CONSTITUTION AND THE UNWRITTEN RIGHT TO VOTE

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ABSTRACT

The Constitution provides the probability for convergence of the political point of view with the people’s point of view in an important democratic space for dialogue mediated by the legal point of view. It is possible that such a dialogue may be tilted in favour of those who control such a space but the Constitution makes sure that the judiciary minimizes any such possibility. The rights have been the subject-matter of political and judicial battlefields, including the most basic right in a democracy, the right to vote. The right to vote is not a fundamental right but Article 326 defines the right, which is given in the Representation of People Act, 1951. Article 326 states that elections to Parliament and Legislative Assemblies would be conducted on the basis of adult franchise and every adult citizen could register in the electoral rolls to vote. However, there is a difference between right to enroll as a voter and right to vote. The central question of this research is that whether the right to vote as been fundamentally upheld by the Indian Constitution Furthermore, how has the judiciary interpreted this unwritten right? The method of inquiry would be through the qualitative study of judgments and the legal interpretations of the right to vote for citizens in India.

INTRODUCTION

The Constitution of India has anchored its aspirations and focused them in a written code to provide a vision for the nation along with a plan for its administration. The concept of constitutions has been evolving from the time of Aristotle and is today an agreed norm, “a decision” concerning the organization of the government. The Constitution provides the chance for convergence of the political and legal points of view and balances the two. In doing this, the judicial review has played a crucial role in the progress of constitutionalism in India. As political

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authority in a democracy has justification of the majority vote, the value of the constitutional space for dialogue for the sake of justice itself cannot be underestimated.

The rights have been the arenas of political and judicial interpretations, including the most basic right in a democracy, the right to vote. The right to vote is not a fundamental right but Article 326 defines the right, which is given in the Representation of People Act, 1951. Article 326 states that elections to Parliament and Legislative Assemblies would be conducted on the basis of adult franchise and every adult citizen could register in the electoral rolls to vote. However, there is a difference; “it is a right to be enrolled a voter, but not to vote.” Therefore, the question arises on whether the fundamental ness of the right to vote has been upheld in the Indian Constitution and how the judiciary has interpreted this unwritten right.

RIGHTS AND CONTESTS:

The fundamental rights were more than mere guarantees to the people; they were objectives of the state, ironically, evident in the debate about the restrictions on freedom of speech and expression in Article 19(1)(a) that led to the First Amendment, passed by Parliament in June, 1951. The fact that cabinet ministers did not want to retain ‘reasonable’ before the word ‘restrictions’ for fundamental right of speech and expression actually validated the right. Austin finds a significant paradox in the First Amendment that the attempt to control freedom, in reality, liberated it. “Now, the courts could rule on what were ‘reasonable restrictions’ on the freedom of expression.” But the debate achieved something else as well. It exposed the interests of those in power, even if they had only a few years earlier enshrined the rights in the Constitution; it unraveled the accepted continuity from freedom struggle to free India. Yet, it is the voter who freely decides the validity of such a government, and whether a political party should rule the nation or not.

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5GRANVILLE AUSTIN, INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 322 (Zoya Hasan et al. eds., 2002).
The Constituent Assembly supported adult suffrage stating that to make the right to vote conditional to property or educational qualifications would be disenfranchising large sections of farmers, labour and women, and therefore, would be against the principles of democracy. For instance, propertied women were allowed to vote for the first time in 1929-30 provincial elections in India, but this was merely “symbolic” as the majority was excluded from voting. Separate electorates for minorities and the Scheduled Castes and Scheduled Tribes was much debated but discarded in favour of a common electoral roll that would give the right to vote equally to all citizens. Yet, this right is merely a constitutional right, which provides the citizen the right to be registered as a voter but not to vote.

The equality of the vote, along with its importance for dignity and survival, generates the “deep felt sense of ‘something sacred,’ which gives a moral and emotional core to the ritual elements of the election and draws India’s voters irresistibly towards it.” And yet, every election is not a final verdict on the kind of government citizens deserve; it is merely an interim one in the search for an ideal government. The Constitution provides the framework for an ideal government, especially with the help of the values and obligations towards the sections deprived of their rights and development. As even the vote evolves, the questioning of policy by “constitutional losers” forces the state to extend them benefits and protection. However, demands for justice and need for commitment to certain sections itself shows that the Constitution is capable of irregularities in delivery of the very values it is based on, like equality. The question, therefore, arises about whether there can be any code, which purely and periodically delivers everything it promises to uphold?

The voter’s search for the ideal government may not have, perhaps, begun with the ideal Constitution. Most constitutions were created by constituent assemblies not directly elected and

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8 Ibid.
10 The right to vote in the Indian Constitution is included in Part XV dealing with Elections and not in Part III of the Constitution, which provides the fundamental rights.
12 Hasan, supra note 6 at 40.
not democratically represented. The Indian Constituent Assembly was also afflicted with this “historic burden of democratic deficit.”13 At that time, there may have been administrative reasons for this. A direct election on the basis of universal adult franchise would have required framing of rules for election, preparation of electoral rolls, setting up elaborate machinery, which would have taken three to five years14 for the formation of the Constituent Assembly.

The right to vote serves the state by providing legitimacy to the government and serves the citizens by providing an avenue for expressing their choice. It is, however, not provided that the citizens can choose the system through which they are to express their vote or their choice. Besides giving government the mandate to rule, the voter has no say in the voting process, including “any constitutional right to a system of free and fair elections.”15 Rights may be prohibitions on the state’s sphere, but they require the state to create and maintain the circumstances in which the rights can be implemented. The right to vote is not granted as a fundamental right, mainly due to administrative difficulty and the “practical impossibility to enroll all eligible voters.”16 Modern technology, not available at the time of Constitution-making, may ease the administrative effort of implementing the right to vote17 if it is made a fundamental right. But the question arises on whether the right to vote needs to be a fundamental right, or as the Supreme Court of India (SCI) held in various cases, it can remain a statutory right, a privilege, a constitutional right and part of the fundamental right of expression. The right to vote, therefore, demonstrates the depth of our Constitution and how the judiciary has acted on behalf of constitutionalism.

Additionally, the right ‘not to vote’, or negative voting, is yet another step of the judiciary to check systemic imbalance that favours funds, force and family in Indian politics. The negative voting through NOTA (None of the Above) option was initiated to force political parties to field better candidates, but it also points to the weaknesses of the positive vote. The negative vote was expected to judge the accountability of political leaders more acutely than the positive vote

13Ibid. at 97.
14CHAUBE, supra note 4 at 15.
16CHAUBE, supra note 4 at 222.
The positive vote has failed to prevent the election of unsuitable candidates; the NOTA might achieve that by giving voters the option to record their disgust. The negative vote is an implicit part of the right to vote; that it had to become explicit, questions the role of the vote in India and whether it requires strengthening.

**LEGAL FRAMEWORK:**

The Indian Constitution defines who can and who cannot be a voter, a matter that can be decided by Parliament “from time to time.” As it is not a fundamental right, it is not binding on the state to provide the right to vote for every citizen. It can provide the right to only those citizens who are considered eligible voters.

Part XV of the Constitution that deals with Elections, provides in Article 325 for making a single general electoral roll for each constituency of Parliament and State Legislature for which “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.” Electoral experience of the last few decades has shown that the making of electoral roll is not a simple administrative measure. Governments have used and misused state machinery for the political purposes of inclusion and exclusion of names in the voters’ list. This has been done to tilt the balance of the electorate in favour of a certain candidate or party. Deletions of names from electoral rolls on the basis of residence robs people a chance to vote. Even the Election Commission of India (ECI), while guiding the Electoral Officers about how to make the rolls, has put emphasis on the issue of residence of voters and appeals in case of deletions and petition for inclusions.

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20 Article 327 of Constitution: Power of Parliament to make provision with respect to elections to Legislatures.
administration with the help of political parties may conduct door-to-door verifications of the election rolls.

The onus, however, is on the voter to come forward to check the electoral rolls and discover the malpractices. Without any guarantee that citizens may remain voters, they need to constantly ascertain whether their names remain on the electoral rolls and stay vigilant about the revisions. This may add to the cynicism that voting is yet another evidence of a ‘system’, which would rather keep the voter away from the polling booth. Though the ECI is proactive about any complaints, the need for vigilance points to the expectation and the precedence of injustice.

Article 326 states the qualifications and reasons for disqualifications of a voter. The Constitution provides adult suffrage and states that a citizen who is above 18 years, resident of the given constituency and “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 practice, shall be entitled to be registered as a voter at any such election.”24 Considering the pressure on every government to remove the bar on criminals contesting elections,25 the denial of political rights like the right to vote for prisoners26 may be an unequal argument. If prisoners should not enjoy rights and freedoms at par with a law-abiding citizen, then that should include the right to contest elections as well. However, the increasing criminalization of politics27 points to the fact that it may be easier for a prisoner to contest elections, given certain parameters like money and muscle-power, than to vote.28

On July 10, 2013, the SCI upheld a Patna High Court order which had stated that “a person who has no right to vote by virtue of the provisions of sub-section (5) of Section 62 of the 1951 Act is

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24Constitution of India (Bare Act), supra note 22.
26The Representation of People Act 1951 states in Chapter IV, Right to Vote: Section 62 (5) bars prisoners or those in lawful police custody from voting in elections.
not an elector and is therefore not qualified to contest the election to the House of People or the Legislative Assembly of a State.”

The High Court held, “A right to vote is a statutory right, the Law gives it, the Law takes it away. Persons convicted of crime are kept away from elections to the Legislature, whether to State Legislature or Parliament, and all other public elections.” Calling it a privilege to vote, the Court stated, “the elector would not be qualified, even if his name is on the electoral rolls. The name is not struck off, but the qualification to be an elector and the privilege to vote when in the lawful custody of the police is taken away.”

This crucial judgment about two issues: criminals right to vote and right to contest elections, rests mainly on Article 326 of Constitution that lays down conditions for adult suffrage; Section 16(1)(c) of the Representation of People Act, 1950, which lays down disqualification for voting; Section 4 and 5 of the Representation of People Act, 1951, which provides qualification for contesting elections, including being an elector; and Section 62 (5) that bars prisoners from voting. The judgment, however, is silent on the question of why those in police custody, undertrials and those serving a sentence should continue to be denied a chance to vote.

Significantly, the “interference by courts in electoral matters” is barred under Article 329 specifically for election disputes and delimitation. However, under Article 327, the Parliament can make laws regarding electoral rolls from time to time, which also cannot be subject to judicial review as upheld by the SCI in Trivedi v. Raju. Referring to Article 327, the Court stated that Parliament could make laws on all matters relating to the elections including the preparation of electoral rolls, which cannot be challenged except in the prescribed manner.
Though the Constitution does provide qualifications for election to Parliament in Article 84 and for Legislatures in Article 173, these do not include the condition that the candidate should be a voter. That is provided in the Representation of People Act, 1951, Part II, Chapter I. However, as part of a statute these conditions can be changed by Parliament, which can decide on the method of its own election and the nature of those who can contest such election. As the right to vote is in the statute and not the Constitution, it would be correct to assume that that provision may see different interpretations in future as it has in the past.

35 Articles 84 and 173 of the Constitution state that for election to Parliament and State Legislatures a person should be a citizen of India and not less than thirty years of age in case of State Legislatures and for the House of People, not less than twenty-five years of age.
JUDICIARY AND THE RIGHT TO VOTE:

(1) Nature of Statue: In *N.P. Ponnuswami v. Returning Officer*, the SCI stated that the word ‘election’ in Article 329 (b) connotes the entire election process commencing with notification of election to declaration of result. And that the election process once started cannot be interfered with by the courts. The Court also held that “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.”

(2) A Statutory Proceeding and Right: In *Jaganath v. Jaswant Singh*, the SCI held in its judgment that an election was “not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law.” The SCI in *Jyoti Basu v. Debi Ghosal*, held in para 8 of the judgment that the right to vote “fundamental though it is to democracy, is, anomalously enough neither a fundamental right nor a Common Law Right. It is pure and simple a statutory right.” The Court held that outside the statute, there was no right to elect or get elected. These were statutory creations subject to limitations. The Court in *C. Narayanaswamy v. Jaffer Sharief* held in para 9 of the judgment that the right to elect or be elected was “a pure and simple statutory right” based on the Representation of People’s Act.

(3) A Constitutional Right: While giving his judgment in the SCI in *Mohinder Singh Gill v. The Chief Election Commissioner*, Justice Krishna Iyer referred to Winston Churchill’s famous quote describing the ‘little man’s’ most important vote, and held, “The most valuable right in a democratic polity is the ‘little man’s’ little pencil-marking, assenting or dissenting, called his

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36(1952) SCR 218.
37Article 329 (b) of the Constitution states that an election can be called in question only through an election petition presented before the designated authority.
38N.P. Ponnuswami v. Returning Officer (1952) SCR 218.
40Ibid. at 3.
41(1982) 1 SCC 691.
42Ibid.
44Ibid.
45(1978) 1 SCC 405.
46Churchill: “At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper - no amount of rhetoric or voluminous discussion can possible diminish the overwhelming importance of the point.”
vote. A democratic right, if denied, inflicts civil consequences…The straight-forward conclusion is that every Indian has a right to elect and be elected and this is a constitutional as distinguished from a common law right and is entitled to cognizance by courts subject to statutory regulation.”

JUDICIARY AND THE RIGHT NOT TO VOTE

The SCI on September 27 2013, in the case of People’s Union for Civil Liberties v. Union of India, delivered the landmark judgment allowing negative voting in elections. The petitioners had claimed provisions 41 (2) & (3) and 49 (O) of the Conduct of Election Rules, 1961, which allow negative voting, violate the secrecy of vote provided in Section 128 the Representation of People Act, 1951. Though the provisions accept that a voter has a right not to vote, it was claimed that the secrecy of a voter who decides not to vote was not maintained and that it was a violation of Article 19(1)(a).

The counsel for Union of India argued that “the right to secrecy has been extended to only those voters who have exercised their right to vote and the same, in no manner, can be extended to those who have not voted at all.” Quoting Section 2(d) of the Representation of People Act, the counsel for the government argued that it defines election to mean “an election to fill a seat, it cannot be construed as an election not to fill a seat.”

The judgment refers to the verdict in the case of People’s Union for Civil Liberties v. Union of India. In that verdict, Justice P. Venkaratama Reddi had held that the right to vote “if not a fundamental right, is certainly a constitutional right.” Quoting Justice Reddi’s opinion, the Court

49 Provisions 41 (2) & (3) of the Conduct of Election Rules, 1961: Spoilt and returned ballot papers.
50 Rule 49 (O) of The Representation of People Act provides that if a voter decides not to vote a remark will be made by the presiding officer in the register of voters.
51 Section 128 of the Representation of People Act, 1951: Maintenance of secrecy of voting.
52 Article 19(1) (a): Protection of certain rights regarding freedom of speech, etc. - (1) All citizens shall have the right- (a) to freedom of speech and expression.
53 PUCL, supra note 49, at 7.
54 Ibid.
55 AIR 2003 SC 2363.
56 Ibid. at 50.
held that “though the right to vote is a statutory right but the decision taken by a voter after verifying the credentials of the candidate either to vote or not is his right of expression under Article 19(1)(a) of the Constitution.”

CONCLUSION: THE UNWRITTEN RIGHT

In the case Union of India v. Association of Democratic Reforms and Another, it was held that right to vote is part of the fundamental right to expression and would, therefore, belong to the category of a fundamental right.

In his judgment, Justice Shah commented on the need for constantly reinterpreting the fundamental rights. “Firstly, it should be properly understood that the fundamental rights enshrined in the Constitution such as, right to equality and freedoms have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since last more than 50 years, this Court has interpreted Articles 14, 19 and 21 and given meaning and colour so that nation can have a truly republic democratic society.”

As an example, the Court pointed out the rights that are now included in the ambit of personal liberty like right to go abroad, right to privacy, right against solitary confinement, right to legal aid, right to speedy trial, right against handcuffing, right against delayed execution, right against custodial violence, right against public hanging, etc.

In his judgment, Justice Reddi stated that though initially voting is not a fundamental right, “but at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamount to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter.” It was concluded that the right to vote

57 Ibid.  
59 Ibid. at 17.  
60 Article 21: Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.  
61 PUCL 2003, supra note 56 at 50.
was “a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a).”

But being a fundamental right, the right to vote can attract reasonable restrictions, as given under Article 19(2). The SCI in *Kuldip Nayar v. Union of India & Ors*, while considering open ballot system in indirect election to Council of States, stated that reasonable restrictions can be applied to right to vote as it is seen as a fundamental right.

In India today, voters are free to vote, free not to vote, vote but reject all candidates, and vote for the first time when they turn 18 years. The right to vote’s unwrittenness in the Constitution may be the reason for its effectiveness, which may not be reinforced if it had been a fundamental right. Along with the right not to vote, the vote assumes the true form of a freedom that has a tremendous impact on political power.

The diversity of people and problems in India require both the written and unwritten rights, and constitutionalism helps in reconciling with the “the competing interests, resolve conflicts, elect representatives, and implement public decisions in a peaceful, civilized, and orderly manner.”

It may be just as Austin states: “Democracy is a messy business: subject to greatness, meanness, and error. Constitutional government is work in progress; a matter of never ending adjustments. Each generation must cope with it anew.”

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62 Ibid. at 63.
63 Article 19 (2) of the Constitution states that the State may impose reasonable restrictions on the freedoms in the interest of sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.
65 Ibid.
66 CHAUBE, supra note 4.
67 Hasan, supra note 6 at 320.