

**CONSTITUTIONAL LEGITIMACY OF COMPULSORY VOTING IN INDIA:
A DEONTOLOGICAL DEFENSE IN LIGHT OF THE AUSTRALIAN STORY**

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Abstract

Generally, the practice of compulsory voting is seen, *inter alia*, as an excessive clampdown on individual liberty, which is a cornerstone of democratic societies. Hence, the popular view is that compulsory voting is not constitutionally legitimate. In that context, this thesis carries out a constitutional and moral analysis of the question whether compulsory voting is constitutionally legitimate in a democracy. This question is explored with a focus on India where, recently, there have been a few politico-legal developments regarding the viability of compulsory voting. Regrettably, there have not been any parallel academic discussions by scholars to rationalize those ongoing developments. This thesis wishes to seal that void. After thorough discussions about the said question in the Indian context along with comparative references to the Australian experience of compulsory voting, this thesis concludes that compulsory voting is constitutionally legitimate and does not unreasonably suppress individual liberty. Primarily, the thesis adopts a deontological approach to maintain that voting is a civic duty and a political right simultaneously. Hence, the right to vote does not entail the right 'not to' vote. This right is not essentially alike other personal rights like the right to freedom of religion as it entails a 'public interest' element. Furthermore, voting is the most fundamental tool of political participation that the citizenry must judiciously utilize to enhance legitimacy and representativeness of the elected government, and to hold it accountable to the real society. As the thesis's support for compulsory voting in India stems from a deontological perception rather than a totalitarian stance, it does not explicitly advocate a sanction-based compulsory voting law. Instead, the thesis proposes an amendment to Chapter IVA of the Indian Constitution (Fundamental Duties) to make voting a fundamental duty of every Indian.

1. Introduction

While leading Hillary Clinton's campaign rally for the 2016 United States ("US") presidential election, the country's former Vice-President Al Gore said "Take it from me, every vote counts...Trust me on this. You can consider me an exhibit A of that proposition. Every single vote counts."¹ Al Gore, who lost the 2000 US presidential election to George W. Bush only because of a very close margin of votes in Florida, knows the importance of voting and value of each vote better than anyone else. His statement holds true for any democratic country. Voting in elections is the paramount aspect around which any democracy functions. However, when voters do not share the same sentiment as Al Gore or due to other socio-political factors, the number of people who vote decreases, thereby causing concerns about the substance of democracy. To counter this problem of low voter turnout, some countries have implemented the practice of 'compulsory voting' in their electoral systems.² A legal system with compulsory voting makes attending the polling station and voting in elections mandatory for citizens who are eligible to vote as per the national law.

But then, everyone does not whole-heartedly welcome this electoral practice. Compulsory voting is arguably the single most debated topic within the sphere of electoral democracy. It divides scholars into two strongly opposing sides of the debate. According to American jurist Frederick William Holls³ and political scientists like Arend Lijphart⁴, Lisa Hill⁵, Jill Sheppard⁶,

¹ M.Reilly, 'Al Gore Reminds Voters That Each Ballot Counts: 'Trust Me On This'', *The Huffington Post* (August 11, 2016), http://www.huffingtonpost.com/entry/al-gore-voting-election-day_us_5821e33be4b0e80b02cca639 (last accessed April 6, 2017).

² As per the latest data, compulsory voting is practiced in 26 countries. See 'Compulsory Voting', *International Institute for Democracy and Electoral Assistance*, http://www.oldsite.idea.int/vt/compulsory_voting.cfm (last accessed April 6, 2017).

³ F.W.Holls, *Compulsory Voting*, 1 American Academy of Political and Social Science (1891) 586-607.

⁴ A.Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91(1) American Political Science Review (1997) 1-14.

⁵ J.Brennan and L.Hill, *Compulsory Voting: For and Against* (Cambridge University Press 2014); L.Hill, *On the Reasonableness of Compelling Citizens to 'Vote': The Australian Case*, 50 Political Studies (2002) 80-101.

⁶ J.Sheppard, *Compulsory Voting and Political Knowledge: Testing a 'Compelled Engagement' Hypothesis*, 40 Electoral Studies (2015) 300-307.

Scott Tyson⁷, Anthoula Malkopoulou⁸, Clara Fischer⁹, Bart Engelen¹⁰, and Justine Lacroix¹¹, compulsory voting is a good idea that enhances legitimacy of democratic governments due to higher voter turnout. For them, compulsory voting is certainly in consonance with all democratic and liberal principles. It was Arend Lijphart who pioneered a serious debate about compulsory voting in the recent decades through his work in 1997 in which he persuasively argued in favor of compulsory voting's value in upholding representative democracy. On the contrary side, which I prefer to refer as the 'liberal' side¹², several authors like Jason Brennan¹³, Annabelle Lever¹⁴, Ben Saunders¹⁵, Shane P Singh¹⁶, and Keith Jakee and Guang-Zhen Sun¹⁷ strongly oppose the idea of compulsory voting. A common argument that is raised by the liberals is that compulsory voting is a form of state coercion against individual liberty and citizens' freedom to choose whether to exercise their political rights like the right to vote. Secondly, they point out that electoral outcomes are distorted when uninformed voters are forced to vote in a compulsory voting regime.

This thesis dives into this ongoing debate regarding compulsory voting. In this thesis, the author carries out a constitutional analysis of this central research question: *Is Compulsory*

⁷ S.A.Tyson, *Information Acquisition, Strategic Voting, and Improving the Quality of Democratic Choice*, 78(4) Journal of Politics (2016) 1016-1031.

⁸ A.Malkopoulou, *The History of Compulsory Voting in Europe: Democracy's Duty?* (Routledge 2015).

⁹ C.Fischer, *Compulsory Voting and Inclusion: A Response to Saunders*, 31(1) Politics (2011) 37-41.

¹⁰ B.Engelen, *Why Liberals Can Favour Compulsory Attendance*, 29(3) Politics (2009) 218-222; B.Engelen, *Why Compulsory Voting Can Enhance Democracy*, 42 Acta Politica (2007) 23-39.

¹¹ J.Lacroix, *A Liberal Defence of Compulsory Voting*, 27(3) Politics (2007) 190-195.

¹² I use the term 'liberal' or 'liberals' in the general sense to refer to the political thought that favours the maximization of individual freedom and personal autonomy from the State.

¹³ Brennan 2014 (n 5).

¹⁴ A.Lever, *Is Compulsory Voting Justified?*, 1(1) Public Reason (2009) 57-74; A.Lever, *Compulsory Voting: A Critical Perspective*, 40(4) British Journal of Political Science (2010) 897-915; A.Lever, *Liberalism, Democracy and the Ethics of Voting*, 29(3) Politics (2009) 223-227.

¹⁵ B.Saunders, *The Democratic Turnout 'Problem'*, 60(2) Politics (2012) 306-320; B.Saunders, *Increasing Turnout: A Compelling Case*, 30(1) Politics (2010) 70-77; B.Saunders, *Tasting Democracy: A Targeted Approach to Compulsory Voting*, 17(3) Public Policy Research (2010) 147-151.

¹⁶ S.P.Singh, *Compulsory Voting and Dissatisfaction with Democracy*, British Journal of Political Science (published online on April 26, 2016), <https://doi.org/10.1017/S0007123416000041> (last accessed April 6, 2017); S.P.Singh, J.Roy and P.Fournier, *Compulsory Voting and Voter Decision Making*, SSRN (March 24, 2017), <https://ssrn.com/abstract=2889090> (last accessed April 6, 2017).

¹⁷ K.Jakee and G.Sun, *Is Compulsory Voting More Democratic?*, 129(1) Public Choice (2006) 61-75.

Voting Constitutionally Legitimate in a Democracy? Specifically, this question is analyzed to understand whether compulsory voting is compatible with Indian constitutional law principles and the country's political scenario.

Certain legal developments in India in the recent past acted as the motivation behind studying this thesis question in the Indian background. In March, 2015, the Law Commission of India published a report on electoral reforms in which it rejected the idea of compulsory voting as it was, *inter alia*, undemocratic and illegitimate.¹⁸ Following this, in August, 2015, the High Court of Gujarat stayed the operation of Gujarat Local Authorities Laws (Amendment) Act 2009 ("Gujarat Act") which had made voting in local municipal elections compulsory on the ground that the right to vote had an inherent right to abstain from voting as well.¹⁹ Further, in October, 2016, the Chief Election Commissioner of India made a statement indicating the impracticability of compulsory voting albeit encouraging high voter participation.²⁰ More recently, on January 23, 2017, the Supreme Court of India issued notice to the Union Government directing to file its reply to a writ petition that seeks to implement compulsory voting in India.²¹

1.1. Research Significance

These events have sparked an exchange of dialogues among government branches and related institutions regarding the constitutional validity of adopting compulsory voting in the world's largest democracy. But, these debates are proceeding at a superficial level. Theoretical,

¹⁸ Report No. 255: *Electoral Reforms*, ¶ 9.24, Law Commission of India (March, 2015), <http://lawcommissionofindia.nic.in/reports/Report255.pdf> (last accessed April 6, 2017).

¹⁹ Ashok K.M., 'Gujarat High Court halts State Govt.'s move to make Voting Compulsory', *Live Law* (August 21, 2015), <http://www.livelaw.in/gujarat-high-court-halts-state-govt-s-move-to-make-voting-compulsory/> (last accessed April 6, 2017).

²⁰ 'Idea of Compulsory Voting 'Not Practical', Says Chief Election Commissioner', *NDTV* (October 19, 2016), <http://www.ndtv.com/india-news/idea-of-compulsory-voting-not-practical-says-chief-election-commissioner-1476276> (last accessed April 6, 2017).

²¹ 'Compulsory vote notice', *The Telegraph* (January 24, 2017), https://www.telegraphindia.com/1170124/jsp/nation/story_132101.jsp#.WNvLeDuGPIU (last accessed April 6, 2017). The government is yet to file its response in this matter.

doctrinal, or even empirical inputs that lend substance to these debates are absent. A survey of the Indian legal or political science literature did not highlight any credible scholarly research on compulsory voting in India.²² When there is a growing discussion on any legal issue, it is vital for the legal academia to contribute to those deliberations through their writings. Therefore, this thesis aims to make a positive contribution towards sealing that ‘literature void’ by initiating a scholarly debate on the legitimacy of compulsory voting in India.

However, the most important fact that warrants a serious conversation about the need and legitimacy of compulsory voting is the alarming voter turnout trends in national parliamentary elections in India. As per the data provided by the Election Commission of India, the average voter turnout for parliamentary elections since the first election in 1951-52 hovers around 55-60% of the registered voters only.²³ Therefore, it is urgent to conduct a detailed constitutional scrutiny about compulsory voting and evaluate its necessity in India.

1.2. Comparative Dataset

As India has never experimented compulsory voting in the past, a comparative study must be made with another reliable jurisdiction that has successfully practiced the same in order to address the research question at hand more effectively. It is imperative to understand how that jurisdiction has developed the theory and practice of compulsory voting. Even though there are democratic countries like Belgium and Argentina which had introduced compulsory before others, Australia is the major modern democracy where compulsory voting has been enforced thoroughly and most efficaciously since 1924. Moreover, it is asserted that “Australia has the oldest and probably the most efficient system of compulsory voting among the established

²² The set of literatures mentioned earlier in this chapter pertain only to debates about compulsory voting in general and at a conceptual level.

²³ See http://eci.nic.in/eci_main1/GE2014/line.htm (last accessed April 6, 2017); see also the data provided by International Institute for Democracy and Electoral Assistance, <http://www.idea.int/data-tools/question-view/521> (last accessed April 6, 2017).

democracies”.²⁴ Further, Australia’s success in this regard is evident from the consistent public support for compulsory voting.²⁵ Also, more than Belgium, Argentina, or any other jurisdictions that may have profitably implemented compulsory voting, Australia stands closer to India as both are commonwealth nations with federal structures of governance and legal systems based on common law. Hence, the research question of this thesis will be examined by considering the Australian experience of compulsory voting.

1.3. Research Findings & Objectives

After a thorough analysis of the central research question using different strands of propositions, this thesis answers about the constitutional legitimacy of compulsory voting in the affirmative. The author predominantly adopts, as the thesis title suggests, a ‘deontological’ approach to defend compulsory voting. The Oxford Dictionary defines deontology as “the study of the nature of duty and obligation”.²⁶ On that front, it is argued that compulsory voting is constitutionally and morally legitimate because voting is the most fundamental civic duty of citizens who owe their duty towards other fellow beings to vote and form governments that possess maximum legitimacy and are representative of the entire society. This argument holds particular implication for India where voting turnout trends are miserably low for the standards of an established democracy. The basic argument here is that voting is both a civic duty and an individual political right equally. This approach helps to appreciate why there must be a harmonious symmetry between individual rights and democratic duties of citizens. The spirit of my argument is that in a democracy with a well-defined constitution in place, there can never be a situation where only individual rights can seek primacy eternally.

²⁴ M.Mackerras and I. McAllister, *Compulsory Voting, Party Stability and Electoral Advantage in Australia*, 18 *Electoral Studies* (1999) 217-233, 217.

²⁵ Hill 2002 (n 5) 81.

²⁶ See *Oxford Living Dictionaries* (Oxford University Press), <https://en.oxforddictionaries.com/definition/deontology> (last accessed April 6, 2017).

The thesis further concludes, *inter alia*, that compulsory voting does not suppress individual liberty and freedom of choice unreasonably. Compulsory voting is seen as a wise electoral practice required for a democratic country to become democratically legitimate in its truest sense.

With this principled approach, the thesis objective is to try and convince the Indian society that compulsory voting is not an unreasonable oppression of basic rights and freedom in a democratic country. The endeavor is to make the citizens acknowledge the dynamic value of voting in elections and to consider the exercise of their right to vote as a pious duty towards their fellow citizens. The most important issue this thesis finally considers is how can this duty-oriented culture be injected into the Indian society. Like in Australia, sanction-based legislation could be used to make voting mandatory in every election. However, after considering the principles enunciated by this thesis, and the current socio-political and legal scenario in India, the author does not encourage the use of punitive laws to embed a deontological culture of voting in India. The thesis conclusion draws inspiration from discussions in the substantive chapters and propose certain promising recommendations that complement the idea of compulsory voting as advocated by the author. Thus, the scope of this thesis is limited to that extent. It does not discuss effectiveness of sanction-backed compulsory voting laws or any other practical considerations that arise with respect to implementation of such laws in India.

Beyond the discussions concerning the main research question, this thesis aims to design an alternate nomenclature for the term ‘compulsory voting’. The idea is to develop this electoral concept more as a positive obligation rather than a compulsion and hence, in line with the underlying philosophy of this thesis.

1.4. Methodology & Structure

The methodology of this thesis is based on developing a theoretical body of arguments in favor of the legitimacy of compulsory voting conceptually as well as in the Indian context.²⁷ The author relies on primary sources like constitutions, statutes, parliamentary and constituent assembly debates, case law, and speeches. Secondary sources like books and journal articles are also used sufficiently. Further, newspaper articles are used in the study mainly in the Indian context because of the dearth of scholarly literature in the form of books and journal articles on compulsory voting in India. Thoughts presented in all the sources will be critically evaluated, validated, or rebutted in the upcoming chapters. Moreover, as compulsory voting is a subject that cuts across disciplines like law and political science, the nature of analysis will be interdisciplinary. Apart from legal literature, contributions made by political scientists will occupy a generous portion of the sources used.

The thesis structure is arranged in a simple and logical manner. Chapter 2 will present a comprehensive picture of Australia's compulsory voting system by examining the country's constitution, electoral legislation, relevant case law, and public opinions. By now, we know that compulsory voting is not practiced in India. So, Chapter 3 will sketch out India's existing legal framework about voting rights. Apart from that, Chapter 3 will look at all the politico-legal debates that have happened in India vis-à-vis the introduction of compulsory voting. Chapter 4 is the main substantive chapter that will publish the thesis's theoretical arguments backing the constitutional legitimacy of compulsory voting in India. Details from chapters 2 and 3 will be considered judiciously in Chapter 4 for the detailed analysis. Chapter 5 will conclude this thesis by proposing two recommendations in the form of constitutional and statutory amendments in India, and suggesting a new terminology for 'compulsory voting'.

²⁷ Nevertheless, empirical data will be used sparingly to justify some of the theoretical arguments.

2. Australia: An Overall Evaluation of its Compulsory Voting Model

Australia is one of the world's largest liberal democracies. Apart from that status, Australia is also credited, along with Belgium and Argentina, for pioneering the practice of compulsory voting in and around the beginning of the 20th century.²⁸ In fact, Australia is considered to have adopted and enforced the most efficient compulsory voting model in the world.²⁹ These are the precise reasons why this thesis preferred to study the constitutional legitimacy of compulsory voting in India in light of the Australian experience.

To lay down a reliable reference for analysis of the said research question, this chapter will closely look at the highly prominent Australian model of compulsory voting and its features. Before examining the current design of the legislative arrangement and constitutional principles of compulsory voting, this chapter will inform the readers about the historical origin of the same in Australia. Thereafter, the author will evaluate all the judgments pronounced by Australian courts regarding the constitutionality of compulsory voting. Finally, this chapter will take efforts to understand how the Australian citizens have responded to the system of compulsory voting.

2.1. History & Origin

In Australia, compulsory voting was implemented at the level of federal elections to the Parliament in 1924. Why did the Australian lawmakers decide to introduce it? What were the major developments that led to its introduction in 1924? Who was the mastermind behind its introduction? These are some of the basic questions this section will explore.

²⁸ International Institute for Democracy and Electoral Assistance (n 2). While Belgium was the first nation to introduce compulsory voting in 1892, Argentina and Australia did the same in 1912 and 1924 respectively.

²⁹ Mackerras and McAllister 1999 (n 24); J.Louth and L.Hill, *Compulsory Voting in Australia: Turnout with and without it*, 6(1) Australian Review of Public Affairs (2005) 25-37, 26.

Before compulsory voting saw the daylight in Australia, there was a related electoral reform that had taken place. In 1911, enrolment of eligible voters in the electoral rolls for federal elections was made mandatory.³⁰ Enrolment means the registration of citizens as voters in the electoral rolls once they have reached the minimum suffrage age set by the law. “It had the intended effect of greatly increasing the size of the electorate: in April 1910 enrolment was 2 258 482; by the time of the May 1913 federal election it had risen to 2 760 216.”³¹ Hence, even before the introduction of compulsory voting, Australians had taken a crucial step forward to democratize the Australian electorate by making it more inclusive.

During that time in the early years of the 20th century, compulsory voting was promoted by the country’s second Prime Minister, Alfred Deakin.³² Even though his proposal did not find national consensus initially, the idea of compulsory voting started growing in Australia at the state level. Compulsory voting was introduced in Australia for the first time in the State of Queensland in 1915.³³ This did not apply to federal elections and was confined only to the state elections. The main motivation behind this move was to improve voter turnout in those elections. The Government of Queensland headed by Premier Digby Denham wanted an effective method in “getting out the vote” and believed that “compulsory voting would restore a level playing ground”.³⁴

Therefore, the underlying cause for the birth of compulsory voting in Australia was the common problem faced by the most established and prominent democratic countries like India, the US, and the United Kingdom: ‘low voter turnout’. This cause of concern became more

³⁰ Mackerras and McAllister 1999 (n 24) 219.

³¹ Ibid.

³² T.Evans, *Compulsory Voting in Australia*, Australian Electoral Commission (January, 2006) 5, http://www.aec.gov.au/About_AEC/Publications/voting/files/compulsory-voting.pdf (last accessed April 6, 2017).

³³ A.Gray, *The Constitutionality of Australia’s Compulsory Voting System*, 58(4) Australian Journal of Politics and History (2012) 591-608, 591; S.Birch, *Full Participation: A Comparative Study of Compulsory Voting* (Manchester University Press 2009) 26.

³⁴ Evans 2006 (n 32).

serious with time even with respect to federal elections. While the voter turnout in federal elections of 1919 stood at 71%, it became less than 60% in 1922.³⁵ Such a drastic drop in voter turnout served as a great push towards introducing compulsory voting in federal elections as well. In fact, after 1915, the Royal Commission upon the Commonwealth Electoral Law and Administration had also suggested to make voting compulsory in federal elections.³⁶ In this backdrop, on July 16, 1924, Tasmanian Senator Herbert Payne introduced a private member's bill in the Senate to amend the Commonwealth Electoral Act 1918 ("Electoral Act 1918") by introducing compulsory voting for federal elections.³⁷ This bill was passed smoothly in both the houses of the Parliament and became a law hence, establishing compulsory voting in Australian federal elections for the first time in 1924. It must be noted that compulsory voting was introduced solely and not as a part of a wholesale electoral reform.³⁸

The effect of this electoral reform was felt instantly in the first federal election after 1924. In the federal election in 1925, voter turnout had surged massively to 91%.³⁹ If this data is compared to that in the 1903 federal election, the turnout was only 46.86% (the lowest turnout in the history of Australian federal elections) at that time.⁴⁰ Hence, it is apparent that

³⁵ Ibid; A.Twomey, *Compulsory Voting in a Representative Democracy: Choice, Compulsion and the Maximisation of Participation in Australian Elections*, 13(2) Oxford University Commonwealth Law Journal (2013) 283-312, 287.

³⁶ S.Bennett, *Compulsory Voting in Australian National Elections*, Research Brief, no.6, Parliamentary Library at the Parliament of Australia (October, 2005) 3, http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/06SH6/upload_binary/06sh63.pdf;fileType=application%2Fpdf#search=%22library/prspub/06SH6%22 (last accessed April 6, 2017).

³⁷ Ibid at 4; see also Twomey 2013 (n 35). Senator Payne introduced the amendment proposal as a private member's bill because the leading political parties were apprehensive about giving explicit backing for such a bill. They may have been cautioned by the experience of Queensland Premier Denham who lost the state election just after introducing compulsory voting in the State.

³⁸ Birch 2009 (n 33) 32.

³⁹ L.Hill, *Compulsory Voting in Australia: A Basis for a 'Best Practice' Regime*, 32(3) Federal Law Review (2004) 479-498, 481 (fn 7).

⁴⁰ Ibid. For a detailed look at the voter turnout data of Australia's federal elections since 1901, see 'Who Voted in Previous Referendums and Elections', *Australian Electoral Commission* (September, 2015), http://www.aec.gov.au/Elections/Australian_Electoral_History/Voter_Turnout.htm (last accessed April 6, 2017).

compulsory voting made a pathbreaking impact on Australian elections and the societal attitude towards voting in general upon its introduction in 1924.

2.2. Design of the Law & Principles

Having known the ‘why’, ‘when’, and ‘how’ of compulsory voting in Australia, this section will now proceed to examine the nature and features of compulsory voting in Australia. Before moving on to understand the law on compulsory voting, this thesis will highlight the nature of the right to vote in Australia. First of all, it must be noted that the right to vote is not explicitly granted to Australians in the Commonwealth of Australia Constitution Act 1900 (“Australian Constitution”). However, there are a few provisions in the Constitution that broadly guarantee the right to vote. Firstly, Section 7 (¶ 1) of the Australian Constitution states that “the people” will directly choose the senators of each State who will then represent those states in the Senate of the Federal Parliament.⁴¹ Secondly, Section 24 (¶ 1) of the Australian Constitution mandates that members in the House of Representatives of the Federal Parliament shall be directly chosen by “the people”.⁴² The constitutional scheme created by these two provisions clarifies that “the people” of the Australian Commonwealth are crucial to the functioning of the Federal Parliament and in general, the Australian democracy. The phrase “directly chosen by the people” that appears in both Section 7 and Section 24 indicates that citizens do have the democratic right to vote in elections to the Federal Parliament. Furthermore, Section 41 enhances this inherent right to vote in the form of a restriction on the powers of the Federal Parliament. Section 41 titled ‘Right of Electors of States’ guarantees that any person who has the right to vote in elections to the Parliament of any State, shall have the right to vote in federal

⁴¹ Section 7 (¶ 1), Australian Constitution:

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

⁴² Section 24 (¶ 1), Australian Constitution:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

elections as well.⁴³ This section secures that right by restricting the power of the Federal Parliament to limit that very right of the people by way of a law. On top of these constitutional provisions and their mandate, the High Court of Australia (“HCA”) has strengthened the protection of the ‘implied’ right to vote in Australia. In *Roach v Electoral Commissioner*⁴⁴, the HCA held that:

“universal adult suffrage was a long established fact, and that anything less could not now be described as a choice by the people...we have reached a stage in the evolution of representative government which produces that consequence. I see no reason to deny that, in this respect, and to this extent, the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote.”⁴⁵

In their joint judgment, Justices Gummow, Kirby, and Crennan also stressed on the importance of the Electoral Act 1918 in securing the right to vote, in the following words:

“Part VII (ss 93-97) [of the Electoral Act 1918] deals with qualifications and disqualifications for enrolment and for voting. In particular, s 93 specifies those entitled to enrolment (persons who have attained 18 years and are citizens or a member of a closed class of British subjects) and, with certain exceptions, provides that an elector whose name is so enrolled is entitled to vote at Senate and House of Representatives elections. The provisions with respect to entitlement represent the culmination of the movement for universal suffrage.”⁴⁶

Thus, the Australian Constitution and its jurisprudence evolved by the HCA have come a long way to shield the act of voting as an important right in robust terms although it is not explicitly protected.

However, due to the presence of compulsory voting, the nature of voting is multi-dimensional in Australia. The concept of compulsory voting is not constitutionalized in Australia as is the case in Belgium.⁴⁷ Section 245 of the Electoral Act 1918 codifies the law on compulsory voting. It is a complete and detailed code with 18 sub-sections. Section 245(1) of the Act states:

⁴³ Section 41, Australian Constitution:

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

⁴⁴ (2007) HCA 43.

⁴⁵ Ibid at ¶ 7 of Chief Justice Gleeson’s judgment.

⁴⁶ Ibid at ¶ 29.

⁴⁷ See Article 62, Constitution of Belgium 1831.

“It shall be the duty of every elector to vote at each election”.⁴⁸ This is the reason why voting is conceived in a multi-dimensional manner in Australia. While it is recognized as an implied right under the Australian Constitution (sections 7, 24, and 41) and the Electoral Act 1918 (Part VII of the Act), it is explicitly prescribed as a ‘duty’ under Section 245(1) of the Electoral Act 1918. Therefore, voting is a ‘duty-right’⁴⁹ in Australia and not just a right as we will see in Chapter 3 is the case in India.

The duty to vote is enforced in Australia by way of a punitive legislative design. Section 245(15) of the Electoral Act 1918 states that “An elector commits an offence if the elector fails to vote at an election”. Regarding the consequences of non-compliance with the duty to vote under Section 245(1), the law mandates a clear set of procedures and requirements. Under Section 245, it is the duty of the Australian Electoral Commission officers, after an election, to make a list of the voters who failed to vote and thereafter, send those abstainers a penalty notice.⁵⁰ At this stage, the abstaining voter has two options: a). Submit the details of circumstances which show that he/she actually voted, or b). In case he/she failed to vote, either give a “valid and sufficient reason for the failure” or “pay 20\$ as penalty”.⁵¹ Further, the mandate of sub-sections 6 to 11 of Section 245 allows up to three chances for the abstaining voter to perform any of those available options under Section 245(5) and thereby, avoid the initiation of court proceedings against him/her for the offence under Section 245(15). Finally, if the abstaining voter does not comply with the above-mentioned requirements under Section 245, the Electoral Commission officer may institute court proceedings under Section 245(16) read with Section 245(15) for the offence of failure to vote. If the matter is taken to the court, the leviable fine as per the law would be up to 50\$ i.e 30\$ more than the original fine of 20\$

⁴⁸ For the full text of Section 245 of the Electoral Act 1918, see http://www.austlii.edu.au/au/legis/cth/consol_act/cea1918233/s245.html (last accessed April 6, 2017).

⁴⁹ Hill 2014 (n 5) 155. Lisa Hill rejects the notion that voting is a waivable privilege.

⁵⁰ Section 245(2) and Section 245(3), Electoral Act 1918.

⁵¹ Section 245(5), Electoral Act 1918.

prescribed in Section 245(5).⁵² This is the overall legal framework of Section 245 of the Electoral Act 1918 that is used to enforce compulsory voting in Australia.

Interestingly, scholars view this punitive method of compulsory voting as mild and non-burdensome. It has been stressed that “The penalties in Australia for failure to attend a polling booth are fairly mild and cases of recalcitrance are handled in an orderly and predictable fashion but without zealotry”.⁵³ Moreover, the percentage of non-voters who are penalized with fines or the frequency of matters taken to the court “never exceeds 1 per cent of the electorate and is normally much less”.⁵⁴ This is a positive data that highlights the non-confrontational approach of the compulsory voting law under Section 245 of the Electoral Act 1918 towards Australian citizens.

The low rate of enforcement of sanctions and court proceedings may be attributed to the nature of exceptions that are provided to the voters for not complying with the duty to vote under Section 245(1). Although there is no conclusive definition or legal test to determine what kind of reasons will meet the condition of ‘valid and sufficient reason’ for the failure to vote under Section 245(5), other parts of Section 245 permit quite a few reasonable exemptions from the requirement to vote in each election:

- i. Section 245(4)(b): Absence from Australia on polling day;
- ii. Section 245(14): Faith in religious duty to abstain from voting; and
- iii. Section 245(17): eligible voters who live abroad, are itinerant, or is based in the Antarctic.

These are sufficiently reasonable exemptions granted mainly on the grounds of religious faith, nature of employment, and residence. Besides, even the HCA has interpreted the condition of

⁵² Mackerras and McAllister 1999 (n 24) 224.

⁵³ L.Hill, *Public Acceptance of Compulsory Voting: Explaining the Australian Case*, 46 (4) Representation (2010) 425-438, 426.

⁵⁴ Mackerras and McAllister 1999 (n 24) 224.

‘valid and sufficient reason’ broadly. In *Judd v McKeon*⁵⁵, the HCA had observed that the question whether the reasons provided for the failure to vote amount to ‘valid and sufficient reason’ will depend on the facts of each case. Nevertheless, the court highlighted certain instances that may satisfy the said requirement under Section 245:

*“Physical obstruction, whether of sickness or outside prevention, or of natural events, or accident of any kind, would certainly be recognised by law in such a case. One might also imagine cases where an intending voter on his way to the poll was diverted to save life, or to prevent crime, or to assist at some great disaster, such as a fire: in all of which cases, in my opinion, the law would recognise the competitive claims of public duty.”*⁵⁶

Hence, even though Section 245 of the Electoral Act 1918 prima facie looks like a strong sanction-based enforcement of the civic duty to vote, discussions in this section have proved that its enforcement and practical application have been careful, non-confrontational, and easy on the voters.

Another aspect of the Australian electoral system which makes the implementation of compulsory voting lighter on the citizens is the pro-active approach of the Australian State. The Australian Electoral Commission, along with its State level commissions, has always taken prudent measures to ensure that citizens are not overtly burdened on a polling day to cast their votes. Lisa Hill states that apart from providing constructive help during the first stage of voter registration, electoral commissions “provide absent voting, mobile polling, and posting voting; and ensure that elections are held on a Saturday and that polling booths are generally close at hand”.⁵⁷ This is an appreciable way of responsible functioning of the Australian electoral system. In any case, such measures definitely go a long way to make compulsory voting regimes more legitimate and acceptable for citizens.

⁵⁵ (1926) 38 CLR 380.

⁵⁶ *Ibid* at 386.

⁵⁷ Hill 2014 (n 5) 123. Hill also states that “In any given federal election, up to 500 mobile teams will visit 2,000 special hospital locations; mobile teams will visit 300 or so remote outback locations and over 40 prisons; and there will be hundreds of prepoll voting centers and around 100 overseas polling places to which approximately three tons of election-related and staff training materials will be air-freighted immediately prior to polling.”

To sum up the discussions so far, it is fairly evident that the sanction-backed compulsory voting system in Australia is well-balanced in terms of its implementation. Now it is important to evaluate whether this democracy enhancing electoral practice has had a real impact. Section 2.1. of this chapter verified that compulsory voting could substantially increase voter turnout from less than 60% to more than 90% in the federal election in 1925 itself. Notably, since then, the electoral turnout in Australian federal elections has never been below the 90% mark.⁵⁸ This is a splendid achievement for the Australian democracy. All democratic countries should dream of achieving this feat concerning democratic inclusiveness and healthy electoral participation.

Overall, the compulsory voting system in Australia reveals the significance of the Australian conception of representative democracy. “Representative democracy is one of the pillars of the Australian constitutional system.”⁵⁹ The constitutional scheme of parliamentarianism and compulsory voting upholds this facet of the Australian democracy. First of all, Section 7 and Section 24 of the Australian Constitution envisage a democratic setup in which the Federal Parliament is entirely composed of members and senators directly chosen by the people of the Commonwealth through elections. Thus, it makes the people supreme. Further, by way of compulsory enrolment⁶⁰ and compulsory voting, it is ensured that “the people” who directly choose the Parliament members constitute a democratic electorate in the sense that it is widely representative and reflects the entire voice of the real society. Besides, the consistent level of high electoral participation shown by Australian citizens⁶¹ since 1925 does complete justice to the essential ingredients of Australian citizenship i:e “inclusive participation and democratic self-rule”.⁶² Hence, it is strongly proclaimed that “On any scale that measures legislatures

⁵⁸ See the data provided by the International Institute for Democracy and Electoral Assistance, <http://www.idea.int/data-tools/country-view/54/40> (last accessed April 6, 2017); Evans 2006 (n 32) 7; Birch 2009 (n 33) 80.

⁵⁹ C.Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing 2011) 109; see also *Nationwide News Pty Ltd v Wills*, (1991) 177 CLR 1.

⁶⁰ Mackerras and McAllister 1999 (n 24) 219.

⁶¹ International Institute for Democracy and Electoral Assistance (n 58).

⁶² Hill 2002 (n 5) 82.

according to the extent they represent the choice of the people, the Commonwealth Parliament would rank among the best.”⁶³

Hence, the compulsory voting model of Australia is designed for sustaining the principle of representative and responsible democracy in Australia by ensuring that state powers are ultimately controlled by the entire people of the Commonwealth. This form of a ‘duty-right’ model of voting advocated by Australia is thus, certainly a lesson in democracy for other countries.

2.3. Case Law

This section will briefly assess the jurisprudence of compulsory voting law evolved by the HCA, the highest court in Australia. This section is pertinent because in every common law jurisdiction like Australia, the courts of law evolve substantial principles of law through judicial interpretation. Along with the constitution and legislations, these principles play a major role in determining how the laws are enforced. Therefore, it is crucial for this thesis to understand the HCA’s inclination towards the practice of compulsory voting.

The compulsory voting scheme under the Electoral Act 1918 was challenged before the HCA for the first time in 1926. In *Judd v McKeon*⁶⁴, a voter who had failed to vote in a Senate election was prosecuted for not demonstrating a ‘valid and sufficient reason’ for not performing the duty to vote. The abstaining voter argued that he considered the fact that he did not support any of the candidates listed in the ballot as a ‘valid and sufficient reason’ to abstain from voting. However, the court rejected his argument and upheld the compulsory voting requirement under the Electoral Act 1918. According to the majority judgment, in elections, the choice of voters is restricted to the choice between the listed candidates and does not extend to the choice not

⁶³ S.Ratnapala and J.Crowe, *Australian Constitutional Law: Foundations and Theory* (3rd ed., Oxford University Press 2012) 91.

⁶⁴ *Judd v McKeon* 1926 (n 55).

to vote.⁶⁵ Further, while recognizing the right to vote as a political right of the highest nature,

Justice Isaacs held that:

*“But I am equally free from doubt that Parliament, in prescribing a “method of choosing” representatives, may prescribe a compulsory method. It may demand of a citizen his services as soldier or juror or voter. The community organized, being seised of the subject matter of parliamentary elections and finding no express restrictions in the Constitution, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be...A method of choosing which involves compulsory voting, so long as it preserves freedom of choice of possible candidates, does not offend against the freedom of elections...”.*⁶⁶

The appellant’s argument that voters who have the right to vote simultaneously possess the right ‘not to’ vote⁶⁷ was also rejected by the HCA. In that context, Justice Rich held that “compulsory voting is valid. The vote is not merely a right but a duty. Every elector must discharge that duty...”⁶⁸

Thus, the challenge against the constitutionality of compulsory voting failed in *Judd v McKeon*. Remarkably, the rationale of *Judd v McKeon* has not yet been overruled and compulsory voting is still held to be constitutionally valid by the HCA. In *Faderson v Bridger*⁶⁹ as well, the HCA followed the path laid down by *Judd v McKeon* and upheld compulsory voting. However, as a relief for electors, the HCA held that “A failure to vote therefore involves a failure to attend, accept the ballot paper and having marked it, to put it in the ballot box. Of course, there is no offence committed by not marking the ballot paper in such a fashion that the elector’s vote is in law a valid vote.”⁷⁰ So, voters are thereby, allowed to merely accept the ballot paper and put it in the ballot box without marking any candidate if they wish to do so. Further, in 1996 as

⁶⁵ Ibid at 383.

⁶⁶ Ibid at 385.

⁶⁷ Ibid at 382.

⁶⁸ Ibid at 390.

⁶⁹ (1971) 126 CLR 271.

⁷⁰ Ibid at 272.

well, the HCA accepted the ratio in *Judd v McKeon* and *Faderson v Bridger* to validate compulsory voting in Australia.⁷¹

In Section 2.2. of this chapter, this thesis had demonstrated that the underlying principle behind compulsory voting in Australia is the value of representative democracy. In *Mulholland v Australian Electoral Commission*⁷², the HCA also substantiated that logic by stating that introduction of compulsory voting (among other reforms) was a boost to the evolution of ‘representative government’ in Australia.⁷³ Additionally, in *Rowe v Electoral Commissioner*⁷⁴, the HCA made a relevant observation regarding the importance of compulsory voting and high electoral participation. According to Lisa Hill, in *Rowe v Electoral Commissioner*, the HCA conveyed a general observation that “because there “is a form of irreversible evolution in the development of electoral laws toward maximum participation in elections,” any law that rendered voting voluntary would be constitutionally invalid due to its negative effect on maximizing participation.”⁷⁵

Thus, the HCA has considered compulsory voting to be in consonance with the principles of Australian constitutional law and other democratic values. Besides, the HCA has also rejected the concept of the right ‘not to’ vote in Australia as voting has a duty facet as well.

2.4. Public Acceptance

A law becomes perfectly legitimate only when the public whole-heartedly accept its mandate. Therefore, the next logical inquiry in this chapter must be regarding the attitude of the Australian society towards the mandate of compulsory voting law since 1924.

⁷¹ *Langer v Commonwealth*, (1996) HCA 43.

⁷² (2004) HCA 41.

⁷³ *Ibid* at ¶ 213.

⁷⁴ (2010) 234 CLR 1.

⁷⁵ Hill 2014 (n 5) 159.

If the readers revisit the discussions in Section 2.2 of this chapter, it was explained that penalizing non-voters by way of fines and court proceedings happens very rarely.⁷⁶ Besides, sanctions have never been imposed on citizens arbitrarily. Interestingly in that context, 80% of Australians are unaware about the amount of fine imposed by the Electoral Act 1918 on non-voters.⁷⁷ This data prima facie proves two aspects. Firstly, the earlier claim that implementation of sanctions is carried out in a non-arbitrary and mild fashion stands verified. Secondly, it is quite evident that most Australians comply⁷⁸ with the legal requirement to vote with self-awareness about their civic obligation to vote. On that note, the claim that Australian citizens support compulsory voting mainly because they consider voting as a civic obligation/duty is credible:

“[W]hen Australians were asked what it took to be a ‘good citizen’ the majority (69%) listed first ‘always voting in elections’. Further, the International Social Survey 2005 Citizenship survey found that, while Australia is not alone in rating voting as the most important duty of a citizen, out of the 29 countries surveyed, Australia was ranked highest in its emphasis on voting as the mark of a good citizen.”⁷⁹

This is a highly positive sign of a healthy democracy. Opponents of compulsory voting who argue that the practice is coercive and illiberal will be disproved by this data.

Furthermore, the fact that around 77% of Australians favor compulsory voting further corroborates the claim that compulsory voting enjoys extensive level of public acceptance in Australia.⁸⁰ Finally, Sarah Birch makes another significant point about the nature of public support for compulsory voting in Australia. Birch states that while debates about abolition of compulsory voting happens recurrently in Belgium, there have never been any rigorous efforts

⁷⁶ Mackerras and McAllister 1999 (n 54) 224.

⁷⁷ Hill 2010 (n 53) 427.

⁷⁸ This is also evident from the consistent level of voter turnout in federal elections above 90% since 1925.

⁷⁹ Hill 2010 (n 53) 429.

⁸⁰ Ibid at 427; number of people who support compulsory voting has averaged consistently between 70-77% for decades now, see Hill 2014 (n 5) 124; see also C.Bean et al., *Australian Election Study 2013*, Australian Data Archive, Australian National University (February, 2014) 48-49.

to end compulsory voting in Australia.⁸¹ This factor illustrates the consistency of public support for the Australian model of compulsory voting.

2.5. Conclusion

Following are some of the main conclusions from this chapter:

- i. Compulsory voting was introduced in federal elections for the first time in 1924 as a remedial measure to address the problem of low voter turnout;
- ii. Since the introduction of compulsory voting, voter turnout has consistently been above 90% in federal elections;
- iii. Duty to vote is enforced by way of a punitive legislative design under Section 245 of the Electoral Act 1918; voting is a duty-right in Australia;
- iv. The perceived burden of compulsory voting is largely reduced by fair and mild implementation of sanctions for non-voters, reasonable exemptions from performing the duty to vote, and the pro-active approach of the State to make voting an easy task;
- v. The underlying principle behind compulsory voting is representative democracy;
- vi. The HCA has consistently held that compulsory voting is constitutionally valid and that there is no right 'not to' vote as voting is a duty as well; and
- vii. Public level support for compulsory voting is substantially high; a considerable majority of Australians consider voting as a civic duty and as a sign of good citizenship.

In this exhaustive chapter about compulsory voting in Australia, the thesis has managed to create a reference for the examination of the research question in Chapter 4. The inferences made about the compulsory voting system in Australia may help the author in assessing whether India also needs a similar scheme of law that establishes voting as a civic duty.

⁸¹ Birch 2009 (n 33) 33.

3. India: The Existing Framework of Voting Rights & Approach Towards Compulsory Voting

Chapter 2 provided a complete picture of all the important features of Australia's compulsory voting regime. It is now time to turn the page to India. Unlike Australia, India does not have a compulsory voting law. Therefore, before undertaking an evaluative study vis-à-vis the constitutionality of compulsory voting in India in Chapter 4, it is imperative to understand the place of voting rights within the electoral system in India. This chapter will strive towards that end. Apart from that, this chapter will highlight all the key politico-legal debates on the issue of introducing compulsory voting that have happened in India since independence in 1947. Altogether, this chapter will inform the reader about India's current attitude towards the idea of compulsory voting. The inferences from this chapter will form a relevant basis for the analysis of the research question in Chapter 4.

3.1. Attitude of Founding Fathers Towards Compulsory Voting

It is ideal to start this chapter in a chronological order by exploring the discussions that took place during the drafting of the Constitution of India from 1946 to 1949. A close review of the Constituent Assembly of India Debates did not indicate any constructive deliberations about compulsory voting. In fact, only one among all the 299 members of the Constituent Assembly raised this issue. While debating about the composition of the Parliament and the type of electoral system on January 4, 1949, M. Ananthasayanam Ayyangar proposed the inclusion of a clause in the Constitution that made voting compulsory. According to Ayyangar, "there must be imposition of penalty on those people who refrain from voting. For a long time to come unless people in this country are compelled to come to the Polling Station, many people may

not care to exercise their votes at all...”.⁸² It is important to note that Ayyangar was concerned about the non-exercise of the right to vote by the newly independent Indian citizens. However, his proposal did not obtain any further support or explicit rejection. Rather, it went under the water at once. Despite being a suggestion coming from a highly-respected parliamentarian like Ayyangar, the idea of compulsory voting did not appeal to other members of the Constituent Assembly. Hence, the attitude towards compulsory voting shown by the founding fathers of the Indian Constitution does not seem to be positive.

3.2. Politico-legal Attitude Towards Compulsory Voting: 1950-2017

This section will look at all the major events that have happened in India since the country became a Republic in 1950. As mentioned previously, all these debates happened or have been happening only at the level of the three main government branches (legislative, executive, and judiciary), and other governmental institutions like the Law Commission of India or government-appointed committees. Since 1950, there has never been any sort of adequate discussions in the public sphere or within the academia. On the political front, nonetheless, the first major discussion on compulsory voting happened early in 1951. During the legislative debates in the Parliament prior to the formulation of the existing Representation of the People Act 1951 (“RP Act 1951”), introduction of compulsory voting was suggested. However, Dr.B.R.Ambedkar, the then Union Law Minister, outrightly rejected the move as he deemed compulsory voting difficult to be implemented in India.⁸³ Thus, compulsory voting faced a cold approach in the initial years of independent India. And it continued to be so. In 1978, the Committee on Election Expenses, headed by the prominent Indian lawyer V.M.Tarkunde, also

⁸² M.A.Ayyangar, Constituent Assembly of India Debates, Vol.8 (January 4, 1949).

⁸³ Law Commission of India (n 18) ¶ 9.3.

vetoed the idea of compulsory voting in India as the Committee believed its implementation would be complex and may be open to abuse.⁸⁴

It was only in the 1990s that the topic of compulsory voting emerged once again in India. In 1990, the Committee on Electoral Reforms, headed by the then Union Law Minister Dinesh Goswami, considered a proposal made by one of the Committee members to introduce compulsory voting as a remedy for the very low voter turnout in Indian elections. The Committee rejected that proposal in the following words, “One of the members feels that the only effective remedy for low percentage of voting is to introduce the system of compulsory voting as in Australia. The Committee does not however favor the suggestion because of practical difficulties involved in its implementation.”⁸⁵ Further, the 2000s saw several Members of Parliament presenting private member bills in the Parliament with the legislative objective of introducing compulsory voting but, without any positive end results.⁸⁶ Among all such bills, two bills introduced in 2004 and 2009 were widely discussed in the Parliament. However, while the 2004 bill introduced by Bachi Singh Rawat was negated by the Lok Sabha (the Lower House of the Parliament), the 2009 bill proposed by Jai Prakash Agarwal was withdrawn after lengthy debates.⁸⁷

In the year 2009, the Supreme Court was also approached with a petition that sought to enforce compulsory voting in India by way of imposing non-monetary sanctions like disconnection of water and electricity supply to the houses of persons who fail to vote in elections.⁸⁸ However,

⁸⁴ *Report of the Committee on Election Expenses*, ¶ 18, Citizens for Democracy (March, 1978), <http://lawmin.nic.in/ld/erreports/TarkundeCommitteeReport.pdf> (last accessed April 6, 2017).

⁸⁵ *Report of the Committee on Electoral Reforms*, ¶ 11.4, Union Ministry of Law and Justice (May, 1990), <http://lawmin.nic.in/ld/erreports/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf> (last accessed April 6, 2017).

⁸⁶ See ‘Private Members Bills’, *India60*, <https://india60.com/goi/bills> (last accessed April 6, 2017).

⁸⁷ Law Commission of India (n 18) ¶ 9.7; see also P.Rao, ‘Compulsory voting in India’, *PRS Blog* (November 17, 2014), <http://www.prsindia.org/theprsblog/?p=3370> (last accessed April 6, 2017).

⁸⁸ D.Mahapatra, ‘Supreme Court rejects plea to make voting compulsory’, *The Times of India* (April 18, 2009), <http://timesofindia.indiatimes.com/india/Supreme-Court-rejects-plea-to-make-voting-compulsory/articleshow/4415484.cms> (last accessed April 6, 2017).

a two-judge bench of the Supreme Court categorically rejected the petition's proposal by labelling its terms as "inhuman methods to make a voter go to the polling booth".⁸⁹ Thereafter, in 2014, India witnessed its biggest and the most significant legal development vis-à-vis compulsory voting. On November 5, 2014, the State of Gujarat became the first State in India to pass a law that made voting compulsory. The Gujarat Act made voting mandatory in the elections to panchayats, municipalities, and municipal corporations.⁹⁰ However, the operation of this Act was stayed by the State High Court in August, 2015.⁹¹

These are the most important developments surrounding the issue of compulsory voting that have occurred in the history of India until this date. The most recent advancements on this issue which were mentioned in Chapter 1 have not been discussed here for the sake of brevity.⁹² Not to be mistaken, those events are also highly germane to the entire history of the politico-legal debates on compulsory voting in India. Overall, this section indicates that the position taken by lawmakers and judges against compulsory voting is generally pessimistic.

3.3. Constitutional and Legal Framework of the Right to Vote

By now it is clear that compulsory voting has not been accepted in India on a consistent basis with the Gujarat Act being a rare exception. This section will now look at the position of the right to vote in India to comprehend whether the law also reflects the same attitude as inferred from sections 3.1. and 3.2.

"The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act."⁹³ This observation by Justice P.Venkatarama Reddi lays

⁸⁹ Ibid.

⁹⁰ For the full text of the Gujarat Act, see <http://lpd.gujarat.gov.in/allpdfs/21-2014.pdf> (last accessed April 6, 2017).

⁹¹ Ashok (n 19). The stay on the Gujarat Act is still valid and the matter has not yet been disposed of.

⁹² See Law Commission of India (n 18); Chief Election Commissioner (n 20); Compulsory vote notice (n 21).

⁹³ *People's Union of Civil Liberties v Union of India*, (2003) 4 SCC 399.

down the democratic value of the right to vote in India. It demonstrates the constitutional and legislative scheme of the right to vote as well. The right to vote is protected in India through a double-tiered mechanism. First, Article 326 of the Constitution of India ensures that elections to the Parliament and State legislative assemblies are conducted on the basis of universal adult suffrage, and guarantee citizens the right to be registered as voters once the required conditions are met. Article 326 reads as follows:

326. 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 2[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.

If Article 326 lays down the general framework of obtaining the right to vote, Section 62 of the RP Act 1951 crystalizes the said political right. Section 62(1) entitles a citizen who meets all the qualifications prescribed under the RP Act 1951 to vote during elections in the electoral constituency where he is registered as the voter. Section 62(1) reads as follows:

62. Right to vote - (1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of by any constituency shall be entitled to vote in that constituency.

So, it is clear from these constitutional and legal provisions that in India, voting is considered as a ‘right’ and ‘entitlement’, and not as a duty or obligation. This kind of a purely rights-based approach regarding voting is further evident from the mandate of Section 79(d) of the RP Act 1951. Section 79(d) defines what an electoral right is under the Act. This provision encapsulates the concept of right ‘not to’ vote in India. Section 79(d) reads as follows:

79 (d). “electoral right” means the right of a person to stand or not to stand as, or 5[to withdraw or not to withdraw] from being, a candidate, or to vote or refrain from voting at an election;

Hence, Article 326 of the Constitution read with Section 62(1) and Section 79(d) of the RP Act 1951 secures the right to vote with a foolproof scheme. Section 79(d) is the most important provision that enhances strength of the right to vote to another higher pedestal. This type of a highly liberal and rights-oriented legal scheme completely matches the present political and legal attitude against compulsory voting which advances the idea of voting as a civic duty of citizens. In this regard, the Indian model is opposite to the duty-right oriented approach of the right to vote in Australia as we saw in Chapter 2.

3.4. Conclusion

This chapter on the Indian conception of the right to vote, and the past and on-going debates about compulsory voting has signaled that the politico-legal background in India is extremely hostile to the introduction of compulsory voting. Ever since the time of drafting the Indian Constitution in 1946 and until this day, barring the sole exception of the Gujarat Act, the electoral concept of compulsory voting has never been welcomed by the legislature, judiciary, or any other governmental institutions/committees. Two main reasons are prominently highlighted in the discussions in Section 3.2. for the outright rejection of compulsory voting. First reason is the perceived impracticability of compulsory voting in a large country like India with drastically high population. Secondly, the constitutional and legislative scheme taken together endorses a principle that individuals have a high level of autonomy and liberty to choose whether to exercise their right to vote. The first rationale may stand on a strong footing as sanction-based compulsory voting law may become hard to operationalize in India where on an average, around thirty crore registered voters fail to turn out and vote in elections.

However, this thesis doubts the tenacity of the second ‘right not to vote’ proposition. True, the current constitutional and legislative arrangement embeds that principle. But that does not mean it may be the right interpretation.

This chapter raises several captivating questions. First, is the Indian legal conception of the right to vote, which is solely based on a rights-oriented viewpoint, correct? Second, did the developments and debates discussed in this chapter proceed based on a misconceived notion of compulsory voting? These are some of the many critical questions that will form a part of the research question analysis in the next chapter. In Chapter 4, this thesis will utilize the inferences and details gathered from chapters 2 and 3 to assess whether compulsory voting, in its truest sense, is constitutionally legitimate from a conceptual perspective and in the Indian system.

4. Compulsory Voting: A Democratic Concept that is Constitutionally Legitimate

Having outlined the basic reference framework in chapters 2 and 3, this chapter will proceed to make a thorough study of the thesis's central research question: *Is Compulsory Voting Constitutionally Legitimate in a Democracy?* This question will be answered in the affirmative. As mentioned in Chapter 1, the question will be mainly analyzed to judge whether compulsory voting is a good and valid idea for India. Therefore, subsequent discussions will focus both on general theoretical arguments in favor of compulsory voting and other India-specific propositions.

4.1. Paramount Significance of Voting

It is said that “Elections are the defining institutions of modern democracy”⁹⁴ and elections are the “instruments of democracy”.⁹⁵ The vitality of elections in a democracy cannot be explained better. Without regular, free, and fair elections, a democracy would be empty. If elections occupy such a high pedestal, it is only natural that voting is the soul that sustains the life of electoral democracy. Joshua A. Douglas correctly terms voting as the “foundational concept for our entire democratic structure.”⁹⁶ He further says that “When a group of citizens collectively elects its representatives, it affirms the notion that we govern ourselves by free choice... Voting represents the beginning; everything else in our democracy follows the right to vote. Participation is more than just a value. It is a foundational virtue of our democracy.”⁹⁷ Voting is therefore, the most basic democratic instrument that precedes every other value.

⁹⁴ R.S.Katz, *Democracy and Elections* (Oxford University Press 1997) 3.

⁹⁵ G.B.Powell Jr., *Elections as Instruments of Democracy: Majoritarian and Proportional Visions* (Yale University Press 2000) 3.

⁹⁶ J.A.Douglas, *The Foundational Importance of Voting: A Response to Professor Flanders*, 66(1) Oklahoma Law Review (2013) 81-100, 81.

⁹⁷ Ibid.

The functional relevance of voting lies in its usefulness in ensuring the legitimacy of an elected government. By voting, citizens make sure that the elected government reverberates their voice. That is important to ensure that the government is accountable to the people. The accountability and legitimacy of governments increase when more number of citizens actively participate in electoral politics and other forms of participation. In fact, “the act of voting is a fundamental condition of deliberative and reflective citizenship.”⁹⁸ Democracies require active engagement of citizens and for that, “while voting is only one element of political engagement, it remains the very foundation of our democracy.”⁹⁹ In that light, compulsory voting is certainly a good idea for engaging more citizens in the functioning of democracy through elections for their benefit.

From the perspective of citizens, elections provide us with regular opportunities to decide who should govern us and how they should govern us. Therefore, voting in elections deliver the chance for citizens to influence the “political machine and shape government policy”.¹⁰⁰ Moreover, voting is the only form of political participation that guarantees equal access to everyone in the society, notwithstanding their socio-economic standing, to make their voice heard.¹⁰¹ This is certainly true in today’s polarized societies (in terms of resources, wealth, and affluence) where for instance, people living in rural areas of India certainly do not have the adequate financial access to television media for raising their concerns unlike the affluent sections of the society. So, voting is the only fundamental political right that considers all our opinions equally.

⁹⁸ Malkopoulou 2015 (n 8) 33.

⁹⁹ M.Harb, *The Case for Mandatory Voting in Canada*, 28(2) Canadian Parliamentary Review (2005) 4-6, 4.

¹⁰⁰ E.Lund, *Compulsory Voting: A Possible Cure for Partisanship and Apathy in U.S. Politics*, 31(1) Wisconsin International Law Journal (2013) 90-117, 90.

¹⁰¹ See generally I.Crewe, *Electoral Participation*, in D.Butler, H.R.Penniman and A.Ranney eds., *Democracy at the polls: A Comparative Study of Competitive National Elections* (American Enterprise Institute for Public Policy Research 1981) 216-263, 216-217.

If the Indian background is considered, India is a parliamentary democracy. People directly elect their representatives every five years to act on their behalf in the Parliament. Representative democracy, although it does not find explicit mention in the Constitution, is central in India. And as the well-known Indian lawyer Gautam Bhatia asserts, voting is “the most important act of expression through which the citizen participates in a representative democracy”.¹⁰² Further, the Indian Supreme Court in *Lakshmi Charan Sen v A.K.M. Hassan Uzzaman*¹⁰³ has clarified the value of voting in the following words: “It is the right of participation in the governance of the country directly or indirectly. This participation of an adult citizen of our country starts with the right to vote for a candidate and elect a representative of his choice to the legislatures and other self-governing institutions.”¹⁰⁴

Regarding the position of voting in a democracy, Annabelle Lever makes an anomalous argument. According to her, “The first is that voting is, at best, only one form of democratic political participation and, from some perspectives, not an especially important or attractive one.”¹⁰⁵ I do not wish to disagree with Lever on the point that in a democratic country, you have other forms of political participation as well. But her take on the apparent insignificance of voting is baseless. She tends to claim that voting is not the most important facet of democracy. However, if voting in elections that happen regularly is the democratic tool which results in formation of governments and holds the rulers accountable predominantly, there is no political thought that will bring down the value of voting to a level of a ‘not so important’ form of democratic participation. Voting is therefore, nothing but the primary form of political participation. In simple terms, without elections and voting, a democracy will not function. But

¹⁰² G.Bhatia, ‘PUCL v Union of India: The Supreme Court and Negative Voting’, *Indian Constitutional Law and Philosophy* (September 28, 2013), <https://indconlawphil.wordpress.com/2013/09/28/pucl-v-union-of-india-the-supreme-court-and-negative-voting/> (last accessed April 6, 2017).

¹⁰³ 1985 AIR 1233.

¹⁰⁴ Ibid. See Justice Baharul Islam’s judgment.

¹⁰⁵ Lever 2010 (n 14) 908.

if other forms of political participation are absent, democracy will still run even if not in the truest sense. By this, I do not intend to diminish the value of other avenues nor do I wish to advocate some form of a ‘thin democracy’ that is merely dependent on electoral politics. The only argument is that voting, if not the only important one, is the most fundamental aspect of a democracy based on representation. As Lisa Hill states, “Voting for our democratic representatives is a special activity, not just one of many ways in which we can participate politically.”¹⁰⁶ Voting is the ‘numero uno’ of all democratic modes of participation. Thus, it is necessarily required of every moral citizen to exercise their right to vote for his/her benefit as well as the common good of the society.

4.2. Representative Democracy & Benefits of High Voter Participation

This section will take cues from the previous section which portrayed the importance of voting and that of active participation in democracy by all citizens. This section will expand wider and prove that compulsory voting, which aims at increasing the number of people who participate in elections by way of voting, has several democratic benefits for the society we live in.

4.2.1. Problem of Low Voter Turnout¹⁰⁷ & Participatory Democracy

As asserted earlier, voting is the paramount form of political participation in a democracy. “Since voting is the most widespread form of political participation...turnout is regarded as an important measure of citizen participation and the well-being of democratic institutions”.¹⁰⁸ Therefore, to assess whether compulsory voting is a good idea in India, the voter turnout data in Indian elections must be primarily investigated. As per the latest report by the International Institute for Democracy and Electoral Assistance, India ranks at 105 out of 196 countries based

¹⁰⁶ Hill 2014 (n 5) 129-130.

¹⁰⁷ Only the voter turnout data of India will be assessed in this section as it is the primary jurisdiction.

¹⁰⁸ K.Lundell, *Civic Participation and Political Trust: The Impact of Compulsory Voting*, 48(2) Representation (2012) 221-234, 221.

on the voter turnout data from the last national elections in each country.¹⁰⁹ The despicable fact is that this rank would certainly fall by at least 25-30 places if the overall average of all national parliamentary elections since India became independent in 1947 is considered. The average voter turnout in all parliamentary elections starting from the first election in 1951 to the last one in 2014 is merely 59.7%.¹¹⁰ For the world's largest democracy, this is a serious sign of its internal democratic deficit.¹¹¹

Bart Engelen correctly states that, "The more citizens abstain, the less representative the electoral result becomes."¹¹² Only a little more than half of the registered voters vote in India. Thus, the Indian democracy is currently facing a huge vacuum in terms of the quality of representation in the Indian Parliament. It is pertinent to note what Andras Sajó remarked about governments. "[A]ccording to the democratic principle, government can function only if it has the approval of those governed".¹¹³ So if we take this statement in the Indian context, who are 'those governed'? Only less than 60% of the registered voters who voted on the election day to form the government constitute 'those governed'? The answer is a NO. In a democracy, the government needs to be authorized by the entire people or as many of them as possible. The approval of the entire society must be clear. For that, it is indispensable that everyone who is eligible to vote must exercise their valuable right to vote. For a strong democracy, there must be self-government (through representatives in case of parliamentary democracies like India) by an active citizenry.¹¹⁴

¹⁰⁹ A.Solijonov, *Voter Turnout Trends around the World* (International Institute for Democracy and Electoral Assistance 2016) Annexure 1.

¹¹⁰ Calculated using the data provided by the Election Commission of India, see (n 23); see also R.L.Pintor, M.Gratchew and K.Sullivan, *Voter Turnout Rates from a Comparative Perspective*, 79, https://fortunecom.files.wordpress.com/2014/04/voter_turnout.pdf (last accessed April 6, 2017).

¹¹¹ There are unfortunately some political theorists who think an average turnout of less than 60% for more than 60 years is "decent", see P.B.Mehta, 'Acts of choice', *The Indian Express* (December 22, 2009), <http://archive.indianexpress.com/news/acts-of-choice/557550/0> (last accessed April 6, 2017).

¹¹² Engelen 2007 (n 10) 24.

¹¹³ A.Sajó, *Limiting Government: An Introduction to Constitutionalism* (CEU Press 1999) 50.

¹¹⁴ B.Barber, *Strong Democracy: Participatory Politics for a new age* (University of California Press 1984) 261.

Noted political theorist in India, Rajeev Bhargava, wrote that “Democracy is an institutional mechanism which helps us obtain resources that potentially satisfy us, enable us to lead the life we wish and choose. But it works for us only if we all take part in running it.”¹¹⁵ I concur with this profound statement. This reflects the great democratic idea of Abraham Lincoln i.e “government of the people, by the people, for the people”. It is undisputed that a democratic system is designed ‘for’ the people. There is no other system of governance that puts the people in the supreme pedestal. But ‘of’ and ‘by’ aspects of the government totally depend on active participation by the voters in elections and thereafter, in other forms of political participation. In fact, as the Condorcet Jury Theorem claims, more the number of people who engage in decision making, the decisions will be proportionally better than if lesser number of persons decided it.¹¹⁶

Thus, India needs to introspect about its current situation where citizens are passive and do not participate in real democracy as evidenced by the abysmal level of voter turnout. Concept of “participationist democracy”¹¹⁷ as promoted by Katz is the most pertinent facet of representative government. Based on the need for higher democratic participation of citizens, Katz advocated that “voting may legitimately be made compulsory...because some of those benefits [of high participation] accrue to the public at large, making active engagement in public life a duty, not merely an opportunity.”¹¹⁸ Even the most influential liberal thinker John Stuart Mill also stressed on the need for higher participation. Mill says that “it is evident that the only government which can fully satisfy the exigencies of the social state is one in which

¹¹⁵ R.Bhargava, ‘A simple bicycle and the complex practice of democracy’, *The Hindu* (March 19, 2017), <http://www.thehindu.com/todays-paper/tp-opinion/a-simple-bicycle-and-the-complex-practice-of-democracy/article17530344.ece> (last accessed April 6, 2017).

¹¹⁶ ‘Social Choice Theory’, *Stanford Encyclopedia of Philosophy* (December 18, 2013), <https://plato.stanford.edu/entries/social-choice/#Con> (last accessed April 6, 2017).

¹¹⁷ Katz 1997 (n 94) 295.

¹¹⁸ Ibid.

the whole people participate”.¹¹⁹ The idea of participatory democracy supported by Katz and Mills needs to be embedded in the Indian culture soon for the long life of its democracy. Compulsory voting is a highly democratic measure that will propel the Indian democracy towards this end with higher participation as it is evident from the Australian case.

4.2.2. Idea of Representative democracy

From the discussions till now, it must be clear that representative democracy entails responsibility from the citizens to ensure that the government is explicitly representative of the real society. A rational conclusion is that with higher levels of participatory democracy, the quality of representative democracy will be proportionally higher. Going by that logic, with less than 60% of India voting in each election, the elected governments in India have not been ideally representative of the Indian society because of the 40% of abstaining voters.

This is a constitutional misfortune for India. Because representative democracy and parliamentary democracy are part of the basic structure of the Indian Constitution.¹²⁰ The basic structure doctrine of Indian constitutional law evolved by the Supreme Court in the celebrated case of *Kesavananda Bharati v State of Kerala*¹²¹ classify certain fundamental features of the Indian Constitution as unamendable. So, if representative democracy is considered a part of the basic structure, its importance is huge.¹²² A perusal of the Constituent Assembly of India Debates would also highlight how the constitutional culture of India has entrenched the value of representation. While arguing for the electoral system of proportional representation, D. H. Chandrasekharaiya stated that “Modern democracy, as we all know, is generally a representative democracy which means that our legislatures should properly and fully; reflect

¹¹⁹ J.S.Mill, *Utilitarianism; On Liberty; Considerations on Representative Government* (Everyman's Library 1999) 234.

¹²⁰ Bhatia 2013 (n 102); *Kuldip Nayar v Union of India*, AIR 2006 SC 3127, ¶ 452.

¹²¹ (1973) 4 SCC 225.

¹²² The Indian Supreme Court has held that the “concept of responsible government and representative democracy signifies government by the people”, see *S.R. Chaudhuri v State of Punjab*, (2001) 7 SCC 126, ¶ 34.

the public opinion of the country.”¹²³ This is exactly the principle which the Australian system honors. For them, effective representation is achieved when the Parliament or other legislative bodies reflect the population’s identity more broadly.¹²⁴ India is no less than Australia for being classified as a representative democracy in terms of the constitutional structure. Therefore, India must imbibe this value from Australia and respect it in terms of electoral practice. Inclusive representation of the entire society will be beneficial for the progress of the country. However, if Indians do not care and show dismal interest in upholding such values by not getting out to vote¹²⁵, it is rather unfortunate for the democratic polity. Low participation is problematic in the practical sense of representation as well. According to Arend Lijphart, “unequal participation spells unequal influence - a major dilemma for representative democracy in which the "democratic responsiveness [of elected officials] depends on citizen participation”.”¹²⁶ Thus, he advocated the adoption of compulsory voting to diminish this inequality in participation by different sections of the society and to ensure that elected representatives do not disregard the interests of any particular section of the society. Compulsory voting increases the width of the society that is represented. Moreover, India being a huge country in terms of size and population, and diverse in terms of culture, religion, and language, it is necessary for the national Parliament to reflect all those varied voices.

4.2.3. Compulsory Voting & Political Accountability

This thesis has claimed that higher participation leads to better representation. This section furthers that claim by demonstrating a lesson from Australia that proves how compulsory voting ensures maximum accountability of the government towards its citizens.

¹²³ D.H.Chandrasekharaiya, Constituent Assembly of India Debates, Vol.5 (August 28, 1947).

¹²⁴ G.Appleby, A.Reilly and L.Grenfell, *Australian Public Law* (2nd ed., Oxford University Press 2014) 102.

¹²⁵ To stress once again, voting is the most important democratic apparatus that helps in forming the government and holding them accountable to the people through regular elections.

¹²⁶ Lijphart 1997 (n 4) 1.

Unlike India, Australia does not have a constitutionalized bill of rights.¹²⁷ Thus, a natural thought that comes to the mind of any constitutional law scholar might be as to how are then, the people protected against arbitrary actions of the government? Professor Cheryl Saunders at University of Melbourne tells us that governmental arbitrary actions against the rights of Australians are restrained by (in the absence of a bill of rights) the structural design of representative democracy and federalism within the Australian Constitution.¹²⁸ Thus, trampling of implied and basic human rights of Australians is prevented by democratic values like representative democracy. It must be remembered that representative democracy in Australia is augmented by the practice of compulsory voting which gives full meaning to the term representation. Likewise, readers must also appreciate the confidence of the public in their system of representative government. Citizens are aware of their vulnerability vis-a-vis the ruling government due to the lack of a bill of rights. However, on the other hand, they take proactive initiative in attaching high level of accountability on the government through elections. Compulsory voting model of Australia helps them achieve it. When 90% of the population votes (as has been the case in Australia since 1925) to elect their representatives who ultimately form the government, the mandate is legitimate and backed by the approval of ‘almost’ the entire society. When there is such legitimacy, the sense of responsibility of the government towards the public rises. Moreover, in 1944 and 1988, referendums were held in Australia to decide whether there was a need to formulate a national bill of rights. In both instances, Australians answered with “an emphatic ‘no’”.¹²⁹ These trends, undeniably convey the strong conviction of Australians about the existing system of representative government geared with

¹²⁷ Part III of the Indian Constitution guarantees certain fundamental rights to Indians.

¹²⁸ Saunders 2011 (n 59) 262-263.

¹²⁹ J.Allan, *Why Australia Does Not Have, and Does Not Need, a National Bill of Rights*, 24(2) *Journal of Constitutional History* (2012) 35-45, 37.

compulsory voting. The act of voting is considered as the most important democratic tool to keep the government in check.

Thus, Indians who complain whenever the government comes up with rights-infringing law or policy like the recent policy to demonetize 500 Rs. and 1000 Rs. currency notes, must remember how the Australians deal with such government actions. A consistent level of high voter turnout will certainly keep any government under control to not do anything extreme that will be rejected by the citizenry. In that context, notable constitutional lawyer Fali S. Nariman supported the idea of compulsory voting in India as it would enhance accountability and democracy in India.¹³⁰

4.2.4. Compulsory Voting & Legitimacy of the Government

It is said that the “most basic understanding of representation in democracy is for promoting democratic legitimacy of elected government”.¹³¹ If this reasoning is drawn along with the inference made in earlier sections of this chapter that higher voter participation ensures better quality in representation, the net result is that higher voter participation helps in improving democratic legitimacy of elected governments as well. The secondary conclusion is that compulsory voting, which ensures very high voter participation in elections, is certainly correlated to improved legitimacy of the government. This conclusion is verified. Jill Sheppard in her latest work in 2015 states that “evidence from countries with compulsory voting suggests that, by stimulating turnout and consequent engagement with democratic processes, compulsion can enhance the legitimacy of political institutions among citizens”.¹³²

¹³⁰ ‘Fali S Nariman: Voting should be made compulsory throughout India’, *The Economic Times* (November 23, 2014), <http://economictimes.indiatimes.com/opinion/interviews/fali-s-nariman-voting-should-be-made-compulsory-throughout-india/articleshow/45241879.cms?inttarget=no> (last accessed April 6, 2017).

¹³¹ C.R.Hayward, *Making Interest: On Representation and Democratic Legitimacy*, in I.Shapiro et al. eds., *Political Representation* (Cambridge University Press 2009) 111.

¹³² Sheppard 2015 (n 6) 301; Lundell also empirically proves that compulsory voting increases public trust in the government machinery and thereby, improves the government’s legitimacy, see Lundell 2012 (n 108) 229.

In the Indian context, lamenting about the low voter turnout trends, Justice Kurian Joseph, a sitting judge of the Indian Supreme Court, stated that “Decisions taken by a government elected through a process partaken by a higher proportion of population would provide more legitimacy to the Government as it would then represent a majority of the population.”¹³³ Thus, compulsory voting’s constitutional legitimacy and effectiveness seems to be further validated by this important benefit it produces.

This thesis closely relates to the ‘legitimacy argument’ in the favor of compulsory voting. This is because voting is the democratic tool used for forming the government that will govern every individual after an election. Hence, if a considerable number of eligible voters do not vote, legitimacy of the elected government will be tarnished.¹³⁴ Indian citizens must remember the caveat that when the people have the last voice in a democracy, that privilege in reciprocation makes it imperative for them to legitimize the regime they live under.¹³⁵

In this context, Annabelle Lever raises another shaky proposition. As per her logic, it is the right of voters to choose not to vote because they “do not owe their government electoral support or legitimacy”.¹³⁶ Lever’s statement carries a possible meaning that indicates that the government is an alien body without any sovereign authority and answerability to the citizens. That is incorrect in the face of the basics of political science. Besides, she argues that we do not need to lend support or legitimacy to the government. This argument is made as if it was the case that citizens are completely independent from the State. This kind of an argument is based on overstretched liberal notions. In fact, attaching legitimacy to the government by

¹³³ K. Joseph, ‘Expanding the Idea of India’, *The Hindu* (July 15, 2016), <http://www.thehindu.com/opinion/oped/Expanding-the-Idea-of-India/article14488980.ece> (last accessed April 6, 2017). For the full text of Justice Joseph’s speech, see http://www.thehindu.com/migration_catalog/article14463342.ece/BINARY/Expanding%20the%20idea%20of%20India (last accessed April 6, 2017).

¹³⁴ 40% of the Indians who do not vote on an average in a parliamentary election contributes to this problem.

¹³⁵ S. Boyron, *The Constitution of France: A Contextual Analysis* (Hart Publishing 2013) 61.

¹³⁶ Lever (Is Compulsory Voting Justified?) 2009 (n 14) 67.

voting in large numbers is not for the sake of the government. Rather, that legitimacy of the government works in favor of the citizens. Higher the legitimacy, higher the government's accountability will be towards the society.

Hence, compulsory voting is necessary in a country like India, which is already facing high democratic deficit, to increase the legitimacy of elected governments by ensuring that they are formed with the backing of a high majority of eligible citizens.

4.3. Voting as a Fundamental Civic Duty

Having known the paramount significance of the act of voting, and the correlated relevance of high participation of voters in elections for the sake of representative democracy, political accountability, and the legitimacy of elected governments, the thesis will now proceed to put forward the strongest argument in favor of compulsory voting. The thesis claims that voting is a fundamental civic duty of a responsible citizen. This deontological perspective is well-founded and will be substantiated in the upcoming paragraphs of this section.

In previous sections of this chapter, this thesis explained the nature of the act of voting. Voting has multiple implications in a democracy that affects every citizen. For instance, if people vote in large numbers, representative democracy and legitimacy of the government is enhanced. A highly accountable and legitimate government, if not in a direct sense, is still relevant for the respectful existence of everyone. That is why Katz insisted that compulsory voting may be legitimate as voting is a duty and not just an opportunity for citizens.¹³⁷ Even before that, back in the late 19th century itself, this type of a deontological outlook towards voting had originated. The work of Frederick William Holls, a famous American jurist, is important in this context. He had a positive view about the nature of voting as a duty. In his words, "It has, indeed, never

¹³⁷ Katz 1997 (n 94) 295.

been denied that voting partook of the nature of a duty, as well as a privilege”.¹³⁸ He further elaborated that if citizens do not utilize this privilege, it would be detrimental to the society’s interests.¹³⁹ Therefore, even though Holls recognized that voting was a dominant political right of every citizen, he did not fail to point out the ill effects of not exercising the right to vote. Thus, the nature of voting as a duty assumes importance in that context. Both Katz and Holls emphasize on voting as a duty because the exercise of the right to vote has numerous democratic benefits that would accrue in the society at large. Likewise, the non-exercise of the right to vote would also cause harm to the society.

Therefore, the element of ‘public interest’ in the act of voting is the peculiar factor that causes the political right to vote to become an equally valuable civic duty owed by individuals to each other. From the discussions till now, at least it is sure that voting is not a private affair by any means as the Russians claim it to be.¹⁴⁰ The most important issue therefore, is the balance between voting as a right and as a duty.

Regarding that balance, it is necessary for our society to realize that in today’s world of increasing talks of liberty, freedom, and rights, duties are never emphasized to the full extent. In an interesting work on rights and duties by Thomas Haskell, he stated that “historically speaking, it is of course true that duties talk was as emblematic of traditional society as rights talk is of our own era.”¹⁴¹ This is evident if we look at the 70-year-old history of independent India. In the original Constitution of India, along with fundamental rights under Part III of the Constitution, there was no mention of any fundamental duties of Indian citizens. It is only in the 1970s that the Constitution was amended to include certain duties, that too non-enforceable,

¹³⁸ Holls 1891 (n 3) 587.

¹³⁹ Ibid at 588-589.

¹⁴⁰ ‘Most Russians oppose compulsory voting, poll shows’, *RT Question More* (November 3, 2016), <https://www.rt.com/politics/365198-most-russians-oppose-idea-of/> (last accessed April 6, 2017).

¹⁴¹ T.L.Haskell, *Taking Duties Seriously: To What Problems are Rights and Duties the Solution?*, in N.J.Finkel and F.M.Moghaddam eds., *The Psychology of Rights and Duties: Empirical Contributions and Normative Commentaries* (American Psychological Association 2005) 244.

that morally binds every Indian. At this stage, it would be prudent to remember that “If there is over-emphasis on the rights of the individual, there is likely to be anarchy, in which the very individual will suffer.”¹⁴² The basic essence of my argument is that in a democracy with a well-defined Constitution in place, there can never be a situation where only individual rights can seek primacy eternally. We must not “think of ourselves as freely choosing, individual selves, unbound by obligations antecedent to rights, or to the agreements we make.”¹⁴³ There must be a harmonious balance within the Constitution regarding the rights and duties of every citizen.

This issue of balance becomes more vital when we talk about political rights and civic duties that have implications beyond our personal and autonomous sphere of life. This delicate balance has been expressed well by Bart Engelen. Engelen states that “democratic rights are not completely optional, but always attached to corresponding duties.”¹⁴⁴ Therefore, it indicates a republican thought where the citizen’s duty may be preferred when the overriding public interest element is supreme. It is only morally right, in exceptional situations where an overriding public interest is involved, that citizens cede certain aspects of their personal rights and freedoms for the sake of the society at large. Voting is one such duty-oriented democratic activity that has ever lasting ramifications on the society. Therefore, the duty to vote must not be tarnished using an extreme interpretation of citizens’ rights. Moreover, as this thesis has shown, voting will ultimately benefit the citizens by creating a full-fledged democratic and accountable society.

Australia provides a wonderful lesson on how to balance the duty to vote and the right to vote. Since the beginning of the 20th century, the right to vote has only been amplified in Australia.¹⁴⁵

¹⁴² J B Kripalani, *Fundamental Rights*, Rajaji Birthday Lecture, Public Affairs Pamphlet No. 22, Gokhale Institute of Public Affairs (1977) 12; see also P.J.Kurien, ‘What the citizen must do’, *The Indian Express* (December 9, 2015), <http://indianexpress.com/article/opinion/columns/what-the-citizen-must-do/> (last accessed April 6, 2017).

¹⁴³ M.J.Sandel, *The Procedural Republic and the Unencumbered Self*, 12(1) *Political Theory* (1984) 81-96, 94.

¹⁴⁴ Engelen 2007 (n 10) 34.

¹⁴⁵ Australian Public Law 2014 (n 124) 109.

From granting the right to vote to the indigenous people in 1984¹⁴⁶ to securing the same for prisoners in 2007 in the case of *Roach v Electoral Commissioner*¹⁴⁷, Australia has come a long way in expanding the franchise. Simultaneously, since 1925, the country has enforced compulsory voting thoroughly without any hurdles to improve the democratic health of Australia. This is a good model of adequate balance of ‘duty v right’ in the context of political rights from which India can learn a lesson or two. As it was seen in Chapter 3, India’s legal framework and the political attitude towards voting is purely restricted to rights-based approach. The current Indian scenario is therefore, not in conformity with the correct nature of the act of voting, which is a ‘duty-right’.

To understand why the deontological approach to voting is necessary in India, the thesis must look at how India votes. It is in a peculiar way that the deontological aspect of voting assumes significance in India. In Lijphart’s article, he had supported the introduction of compulsory voting to ensure that the poor and marginalized sections of the society also get equal chances to cast their vote and be heard. Therefore, the cause of concern was the non-participation of the marginalized sections in electoral activities. When the page is turned to India, a different picture emerges. In India, quite a few studies and scholars have verified that poor people in rural India votes more than well-off citizens in urban constituencies. A study by IndiaSpend after the 2014 national election indicated that the difference between the highest rural and urban voter turnout data in the said election was 15%.¹⁴⁸ Eminent academician Pratap Bhanu Mehta also corroborates this divide between rural and urban voters where rural voter turnout has been “usually much higher, than amongst the privileged”.¹⁴⁹ Another interesting revelation was

¹⁴⁶ ‘History of the Indigenous Vote’, *Australian Electoral Commission* (August, 2006) 14, http://www.aec.gov.au/indigenous/files/history_indigenous_vote.pdf (last accessed April 6, 2017).

¹⁴⁷ *Roach* (n 44).

¹⁴⁸ S.Tewari, ‘Rural India Continues To Outvote Urban India’, *IndiaSpend* (May 30, 2014), <http://www.indiaspend.com/cover-story/rural-india-continues-to-outvote-urban-india-71875> (last accessed April 6, 2017).

¹⁴⁹ Mehta 2009 (n 111).

made by a study conducted by the Gokhale Institute of Politics and Economics which claimed that people with more wealth and education tend to vote much lesser than others.¹⁵⁰ Thus, people in urban areas, ones who are more privileged, and the ones with more wealth and education, vote less than other marginalized sections of the society. If the lack of voter participation was seen the most among the poor and marginalized, it could have been assumed safely that their reasons for non-voting would be related to socio-economic hindrances like the lack of education and political awareness or the inability to miss one day of their daily wage works. However, no such factors hinder the prospects of the educated and wealthy to come out and vote on the polling day. These startling truths clearly indicate that the privileged do not consider voting as a civic obligation that needs to be performed when called upon to. According to Lijphart, such abstainers are selfish and immoral free riders.¹⁵¹ This is an alarming trend that calls for a strong culture of deontological approach towards voting in India. The nature of the duty to vote has been profoundly described by renowned Indian politician, V.S.Srinivasa Sastri, who held that “These [voting], however, you will recognize are duties which every right-minded citizen must agree to discharge. The franchise hitherto is only a right with us, the law does not make it a duty as well. Still the ideal of citizenship requires that it be regarded as a duty.”¹⁵²

Anxiety over the lack of enthusiasm among Indians to exercise their well-recognized right to vote manifested in a speech by the President of India, Shri. Pranab Mukherjee. In one of his speeches, the President made a statement directed at all eligible voters in India, in the following words: “[V]ote with pride in every election. It is your fundamental right and please exercise

¹⁵⁰ ‘Education dims Interest in Voting’, *Pune Mirror* (January 8, 2017), <http://punemirror.indiatimes.com/pune/civic/education-dims-interest-in-voting/articleshow/56395901.cms> (last accessed April 6, 2017).

¹⁵¹ Lijphart 1997 (n 4) 11.

¹⁵² V.S.S.Sastri, *The Indian Citizen: His Rights and Duties* (Hind Kitabs Limited 1948) 72.

it.”¹⁵³ This request by the President says a lot about the lack of importance India gives for voting. Further, since 2011, India has been observing January 25th as the National Voters’ Day. If any real meaning has to be attached with this special day, Indian citizens must rethink within their conscience about their moral and civic obligation to cast their votes and contribute to the common good of the society and eventually, to their own benefit.

Thus, this thesis presses once more that voting is a sacred and fundamental civic duty that needs to be performed by conscience-bound citizens. Compulsory voting is not based on coercion by the State as the nomenclature may seem to suggest. Instead, the real motive of compulsory voting is based on the principle of voting as a duty. If everyone believes that voting is a duty, its performance will arise out of your own moral conscience rather than because of any compulsion. Finally, it will be appropriate for Indians to remember the wise words of Mahatma Gandhi: “The true source of rights is duty. If we all discharge our duties, rights will not be far to seek.”¹⁵⁴

4.4. Fallacy of the Right ‘Not To’ Vote

After establishing that voting is a duty-cum-right, in this section, the thesis will expand the argument to another related concern. The proposition that ‘if there is a right to vote, there is an equivalent right ‘not to’ vote’ is the main argument that is constantly raised by liberals against compulsory voting. This section will deconstruct the theory behind the concept of the right ‘not to’ vote and prove that it is baseless.

4.4.1. Right to Vote ≠ Other Individual Rights

Throughout the discussions in this chapter and especially, in Section 4.3, this thesis has confirmed that the right to vote has a ‘public interest’ element attached to it in the sense of its

¹⁵³ P.Mukherjee, *Fourth National Voters’ Day Speech*, Election Commission of India (January 25, 2014), http://eci.nic.in/ECI_MAIN1/current/PresidentSpeech27012014.pdf (last accessed April 6, 2017).

¹⁵⁴ P.Dayal, *Gandhian Theory of Social Reconstruction* (Atlantic Publishers 2006) 240.

effects that accrue upon its use or non-use. It is due to the magnitude of those effects and benefits produced by the act of voting in a democracy that this thesis has focused on a deontological approach to voting. Naturally, the same rationale can be extended to prove the unique nature of the right to vote in contrast with other individual fundamental rights like the right to freedom of religion or the right to freedom of occupation. Unlike those rights, voting has realistic effects on the democratic functioning of a country because elections are the only form of democratic apparatus that facilitates the formation of governments. The functional and existential importance of a government need not be explained as it is loudly obvious. More than that, regular elections and voting are the main tools that every citizen can utilize to hold the government accountable to the society. And as noted in the beginning of this thesis drawing from the experience of Al Gore, each citizen's vote counts in achieving both the above-mentioned objectives of voting. It must be remembered that more the number of voters who participate in elections, the mandate and legitimacy of the government will be much stronger. Likewise, it was explained earlier that higher voter participation also adds to the quality of representation in a parliamentary democracy system.

I cannot think of any other civil or political rights accorded to individuals that have so many democratic and societal ramifications like is the case with the right to vote. Thus, the nature and essential characteristics of the right to vote is unique when compared to other individual rights which are highly personal and particular to the individual self. For example, the society will never be affected because of my choice (of religion) to follow Hinduism or Christianity or Islam. However, voting is a democratic right that exerts influence over the entire society that we live in upon its use or non-use. It is pertinent at this moment to take note of Lisa Hill's comment about the right to vote. According to her, "the right to vote cannot be inverted or

waived because it exists to serve more than personal ends.”¹⁵⁵ The lack of ‘personal’ element in the right to vote is what ultimately makes it a duty-right.

Despite this evident distinction between the right to vote and other personal civil rights, there are scholars who equate the right to vote with such rights for claiming the right ‘not to’ vote. For instance, Suhrith Parthasarathy, an Indian lawyer, stated that “Just as one’s right to freedom of religion also includes the freedom to practice no religion, the right to vote, as a form of ethical choice, includes the right not to vote.”¹⁵⁶ Likewise, Annabelle Lever equated the right to vote with the right to marry. She stated that “we need not refuse, accept, or offer to marry someone in order for our right to marry to be valuable and valued.”¹⁵⁷ It is so hard to believe how the right to vote which has the most outward societal effects that affects democratic functioning of a nation, is being equated to the most personal of rights like the right to marry or the right to freedom of religion. Whether you get married or not does not affect anybody else in this society in terms of their rights and benefits. It is solely a private affair to be decided by an autonomous individual. However, that is not the case with the right to vote. Hence, it is asserted that such claims where the right to vote is brought down to the level of other private civil rights is unfounded.

Lastly, the argument put forward by Heather Lardy is quite significant to further establish the difference in nature of the right to vote from other rights and freedoms. Lardy explains that “the idea of the right to vote is based upon a different theory of liberty from that which founds the traditional civil liberties. Those latter rights are essentially about guaranteeing liberty in the sense of non-interference by officialdom with individual choice and action.”¹⁵⁸ Further, Lardy

¹⁵⁵ Hill 2014 (n 5) 202.

¹⁵⁶ S.Parthasarathy, ‘Narendra Modi’s Dangerously Flawed Ideas On Compulsory Voting’, *The Caravan* (November 21, 2014), <http://www.caravanmagazine.in/vantage/narendra-modi-dangerously-flawed-ideas-compulsory-voting> (last accessed April 6, 2017).

¹⁵⁷ Lever (Ethics of Voting) 2009 (n 14) 225.

¹⁵⁸ H.Lardy, *Is There a Right Not to Vote?*, 24(2) *Oxford Journal of Legal Studies* (2004) 303-321, 311.

clarifies that the right to vote, on the other hand, is founded upon the theory of positive liberty which grants the right to participate in elections not just if they wish to do so. “The democratic standing which the right to vote confers is fully intelligible only as the award of an entitlement to participate actively, rather than as a merely passive possessor.”¹⁵⁹

Thus, as the nature, effects, scope, and the origin of the right to vote stands on a different pedestal in comparison with other civil liberties and rights, the common argument that ‘when there is a right to do something, there is a right not do the same’ does not apply to the right to vote.

4.4.2. Real Meaning of the Right ‘not to’ Vote in India: Supreme Court to the Rescue

Now it is clear that voting, despite being a vital political right, is an equally massive democratic duty that needs to be performed by all eligible voters during elections. The correct theoretical foundation and nature of the right to vote was also expounded in the previous section of this chapter. Based on that correct understanding evolved in Section 4.4.1, there is no right ‘not to’ vote, meaning the right to abstain from voting by not visiting the polling booth.

Coming to the Indian scenario once again, if discussions in Chapter 4 until now are read with the contents in Chapter 3, it is visible that the legislative understanding of the right to vote in India is incorrect. If the mandate of Article 326 of the Indian Constitution is taken along with sections 62 and 79(d) of the RP Act 1951, it is seen that the right to vote is couched only in terms of citizen’s rights. The most important provision in this set is Section 79(d) of the RP Act 1951.¹⁶⁰ As it grants the right ‘not to’ vote, Section 79(d) is based on a misconceived notion of the act of voting and contradicts the actual nature of the right to vote.

¹⁵⁹ Ibid.

¹⁶⁰ Refer page 28 of this thesis for the text of Section 79(d) of the RP Act 1951.

However, the Indian Supreme Court has come to the rescue for the sake of real democracy. Even if Section 79(d) remains on the statute book today, the Supreme Court in the case of *People's Union for Civil Liberties v Union of India*¹⁶¹ (“*PUCL 2013*”) has interpreted the nature of the right to vote accurately and declared the correct position of law.

In *PUCL 2013*, the Supreme Court heard a writ petition under Article 32 of the Indian Constitution challenging the constitutionality of Rules 41(2), 41(3), and 49-O of the Conduct of Election Rules, 1961 (“Rules”). The main argument against the validity of these provisions was that they violated the concept of ‘secret ballot’ by authorizing presiding officers at polling booths to record the names of persons who did not vote for any of the candidates. Secret ballot is a vital component of free and fair elections, and is protected by Article 19(1)(a) and Article 21 of the Indian Constitution. Further, the petitioner prayed to the court for directing the Election Commission of India to include the option of “None of the Above” (“NOTA”) in the electronic voting machines to protect the right ‘not to’ vote.¹⁶² An important aspect that needs attention here is the fact that the petitioner did not argue that citizens possess a right to choose whether to visit the polling station and vote at all. Instead, what they meant by the right ‘not to’ vote was that while voting, they must be provided an option that would allow them to reject all the nominated candidates. Hence, fortunately, this is not an extreme form of liberal argument that is being raised here.

The unanimous judgment of the Supreme Court was authored by Justice P. Sathasivam, who was then the Chief Justice of India. In ¶ 37 of the judgment, after considering the mandate of Section 79(d) in the RP Act 1951, the court held that a right ‘not to’ vote is recognized by the RP Act 1951 and its Rules. Nevertheless, the court clarified the implication of the right ‘not to’ vote in the following words:

¹⁶¹ (2013) 10 SCC 1. This case was decided by a 3-judge bench of the Supreme Court on September 27, 2013.

¹⁶² Ibid at ¶ 3 and ¶ 10 of the judgment.

“A voter may refrain from voting at an election for several reasons including the reason that he does not consider any of the candidates in the field worthy of his vote. One of the ways of such expression may be to abstain from voting, which is not an ideal option for a conscientious and responsible citizen. Thus, the only way by which it can be made effectual is by providing a button [NOTA] in the EVMs [electronic voting machines] to express that right. This is the basic requirement if the lasting values in a healthy democracy have to be sustained...”¹⁶³

Thus, the right of citizens ‘not to’ vote given under Section 79(d) has been categorically restricted to mean the right of citizens ‘not to’ vote for any of the listed candidates by using the NOTA option. The Supreme Court elucidated that the right ‘not to’ vote does not imply the right to abstain from voting by not visiting the polling stations.

Besides, the Supreme Court also highlighted the need for higher voter participation in India. In the words of Justice Sathasivam:

“Eventually, voters’ participation explains the strength of the democracy. Lesser voter participation is the rejection of commitment to democracy slowly but definitely whereas larger participation is better for the democracy...The voters’ participation in the election is indeed the participation in the democracy itself. Non-participation causes frustration and disinterest, which is not a healthy sign of a growing democracy like India.”¹⁶⁴

Apart from advocating the correct conception of the right to vote, the judgment has also succeeded in illuminating the value of participatory democracy. An overall reading of this judgment conveys that it is the duty of a “conscientious and responsible citizen” to not abstain from voting and cautiously exercise his/her right to vote in order to improve the “strength of the democracy”.

Hence, while the SC has recognized the freedom of citizens not to vote, it has restricted the meaning of the phrase ‘not to vote’ to mean the choice of NOTA and thereby, rejecting all the listed candidates. The Supreme Court has prudently interpreted the democratic nature of the right to vote and shaped a balanced reasoning with which this thesis completely concurs.

¹⁶³ Ibid at ¶ 37 of the judgment. The court finally directed the Election Commission of India to add NOTA buttons in all electronic voting machines. Since this landmark judgment, in all the national parliamentary elections and state legislative assembly elections, citizens have the right to not vote for any of the candidates listed.

¹⁶⁴ Ibid at ¶ 50 of the judgment.

4.4.3. Right to Vote: The Most Treasured Political Right

Apart from the assertion that the right to vote does not entail the right ‘not to’ vote within itself, this thesis would like to remind the existential importance of this highest political right. The evolved value of the right to vote over many centuries itself makes a credible case for the voters to exercise the said right judiciously. The US Supreme Court has explained the democratic value of the right to vote better than any other institution. In cases like *Yick Wo v Hopkins*¹⁶⁵, *Reynolds v Sims*¹⁶⁶ and *Harper v Virginia Board of Elections*¹⁶⁷, the US Supreme Court had held that the right to vote is ‘preservative’ of all other rights and freedoms. This profound formulation about the significance of voting rights, regardless of its origin in the US Supreme Court, applies to the constitutional culture of any democratic country. This approach by the US apex court is not surprising given the fact that it is in the US where the right to vote developed as a political right over a long time due to intense social movements all along its history.¹⁶⁸ Further, it is said that democracy is impossible without political rights like the right to vote.¹⁶⁹ That said, if the right to vote is considered as the preservative right that secures other rights, and if the right to vote is deemed as one of the political rights without which a democracy cannot function, how can there be any argument that diminishes the value of voting? It is only when the right to vote is judiciously exercised that other civil rights and liberties of individuals can be protected from governmental actions. Thus, the right to vote achieves its aims only upon its utilization by citizens unlike other personal human rights.

Thus, citizens including liberals, must acknowledge the real nature and values inherent in the act of voting and thereafter, exercise their most important political right thoughtfully. Finally,

¹⁶⁵ 118 US 356 (1886).

¹⁶⁶ 377 US 533 (1964).

¹⁶⁷ 383 US 663 (1966).

¹⁶⁸ See A.Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books 2001) 317.

¹⁶⁹ W.Osiatyński, *Human Rights and their Limits* (Cambridge University Press 2009) 72.

Lijphart's message regarding the aims of democracy after the expansion of the right to vote over the years is noteworthy in this context: "After universal suffrage, the next aim for democracy must be universal or near-universal use of the right to vote."¹⁷⁰ So, let us hope.

4.5. Compulsory Voting Invades Freedom & Liberty: Myth Debunked

Coming to the final limb of this thesis's arguments in favor of compulsory voting---based on the principle of 'voting as a duty'---this section will briefly substantiate why compulsory voting does not unreasonably suppress personal liberty and freedom of choice of voters beyond any permitted constitutional standards.

John Stuart Mill, one of the greatest thinkers of liberty, stated that an individual citizen is not accountable to the public 'only' if his/her actions that do not have any effects on the society.¹⁷¹

This maxim by Mill is crucial while deciding whether compulsory voting infringes upon an individual's autonomous sphere of liberty. However, as this thesis has explained in all the previous sections of this chapter, voting is not a personal activity. Each vote is significant and it affects the society in general. Therefore, when citizens are asked to go out and vote in elections, they cannot claim the protection of Mill's doctrine because Mill allows complete autonomy to citizens only when their actions do not reverberate any effects on the society.

Moreover, Lijphart argues that even if voters are compelled to exercise their duty to vote, it "entails only a very minor restriction" on individual freedom.¹⁷²

More specifically regarding freedom of choice of voters in the Indian context, the *PUCL 2013* judgment has guaranteed sufficient and enhanced freedom of choice while voting than ever before, by introducing the NOTA option. The importance of this reform measure was voiced by the *PUCL 2013* judgment itself:

¹⁷⁰ Lijphart 1997 (n 4) 11.

¹⁷¹ J.S.Mill, *On Liberty* (Gertrude Himmelfarb ed., Penguin Books 1974) 163.

¹⁷² Lijphart 1997 (n 4) 11.

“Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered.”¹⁷³

Therefore, any apprehension raised against compulsory voting in India on the ground that it curtails freedom of choice of individuals is less forceful now. The option to vote for NOTA substantially enhances the voter’s freedom of choice as they will no longer be forced to choose at least one candidate from the list. In fact, the NOTA reform would supplement and increase the legitimacy of compulsory voting systems to make democracy more effective as it would allow every type of voices to be heard during elections.

Interestingly, Australians do not have the option of NOTA in their ballot papers. However, the HCA had ruled that they can fold an empty ballot paper and put in the ballot box to be considered to have voted legally in case they are not satisfied with the candidates listed.¹⁷⁴ The usage of NOTA is certainly superior than blank votes as NOTA conveys messages of political displeasure or protest in clearer terms than empty ballot papers. Moreover, “Abstention from voting, as evident from empirical studies across the world, is open to multiple interpretations. This ambiguity is in principle absent from...India’s NOTA options. They clearly capture dissatisfaction and are able to put a number on it.”¹⁷⁵ Australia may therefore, adopt the practice of NOTA into their electoral system and replace the existing practice of allowing blank votes. It would certainly enhance the legitimacy of their already efficient compulsory voting regime. Remarkably in India, the data regarding the usage of NOTA until now reveals positive signs about how the voters have used NOTA purposefully. For instance, “A quick analysis of NOTA

¹⁷³ *PUCL 2013* (n 161) ¶ 53.

¹⁷⁴ *Faderson* (n 69).

¹⁷⁵ G.Goel, ‘Yoga teachers’ twist: How Indian voters are using NOTA creatively to lobby for specific demands’, *Scroll.in* (February 10, 2017), <https://scroll.in/article/828113/when-other-protests-have-failed-could-nota-help-yoga-teachers-get-jobs-in-uttarakhand> (last accessed April 6, 2017).

usage in all elections so far does suggest some interesting early pointers. First, reserved constituencies have seen a relatively larger number of NOTA votes, which points to the continued social prejudice against political reservation for SC/STs.”¹⁷⁶

Thus, the fear that the duty to vote unreasonably infringes upon the individual’s liberty and freedom of choice, in the Indian context at least, has been dispelled by this section. Moreover, the use of NOTA in India has indicated its capability to translate democratic discontent into votes against politicians. Thus, freedom of choice of voters is only enhanced, and not abridged, when they exercise their civic duty to vote.

4.6. Conclusion

In this all-important chapter, I have asserted that compulsory voting is constitutionally legitimate by predominantly relying on the following arguments:

- i. Voting, while being the supreme political right, is also the paramount democratic duty of an individual;
- ii. The right to vote does not share the same philosophy and underlying principles as other personal rights like the right to freedom of religion and hence, is unique;
- iii. The right to vote does not encompass the right ‘not to’ vote by abstaining from voting day procedures;
- iv. Compulsory voting does not unreasonably suppress individual liberty and freedom of choice due to supplementary electoral measures like NOTA in India;
- v. Compulsory voting enhances voter turnout, ensures that voices from every section of the society is determinant in choosing their representatives and consequently, increases the legitimacy and accountability of the elected government; and

¹⁷⁶ V.R.Vachana and M.Roy, ‘NOTA and the Indian voter’, *The Hindu* (February 28, 2017), <http://www.thehindu.com/todays-paper/tp-opinion/nota-and-the-indian-voter/article17379880.ece> (last accessed April 6, 2017).

vi. Compulsory voting does justice to the life of a representative democracy like India.

Therefore, this author believes with utmost conviction that the electoral practice of compulsory voting (if supplemented with other electoral measures like NOTA and adequate voter education programs) is constitutionally legitimate in any democracy, undoubtedly, including India. But how should India assimilate this practice into its system? Having made a powerful case ‘for’ compulsory voting based on the principles and philosophy conveyed in this chapter, this thesis will conclude by advocating certain measures that would embed those valuable principles concerning voting in India’s constitutional and political culture.

5. Conclusion

Primarily through the arguments raised in Chapter 4, this thesis has substantiated that compulsory voting is constitutionally legitimate in the general sense as an electoral concept as well as in the Indian context. Among all the viewpoints used for that purpose, the duty-based perspective is the most pertinent one as is suggested by the thesis title. Because of the deontological foundation of this thesis, there are two main elements this concluding note will highlight.

The Nomenclature Problem

The term ‘compulsory voting’ is a misnomer. It misinforms people about the real connotation and aim of this electoral concept. The idea behind this concept is to ensure that every citizen’s opinion is heard, and that citizens have a pious obligation towards other citizens to cast their vote and form a genuinely legitimate government for the society’s common good. Equating this objective with the term ‘compulsory’ creates a negative stigma of being coerced to do something. That is the underlying reason for all the liberal arguments against compulsory voting. Hence, with the motive of enabling the citizens to understand the true value of this electoral practice, this thesis proposes to rename compulsory voting with the term ‘deontological voting’. Eventually, this novel nomenclature for compulsory voting would be able to facilitate a change in the socio-political culture of voting in India and elsewhere.

Recommendations

In the introductory chapter, a concern was raised about how the principles of voting, and the deontological idea of compulsory voting promoted by this thesis could be transposed into India’s constitutional and legal arrangement. What is the best way to persuade and alter the mindset of citizens about their duty to vote? To institutionally embed the principle of deontological voting (in its comprehensive sense as discussed till now) in India, I propose two

recommendations. As voting is a moral civic duty, the author believes that its effective performance is not something that needs support of a sanction-based law which punishes an act of non-performance. After all, the law cannot ideally enforce morality; morality to perform an indispensable duty must come from within your conscience. The aim of this thesis is to sensitize the Indian society about the value of voting for the progressive development of a democratic society. The purpose is to make the citizens rethink about the existing misconceived liberal notions surrounding the right to vote. For that purpose, an explicit punitive law may not be the most capable. The author does not wish to witness an election day when the Indians will go to voting stations merely because of the presence of a sanction rather than their honest awareness about their duty to vote. Hence, it is recommended that Part IVA of the Indian Constitution on Fundamental Duties must be amended to add ‘the duty to vote in elections’ as a fundamental duty of every Indian citizen. This move would transform the status of the right to vote into a constitutional obligation as well. This step may not be effective in the short run to increase voter turnout in elections. But this is certainly the holistic manner of reforming the public attitude against voting and about the constitutional nature of the right to vote. By formally recognizing the obligation to vote, the State would also bind itself to a certain normative attitude towards elections. Moreover, the Election Commission of India and schools must subsequently, imbibe this idea in their voter education programs and education curricula respectively, to remind citizens about their most important civic duty. This proposal finds support in the views of Justice Kurian Joseph.¹⁷⁷ He considers the duty to vote as one of the “certain duties that are essential to any democracy [that] need to be reinforced within the current context so as to instil a new sense of civic responsibility”.¹⁷⁸ Similarly, the Justice J.S. Verma Committee to Operationalize the Suggestions to Teach Fundamental Duties to the

¹⁷⁷ Kurian Joseph 2016 (n 133).

¹⁷⁸ Ibid.

Citizens of India formed by the Union Government in 1998 had recommended the addition of “duty to vote at elections, actively participate in the democratic process of governance...” as a fundamental duty under Part IVA of the Constitution.¹⁷⁹

The second recommendation is an equally important statutory amendment that is indispensable to give full effect to the fundamental duty envisioned by the first proposal. We saw in Chapter 3 that Section 62 of RPA 1951 grants the right to vote to all Indian citizens who are eligible under the Act and Section 79(d) enhances this right by allowing the voter an option to refrain from voting as well. But it was forcefully argued in Chapter 4 that the grant of the right ‘not to’ vote by Section 79(d) is based on a deeply flawed rationale about the right to vote. Therefore, it is recommended that the words “or refrain from voting” must be deleted from Section 79(d). Even though the Supreme Court in *PUCL 2013* has expounded the correct position of law, this provision was not directly affected in terms of its language. This amendment would help in clarifying the ratio of *PUCL 2013* much better. The suggested amendment would also alter the balance of the legislative nature of the right to vote and make it in line with the correct conception of the nature of voting.

These two recommendations seek to solidify the concept of voting both as the most important democratic right as well as the most basic democratic duty of an Indian citizen. Moreover, the combined effect of these two amendments would provide a strong foundation for the Indian State to steer its society towards a moral milestone with respect to the ethos of a genuine democracy. Most notably, it will reduce the democratic deficit in the political and civic attitude of the society.

¹⁷⁹ See *Report of the National Commission to Review the Working of the Constitution*, ¶ 3.40.3, Chapter 3, Vol. 1, Union Ministry of Law, Justice and Company Affairs (March 31, 2002), <http://lawmin.nic.in/ncrcw/ncrcwreport.htm> (last accessed April 6, 2017).

Despite using the Australian experience of implementing compulsory voting as the learning reference to argue a case for the same in India, this thesis has not advocated the legal arrangement of Australia to enforce the civic duty to vote in India. The Indian society is very sensitive to any state action that it perceives to be intruding into individual autonomy by any measure. Thus, it is necessary to initially sensitize the public about the fact that voting is a fundamental civic duty through the ways endorsed here. Moreover, the deontological approach is essential to balance the exorbitant growth of liberal fanaticism in India.

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