

# **HUMAN RIGHT TO VOTE IN INDIA – THE ROLE OF LAW**

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## **ABSTRACT**

*Right to vote is a human right of every citizen. Political Rights form a distinct category of Human Rights. Right to vote, right to contest at elections and the right to hold public office are considered important political rights. Beginning with the Universal Declaration on Human Rights 1948 to the Convention on the Rights to Persons with Disabilities, 2006 this right has been recognized for all citizens of a country. Popular sovereignty is echoed in the opening words 'We the Peoples of the Nations...' of the Preamble to the United Nations Charter.*

*Indian Constitution declares itself as democratic republic. Supreme Court of India has recognized 'democracy' as one of the basic features not amenable to abrogation. Fundamental Rights part and the Directive Principles part of the constitution can be seen as the human rights conscience of our Constitution. But right to vote is not found therein.*

*Part XV of Indian Constitution which deals with elections and the Representation of People Acts 1950 and 1951 and various other provisions of the constitution laying down the qualifications, conditions and the like form the electoral law of India. The purpose of this paper is to examine the right to vote in the international human rights law and its guarantee in the legal frame work of India. The focus will be on how far is the right to vote under Indian law*

*\*universal*

*\*equal ie., non discriminatory*

*\*free in expression-secret ballot and*

*\*periodic in expression-periodic elections.*

*This close and critical study will help in understanding the extent of legal protection of the right to vote in India and shed light in the path towards betterment.*

"We the peoples of the Nations" begins the United Nations Charter. The principle of popular sovereignty is echoed therein. One man, one vote, one value is acclaimed as the greatest democratic ideal. Human rights are seen as a guarantee against tyranny & oppression<sup>1</sup> This guarantee rests on the pillar of political rights : the right to vote, the right to contest at elections and the right to hold public office.<sup>2</sup> The political rights are recognized in all major international instruments on human rights-both universal as well as regional.

The purpose of this paper is to examine the right to vote in the international human rights law and its recognition within the legal framework of India.. This will help in understanding the extent of legal protection of the right in India and the path towards betterment.

## **Right to vote under International Human Rights instruments – Universal and Regional**

UDHR, 1948 recognizes the right to vote. Everyone has the right to take part in the government of his country directly or through freely chosen representatives. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic

& genuine elections, which shall be by universal & equal suffrage and shall be held by secret vote or by equivalent free voting procedure.<sup>3</sup>

The International Convention on Civil and Political Rights, 1966 recognizes the right in more categorical terms.

Article 25 Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2<sup>4</sup> and without unreasonable restrictions:

(a) ....

(b) To vote & to be elected at genuine periodic elections which shall be by universal & equal suffrage & shall be held by secret ballot guaranteeing the free expression of the will of the electors.

(c) ....

International Convention on the Elimination of All forms of Racial Discrimination, 1966, recognizes the duties of the state parties to guarantee without distinction as to race colour, or national or ethnic origin the right to vote<sup>5</sup> Convention on the Political Rights of Women, 1952 recognizes right to vote for women on an equal footing with men. The Convention on the Elimination of All forms of Discrimination Against Women 1969 casts duties on State to eliminate discrimination & ensure equality to women on equal terms with men in respect of the right to vote in all elections & public referenda<sup>6</sup>

The Right to vote of the disabled persons is protected. Convention on the Rights of persons with Disabilities 2006, lays down that persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>7</sup> This convention mandates that state parties shall guarantee to persons with disabilities the right to vote ensuring that voting procedures, facilities and materials are appropriate, accessible & easy to understand & use. Disabled may be allowed at request assistance in voting by a person of their own choice.<sup>8</sup> It is interesting to note that although the civil rights and socio economic rights of children are protected, the Convention on Rights of a child, 1989 does not recognize right to vote of children & also the other political rights.

Notable regional arrangements for the protection of human rights have emerged. These have also recognized the right to vote. European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 incorporates the right to have 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.<sup>9</sup> American Convention on Human Rights 1969 recognizes the equal right to vote & free expression of will. It also recognizes the authority of the state to regulate the right by law on the basis of age, nationality, residence, language, education, civil & mental capacity or sentencing by a competent court in criminal proceedings.<sup>10</sup> African Charter on Human Rights & People's Rights, 1981 also seeks to protect the right to vote of every citizen.<sup>11</sup>

Right to vote is thus a well entrenched human right under International Human Rights law both Universal and Regional. The essentials of the right are

1. Available to all citizens (universality)
2. Without discrimination (equality)
3. Guarantee of free expression (secret ballot)
4. Guarantee of periodic expression of will (periodicity)

If you destroy the right to elect the representatives in a free & fair election, the very concept of a civil society will be destroyed forever.<sup>12</sup>

## Human Right to vote under Indian law

The people of India have declared their sovereignty and have proclaimed India as a 'democratic state' in the preamble to the Constitution of India. Supreme Court of India has laid down that 'democracy' is a basic feature of the Constitution and therefore beyond the amending powers of the Parliament.<sup>13</sup>

Fundamental rights and the Directive Principles of State Policy under the Constitution of India are considered to be the foundation stone of human rights jurisprudence in India. The principle of equality is our preambular promise and is also enshrined in the Fundamental Rights. Political rights to vote and contest at elections in terms similar to international human rights instruments are not incorporated in the Fundamental rights Part of the Constitution, although Right to hold public office to all citizens is guaranteed under Article 16 of Fundamental Rights Part. But, in substance, guarantee of right to vote is found in Part XV of the Constitution titled "Elections". The Committee on Fundamental Rights of the Constituent Assembly recommended that the independence of the elections should be regarded as a fundamental right and necessary provisions should be made in this regard. But the Assembly considered that even though it is important its place should be somewhere else and ultimately the Drafting Committee put it in a separate chapter.<sup>13a</sup>

Constitution and the Representation of People Acts, 1950-1951 provide for the entire electoral law of India.

**Universality and Equality:** Constitution of India stipulates that there shall be only one general electoral roll for every territorial constituency. No person shall be ineligible for inclusion in the electoral roll on grounds of religion, race, caste or sex.<sup>14</sup> Every citizen who is not less than eighteen years of age<sup>15</sup> shall be entitled to be registered as a voter unless disqualified under the Constitution or any law made by the appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice<sup>16</sup> This provision has been hailed as the fountain spring of India's democracy.<sup>17</sup> At one stroke all undemocratic qualifications have been removed. The Supreme Court unfortunately refuses to accept the right to vote as a civil right under the Constitution and has dumped it as a creature of statute subject to limitations imposed by it.<sup>18</sup>

**Disqualifications to vote:** The equal right to vote is directly governed by Ss. 16 & 19 of 1950 Act & Ss. 11A & 62 of the 1951 Act. Section 16 disqualifies a person from registration in an electoral roll who is not a citizen of India or is of unsound mind or is disqualified for election offences/corrupt practices. Also, after registration if any person becomes disqualified his/her name shall be struck off from the rolls. Section 19 lays down minimum 18 years of age & ordinary residence in the constituency as conditions for registration. Laying down the disqualifications for voting, S.11A disqualifies for six years from the date of conviction for conviction under S.171 D or S.171F, Indian Penal Code<sup>19</sup> or under S.125 or Sec. 135 or S.136 (2) (a) of 1951 Act from the date of conviction and upto six years for disqualification for election offences under S.8A, 1951 Act.

Section 62, 1951 Act deals with right to vote. Every person who is entered in the roll of a constituency is entitled to vote in that constituency. A person suffering from disqualification cannot vote. Every person entitled to vote, can vote only in one constituency and only once at one election. Section 62 (5) disallows a person to vote at an election if he/she is confined in a prison; the confinement may be under a sentence or in the lawful custody of the police. This disenfranchisement will not apply to those confined under any preventive detention law.

The Constitution identifies disqualification only on grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice. Section 62(5) disenfranchises all persons in prison including the under trials & those in police custody. This is against Article 326, the letter

& spirit. Confinement in prison does not involve loss of citizenship. Under trials have a right to be presumed innocent until the guilt is proved.<sup>20</sup> Arbitrary arrest & confinement have become very usual and they can negate the right to vote. Delay in trials have become routine although right to speedy trial is recognized<sup>21</sup> Under trials who cannot furnish bail are unreasonably discriminated and their right to vote is deprived. A person under trial for murder who is on bail can vote but a person arrested for loitering in public place at odd hours cannot if he cannot afford bail. Parliament has abdicated its responsibility of formulating the policy on disqualification on the ground of conviction. S.62(5) has been upheld and the plea that all under-trial prisoners should be extended the right to vote dismissed by the Supreme Court<sup>22</sup> This judgment will have to be reconsidered<sup>23</sup> & the Parliament shall lay down by law, in detail, the disqualification due to conviction. Number of years of disqualification shall suit the nature & gravity of the offence.

It is quite strange to allow people with criminal charges to contest at election but disallow such persons from voting if they are confined in prison. It may be recalled that in the trust vote on 22 July 2008, convicted members voted in the Parliament on the ground that their appeals were pending in the higher courts. They were released from jail for the purpose of voting. The decision of the Supreme Court in Sanjay Dutt v. State of Maharashtra<sup>24</sup> is a glimmer of hope. Accused before the Special Judge charged under the Arms Act and Terrorist And Disruptive Activities(prevention) Act, Sanjay Dutt was convicted and sentenced to six years rigorous imprisonment. His petition under Section 389 of Cr PC for suspension of conviction and sentence pending final hearing of the appeal to enable him to contest election was dismissed. The court was of the opinion that in the absence of exceptional circumstances the power to stay cannot be exercised.

**Genuine Elections & Secret Ballot :** Elections shall be genuine & not farce. Constitution of India ensures free, fair & impartial elections by establishment of Election Commission as a constitutional body to control, direct & superintend the conduct of all elections.<sup>25</sup> The Commission is autonomous and insulated from the executive. Supreme Court has strengthened the role of Election Commission by recognizing its power to scrutinize the election expenses incurred by political parties & the sources of such expenses<sup>26</sup> and its power to demand information on assets, criminal antecedents & educational qualification of candidates contesting elections.<sup>27</sup>

Nexus between Election Commissioners and politicians/political parties can endanger the Election Commission's role. Media exposes on Mr. Navin Chawla's affinity to Congress and subsequent developments indicate the need to tighten the rules insulating the Commission from the Executive. Chief Election Commissioner enjoys a security of tenure similar to that of a Supreme Court Judge but the Constitution fails to lay down the qualification(s) for the post. The Constitution should lay down qualifications for persons to be appointed in the Commission. Further the appointments should be in consultation with the opposition party and other major political parties.<sup>28</sup> the Supreme Court has asserted its power of review over decisions of the commission to postpone elections etc. on grounds of Law & Order situations.<sup>29</sup> This review can prevent & also protect against politically coloured/ favoured decisions by the Commission.

The principle of free and fair elections has been engrained in Article 25, ICCPR in terms of secret ballot guaranteeing free expression of will of the people. Secret ballot is essential to ensure free participation & expression by the people & to rule out victimization on the basis of their votes. Although Constitution has prescribed secret ballot in the election of President & Vice-President of India.<sup>30</sup> It remains silent as to elections to the Lok Sabha, Rajya Sabha & State Legislatures. This void is filled up by Sections 55 & 128 of the 1951 RPA. S.55 says that at every election, poll shall be taken by ballot, which is not open, except at the election to fill seats in the Rajya Sabha. S.128 recognizes the duty to maintain secrecy of voting and punishes for breaches.<sup>31</sup>

**Periodicity:** Constitution of India provides for a parliamentary form of government both at the centre & at the states. The term of the Lok Sabha, state legislative assemblies, the panchayats &

municipalities is 5 years.<sup>32</sup> Rajya Sabha is a continuing body; 1/3 of its members retire every 2 years.<sup>33</sup> 42nd Constitutional Amendment Act amended Articles 83(2) & 172(1) and increased the duration to six years. But 44th Constitutional Amendment Act restored status quo. The duration of the Parliament & the State Legislative Assemblies may be extended by Parliament by Law for a period not exceeding one year at one time during a period when a Proclamation of national emergency under Article 352 is in operation. However it shall not exceed in any case beyond a period of six months from the date the Proclamation of Emergency has ceased to operate. People of this country shall express their mandate as early as possible. Any constitutional amendment diminishing the guarantee of periodicity is most likely to be struck down by the Supreme Court as threatening the basic principle of democracy.

President can on the advise of the Prime Minister dissolve the Parliament before the term and announce general elections. Constitution lays down no hard and fast rules on the question of such dissolution & leaves it to conventions & circumstances. Prime minister can ask for dissolution when he suffers due to slender majority & seek the fresh mandate of the people<sup>34</sup>. In respect of the state legislatures as well, the Governor can dissolve the assembly. In our federalpolity, Centre has powers to dismiss the State Government and dissolve the legislative assembly using emergency powers. On the grounds of failure of the constitutional machinery in the states, this drastic power can be used. The judiciary has asserted its authority to nullify a proclamation issued under Art. 356 and reinstate the government in case of misuse.<sup>35</sup> Right to vote would be of little meaning if a democratically elected government can be thrown out of power by misuse of constitutional authority.

**Right to information of voters :** Voters require proper and adequate information about the contestants in the election if they have to meaningfully cast their votes. Criminalisation of politics has become a grave problem afflicting our democracy. Law Commission's suggestion that the persons charged with serious offences be disqualified from contesting the election and the Election Commission's expression of concern over criminalisation of politics have not been acted upon by the government and Parliament.<sup>36</sup> Judiciary has ruled that the Election Commission must make it mandatory for the candidates contesting elections to give details of –

# conviction, acquittal, discharge of any offence, punishment

# pending accusations / charges

# assets

# liabilities, government dues

# educational qualification.

Holding right to information an essential component of free speech,<sup>37</sup> the Supreme Court recognized the right of the voters to know the candidates sufficiently enough to make the right choice. Now the Representation of People Act 1951 has recognized a duty on the candidates contesting elections to provide information as to criminal convictions and accusations.<sup>38</sup> The applicability of Right to Information Act 2005 against individual MPs or MLAs has not been accepted by the Central Information Commission.<sup>39</sup>

Universal right to vote cannot by itself guarantee universal participation through voting. Fundamental duties of citizens<sup>40</sup> in the Constitution is just a tokenism and even that does not include duty to vote. Disillusioned youngsters, beauty conscious women who are worried about the indelible ink, and working lot who look upon election day as a day of rest have dishonored the divinity in the human right to vote. Indian democracy believes that the 'little Indian' is all capable. True capability requires education and an awakening, as Mahatma Gandhi stressed, about the vastness and greatness of this country. Citizenship is the greatest of all offices in the polity of any country. Right to vote can establish a popular government which in turn can ensure welfarism and good governance.

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### Notes and References

1. Preamble to UDHR, 1948
2. See, The Convention on Political Rights of Women, 1952
3. Article 21, UDHR
4. Article 2 (1) mentions the following distinctions- race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
5. Article 5
6. Article 7 a
7. Article 1
8. Article 29
9. Article 3, protocol 7
10. Article 23
11. Article 13.
12. P. Chidambaram, The Citizen & the Rule of Law, in Rule of Law in a Free Society Ed. N.R.Madhava Menon, Oxford University Press, 2008, 10 at p.12
13. Keshavanandha Bharathi v State of Kerala, AIR 1973 SC 1461; S R Bommai v Union of India, AIR 1994 SC 1918
14. Article 325
15. Constitution (61st Amendment) Act 1989 brought down the age from 21 years.
16. Article 326
17. M.Y. Pylee, India's Constitution, Asia Publishing House, 1979.
18. See, Ponnuswami AIR 1952 SC 64; Jyoti Basu v. Debi Ghosal, AIR 1982 SC 983
19. Indian Penal Code, Chapter IX A-of Offences Relating to Elections - S. 171E Punishment for Bribery & S.171 F Punishment for undue influence or impersonation at an election.
20. Article 11(1), UDHR; Article 14(2), ICCPR
21. Hussainasa Khatoon v Bihar, AIR 1979 SC 1360; Abdul Rehman Antulay v R.S. Nayak, (1992) 1 SCC 225
22. Anukul Chandra Pradhan v UOI, AIR 1997 SC 2814.
23. For a criticism of the judgment read, M.P. Jain, Indian Constitutional Law, 2007, Wadhwa pp 804, 805.
24. 2009 (4) UJ SC 2036; MANU/SC/0492/2009
25. Article 324
26. Common Cause v UOI. (1996) 2 SCC 152

27. UOI v. Association for Democratic Reforms (2002) 5 SCC 320.
28. Former CEC Gopalaswami wrote to the President such suggestions. See Indian Express p.11 dated 5th Feb 2009.
29. Digvijay Mote v UOI, (1993) 4 SCC 175
30. Articles 55 & 66
- 31 Punishment is imprisonment for a term which may extend to 3 months or with fine or with both.
32. Articles 83 (2), 172(1), 243-E, 243-U
33. Article 83(1)
- 34.For a discussion on the conventions see, H.M. Seervai, Constitutional Law of India, Universal Law Publishing Co.2004 Vol I
35. S. R. Bommai v UOI, AIR 1994 SC 1918
36. Law Commission 170<sup>th</sup> Report(1999)
37. Art.19(1)a recognizes freedom of speech and expression of all citizens.
38. 2002 Amendment Act to RPA introduced S. 33A:Right to information
39. CIC judgment : Girish Chandra Mishra v. Sonia Gandhi, dated 10.12.09 from [www.cicindia.org](http://www.cicindia.org) (19.01.10)
40. Art. 51A

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