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Right to Vote: Problems Faced by Migrant Workers

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ABSTRACT

The Right to vote is considered Fundamental to Democracies, millions of people are still disenfranchised, sometimes deliberately, around the world. The right to vote is not enforced or cannot be enforced by many groups of people which may include minorities, non-citizens, refugees, homeless, etc. The recent COVID-19 pandemic which led to a nationwide lockdown in India created such a situation where millions of people could not enforce or exercise their right to vote this group of people were the Migrant Workers.

The Right to vote is enshrined in the Constitution of India. Article 326 of the Indian Constitution provides for universal adult suffrage however under the current ballot system a mass of people namely the migrant workers have been disenfranchised to that end the author has hypothesized that the Migrant Workers should form a separate class of voters and having proved that there is mass disenfranchisement of this separate class of voters we must reform our ballot mechanism by extending the system of postal ballots to solve the problem of disenfranchisement.

Keywords: *Right to Vote, Migrant Labour, Constitution, Ballot.*

I. INTRODUCTION

The Right to vote is the sine qua non of any Democracy, without which our Democracies will cease to exist, it is the single most critical means through which even the poor, and the downtrodden of society might influence the decision-making of a government of a State. It is through voting that a person can see his subjectivity be reflected in the laws and policies made for his community. It is the choices we make in the polling booth that decides whether our virtues and qualities are represented.

The Right to vote is considered so fundamental to modern-day Liberal Democracies that it has been enshrined in Article 21 of the Universal Declaration of Human Rights (UDHR) which was adopted unanimously by the UNGA in 1958.

Article 21 states:

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"(1) Everyone has the right to take part in the government of his/her country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) 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 ballot or by equivalent free voting procedures."

Not just the UDHR but the Right to vote is also set down in International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights, the Charter of the Organization of American States, the African (Banjul) Charter on Human and Peoples' Rights and many other international human rights document.

India is the biggest democracy in the world with an electorate of more than 800 million people. Although the Preamble of the Indian Constitution states it as the Democratic Republic, the Right to vote enshrined in the Constitution is not a Fundamental Right, it's not even a Constitutional Right. The Supreme Court has time and time again emphasized that the Right to Vote is a legal right and subject to statutory Limitation most prominently in case of **Jyoti Basu v. Debi Ghosal² and P. Nalla Thampy Thera v. B.L. Shankar.³** What the Constitution gives is the right to be enrolled in the electorate i.e. Art. 326 and this right is to be given to any adult without any regard to gender, religion, caste i.e. Art. 325.

While the Right to vote is considered Fundamental to Democracies, millions of people are still disenfranchised, sometimes deliberately, around the world. The right to vote is not enforced or cannot be enforced by many groups of people which may include minorities, non-citizens, refugees, homeless, etc. The recent COVID-19 pandemic which led to a nationwide lockdown in India created such a situation where millions of people could not enforce or exercise their right to vote this group of people were the Migrant Workers. The zero accountability⁴ that the government has shown towards these Migrants Workers can be shown to be the direct effect of the inability of Migrant Workers to cast their vote and form a concrete electorate base whose interest must be fulfilled by the Government.

II. THE EVOLUTION OF RIGHT TO VOTE

India has been described as a Democratic Republic in the Constitution and Democracy is a

² Jyoti Basu v. Debi Ghosal, AIR 1952 SC 64.

³ P. Nalla Thampy Thera v. B.L. Shankar, 1984 AIR 135.

⁴ Sunil Prabhu, No Data On Migrant Deaths, So No Compensation: Government To Parliament, NDTV (Sept. 15, 2020 10:36 AM), <https://www.ndtv.com/india-news/no-data-on-migrant-deaths-so-no-compensation-government-to-parliament-2295409>.

basic feature of the Indian Constitution. The Right to vote has come to be considered the most fundamental of rights in a democracy, this can be seen by its incorporation in the UDHR and the ICCPR in International Law.

The right to vote although not mentioned explicitly in the Constitution is laid down in Article 325 and 326 of the Constitution, Art. 326 provide the foundation for universal suffrage. It states:

"326. Elections to 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 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 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."

["The Constitution of India (1949)" . Lok Sabha Secretariat. p. 1087. Archived from the original on 3 December 2013. Retrieved 30 November 2013.]

The Supreme Court however has time and time again emphasized that this article does not vest any extra-statutory right in any citizen i.e. it is only a statutory right and not a constitutional or fundamental right despite it being in the constitution.

The first of the many cases in which the Supreme Court has considered the question involving the Right to vote was N.P. Ponnuswami v. Returning Officer, Namakkal Constituency.⁵

In the case, the appellant, had filed for nomination in the election for the Madras Legislative Assembly from a constituency in Salem District. The Returning Officer(RO) when scrutinizing the nomination paper rejected the appellant's paper whereupon the appellant moved to High Court under Art. 226 for a writ of certiorari to quash the order of the RO. Dismissed by the High Court Application by the appellant on the basis that it had no authority to intervene in the order, By virtue of the provisions of Article 329(b) of the Constitution, Hence, the appellant appealed to the Supreme Court. Justice Fazl Ali stated 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

⁵ AIR 1952 SC 64 at 71

subject to the limitations imposed by it.”⁶ The appeal thereafter was dismissed

The Supreme Court reiterated this decision in *Jyoti Basu v. Debi Ghosal*⁷, in the case Mohd. Ismail from the Communist party of India (Marxist), fought election from a constituency in West Bengal and was elected to the Assembly. An election petition was filed by an opposing candidate Shri Debi Ghosal in the Kolkata High Court in which Shri Jyoti Basu, the then chief Minister of West Bengal, was joined as respondents along with the elected candidate. Shri. Jyoti Basu then objected in the High Court that he cannot be impleaded as a respondent in an election petition under the Representation of the People Act, 1951. This submission however was dismissed by the High Court.

Shri Jyoti Basu then filed for an appeal for striking out his name from among the respondents in the Supreme Court, the court upholding his reasoning allowed his appeal, holding that under Section 82 of the Representation of People Act, 1951 only the candidates at the impugned election could be joined as respondents to an election petition, and no one else.

The Court while contemplating the nature of the Right to Vote stated:

“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. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied.”

***Jyoti Basu v. Debi Ghosal* AIR 1982 SC 983, at 986.**

The interpretation of Right to Vote by the Supreme Court which falls short of providing both

⁶ Id.

⁷ AIR 1982 SC 983

common law and constitutional protections to the Right to vote is based on very shaky judicial reasoning.

Firstly, The decisions of the Supreme Court which put the Right to vote neither as a constitutional nor a common law right does not give regards that is due to Article 325 and 326 which combined with the fact that Free and fair election is part of the basic feature of the constitution makes the Right to Vote more substantive than a mere statutory right, "The right to vote is not the gift of the Legislature but flows from the Constitution".⁸

Given that under Article 326, a person who has achieved the age of 18 is entitled to a right to vote it seems that the right to vote does flow from the constitution. The article also provides that the right may only be disqualified on the grounds of "non-residence, unsoundness of mind, crime or corrupt or illegal practice" further Article 325 extends these protections by stating that no voter be debarred from voting on the basis of religion, race, caste or sex. This limits the power of the legislature to legislate on the right to vote, any legislation must be within the ambit of these parameters highlighted in article 325 and 326 and any law violating these parameters will be void. Secondly, under Article 239(b) which confers the right to challenge an election through an election petition it, therefore, is a constitutional right, what the legislature can do here is create a forum and procedure for deciding on an election petition.⁹ Thus, it can be inferred that the Right to vote is not simply a gift of a statute it has a constitutional grounding.

The fact that the right to vote is neither a constitutional right nor a fundamental right is a contradiction which even the Supreme Court admitted in the *Jyoti Basu v. Debi Ghosal* case it remarked "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."¹⁰

Treating the Right to vote as a mere statutory right will always make it susceptible to legislative tyranny, for example legislature might not feel that it is not obliged to protect the citizens from a wrongful removal from the electoral rolls, such deregistration of voters mainly affects the marginalized groups such as the migrant workers and given the socio-economic condition of such groups election is the only forum through which they can express their voice.

⁸ M.P Jain, *Indian Constitutional Law* 1145 (8th Ed. 2018).

⁹ *Id* at 1146.

¹⁰ *Supra* Note 3 at 986.

III. MIGRANT WORKERS AS VOTERS

“We do not have government by the majority. We have government by the majority who participate.” --**Thomas Jefferson**

The migrant worker crisis brought on due to the announcement of the COVID-19 national lockdown can be directly said to be caused by the inability of that group to cast their vote and form a concrete electorate whose interest must be served by political parties.¹¹

Circular migrants a predominantly ambulant class and distinguished from permanent migrants, who oscillate between their work state to their home state all throughout the year. A report by the National Commission for Enterprises in Unorganized Sector in 2007, reported that most of these migrants workers were lower caste, landless, and lacked formal education and that these were over-represented in this group.¹²

Their oscillation between work states and home states is usually governed by seasonal patterns of harvest, they temporarily move into the urban areas for work. Working in urban cities in other states are means by which migrants workers maximize their earnings and invest them back home.¹³This consistent mobile nature of the group is contradictory with the stationary nature of the Right to Vote.

(A) Access to Vote

Every citizen eligible to vote is registered in a single constituency in order to vote in the elections of Lok Sabha, State Election, and the Municipal elections. The Disenfranchisement faced by the migrant workers is not a denial of the right to vote as understood under Article 325 and 326 the migrant workers are entitled to vote however the current system denies them their freedom to access the Right to vote.

In the case of *People's Union of Civil Liberties v. Union of India*¹⁴ drew up a distinction between the conferring of the Right to Vote and the culmination of that right in the expression of choice by voting. The Court stated:

"Here, a distinction has to be drawn between the conferment of the right to vote on fulfilment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on

¹¹ Teesta Setalvad, The migrant's right to vote: EC must ensure optima conditions for the exercise of this freedom, *Indian Express*(July 18, 2020, 2:51 PM)

¹² Report on Condition of Work and Promotion of Livelihoods in the Unorganized Sector, National Commission for Enterprises in Unorganized Sector, 128 (2007), https://dcmsme.gov.in/Condition_of_workers_sep_2007.pdf

¹³P. Sainath. The millions who cannot vote, *Countercurrents.org*(March 15, 2004)

¹⁴ *People's Union of Civil Liberties v. Union of India*,(2003) 2 S.C.R 1136

the pedestal of 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. That is where Article 19(1)(a) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom."¹⁵

In the case, the PUCL had challenged the validity of Section 33B of Representation of People Act, 1951 which provided unless a court order or an order by the Election Commission a candidate was not bound to disclose any information other than the information required under the Representation of People Act, 1951. To which the Supreme Court held that Voters have a right under Art. 19(1)(a) to gain information about their political candidate.

The Supreme Court in 2006 elevated the "Freedom of voting" in the case of *Kuldip Nayar vs Union Of India*¹⁶ to fundamental freedom under Art. 19(1)(a) and in *People's Union for Civil Liberties* reiterated that: "freedom of voting as distinct from the right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter."

The freedoms that are guaranteed under the Constitution, in this case, the access to the right to vote, impose a duty on the government to ensure conditions that enable proper exercise of those rights in a 2019 case *Indibility Creative Pvt Ltd v. Government of West Bengal*¹⁷ highlighted this principle and ordered the West Bengal Government who had 'shadow' banned a Bengali film, *Bhobishyoter Bhoot* ('Future Ghosts'), a political satire.

The Fundamental right to access the vote is violated and the right is denied to the migrant workers in two ways

1. A migrant worker can only be enrolled as a voter in one constituency in which he 'ordinarily resides'
2. The current ballot casting system can only be accessed by migrant workers by in-person voting at constituency in which they 'ordinarily reside'.

¹⁵ Id at 417

¹⁶ *Kuldip Nayar vs Union Of India*, 2006 SC 3127

¹⁷ *Indibility Creative Pvt Ltd v. Govt of West Benga*, Writ Petition (civil) No. 306 of 2019

(B) The Problem regarding Access to vote.

Section 19 of the Representation of People Act, 1950 lays down the condition for registration in the electoral of that constituency, it states that anyone who

- a. has attained the age of 18 years on the date of registration
- b. is an ordinary resident in that constituency¹⁸

The term "Ordinarily Resident" is defined under Section 20 of the Representation of People Act, 1950 as someone who "owns" or is in possession of a "dwelling house", as is evident this definition makes the migrant workers unqualified to register in their work cities as they stay there for uncertain amount of time. Also, there is the issue of practicality which prevents the migrant workers from receiving proof of residence in their work cities, where most of them lives in temporary or makeshift housing. "Their reality is invisibilized in the requirement of documentary proof such as a passbook, rent agreement, and utility bills, none of which may be accessible to them."¹⁹

In this context, the current ballot system which requires the migrant workers be present in-person to cast the votes meaning that they would have to travel back to their home states to cast their vote which could come at great risk in both time and money as they also have to deal with many electoral issues back home a study by Aajeevika Bureau reported that Migrant workers have to deal with challenges such as "improper removal of names from electoral rolls and continued access to government schemes"²⁰

A solution is imperative as it would help the Migrant workers in providing a voice in the government of the states which they help thrive, those migrant workers who return to the same work city year after year would also get a direct voice where they experience much of marginalization.

IV. SUGGESTION

The most probable and immediate solution to protect the freedom of migrant workers to vote is through the electronically-transmitted postal ballot (ETPB), which might allow the migrant workers enrolled in the electoral roll in their home constituency to access their vote. While the ETPB system might not give political power to the migrant workers in their work state it will

¹⁸ Representation of People Act, 1950, Act No. 43 of 1951(1951)]

¹⁹ Teesta Setalvad, The migrant's right to vote: EC must ensure optima conditions for the exercise of this freedom, Indian Express(July 18, 2020, 2:51 PM)

²⁰ Political Inclusion of Seasonal Migrant Workers in India: Perceptions, Realities and Challenges, Aajeevika Bureau,7(2012) <https://www.aajeevika.org/assets/pdfs/Political%20Inclusion%20of%20Migrant%20Workers%20in%20India.pdf>

introduce them as a concrete electorate in their home states by providing participation in the election process. The political parties will then be forced to take on their cause.

Firstly there must be recognition of the Right to vote as a constitutional right that is the only way by which we can guaranteed a safety from disenfranchisement. The argument is two pronged to propose this reform, Firstly he argues that Right to vote enshrined in Article 325 and 326 flows directly from the constitution and hence cannot purely be subjected to whims of the legislature by being termed as a purely statutory right. Secondly, he argues that democracy and, free and fair election are basic structure and hence declaring right to vote as a purely statutory right will nullify that.

Currently, Section 60(c) of the Representation of People Act,1951 gives the power to the Election Commission of India to notify "classes" of voters who cannot participate in an in-person voting process, due to physical and social circumstances, in their constituency.

Once the ECI notifies the Central Government the "classes" of voters are eligible for voting through ETPB. In the ETPB system, the ballot is system-generated and protected by dual encryption which safeguards it against voter fraud. Not only is the ballot doubly encrypted it can be subject to oversight by the returning officers and other traditional ways of oversight.

There have been several notifications that have tried to introduce a new class of voters. Postal ballots were extended to defence personnel, disabled person, and senior citizens. In the 2019 general elections, 18 lakh defence personnel participated in the voting process through the ETPB system.²¹

The only challenge that lies before the EC is for the identification of circular migrant workers, though their task is made easy by the Inter-State Migrant Workmen Act, 1979. The EC must work in this direction to ensure that the Right to vote is properly exercised by the Migrant Workers.

V. CONCLUSION

Constitutional interpretation must change with societal change, in order to serve the demands of justice better. When the Constitution was still nascent, Universal Suffrage showed a commitment towards the dismantling of the subversive and oppressive economic system through voting. The universal adult franchise is not just the way through which a private citizen expresses his opinion towards the governance of his country for millions of downtrodden it is

²¹ Election Commission of India, ETPBS, eci.gov.in (Feb 18,2020) <https://eci.gov.in/it-applications/web-applications/etpbs-r7/>

the only way in which he may in a political system dominated by private capital voice his opinion. The Supreme Court's reluctance in providing common law and constitutional protections to the Right to Vote, therefore, runs contrary to the fact that this right is the only refuge and redressal mechanism a private citizen may have in this country. Regarding the right to vote and its importance, B.R Ambedkar in the First Roundtable Conference said:

"Just as the capitalist must have the power, if he is to have any constitution, to dictate how he shall live on terms of associated life with the labour, surely the labour is entitled also to have the power to regulate the terms on which he shall live with his capitalist master. It cannot be a one-sided bargain ; it must not be a one-sided bargain. If you understand the franchise in the right sense of the word, then it seems to me the franchise is something which must be regarded as the inherent right of every individual in the State; and if you understand that the franchise is the inherent right of every man or woman who is capable of understanding it, then surely you cannot make an inherent right of a people dependent upon the convenience of your administration."²²

Vol. 2, Ministry of External Affairs, Dr. Babasaheb Ambedkar Writings And Speeches, 559 (2nd ed. Hari Narke, 2014)

We saw in this paper how not guaranteeing these protections to the Right to Vote disenfranchises millions of people in this case the Migrant Workers. We also saw how merely extending the Postal Ballot system may re-enfranchise millions of migrant workers.

²² Vol. 2, Ministry of External Affairs, Dr. Babasaheb Ambedkar Writings And Speeches, 559 (2nd ed. Hari Narke, 2014)

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