

IS COMPULSORY VOTING THE WAY FORWARD?- A COMPARATIVE ANALYSIS

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Abstract

Compulsory Voting exists in many countries than is commonly thought. It has been a proven tool to arrest the trend of low voter turnout and to maintain consistently high turnouts. But is it as illiberal and undemocratic as its nomenclature indicates? Having made its debut in India in 2014 and owing to its non-implementation till today, its effectiveness is yet to be tested.

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I. Introduction

IN THE run up to the U.S Presidential elections of 2016, candidate Bernie Sanders, in addition to issues such as immigration and national security, drew attention to the problem of low voter turnout in the country and wrote on his twitter page, “if we truly believe in a vibrant democracy, then we [the US] must have the highest voter turnout in the world.”¹ A similar sentiment resonated with the former U.S President Barack Obama when he praised the transformative capacity of compulsory voting in raising voter turnout in Australia.²

Voter turnout is in steady decline in industrialized democracies around the world.³ Low voter turnout raises questions over the “representativeness” of the resultant elected government in a participatory representative democracy. Mandatory electoral participation or legally requiring

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¹ Bernie Sanders, Twitter post, August 15,

2015,7:58p.m.,<https://twitter.com/berniesanders/status/632702839534391296>.

²“Barack Obama praises Australia’s mandatory voting rules”, *The Guardian* (2016) available at: <https://www.theguardian.com/us-news/2016/apr/10/barack-obama-praises-australias-mandatory-voting-rules>.

³Andre Blais, E. Gidengilet *et al.*, “Where Does Turnout Decline Come From”43 (2)*European Journal of Political Research* 221-36 (2004).

The highest ever turnout India recorded was in 2019 General Elections *i.e.* around 67% and even then the turnout in urban areas has lagged behind it’s rural counterparts.

enfranchised citizens to turn out to vote or compulsory voting is often seen as an electoral reform to arrest the trend of low voter turnout. However, it must be mentioned at the very outset that in compulsory voting regimes, compulsion is only to turnout and not to vote meaning thereby that voters are not compelled to cast their votes in favour of a particular candidate rather they are free to mark the ballots as per their own volition and can even cast blank ballots or None-of-the-above (NOTA) if they are dissatisfied with the candidates on the ballot. Compulsory voting was first applied to modern elections in the 17th century American colonies with fines for non-voting and presently there are 28 countries in the world which practice compulsory voting in some form.⁴

In 2014, the state of Gujarat made amendments to its local body laws in which it was laid down that all eligible voters in Gujarat must cast their ballots in Municipal, *Nagarpalika*, and *Panchayat* elections or be subjected to disadvantages or consequences.⁵ The idea of compulsory voting for India, however, was mooted for the first time on January 4, 1949 by M. Ananthasayanam Ayyangar during the Constituent Assembly debates wherein he proposed for the inclusion of a clause that made voting compulsory in the Constitution and also imposition of penalty for those who abstained from voting.⁶ However, the proposal neither garnered support nor attracted explicit rejection and largely remained non-debated. Thereafter compulsory voting was sporadically referred to on various occasions, at the time of enactment of Representation of People's Act 1950, in the Tarkunde Committee Report, Dinesh Goswami Committee on Electoral Reforms and in the 255th Report of the Law Commission of India.⁷ Compulsory voting has also been the subject matter of many private member bills in India. And it becomes pertinent to mention here that in all these instances compulsory voting has been rejected for India owing to the daunting nature of its implementation without any systematic and continued normative engagement with the debate on the practice whatsoever. India is a voluntary voting regime and how the electorate will receive and respond to the practice of compulsory voting, if ever implemented, still remains to be seen. Ideally, normative debate must precede the actual introduction of any policy/reform measure and since compulsory voting has never been implemented in India (it

⁴Sarah Birch, *Full Participation: A Comparative Study of Compulsory Voting* 20 (Manchester University Press, 2009).

⁵The Gujarat Local Authorities Laws (Amendment) Act, 2009 as amended in 2014. The non-voters would have 30 days to explain their absence in order to avoid disadvantages or consequences, the nature of the same was not specified in the amendment. It is pertinent to note that the High Court of Gujarat stayed its implementation in August, 2015.

⁶Constituent Assembly Debates, Vol. 7 (Jan. 4, 1949).

⁷See Law Commission of India, 255th Report on Electoral Reforms (March, 2015).

has been introduced by the state of Gujarat in 2014) either in part or full therefore present time offers a unique opportunity to understand how compulsory voting fares in other countries and also delve into the arguments (both ‘for’ and ‘against’) which surround the practice.

II. Compulsory voting around the world

In most of the countries presently employing compulsory voting, the provisions relating to the practice are either entrenched in the Constitutions or find mention in electoral laws. For instance Article 37 of the constitution of Argentina states that suffrage shall be universal, equal, secret and compulsory. Also, article 12 of the *Código Nacional Electoral* of Argentina states that voting is a duty and exempts persons over 70 years of age from such an obligation. The Constitution of Belgium in its article 62 states that voting is obligatory and secret. On the other hand in countries such as Australia the provisions related to compulsory voting are not contained in the Constitution but are codified in legislations. In Australia the compulsory voting at federal elections was introduced in 1924 via section 245 Commonwealth Electoral Act.

Most of the countries which practice compulsory voting belong to Latin America and the reason for adoption of the practice by a large number of Latin American countries has been attributed to a legal tradition that favoured the formalization of political development.⁸ Thailand became the recent Asian country to adopt compulsory voting in 1997 as a part of broader electoral reforms in order to enhance the quality of elections by curbing electoral abuse including vote-buying in particular.⁹

Among the countries which presently practice compulsory voting, Australian model of compulsory voting is considered to be the most well implemented and most effective¹⁰ The voter turnout in Australian federal elections has been consistently high since the introduction of compulsory voting in the continent. The table below shows the voter turnout of the last five elections to the House of Representatives:

⁸*Supra* note 4 at 27.

⁹David Murray, “Thailand’s Recent Electoral Reforms” 17(4)*Electoral Studies* 525-36 (1998).

¹⁰Jonathon Louth and Lisa Hill, “Compulsory Voting in Australia: Turnout With and Without” 6(1)*Australian Review of Public Affairs* 25 (2005).

Year of election	Voter turnout
2004	94.32%
2007	94.76%
2010	93.22%
2013	93.23%
2016	91.01%

Source: Australian Electoral Commission.

III. Debates surrounding compulsory voting

Although compulsory electoral participation has been debated since the time of French Revolution,¹¹ the revival of contemporary academic interest in the practice can be attributed to Arendt Lijphart who in a 1997 paper argued that “voluntary voting reproduces social inequalities in the field of political participation and presented a strong case for making electoral participation obligatory”.¹²

Prima facie, a law compelling the electors to vote seems contrary to liberal and democratic values. The reason for such an understanding of the practice of compulsory voting can partly be owed to its terminology and emanates from the fact that it is often misconstrued as a compulsion to cast vote in favour of a particular candidate. In fact countries which practice compulsory voting require their citizens to turn up and cast a ballot, regardless of whether it is valid, blank or NOTA (None-of-the-above) has been marked.

Any engagement with the defence and opposition of compulsory voting must begin with a basic question that can democracy (as is present in most parts of the world) be conceived without voters and voting. And low voter turnout should be viewed in the light of the fact that democracy still remains and also likely to remain (for the foreseeable future) the most widespread and acceptable form of government with voting (with all its distortions and problems) being the primary mechanism via which legitimate governments are established.¹³

A defence of compulsory voting begins with the exploration of the relationship between rights and duties. The concepts of rights and duties inform and in fact are integral to

¹¹ *Supra* note 4 at 21.

¹² Arend Lijphart, “Unequal Participation: Democracy’s Unresolved Dilemma” 91 *American Political Science Review* 1-14 (1997).

¹³ Jason Brennan and Lisa Hill, *Compulsory Voting: For and Against* 126 (Cambridge University Press, 2014).

understanding of political order.¹⁴ Modern history of voting is replete with literature distinguishing between voting-as-a-right and voting-as-a-function, the latter concept denoting duty. In fact voting was viewed as a duty rather than a right in the debates which dominated the French Constituent Assembly of 1791 which was the first body in the modern world to grant universal suffrage.¹⁵ Even John Stuart Mill in 1861 argued that “suffrage is a trust and not merely a right which a person is bound to exercise according to his best and conscientious opinion of the public good” and Mill even went on to say that “if suffrage belongs to the person only for his own sake then on what ground can he be blamed for selling it or using it to recommend himself”.¹⁶ The contemporary jurisprudential understanding, however, views rights and duties as not mutually exclusive but consider that rights and duties go hand in hand therefore the electoral rights and obligations also come under the purview of such an understanding. This is reinforced by the fact that in many countries whether they are compulsory voting regimes or not, voting, in addition to being a right, is codified as a duty as well.

The most common criticism of compulsory voting is that it is antithetical to liberal and democratic values. It is further argued that compulsory voting violates a right not to vote. Why would people not want to vote? The most genuine reason could be that they are dissatisfied with the poor quality of candidates so non-voting could serve as an expression of discontentment with politics. Even historically as well, boycotting the polls served as an expression of political protest. But during those times there were no options like NOTA to formally register one’s disaffection with the quality of politics. The attempts of asserting the right of not to vote have been put to judicial tests since early twentieth century, most prolifically in Australian courts. In the case of *Judd v. Mckeon*¹⁷ the validity of section 245 of the Commonwealth Electoral Act of 1918 which makes non-voting an offense was unsuccessfully challenged. The court refused to recognize a right of not to vote and similar rulings were made in subsequent cases as well. Interestingly in 2010 in Australia, in the case of *Rowe v. Electoral Commissioner*¹⁸ the court observed that there has been a “form of irreversible evolution in the development of electoral laws towards maximum participation in elections” and any law which has the effect of “rendering voting voluntary would be constitutionally invalid due to its negative effect on maximising participation”. A similar

¹⁴Richard Katz, *Democracy and Elections* (Oxford University Press, 1997).

¹⁵*Supra* note 4 at 41.

¹⁶As cited in Birch, *supra* note 4 at 41.

¹⁷1926, CLR 380.

¹⁸2010, 234 CLR I.

challenge to compulsory voting laws was presented before the European Court of Human Rights in the case of *X v. Austria*.¹⁹ In this case the violation of article 9 of European Convention on Human Rights which concerns freedom of thought, conscience and religion was asserted by an Austrian citizen to challenge compulsory voting. He argued that the ballot paper listed only two candidates and he found neither of them suitable to be elected as a Federal President therefore compelling him to vote would violate his freedom guaranteed by article 9 of the convention. The court rejected his case as “manifestly ill-founded” as there was no compulsion to mark the ballot in favour of a candidate as the citizen could have simply handed over the blank or spoilt ballot and therefore the court held that compulsory voting does not violate freedom as enshrined in article 9 of the European Convention on Human Rights. In fact courts have held right to vote as fundamental as it is “preservative of all rights”²⁰ and “the citizen’s link to his laws and government”.²¹ The assertion that implicit in right to vote is a right not to vote has received some scholarly attention as well. Lisa Hill expresses doubts regarding the tenability of the assumption that the existence of any right automatically implies the right to invert it, meaning thereby that “simply inverting the positive right with a bit of lexical adjustment does not automatically yield an unassailable negative right”.²² In other words, the act of not voting does not signify that a particular right is being exercised.

Another charge levelled against compulsory voting is that it is antithetical to liberty. Liberty has been distinguished into liberty as non-domination and liberty as non-interference.²³ It is sufficiently clear that it is difficult to reconcile compulsory electoral participation with one of these conceptions of liberty *i.e.*, liberty as non-interference but if a measure strengthens one aspect of liberty at the cost of the other, would it be fair to call the measure illiberal in entirety. Because though compulsory voting violates the conception of liberty as non-interference or negative liberty, it upholds other conceptions of liberty such as freedom from domination, promoting autonomy and positive liberty.

¹⁹ Appn. No. 4982/71, May 1971, *available at*:

<https://books.google.co.in/books?id=yz7sCAAAQBAJ&pg=PA468&lpg=PA468&dq=Application+No.+4982/71,+May+1971&source=bl&ots=MasNHyc0h&sig=ACfU3U3MdgSOHc9PzEQSQLwBD0AFmsyXPw&hl=en&sa=X&ved=2ahUKEwi416n6y5jkAhV>.

²⁰ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Smiley v. Holm*, 285 U.S. 355 (1932); *Cook v. Gralike*, 531 U.S. 510 (2001).

²¹ *Evans v. Cornman*, 398 U.S. 419 (1970).

²² *Supra* note 12 at 161.

²³ Heather Lardy, “Is There a Right Not to Vote?” 24(2) *Oxford Journal of Legal Studies* 315 (2004).

Low voter turnout is considered by the opponents of compulsory voting as an indicator of the health of a democracy as it serves to express citizens' disenchantment with the political establishment which of course must be addressed but failure to vote is not always due to discontentment. In fact The Australian Electoral Commission closely scrutinizes tracks and assesses blank and deliberately spoiled ballots for the purposes of interpretation.²⁴ Low levels of electoral participation can also be due to the fact that the citizenry views it as an onerous chore. Therefore compulsory voting, as an electoral reform if ever is to be made palatable to an electorate which has never experienced it, should not be introduced as a piecemeal measure and must be situated in broader electoral reforms. The ease of getting voter identity cards made, hassle free transfer of voter IDs in case of change in residence, weekend voting are some such measures which can have the effect of making the act of voting less burdensome.²⁵

IV. Compulsory voting, NOTA and India

Although India has never experienced compulsory voting but the concept has been sporadically referred to since the constituent assembly debates. Compulsory voting has also been a subject of Private Member Bills, both of *Lok Sabha* and *Rajya Sabha* and has been introduced four times in both the Houses. In *Lok Sabha* it was introduced by Janardhan Singh Sigriwal, Varun Feroze Gandhi, Chandrakant Bhaurao Khaire in 2014 and by Sukhbir Singh Jaunpuria and ChanduBarneShrirang in 2017. In *Rajya Sabha* it was introduced by C.P. Thirunavukkarasu in 2001, T. Subbarami Reddy in 2002, V. Narayanasamy in 2007 and 2009 and Jai Parkash Aggarwal in 2006. The Indian political establishment has displayed curiosity, to say the least, towards compulsory voting time and again. In 2014 the state of Gujarat made amendments to its local body laws and introduced an "obligation to vote" in municipal, *nagarpalika* and *panchayat* elections.²⁶ The provision says that it shall be the duty of a qualified voter to vote at the election, however, he will be free to cast his vote in favour of none of the candidates contesting in the election.²⁷ Further the amendment also introduces the term "defaulter voter" who will be designated so by the election officer after the former has been given notice of the same.²⁸ Thereafter the defaulter voter would be required to provide

²⁴ *Supra* note 12 at 145.

²⁵ Exemptions such as physical illness, bodily infirmity or absence from the state on the day of election and other such reasons as provided by the state government in consultation with the state election commission were also contained in Gujarat (Local Laws Authorities) Amendment Act, 2009.

²⁶ Gujarat Local Authorities Laws (Amendment) Act, 2009 as amended in 2014, s. 16A.

²⁷ *Id.*, s. 16A(2).

²⁸ *Id.*, s. 16B.

the reasons for failure to vote. There are exemptions to the obligation to vote on the basis of illness, bodily infirmity, abstention on the date of the election from the country or state of Gujarat and other such valid and sufficient reasons. Fines for non-voting exist in most compulsory voting countries. A minimal amount is imposed as fine for the first instance of default and the amount increases with subsequent defaults. Non-monetary sanctions for non-voting are also present in some countries. Those who fail to vote more than once in Belgium may find their names removed from the electoral rolls and consequently can't be hired to or promoted in public office, nor can they receive state honours; in Bolivia non-voting can result in loss of suffrage certificate without which they become ineligible for employment in the public sector.²⁹

When Lijphart cautioned that unequal turnout reproduced social inequality, it was the dismal representation of the lower strata of the society in the democratic process which was implied. In India, however, it is the upper and the middle class which doesn't exercise its voting rights and voter apathy is often synonymously used with middle class discontentment. Moreover when in 2013 the Election Commission was directed by the Supreme Court of India to introduce NOTA the apex court hoped that it would enhance voter turnout in urban areas as the urban voter would mark NOTA to express discontent with the quality of politics rather than boycotting the polls.³⁰ It was further observed by the apex court that abstaining from voting is not an ideal option for a responsible citizen and the only way such discontentment can be made effectual is through NOTA.³¹ In a way the Supreme Court restricted the meaning of right not to vote to mean not to cast vote in favour of a candidate if the voter is not satisfied with the kind of candidates listed on the EVM and did not support low voter turnout. In fact courts nowhere have supported abstaining from elections and have regarded voting as a "preferred" right.³² The urban low voter turnout doesn't show any signs of relenting as can be seen from the fact that the introduction of NOTA has not boosted urban voter turnout and in fact NOTA votes increase as constituencies get more rural.³³ If the educated, urban-located voter who is socially and regionally better situated to gather information about political contestants is prompted to exercise his franchise, would it amount to an unjustified imposition?

²⁹ *Supra* note 4 at 9.

³⁰ *PUCL v. Union of India* (2013) 10 SCC 1.

³¹ *Ibid.*

³² I. A Douglas, "Is the Right to Vote Really Fundamental?" 18 *Cornell Journal of Law and Public Policy* (2008).

V. Concluding Remarks

How compulsory voting affects the electoral success of political parties (left, right or far-right) has engaged the attention of politicians as well as of the academicians since the inception of mandatory voting laws.³⁴ The available literature regarding it is largely country oriented but various context specific studies have shown that compulsory voting seems to favour left based parties in the Australian context³⁵ than the far-right (as is feared) and in fact in Belgium it has been suggested that abolishing compulsory voting would lead to undesirable outcomes like over-representation of the affluent and male gender.³⁶

India finds itself in a unique position *vis-a-vis* compulsory voting. Since compulsory voting has never been implemented in India, any prediction regarding its reception or its purported effects on the enhanced political sophistication and information seeking behaviour remains largely conjectural at this stage. It goes without saying that implementation of law of such an import would come with unforeseen costs both financial and administrative therefore such a measure, if ever to be introduced, must be tested on a smaller scale in the first instance. The daunting nature of a task should not become its undoing.

Democracy which is still the most acceptable form of government and acts as a bulwark against tyranny is constituted by voters and the act of voting aids in its perpetuation. Therefore, discrediting compulsory voting by calling it illiberal and undemocratic when all it seeks to attain is high turnouts at elections would require evidence to the effect that high turnout is inimical to democracy and the rights of the citizens.

³³Garima Goel, "Patterns of NOTA voting in India: Voting From the Margins" 53(33) *EPW* (2018).

³⁴A. Malkopoulou, *The History of Compulsory Voting in Europe: Democracy's Duty?* (Routledge, New York, 2015).

³⁵M. Mackerras and I. McAllister, "Compulsory Voting, Party Stability and Electoral Advantage in Australia" 18(1) *Electoral Studies*, 217-34 (1999).

³⁶Marc Hooghe and Koen Pelleriaux, "Compulsory Voting in Belgium: An Application of the Lijphart Thesis" 17(4) *Electoral Studies* 419-24 (1998).

As far as generalized predictions (as opposed to country specific outcomes) are concerned regarding the impact of the institution of compulsory voting on the electoral fortunes of the right and left wing parties, Sarah Birch makes use of the data of 41 countries (out of which 6 are the compulsory voting states) compiled by Kenneth Benoit and Michael Laver (in their 2006 book *Party Policy in Modern Democracies*, London, Routledge). Based on the Benoit-Laver dataset Birch presents various OLS regression models which employ *variables* such as compulsory voting, sanctioned compulsory voting and constitutionalized electoral obligation and *control factors* such as per capita GDP, democracy, GDP growth, unemployment (in the year of election) and on the basis of multivariate models comes out with a null finding *i.e.*, compulsory voting does not support the political fortunes of either left or right wing parties. This finding, Birch says, should serve to assuage the fears that compulsory voting might unduly favour the right end of the political spectrum.