

THE 'FUNDAMENTALS' OF THE RIGHT TO VOTE AND ITS CONSTITUTIONAL STATUS

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The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

—Article 21, Universal
Declaration of Human Rights, 1948

The right to vote has become a well-accepted part of international law¹ and Indian constitutional jurisprudence. The historical and the jurisprudential foundations of this right have been largely ignored by public discourse. As demonstrated by the controversies over the Presidential elections in the United States of America in 2000 and the subsequent judgment of the Supreme Court of United States in *Bush v. Gore*², the citizenry can ill-afford a sense of complacency over this valuable right. The precise status of the right to vote has serious ramifications in determining the future of a polity.

The verdict of the Supreme Court of India in *Peoples Union for Civil Liberties v. Union of India*³ puts into perspective the status of the right to vote in India. The Apex Court struck down The Representation of the People (3rd Amendment) Act, 2002⁴ on the

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¹Alexander Kirshner, "The International Status of the Right to Vote", at <<http://www.fairvote.org/private/Kirshner.doc>>, last visited 18th July 2004.

² 531 U.S. 9, 104 (2000).

³ AIR 2003 SC 2363.

⁴ This amendment was introduced in the aftermath of the judgment in *Union of India v. Association for Democratic Reforms*, (2002) 5 SCC 294, where the Election Commission was directed by the Supreme Court to ask for information on affidavit from each candidate seeking election to parliament or a State Legislature as a necessary part of his nomination paper on:

(a) Whether the candidate is convicted, acquitted or discharged of any criminal offence in the past – if any, whether he is punished with imprisonment or fine.

ground of the violation of the fundamental right of the voters to know the antecedents of candidates contesting elections to legislatures under Article 19(1)(a) of the Constitution of India. The Court reaffirmed its earlier ruling in *Union of India v. Association for Democratic Reforms*.⁵

A less highlighted facet of the judgment was the difference of opinion between the Judges over the constitutional contour of the right to vote, as distinct from the right to information of the voters. Though concurring on the operational part of the judgment, they had separate views on the status accorded to the right to vote in the Indian constitutional framework.

M B Shah, J. observed (for himself and on behalf of D M Dharmadhikari, J.):

*“there cannot be any dispute that the right to vote or stand as a candidate for election and decision with regard to violation of election law is not a civil right but is a creature of statute or special law and would be subject to the limitations envisaged therein.”*⁶

In contrast, P Venkatarama Reddi, J., concurring with the invalidation of the impugned amendments, differed about the status of the right to vote in our constitutional structure. He remarked:

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- (b) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof.
 - (c) The assets (immovable, movable, bank balance, etc.) of a candidate and of his/her spouse and that of the dependants.
 - (d) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.
 - (e) The educational qualifications of the candidate.

Though the amendment was purported to implement the aforesaid judgment, it significantly differed in its substance. The candidate was not required to disclose the cases in which he has been acquitted or discharged of criminal offence, his assets and liabilities and his educational qualifications. Section 33-B of The Representation of the People (3rd Amendment) Act, 2002 provided that:

“Notwithstanding anything contained in any judgment, decree or order of any Court or any direction, order or any instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under the Act or the Rules made thereunder.”

⁵ (2002) 5 SCC 294.

⁶ *supra* n. 3, at 2390, para 59.

“..The right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326...”⁷

This research paper seeks to examine the status enjoyed by this right under international instruments and in various jurisdictions. It also explores the constitutional treatment of the right to vote in India, in light of the various positions taken by the Indian judiciary.

I. Global View: A Tale of Heterogeneity

A citizens' right to vote and the affirmative obligation of the State to protect this right have become an integral part of the multitude of international legal instruments, both binding and non-binding.

Article 21 of the Universal Declaration of Human Rights, 1948 (UDHR), lays down the right of persons to participate in governance and enjoy universal adult franchise. Article 25 of the International Covenant on Civil and Political Rights, 1966 (ICCPR),⁸ while reaffirming the substance of Article 21 of UDHR, restricts the incidence of this right to citizens. The Human Rights Committee (established under the ICCPR) reaffirmed that the treaty not only protects the rights of every citizen to vote, but also enjoins the states to take legal measures to ensure that citizens are able to effectively enjoy this right.⁹ This duty of the state was further emphasised by Article 3 of Protocol No. 1 of the European Convention of Human Rights, 1950 states that:

⁷ *ibid* at 2401, para 101. He further stated that though “...the right has been shaped by the statute...it is not very accurate to describe it as a statutory right”.

⁸ Article 25 of the ICCPR states: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely-chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”

⁹ Human Rights Committee, “The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25). 12/07/96. CCPR General comment 25. (General Comments)”, at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+25.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+25.En?OpenDocument)>, *supra* n.1.

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

Initially there was uncertainty with regard to whether this provision contemplated an individual’s right to vote and contest an election. This issue was settled, recognizing the individual’s right to vote and contest an election, in *W, X, Y and Z v. Belgium*¹⁰ in 1976 by the European Commission on Human Rights.¹¹

While the right to vote of citizens is recognised almost universally, the status accorded to this right varies in different polities.¹² A number of Constitutions provide for a vibrant right to vote with a strong affirmative component guaranteed therein. For instance, the Constitution of Suriname establishes the positive obligations of the State to ensure public participation in the political process.¹³ Others, like Peru¹⁴, not only assert the right to vote but also explicitly delimit the power of the state to restrict those eligible to vote.¹⁵

Several constitutions also articulate a separate right to vote. For example, Article 49 of the Constitution of Portugal states:

“All citizens who are over eighteen years of age have the right to vote, except for the incapacities laid down in general law. The exercise of the right to vote is personal and constitutes a civic duty.”

¹⁰ (Nos. 6745 & 6746/74) (1975), 2 Eur. Comm. H.R. D.R. 110 at 116, 18 Y.B. Eur. Conv. H.R. 236 at 244.

¹¹ This was reaffirmed in *Mathieu-Mobin and Clerfayt v. Belgium* (1987), Eur. Ct. H.R. Ser. A, No. 113, 30 Y.B. Eur. Conv. H.R. 114.

¹² For an intensive examination of the diverse ways in which democratic constitutions treat the right of the citizens to vote, refer to the taxonomy drawn by Alexander Kirshner., *supra* n.1.

¹³ Article 54 of Constitution of Suriname states that: “The State is obliged to register those with voting rights and to convoke them to participate in elections. The registration of the voters shall serve no other purpose. Those with a right to vote are obliged to co-operate with the registration of the electorate.”

¹⁴ Article 32 of the Peruvian Constitution states that: “Citizens enjoying their civil capacity have the right to vote. The vote is personal, equal, free, secret and obligatory until one is seventy years old. It is optional after this age. All Acts that limit or prohibit citizens from exercising their rights are null and punishable.”

¹⁵ *supra* n.1.

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In others, the right to vote of individuals is derived by means of necessary implication as an individual is not guaranteed a separate right to vote. They only provide for elections to legislative bodies and public offices on the basis of universal adult franchise and secret ballot.¹⁶

Judicial interpretation has also aided in defining the contours of this right. For instance, the Supreme Court of Canada in *Sauve v. Canada*¹⁷ recognised that even inmates serving sentences of two years or more have the right to vote and, therefore, invalidated Section 51(e) of The Canada Elections Act, 1970 which deprived them of this right.¹⁸

The Constitutional Court of South Africa while upholding the right of the prisoners to cast their vote in *August and Another v. Electoral Commissioner and Others*,¹⁹ remarked:

*“... the universality of franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts...Rights may not be limited without justification and legislation dealing with franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”*²⁰

On the other hand, a number of democratic countries accord merely a statutory recognition to the right to vote. Paradoxically, in the United States of America, which enunciated the principle of ‘one person, one vote’, citizens do not have a constitutional right to vote. In *Alexander v. Mineta*,²¹ the Supreme Court of United States, in its majority

¹⁶ For example, Article 68 of Constitution of Spain states: “The House of Representatives is composed of a minimum of 300 and a maximum of 400 Deputies elected by universal, free, equal, direct and secret suffrage under the terms established by law.” Similarly, Article 69 states: “In each province, four senators will be elected by universal, free, equal, direct and secret suffrage by voters of each of them, under the terms established by law.”

¹⁷ [2002] 3 SCR 519.

¹⁸ The Supreme Court of Canada proceeded to observe that “*the right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features underpins the legitimacy of Canadian democracy...*”, McLachlin, C.J.C., at para 34.

¹⁹ 1999 (4) BCLR 363 (CC).

²⁰ *ibid* at para 17.

²¹ 90 F. Supp. 2d 35 (D.D.C. 2000).

verdict stated explicitly that the US Constitution “*does not protect the right of all citizens to vote, but rather the right of all qualified citizens to vote.*”²²

Therefore, when the Republican-controlled Florida legislature in 2000 declared that it would simply select the State’s Electoral College members if it considered the outcome of the popular vote still unsettled on December 12th, 2000,²³ the Supreme Court, in *Bush v. Gore*,²⁴ emphasized that the Florida legislature was acting well within its rights. The Court stated in stark terms that the

“...individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.”

Thus, the Court reasoned that, since the “*individual citizen has no federal constitutional right to vote for electors for the President of the United States,*” whenever such a right is granted by state legislators, they can always revoke it and simply “*take back the power to appoint electors.*”

²² Jeff Milchen, “A Missing Foundation for Democracy: The Right to Vote” at <http://reclaimdemocracy.org/political_reform/right/right_to_vote.html>, last visited 2nd March 2005.

²³ This sordid story unfolded in the immediate aftermath of the very close and equally vicious presidential elections in the United States of America in 2000.

The results of the election were not known for more than a month after the polls as the counting and recounting of Florida presidential ballots, which swung the election, extended for more than a month. Under the Electoral College system prevalent in that country, each State votes for the President separately: a victor is then declared in each state, and the victor in the state wins a number of ‘electoral votes’. At the end of the nation-wide ballot-count, the psephologic calculus was such that the ‘electoral votes’ of Florida would make either candidate victorious. Florida, however, did not have an official victor because the result was within the margin of error for machine counting. Further complications arose out of allegations of wrongful disqualification of minority voters due to felony and technical flaws with voting machines. Al Gore, the democratic candidate sought a manual recount of votes since the Florida state law provided for an automatic recount due to the small margins. The recount gave rise to a protracted series of litigation all the way up to the Supreme Court of the United States of America. Early in the afternoon of December 12th, the statutory deadline for declaration of results, the Republican-dominated Florida House of Representatives voted nearly on party lines to certify the State’s electors for Bush since no constitutionally-valid recount could be completed by then. See “U.S. Presidential Election, 2000”, Wikipedia at <http://en.wikipedia.org/wiki/U.S._presidential_election%2C_2000>, last visited 2nd March, 2005.

²⁴ supra n. 2.

Therefore, forms of protection for the right to vote that have been adopted are heterogeneous and disparate. The constitutional treatment of the right to vote in India must be examined in light of this diversity.

II. The Constitutional Conspectus and Judicial Construction

The right to vote of citizens is dealt with in the Indian Constitution under Articles 325²⁵ and 326²⁶, which lay down the foundation for universal adult suffrage in India.²⁷ However, the Courts have emphatically held that they do not vest any extra-statutory right in the citizenry. This was enunciated in *N P Punnuswami v. Returning Officer*,²⁸ where Fazl Ali, J. observed:

*"the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."*²⁹

The Apex Court reiterated this proposition in *Jyoti Basu v. Debi Ghosal*³⁰ and pronounced that there is no common law right to elect and that such a right is purely statutory in character.

These pronouncements illustrate that the judicial dicta has fallen short of providing a constitutional protection to the right to vote in India and has made the right subservient

²⁵ Article 325 states: "No person to be ineligible for inclusion in, or to claim to be included in a special electoral roll on grounds of religion, race, caste or sex.—There shall be one general electoral roll for every territorial constituency for election to either house of parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them."

²⁶ Article 326 states: "**Elections of the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.**—The elections to the House of People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than [eighteen years] of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."

²⁷ Conditions for exercise of the right to vote are enunciated in The Representation of the Peoples Acts of 1950 and 1951.

²⁸ AIR 1952 SC 64.

²⁹ *ibid* at 71, para 18.

³⁰ AIR 1982 SC 983.

to legislative will.³¹ However, such interpretation appears to be based on a shaky jurisprudential foundation. An appraisal of Indian constitutional provisions along with global and historical experiences, reveals that it may not be entirely correct to hold that the right to vote is a mere statutory right in India.

Though the precise character and ambit of the right to vote did not attract much attention in the Constituent Assembly Debates, the concept of universal adult suffrage, which forms its cornerstone, occupied a central place in these debates. It was one of the long-standing demands of the Indian National Congress and had become a *sine qua non* of independence.³² K M Panikkar observed that, “*adult suffrage, the ‘acceptance of the fullest implication of democracy’ was the most striking feature of the Constitution.*”³³

S Radhakrishnan was of the view that “*adult suffrage is the most powerful instrument devised by man for breaking down social and economic injustice and destroying the walls that imprison men’s minds.*”³⁴ It is thus amply clear that the right to vote was an integral component of the vision expounded by the founders of the Republic of India.

It is submitted that Article 325 and Article 326 of the Constitution of India categorically indicate the existence of the right to vote in the hands of the citizens. Article 325 provides for non-discrimination in the realm of inclusion into the electoral rolls. In addition, Article 326 provides not only for election on the basis of adult suffrage, but also limits the grounds³⁵ on which a citizen may be disqualified from voting.³⁶ So, any statute that endeavours to regulate the right to vote must fall within the constitutional confines of these two Articles and it is not correct to say that the right to vote is merely a product of the legislature.³⁷ The legislature’s power to interfere with this right

³¹ An interesting facet of these decisions is that none of them were primarily concerned with the exact status of right to vote in the Indian constitutional framework. The observations on the nature of the right to vote were made in the course of determining the specific points of controversy in the cases.

³² Granville Austin, “The Indian Constitution: Cornerstone of a Nation”, 46 (2002).

³³ K M Panikkar, “Hindu Society at Crossroads”, 63-64 (1955) quoted in Granville Austin, “The Indian Constitution: Cornerstone of a Nation”, 46 (2002).

³⁴ S Radhakrishnan, Foreword in B Shiva Rao, “The Framing of India’s Constitution: A Study (1968)” quoted in Granville Austin, “Working of a Democratic Constitution: The Indian Experience”, 18 (2002).

³⁵ The grounds mentioned in the Article are: non-residence, unsoundness of mind, crime or corrupt or illegal practice.

³⁶ The constitutional scheme on the issue of voting in India has several similarities with the constitutional provisions of Spain, *supra* n. 16

³⁷ MP Jain, “Indian Constitutional Law”, 943 (2003).

is circumscribed by the Constitution. Thus, it is contended that the opinions expressed in *NP Punnuswami v. Returning Officer*,³⁸ *Jyoti Basu v. Debi Ghosal*³⁹ and by MB Shah and Dharmadhikari, JJ in *Peoples Union for Civil Liberty v. Union of India*⁴⁰ that the right to vote is the creation of a statute and is subject to statutory limitation is untenable and does not withstand the touchstone of constitutional and jurisprudential logic. This view ignores the directive of our constitutional founders as enshrined in Articles 325 and 326. However, the view of P Venkatarama Reddi, J. that the right to vote is a constitutional right and not a mere 'gift of the legislature' appears to be in consonance with constitutional intent.

III. The Statutory Right of Voting: The Limitations

The fact that there is no fundamental or constitutional right to election and vote is a contradiction apparent on the face of it and is difficult to reconcile with the principle of popular sovereignty.⁴¹ The Supreme Court in *Jyoti Basu v. Debi Ghosal*⁴² admitted this contradiction where it remarked that “*a right to elect, fundamental though it is to a democracy, is, anomalously neither a fundamental right nor a common law right. It is pure and simple a statutory right.*”⁴³

If the right to vote is treated as a mere creation of statute and rendered subject to statutory mandate, it will always remain hostage to legislative tyranny. If the electorate is likely to sway to a party other than the one controlling the legislature, the legislature could then change the conditions of eligibility for exercising votes in order to doctor the results.⁴⁴

³⁸ supra n.28.

³⁹ supra n.30.

⁴⁰ supra n.3.

⁴¹ Tushar Kanti Saha, “Democracy in Danger: Criminality and Corruption in Lok Sabha Elections”, 19-22 (2000).

⁴² supra n.30.

⁴³ *ibid.* at 986, para 8.

⁴⁴ This provides for a distinct possibility of reoccurrence of the Florida deregistration controversy which arose during the U.S. presidential elections in 2000. See Demetrios James Caraley, “Editor’s Opinion: Why Americans Need a Constitutional Right to Vote for Presidential Electors”, 116 *Political Science Quarterly* 1 at 3, at <http://www.psqonline.org/99_article.php3?byear=2001&bmonth=spring&a=01free>, last visited 14th July 2004.

Further, the legislature will not be obliged to deal with wrongful purging of qualified voters from electoral rolls.⁴⁵ Deregistration of voters mainly affects the marginalised groups like migrant labourers, indigenous groups, etc. Given the non-existent socio-economic power of such peripheral groups, elections remain their sole forum for expressing their voice. Consequently, the socio-political deprivation induced by such irregularities gets magnified. A right to vote will enable disenfranchised citizens to fight victimization and negligence of electoral officials who purge legally registered citizens from the voter rolls.⁴⁶

In this context, a constitutional affirmation of the right to vote would provide individuals with a powerful tool to challenge a State action or state inaction that impedes voters.⁴⁷ The additional importance of this right lies in the fact that even in the absence of any express affirmative constitutional sanction, the courts have seen it as imposing a positive obligation on the state to ensure that people can vote.⁴⁸ Consequently, it appears to be extremely desirable to unequivocally posit the right to vote in the Constitution.

IV. A Constitutional Right and its Operationalisation

The declaration of the right to vote as a constitutional right would not be a mere case of juristic symbolism. Articles 325 and 326 of the Constitution of India are not toothless but they accord genuine protection to the right to vote. As discussed earlier, they circumscribe the power of the Legislature to interfere with the right to vote of the citizens. It is postulated that the legislature can confine the right only on grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice.

A law disqualifying people from voting on any other ground can be challenged under Article 226 of the Constitution. This Article is extremely expansive in its ambit and a High Court may there under enforce not only a fundamental right but any other legal

⁴⁵ This acquires significance in the light of the fact that discrepancies in electoral rolls pose a major impediment to smooth conduct of elections. This problem was acknowledged by the National Commission for the Review of Working of the Constitution in its study.

⁴⁶ *supra* n. 22.

⁴⁷ Some observers have argued for converting the right to vote into a fundamental right. The debate between constitutional right and a fundamental right would require an elaborate discussion of the issues involved and has not been dealt with in this paper.

⁴⁸ *supra* n.1.

right. It was asserted by the Supreme Court in *Dwarka Nath v. I-T Officer*⁴⁹ that “*this Article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised.*”⁵⁰ Thus, the significance of a constitutional right lies in the fact that it is independent of statutory norms and the remedy under Article 226 would be available in all cases. The remedy arising thereof shall be immune to legislative dictates.

V. Conclusion

The assertion of the Supreme Court that there is no fundamental or constitutional right to vote and that this right is a product of the Legislature stands at odd with globally accepted tenets of democracy and our constitutional philosophy. This right has acquired a principal position in all the major countries of the world. Further, the Constitution of India does, by necessary implication, place the right to vote on a pedestal higher than ordinary statutory rights. Articles 325 and 326 circumscribe the power of the Legislature to restrict the scope of the right to vote. Undue legislative interference can be dealt with through resort to the constitutional remedy guaranteed by Article 226.

Nevertheless, by way of abundant caution and for removal of all doubts, a constitutionally guaranteed right to vote should be introduced. An express assertion of this right will dispel the unwarranted and potentially dangerous cloud of confusion that has enveloped the constitutional status of the right to vote in India. An express constitutional protection of the right to vote protects the right from the whims and caprices of an overwhelming legislative majority. In addition, it ensures that there is more accountable implementation of the right. It will result in a remedy for the people who are chronically disenfranchised due to systemic flaws in the electoral processes.

⁴⁹ AIR 1966 SC 81.

⁵⁰ *ibid* at 84-85, para 4.

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