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ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

W H I T E B L A C K
L E G A L

RIGHT TO VOTE AS A FUNDAMENTAL RIGHT

AUTHORED BY - SHUBH THAKUR

ABSTRACT

The right to vote is the cornerstone of democracy, serving as a fundamental mechanism for citizens to express their political preferences and influence decision-making processes. It is a fundamental human right that empowers individuals to participate in the governance of their societies. The significance of the right to vote cannot be overstated, as it encapsulates several crucial aspects of democratic societies. The right to vote ensures that all citizens, regardless of their socio-economic status, race, gender, or other characteristics, have an equal opportunity to participate in the political process.

Free and fair elections and representative democracy, of which voting is an essential part, have been held, by a catena of judgements of the Supreme Court, to a part of the basic structure doctrine given by the *Kesavananda Bharti* case¹. The importance of the right to vote has never been disregarded by any court, the discrepancy however lies between the various judgements have been upon the nature of the right, that is, whether the right to vote is a statutory right, a constitutional right or a fundamental right. This article shall be dealing with the issue of the nature of right to vote and the ambiguity present regarding the same, and also suggest reasons as to why the right to vote be regarded as a Fundamental Right.

CONSTITUTIONAL PROVISIONS AND THE REPRESENTATION OF THE PEOPLE'S ACT, 1951

The constitution of India under Article 326² provides for the right to vote to every citizen who is 18 years old or above for the elections to the House of People and State Legislatures. The Article further lists four grounds on which restrictions can be imposed on the exercise of the right to vote, which are: non-residence, unsoundness of mind, crime or corrupt or illegal practices. Further, Articles 327³ and 328⁴ provide the Parliament and the State Legislatures, respectively, the powers to make

¹ (1973) 4 SCC 225

² Indian Constitution, *Article 326*

³ Indian Constitution, *Article 327*

⁴ Indian Constitution, *Article 328*

provisions for regulation of the conduct of elections.

The Parliament under Article 327 enacted the Representation of the People's Act, 1951 in order to regulate the voting process in the country. Section 62⁵ of the RPA provides for the Right to Vote for the citizens of; restricted by the general grounds for restricting the right which have been mentioned in Article 326 and other restrictions such as being allowed to vote from a single constituency.

NATURE OF THE RIGHT

The Judiciary has time and again interpreted the nature of the right to vote in a catena of judgements while dealing with varied set of issues. The article presents various judgements in which the Indian Judiciary has interpreted the nature of the right to vote. Earliest judgements have interpreted the right to vote as simply a statutory right. The Supreme Court in *Jyoti Basu and Others vs Debi Ghosal and Others*⁶, while dealing with a challenge to the High court rejecting an application in an Election Petition to strike out the names of certain parties from the array of parties, held the right to vote to be statutory right; “. A 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. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election.”

Similarly, the Supreme Court in the case of *Mohan Lal Tripathi vs. District Magistrate, Raibraally and others*⁷ while dealing with a case wherein the appellant who was elected directly under Section 43 of the U.P. Municipalities Act was removed by a no-confidence motion. It was his contention that his removal was undemocratic as it was sought to be done by a smaller and different body than the one that elected him. The court in this case again held the right to vote to be a statutory right, not a natural and absolute right, “...But electing representatives to govern is neither a ‘fundamental right’ nor a ‘common right’ but a special right created by the statutes or a ‘political right’ or ‘privilege’ and not a ‘natural’, absolute’ or ‘vested right’.”

However, the Supreme Court diverged from its earlier opinions regarding the nature of the right to vote. The Supreme Court in the case of *People's Union for civil Liberties (PUCL) and Another vs. Union of India and Another*⁸, where it held the right to vote to be a constitutional right. The court was dealing with the nature of the right to vote, and to know the credentials of the

⁵ The Representation of the People's Act, Section 62

⁶ 1982 (1) SCC 691

⁷ (1992) 4 SCC 80

⁸ (2003) 4 SCC 399

politicians standing for the elections. “With great reverence to the eminent Judges, I would like to clarify that 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, the right has been shaped by the statute, namely the RP Act. It is not very accurate to describe it as a statutory right, pure and simple.”

After a decade, the Supreme Court again in another judgement while dealing with the case of *People's Union for Civil Liberties v. Union of India*⁹, aka the second PUCL case, while also referring to the other then-recent judgements on the similar lines, the court held the right to vote to be a statutory right. “The contention of the petitioners in *Kuldip Nayar*¹⁰ was that majority view in *People's Union for Civil Liberties*¹¹ held that right to vote is a constitutional right besides that it is also a facet of the fundamental right under Article 19(1)(a) of the Constitution. It is this contention on which the Constitution Bench did not agree too in the opening line in para 362 and thereafter went on to clarify that in fact in *People's Union for Civil Liberties*, a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression. Thus, there is no contradiction as to the fact that right to vote is neither a fundamental right nor a constitutional right but a pure and simple statutory right.”

The Judiciary by way of its varied judgements has created a distinction between the right to vote and the freedom to voting with in many judgements regarding the right to vote to be a statutory or a constitutional right and the freedom to vote to be a facet of the right to express guaranteed under Article 19(1)(a). In other words, the freedom of expression is attracted when the voter goes to the polling booth and casts his vote, 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.

However, the Supreme Court in its very recent judgement in 2023 in the case of *Anoop Baranwal Vs. Union of India*¹² has not only held the right to vote to be a basic feature of the constitution, but also held it as a fundamental right guaranteed under Article 19(1)(a)¹³ of the Constitution. The court was dealing with the issue of whether the current process for appointment of the officials in the Election are transparent in nature, and whether there is a legislative vacuum

⁹ (2013) 10 SCC 1

¹⁰ (2006) 7 SCC 1

¹¹ Supra Note 9

¹² (2023) 6 SCC 161

¹³ Indian Constitution, Article 19(1)(a)

for the implementation of Article 324(2)¹⁴ of the Constitution. “68. The right to take part in the conduct of public affairs as a voter is the core of the democratic form of government, which is a basic feature of the Constitution. The right to vote is an expression of the choice of the citizen, which is a fundamental right under Article 19(1)(a). The right to vote is a part of a citizen's life as it is their indispensable tool to shape their own destinies by choosing the government they want. In that sense, it is a reflection of Article 21. In history, the right to vote was denied to women and those were socially oppressed. Our Constitution took a visionary step by extending franchise to everyone. In that way, the right to vote enshrines the protection guaranteed under Article 15 and 17. Therefore, the right to vote is not limited only to Article 326, but flows through Article 15, 17, 19, 21.”

This varied set of judgements, among others, by the Indian Judiciary has created an ambiguity regarding the nature of the right to vote, as to whether it is a fundamental right, a constitutional right or a statutory right.

THE WAY FORWARD: WHY VOTING A FUNDAMENTAL RIGHT

Though there is ambiguity present regarding the nature of the right to vote, it is incontestable that it is indispensable for the functioning of a vibrant democracy. Voting rights ensure that the views of the citizens are represented and the principle of ‘government by the people’ is fulfilled. In many liberal democracies too, voting rights have been recognized as a basic human right. The framers of the Indian Constitution aspired the constitution to be accommodative with the changes in the needs of the society, they aspired to make it a ‘living document’. Similarly, the bag of Fundamental Rights is not limited in its scope, and the Indian Judiciary has time and again expanded the scope of the Fundamental Rights especially under Article 21. This article further explains the reasons why the right to vote should be given the status of Fundamental Right.

1. The Right to Vote and the Historical Perspectives

Initially during the preparation of the draft constitution, the right to vote was formulated to be a part of the fundamental right. There was a huge consensus amongst the constitution-makers that the universal adult suffrage should be a fundamental right and the elections should be free and fair, secretive and periodical. The fundamental rights sub-committee had also approved the inclusion of the right to vote in the chapter on fundamental rights. In their drafts prepared for the consideration of the Constituent Assembly, Dr. BR Ambedkar and KT Shah had proposed the incorporation of

¹⁴ Indian Constitution, Article 324(2)

the right to vote in the fundamental rights portion.

After the clause on the right to vote passed by the Fundamental Rights Sub-Committee and the Minorities Sub-Committee reached for consideration before the Advisory Committee, there was a serious debate on whether to keep the clause in the fundamental rights chapter or not. But this view was disagreed with by several members of the Advisory Committee. They had an apprehension that such a clause may be objected to in the Constituent Assembly by the representatives of the Princely States and opined that the right to vote should rather be given a place in any other part of the Constitution than the part on Fundamental Rights.

Based on the analysis of the Constituent Assembly Debates, the Advisory Committee's discussions initially saw it as a fundamental right. The founders only changed it from being a fundamental right to another constitutional clause because they didn't want to offend the Princely States, who they were in talks with to join a unified India. Otherwise, they had emphasized the significance of universal adult suffrage and the right to vote. We have the chance to fulfill their goal 75 years after independence by realizing what they were unable to do because of the sociopolitical conditions of their day. Following the Constitution's ratification, the princely states are now a part of various states of the Indian union in today's time, and have accepted direct election as the mode of elections.

2. Right to Vote and the Freedom to Express

Article 19(1)(a) of the constitution guarantees every citizen the freedom of speech and expression. Expression of opinion can be in many forms such as music, print media, audio-visual communication; similarly, voting is also a form of expression of opinion protected under this article. By way of voting, the voter expresses his opinion or choice by electing a political leader who represents his ideological beliefs. The right to vote is an indispensable right in any democratic society and the right to take part in the conduct of political affairs of a nation is the core of the democratic form of government, which is a basic feature of the Constitution¹⁵. The right to vote is a part of a citizen's life as it is their indispensable tool to shape their own destinies by choosing the government they want. This has been upheld by the Supreme Court in the *Anoop Baranwa* case¹⁶ and *Brajesh Singh Vs. Sunil Arora and Ors*¹⁷.

¹⁵ Indira Nehru Gandhi v. Raj Narain, 1975 AIR 865

¹⁶ Supra Note 13

¹⁷ (2021) 10 SCC 241

This being said, the right to vote is protected by Article 19(1)(a)¹⁸, and any law restricting the right to vote, except only on the grounds of reasonable restrictions, would be void and inoperable, as per the mandate of Article 13(2)¹⁹ of the Constitution. However, ‘*reasonable restrictions*’ can be imposed on the exercise of the right to vote as provided by Article 19(2)²⁰ on the grounds of Security and sovereignty of India, Friendly relations with foreign states, public order, and Decency or morality.

CONCLUSION

The right to vote is the cornerstone of democracy, serving as a fundamental mechanism for citizens to express their political preferences and influence decision-making processes. It is a fundamental human right that empowers individuals to participate in the governance of their societies. The significance of the right to vote cannot be overstated, as it encapsulates several crucial aspects of democratic societies. Voting provides citizens with a direct means of influencing public policies and decisions that affect their lives. By casting their ballots, individuals can contribute to shaping the direction of their communities, regions, and nations on issues ranging from healthcare and education to economic policies and social welfare.

The right to vote is not merely a privilege but a fundamental democratic right that underpins the functioning of free and fair societies. It empowers individuals, promotes equality, ensures representation, and strengthens the foundations of democracy. Upholding and protecting the right to vote is essential for fostering inclusive, participatory, and accountable governance.

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¹⁸ Supra Note 14

¹⁹ Indian Constitution, *Article 13(2)*

²⁰ Indian Constitution, *Article 19(2)*