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IS INDIA A *DEMOCRACY**?

A Critical Analysis of India's First Past the Post System

- Nikhil Borwankar* 5th May, 2022

ABSTRACT

The widespread, colloquial understanding of the term "democracy" is "rule by majority". So when was the last time any ruling party in India won a national "majority"? Never. Rule 64 of the Conduct of Election Rules, 1961, mandates that the winner of an election to a Parliamentary Constituency in the Lok Sabha shall be "the candidate with the most votes". That is, a candidate with the "plurality" of votes is elected, which is distinct from a "majority" (50%+). This system of voting is colloquially referred to as 'First Past the Post' (FPP). However, a significant number of candidates/parties fail to secure a true majority (50%+1) of votes even at the constituency level. Thus, a "majority" in Parliament is actually merely the aggregation of this constituency-level 'plurality'. It does not constitute a majority of the overall votes polled at either the constituency level or the national level. On average, 51% of all constituencies in all general elections since 1962 returned candidates who did not secure a majority (50%+) of the votes in their own constituencies. Thus, constituencies have routinely come to be represented by MP's who were, themselves, not chosen by the majority. Or worse, rejected by the majority. Apart from the fact that FPP yields disproportionate results, the system also-

- favours established political parties,
- engenders corrupt practices
- encourages 'strategic voting'
- incentivises divisive identity politics;
- is incurably biased,
- is prone to results that are unjustifiably incommensurate with the vote distribution
- frequently "wastes" two thirds of the total vote.

FPP infringes the fundamental right of freedom of expression through the ballot, impedes the constitutional right to effective representation and violates the cardinal principle of democracy, 'rule by majority'. In so doing, FPP (Rule 64) is ultra vires Art.13, 14, 19(1)(a) and 21 of the Constitution of India.

Keywords: Public Choice, Plurality, Majority, Representation

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INTRODUCTION

In the landmark Kesavananda Bharati case¹, one feature that was unanimously held to be part of the "basic structure" of the Constitution was democracy. Thus, the constitutionality of India's electoral system is an issue of profound consequence that is at the very root of the concept of "democracy" in the *basic structure doctrine*. Over the years, the Supreme Court has made several, incremental advances in the constitutional jurisprudence on the subject of elections and the right to vote. Notably, the Court has held that a vote is a form of expression under Article 19(1)(a) of the Constitution, and that every citizen has an equal right to an effective vote. This paper focuses on the method of election of representatives to the Lok Sabha, and analyses whether the present method is truly representative, treats all voters equally and captures voters' choices efficiently.

Axiomatically, "democracy" is generally interpreted as "rule by majority". This paper does not question the suitability or rationality of this axiom. However, it does analyse whether this simple standard is, in fact, met by the present system of elections to the Lok Sabha. It questions whether India is, indeed, ruled by a "majority".

I. PRESENT SYSTEM OF ELECTION TO THE LOK SABHA

Primarily, Rule 64 of the Conduct of Election Rules, 1961 (hereinafter, "Rule 64"), read with Section 66 of the Representation of People's Act, 1951, read with Art.81 and Art.326 of the Constitution of India give rise to the present mechanism or 'electoral algorithm' for the determination and declaration of winning candidates in elections to Lok Sabha parliamentary constituencies.

The language of Rule 64² of the Conduct of Election Rules, 1961, is as follows:

64. Declaration of result of election and return of election.—

The returning officer shall, subject to the provisions of section 65 if and so far as they apply to any particular case, then—

(a) declare in Form 21C or Form 21D, as may be appropriate, *the candidate to whom the largest number of valid votes* have been given, to be elected under section 66 and send signed copies thereof to the appropriate authority, the Election Commission and the chief electoral officer; and

(b) Complete and certify the return of election in Form 21E, and send signed copies thereof to the Election Commission and the chief electoral officer.

[Emphasis Supplied]

¹Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225: AIR 1973 SC 1461

²Subs. by Notifin. No. S.O. 4542, dated the 20th December, 1968 (w.e.f 1-1-1969), for rule 64.

The direct result of Rule 64 is that a candidate obtaining less than 50% of the total vote, but simply one more vote than his nearest competitor, can be declared the winner. Thus, a candidate is merely required to obtain a constituency-level “plurality” in order to be declared the winner of the electoral contest. The result is a “single member plurality” (hereinafter, SMP) based system, colloquially and interchangeably referred to as “First Past the Post” (hereinafter, FPP) system. Pertinently, neither SMP nor FPP are explicitly defined in the Constitution or any other Statute. Instead, the aforesaid system is merely the manifestation of the language of the aforementioned Rule 64.

An SMP/FPP elected candidate cannot be said to have secured the “majority vote”. Nevertheless, this candidate goes on to represent an entire constituency in Parliament. However, the majority of the constituency did not vote for him and their votes have now effectively been wasted. Fundamentally, the said circumstance cannot be termed “majority rule”, as the majority did not, in fact, vote for the candidate who now purports to exercise legislative powers on their behalf. Thereby, Rule 64 violates the cardinal principle of democracy, which is rule by majority.

A. *Brief Statistical History of the Present Election System of the Lok Sabha*

Publicly available electoral data³ of all Lok Sabha elections since independence (See: **Table 1; below**) conclusively establishes that under the system arising from Rule 64, India has never had any political party secure a 50% + 1 or true “majority” of the vote share in any of the 17 Lok Sabha elections conducted so far, since independence.

Table 1: **Vote share of major political parties in the Lok Sabha Elections, 1952-2019**

Year	No. of Seats	Total Turnout (%)	Congress		Communist Party of India		CPI (Marxist)		Jana Sangh / Bharatiya Janata Party (BJP)		Janata Party		Janata Dal	
			Votes (%)	Seats	Votes (%)	Seats	Votes (%)	Seats	Votes (%)	Seats	Votes (%)	Seats	Votes (%)	Seats
1952	489	45.7	45.0	364	3.3	16	-	-	3.1	3	-	-	-	-
1957	493	47.7	47.8	371	8.9	27	-	-	5.9	4	-	-	-	-

³Sources:

- Norio KONDO, “DISCUSSION PAPER No.98 Election Studies in India”, *Institute of Developing Economies (ide), Jetro, Japan*, March, 2007.
- Election Commission of India, Reports of General Elections of Lok Sabha, 1952-2019.

Table 1: Vote share of major political parties in the Lok Sabha Elections, 1952-2019

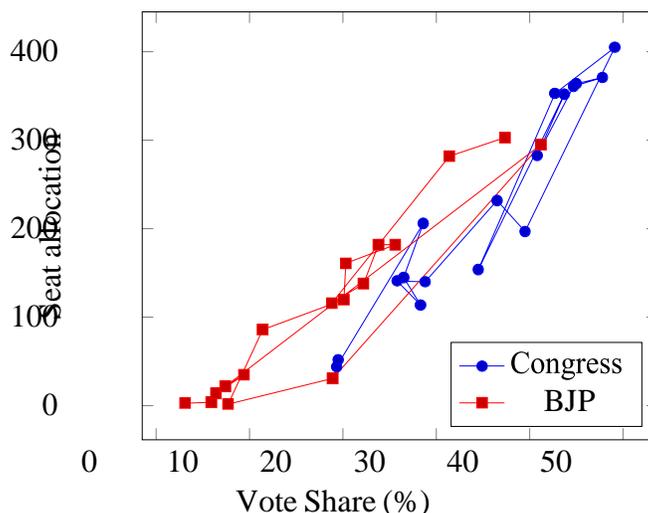
Year	No. of Seats	Total Turnout (%)	Congress	Communist Party of India	CPI (Marxist)	Jana Sangh / Bharatiya Janata Party (BJP)	Janata Party	Janata Dal
1962	494	55.3	44.7	361	9.9	29	-	-
1967	520	61.2	40.8	283	5.0	23	4.4	19
1971	518	55.3	43.7	352	4.7	23	5.1	25
1977	542	60.5	34.5	154	2.8	7	4.3	22
1980	542	56.9	42.7	353	2.6	11	6.1	36
1984	542	63.6	49.1	405	2.7	6	5.7	22
1989	543	62	39.5	197	2.6	12	6.6	33
1991	543	55.2	36.5	232	2.5	14	6.2	35
1996	543	57.9	28.8	140	2.0	12	6.1	32
1998	543	62.0	25.8	141	1.8	9	5.2	32
1999	543	60.0	28.3	114	1.5	4	5.4	33
2004	545	58.1	26.5	145	1.4	10	5.7	43
2009	546	58.2	28.6	206	1.4	4	5.3	16
2014	543	66.4	19.31	44	0.8	1	3.3	9
2019	542	67.4	19.49	52	0.58	2	1.75	3

1. Deviation in Vote-share vs. Seat-share

For a clear illustration of the arbitrariness that is inherent in the FPP system arising from Rule 64, a graph is plotted on the basis of vote share percentage against the number of seats secured in the Lok Sabha by the Congress & the BJP in all general elections between 1984 - 2019. As is evident, the number of seats a party can secure based on its own vote share is utterly arbitrary and varies from election to election.

The below graph illustrates that for a given percentage of vote share, the number of seats a party will secure in the Lok Sabha is not predictable i.e. arbitrary. For instance, the difference in vote share of the Congress party between 2014 & 2019 was approximately 0.2% (gain). However, the party gained 8 seats in the Lok Sabha as a result. For the same period, the difference in vote share of the BJP was approximately 6% (gain), but that translated into only 21 seats gained. Conversely, the difference in vote share of the Congress party between 2009 & 2014 was approximately 9.3% (loss), which translated to a loss of 162 seats.

Whereas, for the same period, the difference in vote share of the BJP was approximately 12.6% (gain), but that translated into only 166 seats gained. Such obvious arbi-



trariness is an inherent and unrectifiable defect in the FPP system of elections that arises from Rule 64.

Instead, as the above data shows, the only constant in every election since independence is the fact that the representation secured by political parties in Parliament is not commensurate with the proportion of votes cast. While the data in the table above represents the percentage of votes secured by major political parties nationally, a significant number of candidates/parties failed to secure a majority (50%+1) of votes even when viewed from the Parliamentary Constituency level. Thus, a “majority” in Parliament is actually merely the aggregation of the parliamentary constituency-level ‘plurality’ of votes without actually constituting a majority of the overall votes polled at either the parliamentary constituency level or the national level. This has been the case in every Indian Elections since independence.

2. Historical Constituency-wise Plurality

Table 2: Percentage of candidates winning by ‘plurality’ (<50%) vote share, Lok Sabha Elections, 1952-2019

Year	No. of Seats	Total Turnout (%)	Lowest winning vote share (%)	No. of Seats with mere plurality	Seats with mere plurality (%)	Top 3 states with most seats allocated on plurality
1952	489	45.7	-	-	-	-
1957	493	47.7	-	-	-	-

Table 2: Percentage of candidates winning by 'plurality' (<50%)vote share, Lok Sabha Elections, 1952-2019

Year	No. of Seats	Total Turnout (%)	Lowest winning vote share (%)	No. of Seats with mere plurality	Seats with mere plurality (%)	Top 3 states with most seats allocated on plurality			
						State	Plurality Seats	Seats	% Plurality
1962	494	55.3	21.93 Mainpuri U.P .	288	58	UP	73	86	84
						Bihar	32	51	63
						MP	30	36	83
1967	520	61.2	16.71 Shahjahan- pur U.P.	308	59	UP	75	85	88
						Bihar	43	51	84
						WB	27	40	67.5
1971	518	55.3	21.08 Bastar M.P .	165	32	WB	34	41	83
						Bihar	33	52	63
						MP	27	83	32.5
1977	542	60.5	30.27 Shillong Meghalaya	66	12	WB	9	42	12
						Bihar	7	54	13
						MP	6	41	14.6
1980	542	56.9	18.85 Inner Manipur	239	44	UP	76	84	90.4
						Bihar	46	54	85
						MP	22	40	55
1984	542	63.6	24.33 Inner Manipur	145	26.7	UP	34	83	41
						Bihar	20	54	37
						MH	16	47	34
1989	543	62.0	27.12 Jamshedpur Bihar	220	40.5	UP	57	83	68.6
						MH	27	48	56
						Bihar	24	53	45
1991	543	55.2	23.06 Rae Bareli U.P .	325	59.8	UP	76	82	92

Table 2: Percentage of candidates winning by 'plurality' (<50%)vote share, Lok Sabha Elections, 1952-2019

Year	No. of Seats	Total Turnout (%)	Lowest winning vote share (%)	No. of Seats with mere plurality	Seats with mere plurality (%)	Top 3 states with most seats allocated on plurality			
						State	Plurality Seats	Seats	Plurality %
						AP	28	44	63.6
						MH	27	47	57
			18.63						
1996	543	57.9	Srinagar J&K	394	72.5	UP	79	85	93
						MH	40	48	83
						AP	39	43	90.6
			25.55						
1998	543	62.0	Kokrajhar Assam	362	66.6	UP	77	84	91.6
						Bihar	46	53	86.7
						AP	38	43	88
			26						
1999	543	60.0	Misrikh U.P.	323	59.5	UP	79	83	95
						MH	38	47	80.8
						Bihar	34	54	63
			25.98						
2004	545	58.1	Mohanlalganj, U.P.	324	59.2	UP	70	79	88.6
						MH	33	48	68.7
						Bihar	27	40	67.5
			21.27						
2009	546	58.2	Buxar Bihar	425	77.8	UP	72	81	88.8
						MH	38	48	79
						TN	37	40	92.5
			26.12						
2014	543	66.4	Ladakh, J&K	342	62.9	UP	61	81	75
						WB	37	43	86
						Bihar	34	38	89
			29.3						
2019	542	67.1	Baramulla, J&K	203	37.4	WB	31	42	73.8
						UP	25	79	31.6
						MH	20	47	42.5

Thus, from the above cited data⁴, it is evident that -

(i) In the 2019 Lok Sabha general elections, 37% i.e. over one third of all seats were allocated to candidates who secured less than a majority (50%+) of the total votes cast in their own Parliamentary Constituency. That is to say that over one third of present MP's in the Lok Sabha are not preferred by a majority of their own constituents.

(ii) On average, 51% of all Parliamentary constituencies in all general elections since 1962 returned a candidate who did not secure a majority (50%+) of the vote in his own constituency. Thus, since independence, a majority of Parliamentary Constituencies have come to be represented by MP's who did not secure a majority vote.

(iii) Larger, more diverse states tend to return more MP's who did not secure a majority (50%+) of the vote in their own constituency. For instance, since 1962, on average 75% (three fourths) of all MP's elected from Parliamentary constituencies in U.P., India's largest state by population, did not secure a majority (50%+) in their own constituency, and were instead mere 'plurality' candidates. Other large and diverse states like Bihar, West Bengal, Madhya Pradesh, Andhra Pradesh, Maharashtra etc. also tend to elect a large majority of MP's who are not themselves majority candidates.

(iv) Even a vote share of 16.7% can be sufficient to secure a seat in Parliament, as is evident from the 1967 election in the Shahjahanpur constituency in U.P. Other such voteshare percentages that do not even amount to a quarter of the total votes polled in that constituency, but are nevertheless sufficient to secure a seat in Parliament have been highlighted in the table above.

B. *Brief Legislative History of FPP in Lok Sabha*

It is noteworthy that nowhere does the Constitution explicitly or implicitly adopt the first-past-the-post (FPP) system of elections, otherwise known as simple majority where a candidate with the most number of votes from a constituency wins the seat. Neither has the FPP system been explicitly or implicitly adopted by the Representation of People's Act, 1951. The present system or method arises only from the aforementioned Rule 64 of the

⁴**Table 2 contains parsed and analysed data. The raw data for this analysis is sourced from:**

- a. Election Commission of India, Reports of General Elections of Lok Sabha, 1952-2019.
- b. Saloni Bhogale, Sudheendra Hangal, Francesca Refsum Jensenius, Mohit Kumar, Chinmay Narayan, Basim U Nissa, and Gilles Verniers, "TCPD Indian Elections Data v1", *Trivedi Centre for Political Data, Ashoka University*, 2019.

Conduct of Election Rules, 1961. The aforesaid Rule, though clear in its interpretation, consistently turns up arbitrary results incommensurate with voters' expression due to an inherent and incurable defect in its social, political and axiomatic assumptions.

These incurable anomalies and unjustifiable deviations from all rational norms of 'fairness' have not gone unnoticed. In fact, the Election Commission of India itself has repeatedly highlighted these issues over several decades and sought Parliament's intervention to amend the present method of election. Furthermore, even the Law Commission of India has studied these anomalies and highlighted the grave impact FPP has had on the polity and democratic traditions of India. So how then did this method of election come to be selected over other available methods? Part of the answer to this question lies in the Constituent Assembly Debates.

1. Constituent Assembly Debates

On 4th January 1949, about eleven months before the final version of the Constitution of India was formally adopted, **Mr. Kazi Syed Karimuddin**, a widely reputed legal contemporary of Dr. B. R. Ambedkar who earned his LL.B degree from the prestigious Aligarh Muslim University⁵, moved Amendment No.1415 to the 1948 Draft Constitution⁶ that was up for deliberation before the Constituent Assembly. This came to be the most consequential amendment concerning the formal adoption of the voting method, and the debates surrounding this amendment sheds considerable light on the reasons for the ultimate rejection of the proposal for a PR system and the selection of the FPP system instead.

Article 67(5) of the Draft Constitution⁷, as it stood then, provided for the composition of the Lok Sabha thus -

"67(5)(a) Subject to the provisions of articles 292 and 293 of this Constitution, the House of the People shall consist of not more than five hundred representatives of the people of the territories of the States directly chosen by the voters."

Mr. Karimuddin proposed to amend Article 67 to append the words "[...] directly chosen by the voters in accordance with the system of proportional representation with multi-member constituencies by means of cumulative vote."⁸

⁵Mr. Kazi Syed Karimuddin was born in Yavatmal, Maharashtra and was elected to the Constituent Assembly from the Central Provinces (later, Madhya Pradesh) through a Muslim League ticket. Source: Constituent Assembly Members, available at: <https://www.constitutionofindia.net/constituent-assembly-members/kazi-syed-karimuddin>, last visited on April 25, 2022.

⁶Vol.VII, *Constituent Assembly Debates*, 1233—1265

⁷Draft Constitution of India, presented to the Constituent Assembly on 21st February 1948, Art.67(5)

⁸Amendment No.1415, Draft Constitution of India, presented 21st February 1948

Articles 292⁹ and 293¹⁰ of the Draft Constitution provided for reservation of seats for minority candidates in a joint electorate. Some accomplished and widely respected representatives of the minorities who had chosen to remain in post-partition India had proposed to drop their demand for separate electorates in favour of minority reservations, though no formal agreement to this effect had been arrived at¹¹.

Arguing in support of his proposition, Mr. Karimuddin averred that the PR system was "profoundly democratic" because it brought the value of each vote "more near equality" and ensured that "no vote shall be wasted". Dismissing the perceived perils of instability arising from a PR system that was believed to engender political fragmentation and brinkmanship, he instead postulated that "where there is heterogeneous population, it is very necessary that we should have Coalition Governments". This, he suggested, was the only method which guaranteed representation to religious, ethnic and political minorities,

⁹Article 292 of the Draft Constitution of India, presented 21st February 1948:

292. Seats shall be reserved in the House of the People for-

(a) The Muslim community and the Scheduled Castes;

(b) The scheduled tribes in every State for the time being specified in Part I of the first Schedule; and

(c) The Indian Christian community in the States of Madras and Bombay, according to the scale prescribed in sub-clause (b) of clause (5) of article 67 of this Constitution.

¹⁰Article 293 of the Draft Constitution of India, presented 21st February 1948:

293. Notwithstanding anything contained in article 67 of this Constitution, the President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than two members of the community to the House of the People.

¹¹Vol.VII, *Constituent Assembly Debates*, 1233—1265;

During the debate, Dr. B. R. Ambedkar argued that -

"at the initial stage when this Constituent Assembly met [...], there was an agreement arrived at between the various minority communities and the majority community with regard to the system of representation. [...] The minorities who, prior to that meeting of the Constituent Assembly, had been entrenched behind a system of separate electorates, [...] became prepared to give up that system and the majority which believed that there ought to be no kind of special reservation to any particular community [...] agreed [...] to a system of joint electorates with reservation of seats. [...] the proper procedure for effecting a change in articles 292 and 293 would be to leave the matter to the wishes of the different minorities themselves.

Pandit Thakur Dass Bhargava interjected stating -

But there was no agreement about reservation of seats among the communities and a number of amendments were moved by several Members for separate electorates and so on, but they were all voted down. There was no agreement at all in regard to these matters.

and forestalled the "tyranny of the majority". Moreover, he accurately pointed out, the FPP system "does not even guarantee the rule of the majority".

In support of his arguments, Mr. Karimuddin quoted from the experience of the 1924 UK general election which saw the Conservative Party secure 66.99% of the seats in Parliament (412/615) while only polling 46.8% of the total votes¹². Incidentally, the Labour Party which had polled 33.3% of the vote only managed to secure 24.5% (151/615) of the total seats. Thus, a fine, direct and nearly contemporaneous illustration of the disproportionality and arbitrariness that could result from the FPP system was very much available to the framers of the Indian Constitution during the Constituent Assembly debates.

Further, Mr. Karimuddin relied on the experience of the minorities in the South and West of Ireland who had been without representation in the eight Parliaments from 1885 to 1911. Indeed, in exchange for the adoption of the PR system, he stated that he was even prepared to concede the reservations of seats for minorities as was then embodied in Art. 292 and 293. But he did not restrict his argument to the political empowerment of minorities alone. Instead, he urged that the PR system would also provide representation even to political minorities not necessarily along communal lines alone.

Additionally, he argued that the proposal for reservation of seats for minorities in a joint electorate suffered from "serious defects". Persuasively, he contended that in a joint electorate it would likely be the will of the majority community that would determine the success of even the minority candidate vying for the same reserved seats, thereby rendering the remedy worse than the cure. Almost prophetically, he submitted that

"[...] in the general election and according to the present electoral system if the pendulum swings in favour of communism, all schemes of development will be lost and if it swings in favour of communalism, the secular nature of the State will be lost; and if the minorities are neglected, whether they are political, or communal, and crushed and kept out of Parliamentary activities, it will be a good fodder for the communists and they will sit in their lap. Therefore it is part of wisdom to persuade the opposition to take of the ways of constitutionalism and the only way to do it is the introduction of the system of proportional representation. I prophesy that if this is not done, it will lead to chaos. That does not mean that I oppose the continuance of the present regime. I want the Congress to live longer because they have given peace, tranquility and a secular State to all the communities in India but this cannot be guaranteed unless the system of proportional representation is introduced."

¹²Edmund Tetteh, Research Paper 08/12 titled "Election Statistics: UK 1918-2007", *Social & General Statistics Section House of Commons Library*, 1st February, 2008

He found support for these propositions in **Prof. Khushal Talaksi Shah**, an economist educated at the London School of Economics and also a lawyer at Gray's Inn¹³. Prof. Shah had moved another amendment, No.1416, that was closely similar to amendment No.1415 proposed by Mr. Karimuddin. Prof. Shah sought the inclusion of the words -

””That in sub-clause (a) of clause (5) of article 67, for the words 'not more than five hundred representatives of the people of the territories of the States directly chosen by the voters', the words 'such members as shall, in the aggregate, secure one representative for every 500,000 of the population in all the constituent parts of the Union, whether States or territories directly administered by the Centre. All members of the People's House shall be chosen directly by the votes of adult citizens. The votes shall be cast in a secret ballot and voting shall be on the basis of Proportional Representatives with Single Transferable Vote' be substituted.””

Thus, Prof. Shah supported the proposal to adopt the PR system with the notable preference for the Single Transferable Vote method. Speaking in support of his proposal he submitted that -

”I do not propose to descant at length, upon the theoretical grounds in favour of Proportional Representation or against it, as the previous speaker has placed a fairly exhaustive case before you. I would only like to add, lest I should be misunderstood, that the principle of Proportional Representation is not intended so much to perpetuate communal minorities, as to reflect the various shades of political opinion which after all, should be reflected in your Legislature, if you desire to be really a democratic government. The French system for instance, strictly speaking, is not based on Proportional Representation; and yet, different shades of political opinion are reflected in the French Assembly. Even so French Governments in the third Republic had an average life, it is said, of perhaps not more than eleven months. On that count, however, the principle is not necessarily to be condemned, as the public opinion of all shades gets a chance of expression and there is in it, if not greater stability, at least greater reflection of popular will than would be the case in a system of absolute vote that is apparently contemplated here.”

Prof. Shah endorsed the idea that the PR system is fundamentally more representative, and thereby more democratic, than the FPP system. He also held the notion of

¹³Prof. K. T. Shah was made Professor of Economics at Mysore University when he was 30 years old and in 1921 went on to become the first Professor of Economics at the Bombay University. Source: Constituent Assembly Members, *available at*: <https://www.constitutionofindia.net/constituent-assembly-members/kazi-syed-karimuddin>, last visited on April 25, 2022.

perceived instability resulting from the PR system but justified its adoption on the grounds of greater participation and the instability inherent even in other non-PR systems such as that in France. In the end, this notion of perceived instability would be quite significant, becoming one of the primary grounds for the rejection of the PR system. Perhaps, in opting not to "descant at length, upon the theoretical grounds in favour of Proportional Representation", Prof. Shah missed an opportunity for a detailed economic analysis and comparison of the competing systems. One might argue it was incumbent upon the framers of the Constitution to more thoroughly debate the cost-benefits and fairness of competing models. Ultimately, however, a scientific comparison of competing models was never attempted. Instead, the framers relied more on anecdotal evidence and Crown reports or other officially documented experiences, and that too, only in passing.

Another voice in support of the PR+STV model was that of **Mr. Mahboob Ali Beg Bahadur**, from Kashmir Valley's Sarnel village in Anantnag district who had also pursued law at the Aligarh Muslim University (AMU) like his contemporary Mr. Karimuddin¹⁴. Mr. Beg argued -

"My submission is that there is no scope for any communal body as such being returned by this method, and if it could be returned, it would be returned in the same way as any body holding different views from the majority party could be returned. If there is no objection to a section of people holding views different from the majority, they could get into the legislatures by this method."

Pertinently, Mr. Beg argued that the PR+ STV model had recently been approved and adopted by the Constituent Assembly as the method of election of candidates to the Council of States (Rajya Sabha). It would follow, he urged, that -

"What is true in the case of election to the Council of States is equally true in the case of election to the House of the People. Why should it be different, I ask, if this method would enable a party or section of persons, who hold different views from those views held by the majority, if this method enables those persons to be represented there and thereby they form what is called 'an Opposition Block' ? Can you think of any parliamentary democracy where there is no opposition ? Unless there is opposition, Sir, the danger of its turning itself into a Fascist body is there."

¹⁴Source: Constituent Assembly Members, *available at*: <https://www.constitutionofindia.net/constituent-assembly-members/mirza-mohammad-afzal-beg>, last visited on April 25, 2022.

The proposals were more generally supported by **Sardar Hukam Singh**, another lawyer who obtained his degree from Amritsar and Punjab University Law College¹⁵, who argued that -

”Sir, it has been argued here by more than one Member that plural member constituencies and cumulative voting would be too costly and unworkable. My position is that if separate electorates are detestable and if reservation of seats is objectionable, then some method has to be devised by which the rights of minorities can be safeguarded and that this is the only method suggested in the amendments that can be considered. If it is cumbersome and if it is costly, then it has to be settled in accordance with the democratic principles that we are following now. And my submission is that this is the only mode by which we can satisfy the minorities and stick to our principles that we have chalked out so far.”

To these proposals for a PR based system of elections responded another member, **Pandit Thakur Dass Bhargava**, member from East Punjab originally from Rewari, Gurgaon district near Delhi. Another lawyer educated at Law College, Lahore, he opposed these amendments apprehending that its adoption would result in the backdoor reintroduction of 'separate electorates' along communal lines, something that the framers were determined to avoid in view of the bitter experiences of the recent disturbances looming large in the collective consciousness. Speaking against these amendments, and against No.1415 in particular, he argued that -

”An amendment was sought to be moved by Mr. Karimuddin to the effect that the representation should be by way of proportional representation by the use of cumulative voting, which to my mind clearly means a reversion to separate electorates.”

In fact, Mr. Bhargava represented a faction that was opposed to reservations per se. He stated as much when he said -

”I do not want to conceal my feelings from this House that I want that there should be no reservation of constituencies for any communities, i.e., no reservation of seats for any community”

However, Dalit leader and an avowed supporter of the proposed reservations, **Mr. H. J. Khandekar**, echoed the same view as Mr. Bhargava albeit for different reasons. Mr. Khandekar protested that the cumulative voting method proposed by Mr. Karimuddin was

¹⁵Source: Constituent Assembly Members, *available at*: <https://www.constitutionofindia.net/constituent-assembly-members/hukum-singh>, last visited on April 25, 2022.

”[...] motivated by the desire to secure separate electorates by indirect means, for while on the one hand we would be abolishing separate electorate, on the other we would be retaining it by having the cumulative system of voting. If we accept the amendment, it is plain that its consequences would be that members of a community would under the cumulative system of voting, cast their votes for the candidate belonging to their community, and thus separate electorates will continue to exist indirectly.”

This apprehension was not entirely misplaced and was the result of the recent experiences of the backward communities with elections resulting from the 'Poona Pact'¹⁶ of 1932. As Mr. Khandekar pointed out-

”[...] we had to contest two elections under the Poona Pact. First, for Panel election there was contest amongst ourselves and after that in the general election we contested the candidates of other communities. At that time there was cumulative system of voting for us and not the distributive system. My Friend Mr. Kazi Syed Karimuddin has moved an amendment No. 1415 on the list, seeking to introduce cumulative system of voting. If it is accepted, elections will be held on the basis of cumulative system of voting. Under this system if there be two seats, one reserved and the other general in a constituency every voter would be given two ballot papers and he would have the option to cast both of his votes for one candidate or distribute these among two candidates. In this case naturally a voter, to whichever community he may belong, will

¹⁶The Poona Pact of 1932 was an agreement between B.R. Ambedkar and M.K. Gandhi on the political representation of the Depressed Classes (a loose term that referred to Dalits/Untouchables/Scheduled Castes). Then British Prime Minister, Mr. Ramsay Macdonald, announced the 'Communal Award' that gave Depressed Classes separate electorates for central and provincial legislatures. Mr. Gandhi viewed this as a danger to the Hindu community that would de-link these classes from the Hindu religious fold. On the other hand, Mr. Ambedkar and other leaders of the Depressed Classes welcomed the award. However, Macdonald's Communal Award only provided for 70 reserved seats for the Depressed classes out of the approximately 1580 seats to which elections would be held under the reforms introduced by the Government of India Act, 1919. This was utterly disproportionate to the demographic size of the Depressed Classes at the time, which constituted approximately half the total population. In protest against both 'separate electorates' and the disproportionality of the Communal Award, Mr. Gandhi commenced a fast unto death at the city of Poona (now Pune, Maharashtra). Eventually, a pact was arrived at which addressed some of Mr. Gandhi's concerns while still providing for reservations. The Pact contained nine points, seven of which laid out the manner and quantum of representation of the Depressed Classes at the central and provincial legislatures. Separate electorates for Depressed Classes *did not* feature in the document. Instead, the Pact proposed a system of 'joint electorates' with reserved seats. It reserved 148 seats from the general electorate for Depressed Classes, 78 more than in the Communal Award.

Source: <https://www.constitutionofindia.net/historical-constitutions/poona-pact-1932-b-r-ambedkar-and-m-k-gandhi-24th-september-201932>, last visited on April 25, 2022.

cast both of his votes for the candidate belonging to his community and not to person of other communities. Communal rivalry therefore will continue. We have to do away with communalism as early as possible and therefore I oppose that amendment. As I belong to Harijan community whose elections were so far held on the basis of the cumulative system of voting, I have more experience of it than others. I have still in my mind the disastrous results of the cumulative system.”

Thus, Mr. Khandekar, though opposed to the ”cumulative system” of voting from bitter experience, was not fundamentally opposed to the concept of PR per se. More particularly, he was not opposed to the PR-STV method proposed by Prof. K. T. Shah vide proposed Amendment No.1416.

On the other hand, **Mr. M. Ananthasayanam Ayyangar**, a former Mathematics teacher turned lawyer from Madras Law College, objected to the PR-STV method on the grounds of impracticality, when he argued -

”Two methods of election have been suggested. With all respect to the mover, I would suggest that proportional Representation by means of the single transferable votes is not practicable at all. These are large constituencies and each constituency will consist of population ranging between five lakhs and seven and a half lakhs. Further we are not an advanced country; many of the people are not literate. The literate population of our country is no more than fourteen per cent. Exercising preference by means of the single transferable vote is impossible. We commit mistakes even on the floor of the House in the Legislative side when we elect members of the Standing Committees in Legislature for the various Departments. We do not exercise our votes properly. Therefore it is impossible to expect the illiterate voters to be able to exercise their votes properly. For a long time to come it is unthinkable having regard to the low progress of literacy in our country.”

He also objected to the ’cumulative method’ reasoning that -

”Then as regards proportional representation by means of cumulative votes, my suggestion is that that has been tried regarding the scheduled caste primary election. I would refer to Volume III of the Constitutional Precedents published by Sir B. N. Rau; at page 161 he has appended an Appendix to the Chapter on the system of representation. Therein he says—

”The number of seats a party captures in an election depends on the correctness with which it has gauged the support it commands in each of the constituencies, and set up the right number of candidates on its behalf.”

As an illustration he says in the Appendix how the Congress lost both seats

by miscalculation when it was possible for the Congress to have captured at least one seat. That is what happened in 1937 in the C. P. Legislative Assembly elections— Bhandars Sakoli (General Rural). Both seats were lost to the Congress. Then the Congress party contested in the Bombay Legislative Council, Bombay city and Suburban Districts, two out of four seats. If it had under-estimated or over-estimated its electoral strength and nominated less or more candidates, it would have lost a seat. Now therefore this cumulative election would not absolutely be appropriate.”

Thus, he concluded that -

”The one is impossible (PR-STV) and the other would not meet the purpose (Cumulative Voting). In that way social justice would not be rendered.”

However, it would be trite to say that it was the opinion of **Dr. Bhimrao Ramji Ambedkar** that carried the greatest weight. And he did not favour PR. Indeed, he agreed with Mr. Ayyangar that illiteracy was an insurmountable obstacle in the way of PR when he argued -

”Now, I do not think it is possible to accept this amendment, because, so far as I am able to judge the merits of the system of proportional representation, in the light of the circumstances as they exist in this country, I think, that amendment cannot be accepted. My Friend Mr. Karimuddin will, I think, accept the proposition that proportional representation presupposes literacy on a large scale. In fact, it presupposes that every voter shall be literate, at least to the extent of being in a position to know the numerals, and to be in a position to mark them on a ballot paper. I think, having regard to the extent of literacy in this country, such a presupposition would be utterly extravagant. I have not the least doubt on that point. Our literacy is the smallest, I believe, in the world, and it would be quite impossible to impose upon an illiterate mass of voters a system of election which involves marking of ballot papers. That in itself, would, I think, exclude the system of proportional representation.”

Thus, illiteracy, lack of numeracy and the sheer logistical complexity of undertaking an electoral exercise in a new nation that had never been exposed to Western style democracy with universal adult franchise were key factors in his opposition to the proposed amendments advocating for the adoption of the PR system.

Dr. Ambedkar also believed that since Art.292 & 293 of the Draft Constitution provided for reservation for minorities anyway, the adoption of the PR system would dilute this provision at least insofar as the proposers of these amendments volunteered to forgo these reservations in exchange for PR. He believed that the minorities, which had hitherto

demanded regressive 'separate electorates', had only agreed to progressive 'joint electorates' in exchange for minority reservations, a concession he thought was hard won. He argued -

"Now, my submission is this, that while it is still open to this House to revise any part of the clauses contained in this Draft Constitution and while it is open to this House to revise any agreement that has been arrived at between the majority and the minority, this result ought not to be brought about either by surprise or by what I may call, a side-wind. It had better be done directly and it seems to me that the proper procedure for effecting a change in articles 292 and 293 would be to leave the matter to the wishes of the different minorities themselves. If any particular minority represented in this House said that it did not want any reservation, then it would be open to the House to remove the name of that particular minority from the provisions of article 292. If any particular minority preferred that although it did not get a cent per cent deal, namely, did not get a separate electorate, but that what it has got in the form of reservation of seats is better than having nothing, then I think it would be just and proper that the minority should be permitted to retain what the Constituent Assembly has already given to it."

But another apprehension Dr. Ambedkar voiced was more foundational than what other speakers had thus far stated. He believed that "proportional representation is not suited to the form of government which this Constitution lays down" i.e. the Parliamentary system. His rationale for this was that one of the unavoidable features of the PR system was "the fragmentation of the legislature into a number of small groups". This, he believed was contrary to the Parliamentary system wherein "a government shall continue to be in office not necessarily for the full term prescribed by law, namely, five years, but so long as the Government continues to have the confidence of the majority of the House. Obviously it means that in the House where there is the Parliamentary system of Government, you must necessarily have a party which is in majority and which is prepared to support the Government."

To supplement his 'PR-induced-instability' hypothesis, Dr. Ambedkar reasoned -

"I think the House will know that although the British Parliament appointed a Royal Commission in the year 1910, for the purpose of considering whether their system of single-member constituency, with one man one vote, was better or whether the proportional representation system was better, it is, I think, a matter to be particularly noted that Parliament was not prepared to accept the recommendations of that Royal Commission. The reason which was given for not accepting it was, in my judgment, a very sound reason, that proportional

representation would not permit a stable government to remain in office, because Parliament would be so divided into so many small groups that every time anything happened which displeased certain groups in Parliament, they would, on that occasion, withdraw their support from the Government, with the result that the Government losing the support of certain groups and units, would fall to pieces. Now, I have not the least doubt in my mind that whatever else the future government provides for, whether it relieves the people from the wants from which they are suffering now or not, our future government must do one thing, namely, it must maintain a stable government and maintain law and order. (Hear, hear). I am therefore, very hesitant in accepting any system of election which would damage the stability of government. I am therefore, on that account, not prepared to accept this arrangement.”

However, this argument reflects an inaccurate assessment of British political history, more so the realpolitik that was behind the adoption and perpetuation of the FPP-system and the numerous abortive or failed attempts at change in the UK itself. This is explored in the next section.

2. Origin of the FPP system in the UK

It is a commonly held perception that the FPP system is, and always has been, the bulwark of British democracy. Indeed, from Dr. Ambedkar’s arguments during the Constituent Assembly debates, one might be forgiven for inferring that he too held the same notion. Even British politicians have espoused the same views. In April 2011, in the run-up to the Alternative Vote Referendum, then-Prime Minister David Cameron appealed to tradition in his defence of the existing First-Past-the-Post (FPTP) electoral system¹⁷. Arguing that it was ‘enshrined in our constitution and integral to our history’, he contended that ‘First-Past-the-Post isn’t just one way of counting votes; it is an expression of our fairness as a country.’ His comments were echoed by the Labour peer Lord Reid, at a time a fellow campaigner against electoral reform, who called FPTP ‘the British way’, and ‘the foundation of our democracy for generations’. But this notion has no foundation in fact.

In 1264 AD, Simon de Montfort, the rebellious 6th Earl of Leicester who had seized power in England following his victory over King Henry-III at the Battle of Lewes during the ‘Second Barons’ War’, summoned the first ‘Parliament’ as a means to create popular support and cement his newly acquired status. The term ‘Parliament’ had first appeared in the 1230s and 1240s to describe large gatherings of the royal court, and parliamentary gatherings were held periodically throughout Henry’s reign¹⁸. However, unlike the

¹⁷David Klemperer, Report on *Electoral Systems and Electoral Reform in the UK in Historical Perspective*, The Constitution Society, 2019

¹⁸David Carpenter, *The Reign of Henry III*, Hambledon Press, London, UK, 1996.

'King's Parliament' which was composed almost exclusively of 'Knights of the Shire'¹⁹ viz. nobility and aristocracy, the rebellious Earl summoned not only two Knights from each county but also two Burgesses²⁰ from each borough to join his new Parliament, the first time this had ever been done. By the 14th century, it had become the norm, with the gathering becoming known as the 'House of Commons'.

Thus, for over six centuries from 1264 AD until the passage of the Redistribution of Seats Act 1885 by Westminster, every English county and borough was a multi-member constituency. In fact, it was only the realpolitik behind the conception of the this Act and in the run up to its passage in 1885 that resulted in the accident of history that is the FPP system.

Between 1832 - 1884, Britain had greatly expanded the franchise. The Great Reform Act of 1832 increased the number of voters by 300,000 making one-in-five male householders eligible to cast the ballot. The Second Reform Act of 1867 further extended this franchise to one-in-three male householders thereby nearly doubling the size of the electorate. Even at this time, the two-member constituencies were largely retained with the significant exception being the creation of thirteen three-member constituencies in Britain's largest cities. In these constituencies, the Act instituted the **Limited Vote**, by allowing each elector to select only two candidates. The idea was to prevent single-party dominance of the cities, and to instead ensure that their representation more accurately reflected the partisan balance of their electorates. The motivation for this significant change was, in fact, nakedly partisan. Then Prime Minister, Mr. Benjamin Disraeli, a Conservative, wished to weaken the stranglehold of the Liberal Party on Britain's urban centres. This was arguably Britain's first experiment with a form of Proportional Representation (PR)²¹.

In practice, however, the Limited Vote served to promote neither proportionality, nor the interests of the Conservative Party. In many cities, including, most famously, Birmingham, the strength of the Liberal Party's organization was such that it was able to coordinate the vote of Liberal electors to be spread evenly across all three of their candidates. This meant the party was able to win all three seats while receiving little more than 60% of the vote²². By 1884, with the ever increasing clamour for further expansion of the franchise, Prime Minister William Ewart Gladstone's Liberal government was under pressure from

¹⁹'Knight of the shire' was the formal title for a member of parliament (MP) representing a county constituency in the British House of Commons. Tomlins, Thomas Edlyne; Granger, Thomas Colpitts (1835). "Knights of the Shire". *The Law-dictionary, Explaining the Rise Progress and Present State of the British Law*. Vol. II (4th ed.). London: Clarke. p. 10. Retrieved 7 April 2017

²⁰'Burgesses' were originally freeman inhabitants of a city where they owned land and who contributed to the running of the town and its taxation. Chisholm, Hugh, ed. (1911). "Burgess". *Encyclopædia Britannica*. Vol. 4 (11th ed.). Cambridge University Press. p. 814.

²¹*Supra*; note 17

²²*Ibid.*

the radical wing of the party to extend the vote to all male householders paying rent of at least £10, and so expand the electorate to over five million. With the Conservatives opposed to any such expansion, PM Gladstone was compelled to cut a deal.

Thus, the Third Reform Act of 1884 came to be passed, which further expanded the franchise as the radical liberals had demanded. In exchange for this expansion, however, Gladstone had to concede to the Conservatives' demand for the Redistribution of Seats Act 1885 the following year. To decide how these seats would be apportioned, and thus also what electoral system would be used, a cabinet committee was established under the chairmanship of the radical Liberal politician Sir Charles Dilke. Although the commission considered both the 'Limited Vote' and the 'Cumulative Vote', in the end Dilke cut a deal with the Conservative leader, Viscount Cranbourne (the future Lord Salisbury), that became known as the 'Arlington Street Compact'. Under this deal, all of the three-member seats, and most of the two-member seats, were abolished: for the first time, FPP in single-member districts would become the norm across most of the UK, bringing the electoral system for the House of Commons far closer to what exists today²³.

Modern FPP, then, was to a certain extent the product of a cynical factional deal: Cranbourne believed that splitting many of the Liberal-held two-member seats would create new single-member seats potentially winnable by the Conservatives; Dilke, meanwhile, saw single-member districts as a way to reduce the influence of the rival Whig faction within the Liberal Party, since in two-member Liberal seats the party had generally been standing one Whig and one radical²⁴.

Moreover, the British Parliament itself did not engage in any scientific analysis of the advantages or disadvantages of the various competing voting methods available at the time. In 1853, a Liberal MP, James Garth Marshall, devised his own scheme he called the 'Cumulative Vote'²⁵. His attempt was to ensure minority representation. This system gave each elector in a multi-member district as many votes as there were seats. However, it allowed voters to distribute their votes as they wished, including to 'cumulate' multiple of their votes onto a single candidate. The idea was that any significant minority group would be able to secure at least some representation if they can accumulate all their votes onto a single candidate. It was this system that was eventually adopted for representation of the 'Depressed Classes' in India pursuant to the 'Poona Pact of 1932'.

In the late 1850's, an intellectual named Thomas Hare devised the precursor to the modern-day 'Single Transferable Vote' (PR-STV) system²⁶. This method involved voters ranking the candidates by order of preference. In each multi-member constituency, a quota for election would be determined by dividing the total number of votes cast by the number

²³*Supra*; note 17

²⁴*Ibid.*

²⁵*Ibid.*

²⁶*Ibid.*

of seats available. Any candidate receiving more votes than the quota would be elected, and any surplus votes they received above the quota would be redistributed in proportion to their voters' next preferences. Should more seats remain to be filled after this, the candidates with fewest votes would be eliminated, and their votes redistributed to their voters next preferences. These eliminations would continue, pushing more candidates over the quota, until all the seats in the constituency had been filled. Indeed, this method was favoured by then Liberal MP, John Stuart Mill, who's 1859 treatise 'On Liberty', was no doubt on the mind of Mr. Karimuddin nearly a century later when he borrowed the phrase 'tyranny of the majority' in his address to the Constituent Assembly on 4th January, 1949. Ironically, this method (PR-STV) was chosen by India's Constituent Assembly as the system of election of representatives to India's Council of States (Rajya Sabha).

Despite various methods of voting vying for public approval, Westminster succumbed to realpolitik and instead opted for the FPP system pursuant to the Arlington Street Compact in 1885. But, as constitutional scholar David Klemperer notes-

"Although many Liberals remained happy with the FPTP system, others, who worried about the potential for the Conservative Party to win seats due to a progressive vote split between Liberals and Labour, began to favour reform. Some were won over to PR, and specifically to STV, which was now by far the most commonly advocated PR system. More were attracted by a new system, the Alternative Vote (AV)²⁷. [...] For Liberal MPs, this system had the advantage of maintaining, for the most part, the existing constituency structure with which they were familiar, while also avoiding the dangers of a split progressive vote. In seats with a progressive majority, Conservative candidates would be kept out by the re-allocation of votes between the progressive parties, each of whose voters would no doubt mark the other as their second preference. [...] The Labour Party was similarly divided on the issue of electoral systems, with neither the supporters of PR, nor the supporters of AV, managing to win a majority at party conference. While some sought reform as a means to allow Labour to break free from its alliance with the Liberals, others had no wish to polarize supporters of the two parties. Even the Conservative party was far from united on the issue: although most Tories continued to support FPTP, often relishing the prospect of a divided progressive vote, others, faced with the

²⁷ 'Alternative Vote' results when the STV voting method is applied to Single Member Constituencies. AV was originally proposed in 1888 by Sir John Lubbock, the founder of the Proportional Representation Society, as a supposed improvement on the two-round electoral system then used in much of continental Europe. Under this system, elections would be held in single-member constituencies, and voters would rank candidates in preference order. If no candidate received a majority of first preferences, the candidate with fewest would be eliminated, and their votes re-allocated to their voters' second preferences. The eliminations would continue until one candidate received a majority.

future spectre of a fully-enfranchised working class, were increasingly wary of majoritarianism, since feared it could eventually lead to unchecked social-ist rule. Moreover, in the context of a party bitterly divided over the issue of Tariffs, the increasingly beleaguered free trader faction found themselves tempted by PR's promise of representative for minorities."

Then, in 1908, the Liberal government established a Royal Commission on Electoral Reform. This commission tendered its report in 1910 and, inter alia, recommended the adoption of the 'Alternative Vote' method for elections to the House of Commons. It was this report to which Dr. Ambedkar alluded in his address to the Constituent Assembly on 4th January, 1949. However, in so doing, Dr. Ambedkar omitted to mention the reasons as to why "Parliament was not prepared to accept the recommendations of that Royal Commission". Indeed, Dr. Ambedkar appears to have casually dismissed the turbulent British politics of the era in over-simplifying the primary reason for this 'rejection' as being attributable to the notion that "proportional representation would not permit a stable government to remain in office".

The years between 1908 - 1914 have been referred to by the American historian George Dangerfield as the years of "the strange death of Liberal England"²⁸. These years were marked by the near cataclysmic tumult unleashed by the Budget of 1909 tabled by Liberal MP David Lloyd George, as chancellor of the Exchequer. Through his budget, Mr George was responding to the public demand for poverty alleviation when he set out deliberately to raise money to "wage implacable warfare against poverty and squalidness". As noted in the Encyclopedia Britannica²⁹ -

"The money was to come in part from a supertax on high incomes and from capital gains on land sales. The budget so enraged Conservative opinion, inside and outside Parliament, that the Lords, already hostile to the trend of Liberal legislation, rejected it, thereby turning a political debate into a constitutional one concerning the powers of the House of Lords. Passions were as strong as they had been in 1831 [i.e. prior to the passing of the Great Reform Act of 1832]. Yet, in the ensuing general election of January 1910, the Liberal majority was greatly reduced, and the balance of power in Parliament was now held by Labour and Irish nationalist members. The death of King Edward VII in May 1910 and the succession of the politically inexperienced George V added to the confusion, and it proved impossible to reach an agreement between the parties on the outlines of a Parliament bill to define or curb

²⁸George Dangerfield, *The Strange Death of Liberal England*, Stanford University Press, 1977; original 1935.

²⁹Asa Briggs, Patrick Joyce, *The Return of the Liberals*, Encyclopedia Britannica available at: <https://www.britannica.com/place/United-Kingdom/The-return-of-the-Liberals>, last visited: 03.05.2022

the powers of the House of Lords. After a Liberal Parliament bill had been defeated, a second general election in December 1910 produced political results similar to those earlier in the year, and it was not until August 1911 that the peers eventually passed the Parliament Act of 1911 by 131 votes to 114. The act provided that finance-related bills could become law without the assent of the Lords and that other bills would also become law if they passed in the Commons but failed in the Lords three times within two years. The act was finally passed only after the Conservative leadership had repudiated the “diehard peers” who refused to be intimidated by a threat to create more peers.”

While Britain was consumed with the Commons v. Lords debate, the Royal Commission’s report of 1910 gathered dust. Shortly thereafter, World War I had broken out in 1914. In fact, Parliament had barely had any time to formally consider the merits of the Commission’s recommendation for the adoption of the AV system prior to the outbreak of the war.

But Dr. Amedkar missed another key event in his analysis, besides the realpolitik of Britain. By 1916, after the advent of World War I, all three political parties (Labour, Liberals & Conservatives) temporarily all united in a coalition. This coalition government agreed that the next election would have to take place on a much wider franchise, not least to include many of the as yet un-enfranchised soldiers. To resolve the specifics of this, a ‘Speakers Conference’ was called in 1916, bringing together 32 MPs and Lords from all parties³⁰. The proposals this Speakers Conference presented in 1917 were radical. They proposed, inter alia, -

- the enfranchisement of all men over 21;
- the enfranchisement of all women over the age of either 30 or 35;
- the abolition of FPP;
- the use of STV for election of MPs in borough constituencies (approximately one third of the total); and
- the use of AV in all the rest

Although the government agreed to support most of the Conference’s proposals, they rejected those relating to the electoral system, in part due to the hostility of Liberal Prime

³⁰*Supra*; note 17

Minister David Lloyd George, the dramatis persona of the Budget of 1909 and the subsequent Commons v. Lords debate. Instead, the government gave the House of Commons a 'free vote' on the issue. Klemperer³¹ notes that -

"At this point, although the Liberal and Labour parties were largely united in support of AV, they were divided on STV. Crucially, many Liberal MPs, although supportive of electoral reform, had no wish to see their own single-member constituency, with which they were familiar, and in which they were personally entrenched, merged into a new multi-member seat. Conservative MPs meanwhile were also attached to their own single-member constituencies, but mostly feared that AV would work to their disadvantage, and so defended FPTP. In a series of votes therefore, the House of Commons supported the adoption of AV, but consistently rejected any use of STV. STV was rejected 169 – 201 in the free vote, and an attempt to re-introduce it at the Report stage was defeated 126 – 202. AV was accepted in the free vote 125 – 124, and an attempt to strike it out at the Report stage was defeated 150 – 121."

Despite the narrow victory in the House of Commons, however, the Bill to expand the franchise and amend the method of voting did not pass the House of Lords. Klemperer further notes that -

"The Lords had a Conservative majority, and like their party colleagues in the Commons, they were hostile to AV for reasons of party interest. Interestingly though, and unlike their counterparts in the Commons, the Conservative peers had been won over to PR. Many of them were free traders, but more importantly, most of them feared that without PR, the enfranchisement of the working classes would lead to socialist government. The Lords therefore amended the bill to re-include the use of STV for the borough constituencies, but also to maintain FPTP in the counties. The result was a game of legislative ping-pong, in which the House of Commons repeatedly voted to refuse to accept the amendment from the Lords, who for their own part refused to back down. In the end, MPs, fearing that the Bill risked failing altogether, compromised. Although they refused to accept the introduction of STV, they dropped the measure to introduce AV, and so granted a reprieve to FPTP. This was enough to allow the bill to finally pass the Lords, and so to become the Representation of the People Act 1918."

Thus, while there was disagreement between the House of Commons and Lords as regards the precise method, both Houses generally concurred that some form of PR was

³¹*Supra*; note 17

necessary. This contradicts Dr. Ambedkar's assertion of 4th January 1949 that Westminster had rejected PR on the grounds of potential instability arising therefrom. Indeed, he made no mention at all of the fact that the All Party Speakers conference of 1917 had proposed to abolish FPP altogether and that both the Commons & the Lords were in agreement that PR was necessary. In fact, the narrow disagreement on the precise method of voting was even greater cause for debate at the time of framing the Indian Constitution in 1949. In the end, however, while the expanded franchise incorporated in the British Representation of the People Act 1918 formed the basis of the Indian Representation of the People Acts of 1950 and 1951, which expanded it even further to introduce 'universal adult suffrage', these enactments also carried over as a vestige of history the FPP method from Britain into India.

Thus, Dr. Ambedkar did not consider the political history of the FPP method in the UK. Further, he omitted to mention that the Royal Commission's Report on Electoral Reforms of 1910 was superceded in both political significance and administrative importance by another seminal document, the report of the 'All Parties Speakers Conference' proposals of 1917. He mischaracterised the failure of voting method reform in the British Parliament as a "rejection" of PR and misattributed its cause to perceived instability.

C. *Method of election to the Rajya Sabha*

On 3rd January 1949, one day prior to the formal adoption of the FPP system of voting for the Lok Sabha, the Constituent Assembly had debated the method of voting for election of representatives to the Rajya Sabha or the 'Council of States'. With regard to this representation of the States in Parliament, however, it appears the framers were deeply concerned about securing adequate representation for all communities from each State to this Upper House of Parliament. The question before the Constituent Assembly was how best to ensure the representation of the widest possible cross-section from every State and not merely that of only the majority party in each State. There was genuine apprehension that the Upper House would be rendered redundant if it came to pass that only the majority party from each State were to elect its members. In such a scenario, the Upper House would merely be a poor reflection of the Lower House and, thus, become wholly superfluous.

Article 67(3) of the Draft Constitution³², as it stood then, provided for the election of representatives to the Rajya Sabha thus -

"(3) The representatives of each State for the time being specified in Part I or Part III of the First Schedule in the Council of States shall-

³²Draft Constitution of India, presented to the Constituent Assembly on 21st February 1948, Art.67(3)

- (a) Where the Legislature of the State has two Houses, be elected by the elected members of the Lower House;
- (b) Where the Legislature of the State has only one House, be elected by the elected members of that House; and
- (c) Where there is no House of the Legislature for the State, be chosen in such manner as Parliament may by law prescribe.”

Voicing these apprehensions, **Mr. Mahboob Ali Beg Bahadur** moved Amendment No.1407³³ whereby he proposed -

”That in clause (3) of article 67, the following new sub-clause (d) be added:-
'(d) The election under sub-clause (a) and (b) shall be in accordance with the system of *proportional representation by means of the single transferable vote.*” [*Emphasis Supplied*]

In support of his proposal Mr. Beg contended that the Assembly had already accepted this system of election under article 55, that is, in regard to the election of the President (Art.44 of the Draft Constitution) and Vice President (Art.55 of the Draft Constitution). He therefore submitted that there was ”nothing new or extraordinary” in his proposal. Citing numerous British and foreign sources in support he argued that -

”[...] this method of election represents the expression of the people’s will and it will be more stable as well as responsible. My submission is that all the fears that some people might entertain that this method of election would involve the country in sections and it will go against the solidarity of the country are false. Some people who are really communally minded smell a rat in anything in regard to this kind of representation; that is unjustifiable. This is the most scientific and most democratic method of representing the people of a country in a democratic system of Government.”

He found support in Mr. Mahavir Tyagi who had moved Amendment No.1403 seeking to include the very same words but at the end of clause 67(3)(a) & (b), only in order to avoid any potential inconvenience insofar as rewording of the language was concerned. Further supplementing his argument in support of the PR-STV method for elections to the Rajya Sabha, he warned that -

”[...] the Council of States will be represented by those members who are sent into the Council by the respective States, by general election, by majority

³³Vol.VII, Constituent Assembly Debates, 1195—1231

voting, which means that the representatives of the States will not have any member belonging to the minority party of the respective States. It means that, if in the States the election is not by means of the single transferable vote, the minorities will have no representation at all in the Council of States. Sir, I do not agree with the type of democracy in vogue in Europe. This is the biggest fraud which the politicians of the world are unconsciously practising on the masses. Under the existing system of elections the masses do not get any real representation at all. All democracies based on party basis are the monopoly of the chosen few, the literates and the intelligentsia. They form parties and the elections are run on party lines.”

As a solution to the problem of providing representation in the Rajya Sabha to even the opposition parties in the States, he argued -

”We have, however, adopted the western model of democracy which I cannot help. There must therefore be parties in our body politics. Let us therefore give seats in the Council of States to some Members holding the views of the opposition also. Such members can get elected only if my amendments are accepted. Only then Members who are opposed to the party in power in the States can come in. Whenever high State policy is under discussion we can have the advantage of the views of the other side only if they are allowed to come in by this method. The Democracy of the western type is based on free play of the opposition. Without good opposition the democracy will become one legged, it would limp and tumbledown.”

Another supporter of this proposed PR-STV method for the Rajya Sabha elections was **Mr. Mohammad Ismail Khan**. In his opinion, he stated that -

”It is said that this system of election will lead to fissures and divisions amongst the People. But, in reality, it would not be leading to that result or effect at all, because people know that under this system of election every group of people has got an effective say in the election. Therefore every group will be drawn towards the other group. When it is a question of election they will be made to work with each other. They will be compelled to seek the franchise of every group. Therefore it will really bring the people together instead of disintegrating them. It will make each group seek the franchise of other people.”

In relation to the composition of the Constituent Assembly itself, another member, **Mr. Hriday Nath Kunzru** aptly pointed out that -

”Unless the system of proportional representation is introduced, the views that are unpopular would never be represented. Take, Sir, the election of members to the Constituent Assembly. There are some members of this House who do not belong to the Congress and have yet been able to get elected. They have been able to secure their election because of the existence of the method of proportional representation with the single transferable vote for the election of the members of the Constituent Assembly. But for this system no one who was not a Congressman could have been here.”

In regard to the widely held perception that PR system engendered communalism and divisive politics, he submitted -

”There need be no reasonable fear therefore that the election of members of the Council of States by means of proportional representation would mean the reintroduction of communal electorates with all the evils that they involve. On the contrary, I think that in the changed circumstances [i.e. joint electorates] this method would enable a fair representation of the views of sections that would otherwise be overwhelmed and would not be able to make their voice heard, to be secured.”

Responding to these arguments in support of PR-STV for Rajya Sabha, **Dr. Ambedkar** stated that -

”Mr. Vice-President, I am agreeable to amendments Nos. 1369, 1375, 1378, 1380, 1400 and 1403. With regard to the last two amendments (Nos. 1400 and 1403) those are also covered by an amendment moved by Mr. Mahboob Ali Baig. It is amendment No. 1407. I would have been glad to accept that amendment but unfortunately, now examining the text of that amendment, I find that it does not fit in with the generality of the language used in clause (3) of article 67. That is the only reason why I prefer to accept amendment No. 1403, because the language fits in properly with the language of the article.”

Thus, Dr. Ambedkar and almost all other members adopted the PR-STV method for elections to the Rajya Sabha without any significant objections. Indeed, the pursuit of providing representation to all communities, not merely the majority, weighed heavily on their minds.

It bears repetition that the principle objections to PR in the Lok Sabha during the Constituent Assembly debates of 4th January, the very next day, were based on India's then poor literacy rate, logistical difficulties and perceived government instability. No such objections were raised with regard to elections to the Rajya Sabha. Obviously, the size of

the electorate for elections to the Rajya Sabha and Lok Sabha differed vastly as indeed did the logistical complexity of conducting elections themselves. But the framers were not as concerned with the perceived instability induced by PR in the Rajya Sabha as they were in the Lok Sabha. Indeed, it is fair to surmise that the Assembly believed that the electors comprising the electorates of the Rajya Sabha stood on a higher pedestal than the common-man electors of the Lok Sabha, who were illiterate, innumerate and nonsecular. It is further evident that the Assembly believed that even a majoritarian Lok Sabha constituted by plurality and an epistocratic Rajya Sabha constituted by proportionality would provide an adequate system of democracy for India with sufficient checks and balances.

However, this rationale is no longer sustainable. The literacy rate as per the latest 2011 Census is 74% as opposed to 18% in 1951. Thus, India had the largest literate electorate since independence. Furthermore, FPP in the Lok Sabha has not always ensured stable majority governments. In fact, for decades, the formation of coalition governments at the Centre has been the norm rather than the exception. Additionally, the Election Commission has large financial and human resources at its disposal, with general elections conducted by way of electronic voting. The Commission had a budget of around Rs 50,000 crore for the 2019 elections; it has the capability to administer elections based on proportional representation via completely electronic means. Lastly, while the constitution has made room for reservations in the legislature for members of the Schedule Castes and Schedule Tribes, other marginalised communities find no safeguard.

Some of the above discussed anomalies and issues were noticed by the Election Commission of India as well, as we shall see in the next section.

D. Election Commission Report, 1972

The 1972 Report of the Election Commission also considered the merits of the proportional representation system, particularly by taking a look at how it operates in other countries. It took note of the fact that few populous countries have adopted a pure version of the proportional representation system – at best, a hybrid version of FPP and proportional representation was followed, such as in Germany. It listed the many disadvantages of the proportional representation system – that it led to a multiplicity of political parties, increase in the power of the bureaucracy and the party leaders, and its complexity. It therefore came to be noted that a hybrid of the list system and proportional representation was suitable for India.

In 1977, a proposal to introduce the proportional representation system to Lok Sabha elections in some form was considered³⁴ by then Chief Election Commissioner SL Shukla who suggested that a hybrid system be adopted, whereby half the seats in the Lok

³⁴V.S. Rama Devi and S.K. Mendiratta, *How India Votes: Election Laws and Procedures*, (3rd edn., 2014), note 161, at 1187

Sabha would be filled by direct elections under the FPP system, while the other half be filled by political parties in proportion to their vote share. This proposal did not outline the method of determination of seats which would not be represented through direct elections, and how the disparity between the two types of seats would be addressed.

Decades later, even the Law Commission of India took note of the rising inconsistencies resulting from the FPP system, as discussed in the next section.

E. 170th Law Commission Report, 1999

The Law Commission of India, in its 170th Report relating to Reform of the Electoral Laws recognised the unsustainability of the rationale of the present FPP method and highlighted the arbitrary and indefensible distortion in representation that it manifests. The Law Commission further recommended that the present FPP system be altered suitably in order to secure maximum effectiveness of every individual vote, which were regrettably never adopted.

The Commission recognised that there are certain States in India where there are three or four recognised political parties, more or less evenly balanced. In such a situation what is happening is that the winning candidate is receiving, in many cases, 30% or less of the valid votes cast. The remaining 70% or more votes polled (cast in favour of the defeated candidates including independents) are practically going waste, without representation, and without a voice in the representative bodies, namely, Parliament and the State Legislatures.

“It was thought advisable to provide a voice and a representation to the wasted

votes which indeed very often constituted a majority of the total votes cast.”
(para 1.3.2)

The Law Commission observed that-

”The fact of ‘wasting’ away of the votes cast in the FPP system has also been recognised in other parts of the world. Thus, in the response of the Electoral Reform Society to the Commission on Local Government and the Scottish Parliament, (July, 1998), it has been mentioned inter alia, that the FPP system distorted the expressed wishes of those who actually voted by observing thus: ”Local Democracy” Question 2 One of the reasons for poor turnouts at local government election is that the votes of large numbers of electors will not count, either within their local constituency or in the overall composition of the Council. Until this has been corrected, changing administrative arrangements will only have a limited effect. The magnitude of this problem is not often appreciated. For example, in the local authority elections in April, 1995 in Edinburgh, 49% of those who actually voted cast a vote that had no effect in

securing the election of any representative as they were for losing candidates. It is common in all first-past-the-post (FPTP) elections for between 30% and 60% of the votes cast to be ‘wasted’ in this way. In circumstances where they know that one party holds a seat with a large majority, many electors are discouraged from turning out to vote.” (para 3.2.6.1)

The Law Commission further “set out the desirability of adopting the rule requiring that only a candidate obtaining 50%+1 votes will be declared elected and the holding of a “run-off” election wherever necessary. The concept of negative vote also has been discussed and recommended for consideration.”

Notably, the concept of negative vote, as discussed by the Law Commission, was relied upon by the Supreme Court in the *PUCL* judgment³⁵ by a 4 judge bench wherein it directed the Election Commission to, inter alia, implement the negative vote [“None Of The Above” or NOTA] and maintain its secrecy. However, the Supreme Court has not had occasion to test the constitutionality of the aforesaid Rule 64 and the recommendations of the Law Commission in this regard. Should this question of law ever arise for consideration, there are sound logical-mathematical and legal arguments against the FPP system, as we shall see in further sections.

II. LOGICAL-MATHEMATICAL ARGUMENT AGAINST FPP

Any election based on a single-vote seat allocation rule can be logically evaluated for its ‘fairness’. Further, ‘fairness’ of an electoral system can itself be axiomatically defined as a set of rules that satisfy the axioms of ‘neutrality’, ‘anonymity’ and ‘non-negative responsiveness’ in the results that an election produces. When viewed both axiomatically and empirically, such an electoral system that satisfies all three of the above axioms tends to produce seat allocation that is proportional to the distribution of the vote³⁶.

Conversely, any electoral system that produces seat allocation which is incommensurate with the distribution of the vote is both axiomatically and empirically ‘unfair’ and likely biased. There exists a logical connection between ‘bias’ and ‘proportionality’ that can be proved by means of axiomatic, Cartesian logic. Indeed, many efforts in this direction have been made in the field of Social Choice Theory concerning methods of aggregating individual interests to determine net social preferences.

³⁵*PUCL & Anr Vs. Union of India & Anr*, (2013) 10 SCC 1

³⁶*Eliora van der Hout and Anthony J. McGann, Liberal political equality implies proportional represen-*

A. Evaluating the "Fairness" of an Electoral System

The three axioms or characteristics of a "fair" electoral system viz. 'neutrality', 'anonymity' and 'non-negative responsiveness' can be described as follows:-

a. Neutrality

- the condition that parties/candidates are not discriminated against on the basis of their identity. If all the voters who support party A decide instead to support party B, then party B must get all the seats that previously went to party A. Otherwise the allocation of seats would depend on a bias in the decision rule, and not on the decision of the voters, thus violating the principle of popular sovereignty. Neutrality is a minimal condition that virtually all current electoral systems respect—even single-member district plurality, a.k.a. FPP, satisfies neutrality.

b. Anonymity

- the condition that the decision rule does not discriminate between voters on the basis of their identity, i.e. the degree to which a vote counts does not depend on the individual characteristics of the voter, that is to say that every voter is equal. However, both logically and empirically, Rule 64/ FPP violates this axiom in that the degree to which an individual's vote counts does depend on the distribution of opinion in the constituency in which that voter lives. If the distribution of opinion was random and unpredictable, this might be unproblematic; but this is clearly not the case, and, over the decades, political parties have developed and perfected the art of courting just the right identities of voters in each electoral constituency in order to secure a mere plurality of votes and, thereby, clinch victory without ever actually securing anywhere near 50% of the total vote.

The axioms of 'Neutrality' and 'Anonymity' together constitute 'liberal political equality', which is fundamental to the concept of 'democracy' as part of the 'basic structure' doctrine. It is evident from the cited Constituent Assembly debates³⁷, that Dr. B. R. Ambedkar's interpretation of 'universal adult suffrage', which was eventually incorporated into Art. 326 of the Constitution, was consistent with 'liberal political equality', i.e. that he intended for each voter to be treated equally.

c. Non-negative responsiveness

- the requirement that if a candidate wins extra votes and everything else remains constant, he cannot lose seat share.

³⁷See Section I.B. at pg.11, *Supra*;

Hout & McGann³⁸ offer logical proof that any single-vote seat allocation rule that satisfies 'liberal political equality' and 'non-negative responsiveness' must produce results essentially identical to those of a List Proportionate Representation (PR) system. That is to say, there exists a provable logical connection between 'bias' and 'proportionality'. Thus, proportionality is used as an objective benchmark against which the 'fairness' of any electoral system can be tested. It has been demonstrated that 'proportionality', as distinct from a PR system, is implied by liberal political equality (the requirement that all individual voters be treated equally) and popular sovereignty (the requirement that the voters alone

decide the outcome).

McGann proposes that there do exist objective means to evaluate ‘fairness & bias’ in electoral systems³⁹. Rejecting relativism, he states that in relation to electoral systems -

“The argument commonly made is that there are multiple, competing conceptions of fairness; and that once you exclude the most egregious and obvious violations, you cannot talk about one electoral system being fairer or less biased than another, but only lay down the choice or tradeoffs between competing goals. The claim that there are many definitions of fairness then slides very easily into the conclusion that they are all equally deserving of consideration. I wish to reject this relativism. I wish to do this not because it is normatively enfeebling, but because it is logically flawed. It is, in fact, possible to evaluate fairness and bias in electoral systems objectively, at least if you define fairness in terms of liberal equality, that is, treating each voter equally. And once we do this, the existing empirical literature tells us all we need to know to draw conclusions”

As already seen, the Constituent Assembly debates reveal that⁴⁰ Dr. B. R. Ambedkar’s interpretation of universal ‘adult suffrage’, as was eventually incorporated into Art. 326 of the Constitution, was consistent with ‘liberal equality’, i.e. that he intended for each voter to be treated equally.

Globally acknowledged advances in social choice theory now permit both theoretical and empirical analysis of the ‘fairness’ and ‘bias’ in electoral systems. Relying on authoritative extant literature, basic cartesian logic and the above derived maxim of commensurateness of result with vote-distribution, McGann proves that “single member district

³⁸See Section I.B at pg.11; *Supra*

³⁹Anthony McGann, *Fairness and bias in electoral systems. Representation: Elections and Beyond*, University of Pennsylvania Press 2013 (Chapter 5), (2008) 90-113

⁴⁰*Ibid*; See note 38

systems (and low district magnitude systems in general) have a bias towards large parties, and in particular towards the largest party (provided the district magnitude is odd). However, this bias toward certain parties is only possible because these electoral systems are biased toward certain voters and against others. Some voters live in marginal districts where their votes have impact, while others are packed into safe seats where their votes are essentially irrelevant. Members of geographically concentrated groups get representation, while members of dispersed groups do not”⁴¹.

McGann relied on extant, globally accepted literature on the classification of electoral systems and evaluated them against the benchmark of proportionality/ commensurateness derived above, to measure their bias. Electoral systems were then compared on the following metrics:

- i. Deviation from proportionality/commensurateness
- ii. Bias in favour of large parties
- iii. Bias in favour of established versus new parties
- iv. Bias in favour of some voters over others
- v. Leveraging (Corrupt practices)

Relying on extensive, globally available empirical data, McGann proved that FPP (referred to as Single Member District Plurality or SMDP in his work), fails on essentially all of the above metrics when compared with every other electoral system.

B. Is First Past the Post a "fair" electoral system?

When the above criterion are applied to the publicly available empirical electoral data in India, the result is self-evident. Evaluated against each metric, the FPP system fares poorly, as follows:

1. Deviation from proportionality

Illustration - (data from Table 1)

Table 3: Vote-share Vs. Seat allocation; Congress vs. BJP; 2009-19

Period	Party	Difference in Vote Share (%)	Seats in Lok Sabha
2014 - 19	Congress	0.2 (gain)	8 (gain)
	BJP	6 (gain)	21(gain)
2009 - 14	Congress	9.3 (loss)	162 (loss)
	BJP	12.6 (gain)	166 (gain)

⁴¹*Supra*; See note 39 at pg.36

2. Bias in favour of large parties

This is evident from the cited data in above **Table 1**, that in 17 general elections held in independent India, only two large political parties have ever secured a majority of seats in Parliament. No other party has come even close to the halfway mark.

3. Bias in favour of established versus new parties

This is evident from the cited data in above **Table 1**, that it took the main opposition party 8 general election cycles and over 30 years to get past the halfway mark in Lok Sabha. Furthermore, no other political party has been able to replicate this success nationally.

It is further evidenced by the recent experience of the BJP in the West Bengal assembly elections, wherein it failed to unseat the well established TMC.

4. Bias in favour of some voters over others

An illustration of this malfunction is provided in **Table 2** where Column 4 shows that a candidate can secure a seat in Parliament without even winning a quarter of the vote in his constituency. Therefore, the value of the vote of the individuals that comprise this winning 25% is greater than the value of the remaining 75% of all voters in the same constituency. Furthermore, 75% of the overall vote is wasted, and is therefore of zero value in determining the outcome.

5. Leveraging (Corrupt practices)

The Election Commission, in its report titled “GENERAL ELECTIONS TO THE LOK SABHA, 2019 - PROGRESSIVE SEIZURE”, dated 24.05.2019, stated that a total seizure of nearly Rs 3475 crores had been made by various enforcement agencies across the country as on May 24, 2019, during the previous general election. This marks a 289% increase in seizures from the 2014 general election. Furthermore, the state-wise quantum of seizures corresponds proportionately to the number of constituencies with mere plurality candidates i.e. the higher the number of constituencies in a state that elect based on mere plurality (less than 50%+ vote share), the higher is the quantum of seizures from such a state. The aforesaid is true for every election for which there exists publicly available data. Such seizures include vast quantities of liquor, cash, precious metals and other valuables which are used by contesting candidates to bribe voters. This Supreme Court, and nearly every High Court has made observations with regard to the rising menace of electoral bribery. This increase can be attributed to the flaw in the present FPP/Rule 64 based system that discriminates between the value of different voters in a constituency thereby placing a premium on the more valuable voters and their votes.

Mathematical test of the "fairness" of FPP

The Constituent Assembly completed its deliberations culminating in the adoption of the Constitution in 1950. Shortly thereafter, future nobel laureate Mr. Kenneth Arrow propounded the ‘Impossibility Theorem’, which he first introduced in his seminal 1951 book ‘Social Choice and Individual Values’ (John Wiley and Sons, Inc., 1951). Arrow’s theorem essentially states that no social choice system can determine net social preferences without violating at least one condition in a specific set of “reasonable” criteria.

These criteria have their roots in the democratic basis of social choice theory, the belief that social decisions should, in some “reasonable”⁴² way, depend on the preferences of individuals in the society and on nothing else.

There are four main criteria through which one can measure whether a voting method

is mathematically fair, or reasonable:

1. **Majority / Transitivity:** getting a majority (50+%) of the votes should guarantee a win.
2. **Monotonicity / Non-dictatorship:** if one wins, and then if there is a re-election, if all changes favor that one, then that one should still win. That is, the voting system should not satisfy the wishes of a single voter by overriding the wishes of all the other voters.
3. **Condorcet/Unanimity:** if one wins over each of the others when paired up, then one should win overall. Thus, when applied to a society that unanimously prefers a to b, the voting system must rank a above b. So, if a society is in consensus about the ranking of a pair of candidates, then the society must choose to rank those two candidates in accordance with their common preference.
4. **Independence of irrelevant alternatives (IIA):** if one wins, and then non-winners are removed from the election, then that one should still win.

Illustration:

Consider that in an election, the following votes have been cast by voters in favour of candidates A, B & C, by order of their preference.

Table 4: **Illustration: Preference Ranking**

Preference/ Ranking	Votes		
Total	49	48	3

⁴²For further reference wrt the mathematical definition of ‘reasonable’ criterion, reliance is placed on a mathematical explanation/proof paper of Arrow’s theorem by John Geanakopolis titled ‘Three brief proofs of Arrow’s Impossibility theorem’, Cowles Foundation, Paper No.1116, Yale University; and on a paper titled ‘Arrow’s Impossibility Theorem on Social Choice Systems’, by Ashvin A Swaminathan, January 11, 2013, published by the Princeton University Press.

Table 4: **Illustration: Preference Ranking**

Preference/ Ranking	Votes		
	1st	A	B
2nd	B	C	B
3rd	C	A	A

In words,

- 49 voters ranked or preferred $A > B > C$.
- 48 voters ranked $B > C > A$.
- 3 voters ranked $C > B > A$.

The effects of the present FPP or 'Plurality' based voting method in India can then be illustrated as follows:

1. Violates majority criterion:

A 'majority' candidate has the most 1st place votes. Thus, if A had 51 first preference votes, he would win. However, as FPP requires A to merely have more votes than B & C (i.e. a plurality), technically A still wins even though he does not have a 50%+ actual majority of votes. Furthermore, while A was the preferred first choice of 49% of voters, he was the least preferred candidate for 51% of the voters .i.e. the majority of voters did not prefer A. This is how the FPP / Plurality based system in India presently works. Furthermore, as there is no ranking / preference based voting system, it is impossible to discern the actual preference of voters. It is submitted that this system is violative of Art.14 (Right to Equality) & 21 (Right to Life) of the constitution.

2. Satisfies monotonicity:

In a re-election, if the votes change only to favor the previous winner, there can only be more first-place votes for the candidate that already had most of the first-place votes.

3. Violates the Condorcet criterion:

In the above election, B is a 'Condorcet candidate' yet loses the election by plurality. In a run-off between A & B, B was preferred by $49 + 3 = 51\%$ (a majority) voters as their second choice. Thus, while no candidate secured a majority as the first choice, there did exist a clear majority for the second choice candidate B (51%), and also a clear majority that did not prefer A, ranking him third (51%).

4. Violates IIA:

In the above election, A is the winner by plurality, but if C is eliminated and his votes redistributed, then B wins the recount. That is, since 3 voters preferred $C > B > A$, once C is eliminated, his votes are redistributed to B since these voters ranked $B > A$. Therefore, the elimination of a third party candidate, often known as ‘vote-katra’ or ‘vote-cutter’ colloquially, materially alters the actual outcome. This inherent flaw in the FPP / plurality system is one of the primary causes of ‘leveraging’ or corrupt practices during elections in India. This also constitutes a violation of the ”anonymity

III. LEGAL ARGUMENT AGAINST FPP

A. Arbitrariness

Rule 64 (FPP) irrefutably results in a system which is not “rule by majority”. No party has ever secured a 50%+1 vote in any election in Independent India. As such, elections have been reduced to vote-bank politics thereby empowering politically active minorities at the expense of the vast apolitical majority. The rationale for the FPP system - poor literacy rate, logistical difficulties and protecting government stability - no longer exists with the advent of electronic voting, high literacy, and political awareness. The literacy rate as per the latest 2011 Census is 74% as opposed to 18% in 1951. Furthermore, FPP has not always ensured stable majority governments. In fact, for decades, the formation of coalition governments at the Centre has been the norm rather than the exception. Additionally, the Election Commission has large financial and human resources at its disposal, with general elections conducted by way of electronic voting. The Commission had a budget of around Rs 50,000 crore for the 2019 elections; it has the capability to conduct general elections based on ranked choice, Instant Run-off voting using the Single Transferable Vote via completely electronic means, just as it does for the Rajya Sabha.

“Free and fair elections” by means of the effective exercise of freedom of expression through the ballot have been held to be the very foundation of democratic institutions and part of the basic structure doctrine⁴³. The Supreme Court in the People’s Union for Civil Liberties (*supra*), a three-Judge Bench expressed separate but concurring opinions wherein at para 97, Mr. Reddi, J made an observation as to the right to vote being a Constitutional right, which reads as under:

⁴³See-

- a. State of NCT Delhi Vs. Union of India, (2018) 8 SCC 813,
- b. PUCL & Anr Vs. Union of India & Anr, (2013) 10 SCC 1,
- c. P.R.Belagali Vs. B.D.Jatti, AIR 1971 SC 1348;
- d. Indira Nehru Gandhi Vs. Raj Narain, AIR 1975 SC 2299;
- e. Mohinder Singh Gill Vs. The Chief Election Commissioner, AIR 1978 SC 851

“97 [...] With great reverence to the eminent Judges, I would like to clarify 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, the right has been shaped by the statute, namely, R.P. act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. [.]” **[Emphasis Supplied]**.

The right to vote is a constitutional right, and Rule 64 (FPP) imposes an arbitrary restriction and unreasonable restraint on such right. In its present form, it militates indefensibly against the true intention of the framers of the Constitution, which was always to ensure maximum possible citizen participation in the decision making processes and policy decisions of the State. Can a system which is not rule-by-majority, with safeguards against majoritarianism, be said to be a true democracy? Votes are converted into seats in Parliament in an arbitrary and unfair manner, resulting in an arbitrary and unfair distribution of legislative power and benefits to certain voters. Any rule that creates such an incommensurate disproportionality as demonstrated above is arbitrary, unreasonable, discriminatory and ultra vires.

B. Infringement of Right to Equality - Art.14

The framers of the Constitution clearly intended that every vote cast be equal. A constitution bench of the Supreme Court, in State of NCT Delhi Vs. Union of India, (*supra*) held that -

“51.[...] The cogent factors for constituting the representative form of government are that all citizens are regarded as equal and **the vote of all citizens, which is the source of governing power, is assigned equal weight**. In this sense, the views of all citizens carry the same strength and no one can impose his/her views on others.

52. The Constitution of India has embraced the representative model of governance at all levels, i.e., local, State and the Union. **[Emphasis Supplied]**

Thus, the Supreme Court has recognised that each vote cast by citizens is equal to every other, whether it was cast for the winning candidate or some other. However, the flaw inherent in the present FPP system is that it fails to accord any weight to the significant number of votes that were not cast for the winning candidate, which is frequently larger than the number of votes polled by the winning candidate, as conclusively demonstrated by the cited data. It has already been sufficiently proved, both academically and empirically, that the FPP / Rule 64 system -

- i. deviates unjustifiably from commensurateness/proportionality,
- ii. is biased in favour of large parties,
- iii. is biased in favour of established versus new parties,
- iv. is biased in favour of some voters over others,
- v. engenders ‘leveraging ‘ or Corrupt practices.

These facts are noted by the Election Commission and the Law Commission in their own voluminous literature that has accumulated over decades, but upon which no action has been taken, nor is likely to be taken due to vested interests.

It is common in all first-past-the-post (FPP) elections for between 30% and 60% of the votes cast to be ‘wasted’, in that a majority or a significant minority of voters secure no representation in Legislature, which is ultra vires Art.14 & 21. As already stated, on average more than half of all MP’s in the Lok Sabha do not secure a majority (50%+) of the vote in their own constituencies. Of these, over a third of MP’s do not even secure a quarter of the vote in their constituencies. As such, a third of the electorate of India is left unrepresented in every Lok Sabha, for which there is no logical or empirical justification.

Supporters of smaller parties, who are dispersed across many contests, may not elect any MPs (or may elect a trivial number of MPs), even though they may number hundreds of thousands across India; thereby their role is relegated to “vote cutting” or nuisance value only. There exists no rational, intelligible differentia between the class of citizens who do secure representation in Parliament vis-a-vis that class of citizens whose votes are “wasted” and who do not end up securing any representation at all. FPP disadvantages voters of small parties with particular ideologies, particularly where they are geographically dispersed. These voters, who have particular political affiliations/beliefs, are less able to successfully elect an MP who will represent their views in Parliament and effectively find themselves without a voice in Parliament.

An empirically and logically superior method of election that does not exhibit these incurable defects has already been in use in India for elections to the offices in the Legislative Councils, Rajya Sabha and the President of India. The said method, also known as Proportionate Representation by Single Transferable Vote (PR-STV) is a form of Ranked Choice - Instant Runoff Voting (IRV) and is contained in Rule 75 of the Conduct of Elections Rules, 1961. Today, there exists no intelligible criterion to justify extending the benefit of a more efficient public-choice aggregation system to MP’s & MLA’s while simultaneously denying the general population the same benefit. That is, the IRV system’s ability to capture the full preference of voters without wasting any votes is the natural and constitutional right of every citizen, and ought not to be restricted merely to elected members.

C. Infringement of Freedom of Speech & Expression - Art.19(1)(a)

Rule 64 (FPP) substantially interferes with the right to vote effectively and right to representation. A constitution bench of the Supreme Court in PUCL & Anr Vs. Union of India(*Supra*) held that -

“24) The decision taken by a voter after verifying the credentials of the candidate either **to vote or not is a form of expression under Article 19(1)(a)** of the Constitution. The fundamental right under Article 19(1)(a) read with statutory right under Section 79(d) of the RP Act is violated unreasonably if right not to vote effectively is denied [...] “53) Democracy is all about choice. This choice can be better expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. By providing NOTA button in the EVMs, it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered. We are of the considered view that in bringing out this right to cast negative vote at a time when electioneering is in full swing, it will foster the purity of the electoral process and also fulfill one of its objective, namely, wide participation of people.” [Emphasis Supplied]

Thus, the Supreme Court has recognised and upheld the constitutional right to vote effectively. This right is meaningless unless it translates into effective representation, by a negative vote if necessary. However, Rule 64 (FPP) substantially interferes with the right to effective representation of voters who do not vote for winning candidates. Voters find themselves with significantly less effective representation in the deliberations of Parliament if they vote for other candidates or parties, even where these candidates or parties have significant popular support. The situation today has become unsustainable in that the ballots of approximately half of all voters do not contribute to the election of a Member of Parliament (MP), and these voters find themselves with a significantly impaired representation or voice in the deliberations of Parliament, particularly with respect to Parliament’s legislative function. This substantially interferes with the right to effective representation of voters who belong to minority communities, particularly those that are geographically dispersed, including local residents.

Rule 64 (FPP) indirectly induces a significant number of voters to refrain from voting by creating the legitimate apprehension in their mind that their vote will be “wasted” or be ineffective. This is a violation of S.79(d) r/w S.123(1)(A)(b)(ii) of the Representation of People Act, 1951

S.79(d), of the Representation of People Act, 1951, defines “electoral right” as -

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

Further, S.123(1)(A)(b)(ii) of the Representation of People Act, 1951, defines “Corrupt practices” as, inter alia —

“The following shall be deemed to be corrupt practices for the purposes of this Act:— [...]

A. any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing—

(a) [...]

(b) an elector to vote or **refrain from voting** at an election, or [. . .] ”

[Emphasis Supplied]

Voters in constituencies where their preferred candidate has no chance of winning have little motivation to vote, and thus refrain from voting. Furthermore, such voters often face an incentive to not cast a vote for their honestly preferred candidate, but instead to cast a vote for a candidate that they may dislike in hopes of preventing an even less appealing candidate from winning.

D. Alternative systems to FPP

FPP has no significant countervailing benefits or mechanisms to ensure effective representation for voters who did not vote for the winning candidate. There are other electoral systems that more efficiently aggregate public choice, ensuring that voters are effectively represented in Parliament. Countries and sub-national jurisdictions with highly proportional systems achieve effective representation for voters. This includes jurisdictions using List Proportional Representation systems such as Denmark, Norway, and Sweden; jurisdictions using Mixed-Member Proportional Representation systems such as Germany, Scotland, and New Zealand; jurisdictions using Single Transferable Vote systems such as Ireland, Northern Ireland, and the Australian Senate; and jurisdictions using the Instant-Runoff (ranked choice) systems such as the Australian House of Representatives, the Indian Rajya Sabha and the Indian Presidential elections.

CONCLUSION

Empirically, logically, mathematically and juridically, it is impossible to deny that the ”first past the post” system arising from Rule 64 of the Conduct of Elections Rules 1961, is fundamentally unfair. It fails to efficiently capture actual voter preference, arbitrarily

conferring victory upon unpopular candidates. The system invariably elects Lok Sabhas that are unrepresentative of the population of the country, leading to a material dilution of voter expression amounting to an infringement of fundamental rights under Article 19(1)(a). Furthermore, it fails to treat all votes equally, unfairly privileging some classes of voters at the expense of others, thereby violating the fundamental right to equality under Article 14.

Itself an accident of history, a product of realpolitik and cynical political deal making in the U.K., it has survived numerous attempts at erasure entirely due to political division over the possible alternatives. Of particular note is the fact that nowhere has the body politic of Britain accepted FPP as the bedrock of British democracy. Indeed, both the House of Commons and the House of Lords have on several occasions voted for change, but these attempts have been defeated by the political intractability resulting from divergent views. In fact, there has been a conspicuous gap in any scientific debate in Parliament on the optimal method for the exercise of public choice through voting. Nor has there been any debate from the perspective of the freedom of expression of voters to express their choice by means of exercise of their franchise.

In India, the original rationale for adopting the British FPP model is no longer valid. At independence, India was largely impoverished and illiterate, and therefore unable to sustain the logistical exercise necessary to implement alternative forms of public choice aggregation. Public choice theory itself was insufficiently advanced at the time. Real world empirical data on alternative methods, too, was unavailable, making FPP an inherited vestige from Britain. However, this is clearly not the case today. Over the last century, the FPP system has not been proven to produce governments that are any more or less stable than alternate methods. Additionally, with the widespread proliferation of political parties and the rise of regional denominations, it is pertinent to consider whether this antiquated system may be contributing to greater political instability, if not the outright erosion of democratic values and ethos.

This paper has not analysed the rationality or suitability of the "majority" principle as an efficient or optimal basis for decision making. However, this analysis has proceeded on the presumption that "rule by majority" is the necessary sine qua non for "democracy" as envisaged by the framers of the Indian Constitution and the judiciary in the basic structure doctrine. Proceeding on this presumption, this analysis has highlighted that the FPP system does not, in fact, abide by the majority rule. Indeed, it has never produced a genuine majority (50%+) government in any Lok Sabha election since independence. Furthermore, this analysis has also shown that not only is the Central Government not elected by a genuine majority, but even the vast majority of MP's fail to secure a genuine majority in their own Parliamentary Constituencies.

Naturally, this has serious implications for the health of India's democracy. Allegations of majoritarianism have frequently been levelled against various Governments, past and

present. However, these allegations are wholly inaccurate in as much as the Lok Sabha does not, in fact, represent the majority of the population. It never has. The purpose of this paper is to highlight this basic deficiency in the algorithm of India's democratic architecture, in the hope that the questions it raises may provide a platform for change.

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