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### Peoples Union for Civil Liberties v Union of India: Is Indian democracy dependent on a statute?

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## *Peoples Union for Civil Liberties v Union of India: Is Indian democracy dependent on a statute?*

At the very heart of every political democracy is the right of citizens to participate in its democratic processes.<sup>1</sup> The right to vote is the bedrock of a democratic polity and the essence of representative governance.<sup>2</sup> No right is more precious than the right to have a voice in the election of those who make laws that govern us.<sup>3</sup> All other rights, even the most basic, are illusory without a meaningful right to vote.<sup>4</sup> While democracy is not synonymous with the right to vote, it is undeniable that there is little left of it when the right to vote itself is taken away. For “at the bottom of all tributes”, to borrow the matchless words of Sir Winston Churchill, “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 possibly diminish the overwhelming importance of the point”.<sup>5</sup>

This note is an analysis of the status of the right to vote under the Indian Constitution. The debate on the status of right to vote in India was presented with a novel dimension in the opinion of the Judge P.V. Reddi who in the recent case of *Peoples Union for Civil Liberties v Union of India*<sup>6</sup> observed that the right to vote has its roots in the Indian Constitution and, therefore, is a constitutional right.<sup>7</sup> Strange as it may seem to readers of other constitutional jurisdictions, this was the first occasion that such a judicial opinion has been expressed. For nearly five decades, the Indian Supreme Court had consistently held the view that the right to vote in India was a statutory right “pure and simple”.<sup>8</sup>

### **Is the right to vote a statutory right?**

Article 326 of the Indian Constitution prescribes that elections to the House of the People and to the legislative assembly of every state be held on the basis of adult suffrage.<sup>9</sup> Further, it provides the appropriate legislature with

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<sup>1</sup> See generally L.H. Tribe, *American Constitutional Law* (2nd ed., The Foundation Press, Mineola, New York, 1988).

<sup>2</sup> See *Reynolds v Sims* 377 U.S. 533 at 527.

<sup>3</sup> See *Wesberry v Sanders* 376 U.S. 1 at 17.

<sup>4</sup> *ibid.*

<sup>5</sup> Quoted in *Supreme Court in Union of India v Association for Democratic Reforms* (2002) 5 S.C.C. 294 at 309.

<sup>6</sup> *Peoples Union for Civil Liberties v Union of India* 2003 (3) SCALE 263.

<sup>7</sup> Within the positivist framework of the Indian legal system, rights may broadly be categorised into three types, namely fundamental rights, constitutional rights and statutory rights. Fundamental rights are protected under Pt III of the Constitution as the inherent, inalienable rights of every individual for the violation of which a person may directly petition the Supreme Court for appropriate relief. Constitutional rights also have their basis in the Constitution but are not included in rights mentioned in Pt III. Statutory rights, as the name suggests, are rights that have their origin in legislation. Both fundamental and constitutional rights are beyond the legislative competence of the Parliament or the state assemblies.

<sup>8</sup> *Jyoti Basu v Debi Ghosal* (1982) 1 S.C.C. 691.

<sup>9</sup> The text in full reads: “The elections to the House of the 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

competence to disqualify a person to be registered as a voter on the ground of nonresidence, unsoundness of mind, crime, corrupt or illegal practice. It asserts that elections to the House of the People and the Legislative Assembly of every state shall be on the basis of adult franchise. Does Art.326 also create a constitutional right? An answer to the question may depend on the meaning that is attributed to the term adult franchise. The Article itself explains adult franchise as “that is to say, every person who is a citizen of India and who is not less than eighteen years of age . . . 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*”. In other words, under the Constitution, adult franchise may succinctly be described as conferring a right on the citizens to be mandatorily registered as voters at any election provided conditions prescribed by the Constitution or any other law are satisfied. Let us assume a situation where a citizen has been registered as a voter, thus satisfying the mandate of Art.326. Let it also be assumed that notwithstanding the inclusion of his name as a valid voter, the citizen is refused the opportunity to cast his vote. Does the right to be registered as a voter by necessary implication include the right to vote under Art.326? An answer to this question may be found if one asks the purpose of the right to be registered as a voter.

In *M. Pentiah v Veeramallappa*<sup>10</sup> the Indian Supreme Court has held that one of the established rules of construction is that if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, courts should avoid a construction which would reduce the legislation to futility and rather accept the bolder construction that Parliament would legislate only for the purpose of bringing about an effective result. In the earlier English case of *Holmes v Bradford RDC*,<sup>11</sup> Finnmere J. had explained the above principle observing that the mere fact that the results of a statute may be unjust or absurd does not entitle the court to refuse to give it effect, but if there are two different interpretations of the words in an Act, courts must adopt that which is just, reasonable and sensible rather than that which had none of those things.<sup>12</sup> Therefore, if a too literal adherence to the words of a provision appears to produce an absurdity or an injustice, it will be the duty of the court to adopt a construction not quite strictly grammatical.<sup>13</sup>

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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 other 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”.

<sup>10</sup> (1961) 2 S.C.R. 295.

<sup>11</sup> [1949] 2 K.B. 1 at 7.

<sup>12</sup> See also *R. v Tonbridge Overseers* (1884) 13 Q.B.D. 339 at 342.

<sup>13</sup> *ibid.*

In the light of this principle, is the right to be registered as a voter of any significance if it does not by implication include the right to vote? To have a constitutional right to be registered as a voter and yet no such right to vote is a construction that is palpably contradictory and pedantic. It is contradictory because without the right to vote, the right to be registered as a voter serves no purpose, except for some collateral ones. The right to be registered as a voter without the concomitant right to vote is inherently vague, valueless and void. If on the other hand, meaning is to be attributed to the right to be registered as a voter, then the concomitant right to vote must necessarily accompany it. For it is the right to vote that enables one to fructify the right to be registered as a voter. If Art.326 can be read as conferring a useless right to be registered as a voter on one hand and on the other, a meaningful (and necessary) right to vote emanating from the right to be registered as a voter, then courts should lean in favour of the latter.

Nevertheless, in a series of decisions the Indian Supreme Court has consistently reiterated that the right to vote is a statutory rather than a constitutional right. In *N.P. Ponnuswami v Returning Officer, Namakkal Constituency*,<sup>13</sup> Judge Fazal Ali observed that the right to vote or stand as a candidate for election was not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it. In *Jyoti Basu v Debi Ghosal*<sup>14</sup> Judge Chinnappa Reddi reiterating the position of law held that “a right to elect, though fundamental to democracy, [was], anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right.”<sup>15</sup> Outside of statute, there is no right to elect, be elected or to dispute an election, the Supreme Court said. Most of the later cases<sup>16</sup> have merely reiterated the ratio laid down in *N.P. Ponnuswami*<sup>17</sup> and in *Jyoti Basu*.<sup>18</sup>

In *Jagan Nath v Jaswant Singh*,<sup>19</sup> the question for consideration before the Supreme Court was whether the Election Tribunal had jurisdiction to order impleading of a proper party in pursuance of powers conferred under the Code of Civil Procedure 1908 after the petitioner had failed to make him a party to the proceedings initially. The Court remarked:

The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but it is a purely statutory proceeding unknown to common law and that the court possesses no common law power.

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<sup>13</sup> [1952] S.C.R. 218.

<sup>14</sup> (1982) 1 S.C.C. 691.

<sup>15</sup> *ibid.* at [8].

<sup>16</sup> See also *C. Narayanaswamy v C.K. Jaffer Sharief* (1994) (Supp) (3) S.C.C. 170 at 185; *PUCL v Union of India* 2003 (3) SCALE 293 at [60]; *Gujarat University v N.U. Rajguru* (1987) (Supp) S.C.C. 512; *Anukul Chandra Pradhan v Union of India* (1997) 6 S.C.C. 1; *Rama Kant Pandey v Union of India* (1993) 2 S.C.C. 438.

<sup>17</sup> n.16 above.

<sup>18</sup> n.17 above.

<sup>19</sup> [1954] S.C.R. 892.

The Supreme Court in subsequent cases has quoted this observation as an authority on the proposition that the right to vote is a statutory right. It is submitted that the use of the observation as an authority on the status of the right to vote suffers from a fallacy of reasoning. The question in *Jagan Nath* was not the status of the right to vote nor remotely related to it. The question related purely and squarely to procedural law and it is in this context that the Supreme Court observed that an election petition is a statutory proceeding. Such an observation, it is submitted, has no relevance to the question of the nature of right to vote; nor can the observations made in this particular context be set out as laying down a general law.

In *Jyoti Basu v Debi Ghosal*,<sup>20</sup> the question which confronted the Supreme Court was whether the concept of a proper party was relevant in an election petition under the Representation of the People Act 1951 (RPA). As in the earlier case, the issue before the Court had little to do with the substantive nature of the right to vote. Judge Chinappa Reddy in his judgment laid down the constitutional provisions and the relevant portions of the RPA and in the light of these provisions sought to analyse the question posed before them. The Court cited *Ponnuswami* and *Jagan Nath* and concluded “that the right to elect, 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.”<sup>21</sup> It is submitted that the fundamental observation of the learned judge was fundamentally flawed. Why did the Judge make an observation on the status of the right to vote? It is important to ask the question: how could *Jagan Nath* be regarded as an authority having precedential value on the issue of the nature of the right to vote when the question itself had never been posed before the judges deciding the case? The ratio of *Jagan Nath* may have been of some application while deciding on the real issue in contention, though surely not of any relevance on an unconnected matter. It is, therefore, of little doubt that the observation to the effect that right to vote is a statutory can at best be regarded as *obiter*. The Judge held:

[The] RPA . . . provides for the delimitation of the Constituencies for the purpose of elections to the House of the People and the legislatures of States, the *qualification of voters* at such elections, the preparation of electoral rolls and other matters connected therewith.<sup>22</sup>

It is important to note the observation of the Judge that the RPA lays down the *qualification of voters*. It is submitted that that indeed is the correct position of law.

### **Representation of the People Act, s.62**

Section 62 of the RPA is entitled “right to vote” and contains five subsections, each of which prescribes the conditions under which the right

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<sup>20</sup> n.17 above

<sup>21</sup> *ibid.* at [8].

<sup>22</sup> *ibid.* at [5].

to vote can or cannot be exercised, or as the Judge rightly held in *Jyoti Basu*, it provides for the “qualifications of voters”. Article 326 of the Constitution provides that citizens shall be registered as voters, unless disqualified by law made by an appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice. The legislative competence to enact s.62 clearly flows from Art.326 of the Constitution.

Subsection 1 provides that “no person would have the right to vote unless his name appears in the electoral role of any constituency”. Subsection 2 provides that “no person shall vote if he is subject to any of the disqualifications referred in s.16 of the Act, 1950”. Subsection 3 provides that “no person shall exercise his right to vote in more than one constituency at a general election”. Subsection 4 provides that “no person shall be allowed to exercise his right to vote twice even if his name appears in the electoral role more than once” and subs.5 provides that “no person shall vote at any election if he is confined to prison, whether under a sentence of imprisonment or transportation or otherwise, or is in lawful custody of the police.” In other words, s.62 provides for five instances wherein the right to vote is *restricted* by authority of law.

Section 62, it is submitted, does not confer the right to vote, contrary to what the Supreme Court has consistently held. It does not contain an affirmation of the right to vote. On the contrary, it *assumes* the existence of such a right and prescribes conditions under which the same may be restricted. The section, in other words, is residuary in nature. Except as restricted, all citizens subject to Art.326 have a right to vote.

The only occasion when the status of the right to vote was directly called in question was in *Anukul Chandra Pradhan v Union of India*.<sup>23</sup> Section 62(5) was challenged as unreasonably restricting the right to vote and, therefore, violative of Arts 14, 19 and 21 of the Indian Constitution. The Supreme Court answered the question on a strange parity of reasoning. Observing that prisoners have no fundamental right to vote, the Court upheld the constitutionality of the statute holding that the denial of the right to vote under the Constitution amounted to a reasonable restriction.<sup>24</sup> It is of little doubt that violation of a fundamental right would be justified as a reasonable restriction only if the right is fundamental under the Constitution. From paras 1 to 8 of the judgment, Judge Verma explains why the law was reasonable. However, from paras 9 to 12, he cites precedents suggesting the right to vote is statutory. The reasoning of the Judge raises more questions than it answers. If the right to vote is indeed a statutory right, then why did he justify s.62(5) as imposing a reasonable restriction under Art.19 of the Constitution? Or was he of the opinion that the right to vote was indeed a fundamental right but found himself bound by the decisions of larger benches of the Supreme Court?<sup>25</sup> In any event, the only

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<sup>23</sup> (1997) 6 S.C.C. 1.

<sup>24</sup> *ibid.* at 5.

<sup>25</sup> Unlike the practice of the US Supreme Court, in India all judges do not sit together as a bench to decide every case. The bench strength of judges is often determined by the relative importance of the issues involved in a case. Consequently, smaller benches of judges are bound by the opinions

question that the case directly answered was that the right to vote was not a fundamental right, that too having justified the restriction as reasonable, thereby tacitly accepting the right as a fundamental one. However, it is undeniable that none of these decisions had considered the status of the right to vote as a constitutional right, though not a fundamental one.

Since *Kesavananda Bharati v State of Kerala*,<sup>26</sup> the Supreme Court has consistently held democracy to be a part of the “basic structure” under the Indian Constitution.<sup>27</sup> Democracy, according to the Court, is a fundamental pillar of the Constitution that cannot be amended, repealed or abrogated. It is beyond the constituent power of the Parliament to tamper with the democratic features of the Constitution. Therefore, no constitutional amendment would be valid if it sought to destroy or deprive the Constitution of its democratic foundations.

If the right to vote were a statutory right, as the Supreme Court has consistently held, it would take no more than a repeal of s.62 of the RPA to warrant the end of democracy in India. What is left of democracy without a meaningful right to vote? Evidently, such an amendment would be a statutory amendment, subject only to the limitations prescribed under Arts 245 and 246 of the Indian Constitution. In *Indira Nehru Gandhi v Raj Narain*,<sup>28</sup> Ray C.J. held for the majority that the legislative powers of the Parliament are not subject to the test of basic structure.<sup>29</sup> The majority suggested that while a constitutional amendment could be challenged as violative of the basic structure, it was not permissible to challenge the constitutionality of a statute as violative of the basic structure.

Rightly or otherwise, constitutional law as it stands does not make ordinary law-making power under the Indian Constitution subject to the basic structure limitations. And this presents a strange anomaly. It has already been noted that the right to vote, if it emanates from s.62, as the Court says it does, can be repealed in the exercise of ordinary law-making power. This ordinary lawmaking power, according to the majority opinion in *Raj Narain*,<sup>30</sup> is not subject to the limitations of basic structure. Therefore, democracy, though it cannot be repealed, amended or abrogated in pursuance of the constituent power vested in the Parliament under Art.368 of the Constitution, may be achieved by a simple statutory amendment. In other words, if the Court is right on the proposition that the right to vote is a statutory right, then what could not have otherwise been achieved by a constitutional amendment can be achieved by a statutory amendment. Does Indian democracy stand on the strength of a statute?

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rendered by larger benches on the same issues. In practice, decisions of smaller benches when contrary to the opinion of larger benches have been held as *per incuram* in law.

<sup>26</sup> (1973) 4 S.C.C. 225.

<sup>27</sup> *ibid.* at [292].

<sup>28</sup> (1975) (Supp) S.C.C. 1 at 80.

<sup>29</sup> *ibid.* at [133].

<sup>30</sup> n.30 above.

<sup>32</sup> n.6 above.

### ***Peoples Union for Civil Liberties v Union of India***

In *Peoples Union for Civil Liberties v Union of India*,<sup>32</sup> the principal question was the constitutional validity of ss.33A and 33B of the RPA. It was in this context that the question regarding the status of the right to vote arose for consideration. Judge P.V. Reddi laid down two clear propositions in his judgment. First, that the right to vote is a constitutional right. Secondly, the casting of a vote in favour of a candidate amounts to an expression of the voter's opinion, and that final stage marks the accomplishment of the freedom of expression of the voter, within the meaning of Art.19(1)(a) of the Constitution. He held that none of the previous decisions of the Supreme Court had considered the question whether the citizen's freedom of expression was involved in the right to vote. Accordingly, he rejected the Solicitor General's argument that the case be referred to a larger bench of the Supreme Court. It is open to doubt whether such reasoning is entirely correct as it is undeniable that the Supreme Court had earlier, whether by way of ratio or otherwise, consistently held that the right to vote was a statutory right. Speaking for a three-judge bench, Judge P.V. Reddi could not have differed from the law earlier laid down by larger benches.

In any event, it is not easy to identify what the Supreme Court in this case had finally to say on the status of the right to vote under the Indian Constitution. Judge Shah clearly agreed with the law laid down in previous cases that the right to vote was a statutory right. Judge P.V. Reddi, as noted above, disagreed. For him, the right to vote was a constitutional right. Judge Dharmadhikari, in his short opinion held that he agreed with conclusions (A) to (E) in the opinion of Judge Shah and conclusions (1), (2), (4), (5), (6), (7) and (9) in the opinion of Judge P.V. Reddi. Judge Shah gave five conclusions and Judge Dharmadhikari agreed with *all* of them. Therefore, it may not be erroneous to suggest that he agreed with Judge Shah that the right to vote was a statutory right. Judge Reddi gave nine conclusions and Judge Dharmadhikari agreed with all except (3) and (8). Judge Reddi in his second conclusion stated that the right to vote was a constitutional right. Evidently, Judge Dharmadhikari agreed with this conclusion too. Effectively, Judge Dharmadhikari has expressed the view that the right to vote is both a constitutional and statutory right, while each of the other two judges has held the right as either statutory or constitutional.

### **Conclusion**

Judicial attitudes on the status of the right to vote under the Indian Constitution have been discouraging. This can largely be attributed to the tendency of the Supreme Court to make stray remarks that are unwarranted by the facts of cases and issues posed before them. A refusal to recognise the right to vote as a constitutional right is a threat to the very institution of democracy. Adult suffrage in Art.326 is self-explanatory and a clear repository of the right to vote. The Court has consistently and fundamentally erred in holding (more often than not unnecessarily) that the right to vote finds its foundations in s.62 of the RPA. If this reasoning



was true, the representative character of Indian democracy could be repealed by a mere statutory amendment. For without the right to vote, there cannot be representative democracy. Probably what the Supreme Court meant in holding the right to vote to be a statutory right was that the right does not have any other content than what is expressly provided for. To that extent, the right to vote may be regarded as statutory, *i.e.* the content of the right may be regulated by a statute but not the right *itself*. However, it must be appreciated that it is one thing to say that the right is statutory; it is totally different to suggest that the content of the right is statutory.

The opinion of Judge Reddi is a welcome change. For the first time, the right to vote has been regarded as having foundations in the text of the Constitution. At the same time, it is undeniable that the opinion, though correct, may not be valid in the strict sense of the term: it stands in direct contradiction to the opinion of large benches of the Supreme Court. The best way forward may indeed be to refer the matter to a larger bench. However, at least there is now some judicial recognition of the status of the right to vote as a constitutional right. There is also sufficient justification to argue that the primary content of Art.326 including the right to vote is part of the basic structure. In other words, no constitutional amendment can amend, repeal or abrogate the primary content of Art.326. To that extent, the right to vote is safely secured.

If the Indian Supreme Court does not find this reasoning adequate, bearing in mind the observation in *Raj Narain* that the constitutionality of a statute cannot be challenged as violative of the basic structure, would the Supreme Court regard a statutory amendment repealing the right to vote as constitutional presumably because it violates no provision of the Constitution? And if the answer to the question is in the affirmative, it only begs the question whether Indian democracy is dependent on a statute.

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