THE HINDU CENTRE
for
Politics and Public Policy

Uprooted From Democracy: Rajbala v. State of Haryana

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A panchayat election in progress. File Photo: K. Bhagya Prakash

The recent verdict by the Supreme Court of India, upholding an amendment by the Haryana government to prescribe minimum educational qualifications to contest local body elections runs against the grain of democracy. ***Rajgopal Saikumar*** *points out the flaw in prioritising policies over more basic rights such as voting and participating in the democratic process.*

I

The rural population in the State of Haryana is 1.65 crores out of which 96 lakh are above 20 years of age. With the passing of the Haryana Panchayati Raj (Amendment) Act, 2015 [hereinafter referred to as Act], only 57 per cent of this population will be eligible to contest in Panchayati elections of Haryana. More than half the entire

population of women in Haryana cannot contest in these local elections, while 68 per cent of the Scheduled Caste women and 41 per cent of the Scheduled Caste men will be ineligible to contest. This Act, introduced by the Bharatiya Janata Party (BJP) government in 2015, amends the Haryana Panchayati Raj Act, 1994 to introduce several prerequisites and disqualifications for contesting in its local government elections. Provisions specifically under challenge are Section 175 (1) (t), (u), (v), and (w). Among them, failure to:

(a) Pay arrears of any kind due to Primary Agricultural Co-operative Society, District;
(b) Pay arrears of electricity bills;
(c) Pass matriculation examination or its equivalent examination from any recognized institution/board;

And the requirement to

(d) Submit self-declaration to the effect that he has a functional toilet at his place of residence.

A Division Bench of the Supreme Court comprising Justices J. Chelameswar and Abhay Manohar Sapre, in a judgment delivered last week (*Rajbala v. State of Haryana*), has upheld the constitutionality of this law. Variously dubbed as "frightening", a "fatal blow", and a "supreme error" [1] ,this judgment has now left us with a more troubling question: whether Haryana, where more than half the adult population has been systematically and structurally disenfranchised, continues to be a democracy or not. By democracy, we mean a "deep democracy", and its depth implies metaphorical roots, anchors, intensity, proximity and locality [2] . Such a democracy is not just in its formal aspects but also in a cultural sense, where democracy takes root in the normal everyday conditions of social life. It is in this sense that one is now haunted by the question: *Is Haryana still a democracy?*

Such systematic disenfranchisement is not new to either Haryana or the Supreme Court. The State has already passed laws that prevent those who have more than two living children from contesting for certain Panchayati posts. This law was upheld by the Supreme Court in the much criticised Javed v. State of Haryana [3] , which the Court in *Rajbala* has significantly relied on. Now that such laws have been judicially legitimised and even encouraged by India's highest court, there is the possibility that this trend of disenfranchisement will spread to other States. For instance, Rajasthan had passed an Ordinance (approved by the Governor in December, 2014) which makes similar educational qualifications as prerequisite for contesting in the Panchayat elections of the State. Other State governments are likely to be motivated by these developments.

II

The *Rajbala* judgment makes the following moves to reach its conclusion:

First, relying on *PUCL v. Union of India* [4] and *Javed & Others v. State of Haryana* [5] , it holds that the Right to Vote and Right to Contest are neither fundamental rights, nor merely statutory rights, but are Constitutional Rights. Further, the Right to Contest can be regulated and curtailed through laws passed by the appropriate legislature.

Second, it holds that it is not possible to invalidate a statute only on the grounds that the law is arbitrary, unreasonable or disproportionate. Relying on State of *Andhra Pradesh v. McDowell* [6] the Court expresses suspicion upon whether the doctrine of "substantive due process" can be employed in interpreting the Indian Constitution. Further, because judging arbitrariness and reasonability requires value-judgments that are beyond the scope of judicial competence, it is best left to the wisdom of the legislatures.

Third, the only test of constitutionality that the Court applies is the 'rational nexus' standard under Article 14 (equality before law and equal protection of law). Because the provision disqualifies a large section of the population from contesting in elections, the issue is whether the Act is discriminatory and violates the right to equality of this disenfranchised class of citizens. That is, whether those barred from contesting in election for failure to fulfil the prescribed conditions, form a category of persons who are discriminated against, as opposed to those who fulfil the conditions.

The test is whether this category of persons who have been denied the right to contest have been rationally and intelligibly distinguished from the rest in order to achieve the intended objective of the Panchayati legislation. Based on this test, the Court holds that there is in fact rational nexus between the classification (based on education and property/financial conditions) and the object that the law wants to achieve. The object of the law is to have "model representatives for local self government for better administrative efficiency which is the sole object of the 73rd constitutional amendment."

The Court opines that, "It is only education which gives a human being the power to discriminate between right and wrong, good and bad. Therefore, prescription of an educational qualification is not irrelevant for better administration of Panchayats." It then concludes that, therefore, there is i*ntelligible differentia* and a rational nexus between the object sought to be achieved by the law and the classification itself.

As Ronald Dworkin suggests there is a difference between goals/policies and rights. The legislature has the power to set up the polity's goals while the Court's task is to ensure that in pursuing these goals the government does not infringe on rights. Yet, in*Javed*, the Court gives primacy to the family planning policies at the cost of diluting the right to contest elections. Relying on*Javed*, the Supreme Court in *Rajbala* makes a similar error of prioritising certain policies over more basic rights such as voting and participating in the democratic process.

The judgment tends towards the ideological temperament of the judges, the belief that "It is only education which gives a human being the power to discriminate between right and wrong, good and bad". Distinguishing good from bad does not come necessarily from formal classroom education. Rather it comes from awareness, knowledge and lived experience that develop from continual and inclusive dialogues which allow previous truth claims to be challenged and called into question. Literacy, in this broader sense, is not located in the classroom but in one's ethical interactions with the world.

The judgment can be criticised on various legal, political, social and ethical grounds. In fact, even the legislature needs to criticised for not adequately engaging in pre-legislative public consultations with the voters. But the law has been passed, and the judiciary has upheld it -- nihilism inevitably seeps in.

III

In *Union of India v. Association for Democratic Reforms* [7] , the Court distinguished between the "right to vote" and the "freedom to vote". The former is a statutory right while the latter emanates from Article 19(1)(a), the fundamental right of free speech and expression in the Constitution. The *NOTA judgment* [8] (2013) reaffirms this distinction firmly entrenching the act of voting as a constitutional guarantee. But what is the use of such a "freedom of choice" if the choices are so severely curtailed? The 'right to vote' and 'right to contest' are inter-related precisely because the guarantee of one is meaningless if the other is diluted. The legislature may have the power to regulate the right to contest Panchayat elections but these powers have to be consistent with the constitutional guarantees. If the courts take the right to vote seriously, then such dilution of the right to contest is erroneous. Therefore, if democratic

elections are part of the basic structure of the constitution [9] , the right to vote is protected by Article 19(1)(a) and the right to contest has been held to be a constitutional right the standard of scrutiny to test the constitutionality of such laws that dilute the right to contest in Panchayati elections neds to be much higher [10] .

The Court summarily rejects the empirical evidence of disenfranchisement as irrelevant. The law is clearly pitted against women, and persons from lower class and castes. The Court acknowledges this, and yet summarily rejects the evidence as being irrelevant.

It notes that "No doubt such prescriptions render one or the other or some class or the other of otherwise eligible voters ineligible to contest…[but] numerical dimensions of such classes, in our opinion should make no difference for determining whether prescription of such disqualification is constitutionally permissible unless the prescription is of such nature as would frustrate the constitutional scheme by resulting in a situation where holding of elections to these various bodies becomes completely impossible." In this self-imposed blindness to socio-economic inequities, one is reminded of the regressive *Koushal v. Naz Foundation* [11] that refused to decriminalize homosexuality by noting "that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgender…and this cannot be made a sound basis for declaring the section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution."

In another instance of its tragic reasoning, the Court recognises high rates of rural indebtedness and the large number of farmer suicides as a result. Yet, it turns a blind eye to these conditions by stating that "the possibility of a deeply indebted person seeking to contest elections should normally be rare as it would be beyond the economic capacity of such persons. In our opinion, the challenge is more theoretical than real."

On the issue of toilets, the Court dismisses this challenge by parroting the government's schemes and assurances in making it available for every household. The courts have become, as rightly pointed out by Indira Jaisingh, the ambassadors of the Swachch Bharat programme [12] . Both, education (Article 21A) and toilet provisions (with drainage and sewage facility) are responsibilities of the state. Yet, the state has converted its own failures, into burdens that prevent citizens from contesting in elections and adequately participating in the political processes.

III

Perhaps this judgment only adds to the suspicion several scholars have voiced regarding the Supreme Court's "conservative turn" [13] . In the early 1980's, the Court was considered progressive and activisitic, speaking for the socio-economically poor and marginalised constituencies that were otherwise under-represented in political and administrative process of the state. It did so by providing novel and radical interpretations of the Constitution, and through procedural and substantive innovations that loosened*locus standi*, allowing Public Interest Litigation to specially safeguard the rights of those otherwise excluded and marginalised. As per this narrative, such judicial activism was a way of regaining its lost legitimacy and atoning for the sins that the Court had committed during the Emergency [14] .

In the past two decades however, the Court has taken a "conservative turn". A centre rendered weak by coalition politics in the 1990's led to a vacuum in decision-making. The judiciary was quick and opportunistic to fill this vacuum, quickly transforming its judicial activism into a "Juristocracy" [15] . Similarly, the neoliberal turn in the economy was reflected in judicial values as well. By the late 90's, the Courts had veered away from the original justification of PILs, making themselves a forum for partisan disputes, middle-class interests and oblique political considerations [16] . In another recent judgment, the Supreme Court has upheld the ban on alcohol in Kerala while

exempting five-star hotels from it, in effect, exempting the rich [17] . *Rajbala* is arguably the starkest instance of its elitism, blindness to socio-economic realities, and distrust of grassroots politics.

The belief that those who have no formal education are incapable of governing and representing their needs or that those who have higher education somehow become 'model political representatives' incapable of corrupt practices by virtue of their financial conditions smacks of its classist prejudices. A democracy represents the 'will of the people'. If the people decide to vote for an indebted farmer or an illiterate women instead of an MBA graduate, then so be it. Ever since Plato's *Republic* it has become a cliché to argue that a democratic government rarely implies the "best" government. The best government maybe Plato's "philosopher-king" or the Marxist "dictatorship of the proletariat", but a democracy is not about the "best government", it is merely about electing a government chosen by the people. Yet, the Court in equating education qualifications to "model representatives" clearly shows its prejudices that infringe upon popular will (and popular will is the very foundation of our social contract that gave rise to the state). The Court selectively applies its principle of avoiding "value-judgments" and yet the judgment is itself value specific and ideologically biased against a certain category of people who have been held to devoid of political rationality to lead and represent its interests.

The Supreme Court' distrust of civil society and local governance is the most evident in the now infamous quote from the recent*NJAC* judgment: "At the present juncture, it seems difficult to repose faith and confidence in the civil society, to play any effective role in that direction. For the simple reason, that it is not yet sufficiently motivated, nor adequately determined, to be in a position to act as a directional deterrent to the political executive establishment. It is therefore, that the higher judiciary which is the saviour of the fundamental rights of the citizens of this country… [18] " *Rajbala v. State of Haryana* is a part of this "conservative turn" of the Supreme Court, a trajectory that spells threat in the long run.

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6.^ (1996) 3 SCC 709.
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This article has been updated to correct typographical errors.

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