The Right to Contest Elections and Internal-Party Democracy: A Constitutional Proposal for Election Law Reform

by Niharika Mukherjee

5th year BA LLB, National Law School of India University, Bengaluru

Introduction

Political parties are substantially unregulated in Indian election law, but hold considerable influence over political activity, including government functioning.[1] This influence is not only an empirical fact in Indian politics, but has also been constitutionally sanctioned in the Tenth Schedule of the Constitution.[2] Given this dichotomy, the absence of transparency, accountability and internal democracy in political parties has a severely detrimental effect on the strength of Indian constitutional democracy. The rectification of this problem requires amendment of election laws in the country.

This essay argues that such an amendment must *recognize* the 'right to contest elections' as a constitutional right provided by the Indian Constitution, and *promote* internal democracy within political parties for realising this right. The mode of this amendment should ideally be a statutory amendment, as this is most likely to reflect a common ground among political parties regarding how best internal democracy may be achieved within them. However, this essay recognizes the pragmatic reality of collusion among political parties to avoid measures seeking to make them

[1] Law Commission of India Report, *Electoral Reforms* (Report No. 255, March 2015) 11.
[2] Aradhya Sethia, 'Where's the Party? Towards a Constitutional Biography of Political Parties in India' (2019) 3 Indian Law Review 1.

more transparent. Given this, the essay proposes that in the absence of, or till the enactment of, a statutory amendment on internal party democracy, writ jurisdiction under Article 226 can be used to impose some measure of internal party democracy in political parties.[3] This is possible because, this essay shall show, political parties can be considered to be performing 'public functions' under this provision.

To this end, this essay shall be structured as follows. Part I shall demonstrate that the right to contest elections to all constitutional bodies is a constitutional guarantee under the Indian Constitution. Part II shall show that one of the primary ways of realising this right is to promote internal party democracy in political parties in India. Part III shall contend that the best method to achieve this is through a statutory amendment passed by Parliament. Part IV shall argue, in the alternative, that in the absence of such a statutory amendment, High Courts' writ jurisdiction under Article 226 of the Constitution can be used to impose similar obligations on parties. The final part shall conclude.

Part I- The Right to Contest Elections in the Indian Constitution

The strangeness of democracy being declared part of the 'basic structure' of the Indian Constitution even while the exercise of one's franchise through the right to vote- 'the core expression of democratic rule'- is relegated to the 'secondary legal status' of a mere statutory right has been well-documented.[4] Yet, it is equally strange that the complementary entitlement to this right, the

[3] The Constitution of India 1950 Article 226.
[4] Aditya Sondhi, 'Elections' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution'* (OUP 2017).

right to contest elections, is also yet to be recognized as an important fundamental right of all citizens of the country. The strangeness of this state of the law is exacerbated by the fact that the heart of even a narrow, traditional notion of representative democracy- leaving aside broader conceptions emphasizing the development of public reason and deliberation-[5] lies in the right of citizens to 'elect, [and] be elected' to the legislative bodies within the government.[6]

Regardless, this essay demonstrates that there is adequate reason to argue that the right to contest elections is at least a constitutional right, even if not a fundamental right. This claim is based on two reasons. The first reason is that there is a strand of decisions of the Supreme Court of India that recognize this right (that is, an argument from doctrine or *precedent*).[7] The second reason is that a reading of the Constituent Assembly Debates reveals that an *assumption* among some framers of the Constitution that it guaranteed a right to contest elections, though limited as prescribed by law (that is, an argument from history or *original intent* of the ratifiers of the Constitution).[8]

In regard to the first reason, the inception of the recognition of the right to contest elections by the Supreme Court of India arises in Justice PN Bhagwati's observations in the 1974 case of *Kanwar Lal Gupta v Amar Nath Chawla and Others*.[9] Here, the petitioner had challenged the validity of a Lok Sabha election from a certain constituency, on various grounds including defects in the

[5] Amartya Sen and Jean Dreze, *An Uncertain Glory: India and its Contradictions* (Princeton University Press 2013) Chapter 1.
[6] Sondhi (n 4).
[7] Philip Bobbit, 'Constitutional Law and Interpretation' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2010) 133.
[8] Ibid.
[9] *Kanwar Lal Gupta v Amar Nath Chawla* (1975) 3 SCC 646.

electoral rolls, fraudulent introduction of certain ballot papers, corrupt practices and the undertaking of expenditure greater than the limit prescribed under the Representation of the People Act 1951 ('RPA') by the winning candidate.[10] The court allowed the appeal and set aside the election of the winning candidate on the finding that the corrupt practice of undertaking expenditure in excess of the statutory ceiling had indeed been committed by him.[11] In its analysis on the scope of the ceiling on candidate spending provided under Section 77 of the RPA, the two-judge bench led by Justice Bhagwati made several important observations on the nature of the right to vote and contest elections in India. Noting that unequal economic resources held by different candidates and political parties are bound to create an uneven playing field in an election, the court stated:

"*The object of the provision limiting the [election] expenditure [by a candidate] is two-fold. In the first place, it should be open to any individual or any political party, howsoever small, to be able to contest an election on the footing of equality with any other individual or political party, howsoever rich and well-financed it may be, and no individual or political party should be able to secure an advantage over others by reason of its superior financial strength.*"[12] [Emphasis supplied.]

It further noted, in the same vein:

[10] Ibid.
[11] Ibid.
[12] Ibid para 9.

"This [the availability of disproportionately large resources with some candidates and parties] would result in a serious discrimination between one political party or individual and another on the basis of money power and that in its turn would mean that 'some voters are denied an "equal" voice and some candidates are denied an "equal chance"'. It is elementary that each and every citizen has an inalienable right to full and effective participation in the political process of the Legislatures and this requires that each candidate should have equally effective voice in the election of the members of the Legislature. That is the basic requirement of the Constitution. This equal effective voice- equal opportunity of participation in the electoral process- would be denied if affluence and wealth are to tilt the scales in favor of one political party or individual as against another."[13] [Emphasis supplied.]

Reading the two excerpts together, it is clear that the court's reference to 'an inalienable right to full and effective participation in the political process' is *distinct* from citizens' right to 'equally effective voice in the election of the members of the Legislature', which can be read as synonymous with the right to vote. This is stated more clearly in the former excerpt produced here, where the court directly acknowledges the right of any individual or political party to contest an election, on an equal basis as any other individual or party. Hence, the court here can be seen to have recognized a right to contest elections in Indian law, though without specifying its precise source and scope.

However, a contrary strand of judicial thinking appeared about a decade later, in the court's decision in *P Nalla Thampy Terah v Union of India and Others*.[14] Here, a five-judge bench of the

[13] Ibid para 9.
[14] *P Nalla Thampy Terah v Union of India and Ors* 1985 Supp SCC 189.

court was faced with a constitutional challenge to the validity of Explanation 1 to Section 77(1) of the RPA, which had, later in 1974, been amended to overturn the impact of the court's ruling in *Kanwar Lal Gupta* in relation to its interpretation of this provision.[15] In response to the petitioner's argument that the amendment effectively allowed political parties a 'carte blanche' to spend 'unlimited' amounts for the election of their candidates and that this diluted the principle of free and fair elections, Justice YV Chandrachud on behalf of the court briefly considered the status of the right to contest elections.[16] Specifically, he noted that this was not a 'common law right',[17] supporting this with a previous decision of the court which had held that 'outside of statute, there is no right to elect, no right to be elected and no right to dispute an election', and 'statutory creations they [these rights] are, and therefore, subject to statutory limitation'.[18]

Following this line of reasoning, the court took a decision deferential to Parliament by refusing to hold the amendment unconstitutional. While the court's observations on the nature of the right to contest elections were prefaced with the recognition that this type of stance would indeed dilute the freedom and fairness of elections,[19] its conclusion was regrettably replicated in a number of future judgments. In 2003, for instance, a three-judge bench of the Supreme Court in *Javed v State of Haryana*,[20] stated categorically:

"[The] right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. At the most, in view of Part IX having been added in the

[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid, referring to *Jyoti Basu v Debi Ghosal* (1982) 1 SCC 691.
[19] Ibid.
[20] *Javed and Ors v State of Haryana and Ors* (2003) 8 SCC 369.

Constitution, a right to contest election for an office in [a] Panchayat may be said to be a constitutional right- a right originating in the Constitution and given shape by a statute. But even so, it cannot be equated with a fundamental right."[21]

Following this, the court remarked on the validity of statutory restrictions on the right to contest elections as follows:

"There is nothing wrong in the same statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, a statutory office."[22]

Thus, the court held that the right to contest elections emerged from statute, and 'at most' originated from the Constitution, at least where the body in question had a constitutional status (here, the Panchayat). At the same time, a *statutory* limitation upon it could not be struck down by the court, for the right was not a fundamental right under Part III or even a common law right existing outside the Constitution and relevant statutes. This point was further reiterated by the court through reference to a previous decision by it, where it had held that the 'Fundamental Rights Chapter has no bearing on a right like this created by a statute'.[23]

[21] Ibid para 22.
[22] Ibid para 22.
[23] Ibid para 24, referring to *Jamuna Prasad Mukhariya v Lachhi Ram* AIR 1954 SC 686.

Now, these decisions can- and have- been seen in two different lights, analogous to seeing the proverbial glass as 'half empty' versus 'half full'. A 2022 decision of the Supreme Court, for instance, used the 'half empty' perspective to refuse to grant relief to a petitioner claiming a right to file his nomination for election to the Rajya Sabha despite not having a proposer to propose his nomination, as required by the RPA and the Conduct of Elections Rules 1961.[24] Here, a two-judge bench of the court cited its decision in *Javed* as well as a line of previous cases to hold that the right to contest elections could not be traced, as argued by the petitioner to the fundamental right to free speech and expression (provided under Article 19 of the Constitution), and the fundamental right to personal liberty (provided under Article 21).[25] Hence, these fundamental rights could not be invoked by the petitioner to challenge the denial of his application for nomination for an election, when the latter was clearly in violation of the statutory limitations on his right to contest that election.[26]

On the other hand, the 'half full' perspective was used by the court in its 2016 decision in *Rajbala v State of Haryana*.[27] Here, a two-judge bench of the court was, similar to *Javed*, faced with a constitutional challenge to a set of disqualifications enacted by a State statute in relation to persons seeking to contest Panchayat elections.[28] In response to the State's contention that fundamental rights could not be used to challenge statutory limitations on a person's eligibility to contest elections to a constitutional body like a Panchayat, the court noted that the correctness of this argument turned on the nature of the right to contest elections- specifically, on whether it could be

[24] *Vishwanath Pratap Singh v Election Commission of India and Another* SLP(C) No. 13013/2022.
[25] Ibid.
[26] Ibid.
[27] *Rajbala and Others v State of Haryana and Others* (2016) 2 SCC 445.
[28] Ibid.

considered a constitutional or a statutory right.[29] It proceeded to investigate this question by conducting a literal and structural interpretation of the relevant provisions of the Constitution,[30] a different interpretative approach from the aforementioned decisions, which largely restricted their analysis to citation of precedent.

On a combined reading of Articles 58, 66, 84, 173, 102, 191 and 336 of the Constitution, the court held:

> *"An examination of the scheme of these various Articles indicates that every person who is entitled to be a voter by virtue of the declaration contained under Article 326 is not automatically entitled to contest in any of the elections referred to above [that is, those dealt with in the mentioned Articles of the Constitution]. Certain further restrictions are imposed on a voter's right to contest elections to each of the aforementioned bodies. <u>These various provisions, by implication, create a constitutional right to contest elections to these various constitutional offices and bodies. Such a conclusion is irresistible since there would be no requirement to prescribe constitutional limitations on a non-existent constitutional right</u>."*[31] [Emphasis supplied.]

The conclusion from this reasoning was stated clearly in the supplementing decision authored by Justice AM Sapre in the following words:

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[29] Ibid.
[30] Bobbit (n 7).
[31] *Rajbala v State of Haryana* (n 27) para 35.

"In the light of the aforementioned two authoritative pronouncements in People's Union for Civil Liberties [v Union of India] and Javed cases, we are of the considered opinion that both the rights, namely the 'right to vote' and the 'right to contest' are constitutional rights of the citizen."[32] [Emphasis supplied.]

From the above study of case law, three conclusions emerge. First, the right to contest elections has certainly not been considered a fundamental right, at least not one possible to draw from Articles 19 or 21 of the Constitution. Secondly, however, the right has been considered a statutory right at the very least, and a constitutional right where the eligibility criteria for the body in question has been enshrined in the Constitution. Third, the extent to which statutory restrictions can be imposed on such a constitutional right to contest is not clear from existing case law, given the divergence of opinion between the two benches of equal strength in *Rajbala* and *Vishwanath*. While the former appears to suggest that such statutory restrictions must be 'consistent with provisions of the Constitution', the latter suggests that no such limitation on statutory restrictions exists. Both take into account roughly the same line of precedent, including that of the three-judge bench in *Javed.*

However, the ambiguity in the third conclusion is not of relevance to this essay. For the present purpose, it suffices to note that the right to contest elections has been considered to be a *constitutional right* in a consistent line of cases of the Supreme Court, at least where the body and eligibility criteria for elections in question are enshrined in the Constitution.

[32] Ibid para 97.

This conclusion in case law supported by the second reason for the right to contest elections to be recognized as a constitutional right invoked by essay, that a reading of the Constituent Assembly Debates reveals that an *assumption* among some framers of the Constitution that it guaranteed a right to contest elections. To see this, it is relevant to consider Dr BR Ambedkar's statement in relation to a draft Article proposed by him, laying down certain qualifications to the post of President of the Union of India. Describing its object, he stated on the floor of the Constituent Assembly on 18th May 1949:[33]

> *"Sir, the object of this Article is to prescribe qualifications for a person who wants to be a candidate at an election. Generally, the rule is that a person who is a voter, merely by reason of the fact that he is a voter, becomes entitled to stand as a candidate for election. In this article, it is proposed that while being a voter is an essential qualification for being a candidate, a voter who wishes to be a candidate must also satisfy some additional qualifications. These additional qualifications are laid down in this new Article 68-A."*[34] [Emphasis supplied.]

Another member of the Assembly, Tajamul Hussain of the Indian National Congress, expressed disagreement with this provision. However, his statement before the Assembly reflects agreement with Dr Ambedkar's understanding of the 'general rule of law' that a voter is *entitled* to contest an election, subject to limitations imposed by the law on his candidature for the body in question. He stated:

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[33] Constituent Assembly Debates, *Transcript of Debate dated 18 May 1949* (CAD 1949). Available at <https://www.constitutionofindia.net/debates/18-may-1949/> last accessed on 30 April 2025.
[34] Ibid para 8.86.118.

"I am of the opinion that the qualification of a person to fill a seat in the Parliament is that he should be a voter on the list. The moment a man's name is on the voter's list you cannot prevent him from either standing for election or voting… The ordinary principle of law is that if a person can vote he can also stand for election. This amendment will go against a well-recognized principle as it will mean that a voter cannot stand for election. This should be withdrawn by Dr Ambedkar."[35] [Emphasis supplied.]

While this essay does not concern the validity of qualifications required for a person to contest an election, the above statements from the Constituent Assembly debates reveal an understanding among framers of the Indian Constitution that in general, a right to contest elections does rest with a person qualified to vote in an election. These excerpts, further, support the decisions in *P Nalla Thampy Terah* and *Rajbala*, insofar as they read such a right into the Constitution.

There is, therefore, a two-pronged argument viable to be made in support of a right to contest elections being a constitutional right guaranteed by the Indian Constitution, drawing from both Supreme Court doctrine and original intent of the framers of the Constitution. The implications of the recognition of the right to contest elections, are, admittedly, not drastic, given that a constitutional right may be limited on grounds wider than those that may limit fundamental rights-meaning that a claim of violation of this right may be limited by the four corners of the law providing it.[36] However, its recognition as a *right*, and a *constitutional* right specifically, achieves the impact of opening the door for challenges to infringements of the right by various entities. Further, it creates a constitutional basis for advocating for state action to promote the realization

[35] Ibid para 8.86.139.
[36] *Vishwanath Pratap v ECI* (n 24).

of this right, for instance through statutory instruments. Thus, its recognition as a *constitutional right* creates a set of negative and positive obligations for both state and non-state entities towards the right-holder, namely an ordinary citizen of India. The following part of this essay shall advance an argument that a specific type of obligation- namely, to ensure democracy within political parties- arises from this right, with both negative and positive facets, and affecting both the Indian State and political parties operating in the country.

Part II- Internal Party Democracy and the Right to Contest Elections

Even a cursory glance at contemporary political activity in India reveals that the right to contest elections, even if a constitutional guarantee, remains grossly unfulfilled in any real sense in Indian politics. A citizen of India, otherwise legally eligible to contest elections to a constitutional body in the country, faces, as a matter of social reality, substantial economic and social barriers to participation in the democratic government enshrined in the Constitution. A body of academic literature documents this, emphasizing, in particular, that the monetary power-driven nature of electoral competition in the present day presents a barrier to participation by persons unable to finance their own campaigns.[37] This facilitates an 'adverse selection' system by political parties, which leads them to select wealthy but self-serving persons as their nominees for elections.[38] This is a trend which, over time, results in the burgeoning class of 'political entrepreneurs'[39] that not

[37] MV Rajeev Gowda and E Sridharan, 'Reforming India's Party Financing and Election Expenditure Laws' (2012) 11 *Election Law Journal* 2.
[38] Ibid.
[39] Max Weber, *Politics as a Vocation* (Duncker and Humblodt 1919) available at <http://fs2.american.edu/dfagel/www/class%20readings/weber/politicsasavocation.pdf> last accessed on 30 April 2025.

only fail to substantively represent the interests of their constituencies,[40] but are also more vulnerable to facilitate 'capture' of government organs by vested interests that contribute to their wealth, most commonly large corporations.[41]

This problem is worsened by two aspects of Indian politics- one of which is a feature of its electoral dynamics, and the other a feature of its constitutional law. In terms of the former, there is wide recognition across academic literature,[42] government reports[43] and Supreme Court decisions[44] that elections in India are prominently party-driven rather than individual candidate-driven. This being the case, the internal decisions of political parties, including their 'adverse selection systems' have a direct, tangible impact on the persons actually elected to political office- an ordinary citizen, unable to gain favor with any political party and unable to finance their own campaign, stands negligible chance of winning an election against full-fledged machinery of various parties. Thus, the barriers to power *within political parties* translate to direct barriers to power *within the government*, and these barriers are based on factors entirely unrelated to eligibility criteria to public offices laid down by the law, being generally economic in nature or based on 'cynical political calculations' by parties' internal high commands, on 'caste or religious lines', and, frequently, 'outright corruption'.[45]

[40] Zoya Hassan, 'Constitutional Equality and the Politics of Representation in India' (2015) 212 *Diogenes* 54.
[41] Law Commission of India 255th Report (n 1).
[42] Sethia (n 2).
[43] Law Commission of India 255th Report (n 1).
[44] *Kihoto Hollohan v Zachillhu and Ors* 1992 SCR (1) 686.
[45] Samuel Bagg and Udit Bhatia, 'Intra-Party Democracy: A Functionalist Account' (2021) 30 The Journal of Political Philosophy 3 20.

In terms of the latter, the power that a political party has over its members, including those elected to legislative bodies, is not only a social fact of Indian politics but has also been accorded Constitutional sanction through the insertion of the Tenth Schedule into the Indian Constitution.

In contrast to several countries across Europe and Asia, where political parties have been increasingly regulated by national constitutions,[46] the Indian Constitution remained silent on political parties until 1985, when, through insertion of the Tenth Schedule[47], it gave political parties constitutional recognition for the first time.[48] With this, India became an anomaly in comparison to most European countries, whose initial moves towards 'constitutionalization' of political parties was by way of recognizing their importance for 'sustaining pluralism', 'aggregating interests' in society and reflecting the 'freedom to organize'.[49] It also became an anomaly in comparison to several Southeast Asian countries, which began their constitutionalization of parties by treating them as 'organizations to be limited' to prevent the undermining of democracy, or as 'public bodies' needing to be regulated to ensure that they serve 'public interests'.[50] In contrast to both these approaches, India, in its first instance of affording constitutional recognition to political parties, in effect, gave them more power than they already enjoyed, by giving a constitutional backing to 'party discipline', at least in the Parliament and State Legislatures.[51]

[46] Gabriela Borz, 'Justifying the Constitutional Regulation of Political Parties' (2017) 38 International Political Science Review 1 99.
[47] The Constitution of India 1950 Schedule X.
[48] Sethia (n 2).
[49] Erik Mobrand, Constitutionalization of Political Parties in East and Southeast Asian Democracies (National University of Singapore Centre for Asian Legal Studies, September 2018) 2.
[50] Ibid.
[51] Sethia (n 2) 37.

The Tenth Schedule, targeting the vice of frequent defections by elected members in the legislative bodies of the country, achieved this purpose by prescribing what may be described as an overinclusive set of grounds on which an individual can be disqualified from being a member of the relevant legislative body.[52] That is, apart from 'voluntarily [giving] up his membership' of the political party on whose ticket he was elected, this amendment provides that even those members who simply 'vote or abstain from voting' in the relevant body 'contrary to any direction issued' by either the political party to which he belongs, or any person authorized by it, without having obtained 'prior permission of such political party, person or authority', shall be disqualified.[53] The only grounds on which such a disqualification may not be effected is if the relevant instance of voting or abstention is condoned by the said 'political party, person or authority' within fifteen days of its occurrence.[54] As a result of this provision, the costs of ensuring compliance with the views of the party elite, which was previously done through political negotiations or 'norm-building' within a party,[55] were significantly reduced, as now, such compliance was turned into a 'legal prerequisite'.[56]

A different angle from which this amendment has been seen reveals a still more troubling impact of the same. This is the recognition that the amendment, by constitutionalizing parties' (as opposed to individual members') control over the legislative process, legalizes a 'particularly stark' transfer of power away from the legislative bodies, to political parties.[57] Given that, as noted in the previous section, major Indian political parties are highly centralized, this amendment effectively transfers

[52] Ibid.
[53] The Constitution of India 1950 Schedule X Para 2(1)(b).
[54] Ibid.
[55] Udit Bhatia, 'What's the Party Like? The Status of the Political Party in Anti-Defection Jurisdictions' (2021) 40 Law and Philosophy 305 8.
[56] Sethia (n 2) 46.
[57] Bhatia (n 55) 29.

legislative power *from* legislative bodies- and individuals elected to them- *to* small groups of leaders within parties, who often occupy these positions on the merit of dynasticism or money power, as opposed to support from any significant intra-party electorate.[58]

In view also of judicial willingness to recognize parties, as opposed to individual candidates, as the unit of representation, following the amendment,[59] it may thus be plausibly argued that constitutional dynamics in India have both *decreased* intra-party democracy in India- at least, to the extent that this was guaranteed by individual legislators' earlier freedom to dissent from the 'party line' in legislative bodies-[60] and *increased* the negative impact of the existing intra-party democratic deficit on the degree to which legislative power is exercised in a 'democratic' manner in India.[61]

With these two specific aspects of Indian elections and constitutional law in mind, this essay argues that the lack of internal democracy within political parties presents a substantial, *extra-statutory* barrier to the realisation of the right to contest elections, which, as Part I has shown, is a constitutional right of every citizen of India. As the State has an obligation to protect the rights of its citizens from being violated, the following part of this essay shall argue for a comprehensive statutory framework to be enacted by Parliament to ensure internal democracy within political parties.

Part III- Statutory Imposition of Internal Party Democracy

[58] Ibid.
[59] Sethia (n 2) 45.
[60] Ibid 37.
[61] Bhatia (n 55) 9.

At the outset, it is highlighted that India has no legal mechanism to ensure intra-party democracy.[62] Admittedly, Section 29A of The Representation of the People Act (RPA) 1951 does require that associations or bodies seeking registration with the Election Commission of India (ECI) submit a copy of the 'memorandum or rules and regulations' of the party, along with a declaration that they shall bear 'true faith and allegiance to the Constitution of India'.[63] Further, the ECI's 'Guidelines and Application Format for the Registration of Political Parties in India' also state that the party's constitution should provide details on, inter alia, its organizational structure, method of appointment of its office-bearers, and 'specific provisions' regarding internal democracy in the party and mode of organizational elections.[64] However, following the Supreme Court of India's decision in *Indian National Congress (I) v Institute of Social Welfare*,[65] the law as it stands is that the ECI is not empowered to de-register any political party on the basis of breaching these provisions.[66]

In view of the above, this essay shall now briefly discuss arguments for and against legal regulation of intra-party democracy, prevalent in academic literature, before drawing its conclusions regarding its advisability through statutory amendment in India.

This essay identifies four main arguments in favor of legal regulation of intra-party democracy. The first states that in the absence of 'electoral incentives' to increase intra-party democracy- that is, due to a poor correlation between positive electoral outcomes and degree of internal democracy

[62] Law Commission of India 255th Report (n 1) 70.
[63] The Representation of the People Act 1951 Section 29A.
[64] Election Commission of India, Guidelines and Application Format for Registration of Political Parties under Section 29A of the Representation of the People Act 1951 (as amended on 20 June 2014) Para 3(v).
[65] *Indian National Congress (I) v Institute of Social Welfare* (2002) 5 SCC 685, as quoted in Law Commission of India Report 255 (n 1) 72.
[66] Ibid.

for a party- there is a need for external regulation mandating the same.[67] The second argument, applicable specifically to jurisdictions with strict anti-defection laws- like India- is that since, in these jurisdictions, considerable 'legislative power' is transferred from legislative bodies to political parties, it is justifiable for the law to mandate that political parties ensure 'democratic' decision-making processes outside the legislative body, that is, in the 'extra-parliamentary' side of the party.[68] The third argument is that legal intervention in this respect will bring political parties within judicial scrutiny, which may assist courts in applying 'higher standards of public law review' to them- in the Indian context, this may, for instance, take the shape of application of 'administrative law' principles of natural justice to parties' internal decision-making processes.[69] The fourth argument is that it will enhance peoples' trust in political parties, for, with legal regulation, at least some principles behind their operation will be evident to- and less 'obfuscated' from-[70] the public.

On the other hand, there are three broad arguments identifiable against legal regulation of intra-party democracy. The first is that enforcing specific mechanisms of decision-making in political parties will cause a loss of autonomy to members, to take these decisions themselves, as well as damage the potential for diversity and innovation in devising such methods.[71] Further, imposing a 'one-size-fits-all' set of procedural and organizational requirements on all registered political parties may go against the interests of parties at varying stages of expansion and with varying

[67] Anika Gauja, Enforcing Democracy? Towards a Regulatory Regime for the Implementation of Intra-Party Democracy (Democratic Audit of Australia, April 2006) 6.
[68] Bhatia (n 55) 29.
[69] Charles Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 The American Journal of Comparative Law 1 10.
[70] Bhatia (n 55) 20.
[71] William Cross, 'Considering the Appropriateness of State Regulation of Intra-Party Democracy: A Comparative Politics Perspective' (2016) 15 Election Law Journal 1 7.

access to resources required to implement the same.[72] The second argument is that, any method adopted by a national legislature to ensure intra-party democracy will, inevitably, be one devised by party elites or members in the higher echelons of parties- who become part of legislative bodies- as opposed to ordinary, 'rank-and-file' members. [73]Thus, any method enforced by such a law is likely to safeguard the interests of the former over the latter. In the same vein as the second argument, the third argument suggests that any method adopted by a national legislature at a particular instance will also, inevitably, reflect the interests of the currently ruling party, which, if otherwise disincentivized from promoting intra-party democracy, will ensure that no 'radical changes' are brought in through the requirements of the new legislation.[74]

While keeping in mind the above arguments, however, this essay takes the view that legal regulation of intra-party democracy is indeed advisable in India. This is because of three reasons. First, as discussed earlier, there is a clear deficit of intra-party democracy in India, in spite of the non-mandatory guidelines issued to encourage the same by the ECI. Thus, it is clear that in the absence of a stronger external push towards ensuring intra-party democracy, parties themselves are unlikely to take steps towards developing mechanisms for the same.[75] This is in sharp contrast to, for instance, the jurisdictions in the context of which arguments stating that legal regulation will hamper 'innovativeness' in institution-building by parties have been made, where parties have shown a clear effort to take at least some novel measures towards enhancing internal democracy in recent years- making this argument inapplicable in the Indian context.[76] Secondly, as discussed in Part II of this essay, India is home to exceptional circumstances where not only its electoral

[72] Ibid 8.
[73] Ibid 9.
[74] Ibid 9.
[75] Borz and Janda (n 4) 5.
[76] Gabriela Borz and Kenneth Janda, 'Contemporary Trends in Party Organization: Revisiting Intra-Party Democracy' (2020) 26 Party Politics 1 8.

dynamics of recent years, but also its constitutional dynamics, lend enormous power to political parties as opposed to their members. This is in contrast to, for instance, jurisdictions across Europe and Southeast Asia where political parties are regulated along multiple parameters, including their internal functioning.[77] This forms the ground to argue, possibly, that certain 'exceptional' or *sui generis* conditions[78] exist in India which justify legal regulation of intra-party democracy even in face of its potential negative impacts. Thirdly, this essay argues that concerns regarding party elites' and the ruling party's vested interests being advanced through legislation on intra-party democracy are valid, but must not be overstated. At the least, even if an initial legislation on the subject does reflect such biases, it is likely to serve the no less important objective of bringing the issue into the public arena, as a matter of political debate- which, it is contended, will itself be a step in the direction of generating more widely representative views on the issue.

Having thus reached the conclusion that legal regulation of intra-party democracy is advisable in India, this essay shall now discuss the content of four legal provisions that may be introduced in India, for the same, possibly through an amendment to the RPA 1951. These provisions are aimed at addressing specific concerns posed by a deficit of intra-party democracy, both identified in academic literature generally and arising from the Indian context in particular, which have been discussed at various points in the earlier sections of this essay.

First, this essay endorses the suggestion made by one scholar that decision-making power on how the 'legislative wing' of a political party should vote, must not be held singularly by one organ of the party-[79] for instance, the 'Parliamentary Boards' of the Indian National Congress (INC) and

[77] Erik Mobrand, Constitutionalization of Political Parties in East and Southeast Asian Democracies (National University of Singapore Centre for Asian Legal Studies, September 2018) 2.
[78] Fombad (n 69) 41.
[79] Bhatia (n 55) 30.

Bharatiya Janata Party (BJP)- which, it has been documented, is frequently under direct control of the party president. Rather, such power must be distributed among a broader section of the party's members, through granting them voting power on each such question as it arises.[80] This reform will partially address the specific concern posed by the anti-defection law- that of transfer of legislative power from the elected legislator to the party- by empowering members within the party to also exercise the same, as opposed to merely the party elites.[81] A roughly similar proposal was, significantly, contained in the draft Political Parties (Registration and Regulation) Act 2011, which mandated political parties to create Executive Committees, whose members would be elected by their State and local units.[82] These Executive Committees, whose decisions would be required to be taken on the basis of a simple majority vote with secret ballots, would be 'empowered to elect candidates for contesting Parliamentary and State [elections], having due regard to the recommendations made by the State and District units of the constituency.' This draft, submitted to the Law Ministry at the time, has never been enacted into law.

Secondly, this essay supports the suggestion that all individual party members should have, if not the ability to vote for or against each candidate selected for an electoral contest, the ability to at least 'veto' specific candidates, through, possibly, a vote of 'no confidence'.[83] This will allow, this essay suggests, party members to 'deselect' at least those candidates openly and widely regarded as having no merits save for money power or dynastic credentials, and who otherwise do not enjoy the support of local party members.

[80] Ibid.
[81] Ibid.
[82] Law Commission of India 255th Report (n 1).
[83] Research Foundation for Governance in India, Democracy Within and Without (RFGI 2010) 8.

Thirdly, this essay proposes that parties must provide state level committees a clear- preferably, decisive or at least shared- role in selecting candidates for contesting state elections. This will, apart from instituting some degree of transparency in the candidate selection process followed by parties- itself an important goal, as noted earlier-[84] ensure that the highly centralized mode of functioning of political parties does not severely damage the functioning of the federal division of powers prescribed by the Indian Constitution.[85]

Finally, this essay recognizes that simply providing voting rights to individual party members on different issues does not suffice to encourage a 'culture' of deliberation and dissent within parties.[86] To this effect, it proposes that parties be required to hold meetings, purely for the purposes of deliberation, periodically, throughout the hierarchy of their organs. This suggestion, while arguably not directly affecting the 'balance of power' within the party, will, this essay argues, nevertheless serve to nurture intra-party democracy in an 'intangible' sense, which, as broader notions of the concept hold, are as important as tangible features such as voting rights.[87]

Part IV- Judicial Imposition of Internal Party Democracy

In a democratic state, ideally, it is the legislature that must undertake the function of law-making. While the principles underlying this claim are to be found in the theory of separation of powers,[88] and are beyond the scope of this essay, it is recognized here that there are strong normative grounds to oppose judicial intervention in this function, even if in line with its constitutional mandate of

[84] Ibid 35.
[85] Eswaran Sridharan, 'India's Democracy at 70: The Shifting Party Balance' (2017) 28 Journal of Democracy 83.
[86] Piero Ignazi, 'The Four Knights of Intra-Party Democracy: A Rescue for Party De-legitimation' (2020) 26 Party Politics 1 14.
[87] Ibid.
[88] James Madison, Alexander Hamilton and John Jay, *Chapter 10: Separation of Powers* (1788) 1 *The Federalist* 47 323 <https://press-pubs.uchicago.edu/founders/documents/v1ch10s14.html>.

judicial review and of upholding the text and principles of the Constitution.[89] Primary among these is the 'anti-democratic' nature of judicial interventions in law-making, arising from the fact the judges, unlike legislators, are not elected.[90] Yet, normative arguments in favor of such judicial activity in certain contexts bear significance. As one scholar writes, 'the whole idea of a written constitution is to remove certain issues from the ordinary democratic decision-making processes', and 'Constitutionalism [...] is deliberately designed to be anti-majoritarian'.[91] Drawing from this idea, this essay argues that the existence of the right to contest elections as a *constitutional* right provides a strong reason for the Indian judiciary to impose it- both in relation to internal party democracy and otherwise- on political parties, *if Parliament fails to do this.*

A consideration of the real-life circumstances in question serves to clarify and exemplify the strength of this claim. Across the world, political parties have demonstrated a strong tendency to collude *against* measures geared towards making them more transparent and accountable, and, relatedly, more internally democratic.[92] This is true of India as well- as exemplified by a writ petition filed by the Association of Democratic Reforms before the Supreme Court at the time of writing, seeking a declaration of political parties being 'public authorities' under Section 2(h) of the Right to Information Act 2005 ('RTI Act').[93] The background to this petition reveals that, following an order by the Central Information Commission in 2013 holding political parties to be 'public authorities' under this provision, and hence amenable to public scrutiny under the RTI Act,

[89] Andrei Marmor, 'Are Constitutions Legitimate?' (2007) 20 *Canadian Journal of Law and Jurisprudence* 69.
[90] Ibid.
[91] Ibid.
[92] Ignazi (n 85).
[93] *Association for Democratic Reforms v Union of India* WP(C) No. 333 of 2015 [Supreme Court of India].

the six national political parties mentioned in the order refused to respond in any way to it.[94] This degree of collusion among the parties, that too in relation to statutory proceedings in a matter of 'wide public interest' is one of many indications of the unlikelihood of Parliament actually enacting legislation for the purpose of ensuring intra-party democracy within political parties.[95]

In this light, this essay argues that, in the absence of, or until the enactment of, a statutory instrument by the legislature seeking to promote the realization of the right to contest elections through mandating political parties to create structures for substantive internal democracy, the judiciary can, and should, use its writ jurisdiction under Article 226 of the Constitution to impose appropriate measures for this purpose on political parties. The normative justification for this is clear given the reluctance of *all* political parties to legislate in this respect- but this part of the essay shall demonstrate that there is sound legal basis for using writ jurisdiction under Article 226 for this purpose as well.

Article 226 of the Indian Constitution provides High Courts with the power to issue writs to *'any person or authority*', 'enforcement of any of the rights conferred by Part III and *for any other purpose*.'[96] From judicial precedent, the key feature required to be possessed by an entity to be subjected to this jurisdiction is that it must perform a 'public duty'.[97] While the scope of this duty has not been defined exhaustively, the Supreme Court in its 2005 decision in *Binny Ltd v V Sadasivan* noted:[98]

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[94] *Subhash Chandra Agrawal v Indian National Congress, Bharatiya Janata Party and Ors* 2015 SCC Online CIC 604.
[95] Ibid.
[96] Constitution of India 1950 Article 226.
[97] *Zee Telefilms Ltd and Anr v Union of India and Ors* (2005) 4 SCC 649.
[98] *Binny Ltd v V Sadasivan* (2005) 6 SCC 657.

"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as the authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest..."[99] [Emphasis supplied.]

Further, in its recent decision in *Janet Jeyapaul v SRM University and Others,*[100] the Supreme Court affirmed that the authorities to which Article 226 jurisdiction can be applied are wider in scope than those to which Article 12 in Part III of the Constitution refers, with the twin test for the former being 'whether [it] is formed for discharging any 'public function' or 'public duty' and if so, whether it is actually engaged in any public function or/and performing any public duty.'[101]

Drawing from the centrality of political parties in Indian politics, both in terms of elections and actual governance, which has been reflected upon in Part II of this essay, it is argued here that political parties can be termed as performing essential public functions, of, inter alia, facilitating popular participation in elections to constitutional bodies, shaping decision-making in legislative bodies and shaping political discourse in the country. With this argument in the forefront, it is proposed that measures for internal party democracy, such as the conduct of regular internal elections, formation of local units and their involvement in candidate nomination for elections, may be judicially imposed upon political parties using appropriate directions, orders or writs under Article 226.

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[99] Ibid para 11.
[100] *Janet Jeyapaul v SRM University and Ors* (2015) 16 SCC 530.
[101] Ibid para 16.

Conclusion

This essay has demonstrated that the Indian Constitution provides a right to contest elections, as a constitutional right, even if not a fundamental right. It has argued that one of the core state actions required for the promotion of this right is mandating internal party democracy within political parties in the country- which shall strengthen Indian constitutional democracy in general and the constitutional right to contest elections in particular. It has further proposed that, ideally, such state action should take the form of a statutory instrument, given the allotment of the law-making function primarily to the legislature in India's constitutional framework. However, recognizing the pragmatic unlikelihood of Parliament enacting such a reform given the tendency of political parties to collude against reforms geared towards making them more transparent, accountable and internally democratic, this essay has proposed an alternative solution. This is based on the argument that political parties perform 'public functions' and 'public duties' so as to bring them within the purview of the writ jurisdiction of High Courts under Article 226 of the Constitution. This means that the judiciary can and should, in the absence of a statutory enactment to this effect, use its writ jurisdiction to impose structural and functional changes within political parties to ensure enhanced internal democracy within them. This type of statutory intervention, or, in its absence, judicial intervention, in Indian election law, it is concluded, shall serve to substantially strengthen Indian constitutional democracy.