CITIZEN'S RIGHT TO VOTE: ROLE OF THE SUPREME COURT IN EMPOWERING CITIZENRY TO BRING ABOUT 'A SYSTEMIC CHANGE' THROUGH NOTA FOR CLEANSING OUR BODY POLITIC (A JURISTIC CRITIQUE OF CONSTITUTIONAL DEVELOPMENTS)*

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Abstract

The thrust of the paper is to show how citizenry could be empowered to cleanse our body politic through the judicial exploration of constitutional nature and ambit of their right to vote. In this juristic analysis of the decisions of the Supreme Court the paper has raised such basic questions as how come, if the right to vote has been with us since the very inception of the Constitution and yet it took us more than fifty or sixty years even to raise the question and ask, whether a citizen in the exercise of his right to vote has the right to know the antecedents of the election candidates, and whether in the exercise of that right he has also the right to reject the candidate without losing his right to secrecy about his rejection-preference.

By arresting the deviating approach to the exploration constitutional dimensions of the right to vote, the paper has ventured to suggest that the thrust of developmental approach, on the whole, paves the way for the next progressive phase in which 'the right to vote' would eventually include within its ambit 'the right to re-call' on the basis of a simple axiomatic premise that the 'right to do' inheres the 'right to undo'. This would, in turn, accentuate the process of systemic change at least with two evident advantages. One, the right to recall would avoid the waiting agony for full five years in getting rid of those who are found indulging in corrupt and criminal practices by misusing their power and position. Two, they would be accountable to the electorates on continual basis, leaving little time and space for them to have recourse to manipulative practices, say, for amassing huge wealth through corrupt means.

The critique has eventually led the author to prompt the Parliament for proper legislation, followed by periodic 'Re-statement of the whole gamut of law', which would admirably accelerate the whole process of systemic change for cleansing our body politic by strengthening the rule of law.

I Introduction

RIGHT TO vote is perhaps the simple most right. As such it is known to every citizen. And yet the inherent value of this right still remains unexplored and unknown.

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* This article is based on two lectures delivered by the author very recently, both impinging upon the subject of citizen's right to vote. The first lecture was delivered as a part of Panjab University Special Lecture Series, Colloquium No. IX, and the second lecture under the aegis of the Indian Council of Social Science Research, North-Western Regional Centre at the ICSSR Complex, Panjab University Campus, in the Special Lecture Series.

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May be due to unknown value of this right, the percentage of voters actually visiting the polling booth to cast their votes is not very encouraging.[1] With a view to strengthening the functioning of democratic system of government, the intrinsic value of the right to vote in terms of its nature and ambit is required to be constitutionally explored, understood and appreciated. This would, in turn, prompt the citizens to go to the polling booth and not just to vote but exercise their right to elect their representatives in the light of their judgment. The right to vote could be usefully invoked and applied in making various political arrangements truly functional and thereby provide impetus to the democratic system of governance. The masses are required to be encouraged to participate and exercise their right to vote in the first instance.[2] This indeed was the message of President of India to the nation on the eve of 65th Republic Day when he said that "each one of us is a voter and has a responsibility. We cannot let India down. It is time for introspection and action... 2014 should also become the year of healing after fractured and contentious politics of the past few years…." "Fractured government can prove catastrophic," cautioned the President, for such a regime is "held hostage to whimsical opportunists".[3] With the increasing participation of citizens, the possibility of a 'fractured' mandate is considerably reduced, because, notwithstanding illiteracy coupled with poverty of the large section of our population, their collective vision of a relative good government they would like to have cannot be faulted.

II Exploration of constitutional values

How do we explore the constitutional dimensions of the nature and ambit of the citizen's right to vote? This is done primarily and essentially through the instrumentality of the Supreme Court, which is constitutionally empowered to state authoritatively, what the Constitution is or what does it say on counts of nature and ambit of this right. In this respect, one may bear in mind the clear and categorical mandate contained in article 141 of the Constitution:

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1 On all-India basis, it is said to be around not more than 50 per cent. However, with the addition of about 20 crore of more voters, the 16th *Lok Sabha* is expected to make a mark in the increased participation of the people in the largest democracy of the world.

2 See, for instance, the vehement plea of the spiritual guru Ravi Shankar, the Founder of the Art of Living, to his followers is: "Spread awareness about the right to vote" *The Tribune* Oct. 23, 2013. Participation of the masses in the electoral process will bring about "a change in the system". It will strike at the very root of corruption. In support of his contention, he specifically said: "We have a list of around 12-crore fresh voters who will be voting this year, however, as per the Election Commission around 10-crore are fake voters," *available at*: http://www.tributeindia.com/2013/20131023/cth.1.htm (last visited on Mar.12, 2014).

3 *Available at*: http://www.presidentofidia.nic.in (last visited on Mar.12, 2014).

The law declared by the Supreme Court shall be binding on all courts within the territory of India. How does the Supreme Court declare the law? The Supreme Court is not the legislator. The law making function strictly and properly belongs to the legislature. Making and declaring that law become manifest through the statute enacted by the legislature. However, this law, the statutory law, in turn, under the constitutional system of government must be in accordance with the provisions and principles laid down in the Constitution. The authoritative statement in a conflict situation whether or not the enacted law is in consonance with the constitutional mandate is eventually made by the apex court. This is how the Supreme Court comes into play.

The Supreme Court, thus, declares 'the law' only contextually, and that law is to be deciphered in the form of, what is termed as, "*ratio decidendi*"— the underlying principle-basis of the decision — as distinguished from "*obiter dictum*" that is an observation made by the court just by the way, which is not necessary for deciding the case in hand; it is something hypothetical in nature.

In this context, there is yet another cognate question that needs answering: Whether the law declared by the Supreme Court also binds the other organs of the state, namely, the legislature and the executive. Such a question is relevant to ask, because article 141 makes a reference only to the courts in India that are bound by the Supreme Court-declared-law.

The answer is in the affirmative. The law declared by the Supreme Court is equally binding on the legislature and the executive, because in case of conflict situation presented before the court, the court shall resolve the issue as per the declaration of the Supreme Court, and not according to the understanding and interpretation of the law by them – by the Parliament or the executive.

Thus, the whole process of declaring the law, by reason of being highly contextual, and its deduction being inferential, is quite complex. But, nevertheless, notwithstanding this complexity, such law continues to be of immense functional importance. It brings out the newer nuances in the course of resolution of concrete conflict situations and thereby reflecting upon its nature and widening ambit. This necessitates the continuing critical or juridical examination of the emerging body of judicial legislation!

Bearing this background in mind, the issue of constitutional exploration of the nature and ambit of the right to vote by the Supreme Court may be explored.

III Contextual prepositions for constitutional exploration

The occasion to explore the nature and ambit of the right to vote arose in a precipitated form for the first time when the Supreme Court was required to answer a conflict situation, which revolved around two propositions:

First contextual proposition: 'Whether the citizen's right to vote includes within its ambit his right to know the background of the election candidates, including particularly

if they bore any blemished record, such as criminal background.' The occasional opportunity to raise this proposition arose before the apex court in the year 2002-2003 in two successive cases, *Union of India* v. *Association for Democratic Reforms*,[4] and *People's Union for Civil Liberties* v. *Union of India*.[5]

In order to understand the value of this proposition to be expounded by the Supreme Court, one needs to ask at least two exploratory questions. One, why it took more than fifty years even to ask this question, namely, whether a citizen in the exercise of his right to vote has the right to know the background of the election candidates? How has he been hitherto casting his vote, say, during the last fifteen *Lok Sabha* elections? How did he exercise his right to vote in the last more than 50 state assembly elections? It seems the citizens have been casting their vote without really exercising their right to franchise!

The second exploratory question is: what happened around the years 2002-2003 that encouraged the citizens to raise the said pointed proposition the way it had come to the fore? In this respect, the author has been able to identify and crystallize at least two factors that seemed to have prompted the citizens.

The first factor as background consideration of the proposition was and continues to be the mounting societal concern about, what is pithily described as, increasing "criminalization of politics". The shrieking account of such a sad state of affairs is found in the Report of the Vohra Committee (1993).[6] To show the dismal picture, the author extracts an account from the Report given by the Director, Intelligence Bureau, revealing the nature and extent of proliferation of criminal gangs into our body politic:[7]

> In certain States like Bihar, Haryana and UP, these [criminal] gangs enjoy the patronage of local politicians, cutting across party lines, and the protection of Governmental functionaries. Some political leaders become

4 AIR 2002 SC 2112, *per* MB Shah, Bisheshwar Prasad Singh and H.K. Sema JJ. (Hereinafter simply, *Association for Democratic Reforms*-2002).

5 AIR 2003 SC 2363, *per* MB Shah, P Venkatarama Reddi and D.M. Dharmashikari JJ. (Hereinafter simply, *People 's Union for Civil Liberties*-2003).

6 In view of the increasing public concern about the murky state of affairs, the Union government on 9th July 1993 set up a committee under the chairmanship of the then home secretary N.N. Vohra (now the Governor of the State of Jammu and Kashmir) to study, *inter alia*, the nexus amongst criminals, politicians and bureaucrats, and recommend the requisite measures to de-criminalize our polity.

7 *Vohra Committee Report* para *6.2* (1993) The updated version of the extent of criminalization of politics, Out of 543 MPs, 162 have criminal cases pending against them. It means that 30 percent of Lok Sabha MPs have criminal record. The study suggests that out of 4,807 MPs and MLAs in India, a whopping 1,460 have criminal records pending against them. Here again, around 30 percent of Indian lawmakers have criminal record. *Available at*: http://mahindra-aggarwalonline.20m.com/PR-vohja committeeReport.htm.(last visited on Mar.18, 2014).

> the leaders of these gangs, armed *senas* and over the years get themselves elected to local bodies, State assemblies and the national parliament. Resultantly, such elements have acquired considerable political clout, seriously jeopardizing the smooth functioning of the administration and the safety of life and property of the common man, causing a sense of despair and alienation among the people.

The report was submitted to the government in October 1993, that is, within a stipulated period of less than four months. However, that report remained secret and dormant till it was placed on the table of Parliament in 1995. The occasion for doing so arose in the wake of a murder of a known political activist Naina Sahani in July 1995, when one of the persons arrested happened to be an active politician who had held important political posts, and the national press published a series of reports and articles on the criminalization of politics within the country, and the growing links between political leaders and mafia members.

The report was debated fiercely in the *Lok Sabha*. One of the MPs, Dinesh Trivedi, who participated in the debate, wanted the full disclosure of the report along with all the related documents. When he did not succeed to get the requisite response from the government, he moved the Supreme Court, which resulted in the decision, *Dinesh Trivedi, M.P.* v. *Union of India*.[8]

Although, as a matter of course the need of disclosures made before the committee that resulted in preparing the said report was recognized, and yet the Supreme Court refused to compel the government to make such disclosure in the instant case keeping in view the limited objective of the report. Nevertheless, in the normal course, as a matter of principle, stated the Supreme Court, withholding of information would amount to violation of the citizen's right to freedom of information.[9] "[I]n modern constitutional democracies," said the Supreme Court, "it is axiomatic that citizens have a right to know about the affairs of the Government, which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare."[10] In short, the court added that "democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant".[11] This response of the constitutional import must have encouraged the citizen to raise the said propositional question.

The second factor as background-consideration is in respect of the 170th Report of the Law Commission of India on Electoral Reforms (1999). This report, *inter alia*, made three recommendations:

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8 (1997) 4 SCC 306. (Hereinafter simply, *Dinesh Trivedi, M.P.)*

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

One, debarring candidates from contesting elections if charges were framed against them by a court in respect of certain offences.

Two, directing the election candidates to furnish details regarding criminal cases, if any, pending against them in courts.

Three, requiring the election candidates to file a true and correct statement of assets owned by them or their spouses and dependant relations.

None of those recommendations were implemented by the government as a measure of electoral reforms. The non-implementation of these recommendations must have also prompted the citizen to pursue his right by invoking the judicial processes.

In this backdrop, the critical question before the apex court in *Association for Democratic Reforms*–2002 was, how should they meaningfully answer the conflict problem involving the proposition whether the citizen's right to vote include within its ambit the right to know the background of the election candidates, including particularly if they bore any blemished past. Since on the face of it, the right to know the antecedent of the election candidate seems to be fundamental to the exercise of the right to vote, the three-judge bench of the Supreme Court for deciding the matter judicially desired the respondent government – Union of India – to tell the bench, why in the exercise of his right to vote, a citizen shouldn't have the right to know the antecedents of the election candidate, and, correspondingly, why shouldn't an election candidate be under a duty to reveal his past history, including the blemished record, if any. The response of the government, as reflected through the statement made by the Solicitor General, amounted to convey: 'A citizen in the exercise of his right to vote is entitled to know about the election candidate only on counts on which and the extent to which the State itself permits him to know by way of laying down the qualifications for standing at an election, and until or unless the State itself considers desirable to add anything to what is already given, the citizens have no right to ask anything more on this count.' In support of this stand, the Solicitor General made specific reference to the provisions of section 8 of the Representation of the People Act of 1951 that provides for disqualification on conviction for certain offences, and section 8A that provides for disqualification on ground of corrupt practices. The sum and substance of the whole argument was that it is the Parliament, and the Parliament alone, and not the court, who is the sole authority to determine what is required to be revealed for enabling the citizen to exercise his right to vote.

The clear stand of the government before the Supreme Court in *Association for Democratic Reforms*–2002*,* therefore, amounted to saying summarily: A citizen cannot claim to know the antecedents of an election candidate more than what the state has revealed to him in terms of clearing his nomination to contest the election. It is this,

'thus far, no farther' approach that led the three-judge bench of the Supreme Court to examine the proposition *de novo*. On the basis of their analysis, the apex court eventually held by negating the stand of the government: The citizen's right to vote includes within its ambit his right to know the background history of the election candidates, including particularly if they bore any blemished record, such as criminal background.

The Union of India strongly resented this decision of the Supreme Court, inasmuch as it was not in consonance with its policy perspective. It immediately moved to negate the Supreme Court's decision by promulgating an ordinance[12] which was soon repealed and replaced by the amending Act[13] that came into force with retrospective effect.[14]The legislative response of reversal is contained mainly in sections 33-A[15] and 33-B[16] of the amended Act of 1951.

A bare comparison of the statutory provisions with the directions issued by the Supreme Court in the case of *Association for Democratic Reforms*-2002 reveals that only

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12 The Representation of the People (Amendment) Ordinance, 2002 (No. 4 of 2002), promulgated on Aug. 24, 2002.

13 The Representation of the People (Amendment) Act, 2002, which was passed on Oct. 23, 2002.

14 *Id.* s. 2 (w.e.f. Aug. 24, 2002).

15 Insertion of new section 33A.- After section 33 of the Representation of the People Act, 1951 (43 of 1951) (hereinafter referred to as the principal Act), the following section shall be inserted, namely:- 33 A. Right to information:-

(1) A candidate shall, apart from any information, which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of Section 33, also furnish the information as to whether – (i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the Court of competent jurisdiction; (ii) he has been convicted of an offence other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3) of Section 8 and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of Section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1) display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2) at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

16 The extent of this right to information is limited under Section 33-B, which specifically requires a candidate to furnish information only as provided under the Act and rules. It opens with a non-obstante clause: Notwithstanding anything contained in any judgment, decree or order of any Court or any direction, order of any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.

some of the aspects and not all of the right to information raised by the court are incorporated by the legislature. In fact, the remaining aspects, relating to acquittal or discharge in criminal offences, or amassing of assets and incurring liabilities, or educational attainments, are clearly excluded, for it is specifically stated that no candidate shall be liable to disclose or furnish any such information which is not required to be disclosed or furnished under the Act or the rules made thereunder despite the directions issued by the court on the contrary. In this backdrop, the provisions of the amending Act that have the effect of limiting the right to information have been challenged before the three-judge bench of the Supreme Court under article 32 of the Constitution in *Peoples Union for Civil Liberties* (2003). In support of their stand, the government cited the authority propounded by the Supreme Court itself in its earlier decisions of *N.P. Ponnuswamy* v. *Returning Officer, Namakkal Constituency*,[17] and *Jyoti Basu* v. *Debi Ghosal*.[18] In particular, they quoted the propositional-statement to the effect: [19]

> A right to elect, fundamental though it is to democracy is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right.

What does this proposition mean and convey? For the purpose of understanding, one needs to construe this proposition in the form of three separate statements. First, the right to vote is not a fundamental right. Second, right to vote is not a common law right. Third, the right to vote is a statutory right, pure and simple.

The first statement that right to vote is not a fundamental right is seemingly true. Admittedly it is not a fundamental right in the strict sense of the term, inasmuch as it is nowhere specifically enumerated in part III of the Constitution in the mode and manner in which all the fundamental rights, such as fundamental "right to equality before the law" under article 14, fundamental "right to freedom of speech and expression", under article 19, and fundamental "right to education" under article 21A of the Constitution.

The second statement that right to vote is not a common law right is slightly hazy or unclear. This is because of the connotation of 'common law', which is different from its literal meaning. Literally construed, it means the law which is common. Connotatively, however, its meaning is different. Really, it means the principles of law which had been developed by the courts through the course of centuries, and that such common law principles were developed on the basis of prevailing customary practices. We have inherited the expression, 'common law', from the English law. In

17 1952 SCR 218: AIR 1952 SC 64.

18 (1982) 1 SCC 691: AIR 1982 SC 983.

19 *Supra* note 5 at 2391.

this sense, right to vote is certainly not a common law right, because no such customarily given right existed with us since time immemorial.

The third statement that right to vote is a "statutory right, pure and simple", thus, means that the right to vote is given to us by the Parliament through the enactment of their statute, namely the Representation of the People Act, 1951, and there is no right outside this statute.

The court, *inter alia* held:[20]

> Securing information on the basic details concerning the candidates contesting for elections to Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(*a*). This right to information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the press and electronic media, though, to a certain extent, there may be overlapping.

The right to vote at the elections to the House of the People or legislative assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in article 19(1)(*a*). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter.

Section 33-B inserted by the Representation of the People (Third Amendment) Act, 2002 does not pass the test of constitutionality, firstly, for the reason that it imposes a blanket ban on dissemination of information other than that spelt out in the enactment irrespective of the need of the hour and the future exigencies and expedients and secondly, for the reason that the ban operates despite the fact that the disclosure of information now provided for is deficient and inadequate.

The right to information provided for by Parliament under section 33-A in regard to the pending criminal cases and past involvement in such cases is reasonably adequate to safeguard the right to information vested in the voter/citizen. However, there is no good reason for excluding the pending cases in which cognizance has been taken by the court from the ambit of disclosure.

This decision of the Supreme Court turned out to the turning point in the history of constitutional–electoral law in India, because it discovered the new constitutional dimension of the right to vote, which hitherto remained unexplored for more than fifty years.[21]Henceforth, a citizen, equipped with the antecedents of the election candidates, would be able to decide if any of the candidates is worthy of his vote.

20 *Id.* at 2411.

21 See, Virendra Kumar, "People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies" 47 *Journal of the Indian Law Institute* 135-157 (2005). In this

However, this alone is not enough. In order to transform the right to vote into a powerful, potent, weapon in the hands of citizenry to change the face of the body politic, the need to take the next logical step, which leads the author to the next contextual proposition.

Second contextual proposition: 'whether a citizen's right to vote includes within its ambit the right to reject the candidate without losing his right to secrecy about his rejection-preference'.

Soon after the three-judge-bench-decisions in *Association for Democratic Reforms*-2002, and *People's Union for Civil Liberties*-2003*,* a writ petition under article 32 of the Constitution was filed by People's Union for Civil Liberties[22] for determining, as a logical corollary, whether in the exercise of his right to vote a citizen also has the right to reject the candidates presented at a given election without losing his right to secrecy about his rejection-preference. This was done by way of challenging the constitutional validity of rules 41(2), 41(3) and 49-O of the Conduct of Election Rules, 1961[23] to the extent these provisions violate the secrecy of voting, which is required to be maintained as per the provisions of section 128 of the Act 1951 read with rules 39 and 40-M of the said rules of 1961. Besides, disclosure of rejection-preference, it was further contended, also violates the fundamental right to the freedom of speech and expression under article 19(1)(a) of the Constitution.

Once the citizen's right to vote was held to include within its ambit the right to know the antecedents of the election candidates, it should not have been difficult to logically extend the right to know the antecedents to the right to reject the candidates if their background revealed that none of them was worthy of his vote. This was the issue to be decided in *People's Union for Civil Liberties* v. *Union of India*[24] and which was eventually decided on September 27, 2013, by three-judge bench consisting of P. Sathasivam, CJI and Rajana Prakash Desai and Ranjan Gogoi, JJ. But, why it took about a decade after the writ petition was filed way back in 2004 soon after the two three-judge bench decisions in 2002 and 2003 in succession? There is a revealing history of constitutional development, which explains the delayed-development.

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critique, the author has closely and critically examined, how the Supreme Court, very ingeniously, invoked the various constitutional strategies, and provided entirely a new dimension to the right to vote – a dimension that hitherto remained unexplored

22 Writ Petition (Civil) No. 161 of 2004.

23 Cumulatively, these rules do recognize the right of a voter not to vote but still the secrecy of his having not voted is not maintained in its implementation, inasmuch as in case an elector decides not to record his vote, a remark to this effect shall be made against the said entry in form 17-A by the presiding officer and the signature or thumb impression or the elector shall be obtained against such remark. It is this stance which makes the ground of challenge.

24 (2013) 10 SCC 1. (Hereinafter *People's Union for Civil Liberties*-2013)

The writ petition in *People's Union for Civil Liberties*-2013 was taken up for consideration after about five years (after its filing in 2004) in the year 2009. In the meanwhile some intervening development had taken place. In the year 2006 a judgment of the constitution bench of the Supreme Court appeared in *Kuldip Nayar* v. *Union of India*,[25] which made the maintainability of the 2004-writ petition under article 32 of the Constitution somewhat suspect.[26] The suspicion was on the ground that the right to vote, which had attained the status of fundamental right owing to the two 3-judge bench decisions of the Supreme Court in *Association for Democratic Reforms*-2002, and *People's Union for Civil Liberties*-2003, was having no more that status: it merely relapsed to the status of a mere 'statutory right.' Such an ambivalent position was taken to mean that though the constitution bench in *Kuldip Nayar* did not specifically overrule the ratio in the 3-judge bench decisions of 2002 and 2003, yet it impliedly overruled those decisions, and, thus, created 'a doubt' about the very nature of the right to vote.

Accordingly, when the writ petition of 2004 initially came up before the Supreme Court in this case on February 23, 2009, the respondent government took the stand that writ petition under article 32 was not maintainable before the Supreme Court inasmuch as no fundamental right had been violated. Pursuant to this preliminary-plea, the question arose, whether the constitution bench had impliedly overruled the historic decisions of the two three- judge benches without expressly overruling them.[27] Since this stand created "a doubt" on the constitutional count, the matter was referred to a larger bench of the Supreme Court "to arrive at a decision".[28]This is how the three-judge bench of the Supreme Court consisting of P. Sathasivam, CJI and Rajana Prakash Desai and Ranjan Gogoi, JJ was constituted to decide the writ petition in

25 (2006) 7 SCC 1, *per* Y.K Sabharwal CJI (for himself and K.G. Balakrishnan, S.H. Kapadia, C.K. Thakker and P.K. Balasubramanyan JJ.) (Hereinafter simply, *Kuldip Nayar*).

26 In this case, the amendment made in the Representation of the People Act, 1951 through the amending Act of 2003, deleting the requirement of 'domicile' in the state concerned for getting elected to the Council of States (*Rajya Sabha*), was challenged under art. 32 of the Constitution. One of the central issues on this count before the constitution bench was whether such a change could be made by the Parliament. The petitioners contended that such a deletion violated the fundamental right of the voters of the state concerned and thereby disturbing the basic structure of the Constitution that envisaged federalism. It is in this context, the propositional statement made by the Supreme Court earlier; namely, the right to vote is "neither a fundamental right nor a common law right;" it is a "statutory right, pure and simple." "Outside of statute, there is no right to elect..." [*N.P. Ponnuswamy* v. *Returning Officer, Namakkal Constituency* 1952 SCR 218: AIR 1952 SC 64; *Jyoti Basu* v. *Debi Ghosal* (1982) 1 SCC 691: AIR 1982 SC 983], came to be considered. Since the constitution bench answered the question in the affirmative, it was taken to mean that the constitution bench impliedly overruled the said propositional statement.

27 See *People's Union for Civil Liberties*-2013 (para 4)

28 *Ibid.*

People's Union for Civil Liberties-2013 with the following two-fold reference (made on February 23, 2009):[29]

(a) Whether there is any doubt or confusion with regard to the nature of "the right of a voter" in view of the Constitution Bench's decision in *Kuldip Nayar*.

(b) Whether the Constitution bench's decision in *Kuldip Nayar* "impliedly overruled" the judgments in two three-Judge Bench cases of *Association for Democratic Reforms*-2002 and *People's Union for Civil Liberties*-2003.

The three-judge Bench in *People's Union for Civil Liberties*-2013, in the light of their own understanding of the ratio of the two said judgments in *Association for Democratic Reforms*-2002 and *People's Union for Civil Liberties*-2003,[30] "after a careful perusal" of the verdict of the constitution bench of the Supreme Court in *Kuldip Nayar*,[31] concluded: [32]

> *[W]e are of the considered view that Kuldip Nayar does not overrule the other two decisions, rather it only reaffirms what has already been said by the two aforesaid decisions.* The said paragraphs recognize that right to vote is a statutory right and also in *People's Union for Civil Liberties-2003* it was held that 'fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression.' Therefore it cannot be said that *Kuldip Nayar* has observed anything to the contrary….

The opening part of the statement shows that the blockade of constitutionality has been removed by stating that the 5-judge bench decision of the Supreme Court does not impliedly overrule the decisions of 2002 and 2003. However, while doing

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29 See, *id.* para 17.

30 The ratio of the two said judgments (as read by the three-judge bench in *People's Union for Civil Liberties*-2013 is: "In succinct, the ratio of the judgment was that though the right to voter is a statutory right but the decision taken by a voter after verifying the credentials of the candidate wither to vote or not is his right of expression under Article 19(1)(a) of the Constitution." (Para 19). The purport of this statement becomes clearer in the succeeding paragraph: "As a result, the judgments in *Association for Democratic Reforms-2002* and *People's Union for Civil Liberties-2003* have not disturbed the position that right to vote is a statutory right. Both the judgments have only added that the right to know the background of a candidate is a fundamental right of a voter so that he can take a rational decision of expressing himself while exercising the statutory right to vote." (Para 20).

31 See *People's Union for Civil Liberties*-2013 (para 21).

32 *Ibid.* (Emphasis added.)

33 "… The contention of the petitioners in *Kuldip Nayar* was that majority view in *People's Union for Civil Liberties-2003* held that right to vote is a Constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution. It is this contention on which the

so, the latter part of this statement, read with the succeeding paragraph,[33] it is also stated categorically that "there is no contradiction as to the fact that right to vote is neither a fundamental right, nor a Constitutional [sic] right, but a pure and simple statutory right…" and this introduces, an element of conceptual ambiguity, which requires review.

Thenceforth, the course of constitutional developments took two different directions. First, in the direction of widening the citizen's right to vote so as to include within its ambit the right to negative voting; second, in the direction that tended to deviate from the constitutionally consistent course hitherto taken by the Supreme Court in two consecutive decisions in 2002 and 2003.

First, to proceed with the finding of the 3-judge bench of the Supreme Court in *People's Union for Civil Liberties*-2013 that the constitution bench of the Supreme Court in *Kuldip Nayar* has not impliedly overruled the two three-judge bench decisions of 2002-2003. With this decision in hand, there was no difficulty in logically proceeding ahead to hold and conclude that a citizen in the exercise of his right to vote has also the right to reject all the contesting candidates without losing his right to secrecy.

In order to further fructify this conclusion, the Supreme Court, presumably acting under article 142 of the Constitution,[34] directed the Election Commission of India that in the exercise of its wide powers under article 324 of the Constitution, it should make a provision of negative voting through the insertion of NOTA (none of the above) button on EVMs (Electronic Voting Machines).[35] Following this directive of the Supreme Court, the Election Commission issued orders to all the chief electoral officers of all the states and the union territories to make provision of NOTA button so as to enable a citizen-voter to exercise his right to reject if he found that none of them was worthy of his vote.[36]

Constitution Bench did not agree in the opening line in para 362 and thereafter went on to clarify that in fact in *People's Union for Civil Liberties-2003*, a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression. *Thus, there is no contradiction as to the fact that right to vote is neither a fundamental right nor a Constitutional [sic] right but a pure and simple statutory right…" People's Union for Civil Liberties*-2013 (para 21). (Emphasis added.)

34 Art.142 of the constitution, in the exercise of its jurisdiction, empowers the Supreme Court to pass "such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it."

35 This concept of negative voting is already in vogue in the electoral system of very many other countries, both small and large. France, Belgium, Brazil, Bangaladesh, State of Naveda of the USA (36th State), for instance, are having the provision of negative voting through NOTA on their EVMs. Finland, Sweden, the USA (some of the states) have the provision of neutral voting along with negative voting through blank vote button/a provision on ballot paper. [See *People's Union for Civil Liberties*-2013 (para 58)]

36 "EC issues order on NOTA option" *The Sunday Tribune* Oct. 13, 2013.

For comprehending the concept of negative voting through NOTA, there is a need to clarify its underlying concept.

IV NOTA –underlying concept

NOTA & the concept of 'not voting': Are they intrinsically different?

Both emanate from the right to vote. The right to vote includes the right 'not to vote'. In case of NOTA, which inheres the concept of negative voting, a voter chooses not to vote for any of the contesting candidates. In that sense, both seem to be similar in purport.

Until the introduction of NOTA, under the relevant provisions of the Conduct of Election Rules, 1961[37] the voter might choose not to vote by not going to the polling booth if he did not like the credentials of any of the contesting candidates. And even if he chose to go to the polling booth and collected the requisite receipt as an insignia of his entitlement to vote, and then changed his mind not to record his vote, he could do that. In that eventuality, to account for his presence, a remark to that effect was made against the said entry in form 17-A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark.

However, in both the situations of exercising his right 'not to vote', 'secrecy' of citizen's right to vote was breached, which is otherwise sacrosanct and required to be maintained under the Representation of the People Act, 1951[38] read with the relevant provisions of the Rules of 1961.[39] The provision of NOTA on EVM (Electronic Voting Machine) rectifies this lacuna.[40]

NOTA & Abstain button on EVM in Parliament: Are they similar?

The three-judge bench of the Supreme Court in *People's Union for Civil Liberties*-2013 explained the mechanics of NOTA by comparing it with Abstain button used on EVM in Parliament: [41]

NOTA provision is "*exactly* similar to the Abstain button since by pressing the NOTA button the voter is in effect saying that he is abstaining from voting since he does not find any of the candidates to be worthy of his vote."

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37 Rule 41(2) and rule 41(3) and rule 49-O of the Conduct of Election Rules, 1961 (hereinafter simply Rules of 1961) recognize the right of a voter not to vote.

38 See s. 128 of the Representation of the People Act, 1951 (hereinafter Act of 1951).

39 See rules 39, 41, 41-M of the Rules of 1961.

40 Rules 41(2) and (3), and 49-O have been declared *ultra vires* s. 128 of the Act of 1951 and also art. 19(1)(a) of the Constitution to the extent they violate secrecy of voting, see *People's Union for Civil Liberties*-2013 (para 61).

41 *People's Union for Civil Liberties*-2013 (para 57). Emphasis added

In the author's submission, the analogy of parliamentary practice is only to a limited extent. It is similar only to the extent of three types of options. In the parliamentary voting machine, there are three options: Ayes, Noes and Abstain . In the general elections, all the buttons on the EVMs, prior to the introduction of NOTA, could be broadly be divided into two categories, corresponding to Ayes and Noes that gave an option to the voter to vote in favour of one (or more) of the contesting candidates in preference to all the rest. Now with the provision of NOTA, it came to be equated with Abstain. A closer look reveals that NOTA is not just abstaining. The voter is not just adopting the stance of neutrality by saying that the he is neither favouring this candidate nor that candidate; he is going beyond that; he is positively rejecting all of them. This, indeed, is an assertive way of conveying 'disapproval'.

NOTA : An instrument of silent 'systemic change'

The Supreme Court, while introducing the concept of negative voting though NOTA in *People's Union for Civil Liberties*-2013, has made the following statement: [42]

> When through NOTA a large number of people are expressing their disapproval with the candidates put up by political parties, "*gradually* there will be a systemic change and the political parties will be forced to accept the will of the people and field candidates who are known for their integrity."

Apart from this generic statement, the Supreme Court has not dealt with the *modus operandi* of the concept of negative voting; that is, it does not deal with the nitty-gritty of how and in what manner it is going to impact the polity, say, in terms of the aggregate of NOTA votes or otherwise. It seems, the Supreme Court had left the matter to the Parliament to work out the broad policy perspective in the light of their holdings in the judgment. This became evident when subsequently the Supreme Court refused to entertain a writ by way of public interest litigation (PIL), in which the petitioners sought a direction of the court to the Election Commission that it should order re-election in constituencies where the majority of the voters rejected all the contesting candidates by pressing the NOTA button.[43] The clear reason given was that it was for the Parliament to amend the law in the light of the three-judge bench judgment of the Supreme Court on September 27, 2013, and that the court was not inclined to intervene at that stage.

Soon thereafter, assembly elections were held in the States of Delhi, Chhatisgarh, Rajasthan and Madhya Pradesh with the provision of NOTA button on the EVMs.

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42 *Id.,* para 57. (Emphasis added.)

43 See "NOTA: SC rejects PIL for re-poll" *The Tribune* Nov. 25, 2013.

The computation of the results showed that in all the assembly elections not more than 15 lakh voters used NOTA. In Delhi, less than 1% voters used NOTA button. This negligible percentage of voters using NOTA button has led to the popular perception that NOTA has 'no electoral value' inasmuch as it does not impact the result of elections. Is it really so?

If that be so, how then NOTA could bring about "gradually", as the Supreme Court put it, "a systemic change" in the body politic? What the Supreme Court meant to say is that NOTA cannot bring about an instant change in the political system. It would be a 'gradual' change. One may call it an 'invisible', 'imperceptible' or 'subtle' change. In fact, such an impact of NOTA, painted in words, amounts to saying: 'Beware, NOTA is watching you!' This is how it has impacted the decision-making of the political parties in the selection of their candidates for the ensuing 16th *Lok Sabha* elections. It has cautioned them to select only those candidates, who are known for their integrity.[44] "Candidates' image to play crucial role in LS elections," was the note of caution that depicted the public mood.[45] Accordingly, on the principle of integrity as perceived by the public, very many heavy weights in political arena are denied party representation in the Parliament.[46] It seems, at this point of time, we are tempted to state principally: 'The lesser the number of NOTA votes, the greater is the invisible impact of NOTA!'

NOTA impacted features causing 'systemic change'

One may cull the following NOTA impacted features causing 'systemic change' in the body politic from the Supreme Court judgment in *People's Union for Civil Liberties*-2013:

(a) NOTA accommodates diversity of views by widening the choice of voters through the addition of negative voting.[47]

(b) NOTA ensures 'free and fair elections' by freeing voters from the "fear of reprisal, duress or coercion" in the exercise of their right to vote,[48] or otherwise protecting them from the oppression of the political party known for its "bully' character.[49]

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44 See "Ticket –for-tainted debate rocks Congress" *The Tribune* Mar. 12, 2014.

45 See also "Cong panel undecided on tainted candidates" *The Tribune* Mar. 13, 2014.

46 See "Tainted Kalmadi denied ticket" *The Tribune* Mar. 19, 2014.

47 NOTA allows "people to have diverse views, ideas and ideologies" *People's Union for Civil Liberties*-2013 (para 49).

48 *Id.*, para 54.

49 *Id.*, para 55.

(c) NOTA strengthens the citizen's fundamental rights by widening the ambit of the right to freedom of speech and expression under article 19(1)(a) on the one hand and effectively protecting his right to personal liberty under article 21 of the Constitution on the other.[50]

(d) NOTA, promotes equality by preventing electoral system from being violative of the fundamental right to equality under article 14 of the Constitution.[51]

(e) NOTA increases the participation of voter-citizens in the democratic process, because now they have the opportunity of rejecting all the contenders if they are found not suitable and worthy of their votes.[52]

(f) NOTA "fosters purity of the electoral process", say, by reducing/eliminating the incidence of impersonation or fake voting through "wide" and "effective" participation of the people.[53]

(g) NOTA approach is constitutionally consistent:[54] it helps to realize the ideal of democratic system of government on the basis of constitutional values of justice, liberty, equality and fraternity.

(h) NOTA augments the values of democracy by accelerating democratic processes with incredible speed and accuracy through the exploitation of modern technology, which is economically cost-effective, technologically feasible,[55]

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50 "Not allowing a person to cast vote negatively defeats the very freedom of expression and the right ensured under Article 21, that is, the right to liberty." *Ibid.*

51 See *id.*, para 54. Prior to the introduction of NOTA, secrecy was maintained only in respect of those citizens who wish to cast their votes in favour any one of the contesting candidates (positive voting) and no such secrecy was given to those who wanted to reject all of them (negative voting), and thereby violating the fundamental right to equality under art. 14 of the Constitution. See *id.*, para 46.

52 Earlier, if a voter was not happy with the contesting candidates, he simply did not participate and absented himself, and this did not matter for the contestants. Such non-participation "causes frustration and disinterest, which is not a healthy sign of a growing democracy like India." *Id.*, para 50.

53 *Id.*, para 53. Presently, "in the existing system a dissatisfied voter ordinarily does not turn up for voting, which, in turn, provides a chance to scrupulous elements to impersonate the dissatisfied voter and cast a vote, be it a negative one," *id.,* para 56.

54 In order to make NOTA constitutionally consistent, the Supreme Court has directed the state to realign the relevant rules for the conduct of election so as to be in consonance with the principles as laid down in part III of the Constitution, especially with reference to arts. 14, 19(1)(a) and 21. Rules 41(2) & (3) of the Conduct of Election Rules of 1961 have been held as *ultra vires* s.128 of the Representation of the People Act, 1951 and art. 19(1)(a) of the Constitution to the extent they violate secrecy of voting. See *id.*, para 61.

55 There are no practical difficulties in the adoption of NOTA button on EVMs. Presently, the EVMs that are currently in use can accommodate as many as 64 panels with last panel with NOTA. Election Commission is exploring the possibility of developing ballot unit with 200 panels. *Id.*, para 59.

administratively workable.[56] Moreover, in order to make NOTA 'people friendly', the Election Commission has been directed by the Supreme Court to introduce NOTA in a "phased manner" and that too along with undertaking "awareness programmes to educate the masses".[57]

Summation of NOTA impact

(i) Though NOTA was formally introduced in the electoral system only on September 27, 2013, nevertheless its background consideration reveals that it is the outcome and culmination of a long-drawn history of constitutional development – a history spanning for more than 60 years that has transformed the formal, simple, innocuous right to vote into a powerful instrument of silent 'systemic change'.

(ii) Visibly though, NOTA is said to be not of much 'electoral value', and yet, in the author's estimate, its invisible impact seems to be immeasurable! It "serves", as the Supreme Court has put it, "a very fundamental and essential part of a vibrant democracy".[58]

(iii) Though it is true that hitherto our democratic system has not been working ideally as expected in a true democracy, and yet it is by far the best system of governance available to us, because it is premised on inclusive and equal participation of all by granting every citizen under article 326 a constitutional right to vote based solely upon universal principle of "adult suffrage", which cuts across the narrow confines of religion, race, cast, sex or place of birth.

(iv) NOTA is indeed a grass-root sustainable judicial strategy, for it tends to bring about 'a systemic change' 'from bottom up' in the body politic, and yet leaves enough space for the Parliament to work out a broad policy perspective, but only in accordance with the constitutionally consistent principles propounded by the Supreme Court in their judgment of September 27, 2013.

V Conclusion

The constitutional developments that have hitherto taken place represent more or less a continuum. Barring aside some deviation, which calls for immediate attention, their central thrust, one may venture to suggest, paves the way, for the next progressive

56 The implementation of the NOTA button, according to Election Commission, will not require much effort except for allotting the last panel in the EVM for the same. *Id.*, para 60.

57 *Id.*, para 61.

58 *Id.*, para 58.

phase in which 'the right to vote' would eventually include within its ambit 'the right to re-call'. This is on the basis of a simple axiomatic premise that the 'right to do' inheres the 'right to undo'. It would, in turn, accentuate the process of systemic change at least with two evident advantages. One, the right to recall would avoid the waiting agony for full five years in getting rid of those who are found indulging in corrupt and criminal practices by misusing their power and position. Two, that would make them accountable on continual, day-to-day, basis, leaving little time and space for them to have recourse to manipulative practices, say, for amassing huge wealth through corrupt means.[59]

The singular deviating count, requiring immediate attention for establishing constitutionally consistent continuity, relates to the ambiguity about the intrinsic nature of the citizen's right to vote. In *People's Union for Civil Liberties*-2013, the Supreme Court's reading of the constitution bench decision in *Kuldip Nayar* is in consonance so far as it holds that the 5-judge bench does not 'impliedly' overrule the two three-judge bench decisions of 2002 and 2003.[60] However, an ambiguity creeps in when by virtue of reading the same 5-judge bench judgment it is stated that "there is no contradiction as to the fact that right to vote is neither a fundamental right, nor a Constitutional [sic] right, but a pure and simple statutory right…"[61] which requires review for the free flow of further constitutional development in exploring the intrinsic value of the right to vote. It should suffice to say that the propositional statement within quotes was clearly counteracted by the three-judge bench in *People's Union for Civil Liberties*-2003 so far as it related to exposition of the citizen's right to vote.[62]

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59 Huge expenditure, which is likely to be involved in holding repeated re-elections, is often cited as an impediment to the adoption of re-call provision. Such a problem is not insurmountable. The problem can be met atleast in two ways. Firstly, in the name of huge expenditure, speaking principally, should we continue to be represented by corrupt MPs or MLAs? The seeming reply is simply a big "NO", because the very purpose of retaining such MPs or MLAs is lost if they become corrupt. Therefore, such an eventuality should be taken as an instance of, say, a bad investment, and for this we must be ready and willing to bear the loss resulting from recurring damage. Secondly, such a financial loss can also be minimized. And for this, the author may suggest a strategy: namely, the invocation of the 'Public Trust Doctrine' as expounded by the Supreme Court in *M.C. Mehta* v. *Kamal Nath* (1997) 1 SCC 388, per Kuldip Singh J (for himself and S. Saghir Ahmad J) for protecting our environment. [For the exposition of this doctrine, see author's article, "Breach of the Doctrine of Public Trust: Lessons to be Learned in Environmental Protection" XXXII *The Journal of Corporate Professionals Chartered Secretary* [A 405 1293-A 409 1297], (2002) . On analogous basis of this doctrine, the polluters of 'political, democratic, system must be made to recompense not only for the damage caused, both financially or otherwise, but must also suffer exemplary damages for discouraging others who tend to resort to such misadventures in future.

60 See *supra* note 30 and the accompanying text.

61 See *supra* notes 31and 32 and the following text.

62 See *supra* note 21.

The perusal of *Kuldip Nayar* reveals that the 5-judge bench did not dispute this counteraction by stating that "this Court [in that 3-Judge Bench decision] treated the right to vote to be carrying within it the constitutional right of freedom of speech and expression."[63] Having thus stated, the constitution bench proceeded to state: "But the same cannot be said about the right to stand for election, since that right is a right regulated by the statute."[64] Accordingly, they further distinguished and demarcated the arena of the right to stand for election from that of the right to vote by observing:[65]

> Even without going into the debate as to whether the right to vote is a statutory or constitutional right, the right to be elected is indisputably a statutory right i.e. the right to stand for election can be regulated by law made by Parliament. It is pure and simple a statutory right that can be created and taken away by Parliament and, therefore, must always be subject to statutory limitations.

Notwithstanding exposition of the limited context in which the propositional statement, namely, the right to vote is "neither a fundamental right, nor a common law right, but a statutory right pure and simple", could be relied upon, it continues to be invoked unjustly as the basic principle in the exposition of the citizen's right to vote.[66] For instance, a three-judge bench of the Supreme Court in *Desiya Murpokku Dravida Kazhagam*,[67] albeit by majority, relied upon the same old proposition in expounding the citizen's right to elect.[68] It hardly needs any re-iteration that the right to vote emanates directly from article 326 of the Constitution in most clear and

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63 *Supra* note 25 at 106 (para 298).

64 *Ibid.*

65 *Id.* at 106 (para 299). For the rest of elaboration on this count, see *id.* at 106-107 (paras 300-302).

66 In *N.P. Ponnuswamy and Jyothi Basu* (*supra* note 26), which are cited for the authoritative sources of the propositional statement under consideration, the limited question before the Supreme Court revolved around the nature of the legal right to raise an election dispute and the forum before which such dispute could be raised. In *N.P. Ponnuswamy*, the question was whether a challenge, under art. 226 of the Constitution, to the rejection of the nomination of N.P. Ponnuswamy at an election to the Legislative Assembly is permissible in view of the specific prohibition contained under art. 329(b) of the Constitution. In *Jyothi Basu*, likewise, the question was who were the persons who could be arrayed as parties to an election petition. This simply shows that the propounded principle was never meant for the exposition of the citizen's right to vote as such.

67 *Desiya Murpokku Dravida Kazhagam* v. *Election Commission of India, per* Altamas Kabir J (for himself and Surinder Singh Nijjar J), Chelmeswar J (dissenting), AIR 2012 SC 2191. (Hereinafter simply, *DMDK* -2012.

68 See the author's comment, "Denial of common symbol to a de-recognized political party for its candidates: Whether violates citizen's constitutional fundamental right," XLVIII *Annual Survey of Indian Law* 418-427 (2012).

categorical terms.[69] It is, therefore, clearly a constitutional right. "It is not very accurate to describe it as a statutory right, pure and simple," has been iterated [70] and re-iterated[71] by the apex court.

However, in order to make the right to vote truly functional, the three-judge bench of the Supreme Court in *People's Union for Civil Liberties*-2003 showed great ingenuity by construing that the fundamental right to freedom of speech and expression under article 19(1)(a) is implicit in the constitutional right to vote.[72] Such a judicial construction, instantly raising the status of the right to vote to that of a fundamental right, is axiomatic and, therefore, cannot be disputed, else the citizen's right to vote would ever remain inchoate.

For fortifying the constitutional course of 'systemic change' through the judicial exposition of citizen's right to vote, legislative codification of the un-codified judge-made law is a must.[73] It is only through legislative codification such law can put in a systematic, coherent and consistent form, which is otherwise lying embedded in scattered judicial decisions. Legislative codification, of course, must be preceded by

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69 Art. 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 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."

70 *People's Union for Civil Liberties*-2003 at 2401 (para 101) *per* Reddi J.

71 *DMDK*-2012 at 2217-18 (para 73), *per* J Chelmeswar J (dissenting), citing P.V. Reddi J in *People's Union for Civil Liberties*-2003.

72 See *supra* note 21.

73 Owing to non-codification of the judge-made law, for instance, the Kerala High Court in *Mani C. Kappan* v. *K.M. Mani*, 2007(1) KLT 228, *per* T B Radhakrishnan J did not comprehend the value of the law laid down by the Supreme Court in *People's Union for Civil Liberties*-2003 while holding in an election petition that non-disclosure by the elected candidate of his liabilities in the affidavit annexed with the nomination paper is not violation of the Constitution, but merely ignoring the orders of the Election Commission issued under art. 324 of the Constitution. This stand of the Kerala High Court may be compared with the one taken by the Patna High Court in *Bishnudeo Bhandari* v. *Mangani Lal Mandal*, decided on Nov. 25, 2011, *per* V.N. Sinha J in which it was held, in our view correctly, that failure of the elected candidate not to disclose information which is required to be disclosed in view of the two judgments of the Supreme Court passed in *Association for Democratic Reforms* -2002 and *People's Union for Civil Liberties* -2003 Supreme Court amounts to breach/non-compliance of Constitution and not just ignoring the order of the Election Commission of India, because his order under the direction of the Supreme Court is the law of the land under art. 141 of the Constitution.

continual sustained juridical analysis for deciphering the embedded law, which is highly contextual and, therefore, needs juristic handling.[74]

Thereafter, legislative codification must be followed by, what is termed as, 'Re-statement of the whole gamut of codified law',[75] because that alone would ensure that the internal inconsistencies, that often creep in during the process of adjudication of a given conflict situation, or while employing, say, the non-obstante clause — 'notwithstanding anything contained' in the hitherto prevailing law — are removed, explained or otherwise straightened up.

In short, the law expounded by courts in the course of dispensation of justice needs to be refined, defined, systemized and shaped by the Parliament though debates, discussions and deliberations in the light of constitutional policy perspective. The collaborative outcome, representing the cumulative wisdom of society, would not only avert the possible conflict and confusion, but admirably accelerate the whole process of systemic change for cleansing our body politic by strengthening the rule of law.

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74 This is the work of the state judicial academies led by the National Judicial Academy at Bhopal; law professors in the universities; and the institutes of legal learning like the Indian Law Institute, New Delhi.

75 The exercise of 'Re-statement of Law' could be legitimately taken up by the state law commissions and the Law Commission of India on a continual basis.