

CONSTRUCTING DEMOCRACY IN THE ERA OF RIGHTS: MAKING SPACE FOR RULE AND RESISTANCE

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“A country does not have to be deemed fit for democracy, rather, it has to become fit through it.”

... Amartya Sen

I. INTRODUCTION

The most notable feature of modern political theory is the express inclination of all States towards the acceptance and promotion of democracy. It is spoken as an accepted truth that the political force of democracy is inevitably linked to the desire of finding a solution to human miseries, and therefore must be established as a right of every society.

Democracy as a practical force has to ensure access to a healthy political structure, which is seemingly well coordinated and capable of delivering results. While being of both national and universal acceptance, there are none to question the varied forms it has taken or can take. When making an attempt to understand the modern attributes of democracy, some thought has to be given on what a democracy intends to achieve at a given time and place. The term ‘democracy’ is viewed as highly relative and clothed with ambiguities, in light of new developments and experiences world over. Critics make serious endeavours to answer questions pertaining to the workings and limitations of a democratic structure. The central focus is upon the institutional framework, broadly identified with the legislative, executive and judicial organ of the State, the results it must deliver to the people, the qualitative limitations, as well as the environment in which it operates.¹

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¹ There are considerable issues and questions that are subject matter of deliberation. To name a few: (a) It is significantly highlighted that the current understanding of governance is absorbed in a myth of rights- ‘that realization of rights by the courts is itself tantamount to meaningful change and gain’. There is considerable need to focus on practice and delivery, i.e. – to highlight the difference between

Looking into the wide ambit of democratic theory it is obvious that contemporary issues pertaining to rights, governance and constitutionalism are all within the spectrum of deliberation. The traditional understanding of democracy in terms of representation, check over power, procedural patterns etc only enables the identification of objective principles. A democratic set-up in terms of institutional mechanisms is one dimension of democracy. The expression 'formal democracy' is more so in reference to a political system that features regular fair elections, accountability, effective guarantees of freedom. However, the mere identification of democracy with the formal structural requirements is a faulty perception and must be disregarded. In the words of Maxwell Chibundu, "the legitimacy conferred by democracy flows not from its recognition of the ideal of embodiment of supreme and ultimate authority in the people... In particular democracy relies on periodic elections that are grounded on rationale deliberative processes rather than on haphazard assertions of power by the general populace."² The old age definition of democracy in terms of a procedural commitment does not stand today, making it even more necessary to get acquainted with the new ideas about democracy, its achievements, global/ national obstacles, and its significant role in ascertaining the sanctity of rights and conditions of governance. A few of the currently debated issues are (a) how the high ends of human rights protection, accountability, justice are dependent upon the strength and maturity of democracy, (b) whether the realization of rule of law is subject to the political environment, (c) what actions constitute realization of rights etc.

In the midst of growing legal and theoretical concerns, democracy as a political force in India and various other countries is showing marked signs of dynamism to satisfy the social demands in terms of social or economic needs. It can be expressed as 'democratic dynamism' that comes

court's declaration of rights and actual political practice in furtherance of the said rights, the effect of judicial governance on the construction of social movements for democratic reforms. (b) What are the plausible channels opened by the state to enhance political deliberation? (c) What are the objective parameters to ascertain political performance? (d) What are the impediments to achieving global consensus on the meaning and values associated with democracy? etc.

² Maxwell O. Chibundu, *Political Ideology as a Religion: The Idolatry of Democracy*, Available at <http://ssrn.com/abstract=10223718>, 143 (2007).

with the growing popularity of democratic governance because of the vibrant role of the judiciary. A role identified as relevant because of the failures of legislative and executive initiatives to effectively deliver results. The fact of judicialization has swept the political functioning of various legal systems. It is therefore important to ascertain the viability of the strong role of democratic power (judicial) based on social attitude and demands, especially in the absence of any improvement in the overall democratic structure and the continuous utilization of the law by way of interpretation to legitimize action as well as pacify social frustration.

The popularity of democracy has unleashed or created a space for mechanisms to establish superiority by relying simply on social and political conditions and concerns. In the case of India, it becomes all the more important to analyse and reveal the increasing identification of democracy with the judicial institution in important matters relating to constitutional guarantees and governance, in the absence of much cooperation with or any negligible improvement in the workings of other institutions. The trend is widely popularized as the 'New Separation of Powers' in the modern times and can also be traced in many other countries, which are all deliberating upon the question as whether the enhanced judicial position is appropriate or healthy? In addition to the fact of judicial governance, there is also considerable emphasis on ascertaining how rights get affected with the manner of judicial governance. In other words, it is relevant to ascertain the sanctity of governance and rights as not only a constitutional ideal, but a political aspiration and eventually a social satisfaction.³

II. WHAT MATTERS IN A DEMOCRACY

Under a general theory, democracy has been referred to as the rule of people, or a form of government in which the 'demos' - the people, rule, with power in the hands of many rather than just a few or one. A

³ In modern times, there is widespread debate on testing the legitimacy of judicial power. In the course of defending equality and justice, there is a possibility that the judiciary has impressed upon the society that its pronouncements are to be treated as those of the Constitution. The increasing primacy of judicial interpretation is likely to insulate constitutional decisions from challenge. See Jane Pek, *Things Better Left Unwritten? Constitutional Text and the Rule of Law*, 83 NEW YORK UNIVERSITY LAW REVIEW 1991(Dec 2008).

system characterized with the existence of a bureaucratic organization characterized by efficiency and hierarchy. However, what is open to deliberation is what constitutes 'rule', and the 'people'? "Does talk of the 'people' simply imply some homogeneous will amongst all members of a given community, capable of expression in universally agreed political decisions?"⁴ In modern context, how is will of the people expressed? What all authorities hold the legitimate authority to take decisions on the issues of liberty and distribution? What are the mechanisms to question democratic decision making? What standards ascertain the legitimacy of democratic actions? What are the moral and legal standards governing the actions of decisions makers? etc are all pertinent questions.

Democracy as a functional institution is norm based as well as value based. Democracy is based on the values of liberty and equality. The crucial components of a functional democracy are- 'free speech, political equality, liberty, toleration, empathy, efficiency'⁵. At the level of functionality, the basic idea of democratic governance has evolved with time, and democracy still means different things to different people, depending upon the experience and aspirations. Even after years of experience with democracy, a lot of questions come to mind, that why is democracy preferable to other forms of government? Is voting a right or a duty? What is that we hope to achieve by resorting to democracy? Or how can we improve the quality of democratic discourse?

It is true that with the passage of time, man and society has come up to attach a significant meaning to democracy. In the words of T. Mathew the essential test of a democracy has been, "the belief that the source of political authority must be and remain in the people and not in the rulers. The people have the freedom to determine the nature and content of political power... it will be a government by the people, not as an unorganized mass, not even as an organized majority, but as a society of living selves. It will not rest on mere numbers or quantity, but on the ethical quality and value of social life which is at once its foundation and its product"⁶ The basic underlying value of democracy has been that it does not identify with mere majority rule or with 'majoritarian politics'.

⁴ Jack Lively, DEMOCRACY (1975)9.

⁵ Burt Neuborne, *Making the Law Safe for Democracy: A Review of the Law of Democracy Etc.*, 97 MICHIGAN LAW REVIEW 1578 (May 1999).

⁶ T. Mathew, *A Socialist Society Cannot be Democratic*, in M.R. Pai (ed.), SOCIALISM IN INDIA: A COMMENTARY (1967) 64.

In broad and simple words, democracy refers to an institutional set-up which more generally will include a legislature, executive and a judiciary. The institutions are required to function and reflect the will of the people in their respective functional domains, because democracy is nothing but a government of the people. In traditional texts it has always been the legislature that is identified as the institution that reflects upon the will of the people. But if we trace the development in law, the powers of the executive and judiciaries have increased to the extent of deciding significant issues that affect individual lives. The growth in power has as a matter of fact necessitated a situation wherein democracy is required to express the will of the people. Even under the Indian Constitution, the three wings of the state: the legislature, the executive and the judiciary, are constitutional democratic institutions. The sanctity of a constitutional status is that democratic functioning must submit to the dictates of the Constitution.

It is obvious that the definition of democracy in terms of elections is a minimal definition.⁷ There are a lot of factors that must reflect in the functioning of a guided democracy. Firstly, the continuance of a strong political democracy is largely dependent upon the recognition and respect for the principles of liberty and equality. To many people, the reference to equality, liberty, fraternity gives only an idealistic picture of democracy, because it is like a realist paradox that on the one hand liberty and equality strengthen and are essential to the democratic process, and on the other democratic process must ensure that the values flourish.

At a given point in time, the status of the Constitution and its people comes to be reflected in the face of the democracy. If democracy fails, it is automatically seen as the failure of the Constitution and its people. The task of representing the society has to be realized through the mechanism of democracy. Once that is done it will not be that any such law effectively was chosen only by the actions of any single one of the individuals who formally participate in the process.⁸ Democracy not only has simple normative appeal, it does offer great advantage for the society.

⁷ Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE LAW JOURNAL 1(1998).

⁸ Frank I. Michelman, *The Constitution, Social Rights and Liberal Political Justification*, 1:1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 23 (2003).

The proposition finds support in the words of Amartya Sen, “democracy’s claim to be valuable does not rest on just one particular merit. There is plurality of virtues here, including, first the intrinsic importance of political participation and freedom in human life; second, the intrinsic importance of political incentives in keeping governments responsible and accountable; and third the constructive role of democracy in the formation of values and in the understanding of needs, rights and duties”.⁹

Political Democracy

The expression ‘political democracy’ reflects upon the ‘freedom’ of man. It recognizes the potential of man by recognizing his participation in the electoral process, as well as his participation in upholding the supremacy of the law. In addition, freedom must protect the individual from the arbitrary invasion of the State.

Social Democracy

The expression ‘social democracy’ reflects upon welfare activity, wherein government responds to its positive obligations of good governance and social benefits.

Economic Democracy

The expression ‘economic democracy’ reflects upon the values of planning and economic governance. The democratic set-up is carefully designed to ensure the mobilization of national resources for the ends of equality and redistribution. Even if private ownership is permitted, the State is obligated to prevent private players from abusing their powers.

International Democracy

The expression ‘international democracy’ has evolved with the increasing exchange and communication between the countries, wherein the world is coming to a consensus on resorting to democracy in order to equip and improve the conditions of all mankind. The international course of communication and co-operation do and must oppose rights violation and exploitation.

The results of a democratic set-up largely depend upon the character and will power of the democratic set up. Indeed, international theorists

⁹ Amartya Sen, *Democracy as a Universal Value*, 10.3 JOURNAL OF DEMOCRACY 9-17 (1999).

establish the significance of democracy on the premise that, a country does not have to be deemed fit for democracy, rather, it has to become fit through it.

With specific reference to India, in the words of Neera Chandhoke,

The country holds an enviable record in institutionalizing democracy in the form of Constitutionalism, a competitive party system, regular elections, rule of law, codification of political and civil rights, and guarantees of free press and a vibrant civil society. But even as India satisfies conditions that permit it to claim the label of democracy with some justification; a majority of the people continue to suffer from unimagined hardship, with the most vulnerable among them—the poor among the scheduled castes and tribes... forest dwellers, tribals, and women at tremendous risk in matters of both lives and livelihoods.¹⁰

The results that appear in a democratic set-up are expressive of the following concerns: (a) that democratic functioning and performance depends on a variety of factors including relation and co-ordination between the various organs of the state, (b) the international trends in terms of governance do have a significant impact on the new methodologies adopted at the national level, (c) the pace at which the society is able to initiate legal reforms etc. These are a few factors to highlight the subjectivity of democratic functioning at a given point in time.

III. RIGHTS AND DELIBERATIVE DEMOCRACY: ‘VOTE CENTRIC’ TO ‘TALK CENTRIC’

If democracy is defined as ‘people’s rule’, rights must be entrenched in the legal framework provided, in order to enable individuals to decide and express for themselves and the society. The democratic process dedicated to the establishment of a just order is an evolutionary and ongoing process. In a purely theoretical construct, the increased recognition of individual access to the constitutional protections only deepens the process of constitutional socialization. With reference to the Indian Constitution,

¹⁰ Neera Chandhoke, *Democracy and Well Being in India* Available at [http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/AFA456B71A0BD335C1256FFF0052FE69?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/AFA456B71A0BD335C1256FFF0052FE69?OpenDocument)

the possession and exercise of basic rights enables citizens to mobilise and press the state to deliver on the promises embedded in the Constitution and in policy agendas. In addition to Article 32 and Article 226 of the Constitution of India, the recognition of Public Interest Litigation is another means to enable the people to socialize with the Constitution with the aid of the democratic apparatus. Arguably socialization leads to enhanced participation, and participation deepens democracy by emphasizing the prime legitimacy of the concept- that the Constitution belongs to the people. However, the textual construct of the basic values or the democratic output at a given point in time would reflect upon the conditions that facilitate socialization with the Constitution. In the words of Neera Chandhoke¹¹

The peculiar virtue of Indian democracy, howsoever formal and minimal our avatar of democracy may be, is that it is premised on the recognition of, the grant of, and the codification of basic rights: the right to freedom of expression, of assembly, of association, and more significantly the root right to demand other rights.

The essential facet of any rights discourse in a democracy has to be linked to the process of socialization, which is an ongoing process common to one generation after another. The success of a democracy must be ascertained in reference to how constructively it permits and responds towards the establishment of a social relation between the people rights and their Constitution. For instance, the success of social reforms must also establish a healthy relationship between the reform and the people. The deeper the process of socialization is, the greater will it confirm to the ideals of democratic governance.

Contemporary democratic theory highlights the deliberative character of democracy. Firstly, democratic legitimacy can be seen in terms of ability and opportunity to participate in effective deliberation on part of those subject to collective decisions. Deliberation now is understood to be the essence of democracy, much more than constitutional rights, electoral process, self government etc. Deliberation reflects upon preferences in a non-coercive fashion. Some view 'constitution making as a venue for democratic deliberation.'¹² The procedural versions of democracy focus

¹¹ *Ibid.*

¹² John Dryzek, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITIQUES, CONTESTATIONS* (Oxford University Press, New York, 2002).

on the 'formal properties of collective choice mechanisms, such as voting rule. There is a difference between 'democracy' and 'democratic participation'. Democracy involves popular control over political decisions and equality of rights in the exercise of such control. The extent of democracy depends upon the level of democratic participation. Elections are only the basic important tool of political participation. The central claim is that no voting system can ensure that democratic outcomes will not be irrational and arbitrary. Elections need not be thought to involve citizen choice about specific policies, but they do involve choice of specific political leaders. One feature of contemporary democratic theory is the deliberative character of democracy. The other versions include the rights oriented conception, judiciary oriented conception etc.'¹³

The 'existence of a social-democratic regime is said to be comprising of a widely-supported set of norms, procedural rules, and organizational arrangements that constrain a government (a) to remain subject to democratic control, and (b) actively to regulate market forces and otherwise intervene to enhance equity, social protection and social cohesion, in addition to productivity. The *rights* status is a significant parameter to ascertain the workings of a democracy. It becomes obligatory to address the practices of democracy, because inappropriate governance disturbs 'theory' as well as the expectations of the citizens. So does democratic theory provide space for ascertaining 'democratic harm'? There is a possibility that 'democratic harm' could still ensue despite democratic action in a given situation. For instance, if representative democracy reflects upon the needs of the people only after occurrence of violence and irreparable damage, harm must be reflected in the representative democracy. Also, harm may also be a result of 'reforms' that bring about no change in the social conditions of the people.

The more harms are introduced in the socio-political discourse, the perception of the state is under challenge and the more man is alienated from the structures of governance. To avoid such occurrence, there is a need to think deeper and travel beyond the vague conceptions of democracy. The constitutional conception of democracy requires that we respect

¹³ Richard Pildes, *Competitive, Deliberative, and Rights Oriented Democracy*, 1-2 <http://ssrn.com/abstract=559741> (Last visited 10.7.2009).

democratic conditions and democratic values. The value of democracy will be secure only if it upholds the supremacy of the people through its decisions.¹⁴ The ignorance of democratic values of institutional co-operation and communication is one way of crushing the supremacy of the people. Only a sound theory of democracy that looks into the various avenues that may result in harm is capable of developing a response wherein the 'practice of democracy' will be compatible with its responsibilities. In the absence of an identifiable theory of democratic harm, democratic complexities will always be all time high, and mechanisms to counter problems of poverty, economic anxiety or class division that will be perceived as a greater harm. The need to address democratic harm will expose us to a whole new reality about rights, their existence and sanctity in the eyes of the people and the society.

In its true perspective, the ideal definition of a 'right' must first and foremost satisfy the living consciousness of the people, only then can its fulfillment satisfy the living conditions of the people. A similar concern was addressed at the Copenhagen Declaration on Social Development (1995). The Declaration proposed a 'rights' strategy to development, which "assumes that human rights norms that require and support democracy would provide the basis of political and social stability, and that social and economic rights would eliminate the worst consequences of poverty."¹⁵ However, the very concept of 'rights' is the ideal form of building a constructive criticism of the mode of building a path to development. Eventually, the value of rights begins and ends with the satisfaction of

¹⁴ In the words of Fidel Castro, You who produce things, you who work, who sacrifice yourselves, who have been missing the pleasant things of life, you always were, are now, and will be tomorrow members of the majority of the people.... And yet, you did not run things...and others run things for you...They invented a very peculiar democracy for you who were the majority and yet were practically non-existent as a political element of our society...A real democracy is one in which you, peasant, get the land we have been recovering for you, after wrestling it from foreign hands. The speech was delivered on May Day, 1960. See Paul E. Sigmund, *THE IDEOLOGIES OF THE DEVELOPING NATIONS* (1964) 266 .

¹⁵ Yash Ghai, *Human Rights and Social Development: Towards Democratization and Social Justice* Available at [http://www.unrisd.org/unrisd/website/document.nsf/\(httpPapersForProgrammeArea\)/ECD0417EB1177C5280256B5E004BCAFA?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPapersForProgrammeArea)/ECD0417EB1177C5280256B5E004BCAFA?OpenDocument)

human needs, because- beyond their material wants, men need a belief in the meaningfulness of their lives, a faith in some higher cause to which they as individuals as well as the groups to which they belong can be devoted.¹⁶ The trends that furnish the ‘derivation of rights through philosophical arguments seem unlikely to capture the ways in which the non-ideal society develops and understands its commitments.’¹⁷ New debates over rights and governance are nothing but old debates about justice, in terms of protection and fulfillment for all within the society. The position of modern pluralistic societies requires political and civic virtue of its own kind.

IV. WHY DEMOCRACY NEEDS TO TALK

A deliberative democracy satisfies the requirements of rule of law and constitutionalism. The values of constitutionalism and rule of law are also “integral to the implementation of rights.”¹⁸ Constitutionalism expresses restrained power. The Constitution codifies the rules and standards applicable to democratic structures and “constitutionalism creates an orderly framework that allows people to make political decisions.”¹⁹ First, constitutionalism seeks to limit the kinds of laws that can be created by legislative majorities,

¹⁶ Gwendolen Carter and John H. Herz, *GOVERNMENT AND POLITICS IN THE TWENTIETH CENTURY* (1965) 176.

¹⁷ Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 *STANFORD LAW REVIEW* 209 (2008).

¹⁸ Randall Peerenboom, *Human Rights and the Rule of Law: What's the Relationship*, available at <http://ssrn.com/abstract=816024>

¹⁹ “Constitutionalism as a concept is somewhat nebulous and amorphous. All manner of definitions have been attached to it at one time or another throughout the history of western political theory. The modern interpretation has significantly deviated from earlier forms. It has been frequently noted that modern constitutionalism derives in substantial part-from the crucible of enlightenment rationalism. The same sort of rationalist presumptions which maintained that there is, and ought to be, a formal system based on logic and necessity which accounts for the ordering of the natural world. Throughout the sixteenth and seventeenth centuries, as proponents of rationalist political theory began to construct more formalized and routinized notions of state ordering, up into the nineteenth century... Fundamental liberal notions such as the bureaucratic administration of the State, the notion of divided and limited government, the need for market (now global market) capitalism, the recognition of individual political liberties; representative democracy, and the acceptance of rights regimes (especially certain property ownership regimes) have all become important constituent tenets of the modern constitutionalism.” See David ButleRitchie, *Critiquing Modern Constitutionalism*, 3:37 *APPALACHIAN LAW REVIEW* 39 (2004).

a limit that is usually institutionalized through the adoption of judicial review of legislation. Second, and as part of a general concern with constitutional stability and supremacy, constitutionalism also places limits on the faculty of citizens to alter the fundamental law; it mandates a constitution that can only be altered with difficulty, usually by legislative supermajorities.²⁰

The Constitution and the laws are designed to secure limitations on the exercise of governmental power and definiteness and certainty to the course of government action. The heart of the matter in a constitutional democracy is to check power, in whatever hands that power rests, and to limit the subjection of the constitutional imperatives to the interpretation of the state. Introducing democracy merely with the exercise of uncontrolled power will perhaps invoke a 'perception that the state's monopoly of lawful force makes it a power-source to be feared, a perception that incumbent state officials are exposed to a constant temptation to direct their special powers toward establishing and maintaining their own dominance over the country, a perception that subjecting persons and firms at large rights and obligations in their dealings with others can seriously burden both the efficiency of their operations and the liberties of individuals.'²¹ A satisfactorily submitted democracy will always leave room for criticism and opposition, which alone will make it different from totalitarian regimes. The pursuit of totalitarian techniques of violence employed in a democratic set up is highly unconstitutional and against the very values of law and society.

Democracy is not exhausted in legislatures and daily governance, but that it extends to deliberating and deciding on the very content of the Constitution... It brings out two dimensions: democracy at the level of daily governance, and democracy at the level of fundamental laws.²² Constitutional experts point that one significant change with time has been that democracy has evolved from being "vote-centric to "talk-centric." it is increasingly accepted that vote-centric democracy cannot fulfill norms of democratic legitimacy."²³ John Dryzek refers to it as deliberative turn

²⁰ Joel Colon-Rios, *The End of Constitutionalism- Democracy Debate*, 4 <http://ssrn.com/abstract=1330636> (2009).

²¹ Frank Michelman, *Whither the Constitution*, 21 *CARDOZO LAW REVIEW* 1077 (2000).

²² *Supra* n. 20.

²³ Will Kymlicka, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* (2002) 290.

in democratic theory. A more deliberative democracy would bring greater benefits for the society at large as well as the groups within. The credit for expecting such results lies in the dynamism of constitutionalism. “Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance.”²⁴

Deliberative democracy satisfies the following essentials²⁵:

- Reason Giving Requirement: It affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another. In a democracy, leaders should therefore give reasons for their decisions, and respond to the reasons that citizens give in return. Deliberative democracy also makes room for many other forms of decision-making (including bargaining among groups, and secret operations ordered by executives), as long as the use of these forms themselves is justified at some point in a deliberative process. Its first and most important characteristic, then, is its *reason-giving* requirement.
- Mutual Respect: The moral basis for this reason-giving process satisfies that persons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society, directly or through their representatives. In deliberative democracy an important way these agents take part is by presenting and responding to reasons, or by demanding that their representatives do so, with the aim of justifying the laws under which they must live together. The reasons are meant both to produce a justifiable decision and to express the value of mutual respect. It is not enough that citizens assert their power through interest-group bargaining, or by voting in elections.²⁶

²⁴ Prabhakar Singh, *Constitutionalism in International Law during the Times of Globalization: A Sociological Appraisal*, INDIAN YEARBOOK OF INTERNATIONAL LAW AND POLICY 237 (2009).

²⁵ Amy Gutmann, Dennis Thompson, *WHY DELIBERATIVE DEMOCRACY* (2004) 3.

²⁶ *Id.* at 4.

There has always been an attempt at this exercise and “appropriate theories were (have) developed to explain and justify the legal system, suggesting that the law itself had purposes, because the formation of society had purposes, and that the law had inherent limits- formal limits (the consent of the people through their representatives) and substantive limits (fundamental rights)... Constitutionalism accompanied and made possible an idea of public realm, that is to say, a part of the social process in which legal powers are to be exercised only in the public interest.”²⁷ Deliberation provides color to the process of constitutionalism. It established a healthy relation between the law and the society.

A Constitution can be a true embodiment of supremacy if it defines power, responsibility and privileges. Constitutionalism emerges as the central defining power because of the limitations it imposes on democratic choice, and holds peoples and institutions to their commitments. Constitutional legality or constitutionalism thus performs four critical functions. Firstly, ‘it provides a framework of powers and limitations for the exercise of legislative competence. Secondly, legality ordains the protection of liberties of citizens always threatened by the dominating power of the few. Thirdly, constitutions provide for orderly changes in political structure through the politics of accountability, and fourthly, constitutions provide frameworks for state and non-state pursuit for economic activity and developments.’²⁸ In other words, the three essentials of modern constitutionalism are: “limiting the powers of government, adherence to the rule of law, and protection of fundamental rights. Thus, the rule of law must figure in constitutional democracy as an indispensable ingredient of constitutionalism.”²⁹

²⁷ Phillip Allot, *The Concept of International Law*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 35 (1999).

²⁸ Upendra Baxi, *The Recovery of Fire: Nehru and Legitimation of Power in India*, January 13 ECONOMIC AND POLITICAL WEEKLY 108 (1990).

²⁹ Michel Rosenfeld, *The Rule of Law, and the Legitimacy of Constitutional Democracy*, available at http://papers.ssrn.com/paper.taf?abstract_id=262350 (Last visited 17.7.2010).

³⁰ Neera Chandokhe, *The Taming of Civil Society*, Available at http://www.lse.ac.uk/Depts/global/EventsPDFs/GCSWorkshop_Annenberg/Chandhoke.pdf

V. CONCLUSION

Over the years man has come to accept the necessity of law for establishing a workable socio-political system. The law is valued and treated worthy of respect because of its commitment to certain ends or objectives. For that reason democracy has always exerted an overwhelming influence on our individual and collective lives.³⁰ The value of democracy excites the imagination and inspires the hopes of all peoples of the globe. For that very reason emphasis of politics in human affairs tends to exaggerate the role of the government and politics in improving the lives of the people. It is natural that theorists, judges and politicians consider politics the most important single element in human relations, and political or judicial remedies the most important answer to human troubles. However, "human nature and human problems are more intricate than politics, and "politics is only one approach- and not always the most penetrating one- among many others".³¹ The identification of political dissatisfaction as a resultant only of the elected government does not solve the problem. The exhibition of ethical uncertainty to address the real problems towards political change can hinder the scope of any reconciliation or democratic dialogue. The true vision of reality should always look beyond the state, which has continued to disguise itself as the will of the people. The popular notions that come upon to symbolize the state as the 'will of the people' are possibly only distortions to reality. The identifiable signs of immaturity in the State decisions must not be ignored. "A greater proportion of policy development appears to be a direct ad hoc response to whoever happens, for the time being, to have the dominant influence, which is often highly contextual."³²

The advancement in politicization obliges one to reconsider, and so to reinterpret the very foundations of law and society as they had previously been calculated, or delimited. There is not only the need to identify the new emerging dimensions of democratic behavior, but question or ascertain their viability as sound practices of democratic governance. It is important to "seek out and identify structures of authority, hierarchy, and domination in every aspect of life, and to challenge them; unless a

³¹ Ebenstein, *TODAY'S ISMS: COMMUNISM, FASCISM, CAPITALISM, SOCIALISM* (1970) 24.

³² Colleen Dyble, *TAMING LEVIATHAN: WAGING THE WAR OF IDEAS AROUND THE WORLD* (2008) 161.

justification for them can be given, they are illegitimate, and should be dismantled, to increase the scope of human freedom.³³

A few of the issues that have been discussed above are summed up as follows:

- A 'right' purely projected within the domain of the judiciary is primarily opposed to the idea of deliberative democracy. The first problem is that by imposing on the government as to the nature and character of basic rights, the courts discourage the elected representatives from debating upon the nature itself. "The elusive state of perfection in which human rights are fully respected and realized tells us, among other things, that both human rights and democracy are works in progress. They are projects that are essentially infinite, open ended and highly experimental in nature."³⁴ The principle of proportionality has become a central structural feature of adjudication. The principle of proportionality seems to require decision-makers to engage in complex policy arguments, assessing contested empirical questions and making controversial judgments about trade-offs in order to determine how an issue should be decided in a concrete context.³⁵
- The international order is also significantly affecting the functioning of democracy. Looking at the impact of the international order, critics go on to expose the highly vulnerable character of democracy at a given point in time. The popular trends of neo-liberalism and globalization are a few dimensions that have affected the decision making process world over. The society is constantly alienated from the decision making process occurring under this phenomenon.
- The realm of theory also adds another feature to modern democracy—the role of civil society. A democratic set-up is also judged on how it can equip its citizens to question, react and play an active

³³ Noam Chomsky, *Anarchism, Marxism and Hope for the Future* (1995). Available at <http://flag.blackened.net/revolt/rbr/noamrbr2.html> (Last visited 3.3.09).

³⁴ Makau Wa Mutua, *The Ideology of Human Rights*, 36:589, VIRGINIA JOURNAL OF INTERNATIONAL LAW 593 (1996).

³⁵ Mattias Kumm, *Democracy is not enough: Rights, Proportionality and the point of Judicial Review*, 2 <http://ssrn.com/abstract=1356793> (2009).

role in the satisfaction of wants. At the end of the day, a formal institutional framework may exist, “but there is no magic power in it...It is at once the weakness and strength of democracy, its danger and its glory, that the fate of its members lies largely in their own hands. It is the spirit of the people even with the increasing influence of the State that must be express and vibrant. It is “within the boundaries of formal democracy the civil society mobilises for the strengthening, the expansion, and the effective implementation of policies, that we can expect a transition from political to social democracy. But civil society interventions have their own limits, and it significantly depends upon the political process, its inherent dynamics, and its capacity to correct imbalances and institutional erosions, its basic thrust towards empowering people, even those found in underprivileged and oppressed social terrains.”³⁶ The democratic set-up is highly valued in terms of how it creates a healthy working platform for the civil society to grow and function.

The continuous advancement in terms of democratic practice, institutional responsibility etc makes it all the more important for theorists or political scientists to renew or reconsider democracy as merely a procedural asset. The point of emphasis is subjective, fragile and relative concept of democracy. A ‘formal democracy’ as discussed is not necessarily a ‘functional democracy’. The bright line between the two concepts is the very subject matter of contemporary theory, which is inclusive of the issue of rights, governance, deliberation, state coercion, international norms etc, and also the reason why democracy must be seen in terms of substance and not mere process.

³⁶ Rajni Kothari, *RETHINKING DEMOCRACY* (2005) 14.