



PRISONER'S RIGHT TO VOTE

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" A man without a vote is a man without protection" - LYNDON B. JOHNSON (36th President of the U.S.A)

ABSTRACT

India is the World's largest democracy and has become a democratic republic since the inception of the Constitution of India and voting is the very essence of democracy. It is one's participation in the election process that decides his representative in the organ of Legislature. In fact, the Hon'ble Supreme Court of India has itself reckoned that free and fair elections form part of the Doctrine of Basic Structure which cannot be taken away by the Parliament by an amendment. However, when everyone has the right to vote on attaining 18 years, prisoners alone are deprived of their right to vote.

This paper in detail discusses about the right to vote for prisoners and that whether the reasons assigned by the Courts of law for deprivation of voting right to the prisoners has any plausible reasoning and nexus, along with a comparative study of position of prisoner's right to vote in other countries in the world.

Keywords : Democracy, Voting, election, Prisoners, right, Disenfranchisement

INTRODUCTION

The Right to Vote is universally recognized and is deemed to be of highest pedestal when it comes to the formation of Government. It is in fact the power of the citizen to express his preference based on the

past functioning of the Government. Every country by their Constitution or by any Act limits this exercise of right by assigning plausible reasons such as age, citizenship, unsoundness of mind etc. Initially, even on the basis of sex and religion, right to vote was taken away in certain countries like India. When Legislature authoritatively decided the grounds on which one can be disentitled to right of vote, additionally criminality also found place. With the advent of Judicial review, while the former grounds viz., religion and sex were eradicated, the latter is still in existence.

LEGISLATIVE PROVISIONS ON RIGHT TO VOTE IN INDIA

The right to vote is derived from Articles 19(1)(a) and 326 of the Constitution of India. Vote is nothing but a formal expression of preference by the voter to a candidate as discussed before. While The former deals with the right to freedom of speech and expression, the latter deals with the provision that dictates as to who form the electorate base for election to Houses of Parliament and that of the State Legislature. A reproduction of the Article 326 is given below :-

326. Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage :

The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; but is to say, every person who is a citizen of India and who is not less than twenty one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this constitution or any law made by the appropriate Legislature on



the ground of non residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election

Thus, the Constitution of India expressly states or stresses upon the fact that voting rights should be based on Adult suffrage which is adopted from the Universal Declaration of Human Rights which will be discussed in detail later.

It also clearly says that criminality, corrupt or illegal practice or any other ground can be made as a ground for disqualification by law which can be made by the Parliament. However, clear reading of the Article brings out the fact that the said grounds can only operate as a ground for disqualification of an individual from registration as voter in an election but never has commented or has barred such person from exercising their voting rights if he has already registered as voter.

Thus, by virtue of this Article, one cannot deny voting rights by claiming that the ground of criminality is by default present in the Constitution of India. Later, by virtue of this Article, the Parliament of India passed the Representation of People Act, 1951. It is in this legislation that there is a right to vote conferred upon the citizens of India by Section 62.

62. Right to vote.—

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

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of

the Representation of the People Act, 1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police: Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.

(6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorized to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.

Thus, Section 62(5) clearly casts a blanket ban on the right of the prisoners to vote without any classification of them into under trial and convicted prisoners. The Right to Vote stems from the statute and not the Constitution making it a statutory right.

WHY PRISONERS IN INDIA MUST BE ALLOWED TO VOTE

Prisoners are citizens of the State who have been jailed due to an accusation/finding that



they have breached the law. A **prisoner** is a person who is kept in a prison as a punishment for a crime that they have committed¹. But this simple definition of prisoners does not encompass the variety of prisoners that include under-trial, convicted of which for the under-trial prisoners, guilt is yet to be proved. The following are some of the reasons why prisoners must be permitted to vote :-

- Prisoners have not lost their citizenship by virtue of their wrong(s) hence they being the subjects of the state should still be provided the right to vote just like the other citizens at liberty are provided. The words of the Hon'ble Chief Justice of the Supreme Court of South Africa is of great relevance here
 - " The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity"²
- Prisoners if not provided with the basic right to vote, then upon release they would be forced to be under the rule of the Government elected by the electoral college comprising only of citizens at liberty. Thus, prisoners are made to suffer or submit themselves to the Government elected by the votes cast by their fellow citizens at liberty .
- Double Jeopardy is a written rule under Article 20(3) in our Constitution of India and for the wrong committed by the convict he is sent to jail which serves the punishment. But snatching away the right to vote in addition to the already imposed punishment of jail is a double jeopardy.
- For argument sake, even if it is agreed that the convicted prisoners have to forfeit their right to vote, yet there are lakhs of under-trial prisoners in jail who form the majority of prisoner population in India³ who are also deprived of their right to vote. The basic rule of innocent until proven guilty is also violated here.
- Prisoners sentenced for less than 2 years can contest in elections⁴ but are deprived of their right to vote. Thus, it is violative of Right to Equality under Article 14 of the Constitution of India. Political rights include right to vote as well as right to contest in election hence, permitting exercise of one right and denying the other under the same circumstance is totally invalid.
- While adult suffrage is justified for the fact that below the age of 18 years, individual would not be able to make a reasoned decision while casting his vote due to lack of maturity, there is no such concrete nexus in this classification of prisoners and non-prisoners for disenfranchisement.

¹ Definition from Collins Dictionary

² August v Electoral Commission, CCT 08/99, 1999

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<https://www.deccanherald.com/content/652556/under-trial-population-prisons-rise.html>

⁴ Section 8(3) of the Representation of Peoples' Act, 1951



- Prisoners who have committed a petty offence and also one who has committed heinous crimes are equated and both are arbitrarily deprived of their voting rights.
- Unlike the ordinary citizens at liberty who choose representatives to address their issues in the Legislature, voices of the prisoners are made unheard of. Because of the same, prisoners cannot hope to get better facilities in jail by change of Government.
- Prisoner himself before being jailed would have been a taxpayer on whose contribution, expenses incurred for election process is spent and he himself being removed from exercise of vote is unjustifiable.
- When a person confined for time being under Preventive Detention law is not deprived by the law from voting but under-trial prisoners alone are deprived of their vote defies the logical reasoning and intelligible differentia as both are innocent in the eye of law but one is allowed to vote which again violates Article 14 of the Constitution of India.
- With the presence of this provision of law, ruling government has in the past suppressed the voices of economically poor minority communities such as the Dalits, Adivasis, Muslims and manipulated the election results by imprisoning them⁵. Denial of voting rights to prisoners is denying valuable vote share of these particular communities.
- Violation or breach of law by a citizen is not evidence to the fact that he would be of poor judgmental capacity. This amounts to

equating prisoner to a minor or unsound mind person which is totally erroneous.

- The law creates an exception to the persons released on bail and allows them to vote which clearly is violative of Article 14 of the Constitution of India as the ones who are financially well off can get themselves out on bail and entitle themselves to the right to vote whereas the poor prisoners who will not be able to afford bail sureties have to lose their right.

JURISPRUDENTIAL THEORIES AGAINST PRISONERS' RIGHT TO VOTE

There are two important theories or doctrines that are most widely used by those who object to the conferment of rights to vote to the prisoners. The doctrines and why the same may not stand as a proper reasoning are discussed below.

DOCTRINE OF SOCIAL CONTRACT

According to this Doctrine, Voting rights of Prisoners are forfeited for they having breached the Social Contract by voluntary commission of crime. In the modern state theories such as Social Contract are seldom used and have negligible importance due to the presence of written statutes and. Although, even if Social Contract theory is taken into account, by definition of social contract, contracts cannot be negotiated away by any means and hence denial of right to vote due to breach of contract is unjustified.

⁵ <https://thewire.in/communalism/democracy-minorities-communalism-elections>



DOCTRINE OF CIVIL DEATH

The other Doctrine viz., Civil Death means total loss of all civil rights of person who has been convicted for a felony. It is a olden day European legal principle which has been used presently to justify the snatching of civil right to vote for the prisoner. It is a totalitarian doctrine which prevailed during the medieval times before the Doctrine of Rule of Law was put forth. According to this doctrine, prisoner will not be entitled to Freedom of Expression, Assembly, Right to inherit property, file or appear before Court of law for his own cause. Nowadays, this doctrine is of no application in India because of the fact that the above enlisted rights are fundamental in nature and are guaranteed to the prisoners by law in India and also in almost all countries.

The Doctrine poses serious threat to application of Human Rights to the prisoners and is now rarely given effect to by the Courts of law. Even though the curtailment of other Civil rights as per this Doctrine is done away with, curtailment of right to vote alone is yet in force.

RIGHT TO VOTE AS A HUMAN RIGHT AND INTERNATIONAL CONVENTIONS

As discussed before, Universal Declaration of Human Rights, 1948 is a principal Human Rights Document adopted by the United Nations to secure the rights of individuals in a State. It serves as epitome of individual civil rights and constitutes the principal source from which Fundamental Rights under the Constitution of India and the Article 326 stated before is brought.

⁶ Abebe, A.K. (2013) "In pursuit of universal suffrage: the right of prisoners in Africa to vote" The

- **Article 21(1)** of the UDHR states that :- Every individual has a right to take part in the government of their country through their representative, elected directly or indirectly.
- Further, International Covenant on Civil and Political Rights (ICCPR)'s **Article 25** states vividly that :-
 - Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [i.e race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. and without unreasonable restrictions:
 - (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
 - (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.
- Similarly, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and People's Rights recognize everyone's right to freely participate in election of governments⁶.

All the above Articles stress upon the fact that every citizen must fundamentally participate in the governance of the Country without any distinction and also based on any restriction which is unreasonable. Nowhere the Articles make a mention of disenfranchisement of Prisoners. Thus, when the basic Human

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Rights itself does not permit disqualification of voting rights for prisoners, a mere statute cannot take away the right for two reasons viz.,

- Human Rights cannot be taken away or unreasonably restricted by any statutory regulation.
- India per se, is a signatory to UDHR and has ratified both UDHR as well as the ICCPR. By virtue of principle of dualism, upon ratification, the International Law applies within a state as a binding law.

Moreover, the Standard Minimum Rules for the Treatment of Prisoners also known as the Nelson Mandela Rules, 1955 and The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that the prisoners should be treated with decency and dignity and for the purpose of rehabilitation with the society, they must participate in socio-political activities which clearly includes election of representatives. Articles 60 and 61 of the Nelson Mandela Rules states as follows :-

- **Article 60** states that :- “(1)The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.”
- **Article 61** further states that :- “The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it... Steps should be taken to safeguard,... the rights relating to civil

interests, social security rights and other social benefits of prisoners.”

Thus, the above two article stresses the mandate that the treatment meted out to a person confined in prison must be at par with a person in liberty and the person confined must be permitted to take part in activities what persons at liberty do. While the Articles necessitate the need for bridging of gap between prisoners and citizens at liberty, snatching of Right to vote of prisoners operates rather contrarily and further distances the gap.

RIGHT TO VOTE vis-a-vis ARTICLE 14

The Hon'ble Apex Court considers Right to Vote as a Constitutional Right in one case and Legal right in the other. In the case of **PUCV Vs Union of India**⁷, the Hon'ble Supreme Court held that the right to vote is a constitutional right guaranteed under Article 326. In this case, the Court distinguished between Right to Vote and Freedom of Voting and held the latter is covered under Article 19(1)(a). Thus, the Court stated that the Legislature can by a statute decide the modalities of voting but cannot interfere with the freedom to vote guaranteed under Article 19(1)(a). However, the Court also carefully enumerated that any law that even alters or fixes the modalities have to pass the test of Arbitrariness under Article 14 of the Constitution.

Thus, by the very own words of the Hon'ble Apex Court, the present Section 62(5) of the Representation of Peoples' Act, 1951 also has to pass the test of arbitrariness and intelligible differentia under Article 14 of the Constitution of India as already discussed.

⁷ 2003 2 SCR 1136



INDIAN COURTS' VIEW ON PRISONER'S RIGHT TO VOTE AND COMMENTS

The Hon'ble Supreme Court of India in the case of **Indra Gandhi Vs. Raj Narain**⁸ held that free and fair election also form part of the Basic Structure which cannot be taken away by the Parliament by amendment of the Constitution. Since it instilled some faith in the Supreme Court, a challenge of constitutionality of provision debarring prisoners from voting was challenged in the year 1997 in the case of **Anukul Chandra Pradhan Vs. Union of India**⁹ but the same was heard and dismissed by the Hon'ble Supreme Court of India. The reasons assigned for the dismissal are as follows :-

- (i) Resource crunch as permitting every person in prison also to vote would require deployment of a much larger police force and greater security arrangements.
- (ii) A person who is in prison as a result of his own conduct cannot claim equal freedom.
- (iii) To keep persons with criminal background away from the election scene.

• **COMMENTS** :With regard to the 1st reason, mere resource crunch being an administrative reason cannot be held as a reason to deny an individual his basic civil right and when there is no impediment in conduct of elections for citizens at liberty accounting to crores in population, claiming that the conduct of elections for relatively very less significant number of prisoners alone to be impossible is absurd and unreasonable.

- With regard to the 2nd reason, it is in clear violation of the Human Rights Principles especially the Mandela Rules of 1955. Also the Hon'ble Supreme Court has itself in its Judgments in the case of **Rajagopalan Vs. State of Tamil Nadu**¹⁰ and in the case of **State of Maharashtra Vs. Prabhakar Panduranga Sanzgiri**¹¹ held that even though prisoner's right to movement and liberty is restricted, the Right to Freedom of Speech and Expression and Right to Life was not and thereby upheld the right of prisoners to write and publish under Article 19(1)(a) and Article 21 of the Constitution of India respectively. Thus, when a prisoner by his own conduct is been given equal freedom in one instance cannot be denied in other instance without any other added reason.

- With regard to the last reason, as stated before, The Hon'ble Apex Court remains silent and turns a blind eye towards instances such as candidates with criminal records contest in elections or when they contest from prison or when there is illegal distribution of incentives to influence illiterate voters. The Hon'ble Apex Court without considering the already existing malpractices or criminality seeks to preserve the sanctum and probity of election only by disenfranchisement of prisoners.

• The Supreme Court though it is not bound by its own precedents, drastically refusing to recognize a right which the very Hon'ble Apex Court itself held to be part and parcel of principle Doctrine of Basic Structure is difficult to understand.

⁸ 1975 SCR (3) 333
⁹ AIR 1997 SC 2814

¹⁰ 1995 AIR 264
¹¹ 1966 AIR 424



Also not just in the 1990s, even very recently, a Public Interest Litigation was filed before the Hon'ble Delhi High Court by three law students challenging the constitutionality of Section 62(5) of the Representation of Peoples' Act, 1951 in the case of **Praveen Kumar Chaudhary & Ors. Vs. Election Commission of India & Ors.**¹² but unfortunately this petition also was dismissed on the ground that the Right to vote is merely a statutory right which the statute can regulate and restrict.

COMMENTS : The Court here failed to note that the existence of restriction or exception is not in question but the validity of the same is in question. However, the Court with regard to the validity of the restriction simply reiterated what was held by the Supreme Court in its previous judgments. The judgments so referred by the Hon'ble Apex Courts are analyzed hereunder

In the case of **Mahendra Kumar Shastri vs. Union of India & Anr**¹³, the Hon'ble Apex Court held that the disability which is imposed under Section 62(5) of the Representation of the People Act is equally applicable to all persons similarly mentioned therein and that they are even prevented from contesting the election or offering themselves as candidates for such election. The provision is reasonable and in public interest to maintain purity in electing peoples' representatives and there is no arbitrariness or discrimination involved.

COMMENTS : This is clearly not the case at present as the Parliament of India in the year 2013 passed a Representation of Peoples' Act, 1951 (Amendment and Validation) Bill¹⁴ by which it overturned the Supreme Court Judgment in the case of **CEC Vs. Jan Chaukidar & Ors.**¹⁵ that disentitled the right of individuals to contest elections from jail including under-trial prisoners. A review application filed for the judgment of the Hon'ble Supreme Court which was overturned by legislation was refused to be heard in view of the amendment and hence resulted in approval of the Amendment made by the Parliament consequently the law stands that one can contest in elections from jail. Therefore, clearly the reasoning given in the **Mahendra Kumar Shastri**¹⁶ case is not proper in the present circumstances.

In another case of **S. Radhakrishnan vs. Union of India & Ors.**¹⁷ the Hon'ble Apex Court stated that

"2.M. It was opined that the object of Section 62(5) is to prevent criminalisation of politics and maintain probity in elections and that any provision which furthers that aim and promotes the object has to be welcomed, as subserving a great constitutional purpose. We are in respectful agreement with the view expressed by the three Judge Bench in **Anukul Chandra Pradhan's**¹⁸ case and are not persuaded to take a different view."

¹² Writ Petition (Civil) No. 2336 of 2019

¹³ AIR 1983 SC 299

¹⁴ Bill Number 57 of 2013

¹⁵ 2013 7 SCC 507

¹⁶ Supra Note 13

¹⁷ 1999 10 SCC 265

¹⁸ Supra Note 9



COMMENTS : Thus, in this case the Hon'ble Apex Court upheld the provision on the ground that it seeks to prevent criminalization of politics. It is indeed difficult to understand as to how the Courts in India does not recognize the act of permitting criminals to contest elections as criminalisation of politics but applies the test with voters alone which is as pointed out earlier in clear violation of Article 14 of the Constitution of India.

The Hon'ble Apex Court in the case of **N.P. Ponnuswami v. Returning Officer, Namakkal Constituency**¹⁹, the Constitution Bench held that "The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. The same was reiterated by the Court in **Jagan Nath Vs Jaswant Singh**²⁰

COMMENTS : Here again the Court was reluctant to consider the merits of the case and determine the validity of the limitation but rather blindly permitted the right to be controlled by the statute. Also, when right to vote is not a civil right by the words of the Hon'ble Apex Court itself, then the Doctrine of Civil Death cannot be applied to the prisoners' right to vote and hence the right cannot be taken away by the application of that doctrine unlike the case of England which is to be discussed in the next section.

The Hon'ble Apex Court in the case of **Jamuna Prasad Mukhariya v. Lachi Ram**²¹, the Constitution Bench reiterated its earlier decisions by holding that - "The right

to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute.

Almost a very similar reasoning was given in the case of **Jyoti Basu v. Debi Ghosal**²² held that

" 26.The right to vote is subject to the limitations imposed by the statute, which can be exercised only in the manner provided by the statute and that challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a fundamental right in the Constitution."

COMMENTS : The reasoning given by the Hon'ble Apex Court in the above judgments is not just in violation of the previous judgment in the case of **PUCL Vs. Union of India**²³ but is also in clear violation of Article 13 of the Constitution of India which requires that any law made by the Legislature should not take away or abridge any of the Fundamental Rights under Part III and is to be rendered unconstitutional by the Courts in cases where it is in contravention with Part III. The Hon'ble Apex Court has also in a catena of cases delved into the validity of statutory limitation. Lately, the Hon'ble Apex Court in the case of **In re: Prashant Bhushan & Anr**²⁴ went to the extent of reading into the provision viz., Section 15 of the Contempt of Courts Act, 1971 so as to overcome a mere procedural formality prescribed in it which the court viewed it as a limitation and said that for taking cognizance

¹⁹ 1952 SCR 218

²⁰ AIR 1954 SC 210

²¹ 1955 SCR 608

²² 1982 AIR 983

²³ Supra Note 6

²⁴ Contempt Petition (Criminal) No. 1 of 2020



of contempt, it need not get the consent of the Attorney General of India while the statute mandates the Court to get consent. It is relevant to state that this case is of absolute relevance because of the fact that the exercise of contempt proceedings is a right created by the statute and here the Hon'ble Apex Court was ready to proclaim itself not to be bound by the limitation placed to a statutory right but however takes a different view with regard to the Representation of Peoples' Act alone.

Also, when the statutory limitation is in contravention with the Part III of the Constitution of India, the Hon'ble Apex Court has declared it unconstitutional. The recent instances of the Hon'ble Apex Court would be of great relevance and evidence to that fact. In the case of **Joseph Shine Vs Union of India**²⁵, the Hon'ble Apex Court struck down Section 497 of the Indian Penal Code as unconstitutional for it absolved liability of wife as an offender and thereby violated Article 14 of the Constitution of India and in the case of **Navtej Singh Johar Vs Union of India**²⁶, it held Section 377 of the Indian Penal Code as unconstitutional for it limited consensual homosexual intercourse and branded it a crime. All the judgments mentioned above are evidences to the fact that the Court has struck down provisions but is refusing to strike it down in the present instance alone for reasons best known to it.

Thus, it is clear that the Hon'ble Courts of India are reluctant to rule the

Section 62(5) as unconstitutional and thereby not ready to confer right to vote on prisoners.

POSITION IN OTHER COUNTRIES

ABSOLUTE RIGHT TO VOTE :-

- According to a report published by the BBC in the year 2012,²⁷ 18 European countries have given full voting rights for all categories of prisoners which includes Switzerland, Denmark, Finland.
- Slovenia is also another country that is now guaranteeing the right to vote for all its prisoners²⁸
- Ireland is another country that is highly appreciated for the unprecedented nature of its move in granting right to vote without any public outcry or protest or movement or even Court decision that demanded for such a right. Ireland adhered to its human rights commitments learning through the best international civil rights practices of providing right to vote to all citizens including prisoners.²⁹
- Iran gives absolute right to vote for prisoners,
- Israel also without distinction permits all prisoners to vote and
- Pakistan also provide right to its prisoners to vote in elections by a very recent statutory enactment viz., Elections Act, 2017
- In the African Continent, South Africa, Ghana, Kenya and Botswana also provide their prisoners with the right to vote in elections³⁰

RESTRICTED RIGHT TO VOTE

While in the above countries, right to vote was permitted to be exercised without any

²⁵ 2018 SCC OnLine SC 1676

²⁶ W.P. (CrI.) No. 76 of 2016

²⁷ <https://www.bbc.com/news/uk-20447504>

²⁸ Liberty (2016). Liberty's Briefing on Prisoners' Voting Rights. London: Liberty

²⁹ C Behan, Citizen Convicts: Prisoners, Politics and the Vote, Manchester University Press: Manchester, 2014

³⁰ Supra Note 5



fetters imposed, in many other countries the right to vote for prisoners is permitted with restrictive application by severing them based on the nature of offence committed by them or the category of prisoner that they belong to viz., permitting under-trials to vote and not the convicted.

- In New Zealand and the United Kingdom, Under-trials are allowed to vote but there stands be a blanket ban on convicted prisoners.
- In Germany, limitations related to severity or type of offence and bars only those prisoners convicted of terrorism charges from voting.
- In Australia, classification is based on the term of sentence i.e., For those sentenced to less than three years can vote ³¹
- In countries like France, there is no default ban on prisoners to vote in the elections, rather the court may decide to disallow any convict on a case by case basis.
- However, in some countries like Italy, Greece, Poland and some states of the US such as Florida, right to vote of convicts is even worse and harsher than the Indian law.) The convicts in their state can lose the right to vote even after their release ³²

FOREIGN JUDGMENTS WITH PROGRESSIVE VIEWS

Even though India continues to hold the provision curtailing the prisoners' right to vote as constitutional, Constitutional Courts in many other countries have woken up and understood the compelling need and importance of conferring the prisoners' with the right to elect. Following are two important judgments wherein the Courts

rejected the arguments denying the right to vote for prisoners.

The NICRO CASE (SOUTH AFRICA)

The Constitution of South Africa acknowledges the Universal Adult Franchise under Section 1. Despite this being the case, the Parliament of South Africa brought an amendment to Section 1 that restricted the application of voting rights which debarred prisoners serving imprisonment without the option of fine from voting. When it was challenged, the government's argument was primarily based upon two grounds:-

lack of resources to ensure prisoner's right to vote, and that because prisoners had been deprived of their liberty, it was fair to deny them franchise rights as well.

The Court refused to accept the first argument on the ground that since arrangements had been made for prisoners who were serving a sentence with a fine, this meant that enough resources were available to ensure franchise rights for those serving imprisonment without option of fine as well. The Court for the second contention used the '*proportionality principle*' enshrined in Section 36 of the South African Constitution. This principle tries to strike a balance between interests of those whose rights have been limited and interests of State, by testing whether a far more less restrictive means could have been used to achieve the same purpose. The Court then by application of the principle concluded that a ban on prisoner's franchise rights could not be justified merely on the ground of a policy decision of

³¹ https://aec.gov.au/About_AEC/Publications/Fact_Sheets/fact_sheets/prisoner-voting.pdf

³² Supra note 23



addressing the alarming crime rate, since the government had failed to furnish sufficient data on how restricting franchise rights would reduce the rate of crime.

The *HIRST* CASE (UK)

Just like India, UK law places a total ban on prisoner's voting rights. When this was challenged as being violative of Article 3 of Protocol No 1 of European Convention, the European Court of Human Rights held that although the right to vote is not an absolute right, a blanket ban on prisoner's franchise rights, irrespective of the gravity of the crime and duration of the sentence, was not justified since it breached the *Margin of Appreciation*. The government argued that, in effect, only 48000 prisoners would be deprived of voting, since it would not include people detained on remand or those who had failed to pay the fine. However, the Court opined that 48000 was still a significant number, and that there was no evidence that Parliament had ever sought to weigh the competing interests of the prisoner's right to vote as opposed to the State's interest as done by the Courts in South Africa.

Unfortunately, the UK has still not acknowledged this despite another ECHR Judgment in 2010, which asked the Parliament to bring a law to address the issue. Although a Bill is pending, which gives franchise rights to prisoners serving one year of sentence or less, it has still not seen the light of the day.³³

³³

<https://indconlawphil.wordpress.com/2020/04/09/guest-post-prisoners-right-to-vote-in-india/>

³⁴ Cormac Behan & Ian O'Donnell; (2008) 'Prisoners, Politics and the Polls Enfranchisement and the

SAUVE Vs. CHIEF ELECTORAL OFFICER (CANADA)

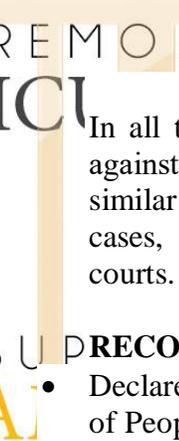
A Canadian court terming the government's arguments as "vague and symbolic objectives," also stated³⁴:

"The law which denied prisoners serving sentences over two years the vote in federal elections was repugnant to the Canadian Charter of Rights and Freedoms."

"Right to vote is fundamental to our democracy and rule of law and cannot be lightly set aside."

That it could not "permit elected representatives to disenfranchise a segment of the population."³⁵

In all the three cases, the arguments made against the prisoner's franchise rights were similar to that of India. However, in all those cases, blanket bans were rejected by the courts.



RECOMMENDATIONS

- Declare Section 62(5) of the Representation of Peoples' Act, 1951 as unconstitutional for violating the Basic Structure of the Constitution and for being violative of Article 14 of the Constitution of India
- Permit all categories of prisoners' to vote irrespective of any further classification of them on the basis of guilt, nature of crime, term of sentence etc.
- Recognition of Right to Vote as a Constitutional Right by virtue of Article 326 r/w Article 19(1)(a) by way of constitutional

Burden of Responsibility'. British Journal of Criminology, 48 (3):319-336

³⁵ <https://www.epw.in/engage/article/prisoners-right-vote-citizen-without-vote>



amendment and elevate it from a mere statutory right.

- Permit prisoners' to vote from prisons through Electronic Voting Machines i.e., by secret ballot system after being briefed about the working of the EVMs, how to cast their vote by demonstration wherever possible or in other cases orally or through Audio Visual presentation and also to stick the party symbols along with the political party name and their candidate at least 30 days prior to the conduct of election at any reasonable place which at all probability can be noticed by all the prisoners. Election Commissioners may by notification depute any member(s) or official(s) of the Election Commission to carry out the mentioned duties.
- To prevent misuse of the right by the Superintendent or Warden of prisons, voting exercise may be done in the direct presence of officials of the Election Commission of India or any executive authority so named by the Election Commission of India and the entire proceedings is to be video-graphed.
- Make special provision authorizing the local, jurisdictional Magistrate to conduct surprise visits to prisons at any time to check if the above mentioned duties are properly carried out.
- Provide Adequate protection to the Presiding Officer and other officials involved in the Election process and
- Prisoners to be provided with the Election Manifestos of the Political parties printed in vernacular language or in the language so understood by the prisoner and must also

make available the details of the candidate provided by him/her while filing Nomination in accordance with rule laid down by the Hon'ble Apex Court in the case of **Association for Democratic Reforms Vs Union of India** ³⁶for them to make an informed decision.

- Communicate the election results once declared

CONCLUSION

As discussed in detail above, almost 4,66,084 prisoners³⁷ in India are being deprived of their right to vote by virtue of a blanket ban in a statutory provision. Moreover, India is one of those very few countries who have been denying this right to its under-trial population as well. And, in India's prison population, a majority are under-trials. While this being the case, candidates with criminal records or who contested from jail form 50% of the House of People of the Parliament elected in the recent Parliamentary Elections i.e., in 2019³⁸. In fact, the chances of winning for a candidate with criminal cases in the Lok Sabha 2019 elections were 15.5% whereas for a candidate with a clean record it is 4.7%³⁹ and the elected candidates only if they are sentenced for any offence for more than two years, they will be faced with immediate disqualification or vacation of their seat⁴⁰. Without proper representation for the prisoners, any election conducted by suppression of almost 4 lakh voices can never be termed as fair election. This is a sheer violation of Human Rights,

³⁶ 2002 (3) SCR 924

³⁷ NCRB 2018-
<https://ncrb.gov.in/sites/default/files/Executive-Summary-2018.pdf>

³⁸ <https://www.indiatoday.in/elections/lok-sabha-2019/story/50-per-cent-mps-new-lok-sabha-criminal-records-1534465-2019-05-25>

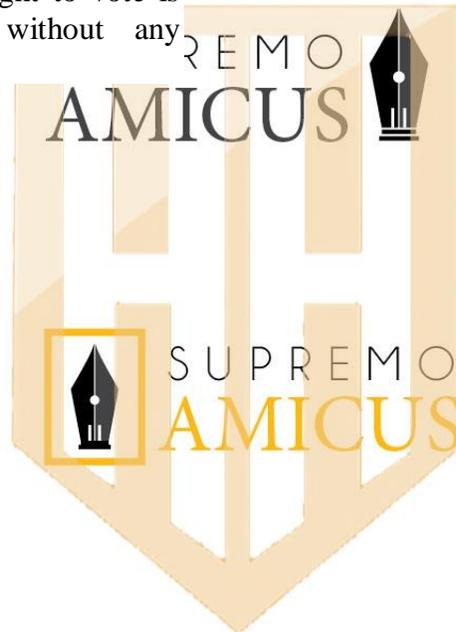
³⁹ <https://factly.in/voters-right-to-know-trajectory-of-law-on-the-disclosure-of-candidates-criminal-antecedents/>

⁴⁰ Lily Thomas Vs Union of India ((2013) 7 SCC 653)



Fundamental Rights, Basic Structure and other International Agreements which when failed to be upheld by the Courts renders it as violation of Article 51 of the Constitution of India. ⁴¹

Courts must come to the rescue and deviate from its previous judgments and hold that possibility of misuse or lack of resources to ensure conduct of elections for prisoners is not a plausible ground to disentitle them from their right to vote. India just like the other Western and European Countries have to become more progressive and march forward to ensure that the right to vote is granted to all prisoners without any classification.



⁴¹ Promotion of International peace and security