

RIGHT TO VOTE AS A FUNDAMENTAL RIGHT: 'MISTAKING THE WOODS FOR TREES'

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I. Introduction

This comment considers the decision of the Supreme Court in *People's Union for Civil Liberties (P.U.C.L.) v. Union of India*¹ under two broad aspects: firstly, whether the right to vote is a fundamental right guaranteed under Part III of the Constitution of India according to the past decisions of the court, and secondly, whether as a consequence of the above, citizens have a right to a negative vote.

A wholesale admission of the importance of the right to vote has been substituted instead by electoral laws, which by no means provide the same constitutional protection as a 'right.' The Court while examining this issue has tended to look at the second question as a species of the first. However, it need not necessarily be the case. The right to negative voting is a right, which may be extended to citizens irrespective of whether right to vote is considered a fundamental right. This will require either the passing of such a law by Parliament, or a statutory directive by the Election Commission (regulatory electoral body), under the powers conferred upon it.

This note will establish why the appreciation of the law by the court in this case is near to an erroneous understanding. The Court wrongly gleaned from previous cases in its unresolved observation: that the right to vote was a fundamental right after the trilogy of election cases.² It is this reasoning which needs to be straightened out by a larger Bench, to which it has been correctly referred. This case note will distinguish the legal position of the right to vote in India from it being an absolute right under the American Constitution. Likewise in the Indian context, it is time a larger bench of the

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1. (2009) 3 S.C.C. 200.

2. Although it does not hold this emphatically, it is generally inferable from the reading in paragraph 41. For the trilogy of cases—See, *Union of India v. Association for Democratic Reforms*, (2002) 5 S.C.C. 294; *People's Union for Civil Liberties v. Union of India*, (2003) 4 S.C.C. 399, (Hereafter "P.U.C.L. 2003"); *Kuldip Nayar v. Union of India*, (2006) 7 S.C.C. 1.

Supreme Court enlarges the scope of the right to vote and recognizes it as a fundamental right and a part of the basic civil and political rights in a democracy. This note endorses the correct intent of the Court in this case; although it finds that on substance, this requires sounder judicial re-application to establish what is correctly intended by it in spirit.

The Indian Constitution contains in Part XV the creation of the Election Commission and the general powers of the Commission regarding 'superintendence, direction, and control' of a citizen's franchise and conduct of elections in India.³ Electoral laws are covered under a special enactment.⁴ The interpretation of the exclusivity of this law has been held as special law; anything pertaining to the exercise of franchise has been viewed as a statutory right.⁵

The right to vote, sacrosanct as it is in a representative democracy, is similar to life and liberty in 'securing natural rights'.⁶ The right to vote—not specifically included as a constitutional right in the Indian context—makes for a contested proposition. This can be gathered from a plain reading of Articles 324 and 326,⁷ which articulate, in contrast to the early Supreme Court decisions on this point,⁸ that it is a mere statutory right. Venkatarama Reddi, J. correctly counter-argues this in a later case.⁹ However, this note

3. Article 324 vests in the Election Commission power of superintendence, direction, and control of preparation of electoral rolls and conduct of all elections to Parliament, and to the Legislature of States. Article 325 provides that there shall be one electoral roll for every territorial constituency and that no person shall be ineligible for inclusion in such rolls on grounds only of religion, race, caste, sex, or any of them. Article 326 provides that elections to the House of People and to the Legislative Assemblies of States shall be on the basis of adult franchise. Article 327 enables Parliament to make laws in respect of all matters relating to the elections to either House of Parliament or to the Houses of State Legislatures.

4. *The Representation of Peoples Act, 1952*. This provides for the delimitations of the constituencies for the purpose of elections to the House of People and the Legislature of States; qualifications of voters at such elections; preparation of electoral rolls; and other matters connected.

5. See *infra* notes 21, 25, 27.

Under The Representation of Peoples Act, 1952, the right to vote is articulated as follows:
"Sec. 62. Right to vote.

(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency. (2) No person shall vote at an election in any constituency if [s]he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950.... (5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police."

6. See *Corfield v. Coryell*, (1823) 4 Wash C.C.R. 371 in *Columbia Law Review Association Inc, Regulation and Limitation of the Right to Vote*, 3 COLUM. L.R. 278 n.2 278-279 (Mar 1911).

7. The Constitution of India, 1950.

8. See *infra* notes 21, 25, 27.

9. *P.U.C.L. 2003* case at 460-461. See also, *infra* Part 3 of this note for a complete discussion on this point.

will discuss that his conclusion cannot be read as the ratio, which in any manner overruled previous cases stating the contrary. But the critical issue is that voting, being more than a mere statutory right, requires overall constitutional protection as a sacred and inviolable human right. The reason for its non-recognition by the Parliament, and early Supreme Court decisions, are logically fallacious. The argument advanced has been that voting or being elected, both are governed and restricted by the specific laws made, and this is why it should be conferred by a statutory right and not an independent enforceable civil right. This reasoning is misleading, because even if it is recognized as a fundamental right, reasonable limitations can be imposed by a validly enacted law, which constitutes acceptable restrictions in its enjoyment as a fundamental right.

The Supreme Court in many of its important decisions has held that democracy is a part of the basic structure of the Indian Constitution,¹⁰ and free and fair elections are integral to the basic features of a democracy. This has been the holding position on the broader judicial protection of democracy and elections, which form an integral part of India's constitutional status as a democratic republic. From this, rights of free and fair elections and universal adult suffrage are necessarily part and parcel for the realization of the larger ideals of democracy.

The present case raises questions which have been left vague and open by the previous decisions of the Supreme Court in this area. These arose in the context of negative voting, which grants citizens the power to reject all candidates appearing on the ballot machine/paper. The need for its introduction has been supported by the Election Commission of India and has met with opposition from the Executive and Legislature. It was urged that such an option would be a signal of the true manifestation of choice of voters in an election on the relative strength of the candidates. It was also felt by Citizens' Groups that this would be a reflection of the general

10. *Kesavananda Bharti v. State of Kerala*, (1973) 4 S.C.C. 225.

"This Court in the case of *Kesavananda Bharti* held by majority that the power of amendment of the Constitution contained in Article 368 does not permit altering the basic structure of the Constitution. All the seven judges who constituted the majority agreed that democratic set-up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect old representatives or, if they so choose, to change representatives and elect in their place other representatives. Democracy further entails that the elections should be free and fair, so that voters may be in a position to vote for candidates of their choice". See *Indira Nehru Gandhi v. Raj Narain*, (1975) Supp S.C.C. 1, Para 198, 87. For a further discussion, see also *Mohinder Singh Gill v. Chief Election Commissioner*, (1978) 1 S.C.C. 405, and *Kihoto Hollohan v. Zachillhu*, (1992) Supp (2) S.C.C. 651.

decline in political standards and values among people in public life contesting elections.

This piece will strike two main arguments in light of the discussions regarding the right to vote: 1) How far have the judgments of the Supreme Court have been consistent on right to vote as a fundamental right; 2) How can these various judgments be reconciled to arrive at a sound legal solution protecting a basic civil and political right in a representative democracy.

II. Background

The Petitioners approached the Supreme Court invoking its jurisdiction under Article 32, seeking enlargement of choice for citizens exercising their sovereignty to include the right to cast a “negative” vote against any of the candidates appearing for election. They sought to make this choice available for citizens at the time of voting. The ground of their challenge rested against the provisions in the Conduct of Elections Rules, 1961, which provided for rules applicable to elections. They challenged Rule 41(2) and 49-O as violative of the secrecy of ballot, which was guaranteed under the main Act.¹¹ Section 128 of the Act provides for maintenance of secrecy of voting, and it was argued that the Rules requiring disclosure of the voter, who decides not to vote, upon entering the election office to cast her/his vote, are violative of secrecy of ballot. The questions framed by the Court were as follows:

- i) Whether Rules 41(2) and 49-O are violative of Articles 19(1)(a) and 21 of the Constitution and Section 128 of the Act, as the impugned rules violate the secrecy of the vote and the voter.

11. Rule 41(2) states:

“If an elector after obtaining a ballot paper decides not to use it, [s]he shall return it to the presiding officer, and [the ballot paper so returned and the counterfoil of such ballot paper] shall be marked as ‘Returned: cancelled’ by the presiding officer.”

Rule 49-O states:

“Elector deciding not to vote. - If an elector, after [her] his electoral roll number has been duly entered in the register of voters in Form-17A and has put [her]his signature or thumb impression thereon as required under sub-rule (1) of rule 49L, decided not to record [her]his vote, a remark to this effect shall be made against the said entry in Form 17A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark.

Section 128. Maintenance of secrecy of voting.-

(1) Every officer, clerk, agent or other person who performs any duty in connection with the recording of counting of votes at an election shall maintain and aid in maintaining the secrecy of the voting and shall not (except for some purpose authorised by or under any law) communicate to any person any information calculated to violate such secrecy. (2) Any person who contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term, which may extend to three months or with fine or with both.”

- ii) Whether The Election Commission can exercise its power under Article 324 of the Constitution¹² to issue a direction for the modification of existing voting machines to enable voters to exercise their right of a negative vote.

The Election Commission filed an affidavit supporting the Petitioners. They recognized that a voter can express her/his displeasure either by staying away from voting all together or informing the polling officer of her/his desire not to vote.¹³ To provide a secure solution to this—preserving their secrecy, they proposed an option that the elector can reject all candidates without disclosure of her/his identity.¹⁴

The Respondent in reply contended that the right of an elector to vote was a statutory right and not a fundamental right, and contended that the petition filed under Article 32 was not maintainable for challenges to statutory rights. In addition, it was contended that the statute provided for right to vote, and right to vote does not include right to negative voting, and in light of this the Rules challenged cannot be questioned as unconstitutional and violative of Section 128 of the Act.

The Petitioners based their arguments on the *Association for Democratic Reforms* case¹⁵ and the *P.U.C.L. 2003* case,¹⁶ stating that the right of the voters to know the antecedents of the candidates was recognized as a fundamental right under Article 19(1)(a). They urged the Court to direct the Commission to take effective measures to provide electors a choice to exercise a negative vote in “favour” of the candidates contesting elections. This was in accordance with the decisions of the Supreme Court in the above cases upholding the right to know, which implied that decision making of the electors was a fundamental right under Article 19(1)(a) which included, in its purview, even negative voting.

The Respondent relied on the *Ponnuswami Case*¹⁷ and *Kuldip Nayar Case*¹⁸ to contend that the present petition was not maintainable. In both the aforementioned cases, the right to vote was held not to be a fundamental

12. The Constitution of India, 1950, *supra* note 3.

13. *P.U.C.L. 2009* at para 20, 210 per Singhvi, J.

14. *Id.* Election Commission sent letters [dated 10-12.2001, 5-7-2004] to Government of India and Ministry of Law, requesting for necessary amendments in the Act and Rules to carry this into effect.

15. *Union of India v. Association for Democratic Reforms*, (2002) 5 S.C.C. 294.

16. *People's Union for Civil Liberties v. Union of India* (2003) 4 S.C.C. 399.

17. *N.P. Ponnuswami v. Returning Officer*, A.I.R. 1952 S.C. 64.

18. *Kuldip Nayar v. Union of India*, (2006) 7 S.C.C. 1.

right under Part III. It was contended that the right to vote was merely a statutory right and did not enjoy the status of a constitutional right, leave alone a fundamental right. This being the position, Article 19(1)(a) could not be enlarged in the present situation. They submitted that the secrecy of ballot was being given a new dimension in the argument of the Petitioners by according the status of a right to something as negative voting.

The Court deliberated on the preliminary objection of the Respondent regarding maintainability of the petition. It discussed early precedents on the point of the right to vote as a fundamental right capable of being read under Article 19(1)(a). It extensively discussed the trilogy of cases mentioned before. In its discussion, it found that the *Association for Democratic Reforms* case and the *P.U.C.L. 2003* case both held that the right of a voter to make her/his choice was a fundamental right and capable thus of being read under the voters' freedom of expression under Article 19(1)(a). However, it read the ratio of the *Kuldip Nayar* case as causing some amount of confusion, which now required a fuller explication by a larger Bench of the Court. So, it declined to pass any decision and referred the preliminary objection to a larger Bench. In doing so, it held that the Constitutional Bench did not overturn the ratio of the *Association for Democratic Reforms* case, and the *P.U.C.L. 2003* case.¹⁹

It is submitted that reference by the Supreme Court to a larger Bench is correct owing to a submerged clarity on the legal position of voting as a fundamental right of expression from the previous decisions of the Court. However, there is an incorrect understanding in expounding the later precedents on this point, which will need scrutiny by the larger Bench.²⁰

III. Judicial Decisions on the Nature of the Right - Electoral Franchise

This section will examine the decisions of the Supreme Court on the aspect of classifying the nature of the right of electoral franchise. The early decisions of the Court clearly hold that the right to elect or the right to contest as a candidate in an election is a creation of statute or special law and is subject to the limitations imposed by this special law. It reasoned that Representation of the People Act, 1951 (RPA) was a complete code in itself dealing with challenges to election and constituted a special tribunal for this purpose. This was the rationale taken by the Court to restrict the scope of this right as one originating from statute.

19. *P.U.C.L. 2009* case at para 41, 216-217.

20. *Infra* Part 4. of this note.

In *N.P. Ponnuswami v. Returning Officer*,²¹ a six-judge Bench of the Supreme Court was confronted by the action of a returning officer rejecting the Appellant's nomination. The Court held that the scope and meaning of the power to conduct an 'election,' in the hands of the Election Commission was wide and connoted the entire process of election. As a consequence, the Court declined to interfere with the decision of the returning officer and dismissed the Appeal. It held that the RPA was a self-contained enactment so far as elections were concerned and election related issues needed to be ascertained according to it.²² The Court observed that when a right or liability was created by a statute, which gave special remedy for enforcing it, the remedy provided by that statute must be availed.²³ The Court went on to hold, that the right to vote was not a civil right, but a creature of statute subject to the limitations imposed on it in the RPA.²⁴

*Jagan Nath v. Jaswant Singh*²⁵ dealt with the presentation of an election petition and the non-joinder of a necessary party. The challenge in this case was made against the Order passed by the Election Tribunal rectifying the defect in the petition of the Respondent. The Appellant approached the Supreme Court contending that the Order of the Tribunal and the decision of the High Court to not entertain the Petition were contrary to law. It was contended that the Tribunal was not a court of general jurisdiction and its jurisdiction was derived from a special statute, and it could not exercise general and inherent powers. The Court dismissed the appeal on grounds that the defect in the petition was not a fatal one. It held that the nature of election laws was not an action at law or equity but a statutory one, and that the court possessed no common law power.²⁶

In *Jyoti Basu v. Debi Ghosal*,²⁷ an appeal questioning the election of the 2nd Respondent was made by the 1st Respondent. The appellants were aggrieved at being impleaded by the 1st Respondent, in the original election petition. The appellants claimed that they were not candidates in the election and could not be made a party. The Court discussed the scheme of the RPA in relation to the power conferred on the Election Commission with the conduct of elections, and the bar on interference of courts in electoral matters.

21. A.I.R. 1952 S.C. 64.

22. *Id.* at para 11.

23. *Id.* at para 12.

24. *Id.* at para 18.

25. A.I.R. 1954 S.C. 210.

26. *Id.* at p. 212.

27. A.I.R. 1982 S.C. 983.

It discussed the nature of the right to elect and ultimately reaffirmed the decision of the Court in *N.P Ponnuswami* case and the *Jagan Nath* case,²⁸ by holding that the right to elect was neither a fundamental right nor a common law right but only a statutory right. It held that outside of the RPA, there was no right to elect, be elected, or to dispute an election. Since it was a statutory creation it was subject to statutory limitations.

The factual situations of the above cases, while not concerned directly with the right to cast one's vote, have nonetheless been unambiguously and positively affirmed by the court while characterising the right to vote as being merely statutory.²⁹ The regulation of the entire process of election, from electing to resolution of disputes, has been straitlaced as purely statutory, being governed by a special law. This has resulted in the disenfranchisement of the citizen's right to cast her/his vote as a fundamental right.

The straitlaced approach of the Court is questionable on grounds of a principled decision. The ratio of the Court exceeds the ambit of its adjudication in each of the above cases. The flaw seems to be in the Court clubbing the right to be elected and electors' right to vote as accompanying one another. This line of approach seems to have landed the Court in enormous difficulty.

The right of an elector to vote is a natural right, as against the right of a citizen to contest in an election. Although, the RPA grants the right expressly, this right needs to be re-evaluated as basic and inalienable. The latter is a restrictive practice by operation of law. There are numerous restrictions on candidates contesting election, from age, to disclosures of finances, legal status, and manner of resolving disputes in election process, and so on. All this makes one's candidacy in an election a complex legal hurdle. On the other hand, the right of an elector to vote is subject to bare minimal restrictions of residence and age. Moreover, adult franchise is constitutionally protected - not the right to contest election. A citizen has the right to vote by virtue of being a legal resident in a particular constituency, but a person does not have the right to stand for election unless her/his nomination as a candidate is approved by the Election Commission. As an alternative, the two rights could be separated: one involving choice and expression, and the other, legal capacity regulated by law. The law recognizes

28. *See Id.* at para 7 & 8.

29. *See also* the following cases affirming the above in similar electoral disputes, *Samant Balakrishna v. George Fernandez*, A.I.R. 1969 S.C. 1021; *Arun Kumar Bose v. Mohd. Furkan Ansari*, A.I.R. 1983 S.C. 1311; *Upadhyaya Hargovind Devshanker v. Dhirendrasinh Virbhadrasingh Solanki*, A.I.R. 1988 S.C. 915.

the right to vote as an essential prerequisite of citizenship and the special nature of the relationship between a citizen and the state is established by the protected enjoyment of the right to vote as a fundamental right. By contrast, the role of the individual to stand in an election, although important, is subject to many legal restrictions imposed by law. The bulwark of a democracy is the right to vote, and it is the interpretation that advances this right, which must be accepted by the Court.

The trilogy of cases presents a fresh dimension to the issues in the *P.U.C.L. 2009* case. The first case, *Union of India v. Association for Democratic Reforms*,³⁰ concerned the petitioners seeking directions from the Election Commission to make available information to the voters of the relevant particulars of the candidates contesting an election. The Court considered whether the voter had a fundamental right to avail such information under Article 19(1)(a). The Court held that criminal convictions, financial details, education were important indicators and a voter had a right to know these particulars. The Court opined that the voter's right to freedom of expression included the right to receive information. The Court in one of its conclusions summed up the extension of right to know as a fundamental right:

“[U]nder the Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, *voter speaks out or expresses by casting vote*. For this purpose, information about the candidate to be selected is a must.”

The ratio of the aforementioned case cannot be said to hold that the right to vote or expressing a vote falls under Article 19(1)(a). This was not a question for determination before the court in this case. The limited question was regarding the right to know under Article 19(1)(a) to voters, not the right to vote by itself. In *arguendo* it can be stated that the two rights are not separable. However, for this, the Court would have had to expressly overrule the previous decisions running contrary to this proposition.

Subsequently, an amending law was passed by the Parliament in compliance with the above decision. This amendment was challenged in the case of *People's Union for Civil Liberties v. Union of India*.³¹ The Petitioners contended that the impugned amendment was not in conformity with the decision of the Court in the *Association of Democratic Reforms* case. The

30. (2002) 5 S.C.C. 294.

31. (2003) 4 S.C.C. 399.

impugned amendment did not provide for proper disclosure of financial assets by the candidates contesting elections, the disclosure of acquittals/ discharges from cases; educational qualification of the candidates; and liabilities to government and public financial institutions. The Petitioners argued that the amendment did not fully capture the essence of the decision of the court with respect to the disclosure of the antecedents of all candidates contesting election. The amendment was challenged as violative of Article 19(1)(a), violating the voters' right to know. The three-judge Bench discussed the issue of the validity of the Amendment, and whether right to vote was a statutory right. The Court upheld the challenge of the Petitioners and struck down the amendment³² The Judges unanimously agreed on the larger issue of extending the right to know to voters under Article 19(1)(a). However, on the point of right to vote, the majority was of the view that right to vote was a statutory right. Justice Shah held in accordance with the precedents on this point that right to vote was not a civil right but a creation of statute.³³ This view of Justice Shah was later relied on in the *Kuldip Nayar* case.

Justice Reddi expressed the minority view on the nature of the right to vote in the *P.U.C.L. 2003* case. Such a view is an optimistic step, and the larger Bench of the court looking into the *P.U.C.L. 2009* case, will need to closely deliberate on his unique view. He held that the right to vote is a constitutional right, and the expression of choice by an elector a fundamental right. He made a fine distinction between the two, i.e., right to vote and the actual choice of ballot; the choice making of the voter being a fundamental right. In his view, freedom of voting falls under freedom of expression. He distinguished the early precedents of this court, by holding that they fall broadly "within the realm of procedural or remedial aspects of challenging the election or nomination of a candidate."³⁴ He held that the factual and legal issues in the early cases were different and did not directly invoke similar question for determination.

The last in the trilogy of cases, *Kuldip Nayar v. Union of India*,³⁵ concerned the challenge to amendments made to the RPA, which introduced changes to the procedure for getting elected to the Council of States by deletion of the requirement of 'domicile' and introduction of the 'Open Ballot System'. The Court after a lengthy consideration dismissed the

32. Justices Shah and Venkatarama Reddi wrote separate judgments. Justice Dharmadhikari concurred with all conclusions of Justice Shah. Justice Reddi partly concurred with the majority findings.

33. *Id.* at para 57, 445 & para 62, 447.

34. *Id.* at para 97, 461.

35. (2006) 7 S.C.C. 1.

challenge. Another question raised pertained to the nature of the right to vote - was it a constitutional or a fundamental right? The Court answered this by assessing all the precedents on this issue. While it drew a fine distinction between right to vote and freedom of voting, *as species of freedom of expression*; it reiterated the view in *Jyoti Basu* case that right to vote was neither a fundamental right nor a common law right, but simply a statutory right.³⁶ The understanding of the ratio on this point is a consistent legal exposition: the majority opinion in *Association for Democratic Reforms* case reiterates the statutory character of the right. Nevertheless, it must be pointed out that this case involved the right to elect representative of the Upper House by members of the Legislative Assembly which is not the same as right of a citizen to vote, so this leaves the question about the correctness of the finding of the court on this point debatable.

IV. Analysis of the *P.U.C.L. 2009* Case

The criticism of the conclusion of the Court covered in this section is twofold: firstly, incorrect understanding of the ratio from the trilogy of cases; and secondly, a failure to uphold right to negative vote as part of Article 19(1)(a) which is an unreasonable limitation on freedom of expression.

The judgment of the Court misreads the ratio of the *Association for Democratic Reforms* case, and *P.U.C.L. 2003* case. The judgment in the *Kuldip Nayar* case clearly corrected any possible notions of a wrong understanding arising from the *P.U.C.L. 2003* case. The opinion of Justice Venkatarama Reddi in the *P.U.C.L. 2003* case on the position of right to vote as a fundamental right was an opinion which was specifically rejected by the majority in *Kuldip Nayar*. However, the Court in *P.U.C.L. 2009* held that *Kuldip Nayar's* correction did not amount to an overrule, and held as follows:

“[W]e have carefully read paras 349 to 364 of the aforesaid judgment [*Kuldip Nayar case*],...[t]he Constitution Bench did not *overrule or discard* [emphasis supplied] the ratio of the two three judge-Bench judgments in *Union of India v Assn. for Democratic Reforms* and *People's Union of Civil Liberties v. Union of India*. The opening line of para 363 tends to create a doubt whether the right of voter to exercise ...”

The assessment of the Court in this concluding paragraph is not an accurate reflection of the ratio of the trilogy of cases. As discussed, the right to vote was not granted the status of a fundamental right in any of those

36. *Id.* at para 362, 121.

three cases. The *Association for Democratic Reforms* case, and *P.U.C.L. 2003* case extended right to know of a voter under Article 19(1)(a). They did not extend right to vote as a fundamental right and clearly held it as being only a statutory right. The Court in this case misread Justice Reddi's opinion as constituting a rewriting of the law on this point by ignoring the larger majority opinion. The case of *Kuldip Nayar* merely reaffirms this position. So the view of the Court that it did not 'overrule or discard' the ratio of the early cases needs correction. The *Kuldip Nayar* case did not overrule or discard the previous ratio. It upheld the decisions of the previous cases, holding that the right to vote was a statutory right. The larger Bench looking into this case will have to avoid the same misinterpretation and move ahead to convincingly overturn the previous cases on this point.

The Court could have been more ingenious in deciding this case by separating right to vote from negative voting. The latter need not be read as derivative of the former. The Court should have looked at the *Association of Democratic Reforms* case and *P.U.C.L. 2003* case where it applied Article 19(1)(a) to protect the interest of the voters to know the antecedents of the candidates and admitted the challenge of the writ petition under Article 32. Negative voting is part of the choice of a voter to reject candidates and this choice is a part of the freedom of expression necessary for a voter. Even if voting is not presently a constitutionally guaranteed fundamental right, the right to negative voting can be inferred as a separate right falling under free speech. Article 19(1)(a) is the foundation of a democracy; it protects the right to have opinions. Negative voting is an offshoot of this right. To read negative voting as derivative of the right to vote is curtailing its vital importance.³⁷

The majority decisions in the trilogy of cases hold that act of "voter speaking out or expressing by casting vote" falls under free speech. This demonstrates that the actual act of voting falls under protection of free speech. There is also a distinction between the right to vote and the expression of a vote from this reasoning. Negative voting is integral to expression of a vote. It is obvious that negative vote will be available to those who by law are recognized as voters. So it was within the power and jurisdiction of the Court to direct the Election Commission to take necessary steps to introduce negative voting.³⁸

37. *But See* Morris Fiorina and Kenneth Shepsle, *Is Negative Voting an Artifact?*, 33 A.J.P.S.C. 423, No. 2 (1989), details an argument and verifies it empirically, whether negative voting has an internal voter psychological explanation. Authors argue probabilistically that negative voting is only artifactual. However, this note does not dwell on the normative justifications of negative voting.

38. There are a series of cases where the judiciary has created law in a field where none exists. *See* for e.g., *Vineet Narain v. Union of India*, (1998) 1 S.C.C. 226, para 49 and 52, where it held that exercising its powers under Articles 32 and 142, the Judiciary can make orders which have the

This step will bring the needed accountability in a parliamentary democracy where the legislature is the link between the voters and the executive.

The implications of the *P.U.C.L. 2009* case warrant special attention to the classification of this right. The inconsistent and feeble ratios on the status of the right to vote as a statutory right require proper judicial reconsideration from the unclear legal position on the issue so far. This case is an occasion for the larger Bench to set right the indistinct legal position.

V. Right to Vote - Comparative Approach under American Constitution

This section will examine in brief the right to vote in the American jurisdiction. The right to vote is absolute and can be reasonably regulated.³⁹ The American Constitution prescribes restrictions on the ability of the states to impose limits on franchise.⁴⁰ The *White Primary*⁴¹ cases uphold the right to vote and the unconstitutionality of restrictions based on race. This right has been read into the umbrella of equal protection. In *Harper v. Virginia Board*⁴² the State of Virginia imposed a polling tax as a precondition for voting; this tax was challenged as unconstitutional. The right to vote in federal elections being guaranteed by the Constitution, the right to vote in state elections was not expressly protected. The majority decision, rendered by Justice Douglas struck down the legislation as violating the equal protection, “[w]ealth, like race, creed or colo[u]r, is not germane to one’s ability to participate intelligently

effect of law by virtue of Article 141 and this has the effect of a mandate to all authorities to act in aid of the orders of the Supreme Court as provided under Article 144 of the Constitution to provide a solution till legislature performs its role.

39. Andrew N. DeLaney, *Appearance Matters: Why the State has an Interest in Preventing the Appearance of Voting Fraud*, 83 N.Y.U.L. Rev. 847 (2008).

40. U.S. CONST Articles 1 & 2 grant power to the states to introduce voter qualifications. See U.S. CONST amend. XV: ‘The Right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colo[u]r, or previous condition of servitude.’ The amend. XIX forbids discrimination based on sex. The amend. XXIV prevents the states from imposing ‘any poll tax or other tax on a voter.’ The amend. XXVI grants right to vote for all citizens on attaining the age of eighteen years or older. In *Reynolds v Sims*, 377 U.S. 533, S.Ct. 1262, 12L.Ed.2d 506, Chief Justice Earl Warren delivered the judgment on equality among voters re-emphasized the importance of this right:

“[A]nd history has seen a continuing expansion of the scope of the right to suffrage in this country. The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restriction on that right strikes at the heart of representative government ... Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the citizens right to vote must be carefully and meticulously scrutinized.”

41. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 73 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

42. 383 U.S. 663, 86 S.Ct. 1079, 16 Led.2d 169 (1966).

in the electoral process.” The decision in this case acknowledged that the Constitution does not guarantee the right to vote in state elections, but the court protected this right under the principle of equal protection.

The case of *Kramer v. Union Free School District No. 15*,⁴³ attempted to comprehensively deal with the issue subsequent to the *Harper* case and clarified the position that despite the Constitution not expressly granting a right to vote, there does exist a right to vote under the principle of equal protection. This case also dealt with the challenge to laws made to restrict voting in school district elections. Chief Justice Warren (delivering the opinion) observed that any “unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”⁴⁴ The Court rejected infringement on the participation of citizens in the process of selection. The Court in *arguendo* was prepared to accept that in some cases the state can limit franchise, however in this case, it was held unconstitutional and struck down as a violation of the equal protection clause.

The right to vote exists as a fundamental civil and political right. The courts in later decisions have endorsed this right as a fundamental right, and permitted the states to impose some restrictions on this right subject to the test of ‘strict scrutiny’.⁴⁵

VI. Towards a Liberal Theory: Right to Vote and Negative Vote as Requisites

This section will examine the question why every person must have right to vote. It will look at significant works of primary liberal theorists and conclude that a substantive recognition of voting rights is the heart of the political process in a functioning democracy. This concept is as old as the idea of citizenship.⁴⁶ The element of participation in voting is the core of citizenship.⁴⁷ Theories of citizenship are various and contrasting, although,

43. 395 U.S. 621, 89 S.Ct. 1886, 23 Led.2Ed. 583 91 (1969).

44. *Id.*

45. See *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1975), the court found the ratio of *Kramer* inappropriate in this case. It upheld the restriction in the water storage district elections. Holding that the district’s operations affect primarily the land-owners in the district and this justified a special restriction in voting. The water storage function was found more ‘specialized’ than maintaining a school board as in *Kramer*. Similarly, the court has also upheld demonstrated interest as restriction such as: age, residence, and citizenship as valid. So, it is gathered that while the right to vote is a fundamental right it can be diluted which is subject to judicial review.

46. See ARISTOTLE, *POLITICS* 108 (Barker Ed., Clarendon Press, 1946) as cited in Heather Lardy, *Citizenship and the Right to Vote*, 17, O.J.L.S. 75 No. 1 75 (1997) 78. Aristotle defines it as one ‘who enjoys the right of sharing in deliberative judicial office.’

47. *Id.* Heather Lardy traced the historical importance of citizenship and the connection with the right to vote, and aptly summarizes her conclusions that this involvement is the essence of citizenship. It can be termed beneficial not only for the polity but also for each individually participating

they all advance degrees of relationships between the citizen and the polity. The requirement of citizenship for voting is a supposition that loyalty and fraternal attributes are possessed only by legal citizens and not by minors, people undergoing conviction, mentally differing persons, and immigrants and so on. This is a contestable proposition in its form. However, this will not be examined in this note. It will focus on the moral foundation for voting as a right.

Liberalism advances the notion of the individual's pursuit of a common good by their exploits. To attain this, it is important that citizens [people] be left to engage in their free conception over autonomy and choice of government.⁴⁸ Political participation is the central element of liberal tradition.⁴⁹ All adults have the inherent right to take part in the political process. This, according to the liberal tradition, is the qualification of political participation as a result of institutions. Negative voting is a natural extension of the right to participation. Liberal theorists like Rawls and Dworkin state that it is for individuals to decide the extent and nature of their participation. This protects not only the right to directly choose one's representatives but also expressly rejecting them.

There is a 'moral quality' attached to voting positively and negatively and it is an interesting intersection of law and politics. The view takes into account that political participation promotes individual's interest in governance. This participation is what makes an enlightened citizenry a body of watchful observers. It also gives the body an identity as an electorate which no other state function can render in this fashion. Dworkin argues that the democratic process has distributive and political participatory

citizen. Through the participation in public affairs, a citizen discovers qualities which may have otherwise remained hidden and develops these characteristics demanded by the role.

48. For more on liberal tradition see *id* n 32 at 82 John Rawls, *THEORY OF JUSTICE* 233 (Oxford University Press 1971).

49. John Rawls responding to the nature of participation states that in conceiving these principles a common starting point will need to be taken to begin with where each are equal:

"The principle of equal liberty when applied to the political procedure defined by the constitution, I shall refer to as the principle of (equal) participation. It requires that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply. Justice as fairness begins with the idea that where common principles are necessary and to everyone's advantage, they are to be worked out from the view point of a suitably defined initial situation of equality in which each person is fairly represented. The principle of participation transfers this notion from the original position to the constitution as the highest-order system of social rules for making rules. If the state is to exercise a final and coercive authority over a certain territory, and if it is in this way to affect permanently [wo]men's prospects in life, then the constitutional process should preserve the equal representation of the original position to the degree that this is feasible." *id.* at 221-222.

consequences.⁵⁰ The individual's gain is the promotion of her/his interest in the larger communal sense as a collective decision.⁵¹ The collective virtue is the creation of an overall 'fraternal political community.'⁵² This notion is significant for creating a dual bond, of the individual as a part of the political community, and also builds a robust political community.

As Heather Lardy points out, the right to vote not only declares this membership in the community as the liberals posit, but also defines it.⁵³ The insistence of liberal doctrines on voting as a means to protect individual's interest is the value of political participation, which if absent is an illegitimate democracy.

VII. Conclusion

Limitations on franchise by imposing cumbersome registration practice for voting are constitutive of disenfranchisement. This can be heavily misused by government power by not registering certain sections as eligible voters and place many limitations. Registration as a voter must be a right—not act as a restriction to voting.⁵⁴ Laws made infringing on the right to vote, however should not abrogate constitutional protections. Indian constitutional law has not as yet witnessed the politics of voting restrictions as in America. State action in this field needs to be limited or else it will be an obstacle to free and fair elections, and political marginalization. The commitment to a democracy brings with it the need to remove unreasonable limitations on voting.

Access to the ballot is vital in any civic engagement. This right has been relegated from constitutional discourse and so far survives in a peculiar category. The problems of disenfranchisement have surprisingly not been adjudicated in the Supreme Court, and the conclusion of the court in the *P.U.C.L. 2009* case has reopened the debate. This note has demonstrated the inconsistency in the interpretation of this right in the decisions of the court. It has advanced a resolution to negative voting to be read as quintessential in a democracy; and as an alternative suggested that this right be read under right of free speech. There is a need for a closer examination by the Court to overrule the dubious early precedents on voting rights. The

50. See *Id.* n 46 Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 1 U.S.F.L.R. 4 (1987).

51. *Id.*

52. *Id.*

53. *Id.* n. 48.

54. See Deborah James, *A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615, No. 7 (1987).

The author argues that registration of voters in America is *per se* a restriction on the right to vote: right to cast a ballot is fundamental and imposition of 'prerequisites' amounts to a restriction.

assumptions for right to vote as a statutory right are challengeable. In constitutional context, rights are fairly widespread, and the exclusion of voting is astonishing. The larger Bench will need to reconcile the early decisions by taking into account the theoretical perspectives on the importance of this right from the liberal standpoint and protect this right as fundamental right for a democracy.