

# APOLOGY TO NON-APOLOGY – INTERNALISING ROLE OF CIVIL SOCIETY

## Abstract

This paper examines what democracies mean in different ages and regions. Starting from the apology issued by Socrates while defending himself before court for choosing to die for his principles rather than face disgrace, the paper traces the theory of governance of political thinkers across the ages particularly Montesquieu, Hobbes, and Locke. The paper also examines the political thought of modern political thinkers including Gandhi, Amartya Sen, Daniel Ziblatt, and Steven Levitsky. It finally examines the role of civil society in modern democracies and concludes that when the media has failed modern societies as the fourth pillar of democracy, it is time to internalise civil society as the fourth pillar of democracy.

## I Introduction

JUST AS one got sinecure in modern democracy, recent events gave continuous jolts out of complacency. These jolts remind us of two things. One, not to take liberties and peace for granted, and two, not to trust governments blindly. The words of Umberto Eco that *freedom and liberation are an unending task* is an eternal political truth.<sup>1</sup> In context of the post-Trump era in America, Harvard Professors Steven Levitsky and Daniel Ziblatt also rang alarm bells that there's nothing in the American Constitution or its culture to immunise the Americans against democratic breakdown.<sup>2</sup> Stanford professor and a recognized authority on democracy, Larry Diamond, is of a firm opinion that the world has been in a period of democratic recession since late 1990s.<sup>3</sup>

Democracies bound by the constraints of written Constitutions generate the illusion of tight institutional vigil on misuse of authority and power. Citizens fall into a sinecure coma, thinking that the struggle of the previous generations absolves them of the burden of vigorously and jealously guarding their freedom. Drugged with economic and civil peace, the populace forgets that struggles are a part of all human life. Even the persons who misuse authority, have had their fair share of struggle to seize power. For us to assume that we need not struggle constantly to safeguard our rights and liberty is injudicious.

Questions of sovereignty and authority have unceasingly occupied political thinkers. The challenges for every political unit are unique in reference to time, territory, and population, and yet the thread of basic human values runs common in all. This paper aims at examining political thought, structure, and challenges both with a historical and current compass, to arrive at a plausible solution which will be suitable to the present time modern democracies. This is not to say that the thesis arrived at in this

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1 *Ur-Fascism*, Umberto Eco, June 22, 1995

2 Steven Levitsky and Daniel Ziblatt, *How Democracies Die* 204 (2018).

3 Larry Diamond, *The Spirit of Democracy* 12 (2008).

paper will continue to be suitable for future challenges, however, it is envisaged that the same are most suitable for the current challenges, and will continue to be effective till a complete shift of the paradigm occurs.

## II The Socrates drama and after

Political philosophy examines the interface of moral and political thought. It examines the philosophy of legitimate political structures. Laws and political systems are built on core human values and philosophies. There is an absolute value attached to core human values which cannot be compromised. Decay in the political system sets in if values are cut off from it. Globally, basic human values are essential and identical despite diverse cultural or political environment. No section of humanity can proclaim that basic human values are not inherent and inalienable. On this kernel develops an entire mesh of values and rights, the complexities of which are environment specific.

At the very draw of curtain of western political philosophy, Socrates, who champions independent and individual thinking is condemned to death, clearly exhibiting the conflict between multitude of polity and personal philosophy. Socrates' life leads to issues of independence of choosing individual way of life, and tests the boundaries of individual freedom of thought and speech. The fact that these issues arise is reflective of existence of conflict between acceptable rules of society and polity, and those individual values which are contrary to political norms, and thus question them. Socrates is accused of treason by corrupting the youth, and of impiety towards the Gods of the state. The accusation is that in his quest to encourage the young to think individually, and in encouraging them to think about their souls rather than to follow the diktat of the state to be exemplary citizens, leads to questioning of existing norms and the Gods accepted by the state, thereby committing serious acts of treason against the state.

The Socratic dialogue in *The Apology*, opens with the speech of Socrates in court in defence of his way of life which places the *questioning man and the examined life over political life of the unexamined*, or rather, the bigoted majority. He questions unchecked political power with tools of reason and philosophy. The question raised by Socrates is whether individual freedom of mind is incompatible with the political life determined by the bigoted majority. This very question is the essence of today's political debate, which is whether the individual freedom of thought must necessarily give way to the larger interest of the State, or rather the persons in control of the State. This also raises the ancillary question, i.e. why should the larger interest of State not be an aggregate of individual interests of the majority, but be discordant with them.

Socrates issues an exaggerated apology for the manner in which he addresses the court, and he demands only one thing, "*let the speaker speak truly and the judge decide justly.*" The ingredients of a fair trial are exhibited by Socrates when he condescends the act of asking a favour of the judge for procuring an acquittal, rather than informing

and convincing him. “For his duty is, not to make a present of justice, but to give judgement; and he has sworn that he will judge according to the laws, and not according to his own good pleasure; and we ought not to encourage you, nor should you allow yourselves to be encouraged, in this habit of perjury – there can be no piety in that.”

Socrates exhibits no fear of dying for his beliefs, because “a man who is good for anything ought not to calculate the chance of living or dying; he ought only consider whether in doing anything he is doing right or wrong – acting the part of a good man or of a bad.”<sup>4</sup> He, like Achilles, minded disgrace more than danger. Socrates goes on to apologise to men of Athens for not opting to upset his death sentence in the exchange of the promise that he must not practise and teach philosophy.

Socrates compares himself to the gadfly given to the State by God. “...*the State is a great and noble steed who is tardy in his motions owing to his very size, and requires to be stirred into life.*” He advises the court to spare him as he is the one who is continually persuading and reproaching the State, privately, and not publicly as a politician. Socrates refuses to side with the strong arm of oppressive power frightening him into doing wrong as per his definition, whether it be under the *Athenian* democracy, or under the oligarchical rule of the Thirty Tyrants.

Thus, the father of western philosophy championed justice as the meaning of life. Socrates ascribes an absolute value to the virtue of justice, and argues that simply an appearance of justice is not sufficient. In Plato’s *Republic*, rule by the majority, is rejected, preferring rule by philosopher kings, who are the symbol of the wisdom of people. In a utopian polity, the philosopher rulers were equated to wisdom, the warriors to courage, and citizens to temperance in society. He argues that only philosopher kings, as reluctant leaders, can govern a just society. As philosophers, both Socrates and Plato focused on ethics and justice, defining them, and identifying them in individuals and society. Socrates thus argued that what was good for an individual was good for the society. Since the value of justice in an individual was tempered by the ultimate goal of life, *i.e.*, the good of the soul after death, it was highly presumptive that an individual would have a good discretion of what was good or bad for her.

However, throughout history, despots far outnumbered benevolent rulers, and continued to consolidate power by legitimising their claims of authority through God. For centuries, despots substantiated their claims on an uncontested “divine right.” In *Leviathan*, Hobbes disputes such “divine right,” instead positing the social contract. In the social contract, the people establish a commonwealth when they cede total power to a sovereign to guarantee their security from foreign and domestic aggression, thereby weakening the legitimacy of many despots that rested in divine right.

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4 See, Plato, “*Dialogues of Plato*” in *Apology of Socrates*.

In his *Second Treatise on Government*, Locke adopts the paradigm of the Social Contract but refutes Hobbes on its specifics. First, Locke establishes human natural rights: life, liberty and property. Second, Locke argues for the separation of power among sovereigns to preserve the natural rights of all. In Locke's social contract, the sovereign cannot violate human's natural rights. In the western tradition, Locke thus first introduces the concept of limited government—that the government ought to be restricted by certain “natural” bounds.

Montesquieu fine tunes the concept of separation of power further. He identifies three distinct powers of the sovereign and argues that they must be separated to maintain the social contract. Further, he specifies how to separate these powers, *i.e.*, executive, legislative and judicial, and their desired relationships with each other. In conjunction with Aristotle and Locke, Rousseau asserts that people establish sovereignty in constitutions. However, the people legitimately constitute sovereignty when it accords with the general will. Therefore, constitutions must separate powers, uphold natural rights and promote the general will, and legitimate sovereigns must uphold natural rights.

John Rawls<sup>5</sup> further establishes two principles of justice and constructs a sovereign who promotes these two principles. The first principle, *i.e.*, the equality principle states that “*each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberty for others.*” The second, *i.e.*, the difference principle, postulates that “*social and economic inequalities are to be arranged also that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.*”<sup>6</sup>

Rawls attaches an order of priority between the two principles, with the first having precedence over the second. This ordering, according to him, means that infringement of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantage.<sup>7</sup> He goes on to state that whether men are free is determined by the rights and duties established by major institutions of society. Liberty is a certain pattern of social forms. Since the first principle insists on an equal application to all, the only reason for government to circumscribe basic liberties and making them less extensive is that otherwise they would interfere with one another.<sup>8</sup>

Rawls also postulates that “*clearly the morality of authority must be subordinate to the principles of right and justice which alone can determine when these extreme requirements, or analogous constraints,*

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5 John Rawls, *A Theory of Justice* (Harvard University Press 1971, revised edn.)

6 *Id.* at 53.

7 *Ibid.*

8 *Supra* note 5 at 56.

*are justified.*” He concludes, that in all cases, the scope of this morality is governed by the principles of justice.<sup>9</sup>

On basis of an empirical study, American political sociologist, Seymour Martin Lipset contended that the nations where democracy was found to be thriving were the nations which had high rate of economic development, and thus revealed itself to be an essential pre-requisite for a democratic setup. He evokes the contention of Aristotle that only in a wealthy *society in which relatively few citizens lived in real poverty could a situation exist in which mass of the population could intelligently participate in politics and could develop the self-restraint necessary to avoid succumbing to the appeals of irresponsible demagogues.*<sup>10</sup> Thus an inextricable connection between economic growth and health of a democracy has been exhibited by a large number of studies, to the extent that the Americans cited it as a justification to support dictatorial regimes with economic growth and anti-communism as their agendas. The issue again arises whether economic development at any cost, including subversion of peoples liberties, is justifiable in any political system, even if the objective of which is to strengthen a democratic government.

### III In defence of democracy

Historical experience has exhibited that the progressive democratic model of governance begets peace and greater good for all in modern polities. While people may regard strong leaders as those who concentrate power, exercise that power, and implement their decisions without caving in to dissenters, collective leadership capitalises on diversity. It is imperative to safeguard norms that support liberal democracy to ensure the state protects public interest rather than furthering private interests as in an oligarchy.

The first principle of equality and justice of Rawls finds a back trail to political leaders and thinkers. Thoughts of M.K. Gandhi, India’s leading political thinker, on democracy were regularly published in the Journals “Harijan” and “Young India”<sup>11</sup> throughout India’s struggle for independence. Gandhi believed that the spirit of democracy cannot be mechanically instilled in the masses overnight. The essential features of Gandhian democracy, emerging from his writings include principles of non-violence, liberty to have individual opinion, room for tolerance, and equality of citizens.

Resounding the Socratic tone, Gandhi believed that democracy in its truest sense was the anti-thesis of majoritarianism. Gandhi believed that:

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9 *Id.* at 408.

10 Seymour Martin Lipset, “Some Social Requisites of Democracy: Economic Development and Political Legitimacy” 53(1) *American Political Science Review* (1959) see, Introduction at 75.

11 Mahatma Gandhi “The Mind of Mahatma Gandhi under the chapter” *Essence of Democracy* 422 (revised edn., 1967).

*“if we want to cultivate a true spirit of democracy, we cannot afford to be intolerant. Intolerance betrays want of faith in one’s cause”*.<sup>12</sup> He wrote, *“the rule of majority has a narrow application, i.e., one should yield to the majority in matters of detail. But it is slavery to be amenable to the majority, no matter what its decisions are. . . . Democracy is not a state in which people act like sheep. Under democracy, individual liberty of opinion and action is jealously guarded. I, therefore, believe that the minority has a perfect right to act differently from the majority.”*<sup>13</sup>

Gandhi’s words need revisiting in the present times.

Gandhi warned against the danger of cult figures and said, *“government of the people, by the people and for the people cannot be conducted at the bidding of one man”*<sup>14</sup>. Alert to misuse of power, he said *democracy is a great institution and, therefore, it is liable to be greatly abused. The remedy, therefore, is not avoidance of democracy, but reduction of possibility of abuse to a minimum.*<sup>15</sup> Gandhi was fully aware that a democratic society must have proactive and vigilant gatekeepers to keep such evils at bay, else even a democratic system is bound to fail.

Gandhi very astutely brought out the red water mark of a collapsing democracy. He believed that when people come in possession of political power, the interference with the freedom of the people is reduced to a minimum. In other words, a nation that runs its affairs smoothly and effectively without State interference is truly democratic. Where such a condition is absent, the form of government is democratic only in name.<sup>16</sup> He was most wary of democracy degenerating into mobocracy.

Contributions of Nobel laureate, Amartya Sen, on democracy are significant. Two of his significant works are an essay titled *“Democracy as a Universal Value”* (1999) and his book *“The Idea of Justice”* (2009).

Sen observes that democracy is more than just voting, elections, and majority rule. *“Democracy has complex demands, which certainly include voting and respect for election results, but it also requires protection of liberties and freedoms, respect for legal entitlements and the guaranteeing of free discussion and uncensored distribution of news and fair comment.”*<sup>17</sup> Sen suggests that democracy is more than just the procedure and institutions; public reasoning and participation play an equally important role. Democracy according to him has three key components/functions, i.e. first, political freedom and exercising political and civil rights, especially right to dissent and criticise; second, political incentives which keep the governments responsible and accountable; and third, constructive role of democracy promotes public discussion and in turn helps the society form its own values and priorities.

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12 Mahatma Gandhi, *Young India*, 33 (1921).

13 Mahatma Gandhi, *Young India* 129 (1922).

14 Mahatma Gandhi, *Harijan* 120 (1940).

15 Mahatma Gandhi, *Young India* 99 (1931).

16 Mahatma Gandhi, *Harijan* 380 (1936).

17 Amartya Sen, *Democracy as a Universal Value* 5 (1999).

Contrary to Aristotle and Seymour Martin Lipset, an interesting point made by Sen is that poor are equally interested in protecting their political and civil rights. Citing the declaration of political emergency in 1970 by Indira Gandhi Government in India, entailing heavy suppression of civil and political rights, media censoring, and justification of imposition of emergency on account of internal threats to democracy, the largely poor Indian electorate firmly rejected the rhetoric, and “*showed itself to be no less keen on protesting against the denial of basic liberties and rights than on complaining about economic deprivation*”.<sup>18</sup>

#### IV Threats to liberal democracy

Modern world has seen a large spectrum of democracies, spanning over thin to thick democracies as defined by Larry Diamond.<sup>19</sup> Elected government is not the only hallmark of a democracy. For a democracy to effectively function towards the ultimate goal of equality and justice, the elected governments are required to uphold the democratic values. Steven Levitsky and Daniel Ziblatt have extensively examined how democracies can be dysfunctional in their book *How Democracies Die*. They maintain that while military coups get a lot of attention, the “death of democracy” has often occurred at hands of elected leaders. Sometimes, these “deaths” are carried out through ‘legal’ means as they are upheld by the judiciary and other institutions that may be packed or stacked, often under the guise of “improving democracy.” Such measures may be ostensibly justified in the name of judicial efficiency and anti-corruption, with the end result being use of the rule of law to undermine the rule of law. Rather than being blatant and obvious for all to see, the erosion of democracy might be imperceptible for many. In a sense the process is analogous to the frog in boiling water that does not recognise that it is going to be cooked as it adjusts to lukewarm water that keeps getting a little bit warmer over time, as opposed to being thrown directly into hot boiling water and recognising the danger immediately.

Given the complexity of and differences among democracies around the world, according to the authors there are two unwritten common democratic norms or ‘soft guardrails’ of democracy. The first is the concept of Mutual Toleration, essentially, the “understanding that competing parties accept one another as legitimate rivals.” Second, the concept of Institutional Forbearance, or the “idea that politicians should exercise restraint in deploying their institutional prerogatives” (*i.e.*, engaging in fair play).

The authors strongly believe that constitutional safeguards, by themselves are not enough to secure a democracy.<sup>20</sup> It is apparent in many cases that the ruling political class itself might be inadequately responsive to citizen concerns. Reminiscent of Gandhi’s sentiment, the authors contend that politicians will be tempted to abandon

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18 *Ibid.*

19 *Supra* note 3 at 21.

20 *Id.* at 97-98.

the soft guardrails of mutual toleration and institutional forbearance when the perceived cost of losing power is sufficiently high. “*Acts of constitutional hardball may then in turn further undermine mutual toleration, reinforcing beliefs that our rivals pose a dangerous threat.*”<sup>21</sup> This highlights the need for gate-keepers that can serve as guardrails to maintain democratic values for a country’s people.

The authors emphasise that the gatekeepers or guardians of democratic systems must continually ensure that the state is clearing the twin test for a functioning and healthy democracy of defanging autocratic leaders, and weaponization of institutions. They thus postulate that it is imperative that the democracy save itself internally, a task in which the gatekeepers/guardians have a crucial role to play.

There is no clearer example of an attempt at weaponizing the institutions than that of constitutional amendments by the Indian parliament which would have compromised the independence of the Indian judiciary by the government assuming an upper hand in judicial appointments.<sup>22</sup> The Supreme Court of India struck down the constitutional amendments in a historic constitution bench judgement, thus internally saving the Indian democracy for the moment.<sup>23</sup> However, the frequency of attacks on Indian democracy has escalated phenomenally, and currently the Indian judiciary’s role as an institutional guardian is on test more frequently than ever in the Indian history.

### V Gatekeepers

The danger of any political system being hijacked by a few is always clear and present. The dangers looms larger with new shifts in society, whether by way science and technology, or social norms. Well accepted formats of political governance get rigged and skewed. Democracies require internal pillars as well as the external pillars to watch out for cartelisation of constitutional institutions. Thus it is necessary to have strong watchdogs who have an active view of the internal functioning, allowing it to pre-emptively steer the internal functioning of constitutional institutions correctly.

So far in modern democracies, media has been the fourth pillar of democracy, being the watchdog of the three institutional pillars. However, the recent experiences are no longer happy. Two factors have been crucial in undermining the credible voice of media. First, the prolixity of news and views. With easy access of technology, no infrastructure or credentials are required to disseminate information. Second, the information fed by media is prone to manufacturing unverified visual imagery, and thus the assurance of credibility of media is strongly undermined.

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21 *Id.* at 112.

22 National Judicial Appointments Commission Act, 2014 (40 of 2014, Gazette of India, Apr. 13, 2014.

23 *Supreme Court Advocates-on-Record Association v. Union of India* 2016 (5) SCC 808 decided on Oct., 16, 2015.

Traditionally media serves as the influencer which maintains the primacy of principles of equality and justice in the polity. This role presently stands fully compromised. The experience of Facebook-Cambridge Analytica data scandal in the 2016 American Presidential elections has exposed the helplessness of media in containing the wave of targeted artificial intelligence nudging. It is more than clear that media is dominated by artificial intelligence, which in turn is primarily motivated by popularity and profit motivations using their algorithms to promote populism. The voice of informed reason of media has been drowned under the din of populist and majoritarian cacophony.

In this scenario, there is an acute requirement of a new avatar of the philosopher king. The moral authority to compromise personal freedoms of human beings is justified on grounds of equality and justice alone. It is for this reason that Rawls orders the two principles of justice. The second principle of differential access of income and wealth is subject to the first principle of equal basic liberties. He thus says that the ordering of the principles means that infringements of the basic equal liberties protected by the first principle cannot be justified or compensated for by greater social and economic advantages. He goes on to say that these liberties have a central stage of application within which they can be limited and compromised only when they clash with other basic liberties. Since they may be limited when they clash with one another, none of these liberties is absolute; but however they are adjusted to form one system, and *this system is to be same for all.*<sup>24</sup>

The liberal constitutions like that of India and America achieve the goals of having the Levitsky and Ziblatt “gatekeepers” by separation of powers between the three organs of the State. This institutional separation is further strengthened externally by the watchdog of press and media. Thus a political system has institutional and non-institutional watchdogs. Currently, when the watchdog of media and press has turned rouge, and has far too many masters with conflicting voices, its moral authority stands diminished. The groups which now have emerged qualifying strongly to be the watchdog are civil societies.

The role of a watchdog can be assumed only on satisfying some essential features. The lowest common criteria that must be possessed by a political watchdog are as follows:

First, it should champion basic democratic value of personal liberties including the liberty to dissent, and the right to political determination. The watchdog must prioritise upholding values of freedom, equality, and rule of law without an exception.

Second, it must be a champion of economic and educational rights, taking into account the differential principle prescribed by Rawls. The watchdog’s ideology must be guided by the limitation of not espousing any such inequality which would not be beneficial to all, no matter how big the economic advantage to any group(s).

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24 John Rawls, *A Theory of Justice* 53 (1971).

Third, the watchdog must be able to provide a platform for public discussion tempered with credible and verified facts and information. A basic level of scientific approach to information is essential to ensure support for policies and ideas which are informed by reason and backed by verifiable facts. This role of the watchdog is akin to that of the guardians in Plato's state, which is the ability to decide the correct path dispassionately in the interest of the state. In Plato's Republic,<sup>25</sup> the guardians are the shepherds who quell the mis-directions of the auxiliaries who are likened to dogs who bark and do not rest till they either slay or are slain.

Any person/body/association may possess these three essential features, but how can such an association be legitimately authorised to have its opinions to be a part of the decision making process of the government to guard against excessive use of authority. The anti-democratic institutional forces dim the voice of civil society, more often than not by using legal means to criminalise it. A heavy toll is taken in terms of time, lives, violence, unrest, and economic decline before change that is propagated by civil society in conflict with the State agenda is brought about. Social and political change is usually a result of a tiring and violent struggle.

Power seized by electoral process attaches a deep impression of acceptance of democratic values by the governing parties, thereby cloaking them with legitimacy. However, temptation of power is overpowering, and the governing persons, willingly or unwillingly, can go off course if they are not kept in check constantly. There is thus a well-recognized requirement of constant and permanent check on exercise of governmental power.

A large area of government action/policy is required to be determined by a consultative process of local and national level consultative bodies under a legislative scheme. However, the statutory scheme usually is also structured to give the government overriding decision making power, diluting or putting to naught the desired result of a consultative process.

A case in point is the Indian Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The object of replacing the old colonial legislation of 1894 on compulsory land acquisition by government was primarily to ensure a humane, participative, informed, and transparent process for land acquisition for industrialisation and development in consultation with institutions of local self-government. Another purpose of the enactment was for the statutory mechanism to provide for a just and fair compensation to the affected families whose land was acquired, including proper rehabilitation and resettlement.<sup>26</sup>

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25 Jowett Translation, Edited by Justin D. Kaplan *Dialogues of Plato* 296 (1950).

26 Statement of Objects and Reasons, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Bill.

The new enactment of 2013, intended to give greater emphasis on public hearings, consultation and public participation by conducting a Social Impact Assessment (SIA) study in consultation with local authorities resulting in a Social Impact Management Plan listing ameliorative measures. The provisions of the 2013 Act give an impression that the land acquisition process under the new Act is participative and consultative. However, the consultative process can eventually be watered down, and even nullified by the government by recording reasons in writing, which essentially means providing a dressed up vision of the benefits of the project and diluting the social impact. It is thus apparent that the consultative wisdom has to be a necessary sacrifice to the altar of executive expediency.

The legislature also sought to alleviate the agony of the land owner suffered due to long drawn and disputed acquisitions which were pending for decades under the old statute. The new statute mandated deemed lapse of land acquisition proceedings if the acquiring authority had not taken possession of the notified land for a long period, or if the authority had not paid compensation to the landowner within the stipulated time.

The conflicting shifts of the Indian Supreme Court in its role of gatekeepers is exhibited in their response to this legislation. Initially when the challenge came up in 2014, a three judge bench decision of the Indian Supreme Court interpreted the provision as mandatory, taking away the discretion of the acquiring authority to drag its feet over the old acquisitions indefinitely.<sup>27</sup> However, in 2018 another coordinate bench of the Indian Supreme Court<sup>28</sup> set aside the previous decision. The validity of the subsequent decision of the same strength was questionable in view of the law of precedents. The coordinate bench, at best, could have referred the decision to a larger bench upon its disagreement with the previous judgement. This necessitated another round of litigation with the Chief Justice of India ordering the reference of the case to a Constitution Bench of five judges.

Though there is no legal bar, but the propriety of the situation demanded constitution of a larger bench comprising of judges who ideally should not have been a part of the previous bench. Principles of fairness incorporated in the practice of the Indian Supreme Court demanded that judges must appear impartial, and thus a judge who may have already expressed a strong view on the issue should not have been a part of the larger bench.

However, the larger bench was still headed by the judge heading the previous three judge bench. There already existed undercurrents of the government having a controlling hand over the judiciary. The decision of the larger bench giving a narrow

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27 *Pune Municipal Corporation v. Harakchand Misirmal Solanki* 2014 (3) SCC 183.

28 *Indore Development Authority v. Shailendra* 2018 (3) SCC 412.

interpretation to the legislation, thereby clamping down heavily on the rights of the land owners came as no surprise. Thus the later view narrowing the previous interpretation clearly exhibited the slipping of the institutional guardrails, especially since the legislature by enacting the 2013 Act had itself accepted the old legislature to be a continuation of British wrong doings.

### **Legislative role of civil society**

The methods of containing the eradication of justness in face of legally permissible devices placed at the disposal of the legislators and governments continues to vex democracies. Since the balance between the just and the unjust, the differential of equal status, the inalienable human rights and developmental policies, and now the more acute challenge of the ethos of artificial intelligence, is a precarious balance, the same is required to be approached sensitively.

The conundrum of giving weight and primacy to the view of the watchdogs requires to be resolved by putting in place a mechanism by which any policy or action contrary to their advice or view would automatically open itself up for judicial review. As experienced in the above illustration, the legal processes guarding citizen rights is reduced to a lip service to fair procedure. It thus becomes necessary to ensure that the legislative and executive freedom must be subject to the consultative wisdom. The endeavour is to ensure that better sense prevails prior to passing a tainted legislation, and that the same sense prevails in application of the law.

This would require not only legislative, but also constitutional changes. In an indirect democracy where the will of the people is entrusted to the legislators, a strong check is required against the personal agenda of legislators. An effective manner of doing the same is to reinforce the will of the people in the legislative sphere through legally recognized watchdogs of civil societies/associations.

A legislative debate must necessarily involve the participation of civil societies which do not ascribe to a political agenda or identify with any political parties. It is time now that non-partisan groups of civil societies must be given a berth in the legislative bodies. Civil societies are a valuable resource to technical aspects of numerous issues like ecology, environment, technological advancement, medicine, economics, gender equality, poverty and other issues. Their participation in the legislative process is crucial.

### **How to select civil society for legislature**

A method of selection of civil society for the legislative bodies of commons of the State and Parliament is required to be evolved which will ensure that the selection is fair, apolitical, and plural. A process of election of civil societies is considered undesirable because the objective is to keep the participation of the civil societies independent of agendas of political parties. A mechanism similar to that of selection of independent and unbiased jury members will ensure this objective.

Most modern political states have a well-established network of think tanks and non-governmental organizations which do significant independent work in specialised fields. The selection of organisations for participation in the legislative process must be based on their body of works and activities, minimum size of the organization, and logistic abilities. It is necessary to ensure that no inconvenient civil society is ousted from the process of selection. Thus the process of selection to the legislative participation must be open to all civil societies. All societies must be free to apply for consideration for selection. The independence and non-partisan leanings must be maintained by restricting donations, memberships, and association with political parties or their members (one would presume that a true civil society will by itself shun any political association).

An association being a collective of ideas, does not have the stamp of a personality cult. A collective opinion has the advantage of prior consensus being arrived at by debate. Further, a cap on number of consecutive terms of a particular association with adequate cool-off period shall ward off the danger of excessive power in the hands of a particular association, and leave space for multiple viewpoints.

It is suggested that the civil societies must be selected to the Council of States with a right to participate in the debates of the House of Commons, and they must also have voting rights. The selection (in contradistinction to nomination) of civil societies shall not offend constitutional documents since the head of the State is usually granted the power to nominate a few members to the council of State possessing some distinctions. As such having voting rights in the Council will ensure a more dynamic process of approving legislation.

The legislators of the House of Commons shall be equally wiser by the opinions of civil societies, which shall have an unquestionable impact on the voting by members of legislative bodies. The House of Commons usually takes into consideration reports of various committees before passing legislations. Similarly, non-partisan and technical opinions of civil societies shall be crucial.

The next challenge is to determine an ideal number of civil society members. In a bicameral legislature, the House of Commons consists of members elected by a direct process in proportion to the population of the constituencies. Similarly, the Constitution prescribes the number of seats to the Council of States. The number of civil societies participating in legislative processes must be in proportion to the number of seats of the Council of States. Two safeguards are absolutely essential in fixation of this number. First, there must be a minimum of two and not more than 1/10<sup>th</sup> the number of seats of the legislative body. This is so because it is essential to maintain plurality of opinions, without the opinions usurping the legislative role and constitutional sanction of the role/power of legislators.

Another mechanism by which the civil societies can be disconnected from a partisan nature is that their term must not be co-terminus with the House of Commons. The selection of the civil societies must not take place simultaneously with that of the general elections, but must be sufficiently spaced in time from them. In such a manner a civil society would serve on the council irrespective of the elected government. As such, the identification with any political party or agenda would snap.

The selection of the civil society must be undertaken by a committee set up for this purpose including representatives of ruling and opposition party in nearly equal proportion, as well as independent eminent persons. To ensure the right choice and plurality of choice, the civil societies must be selected in accordance with the field of their expertise. For example a civil society working in the area of economic development should be eligible to be selected to sit in the legislative debate on fiscal and money legislations. Similarly, think tanks active in the field of environment protection must be selected to sit in on debates on environmental or developmental laws.

The impact of civil societies in modern governance can no longer be ignored. The tragedy is that the voices of the civil society are either ignored or quelled by the government. The voice of reason of the civil society from the outside is heard only after a vigorous strife and struggle, which may be by violent or non-violent means. The above mechanism can be no guarantee against struggle and revolution, but it shall certainly be a guarantee for a more peaceful, rational, and moral process, postponing struggle, revolution, and use of violent means.

## **VI Conclusion**

The role of civil societies shall be as crucial in the executive and judicial spheres. Executive orders are the tool used by authoritarian governments that wear the garb of functioning democracies. Executive orders are also a necessary evil of expedient and efficient governance. However, they execute sharp and heavy blows by the time they are recalled or declared unconstitutional. A consultative step of the government with the civil societies prior to their notification can prevent large injustices. The civil societies having a strong nose for putrid executive orders can stave off harm by raising warning bells. Pre-notification consultation gives a valuable chance to the executive to check itself from going off the right course, and would also not impede the executive expediency.

The endeavour is to minimise the struggle and agony by adopting pre-emptive checks to abuse of power. Unlike Socrates, who apologised for the offence of going against the norms of the state and submitted himself to a trial and accepted his punishment, the authoritarian leaders are non-apologetic about their excesses. The demand of the hour thus is to push them to be apologetic for their excesses by internalising a watchdog in the institutional framework of governance. To maintain the spirit of democracy,

atypical solutions must be adopted to address the failure of typical mechanisms. In this manner a peaceful mechanism to maintain a vigilant check is introduced.

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