption, related offenses and impunity; Condemnation and total rejection of unconstitutional changes of government; Strengthening political pluralism and recognizing the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.' See The Office for Promotion of Parliamentary Democracy, "Democracy Revisited: Which Notion of Democracy for EU's External Relations", 12 (2009). Available at <http://www.europarl.europa.eu/oppd> (Last visited 10.12.2011).

¹³ Some of these elements are explained in greater detail in another declaration by the Human Rights Commission, which states; the rights entailed in a democracy include, inter alia, the following: (a) The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) The right to freedom to seek, receive and impart information and ideas through any media; (c) The rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; (d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) The right of political participation, including equal opportunity for all citizens to become candidates; (f) Transparent and accountable government institutions; (g) The right of citizens to choose their governmental system through constitutional or other democratic means; (h) The right to equal access to public service in one's own country. Also, the African Union's Charter on Democracy (concluded in 2007 but not yet in force), Elections and Governance includes as principles: 'Respect for human rights and democratic principles, Access to and exercise of state power in accordance with the constitution of the State Party and the principle of the rule of law; Promotion of a system of government that is representative; Holding of regular, transparent, free and fair elections; Separation of powers; Promotion of gender equality in public and private institutions; Effective participation of citizens in democratic and development processes and in governance of public

Robert Dahl refers to a few criteria to highlight what democracy provides opportunities for; ¹⁴ (a) Effective Participation (b) Equality in Voting (to eliminate the possibility of majority imposition of choices) (c) Enlightened Understanding (knowledge about policy and outcomes) (d) Control of the Agenda (policies must be open to change or deliberation) (e) inclusion of adults.¹⁵

As evident from the above definitions, democracy is desirable to people for a variety of reasons; it acknowledges freedom, knowledge, participation, and wellbeing. The definitions signal the heart of democracy as *the people, the rules, institutions, political freedom* and *constitutional prescriptions*. The above definitions identify democracy as a political force that involves the governed and the governing, with enough strength provided to both for achieving an objective of social solidarity and political wellbeing.

Under the democratic set-up, the strength exercised over the governed by the governing is often characterized as the state power or state monopoly over legislation and violence for sustaining a system characterized by rights, rules, institutional mechanisms etc.¹⁶ Brian Tamanaha in this regard states that in a democracy citizens create the laws under which they live (political liberty); government officials take actions against citizens following these laws (legal liberty). In the first respect, they rule themselves; in the second they are ruled by the laws which they set for themselves. Citizens, therefore, are at no point subject to the rule of another individual.¹⁷

However, instead of definitive features of democracy, what is open to deliberation is what constitutes *rule*, and the *people*?¹⁸ "Does talk of the people simply imply some

affairs; Transparency and fairness in the management of public affairs; Condemnation and rejection of acts of corruption, related offenses and impunity; Condemnation and total rejection of unconstitutional changes of government; Strengthening political pluralism and recognizing the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.' See The Office for Promotion of Parliamentary Democracy, "Democracy Revisited: Which Notion of Democracy for EU's External Relations", 12 (2009). Available at <http://www.europarl.europa.eu/oppd> (Last visited 10.12.2011).

¹⁴ Robert Dahl, *On Democracy* 37 (2000).

¹⁵ To John Calhoun: "Democracy is not majority rule. Democracy is diffusion of power, representation of interests, and recognition of minorities. Aron: A democratic regime is one. . . in which the peaceful rivalry for the exercise of power exists constitutionally." Bobbio: "A democratic regime is first and foremost a set of procedural rules for arriving at collective decisions in a way which accommodates and facilitates the fullest possible participation of interested parties." See Robert Grey, *Democratic Theory and Post Communist Change*, Appendix 2.1 Selected Definitions of Democracy (1997).

¹⁶ Bhikhu Parekh, "The Modern Conception of Right and Its Marxist Critique" in Upendra Baxi (ed.) *The Right to be Human* 1-22 (1987).

¹⁷ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* 36 (2004).

¹⁸ Traditionally, the people in 'ancient Greece-only included a minority of the society among the decision makers. Aliens, slaves and women were excluded...Also a reference to people as the middle classes that were linked to property, membership of society and a consequent right to political participation...Since

homogeneous will amongst all members of a given community, capable of expression in universally agreed political decisions?"¹⁹ In context, how the *will of the people* expressed? What are the mechanisms to question democratic decision-making? What standards ascertain the *legitimacy of democratic actions*? What are the moral and legal standards governing the actions of decisions makers?

The questions of this genre are multiple and complex.²⁰ As rightly expressed, "thinking of democracy as the exercise of political power where policies and the agents charged with implementing them are directly or indirectly determined by popular voting, leaves open the question of whether this is the best way or even a good way to motivate government."²¹

To Barry Holden, elections although are necessary to entail representatives of the people's interests, the essential characteristics of such persons is the manner of their selection, not their behaviour or characteristics...²² So does the definition of democracy include an understanding to what occurs after elections or whether it ascertains what qualifies as constructive or democratic behavior of the representatives? It has thus emerged that democracy is a functional political virtue. The meaning that can be attributed to democracy is, therefore, broader than the fact of the appointment of the centers of governance. It assumes a holistic sanctity that must be capable of regulating itself through virtues unique to a functional democracy.

In this regard, Robert Dahl refers to the two ways of theorizing on democracy; the method of maximization, and the descriptive method. The former labeling the goal of democracy and the institutions necessary to achieve it, and the latter about the varied

then, the whole task of democratic theory has been to enlarge the proportion of society involved in decision making.' See Barry Holden, *The Nature of Democracy* 14-15 (1974).

¹⁹ Jack Lively, *Democracy* 9 (1975).

²⁰ A democratic set-up in terms of institutional mechanisms is one dimension of democracy. The expression 'formal democracy' is more so in reference to a political system that features regular fair elections, accountability, effective guarantees of freedom. However, the mere identification of democracy with the formal structural requirements is a faulty perception and must be disregarded. In the words of Maxwell Chibundu, "the legitimacy conferred by democracy flows not from its recognition of the ideal of embodiment of supreme and ultimate authority in the people...In particular democracy relies on periodic elections that are grounded on rationale deliberative processes rather than on haphazard assertions of power by the general populace." See Maxwell O. Chibundu, "Political Ideology as a Religion: The Idolatry of Democracy", Available at <http://ssrn.com/abstract=10223718>, 143 (2007).

²¹ Frank Cunningham, *Theories of Democracy: A Critical Introduction* 15 (2002).

²² Our understanding of democracy lies in the fact that elections are conceived to help bring about representation on several grounds. (a) The idea that election will ensure that only persons will be chosen who say that they will advance the interests of the electors. (b) That electors will ensure that representatives will behave in an appropriate way after elections. (c) That because of insecurity of tenure, a representative will refrain from promoting legislation that will adversely affect him when he loses his special status as a representative. *Supra* note 8 at 33.

practices of democracy that enable the identification of common characteristics and the conditions necessary for performance.²³ To discard a dysfunctional approach to democracy, it must necessarily be construed in light of the two classifications; democracy as norm and democracy in practice.

2. The Indian Democracy

The constitutive element of democracy in India- the Constitution of India, embodies a philosophy that can be summarized in three strands: "protecting and enhancing national unity and integrity, establishing the institutions and spirit of democracy, and fostering a social revolution to better the lot of the mass of Indians".²⁴

Speaking historically, under colonial rule, the living conditions in India had reflected a great deal on the character of society the people wanted to build on attaining independence. On attaining its independence in 1947, India absorbed liberal ideals in the form of a parliamentary democratic structure, the directive principles of state policy, fundamental rights, the separation of powers of the three institutions, independence of the judiciary, universal suffrage, economic planning etc. The very values of justice, democracy, and equality were drawn expressly to signify a significant socialist change with the goals of upliftment and emancipation, in order to overcome the horrors of the past. The 'phase witnessed a transition from the pattern of revolutionary organization closely associated with communism²⁵, towards a constructive democratic approach to social-economic problems'.²⁶

The establishment of democracy in India, a society characterized by myriad diversity in language, religion, ethnicity, and economic interest was both a difficult and risky enterprise.²⁷ The liberal provisions in the form of the democratic institutional structure of the legislature, executive and the judiciary, Part III-Fundamental Rights (hereinafter FR's), adult suffrage, and Part IV- Directive Principles of State Policy (hereinafter DPSP), were drafted in a manner conducive to reforms and growth. The attributes were seen as meaningful and essential to 'encroach uncontrolled exercise of power'²⁸.

²³ Richard Krouse, *Polyarchy and Participation: The Changing Democratic Theory of Robert Dahl*, Vol. 14 (3) *Polity* 442 (1982).

²⁴ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* 16 (2003).

²⁵ The power of revolutionary Communism had a specific role to play. It not only aimed at changing the very essence of the state by introducing a fundamental social transformation from a capitalist state to that of a socialist. See Gennady Belov, *What is the State?*, 25 (1986).

²⁶ Vishwanath Prasad Varma, *Modern Indian Political Thought* 471 (1967).

²⁷ M. Manisha, Sharmila Deb (Eds.), *Indian Democracy: Problems and Prospects*, xii (2009).

²⁸ *Supra* note 8 at 527.

With the incorporation of several principles and rules, it was also acknowledged that liberal democracy by itself was not a flavor for change and progress. The Indian democracy had to be coupled with the zeal of the rational, powerful, and right-minded citizenry of the society. For instance, the mechanism of "regular and effective elections, based on universal adult franchise, of all important offices and institutions at the central, regional, and local levels of the political system, is referred to as the most significant factor to explain the success of India's democracy. These features also supported by an independent Election Commission, an independent judicial system that is pro-active in the defense of human rights and marginal social groups."²⁹

Several endearing dimensions of the Indian democracy also rest upon the implicit norms-principles, which guide the conduct of institutions. A few of the notable features of the Indian democracy are spelled out as follows.

3. The Characteristics

The working of the Indian democracy over the years has reflected a path of pragmatism, with a few strands of conflicts and disagreements. All along, the democratic processes are flexible and constantly guided by rules and fundamental principles.

Although the Preamble of the Indian Constitution highlights India as a democratic polity, the meaning of what is democracy can be found in the judicial interpretation of the apex court in India. More so, a discussion on democracy in India has primarily been directed by the Supreme Court, while interpreting significant laws and developments. The court has added greater meaning and dimensions to *what is democracy* in India or what its characteristic features are. A few of the interpretations are highlighted in the cases highlighted below.

In *Mohinder Singh Gill v. Chief Election Commissioner*³⁰ the court stated;

(Democracy) is a continual participative operation, not a cataclysmic, periodic exercise...Although the full flower of participative government rarely blossoms; the minimum credential of popular government is an appeal to the people after every term for the renewal of their confidence. So we have adult franchise and general elections as constitutional compulsions.

²⁹ Subrata Misra, "Democracy's Resilience- Tradition, Modernity and Hybridity in India", March (2011). Available at <http://hir.harvard.edu/comment/reply/2802#comment-form> (Last visited 12.11.2011).

³⁰ AIR 1978 SC 851

In *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*³¹ the court stated that;

Democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-side information, disinformation, misinformation and non-information, all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchy organizations...

In *G.V.K Industries v. Income Tax Officer*³² it was stated by the court that;

Our Constitution charges the various organs of the States with affirmative responsibilities of protecting the interests of, the welfare of and the security of the nation...The power of judicial review are granted in order to ensure that such power is being used within the bounds specified in the Constitution...The very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution.

In *Nandini Sundar v. State of Chhatisgarh*³³ the court stated that;

It is critical for the Government to recognize that dissent or expression of dissatisfaction is a positive feature of democracy, that unrest is often the only thing that actually puts pressure on the government to make things work and for the government to live up to its own promises.

³¹ (1995) 2 SCC 161

³² (2011) 4 SCC 36

³³ (2011) 7 SCC 547

In response to a Writ Petition filed in 2007 alleging widespread violation of human rights in the State of Chhatisgarh on account of the on-going extremism/insurgency, and the counter-insurgency offensives launched by the State of Chhatisgarh.

In *Kesavananda Bharati v. State of Kerala*³⁴ the Supreme Court of India held democracy to be a part of the *basic structure* under the Indian Constitution. Democracy, according to the Court, is a fundamental pillar of the Constitution that cannot be amended, repealed or abrogated. It is beyond the constituent power of the Parliament to tamper with the democratic features of the Constitution. Therefore, no constitutional amendment would be valid if it sought to destroy or deprive the Constitution of its democratic foundations.

In *Swaran Singh v. Standing Council*³⁵ the court highlighted that;

This is the age of democracy and equality. No people or community should be today insulted or looked down upon, and nobody's feelings should be hurt. This is also the spirit of our Constitution and is part of its basic features.

In *People's Union for Civil Liberties v. Union of India* the court stated,³⁶

³⁴ (1973) 4 SCC 255

³⁵ (2008) 12 SCR 132

In reference to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989, the court the so-called upper castes and OBCs should not use the word 'Chamar' when addressing a member of the Scheduled Caste, even if that person in fact belongs to the 'Chamar' caste, because use of such a word will hurt his feelings. In such a country like ours with so much diversity - so many religions, castes, ethnic and lingual groups, etc. - all communities and groups must be treated with respect, and no one should be looked down upon as an inferior. That is the only way we can keep our country united...we have to take into account the popular meaning of the word 'Chamar' which it has acquired by usage, and not the etymological meaning. If we go by the etymological meaning, we may frustrate the very object of the Act, and hence that would not be a correct manner of interpretation. (Para 22-23)

³⁶ AIR 2003 SC 2363

The decision of the court was in reference to the power of the Election Commission of India under Article 324 of the Constitution of India. The Association for Democratic Reforms had filed a writ petition in 1994 before High Court of Delhi for direction to implement the recommendations made by Law Commission in its 170th report and to make necessary changes under Rule 4 of Conduct of Elections Rules, 1961 regarding debarring a candidate from contesting election if charges have been framed against him/her by a Court in respect of certain offences and necessity for candidate to furnish details of criminal cases, if any, pending against him. It also suggested that true and correct statement of assets owned by the candidate should also be disclosed. The issue before the Supreme Court was whether Election Commission is empowered to issue directions as ordered by High Court and whether a citizen has right to get relevant information about prospective candidates.

Also in *Superintendent of Police v. R. Karthikeyan* AIR 2012 Mad 84, the High court of Madras stated, India has adopted a democratic form of Government and no democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government. It is only when the people know how the Government is functioning, they can fulfill the role which democracy assigned to them and make democracy a really effective

the right to get information in democracy is recognized all throughout and it is natural right flowing from the concept of democracy...

In *People's Union for Civil Liberties v. Union of India*³⁷ it was highlighted that;

In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue... The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act. The Constituent Assembly debates reveal that the idea to treat the voting right as a fundamental right was dropped; nevertheless, it was decided to provide for it elsewhere in the Constitution.

The court added great dimensions to the freedom of expression and the right to vote by referring to it as a constitutional right. Freedom of voting as distinct from the right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as the right to secure information about the candidate which are conducive to the freedom.³⁸

In the more recent case of *Sahara India Real Estate Corp. Ltd. v. Securities and Exchange Board*³⁹ the court stated that;

It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our Constitutional system are a number

participatory democracy. Right to information is basic to any democracy. A vibrant citizenry is a prerequisite for survival of democratic society and governance...

³⁷ AIR 2003 SC 2363

³⁸ *Ibid.*

³⁹ 2012 (8) SCALE 541

of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against, other important, and often competing, values.

In *Minerva Mills Ltd. v. Union of India*⁴⁰, Bhagwati, J. said "judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review..."

In light of the various decisions of the court, a few features or objectives of the Indian democracy can be carved out;

- To uphold the Constitution and the law without fear or favor.
- Adult franchise and general elections.
- Equality in law.
- Dissent or expression of dissatisfaction.
- The power of judicial review.
- The right to information.
- The Rule of law.
- The right to vote.
- The inclusion of citizens in the decision-making processes of the State.

It is thus evident that democracy in India has expanded beyond the electoral process to accommodate newer connotations related to institutional behavior and aspects of social justice.

4. The Functional Parameters

In terms of quality, the Indian democracy has added stronger mechanisms for ensuring the credibility and responsiveness of institutions. In other words, it has been functional and dynamic. The following are a few dimensions of Indian democratic politics.

⁴⁰ AIR 1980 SC 1789

4.1 Political Freedom and Representative Democracy

The ties between democracy and the citizens have assumed great importance in India. The democratic culture has acknowledged both the personal entitlement of people to try to persuade and the advantage of inserting all potentially relevant considerations into decision making.⁴¹

More specifically, the concept of political representation has become the most important facet of contemporary democratic theory and practice in India. Representation as an ideal is referred to "as crucial in constituting democratic practices...in addition democratic theorists are increasingly appreciating the contributions of representation to the formation of public opinion and judgment, as well as its role in constituting multiple pathways of social influence within and often against the state."⁴² It is that a 'regulatory rights-enforcement approach to the principle of general adult suffrage is meaningless. It must be replaced by an *organizational* approach. Instead of granting its subjects an enforceable right to vote the state must organize and operate an actual system of elections.⁴³ Voting does not by itself involve empowerment and effective participation. In other words, "an election in which the electorate can only choose or reject a single list of candidates is not democratic on the sense of the word..."⁴⁴

In the context of India, democracy for several years has been associated with the electoral process, for which the right to vote has cautiously been defined and interpreted to maintain its essence. However, democracy today also implies the requirement for a high caliber of politicians, the availability of choices among rival political parties and leaders, a consensus among them on the overall direction of national policy, and specifically political leadership which is accountable to the people.⁴⁵

With the expanding horizon of the Indian democracy, there are visible attempts at ensuring congruence of "people's interest and legislative policy" by mechanisms such as "referendum" and "initiative"⁴⁶. In terms of meaning, the citizen-initiated referendum is essentially an instrument whereby citizens, by a direct vote, can decide

⁴¹ Balmiki Prasad Singh, "The Future of Democracy", Vol.L No.35 *Mainstream* 16 (August 2012).

⁴² Nadia Urbinati and Mark Warren, "The Concept of Representation in Contemporary Democratic Theory", Vol. 11: 387 *Annual Review of Political Science* 388 (2008).

⁴³ Sack Peter, "Legal Technology and Quest for Fraternity: Reflections on Preamble of Indian Constitution" 32:3 *Journal of the Indian Law Institute* 304 (1990).

⁴⁴ *Supra* note 8 at 9.

⁴⁵ *Supra* note 42 at 17.

⁴⁶ Prashant Bhushan, Marlana, Atishi, "Initiatives and Referendums: The Next Step in Indian Democracy", Vol. XLVII No. 34 *Economic and Political Weekly* 34 (August 2012).

The authors make specific reference to incidents in India which reflected a sense of people's participation and consultation having impact on decision making and policy.

whether the legislation passed by Parliament should be accepted or repealed...The citizen-initiated referendum provides a structural mechanism, whereby people's protests and opposition can have a direct impact on policy. The mechanism can also be utilized to bring forth a new legislation or constitutional amendment, whereby putting the proposal on the political agenda.⁴⁷

To innovate and flourish, the Indian democracy must be capable of redefining the nature of politics and reforms and not be tied to any given definition. In addition, the reforms must give effect to the status of individuals as autonomous rights-bearers, entitled to play a role in determining both their rights as citizens and the political rules they have to play by.⁴⁸

One such endeavor is evident in the State of Gujarat, wherein the government passed the Gujarat Local Authority Law (Amendment) Bill in 2009, making voting compulsory in elections to local self-government bodies such as Municipalities and Panchayats. The Statement of Objects and Reasons of the Gujarat Bill are as follows;

It is observed that due to low turnout of voters to discharge their duty by exercising their right to vote, the true spirit of the will of the people is not reflected in the electoral mandate...

In this regard, a survey on 260 subjects of all socio-economic and educational backgrounds, conducted by the Research Foundation for Governance in India (Analysis of Compulsory Voting in Gujarat) indicates the following facts; (a) Voter engagement in local politics is a problem. It prejudicially affects political accountability and responsibility towards political mandates. (b) Reasons for not voting include disinterest in politics, the mark of protest against the government, lack of awareness etc.

The Research Foundation puts forth substantial arguments in favor and against compulsory voting. (a) In Favor- Compulsory voting will enable people to be aware of their local bodies. (b) Not in Favor- compulsory voting is no guarantee for efficient governance. Also, is the State equipped to punish every person who does not perform his/her civic duty? For a few, the scheme is also expressed as coercive and unreasonable for the citizens,⁴⁹ for they require a competent set of candidates than a

⁴⁷ *Ibid.*

The authors also discuss the increasing global acceptance of such means of representative democracy. Referring to the case in Switzerland (2000), wherein a Electricity Market Law for liberalization and deregulation of the electricity market was rejected for non-acceptance from the citizens.

⁴⁸ Richard Bellamy, *Constitutionalism and Democracy* xi (2006).

⁴⁹ 'Other countries that go by compulsory voting are Australia, Peru etc. In the former voters may either explain their reasons for not voting, or pay fine. In Peru, the citizens must carry proof of their voting to avail

stick beating law on political reforms. A survey conducted by the HT-CNN IBN confirmed the public demand for honest and accountable leadership. As expressed; "if one were to confuse faith in democracy with faith in politicians, the results of our survey would be rather depressing...One (such) reform proposed recently was the *right to recall*."⁵⁰

As evident, the Indian legal discourse is certainly paving way for political reforms. One may expect significant changes related to the right to vote, the right to negative vote, and right to recall or compulsory voting.⁵¹

4.2 Public Interest Litigation

Public Interest Litigation (PIL) has been the greatest contribution by the Indian courts to understanding the functional contours of Indian democracy.

According to S.P Sathe, PIL emerged and grew when the Court liberalized its procedure to facilitate access to the common man and increase public participation in the judicial process as a means to control other bodies of government. This required radical change in the traditional paradigm of the judicial process. The traditional legal theory of the judicial process envisioned a passive role for the courts. It postulated: (1) The courts merely found the law or interpreted it, but did not make it; (2) if the courts made the law, they did so only to fill in the gaps left by statute, and then only to the extent necessary for the disposal of the matter; (3) a court will not decide a question of law unless the decision is necessary for the disposal of the matter before it; (4) after a matter is dealt with by a court and it has given its decision, such a decision is binding on the parties and the same matter cannot be raised again before the same court or a court of concurrent jurisdiction; (5) only a person who has suffered an injury or whose right is violated can approach the Court and initiate the judicial process; and (6) a

social services provided by the State'. See Report of Research Foundation for Governance in India. Available at

<http://www.rfgindia.org/publications/Analysis%20of%20Compulsory%20Voting%20in%20Gujarat.pdf>
(Last visited 8.11.2011).

⁵⁰ Abhijit Patnaik, "Will the Honest Netas, Please Stand Up", *The Hindustan Times* at 13 (28th November 2011).

⁵¹ In *N.P. Ponnuswami v Returning Officer, Namakkal Constituency* (1952) S.C.R. 218 the court observed that the right to vote or stand as a candidate for election was not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it. In *Jyoti Basu v Debi Ghosal* (1982) 1 S.C.C. 691 the court held that "a right to elect, though fundamental to democracy... neither a fundamental right nor a common law right. It is pure and simple, a statutory right." Also see In *Anukul Chandra Pradhan v Union of India* (1997) 6 SCC 1; *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294; *PUDR v. Union of India* (2003) 4 SCC 399.

person who has a cause of action and *locus standi* to raise an issue before a court of law must do so within a prescribed time limit provided by law.⁵²

PIL in India has been a part of the constitutional litigation by the independent judiciary armed with the power of judicial review. The power to enforce the Fundamental Rights is conferred on both the Supreme Court and the High Courts. The courts can test not only the validity of laws and executive actions but also of constitutional amendments. It has the final say on the interpretation of the Constitution and its orders are supported with the power to punish for contempt.⁵³

Since its inception, the Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also the determination of public policies and the establishment of rule of law and constitutionalism.

In the case of *S.P. Gupta v. Union of India*⁵⁴ the Supreme Court of India held that;

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . and such person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ.

In *Sheela Barse v. Union of India*⁵⁵ the Supreme Court was of the view that the court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility of organizing of the proceedings, moulding the relief and, equally important, is supervising the implementation thereof.

In *Guruvayoor Devaswom Managing Committee v. C.K. Rajan*⁵⁶, the court made known a few governing principles of PIL. (a) The court in the exercise of powers under Article 32 and 226 of the Constitution of India can entertain a petition filed by any interested person in the welfare of the people who are not in a position to knock on the doors of the court. (b) issues of public importance, enforcement of fundamental rights of a larger number of public vis-à-vis the constitutional duties and functions of

⁵² S.P. Sathe, "Judicial Activism: The Indian Experience", Vol. 6: 29 *Journal of Law and Policy* 63-64 (2001).

⁵³ Surya Deva, "Public Interest Litigation in India: A Critical Review", Issue 1 *Civil Justice Quarterly* 23 (2009).

⁵⁴ (1981) Supp S.C.C. 87, 210. See also *PUDR v. Union of India* AIR 1982 SC 1473; *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161.

⁵⁵ AIR 1988 SC 2211

⁵⁶ (2003) 7 SCC 546

the State, if raised, the court can treat a letter or telegram as a PIL upon relaxing procedural laws as also the law relating to pleadings. (c) The dispute between two warring groups purely in the realm of private law would not be allowed to be agitated as public interest litigation. (d) The court in special situations may appoint a commission or other bodies for the purpose of investigating the allegations...(e) ordinarily the High Court should not entertain a writ petition by way of PIL questioning the constitutionality or validity of a statute or a statutory rule.

Tracing the development of PIL in India, "in the first phase which began in the late 1970s and continued through the 1980's the PIL cases were generally filed by public-spirited persons (lawyers, journalists, social activists or academics). Most of the cases related to the rights of disadvantaged sections of society such as child laborers, bonded laborers, prisoners, mentally challenged persons, pavement dwellers, and women. The relief was sought against the action or inaction on the part of executive agencies resulting in violations of Fundamental Rights under the Constitution. Post- 1990's, in comparison to the first phase, the filing of PIL cases became more institutionalized in that several specialized NGOs and lawyers started bringing matters of public interest to the courts on a much more regular basis. The breadth of issues raised in PIL also expanded tremendously from the protection of the environment to corruption-free administration, right to education, sexual harassment at the workplace, relocation of industries, rule of law, good governance, and the general accountability of the Government... the third phase the current phase, which began with the 21st century is a period in which anyone could file a PIL for almost anything...From the judiciary's point of view, one could argue that it is time for judicial introspection and for reviewing what courts tried to achieve through PIL.⁵⁷

In order to maintain the credibility of PIL as an instrument for the access of justice several attempts have been made time and again.⁵⁸ In this regard, Mehta

⁵⁷ Surya Deva, "Public Interest Litigation in India: A Critical Review", Issue 1 *Civil Justice Quarterly* 27-29 (2009).

⁵⁸ An attempt to curb the misuse of the PIL was made, though not strictly on the part of the Government, in 1996 when a private member Bill was introduced in the Rajya Sabha, the Upper House of the Indian Parliament. The Public Interest Litigation (Regulation) Bill had proposed that petitioners filing frivolous PIL cases should be "put behind bars and pay the damages". However, the Bill which raised concerns of interfering with judicial independence could not receive the support of all political parties. As the Bill lapsed, this attempt to control the misuse of PIL failed. In addition, the Supreme Court has compiled a set of "Guidelines to be Followed for Entertaining Letters/Petitions Received by it as PIL". The Guidelines, which were based on the full-court decision of December 1, 1988, have been modified on the orders/directions of the Chief Justice of India in 1993 and 2003. The Guidelines provide that ordinarily letter/petitions falling under one of the following 10 categories will be entertained as PIL: bonded labour matters, neglected children, non-payment of minimum wages, petitions from jails complaining of harassment, death in jail, speedy trial as a fundamental right, etc., petitions against police for refusing to register a case, harassment

argues that to the extent rule of law signals for making available a forum of appeals, one can argue the Supreme Court of India has done a decent job.

About PIL, there has also been a margin of criticism. As often stated, the unelected judges have effectively replaced the notion of the separation of powers among three governmental branches with a unitarian claim of formal judicial supremacy. The concept of the rule of law is supposed to legitimate this claim, but whether judicial supremacy either as such or as exercised by the Indian Supreme Court upholds the rule of law remains an open question.⁵⁹ The competing claims in support and against the exercise of the power of the courts have further led to developments vis-à-vis judicial power and policy-making.

The following are a few notable decisions in PIL;

In *People's Union for Democratic Rights v. Union of India*⁶⁰, a letter addressed to the Supreme Court was treated as a writ petition to look into the blatant violations of labour law in India while undertaking construction works for the Asian Games. The petitioners claimed that the various authorities to whom the execution of the different projects was entrusted engaged contractors for the purpose of carrying out the construction work of the projects and they were registered as principal employers under section 7 of the Contract Labour (Regulation and Abolition) Act, 1970. These contractors engaged workers through Jamadars who brought them from different parts of India, particularly the States of Rajasthan, Uttar Pradesh, and Orissa, and paid these Jamadars the minimum wage of Rs. 9.25 per day per worker and not to the workmen direct. The Jamadars deducted Rupee one per day per worker as their commission and then paid the workers. There was also a violation of the Contract Labour (Regulations and Abolition) Act 1970, which was leading to exploitation and unhealthy conditions of work.

The court stated that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a different kind of litigation from the ordinary traditional litigation which is essentially of an adversary

by police and death in police custody, petitions against atrocities on women, in particular harassment of bride, bride-burning, rape, murder, kidnapping, etc, petitions complaining harassment or torture of persons belonging to scheduled caste and scheduled tribes, petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wildlife and other matters of public importance, petitions from riot-victims and family pensions. The PIL Cell has been entrusted the task of screening letters/petitions as per these Guidelines and then placing them before a judge to be nominated by the Chief Justice of India. See *Id* at 39.

⁵⁹ Pratap Bhanu Mehta, "The Rise of Judicial Sovereignty", Vol 18:2 *Journal of Democracy* 72 (April 2007).

⁶⁰ 1982 AIR 1473

character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the court not to enforce the right of one individual against another as it happens in the case of ordinary litigation, but it is intended to promote and indicate public interest which demands that violations of constitutional or legal rights of a large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed... Public interest litigation is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority, and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The court in this regard directed the Delhi Administration to ensure that wages were to be paid directly from the contractors to the workers, with no commissions being deducted by the Jamadars.

In *Bachpan Bachao Andolan v. Union of India*⁶¹, the petition was filed in the public interest under Article 32 of the Constitution in the wake of serious violations and abuse of children who were forcefully detained in circuses, in many instances, without any access to their families under extreme inhuman conditions. As reported, there were instances of sexual abuse on a daily basis, physical abuse as well as emotional abuse. The children are deprived of basic human needs of food and water. The petitioner is engaged in a social movement for the emancipation of children in exploitative labour, bondage and servitude.

Bachpan Bachao Andolan has been able to liberate thousands of children with the help of the judiciary and the executive as well as through persuasion, social mobilization and education. The petitioner indicated that for the first time the petitioner came to know about the plight of children in Indian circuses way back in 1996. At that time, the petitioner had rescued 18 girls from a circus performing in Vidisha District of Madhya Pradesh. This was possible after a complaint made by a 12-year-old girl, who managed to escape from the circus premises. She complained that she and several other Nepalese girls had been trafficked and forced to stay and perform in the circus where they were being sexually abused and were kept in most inhuman conditions; also stating, that there are no labour or welfare laws, which protect the rights of these children. Children are frequently physically, emotionally, and sexually abused in these places. The most appalling aspect is that there is no direct legislation, which is vested with powers to deal with the problems of the children who

⁶¹ AIR 2011 SC 3361

are trafficked into these circuses. The Police, Labour Department or any other State Agency is not prepared to deal with the issue of trafficking of girls from Nepal holding them in bondage and unlawful confinement. There is perpetual sexual harassment, violation of the Juvenile Justice Act and all International treaties and Conventions related to Human Rights and Child Rights to which India is a signatory. Consequently, the court directed;

(i) In order to implement the fundamental right of the children under Article 21A it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months from today. (ii) The respondents are directed to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children be kept in the Care and Protective Homes till they attain the age of 18 years. (iii) The respondents are also directed to talk to the parents of the children and in case they are willing to take their children back to their homes, they may be directed to do so after proper verification. (iv) The respondents are directed to frame proper scheme of rehabilitation of rescued children from circuses. (v) We direct the Secretary of Ministry of Human Resources Development, Department of Women and Child Development to file a comprehensive affidavit of compliance within ten weeks.

In *Azad Riksha Pullers Union v. Punjab*⁶² the Punjab Cycle Riksha, or Regulation of Rickshaws Act of 1975 was in question, which provided that licenses to ply rikshaws could be given only to those owners who run the rikshaws. Licenses could not be given to those who owned the rikshaw but rented them to other persons. The Act threatened the unemployment of several rikshaw pullers who did not own their rikshaws, and threatened to leave many rikshaws owned by the non-driving owners idle. The Act was struck down and a scheme was provided by the court whereby the rikshaw pullers could apply for loans to the Punjab National Bank to acquire the rikshaws.

In *Centre for PIL v. Union of India*,⁶³ the Supreme Court allowed two writ petitions challenging the legality of the appointment of P.J. Thomas as Central Vigilance Commissioner based on the recommendation of the high powered committee (HPC) constituted under the proviso to section 4(1) of the Central Vigilance Commission Act, 2003. The apex court reiterated the settled position that though the Government was not accountable to the Courts in respect of policy decisions, it was accountable for the

⁶² AIR 1981 SC 14

⁶³ 2011(3) SCALE 148

legality of such decisions. If a duty was cast under the proviso to section 4(1) of the said Act on the HPC to recommend to the President the name of the selected candidate, the integrity of that decision making process had to ensure that the powers were exercised for the purposes and in the manner envisaged by the said Act, otherwise such recommendation will have no existence in the eye of law.

The apex court, while disposing of the petition passed the several directions, including the following: (1) In cases of difference of opinion amongst the members of the HPC, the dissenting member of the committee should give reasons for the dissent and if the majority disagrees with the dissent, the majority shall give reasons for overruling the dissent as to bring fairness-in-action. (2) All the civil servants and other persons empanelled should be outstanding civil servants or persons of impeccable integrity. (3) The empanelment should be carried out on the basis of rational criteria, which would have to be reflected by recording of reasons and/or noting akin to reasons by the empanelling authority. (4) The selection committee should adopt a fair and transparent process of consideration of the empanelled officers.

4.3 Civil Society

The expansion of democracy has to a great extent been a result of a vigilant civil society in India.⁶⁴ Constitutional experts refer to this change as an evolution of democracy from being "vote-centric to "talk-centric".⁶⁵ In this regard, John Dryzek (Scholar) refers to it as deliberative turn in democratic theory. A more deliberative democracy would bring greater benefits for the society at large as well as the groups within. The credit for expecting such results lies in the dynamism of constitutionalism.

In specific,

Constitutionalism provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance.⁶⁶

⁶⁴ See Simon Chesterman, Michael Ignatieff and Ramesh Thakur (Eds.), *Making States Work: State Failure and the Crisis of Governance* (2005).

⁶⁵ Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 290 (2002).

⁶⁶ Prabhakar Singh, "Constitutionalism in International Law during the Times of Globalization: A Sociological Appraisal", *Indian Yearbook of International Law and Policy* 237 (2009).

Deliberative democracy satisfies the following essentials⁶⁷:

(a) The reason-giving requirement affirms the need to justify decisions made by citizens and their representatives. Deliberative democracy also makes room for many other forms of decision-making (including bargaining among groups, and secret operations ordered by executives), as long as the use of these forms themselves is justified at some point in a deliberative process. Its first and most important characteristic, then, is its *reason-giving* requirement.

(b) Mutual Respect – that implies the moral basis for this reason-giving process satisfies that persons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their society, directly or through their representatives.

In deliberative democracy, an important way these agents take part is by presenting and responding to reasons, or by demanding that their representatives do so, to justify the laws under which they must live together.⁶⁸

The deliberative turn in democracy also explains the increasing presence of civil society actors within political and social spheres. The task of communicating is often associated with civil society, recognized as a functional and responsive entity. Civil society is closely associated with 'the masses', a 'popular upsurge' - 'movement from below', it is capable of varied and relative interpretations. As advocated, civil society is responsible for 'fundamentally reducing the role of politics in society by expanding free markets and individual liberty, or a missing link in the success of social democracy.'⁶⁹ The notion of civil society brings to life the concept of 'deliberative democracy', 'participatory process' and a 'talk-centric system of laws'.⁷⁰

⁶⁷ Amy Gutmann, Dennis Thompson, *Why Deliberative Democracy* 3 (2004).

⁶⁸ *Supra* note 71 at 4.

⁶⁹ Micheal Edwards, "Civil Society", *Encyclopedia of Education* (2005). Available at http://www.infed.org/association/civil_society.htm (Last visited 11.8.2011).

⁷⁰ In reference to the South African case of *Minister of Health v. Treatment Action Campaign* (2002) on social rights, the impact of social movements can be drawn. The Treatment Action Campaign (TAC), a social movement led the long struggle to push the South African government to provide life-saving anti-retroviral treatment to hundreds of thousands of HIV/AIDS sufferers in the nation's public healthcare system. It prevailed despite the obdurate resistance of the nation's President and most of the African National Congress leadership. TAC made the polity and not the courts its chief sphere for rights claims. It raised broad politico-constitutional claims and pursued broad programmatic changes and institutional innovations outside the courts, while pursuing a narrow legal-constitutional strategy. TAC built up hundreds of local branches and a poor people's social movement among HIV/AIDS sufferers. Treatment Literacy combined with rights education enabled poor South Africans with HIV/AIDS to participate in and make demands on

In terms of functionality, civil society enhances deliberation and aims at rectifying errors in governance.⁷¹ It fills in the gaps that may emerge within the electoral apparatus.⁷² With the need for civil action and participation, doubts are often raised as to the relationship of civil society with the state, functionality and impact it may have on the process of law.⁷³ The growing popularity of the public space "highlights the ambiguity of the term 'civil society...'"⁷⁴ For that very reason, democratic theory explores the changing patterns of democratic culture vis-à-vis civil society.

As discussed in the previous chapter, the experiences in India indicate that civil society hysteria is closely associated with the fact of the crisis of the developmental

their own treatment and care. TAC also helped shape the Constitutional Court's own understanding of the judicial role in adjudicating and realizing constitutional social rights by collaborating with civil society and state actors.⁷⁰ TAC's chief sphere for rights claims has been the polity, coalition-building, policy proposals and political initiatives, publicity and lobbying campaigns. All these activities have done more good than the litigation strategy. See William E. Forbath, "*Realizing a Constitutional Social Right Cultural Transformation, Deep Institutional Reform, and the Roles of Advocacy and Adjudication*" Available at <http://ssrn.com/abstract=1292879> (Last visited 5.8.2011).

Also, In the 1990's the Chikla Bachao Andolan movement in India, a movement of fishermen, who resisted the Integrated Shrimp Farm Project (ISFP) a joint venture between the Tata Iron and Steel Company (TISCO, a private sector firm) and the state Government of Orissa for prawn cultivation and export. The project threatened the livelihood of the fishing communities living around the lake, people who for generations had farmed the lake with age-old knowledge of ecology and resource sustainability. The collective resistance put up by otherwise-competing groups, disparate voices within the rural communities and student groups and other community organizations led to significant results in favour of the fisherman. The movement raised important questions about government policy formulation, historical resource use and control, and issues of equity and access of the marginalized versus the power elites. See Rajesh Tandon and Ranjita Mohanty, "Does Civil Society Matter: Governance in Contemporary India", 7:2 February, *The International Journal on Not for Profit Law* (2005).

⁷¹ Historically, from the democratic transitions of the late 1980s and early 1990s and the end of the Cold War, democracy promotion became a key element of foreign policy and development assistance. From the 1980s, 'civil public had dramatically transformed itself into the political public, asserting its right not only to hold state power accountable, but its right to dismiss states that failed to respond to the political aspirations of their people... notably people had the competence to chart out a *political* discourse on the kind of polity they wanted to live in.' The phase with the decline of the Cold War added momentum for the transition of voluntary groups within the political landscape. In the history of Africa, Latin America, and in other parts of south Asia the widespread criticism of representative institutions has made it easier for the public space to be utilized. For instance, National Endowment for Democracy claims to be building civil society in Venezuela but is only supporting groups mobilized against President Hugo Chavez, or politicians on both sides of the Atlantic continue to be engaged in a forced march to civil society in the Middle East, it is clear that the ways in which these ideas are interpreted *does* have a real impact on the lives of real people in the here and the now. Neera Chandokhe, "*The Civil and the Political in the Society: The Case of India*" in Peter Burnell and Peter Calvert, "*Civil Society in Democratization*" 143 (2004).

⁷² Purvi Dass, "*Global Democratic Governance: Role of Civil Society Organizations*", Available at <http://www.civicus.org/pg/world-democracy-day/1127-global-democratic-governance--role-of-global-civil-society-organisations> (Last visited 15.7.2011).

⁷³ *Supra* note 71 at 143.

⁷⁴ Peter Burnell and Peter Calvert, *Civil Society in Democratization* 7 (2004)

state.⁷⁵ The civil society is the platform for deliberation, and inevitably crucial to democracy, for addressing exclusion or suppression within the political space. Recent literature "outlines a model of 'associational democracy' in which state and civil society organizations are both part of a single, new regulatory framework that transforms both."⁷⁶ Deliberation plays an important role in the model of governance.⁷⁷ 'The associational democratic project proceeds in three steps. First, it advocates devolution of public policy prerogatives to local secondary associations. Secondary associations are civil society organizations, that is, social groups intermediate between the economy and the formal institutions of the state.'⁷⁸

The increasing presence of civil society actions, coupled with the demands for political inclusiveness highlight that the essential facet of any rights discourse in a democracy has to be linked to the process of socialization and deliberation, which is an ongoing process.

In India, the success of democracy has to be ascertained by how constructively it permits and responds to the establishment of a social relation between the people. Firstly, in the context of democracy efficiency can be seen in terms of ability and opportunity to participate in effective deliberation on part of those subject to collective decisions. Deliberation now is understood to be the essence of democracy, much more than constitutional rights, electoral process, self-government, etc. Civil society in particular offers the opportunity to deliberate and operates essentially as an 'independent domain'⁷⁹, and in a non-coercive fashion.⁸⁰

On a practical note, civil society needs a healthy and encouraging environment to perform and excel.⁸¹ The state must allow for a platform through which the needs

⁷⁵ Jean-François Bayart links 'civil society' with the notion of antagonism between state and society, restricting the term to those social organizations which embody 'society in its relations with the state insofar as it is in confrontation with the state... Hugh Roberts equates civil society with 'political society' in the sense of a particular relationship between state and society based on the principles of citizenship, rights, representation and the rule of law." *Ibid* at 9.

⁷⁶ Lucio Baccaro, "Civil Society meets the State: A Model of Associational Democracy", *International Labour Organization- International Institute for Labour Studies, Discussion Paper* 138 (2002).

⁷⁷ The requirements for deliberation are extremely stringent. According to Habermas communicative action (deliberation) requires truthfulness, moral appropriateness, and sincerity of communication. Also, deliberation takes place in an "ideal speech situation" in which power differences are leveled. According to Rawls (1993: 49), participants in deliberation are "reasonable," that is, "ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so." *Id* at 11.

⁷⁸ *Id* at 4.

⁷⁹ Orly Lobel, "The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics", Vol. 120 *Harvard Law Review* (2007).

⁸⁰ John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critiques, Contestations* 1 (2002).

⁸¹ *Ibid*.

of the people can be put forth and discussed.⁸² The deliberative turn of Indian democracy has had a meaningful bearing on law and rights. With an increase in demand for good governance and people's participation, the right to know- the right to information been defended and realized within statutory or legal bounds. The citizens and the civil society have utilized the right to know for ensuring meaningful participation and transparency in public matter.

The global pursuit towards realizing the right to know has long been active and impressive. In 2004, the UN Special Rapporteur on Freedom of Expression stated that "recognizing the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency, we declare that the right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation...establishing a presumption that all information is accessible subject only to a narrow system of exceptions".⁸³

The Commonwealth Human Rights Initiative identifies the two features of the right to information as; (a) The right of the public to request access to information and the corresponding duty on the government to meet the request, unless specific, defined exemptions apply; (b) The duty of the government to proactively provide certain key information, even in the absence of a request. In addition, the lack of information undermines the functioning of representative democracy, information may enable citizens to participate in the making and implementation of policies, and access to information may also function as an anti-corruption tool.⁸⁴

⁸² Pranab Bardhan, "Our Self Righteous Civil Society", XLVI Vol. No. 29 *Economic and Political Weekly* 18 (July 2011).

⁸³ Special Rapporteur on on the Promotion and Protection of Right to Freedom of Opinion and Expression. Available at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>

⁸⁴ The Commonwealth Human Rights Initiative, "The Right to Information: Strengthening Democracy and Participation", Available at <http://www.humanrightsinitiative.org/programs/ai/rti/articles/RTI%20Paper%20-%202005%20Ombuds%20Conf.pdf> (Last visited 2.10.2012).

The Human Rights Initiative also discussed the use of right to information in Delhi to that almost 90% of the food meant to be distributed to poor people under the Indian Public Distribution System (PDS), was being siphoned off by corrupt ration dealers. The NGO, named Parivartan, obtained the sales registers and stock registers of some ration dealers in October 2003 using the Delhi Right to Information Act. The records related to distribution of wheat, rice and kerosene during June 2003. The information was disseminated to supposed recipients of rations, who were aghast to see that rations had been siphoned off in their names. The ration dealers had told PDS beneficiaries that they were not receiving stocks from the government, while selling the rations on the black market. Using the records obtained under the Right to Information Act and cross-checking it against the ration cards kept by PDS beneficiaries, Parivartan's research revealed that during the month of June, out of a total of 182 families interviewed, 142 families did not receive a single grain of wheat (only 595kg of 4650kg was distributed) and 167 families did not receive a single grain of rice (only 110kg of 1820kg was distributed). With their documents in hand, Parivartan was able to

In 2012 in the case of *Namit Sharma v. Union of India*⁸⁵ the Supreme Court of India stated that despite the absence of any express mention of the word 'information' in our Constitution under Article 19(1) (a), this right has stood incorporated therein by the interpretative process by this Court laying the unequivocal statement of law by this Court that there was a definite right to information of the citizens of this country. Earlier the Supreme Court spelt out with clarity the right to information as a right inbuilt in the constitutional framework, though there existed no provision giving this right in absolute terms or otherwise.

The RTI Act in India has also been a functional asset of the Indian democracy, with the objective "to radically alter the administrative ethos and culture of secrecy and control, the legacy of colonial-era and bring in a new era of transparency and accountability in governance". Similarly, the expression 'Right to Information' has been defined in Section 2(j) to include the right to inspection of work, documents, records, taking certified samples of material, taking notes, and extracts and even obtaining information in the form of floppies, tapes, video cassettes, etc. Greater transparency, promotion of citizen-government partnership, greater accountability, and reduction in corruption are stated to be the salient features of the Act of 2005.

5. The Entitlement to Democracy

For a long time, both local and global scholarship is determined to explore the possibility of formulating democracy as an entitlement/right.

Theoretically, a right to democracy involves the recognition of an interest in democracy and an interest in the process of democratization in all aspects of political existence. Both the individual and the State have a stake in democracy. The current discourse on political reforms and social unrest or struggle is primarily directed toward establishing democratization in all walks of life. The right to democracy seeks to ensure the presence of a functional, responsive and capable democracy, in line with its normative objectives.

The state will also seek an interest in democracy. Institutional behavior day by day is directed towards the task of constructing a functional democracy. Democracy as a quality and process cannot be underlined as an objective and simply identifiable asset. To understand democracy as an entitlement, we must be able to identify a bare minimum of

confront ration dealers with proof of their corrupt practices. Parivartan has since reported that of 82 families they spoke with in follow-up interviews, all were now getting their full entitlements at correct prices.

⁸⁵ Writ Petition Civil No. 210 of 2012

its existence within a political order. The process of democratization would involve the presence of a constitution, or a similar system of basic norms which authorize the making of *determining decisions* by the people. This would also distinguish democracy from 'systems in which the people, through civil disobedience, riot, general disorders...influence political decision making to such an extent that they are in effect, making the basic determining decisions on important matters of public policy...'⁸⁶

To that extent, a constitutional framework for building institutional structures is seen as a necessity for democracy. Democracy is defined as a political system wherein individuals are "entitled to determining decisions"⁸⁷, and also make such decisions. Such abilities establish the supreme power of the people, styled as *popular sovereignty*. Thus, democracy incorporates the 'matter and manner of laws'.⁸⁸

In addition, *participation/inclusion* in the political arena is fundamental for democracy to flourish. In this regard Prof. Upendra Baxi, deals with the *notion of access* that has often been incorporated by political theory in concepts such as representation, democracy, participation and pluralism.⁸⁹

Access as interpreted by Baxi may be regarded as a form of interaction, which may generate access relationships and structures (or institutions). The complexity of access relations comes to full view when we ask: (i) access *by* whom and *to* whom? ; (ii) access *to* what? (values, resources, public or private goods); (iii) access *through* what ? (formal/informal procedures, norms, institutions); (iv) access *for* what ? (self/ collectivity, manifest/latent aims); and access *in* what ? (that is, in what social milieu/cultures). Access relations and institutions thus involve *roles*, rules, procedures, arrangements—in short, institutional frameworks, objectives, values, ends—in short, cultures.⁹⁰

The ability to appraise and incorporate meaningful access would eventually determine not only the presence of a democratic culture but also the character and course of democracy at a given point in time.

Indeed, the normativity and functioning of democracy, as the two dominant dimensions raise several such questions; first, what are the modalities of institutional behavior? What roles are performed by the legislative, judicial, and executive institutions? Second, rights are subjected to the interpretive capability of the constitutional machinery day by day. To

⁸⁶ *Supra* note 8 at 9.

⁸⁷ *Id.* at 10.

⁸⁸ Allan Hutchinson, Joel Rios, "Democracy and Constitutional Change", Victoria University of Wellington Legal Research Papers, 13 (September 2011). Available at <http://ssrn.com/link/Victoria-U-Wellington-LEG.html>. Also available at <http://papers.ssrn.com/abstract=1714633> (Last visited January 2012).

⁸⁹ Upendra Baxi, Access, "Development and Distributive Justice: Access Problems of the Rural Population", Vol 18:3 *Journal of the Indian Law Institute* 375 (July-Sept 1976).

⁹⁰ *Id.* at 376.

what extent can interpretation be contained or dictated? What possible limitations are inherent to the process of rights interpretation? In other words, "is there a fundamental right to decide democratically the most important issues confronting us, and particularly, the content of rights we possess?"⁹¹ Third, democracy is identified as a medium for the authentic representation of the interests and opinions of the people. Who determines the channels of communication?

What emerges from the above discussion is that democracy as an entitlement is both in substance and process. The essence of the Indian democracy is reflected in the processes and mechanisms adopted for fulfilling the objective of justice and inclusion. For its politically activated and socially vibrant pursuit of development in this age of conflict, globalization, and materialism, the Indian democracy continues to capture the attention of local and global scholarship.

⁹¹ Larry Alexandra, "Constitutions, Judicial Review, Moral Rights and Democracy: Disentangling the Issues", Legal Studies Research Paper Series, University of San Diego (2007). Available at <http://ssrn.com/abstract=1019605>