

## **PARTICIPATION IN DEMOCRACY: IN SEARCH OF LEGITIMACY OF PARAGRAPH 2(1) (B) OF TENTH SCHEDULE OF THE CONSTITUTION**

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Freedom of choice

Value of participation in parliament

*Political legitimacy*

*Legal legitimacy*

Violation of the value of participation

Major violation: No ability to participate

Minor violation: Person has ability but cannot exercise it

Partial violation: Participation in restricted manner

Concluding finding on impact and status of political whip

*Human right vis a vis political whip*

*Freedom of voting vis a vis political whip*

*Value of Participation vis a vis Political Whip*

*Status of political whip*

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## I Introduction

In the present era, participation has been considered as most important symbol and foundational concept of democracy.<sup>1</sup> If people are allowed to participate in political process, only then a political system can be described as democratic and for participation voting right has been considered as most effective way to participate in governance of the nation. When citizens collectively elect its representatives, it affirms the notion that they govern themselves by free choice. Notion behind election of representatives is that citizen has right to participate in governance of the country and they exercised it through the representatives.<sup>2</sup> Therefore, it can be opined that participation is a foundational virtue of democracy.

Indian political system also respect notion of participation in democracy and this principle was accepted even in the constitution of India<sup>3</sup> (hereinafter as the Constitution).

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<sup>1</sup> Joshua A. Douglas “The Foundational Importance of Participation: A response to Professor Flanders” 81 *OKLA. L. Rev.* 53 (2013) (herein after as Joshua A. Douglas in *OKLA. L. Rev.*).

<sup>2</sup> Universal Declaration of Human Rights, 1948, art. 21 (1) reads: Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Art. 25 of International Covenant on Civil and Political Rights, 1966 provides that Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.

<sup>3</sup> The Constitution of India, 1950, art. 325, 326.

But problem started when, *Aya Ram Gaya Ram* (I have come, I have gone) was became a symbol of the politics in India.<sup>4</sup> Defection is not something new to Indian democracy, it have taken place in all parliamentary democracies.<sup>5</sup> The modern democracies are essentially party democracies. It can be said that arguably the prime object of political parties in all democratic countries is to capture power. The political party already in power want to remain in power and opposition parties want to dethrone them and attain power. Sometime, this tussle among the parties reach to such extent that they try to retain and attain the power even through unethical ways, in that situation defection become an option to fulfil their dreams. To control unethical ways to grab the power, therefore, an amendment<sup>6</sup> to the constitution was adopted, and defection was accepted as ground for disqualification<sup>7</sup> in India. It gives powers in the hand of political parties, which are not constitutional institution and even before this amendment, the Constitution did not recognise any role of political parties in Indian political system. So, it can be opined that constitutional framers did not intend to give constitutional recognition to the political parties.

This paper examines legitimacy of para 2(1) (b) of tenth schedule of the Constitution under which directions can be issued to the members of such party for prescribing manner of voting. This paper firstly provides an overview of nature of the political directions. Thereafter, it explores values of participation in democracy and it examines constitutional status of values of participation in India. On the touchstone of such values of participation in India, it examines legitimacy of para 2(1) (b) of the tenth schedule of the Constitution.

## II Political directions: An overview of whip

In this paper, political directions means directions issued in para 2(1) (b) of tenth schedule of the Constitution. These directions can also be described as political whip in India.<sup>8</sup> Whips are generally issued specially by the political organisation to their members

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<sup>4</sup> Paras Diwan “Aya Ram Gaya Ram : the Politics of Defection” 291 *JILI* 21 (1979).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Supra* note 3, 52<sup>nd</sup> Amendment Act, 1985.

<sup>7</sup> *Id.* at tenth schedule, read with art. 102(2) and art.191 (2) provides defection as a ground for disqualification to continue as MP/MLA.

<sup>8</sup> The expression “Whips” is derived from the term ‘Whipper-in’ employed by a hunt to look after the hounds and keep them together in the field. The term ‘Whipper-in’ was originally used in Parliament as in the hunting

for maintaining discipline in discharge of their duties.

### **Meaning and nature of whip**

The Oxford dictionary defines it as “an official in a political party who is responsible for making sure that party members attend and vote in important government debates” later the term was applied to the call or appeal made by such a person, and is defined by the dictionary as “a written instruction telling members of a political party how to vote on a particular issue.”

In the parliamentary form of government, Whips of various political parties are the vital links of the internal organisation of parties, inside the legislatures. In the parliamentary form of government, the efficient and smooth functioning of Parliament and state legislatures depends, to a considerable extent, upon the office of the whip. The whips can be rightly said to be the managers of the parties within the legislatures<sup>9</sup> directions issued by him is known as political whip.

### **Political whip in India: Tenth schedule of the Constitution**

Principle of political whip for dealing with floor crossing is adopted under tenth schedule, which is also known as anti defection law in India. The anti-defection law was passed in 1985 through the 52<sup>nd</sup> Amendment to the Constitution, which added the tenth schedule to the Constitution. The main intent of the law was to combat “the evil of political defections.” Principle of Political Whip was articulated in paragraph 2(1) (b) of the tenth schedule, it provides violation of whip as a ground for disqualification for continuing as Member of Parliament/ Member of Legislative Assembly (MP/MLA) it reads as:

if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such

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field for a member who discharged this duty for his party, but, in due course of time, it became reduced to ‘Whip’. See Report of 14th All India Whips’ Conference, *available at*: <http://mpa.nic.in/mpa/mpahandbook/parlia14.pdf> (last visited on Feb, 20, 2016) (hereinafter as 14th Whips’ Conference) (last visited on Mar. 22, 2016).

<sup>9</sup> *Ibid.*

voting or abstention.

The paragraph 2(1) (b) provides scope for issuing whip not only for voting but also for controlling abstains from voting. When a political party issued a political whip to vote in a particular manner, then each member of such party has to comply with such political whip. Anything contrary to this directive may be considered as defection, which shall be a ground for disqualification under article 102(2)/ article 191 (2) of the Constitution.

### *Power to disqualify*

If any question will arise as to whether a MP/MLA has become subject to disqualification under tenth schedule. The question will be referred for the decision of the speaker of house and his decision shall be final.<sup>10</sup> But when the question will arise as to whether the speaker of house has become subject to such disqualification, the question will be referred for the decision of such member of the house as the house may elect in this behalf and his decision will be final.<sup>11</sup>Power of speaker under tenth schedule is protected by including it within parliamentary proceeding. Tenth schedule provides that all proceedings under sub-paragraph (1) of paragraph 6 in relation to any question as to disqualification of a member of a house under tenth schedule shall be deemed to be proceedings in Parliament within the meaning of article 122 or, as the case may be, proceedings in the legislature of a state within the meaning of article 212.<sup>12</sup>

### *Exceptions*

The tenth schedule also provides two exceptions, where disqualification does not arise under the tenth schedule. First exception to the defection is merger of political parties or group in another political party and second is for providing exemption to the office of the speaker.

### **Merger**

A member of a house shall not be disqualified on the ground of defection where his

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<sup>10</sup>*Supra* note 3, tenth schedule, para 6(1).

<sup>11</sup>*Id.*, proviso to para 6(1).

<sup>12</sup>*Id.*, para 6(2).

original political party merges with another political party and he claims that he and any other members of his original political party:<sup>13</sup>

(i) He and other members of the old political party become members of the new political party or;

(ii) He and other members do not accept the merger and opt to function as a separate group. This exception shall operate only if not less than two-thirds of the members of a particular party in the house have agreed to the merger.<sup>14</sup>

### **Exemption for speaker**

If a member has been elected to the office of the speaker or the deputy speaker of the house of the people or the deputy chairman of the council of states or the chairman or the deputy chairman of the legislative council of a state or the speaker or the deputy speaker of the legislative assembly of a state, shall not be disqualified under the tenth schedule:<sup>15</sup>

(i) If he, by reason of his election to office of the Speaker, voluntarily gives up the membership of the political party to which he belonged immediately before such election and does not, so long as he continues to hold such office thereafter, rejoin that political party or become a member of another political party; or

(ii) If he, having given up by reason of his election to office of Speaker his membership of the political party to which he belonged immediately before such election, rejoins such political party after he ceases to hold such office.

### **Consequences of violation of political whip**

Clause 2 of article 102 and of article 191 provides that “a person shall be disqualified for being a ‘Member’ in the house if he is so disqualified under the Tenth schedule of the Constitution.” Therefore, if MP/MLA voted in such a manner which was not prescribed by the party, even if he abstains, then he has to vacate his seat. So consequence of violation of political whip is that he has to compromise his membership in the house and constituency from which he was elected has to face fresh election.

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<sup>13</sup> *Id.*, para 4(1).

<sup>14</sup> *Id.*, para 4(2).

<sup>15</sup> *Id.*, para 5.

### III Participation in democracy *vis a vis* political whip

Participation has been considered as foundational basis of democracy. In simple words participation means contribution of people in process of governance which includes formation of authorities for governance.<sup>16</sup> The purpose of participation in governance is to secure life and liberty from arbitrary rule, therefore in democracy, rule of law is considered as foundational basis of constitutionalism. In a democracy, participation in governance can be take place by various ways and these ways can be identified as means to participate in democracy.

#### Means to participate in democracy

There can be various ways to participate in a democracy. These ways can be identified according to their nature and purpose.<sup>17</sup> These ways of participation, itself a mean to participate, for example voting is a mean to participate. But it also can be said that a person participated in democratic process by way of voting. These ways or means to participate can be classified into two categories. First category depicts direct participation and second depicts indirect participation.

#### *Direct participation*

Direct participation depicts that participation will contribute directly to the governance process of democratic institutions. Voting, demonstration against state policies, public campaigning for reform, is some of the examples of direct participation in democracy.<sup>18</sup> Generally, in a democratic nation, these means are provided in the higher law of nation, in India, the Constitution provides explicitly these means to make democracy healthier.<sup>19</sup> By these ways persons can inform public will or opinion to state or any

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<sup>16</sup>Therefore, in a democracy, Parliament, executive and other local authorities like municipal, panchayats should be formed by the participation of people.

<sup>17</sup> 'Voting' is a mean to participate in democracy. 'Voting' affects government directly because it a way to constitute government. By 'voting' people can change government, so it can be identified in category of direct participation. Second illustration can be media or press, which cannot change the government directly but can influence other to change the government. It also can make pressure upon the government to work for public. So media participate indirectly in democracy.

<sup>18</sup> However, these ways are not only provide for participation in democracy but also some time it becomes rights of citizens. *Supra* note 3, art. 19(1) (a) which provides 'freedom of voting'.

<sup>19</sup> *Supra* note 2, art. 326 provides 'right to vote'; art. 19 (1) (a) provides 'freedom of speech and expression';

democratic institution. These ways also compel the state to function within the constitutional limitations.<sup>20</sup> In this category voting is a most important and powerful means to participate. It gives authority to the state to rule them.<sup>21</sup> It can change the government, if it will not work according to expectation of the public.<sup>22</sup> In a way it gives authority, as well as it judge functioning of democratic institution and it can also punish for improper functioning.<sup>23</sup> Other means as mentioned above in a way also makes pressure on democratic institutions for functioning in a particular way.<sup>24</sup> By these means, persons can compel such institution to fulfil their demands.<sup>25</sup>

### *Indirect participation*

It can be opined that it is a neutral way to participate in a democratic process.<sup>26</sup> Press, or electronic media and to some extent judicial process can also be a part of this category. Press or media also works for judging functioning of democratic institution. Therefore, in a democratic country, 'freedom of press' is a very important element. In India 'freedom of press' is considered as a fundamental right.<sup>27</sup> It can be said that it is a safety valve to retain

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art. 19 (1) (b) provides 'freedom to assemble peaceably and without arms'; art 19 (1) (c) 'freedom to form associations or unions'.

<sup>20</sup> *Firstly*, it makes pressure upon the government to work within constitutional limitations. *Secondly*, if government violatess constitutional limitations, then such act will be declared as *ultra vires* by the process of judicial review.

<sup>21</sup> The Constitution constitutes 'State' and provides government for governance of 'State'. In the Constitution of India, preamble opens with word "We the People of India" and finally it says that "adopts, enact and give to ourselves this constitution." So state and government are constituted by the people of India and they consented to rule them. 'Social Contact Theory' also gives same reason that state and government is constituted by the people, therefore state can rule them.

<sup>22</sup> Maximum tenure of house of people in India is 5 year but can also be dissolved before five year, after dissolution there shall be general election, in which every citizen can vote who is above 18 year of age and eligible to vote. *Supra* note 3, art. 83; art. 325; art. 326.

<sup>23</sup> In general election, people by way of voting can change government and punish exiting government by removing it from power. Therefore in general election people judge work done by government.

<sup>24</sup> Non government organisations work to check how government policies are functioning in the society. Trade unions work for labour rights. If government policies are not good or violets labour rights, in such situation such organisations demonstrate against government, which creates pressure upon the government to work for welfare of these people. So in a way they make government to function in a particular way.

<sup>25</sup> These demands basically relates to day to day business of people like work, wages, education, health *etc*, some time political parties also make promises to work for them, so people by different ways make pressure to fulfil their demands and to work for them.

<sup>26</sup> In these ways, neutral means to check government policies from objective standard. These means check whether government is functioning within constitutional limits or not and whether government is working for public welfare or not, they convey their findings to the people and the people on these findings exercise direct participation, so in a way it also makes road for direct participation.

<sup>27</sup>*Supra* note 3, art. 19 (1) (a).



an institution as democratic. Sometimes, judicial process also plays a role in participation. In India, public interest litigation (PIL) can be described as a mean to participate in democracy,<sup>28</sup> because it works not only for a particular person but for the entire society. At a one hand, it creates pressure on democratic institution for functioning within constitutional limitation and on the other hand it provides remedy through the judicial process.<sup>29</sup>It is different from other means because other ways only make a pressure to function within limitations as imposed by higher law but PIL in addition provides remedy and provides legal sanction to the pressure.

### **Voting as a participation in democracy**

Voting can be described as fundamental concept in entire democratic process. It, as mentioned above, is a mean to participate in democratic process. Voting can be described as a foundation of democracy. It can be said that voting makes a system as 'Democratic'. Voting has been considered as so sacrosanct in modern era of democracy that it has been accepted not only as a mere means to participate but also as a human right.

#### *Right to vote as human right*

The political rights are recognized in all major international instruments on human rights, both in universal as well as in regional instruments. In political rights 'right to vote' is so important that it has been adopted by various instruments in such a manner that it does not merely recognize the right but also provides safeguard to this right and thus giving strength to it. The right to vote and the right to public participation in government have been recognised under article 21 of the Universal Declaration of Human Rights, 1948 (hereinafter referred as UDHR). It provides right to vote by recognizing three inbuilt rights. First right is to participate in the governance of his country. Second is the right of equal access to public service. And third right is a procedural protection to previous two rights, it provides that the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and

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<sup>28</sup> Because, public interest litigation contribute to make governance effective. The main purpose of PIL is protection of rights of the persons and ensuring limited state power.

<sup>29</sup> It creates a pressure on the government to work within constitutional limitation, and if government cross limitations, Judiciary can give remedy but remedies lies where (constitutional) rights are violated, so role of judiciary is also limited to enforcement of such rights.

equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The International Covenant on Civil and Political Rights, 1966 (herein referred as ICCPR) under article 25 recognises ‘right to vote’ in more categorical manner. It provides more safe guards to the right by stating that “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in the article 2<sup>30</sup> and without unreasonable restrictions.” Article 25 recognizes three in built right in ‘right to vote’. First right is to take part in the conduct of public affairs. Second right is to vote and to be elected in genuine periodical elections which shall be held by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. Third right is to have access, on general terms of equality, to public service in his country.

The ‘Principal of Equality’ is also very important to ‘right to vote’ and even it has accepted as inbuilt feature of ‘right to vote’. Therefore, in addition to UDHR and ICCPR, some other instruments were adopted by the international community for strengthening ‘right to vote’.<sup>31</sup>

‘Right to Vote’ is a well recognised human right under International Human Rights law both at universal and regional level.<sup>32</sup> The ‘right to vote’ is available to all citizens,

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<sup>30</sup> International Covenant on Civil and Political Rights, 1966, art. 2 (1) mentions the following distinctions-race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>31</sup> International Convention on the Elimination of All forms of Racial Discrimination, 1966, art. 5 casts duties on the state parties to provide guarantee for ‘right to vote’ without distinction as to race colour or national or ethnic origin. Convention on the Political Rights of Women, 1953, art. 1 of provides that women shall be entitled to vote in all elections on equal terms with men, without any discrimination. Art. 2 of women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination. Art. 3 provides that women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination. The right to vote of the disabled persons is protected under Convention on the Rights of persons with Disabilities 2006, art. 29 mandates that “States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others.” In same article this convention provides in detail for protection of ‘right to vote’ of disabled persons.

<sup>32</sup> ‘Right to vote’ is also protected under regional instruments. European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 under art. 3 incorporates the right to have free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. American Convention on Human Rights 1969 under art. 23 recognises the equal right to vote and free expression of will. It also recognises the authority of the state to regulate the right by law on the basis of age, nationality, residence, language, educations, civil & mental

without discrimination. It also ensures ‘free expression of will’ and ‘periodic expression of will’. Therefore, it can be opined that participation in democracy is considered as so sacrosanct that it has been adopted as one of the human right by international community.

### **Voting right in India: ‘Right’ or ‘Freedom’**

The ‘right to vote’ is recognized by the Indian Constitution and it is given effect to in specific form by the Representation of the People Act, 1950. The Constituent Assembly debates reveal that the idea to treat the voting right as a fundamental right was dropped; nevertheless, it was decided to provide for it elsewhere in the Constitution.<sup>33</sup> This move found its expression in article 326<sup>34</sup> and it confers ‘right of voting’ on the basis of adult suffrage. But ‘right to vote’ was not given as fundamental right in part III of the Constitution, therefore nature of ‘right to vote’ became crucial issue in Indian constitutional law. It has been shaped by the judiciary according to need of the democratic spirit of country from time to time.

#### *Right to vote or freedom of voting*

In India, the ‘right to vote’ has been held to be a statutory right and not a fundamental right and the same position has been consistently upheld from decision of *N.P. Ponnuswamy v. Returning Officer*,<sup>35</sup> which has been followed in *Jyoti Basu v. Debi Ghosal*,<sup>36</sup> and recently in *Kuldip Nayar v. Union of India*<sup>37</sup> and in *Dr. K. Krishna Murthy v. Union of India*,<sup>38</sup> but before *Kuldip Nayar*,<sup>39</sup> there was another development took place

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capacity or sentencing by a competent court in criminal proceedings. African Charter on Human Rights and People’s Rights, 1981 under art. 3 also seeks to protect the right to vote of every citizen.

<sup>33</sup> *PUCI v. Union of India*, AIR 2003 SC 2363.

<sup>34</sup> Which enjoins that 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 18 years of age, and is not otherwise disqualified under the Constitution or law on the ground of non-residence, unsoundness of mind, crime, corrupt or illegal practice shall be entitled to be registered as voter at such election.

<sup>35</sup> 1952 SCR 218.

<sup>36</sup> (1982) 1 SCC 691.

<sup>37</sup> (2006) 7 SCC 1.

<sup>38</sup> (2010) 7 SCC 202.

<sup>39</sup> (2006) 7 SCC 1.

in *PUCL v. Union of India*<sup>40</sup> where it was observed that the ‘right to vote’, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in article 326 and the right has been shaped by the Representation of the People Act, 1951. But in *Kuldip Nayar case*,<sup>41</sup> and in *Dr. K. Krishna Murthy case*,<sup>42</sup> it was held that ‘right to vote’ is a statutory right. The confusion regarding status of ‘right to vote’ was cleared in 2013 by the Supreme Court in *PUCL v. Union of India*,<sup>43</sup> where observation of *PUCL Case of 2003*,<sup>44</sup> was clarified by highlighting ‘freedom of voting’ under article 19(1)(a).

In *PUCL case of 2003*,<sup>45</sup> court held that article 19(1)(a) includes ‘freedom of voting’ that is another facet of ‘right to vote’, so right to vote itself is not a fundamental right but expression of the right is a fundamental right. In this case court was of opinion that ‘right to vote’ cannot be placed on the pedestal of a fundamental right but at the stage when the voter goes to the polling booth and casts his vote, his freedom to expression arises. Therefore, ‘freedom of voting’ is different from ‘right to vote’.<sup>46</sup>

In *PUCL case of 2013*,<sup>47</sup> ‘freedom of voting’ is further strengthened by providing option for negative voting. In this case court opined that democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalise themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing option for exercising ‘right to negative vote’, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered.

‘Freedom of voting’ thus in India is a fundamental right under article 19(1)(a) which comes into operation after getting ‘right to vote’ which is a constitutional right. If a person is eligible to get ‘right to vote’ then he gets ‘freedom of voting’ as a fundamental right. So

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<sup>40</sup> AIR 2003 SC 2363.

<sup>41</sup> *Kuldip Nayar v. Union of India* (2006) 7 SCC 1.

<sup>42</sup> (2010) 7 SCC 202.

<sup>43</sup> (2013) 10 SCC 1.

<sup>44</sup> *PUCL v. Union of India*, AIR 2003 SC 2363.

<sup>45</sup> *Ibid.*

<sup>46</sup> In *PUCL v. Union of India* (2013) 10 SCC 1 in this judgment, it was clarified by the court that *Kuldip Nayar case*, did not overrule *PUCL v. Union of India*, AIR 2003 SC 2363.

<sup>47</sup> *PUCL v. Union of India*, (2013) 10 SCC 1.

a person can be deprived from being eligible to a voter but cannot be deprived from 'freedom to exercise' it. It is a freedom of voter to decide to whom he wants to give his vote even he can reject all options and can exercise his right by negative voting.

*Do MP's/MLA's have 'freedom of voting'?*

In *PUCL* case of 2003,<sup>48</sup> 'freedom of voting' has been declared by the court as a fundamental right and in *PUCL* case of 2013,<sup>49</sup> the court strengthened 'freedom of voting' by providing an option for negative voting (hereinafter as NOTA) and for providing NOTA. The court compared it with voting options in parliament. The court held that it will be equal to 'Abstain button' in parliamentary voting. Now the issue is that is MP/MLA entitled to 'freedom of voting'? MP/MLA exercises his vote in two processes, first in election of the president<sup>50</sup> and other officials of the Parliament/legislative assembly<sup>51</sup> and second in parliamentary proceedings for enactment of legislature.

*Voting in elections*

Role of MP/MLA is not limited to only parliamentary proceedings. In election of the president, upper house and other officers of the house, only MP/MLAs are eligible to vote. Voting for elections of the members of the Rajya Sabha is a non-legislative activity and not a proceeding within the state legislature.<sup>52</sup> The election to the office of the president is also held by an electoral college which consists of elected members of both houses of Parliament and elected members of the state legislative assemblies.<sup>53</sup> The electors of this Electoral College vote at the presidential election as members of the said Electoral College and the voting at such election is outside the house concerned and not a part of the proceeding of the house. Similarly, election of other officers by members is not covered by parliamentary proceedings. In all these election processes, members have similar 'freedom of voting' as in

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<sup>48</sup> *PUCL v. Union of India*, AIR 2003 SC 2363.

<sup>49</sup> *Supra* note 47.

<sup>50</sup> *Supra* note 3, art. 55.

<sup>51</sup> *Id.*, art. 66, 93

<sup>52</sup> *Pashupati Nath Sukul v. Nem Chandra Jain*, AIR 1984 SC 399.

<sup>53</sup> *Supra* note 2, art. 54.

other elections. The only difference between two is of eligibility of being a voter.<sup>54</sup>

### *Voting in parliamentary proceedings*

Voting in parliamentary proceeding is considered different from voting in other elections including election of president because latter does not fall into legislative activity.<sup>55</sup> Now the issue is that can a member be deprived off his voting rights. In *Kihota Hollohon v. Zachilhu*,<sup>56</sup> it was contented that MP/MLAs have ‘freedom to vote’ under article 105 (2)<sup>57</sup> of the Constitution and the tenth schedule of the Constitution is a violation of such right, but court had rejected this contention and held that tenth schedule does not violate freedom to vote. So in a way the Supreme Court had accepted that MP/MLA have freedom to vote in parliamentary proceeding, though tenth schedule does not violate this freedom. But after 2003, it has been cleared that ‘freedom of voting’ is also available to MP/MLA because in *PUCJ* case of 2003,<sup>58</sup> ‘freedom of voting’ has been declared by the court as fundamental right under article 19(1) (a) and in *PUCJ* case of 2013,<sup>59</sup> court strengthened ‘freedom of voting’ by providing option for negative voting and for providing ‘NOTA’ court compared it with negative voting option in parliament that is ‘Abstain’. On nature of ‘Abstain’ button, the Supreme Court had observed in *Lily Thomas v. Speaker, Lok Sabha*,<sup>60</sup> that “Right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well. ‘Neutral’ means, ‘indifferent’, unbiased, impartial and not engaged on either side.” and this definition was also accepted in *PUCJ* case of 2013<sup>61</sup> for defining nature and necessity of ‘NOTA’. Even in *Kihota Hollohon*,<sup>62</sup> the Supreme Court had observed about the importance of ‘Abstain’

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<sup>54</sup> In general election every citizen is eligible to be a voter, if he is not disqualified under any law to be a voter but in elections of the president or vice president or for elections of other officers only ‘Members’ are eligible to vote. *Supra* note 2, art. 55, art.66, art. 93.

<sup>55</sup> *Pashupati Nath Sukul v. Nem Chandra Jain*, AIR 1984 SC 399.

<sup>56</sup> AIR 1993 SC 412.

<sup>57</sup> *Supra* note 3, art. 105(2) provides that No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

<sup>58</sup> *Supra* note 48.

<sup>59</sup> *Supra* note 47.

<sup>60</sup> (1993) 4 SCC 234.

<sup>61</sup> *Supra* note 47.

<sup>62</sup> *Supra* note 56.

button<sup>63</sup> and held that scope of political whip should be narrow, court observed as:<sup>64</sup>

This provision itself accommodates the possibility that there may be occasions when a Member may vote or abstain from voting contrary to the direction of the party to which he belongs. This, in itself again, may provide a clue to the proper understanding and construction of the expression ‘Any Direction’ in Clause (b) of Paragraph 2(1), whether really all directions or whips from the party entail the statutory consequences or whether having regard to the extra-ordinary nature and sweep of the power and the very serious consequences that flow including the extreme penalty of disqualification the expression should be given a meaning confining its operation to the contexts indicated by the objects and purposes of the Tenth Schedule.

Therefore, It can be opined that even in parliamentary proceeding ‘Members’ have freedom of voting under article 19(1) (a) because in *Kihota Hollohon* case<sup>65</sup> the court was of opinion that ‘Abstain’ button has its own importance and political whips should not be issued in every matter, therefore unrestricted scope of political whip was not accepted by the court and a fundamental right can be a such restriction on the direction issued by the political parties. In *PUCL* case of 2013<sup>66</sup> a similar to ‘Abstain’ button was created for enforcement of ‘freedom of voting’, therefore after 2013 every MP/MLA has ‘freedom of voting’ as a fundamental right under article 19 (1) (a) of the Constitution.

### **What is the value of participation?**

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<sup>63</sup> The Supreme Court had observed that “Parliamentary democracy envisages that matters involving implementation of policies of the Government should be discussed by the elected representatives of the people. Debate, discussion and persuasion are, therefore, the means and essence of the democratic process. During the debates the Members put forward different points of view. Members belonging to the same political party may also have, and may give expression to, differences of opinion on a matter. Not unoften the views expressed by the Members in the House have resulted in substantial modification, and even the withdrawal, of the proposals under consideration. Debate and expression of different points of view, thus, serve an essential and healthy purpose in the functioning of Parliamentary democracy. At times such an expression of views during the debate in the House may lead to voting or abstinence from voting in the House otherwise than on party lines.”

<sup>64</sup> *Supra* note 62, para 19.

<sup>65</sup> *Supra* note 56.

<sup>66</sup> *Supra* note 47.

Recently, Chad Flanders<sup>67</sup> discussed values of participation as foundation for democracy and Joshua A. Douglas<sup>68</sup> agreed on these values of participation. Both professors discussed values of participation, researcher has agreed on this point but he also would like to add one more aspect to this model, which makes values of participation more effective.

### *Values for democracy*

Professor Chad Flanders<sup>69</sup> stated that there are four important values of participation but researcher has opinion that from these four, only three are values and another is a mean to make participation more effective, even professor himself accepted that in strict sense, last one is not a value itself, therefore a classification has been done in this model by researcher. In this part three values of participation have been stated, these are legitimacy, expression and information, which are discussed in following heads.

### *Legitimacy*

First and foremost important value of participation is that it gives legitimacy to the government for ruling. It can be described as a foundation of democracy because it makes difference between democracy and other forms of government.<sup>70</sup> No government can be legitimate, if it does not allow to the people in some manner to choose its ruler and rules. If a political system does not provide participation, then it cannot be a legitimate political system from the view of democratic principles. Therefore, participation has been accepted as human right in international law.<sup>71</sup>

John Locke argues that when a person consents to the creation of a political society, he necessarily consents to the use of majority rule in deciding how the political society is to be organised.<sup>72</sup> When people participate in the democratic process, by their act of participation

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<sup>67</sup> Chad Flanders “What Is the Value of Participation ? ” 66 *OKLA. L. Rev.* 53 (2013) (herein after as Chad Flanders in *OKLA. L. Rev.*).

<sup>68</sup> *Supra* note 1.

<sup>69</sup> *Supra* note 67

<sup>70</sup> See, for example, in monarchy, people does not participate for formation of government, therefore they did not say that they derived governmental powers from people. Acceptance of people as source of power itself indicate that there should be participation of people.

<sup>71</sup> UDHR, art. 21; ICCPR, art. 25.

<sup>72</sup> Tom Christiano, “Democracy” *The Stanford Encyclopedia of Philosophy* (fall 2008 edn.), available at: <http://plato.stanford.edu/archives/fall2008/entries/democracy> (last visited on Feb. 20, 2016).



they consent to the outcome, even if it goes against them. Their participation thereby lends legitimacy to the outcome and perhaps even to the democratic assembly that is elected by citizens. On this account, the acts of voting, for example, are also acts of consent to the outcome of the voting. So participants are thereby obligated to comply with the decision made by the majority.<sup>73</sup>

### *Expression*

‘Expression’ is another value of participation. Participation is a way, by which people can show to others what they think and believe. Participation does not merely mean that to whom they choose to vote. Even, act of voting itself says something. If a person goes to polling booth but he does not vote in favour of any one and press the button of NOTA, it means he did not like promises made by candidates, he wants something else, and so he rejected all of them. In *PUCL* case of 2013,<sup>74</sup> court observed that, “a provision of negative voting would be in the interest of promoting democracy as it would send clear signals to political parties and their candidates as to what the electorate think about them.” Therefore, participation is facet ‘of freedom of expression’ due to this ‘freedom of voting’ was interpreted by the court in *PUCL* case of 2003,<sup>75</sup> and in *PUCL* case of 2013,<sup>76</sup> the button for NOTA was made available and court observed as:<sup>77</sup>

Giving rights to a voter not to vote for any candidate while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval with the kind of candidates that are being put up by the political parties. When the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, 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.

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Supra* note 47.

<sup>75</sup> *Supra* note 48.

<sup>76</sup> *Supra* note 47.

<sup>77</sup> *Id.*, para 55.

### *Information*

Voting in a way also does a good job. It tells rulers, what the people think and want, therefore, nowadays manifesto has become so important.<sup>78</sup> Elections are in their own way a sort of “preference poll” of a certain set of the population. The classic example of ‘voting’ having informational role is the general election of 1977 in India, where people informed that they do not want any restraint on their freedoms and liberty. Elections of 2014 also can be taken as an example of such informational value.<sup>79</sup>

### *When participation become more effective*

It can be opined that in democracy, participation has great value but next aspect of it is that how participation can be more effective for providing values to the democratic process. Equal participation and freedom of choice can be such means which can increase effectiveness of participation. Equal participation was considered as partial value of participation by Chad Flanders<sup>80</sup> but he also stated that it is not an absolute value. But in reply to Chad Flanders, Joshua A. Douglas<sup>81</sup> stated that equal participation is as important as other values of participation in democracy. Researcher has same opinion as Joshua A. Douglas and further would like to clarify that equal participation and freedom of choice can be considered as means to increase effectiveness of value of participation and how it will work to increase effectiveness of participation is discussed in following heads.

### **Equal participation**

‘Equality’ plays an important role in increasing value of participation. If in a country voting right is given to only a particular sect of people in that situation, such system will be a weak democratic. Therefore, even in international instruments, it has been tried to secure

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<sup>78</sup> For example in 2014, in India, in Delhi Assembly Election, Aam Adami Party introduced a election manifesto for every constituency according to the day to day need of people and party surprisingly got 28 seats. On the same line for election of Lok Shaba other parties like BJP also tried to prepare a special manifesto.

<sup>79</sup> In Delhi assembly as well as in Lok Sabha elections corruptions was a big issue due to this Central Government enacted Lokpal Act, 2013.

<sup>80</sup> *Supra* note 67.

<sup>81</sup> *Supra* note 1.

equality among the different sects of people.<sup>82</sup> Similarly, in India, the Constitution also provides that no person shall be ineligible on grounds only of religion, race, caste, sex or any of them.<sup>83</sup> But it does not make any bar for making some eligibility criteria for getting right to vote, for example in India, a person for being a voter must attain age of 18 years, it is a mere an eligibility, similarly, the Constitution also provides other bars like non-residence, unsoundness of mind, crime or corrupt or illegal practice, therefore it cannot be considered as an unequal treatment.<sup>84</sup> It can be opined that equality in participation increases effectiveness of the value of participation. When all persons will have voting right without any discrimination, it will definitely make more pressure on the government to take into account the will of all the people. Therefore, it will increase effectiveness of legitimacy, expression and information given by the people by participating in democratic process. In other words, if opportunity of participation is given to all persons, then it will be approval of government acts by the all persons, which will give authority to the government for ruling all persons.

### **Freedom of choice**

‘Freedom of Choice’ is another element in process of participation, which increases value of participation. In *PUCCL* case of 2013<sup>85</sup> the Supreme Court held that “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.” ‘Freedom of choice’ in political process makes a nation more democratic, if in a nation ‘freedom of choice’ is not given, then such democracy will be limited democracy. In such a political system, where ‘freedom of choice’ does not exist, it can be opined that in such political system, any value of participation will not serve its purpose.<sup>86</sup> Therefore, it can be opined that ‘freedom of choice’ is a basis of values of participation and in other way it is a foundational base of democracy.

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<sup>82</sup> ‘Right to vote’ is specially protected by International Convention on the Elimination of All forms of Racial Discrimination, 1966; Convention on the Political Rights of Women, 1953; Convention on the Rights of persons with Disabilities 2006.

<sup>83</sup> *Supra* note 3, art. 325.

<sup>84</sup> *Id.*, art. 326.

<sup>85</sup> *Supra* note 47.

<sup>86</sup> It will not give full legitimacy to the government. It will be gross violation of another value that is ‘expression’. It will not inform belief an thought of people to government.

## Value of participation in parliament

Value of participation in parliament is same as in discussed above. Application of these values is manifest in Parliament or in any democratic institution. Therefore, participation in parliament has two fold values, one is that it provides political legitimacy to the government and second is that it provides legal legitimacy to the act of government.

### *Political legitimacy*

It is a well established principle that in democracy, people have right to participate in government and this right can be exercised by the people through representatives in parliament.<sup>87</sup> Participation of representative in parliament gives legitimacy to the government, because they on the behalf of people approve the acts of the government. They also inform the government, what the people are thinking and what they want from government. They do not express their beliefs but they express beliefs of people, it can also be opined that in India, therefore, a special protection has been given to the MP/MLAs for their participation in Parliament by the Constitution.<sup>88</sup>

### *Legal legitimacy*

Participation in parliament gives legal legitimacy to the legislations. Legislative power of parliament is not directly defined in one specific article but there are many provisions in the Constitution of India which hints that legislative power of union is vested in Parliament.<sup>89</sup> It is important to note that for exercising such legislative, participation by

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<sup>87</sup> It is also accepted as a human right, for example, Universal Declaration of Human Rights, 1948 art. 21 (1) provides “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives”. International Covenant on Civil and Political Rights, 1966, art. 25 provides that “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in art. 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives”; See also, International Convention on the Elimination of All forms of Racial Discrimination, 1966; Convention on the Political Rights of Women, 1953; Convention on the Rights of persons with Disabilities, 2006.

<sup>88</sup> *Supra* note 3, art. 105(2) provides that “No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.”

<sup>89</sup>*Id.*, art. 79 provides “Parliament which is consist of the President and two Houses” and art. 123(1) provides legislative power of President, so at the very outset it can be said that President is a part of parliament so it also provides legislative power to Parliament when parliament is not seating, Art.123(2) provides that ordinance passed by president has same force as enactment of parliament so it also hints that parliament has legislative power. Art. 386 provides power of amendment of the Constitution to parliament so parliament has

MP/MLA is necessary. The Constitution provides that all questions should be determined at sitting of either house or joint sitting of the houses by a majority of votes of the members present and voting.<sup>90</sup> The Constitution also provides procedure for conducting participation in parliament. Even, the Constitution can also be amended by the special participation in parliament.<sup>91</sup> Proper procedure of participation is necessary for validity of legislation, if it is not followed then such legislation will be *ultra vires*,<sup>92</sup> therefore participation in parliament is essential and it gives legitimacy to the act of government.

### **Violation of the value of participation**

Violation of value of participation depends upon the 'rights'. It means at what extent a person has been denied from his rights. Violations of value of participation can be classified according to the nature of violation of rights. Chad Flanders<sup>93</sup> described two types of violations of value of participation but researcher has opined that there may be third category in between major and minor that is partial violation.

### **Major violation: No ability to participate**

In this category, those cases can be covered under which gross violation took place. If a person fulfilled all the eligibility for being a voter but government refused to give him voting right then it will be a case of major violation. In India, if a citizen fulfilled eligibility criteria,<sup>94</sup> he cannot be scrutinized from being a voter on the ground that he belongs to a particular sect of society,<sup>95</sup> and if he will be scrutinized then it will be a major violation of

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legislative power in the name of constituent power that parliament can amend the Constitution of India. *Supra* note 3, chapter I of part XI provides legislative relation as distribution of legislative power between union and state under art. 245 to Art. 255. Art 245(1) provides as: "...parliament may make laws for the whole or any part of the territory of India....", so it also hints that legislative power are vested in Parliament. Art. 246(1) provides as: "..... Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List')." Art. 246(2), (3) and (4) also confer that parliament has legislative power. Further art. 249 and art. 250 also provide wide legislative power to Parliament. So it can be opined that parliament has the power to legislate even parliament can amend the Constitution of India.

<sup>90</sup>*Supra* note 3, art. 100.

<sup>91</sup>*Id.*, art. 368.

<sup>92</sup>*Supra* note 56.

<sup>93</sup>*Supra* note 67.

<sup>94</sup>*Supra* note 3, art. 326.

<sup>95</sup>*Id.*, art. 325.

value of participation.<sup>96</sup> In this category, those cases would be covered in which person(s) were denied from being a voter, so they are eligible to participate but does not able to participate.

**Minor violation: Person has ability but cannot exercise it.**

In this category, those cases will be covered where a person has been enrolled as a voter but due to some reason he cannot exercise right.<sup>97</sup> If someone goes to polling booth, and if he faces some difficulty in casting his vote then it will also be a case of minor violation.<sup>98</sup> In India, before 2013, there was no option for secret negative voting in electronic voting machines (EVM) that was a minor violation of value of participation, which was corrected by the Supreme Court by introducing new button in EVM for secret negative voting as NOTA.<sup>99</sup>

**Partial violation: Participation in restricted manner**

In this category, those cases will be covered, where ‘freedom of voting’ has been violated. If someone goes to cast his vote, but he does not have many options for casting his vote, even he do not have negative voting right, then it will be a partial violation. In such cases even though a person has eligibility/ability and does not have any hindrance for exercising his right since he does not have much freedom to choose, so he does not cast his vote according to his will. Single party democracy, like China, is a classic example of it. If a person is directed to exercise his right in particular manner then in such situation it will be partial violation

**Concluding finding on impact and status of political whip**

In this part, paper has discussed various aspect of participation including consequence

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<sup>96</sup> Because, it will be violation of Constitutional mandate, which in all circumstances should be respected. It will also be a violation of principle of equality sated in art. 14, *Supra* note 3, art. 15, which is a fundamental right, therefore violation of it will be *ultra vire* to art. 13.

<sup>97</sup> If a person went to polling booth for casting his vote but returning officer refused to allow him for exercising voting because he did not have proper identification proof, in such situation he was eligible to exercise his right but he cannot exercise it.

<sup>98</sup> *Supra* note 67.

<sup>99</sup>*Supra* note 47.

of violation of core principles of participation. In this part, it can be opined that principle of participation in democracy gives some political values as well as right to the citizens to participate in governance of the nation. These rights are considered as so sacrosanct that these are accepted as human rights by various international instruments and in India, it has accepted as fundamental right. But now the issue is that what can be opined from all findings of this part with relation to political whip issued under para 2 (1) (b) of the tenth schedule of the Constitution.

#### *Human right vis a vis political whip*

Voting rights are recognized by various international instruments as a human right.<sup>100</sup> Political whip is recognized by the Constitution of India.<sup>101</sup> It gives power to political parties for issuing direction to members for voting in parliament and non compliance with directions may be a ground for disqualification. So in a way voting of members is controlled by political parties<sup>102</sup> even he cannot press the 'Abstain button'. Therefore, members in Indian parliament do not have freedom to vote. It can be opined that being a human, MP/MLA also has human right i.e. Right to Vote according to their will. Even, it has been clearly mentioned in international instrument that all persons have 'right to participate' in governance of the nation, and this right may be exercised through the representatives of people.<sup>103</sup> If a restriction is imposed on the rights of MP/MLA to participate in governance then it will be the restriction not only on the MP/MLA, but also a restriction on all the persons whom he represents, therefore, it can be opined that the Political Whip which restricts right to participate in governance of the nation is a violation of human right.

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<sup>100</sup> Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; 'Right to vote' is specially protected by International Convention on the Elimination of All forms of Racial Discrimination, 1966; Convention on the Political Rights of Women, 1953; Convention on the Rights of persons with Disabilities 2006.

<sup>101</sup> *Supra* note 3, tenth schedule of para 2 (1) (b).

<sup>102</sup> If party issue a whip that all members of such party will vote against the bill pending in parliament, then all members have to vote against such bill. If any member voted in favour of bill by pushing Yes button or Abstain button then he will be subject to disqualification under tenth schedule read with article 102 (2) or 191 (2) of the Constitution of India.

<sup>103</sup> *Supra* note 87.

*Freedom of voting vis a vis political whip*

In India, 'right to vote' is accepted as a constitutional right which may be subject to some restrictions, such as eligibility to be a voter.<sup>104</sup> But 'freedom of voting' is accepted as a fundamental right under article 19(1)(a) of the Constitution.<sup>105</sup> In *PUCL* case of 2013,<sup>106</sup> court compared 'Abstain' button with 'NOTA' button, but did not compare the consequence of pressing 'Abstain' button in contradiction of party direction. Before 2003, court did not interpret article 19(1) (a) to include 'freedom of voting' but after 2013 it is an accepted fundamental right and therefore negative voting was also accepted.<sup>107</sup> In *PUCL* case of 2013,<sup>108</sup> for defining nature of 'NOTA' as neutral voting option court compared it with 'Abstain' button in parliament and also referred *Lily Thomas v. Speaker, Lok Sabha*,<sup>109</sup> so in *PUCL* case of 2013,<sup>110</sup> the court created 'NOTA' as a 'Abstain' button in general elections for securing 'freedom of voting' that is a fundamental right.

In *Indira Nehru Gandhi v. Raj Narain*,<sup>111</sup> the Supreme Court observed that democracy and free elections are part of the basic structure of the Constitution. It was also held that democracy can function only when elections are free and fair and the people are free to vote for the candidates of their choice. Thereafter, the Supreme Court reiterated this principle in *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi*,<sup>112</sup> and also in *Kihoto Hollohon*.<sup>113</sup> In *PUCL* case of 2013,<sup>114</sup> the Supreme Court held that "democracy being the basic feature of our constitutional set up, there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The 'Fair' denotes equal opportunity to all people," therefore the Supreme Court was of

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<sup>104</sup> *PUCL v. Union of India*, AIR 2003 SC 2363.

<sup>105</sup> *Supra* note 47.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> (1993) 4 SCC 234; in this case the Supreme Court held that "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question." and that "Right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well. 'Neutral' means, 'indifferent', unbiased, impartial, not engaged on either side."

<sup>110</sup> *Supra* note 47.

<sup>111</sup> (1975) Supp 1 SCC 198; in this case, art. 19 was not in issue and the observations were in the context of basic structure of the Constitution.

<sup>112</sup> (1978) 1 SCC 405.

<sup>113</sup> *Supra* note 56.

<sup>114</sup> *Supra* note 47.



opinion that for free and fair election, freedom of choice should be given. So, it can be opined that democracy is a basic structure of the constitution and free and fair election is a part of democracy and for free and fair elections 'freedom of choice' is an essential element, therefore violation of 'freedom of voting' may amount to violation of basic structure.

Political Whip may direct to MP/MLA to cast their vote in particular manner, even he cannot use 'Abstain' option which was compared by the court with 'NOTA'<sup>115</sup> for giving protection to 'freedom of voting'. 'Right to vote' in parliament is not a fundamental right like 'right to vote' in general election but 'freedom of voting' is a fundamental right, which cannot be limited only to general election because it is not a part of 'right to vote' but it is a part of 'freedom of expression'.<sup>116</sup> 'Freedom of voting' is an inviolable fundamental right because it is an essential part of fair and free election which is a part of the basic structure of the Constitution.<sup>117</sup> But political whip does not give 'freedom of voting' to MP/MLA, even it does not allow to use 'Abstain' option, MP/MLA have to cast their vote according to directions issued by party, otherwise, those MP/MLA who will not obey such directions, has to compromise his membership in Parliament/assembly. Though, the Supreme Court has compared 'NOTA' option with 'Abstain' option in *PUCL* case of 2013,<sup>118</sup> by referring observation of *Lily Thomas v. Speaker, Lok Sabha*,<sup>119</sup> that "right to vote includes right to remain neutral" and held that for expressing such neutral view a option should be there and such option is also necessary for 'freedom of voting', that is an essential component of free and fair election, which constitutes basic structure of the constitution. Hence, it can be opined that Political Whip does not respect basic structure of the Constitution because it is not in harmony with 'freedom of voting' that is a fundamental right and an essential component of 'free and fair election'.

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<sup>115</sup> *Ibid.*

<sup>116</sup> *Supra* note 3, art.19 (1)(a).

<sup>117</sup> See *Indira Nehru Gandhi v. Raj Narain* (1975) Supp 1 SCC 198; *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi* (1978) 1 SCC 405; *Supra* note 56.

<sup>118</sup> *Supra* note 47.

<sup>119</sup> (1993) 4 SCC 234.

*Value of Participation vis a vis Political Whip*

Participation is considered as foundational basis of democracy; therefore, it has been accepted as human right in international law.<sup>120</sup> It can be opined that ‘voting’ is a most effective way to participate in a democratic process. It gives legitimacy to the government. Another value of participation is that it gives opportunity to people to express their beliefs and thoughts about governance. MP/MLAs also inform the government, what the people are thinking and what they want from the government, thus, they do not express their beliefs but they express beliefs of people in the Parliament/assembly. In democracy, when persons participate in democratic process, they give consent to the state for ruling them; therefore, it gives legitimacy to the acts of government. In Parliament, Participation of representative gives legitimacy to the government, because they on the behalf of people approves the act of government and people have right to participate in governance.<sup>121</sup> Generally, the higher law of nation provides privileges to the members for their participation in ‘National Assembly’, reason behind it is that they participate in the assembly not for themselves but for the people, so they are only conveying message of the people. Therefore, in India, the Constitution provides a special protection to the MP/MLA for their participation in Parliament.<sup>122</sup> Restrictions on the participation will make legitimacy weak.<sup>123</sup> If a system makes restriction on participation process in assembly, then in such system MP/MLA cannot give information to the state about beliefs of people. Political whip in Parliament makes restrictions on MP/MLA, they can participate in the house as party directs them, otherwise they have to compromise their membership in the

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<sup>120</sup> UDHR, art.21; ICCPR, art.25.

<sup>121</sup> *Supra* note 87.

<sup>122</sup> *Supra* note 3, art. 105(2) of the Constitution, provides that “No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.”

<sup>123</sup> In such situation, where participation took place in a very restricted manner or where only few people can participate, legitimacy will be there but it will be weak legitimacy because in political theory, principle is that “in order to be ruled legitimately, I must give consent to that rule”. According to consent theory of democracy, it is not necessary that I must be ruled by same, to whom I have given consent. It only requires to participate, therefore minority view cannot take defence that we were not consented, in democratic process consent means participation. See Tom Christiano, “Democracy” *The Stanford Encyclopedia of Philosophy* (Fall 2008 edn.), available at: <http://plato.stanford.edu/archives/fall2008/entries/democracy> (last visited on Nov. 30, 2015).

house.<sup>124</sup> Hence, it can be opined that political whip reduces legitimacy of the acts of government.

### *Status of political whip*

Status of Political Whip depends upon legal legitimacy. In this paper it can be opined that for participation in democracy, Indian Constitutional law provides ‘freedom of voting’ as fundamental right and it is also an essential element of ‘fair and free election’ which is a part of the basic structure of the Constitution.<sup>125</sup> Basic structure doctrine restricts legislative power of the Parliament.<sup>126</sup> It has been already opined that political whip violates ‘freedom of voting’, hence political whip does not respect basic structure, and therefore, political whip does not have legal legitimacy in democratic process. Hence, political whip is *ultra vires* to basic structure doctrine. In summing up findings on political whip on the touch stone of ‘participation in democracy’ it can be opined that political whip does not respect human right, ‘freedom of voting’ and values of participation, therefore status of political whip is that it is *ultra vires* to the spirit of democracy and in India, democracy is a part of the basic structure which cannot be violated. So, para 2(1) (b) of the tenth schedule does not have constitutional legitimacy as well as political legitimacy on the basis of principle of participation in democracy.

## **IV Conclusion and suggestions**

In sum up, it can be opined ‘Participation in democracy’ is a foundational basis for achieving high aims of the democracy. It in a way ensures liberty of the persons. Participation plays its role not only in formation of government authorities through in democracy but it also contribute in governance of nation. It gives legitimacy to the entire system for ruling. It provides a platform for expression of thoughts about governance and it informs such thoughts to the governmental authorities through the representatives.

In India, principle of participation is accepted in the constitution. For ensuring participation ‘freedom of voting’ is given to the citizens as a fundamental right and

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<sup>124</sup> Member does not participate in the house as a personal capacity but they participate on the behalf of people, therefore it imposes restrictions on the people.

<sup>125</sup> *Indira Nehru Gandhi v. Raj Narain* (1975) Supp 1 SCC 198.

<sup>126</sup> *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973) 4 SCC 225.

negative voting right is included in this freedom. But it can also be opined that such 'freedom of voting' is not available to the MP/MLA due to the para 2(1)(b) of the tenth schedule of the Constitution, which gives power to issue political whip to political parties for prescribing manner in which MP/MLA can vote. It can also be opined that being *ultra vires* to the 'freedom of voting' para 2(1) (b) does not have legitimacy either political or legal.

Researcher has opinion that political whip in present form should be avoided. Political Whip has potential to demolish entire purpose of democracy; therefore it should not be issued for passing legislative acts. It should be confine to 'no confidence motion' and money bills, because it may result into demolition of entire government. By avoiding Political Whips in legislative proceeding, values of participation can be saved. Researcher also has opinion that 'freedom of voting' should be given to MP/MLAs in absolute form and therefore they should be allowed to use 'Abstain' button in Parliament proceeding irrespective of political directions. In a democracy, there should not be any discrimination between common persons and representatives for exercising fundamental rights, therefore MP/MLA should be allowed to use their negative voting right option and full freedom should be given for rejecting all options by exercising 'Abstain' and if it will be done, then it will be a step for making democracy healthier in India.