

PRISONER'S VOTING RIGHTS IN INDIA: AN OVERVIEW

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ABSTRACT

Right to vote is constitutional right of every citizen under Article 326 of Indian Constitution. There are many sections of Indian society which are deprived of their constitutional right to vote. In India, the prisoners who are on bail have the right to vote. The other categories of prisoners which include detainees, under-trials and convicts have not given any right to vote except who are detained for preventive detention under Section 62 (5) of the Representation of the People's Act 1951. There are many countries for instance; Europe, Ireland, Finland, Spain, Norway, Denmark etc. which have given the right to vote even to their prisoners in order to reform their social life after their release from the prison. According to the National Criminal Branch Report of India, out of total Population 4, 88,511 prisoners were in prison on 31 December 2020 which includes 3, 71,848 under- trials, 1,12,589 convicts and 3,590 detenues who were deprived of their constitutional right to vote. Thus, this paper proceeds to analyze the Prisoner's right to vote in general, its International and National Perspective as well as Judicial approach toward this issue.

I. INTRODUCTION: RIGHT TO VOTE

Suffrage is a civil right which provides right to vote in elections. From the ancient times, the Franks of ancient France had used the word suffrage to point out political franchise. One of the kinds of suffrage is 'Universal Suffrage' which explained as a circumstance where the right to vote is not limited on the basis of race, gender, faith or position.¹India is a democratic country where the right to vote is a constitutional right of every citizen under Article 326 of Indian Constitution. According to section 62 of the Representation of the People's Act 1951, prisoners or convicts of all types including a person who is in

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¹Kavita Singh, *Civil death of prisoner: disenfranchising the prisoner in reality causes his civil death*, <http://docs.manupatra.in/newslines/articles/Upload/2BD91633-6D97-466C-86A1-B1F647358DB6.pdf>.

the legal custody of the police is restricted to vote in elections in India.² According to the National Criminal Branch Report of India, out of total population 4, 88,511 prisoners who were in prisons on 31 December 2020 which includes 3, 71, 848 under- trials, 1, 12,589 convicts and 3,590 detenues who were deprived of their constitutional right to vote.³ Therefore, the larger section of Indian Society was deprived of their voting rights in elections to constitute the Indian Government. There are many countries for instance; Europe, Ireland, Finland, Spain, Norway, Denmark etc. which have given the right to vote even to their prisoners in order to reform their social life after their release from the prison. In India, the Hon'ble Supreme number of times urges that right to vote should be embodied under Article 21 of the Constitution. Unfortunately, till date prisoners have no right to vote in India. Thus, there is needed to relook upon the voting rights of prisoners in India.

II. INTERNATIONAL PERSPECTIVE ON VOTING RIGHTS OF PRISONERS

The right to vote is not uniformly provided everywhere in the countries or inside the countries. In a number of countries, restricted or conditional voting rights are provided to their prisoners. In few countries, prisoners of offence are not given the right to vote during their prison term and even when they are on parole.⁴

As such there is no official data available on right to vote of prisoners globally. According to BBC 2012 Report, 18 European Countries like Slovenia and Ireland have given the right to vote to all its prisoners. There are many other countries like Pakistan, Iran, Israel, South Africa, Kenya, Botswana and Ghana which have also given the voting right to their prisoners to make sure their participation in the formation of their governments. There are many countries which have provided right to vote to their prisoners based on severity and type of offence. For instance, Germany has not given right to vote to the prisoners who are convicted for terrorist act, in Australia prisoners cannot vote if they have been sentenced for minimum three years. Moreover, in France, there is no such restriction on

²The Prisoner Security Act, 1894 (Act No.9 of 1894), s.3.

³*National Crime Records Bureau, Prison Statistics India, 2020*, https://ncrb.gov.in/sites/default/files/PSI_2020_as_on_27-12-2021_0.pdf.

⁴*The right of prisoners to vote: a global overview 2016*, https://cdn.penalreform.org/wp-content/uploads/2016/08/The-right-of-prisoners-to-vote_March-2016.pdf.

the prisoner's voting rights rather the Courts have the power to decide the matter of voting right of prisoners on the basis of their case. There are few countries like Italy and some states of America, where the voting rights of prisoners in election were totally abolished even after their release from the prisons.⁵

In Portugal, the convicts who have committed offences especially against the supreme ruler or State were not given the right to vote.⁶ In the District of Columbia, Maine and Vermont, prisoners not at all lose their voting rights in elections, even despite the fact that they are imprisoned.⁷ In Oklahoma, voting rights of prisoners are not reinstated until a prisoner's sentence is final and the maximum time describe in that sentence expires. The rule applies to inmates in prison and to thousands of prisoners on probation or parole. If an inmate receives a 10 year sentence, build ups credits for good behavior and is released from prison before time without supervision; the prisoner cannot exercise his or her voting right in elections until the 10 year punishment expires. In Florida, felons must have completed all terms of sentence, which includes probation and parole, and must pay any outstanding fines or fees after that their voting rights in elections can be restored. In Nebraska, in felony cases, there is a two-year waiting period after completion of probation for the restoration of voting rights. In 2020, California voters had passed Proposition 17 for restoring voting rights to citizens on parole. In 2021, Connecticut had passed SB 1202, New York had passed SB 830 and Washington had passed HB 1078 in order to give voting rights to prisoners who are on parole⁸. Since 1982, the Canadian Charter of Rights and Freedoms contain an express right to vote in which Canadian citizens have voting rights in an election and to be competent for membership in their legislative houses, ,⁹ subject to rational restrictions mentioned by the law. Right now, all detainees in Canada are permitted to vote in elections. The Canada Elections Act contains various

⁵Baljeet Kaur, *Prisoners' Right to Vote: Citizens without a vote in a Democracy has no Existence*, <https://www.epw.in/engage/article/prisoners-right-vote-citizen-without-vote>.

⁶ Isabel Santos (MP, Portugal), *in debate on prisoner voting rights, don't forget international commitments*, 3 May, 2019, <https://www.oscepa.org/en/news-a-media/op-eds/in-debate-on-prisoner-voting-rights-don-t-forget-international-commitments>.

⁷*Restoration of voting rights for Felons voting rights*, <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

⁸Julie Delcour, *Pros and Cons: should felons be allowed to vote?* <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

⁹Canadian Charter, section 3: 'Every citizen of Canada has the right to vote in an election of the House of Commons or of Legislative Assembly and to be qualified for membership therein.'

provisions where convicts have the right to vote in election, thus, near about 35,000 prisoners had voted in 2006.¹⁰

III. NATIONAL PERSPECTIVE ON VOTING RIGHTS OF PRISONERS

India despite the democratic country does not provide any participation of prisoners in the selection of the Government. In India, prisoners' right to vote is provided under Section 62(5) of the Representation of People Act, 1951 which has described different types of convicts who are not provided suffrage right in India.¹¹ The issue of voting rights of prisoners ought to be dealt in a speedy manner. As section 62 (5) of Representation of People Act, 1951 has prohibited the suffrage rights of the convicts which is in contradiction with the political rights provided under section 8(3) of the Representation of People Act, 1951. The section 8 (3) of the Act, 1951 has allowed to the convict of an offence punishable with less than two years of imprisonment to contest an election. Thus, there is a need to solve this conflict as one side convicts of an offence can contest the election and on other side they cannot vote in elections in order to decide who should lead them.¹²

There are international documents which have also provided the right of suffrage to everyone without any discrimination. These international documents on human rights are being used by Indian Judiciary in order to interpreting the meaning and extent of legislative provisions.¹³ . Art 21 (1) of the Universal Declaration of Human Rights provides equal right of participation to everyone in Government of their countries directly or through elected representatives. In addition, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that every citizen has the right and the opportunity to participate in government affairs directly or through elected

¹⁰*Supra* note 3.

¹¹ The Representation of the People Act, 1951, Section 62(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”.

¹²*Felony Disenfranchisement: A Pertinent Issue in the Election Season*, <https://rgnul.ac.in/PDF/0e6cab38-4027-43e6-b2b5-be5c69b00b16.pdf>.

¹³P. CHANDRASEKHAR RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW 139 (1st ed.1993).

representatives without any kind of discrimination, right to vote and have equal right to access in public service in their countries.

Indian constitution Article 324-to-329-part XV¹⁴ deals with elections. An electoral system works for elections according to the provisions of constitution and People Representation Act, 1950 and people Representation Act, 1951. The Act of 1950 is a kind of background or platform for election. This Act has provisions which deal with allocation of seats and delimitation of constituencies¹⁵ and also provided the rules relating to electoral rolls for parliamentary constituencies.¹⁶ It has also included electoral roll for assembly constituencies. The Act of 1951 provided conduct of elections,¹⁷ about the structure of administrative machinery for elections¹⁸, qualification and disqualification for membership from houses¹⁹, corrupt practices and other offences,²⁰ disqualification, election commission.²¹ It also has provisions for disqualification for voting.²²

In Indian Constitution, Article 19 (1) (d) and Article 19 (1) (e) are interrelated which provides right to move without any restraint all over the land of India and right to live in and settle in any part of India to every citizen of India.²³ Some restrictions can be imposed by the Government on above rights in order to protect the interest of general public or any schedule tribe under Article 19 (5) of the Constitution.²⁴ Therefore, the question arises if any wrong doer is convicted and sentenced to imprisonment, does it violation of his right under Article 19 (1) (d) and Article 19 (1) (e) of the Constitution? In *Sunil Batra v. Delhi Administration*,²⁵ the Court held that limitations which are imposed on a detainee under Sec. 30 (2) of the Prisons Act, 1894²⁶ are reasonable and these limitations are not

¹⁴THE CONSTITUTION OF INDIA, art.324 -art. 329.

¹⁵The Representation of the people Act, 1950, Act No. 43, Acts of Parliament, 1950 (India).

¹⁶*Id.*, s. 13 D.

¹⁷The Representation of the People's Act, 1951, Act No. 43, Acts of Parliament, 1951 (India) at Part V (s. 30-38).

¹⁸*Id.* at Part IV (s.19- s.29).

¹⁹*Id.* at Part II and Part III (s. 3 to s.11).

²⁰*Id.* at Part VII (s. 123).

²¹*Id.* at Part IV (s.146- s.146 C).

²²*Id.* at s. 62, s.11A, s.11B.

²³ THE CONSTITUTION OF INDIA, 1950, art. 19 (1) (g).

²⁴*Id.* at art. 19 (5).

²⁵*Sunil Batra v. Delhi Administration*, AIR 1980 SC 1597 (India).

²⁶ Section 30 of Prison Act- Prisoners under sentence of death.— (1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailer and all articles shall be taken from him which the Jailer deems it dangerous or inexpedient to leave in his possession.(2) Every such prisoner

against the Article 19 (1) (d) of the Constitution. The Court held that these limits are imposed in order to protect jails and the convicts or prisoner in jails.

In India, Art 326 of the Constitution gives right to vote to Indian citizens having 18 years of age. India being regarded as greatest democracy in the world has not provided the right to vote to its four lakhs of qualified voters in Lok Sabha Elections in 2019. India is one of the few countries where all detainees are disallowed for voting in the elections. In India, both under-trials and convicts are restricted to vote in elections.²⁷ Article 325 of the Constitution does not eliminate membership in elections on the ground of sex, religion, race, or caste. Article 326 of the Constitution provides adult suffrage (right to vote to citizen above 18 years of age) related to elections to the House of the people and State legislative assemblies. The right to vote is neither a common law right nor a fundamental right or a statutory right either. It is Constitutional right in which free and fair election was held to be as a basic feature of the Constitution.²⁸

IV. JUDICIAL ASPECT ON VOTING RIGHTS OF PRISONERS IN INDIA

The Indian Judiciary has been passed many judgments on prisoner's right to life under Article 21 of the Indian Constitution. There are a few judgments of Supreme Court and High Court on voting rights of prisoners where the Court denied the voting rights to the prisoners. In *Anukul Chandra Pradhan v. Union of India and Ors*,²⁹ section 62 (5) of Representation of peoples Act was challenged and upheld by the Court by stating that denying the right to vote to the prisoners is not the violation of Art 14 and Art 21 of the Indian Constitution. Else voting right of prisoners is conditional imposed by the parliament. The Supreme Court gave several excuses for not providing voting rights to the prisoners. The Court stated that large police force and security force is needed to provide voting rights to prisoners which is not the easy task. Secondly, prisoners are in

shall be confined in a cell apart from all other prisoners, and shall be placed, by day and by night, under the charge of a guard.

²⁷S. Abu backer Sidhic, *Critical Analysis on Right to vote of prisoners*, Indian Journal of Law and Legal Research, ISSN: 2582-887, <https://hcommons.org/deposits/objects/hc:39934/datastreams/CONTENT/content>.

²⁸ M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 943 (4th ed. 2003).

²⁹ *Anukul Chandra Pradhan v. Union of India and Ors*. AIR 1997 SC 2814 (India).

prisons because their own conducts, therefore; they cannot ask for the equality in voting rights. Thirdly, keep prisoners away from elections.

In *S. Radhakrishnan v. Union of India & Ors* ,³⁰ section 62(5) of the Representation of Peoples' Act was challenged where the Supreme Court held that the purpose of Section 62 (5) is to avoid criminalization of politics and preserve goodness in elections. The Court held that the prisoners voting right is statutory right and not the fundamental right which is subjected to the conditions of statute, therefore; dismissed the petition. In *Mahendra Kumar Shastri*,³¹ the Supreme Court stated that restrictions upon the voting rights of prisoners under the Representation of People Act is not unconstitutional and in favour of the interest of public in India. In *Jan Chankidar (Peoples watch) v. Union of India & Ors*,³² the Court held that voting right is statutory right which can be taken or given only by the law. Further, denial of voting rights to prisoners was upheld by the Calcutta High Court in *Rama Prasad Sarkar v. The State of West Bengal & Ors*.³³

In *Praveen Kumar Chaudhary v. Election Commission & Ors*³⁴ case, three law students had filed the petition before the Delhi High Court to challenge the constitutional validity of section 62 (5) of the Representative of People Act which do not provide right to vote to the prisoners and was against right to equality under Indian Constitution, therefore, it is requested to quash the section 62 (5) of the Representation of Peoples Act. The Court dismissed the petition on the basis of precedents of petitioners who pointed out that no difference or categorization between prisoners who are in prison or on bail or is released from the jail is made by the Government. Further, contention was made that the choice of contesting election is given to the person even he is in jail but he is denied his voting right while he is in jail. The petitioner also requested to provide suitable services and facilities to the prisoners to cast vote from prison. Therefore, the Supreme gave the detail explanation for denying right to vote to the prisoners. The Supreme Court held that voting rights of prisoner is only statutory right which is subject to limitation given under section

³⁰ *S. Radhakrishnan v. Union of India & Ors* .AIR 1999 SC 265 (India).

³¹ *Mahendra Kumar Shastri v. Union of India* (1984) 2 SSC 442 (India).

³² *Jan Chankidar (Peoples watch) v. Union of India & Ors*, AIR 2004 (2) BLJR 988 (India).

³³ *Rama Prasad Sarkar v. The State of West Bengal & Ors*, W.P No. 209 of 2011 (India).

³⁴ *Praveen Kumar Chaudhary v. Election Commission & Ors*. W.P. (C) 2336/ 2019 (India).

62 (5) of the Representation of the People's Act and it does not fall under the fundamental rights of citizens under the Indian Constitution. Thus, the Apex Court of India held that that section 62 (5) of the Representation of the People's Act is constitutionally valid and categorization of person who is imprisoned in jail or who are out of the jail is valid categorization.

V. CRITICAL ANALYSIS OF VOTING RIGHTS OF PRISONERS

The voting rights of prisoners are very significant for the improvement of our criminal justice system. The participation of convicts in the formation of government is needed in order to rehabilitate and reintegrate them after their release from prison. Prisoner's voting right is their basic right which includes the principle of right to equality under art 14 of the Indian Constitution. India is among those countries which have fully restricted the voting rights of convicts. If we look upon the other side a prisoner is a human being who is in jail for committed any offence, on basis of any suspicion of his/ her committing any offence. If we analyze the psychology of prisoners of grave offences like Murderer or rapist etc. they will be influenced by the representative of their character which would not be in favour of the betterment of the society. The notion of "civil death" is main bases of exclusion of voting rights of prisoners. It means a human being who has broken law would not be given the fundamental rights mentioned under the Indian Constitution, such as right to assemble, to buy or sale property, to file suit or appear in court, right to freedom of expression. Presently, most of limitations have been removed except the basic right of voting of convicts in elections. The main reason for limiting the voting rights to convicts in India is that a law breaker has violated the "social contact" and in modern democracies, the rule of law is the most important instrument of the social contact, so when a lawbreaker of your own accord violates the law, he or she willingly decides to go outside the social order. Therefore, the law breaker should deny the basic rights which a law abiding citizen enjoys. A law breaker or convict has also broken the faith and thus, he should not be allowed to participate in the process of formation of Government of nation.

Thus, denial of voting rights to prisoners or convicts will give an indication of disapproval from the society and will act as deterrence.³⁵

On the other hand, other view is that prisoners should not be denied the voting rights because they are still part of the general public. No doubt, they took law into their hands but if they get their voting rights and the right to give their opinions on choosing representative of State then they will feel that they are part of the general public and nation. It is logical to ask that if imprisonment doesn't take away the citizenship of the person then why it should leads to the denial of voting rights to prisoners. It is ironical that at the same time as those charged with crimes can contest elections but they cannot vote in elections. In this case, the prisoners or convicts are deemed to be lesser citizens even before their crimes have been proven in the courts.³⁶ Thus, prisoners should get right to vote because confinement as a outcome of imprisonment in itself is a punishment and no extra punishment can be inflicted on the prisoner, and secondly, the idea of jails is not "punishment" in its animal sense, but restriction upon the freedom to reorganization, and preparing the prisoners to rehabilitate and reintegrate into the social order.³⁷

VI. CONCLUSION AND SUGGESTIONS

The requirements of the Indian Constitution for representative government are open to be interpreted so as to protect the right of Indians to vote in elections. Thus, the demand of removing the provision from the Representation of People's Act, 1951 on restricting the voting rights of all types of prisoners including hardcore prisoners would not be accepted by the Indian Judiciary and Government. There are a variety of ways in which enfranchisement of prisoners in India could be achieved in practice. These are following:

- Polling stations could be set up in the prisons or special votes could be provided to prisoners.

³⁵*Supra* note 7.

³⁶Shivanshi Asthana, *Should India's 400,000 prisoners get to vote in the 2019 election?* <https://qz.com/india/1573171/india-elections-2019-should-prisoners-be-allowed-to-vote/>.

³⁷*Supra* note 7.

- There is need to categorize the types of convicts and need to provide right to vote to the under trial prisoners and the convicts who are convicted for minor or non-serious offences.
- Prisoners are exactly an imprisoned population, living in a closely monitored environment. The Election Commission could have little difficulty to decide that who should be given the opportunity to vote in elections but convicts who are eligible or qualify to vote in elections can be registered by the Election Commission separately.
- There is a need to amend sec 62 (5) and section 8 (3) of the Representation of People's Act, 1951 to remove contradiction between these sections.
- "Innocent until proven guilty" that is an important principle of the legal system. Therefore, the under trials should not be denied the voting rights in elections because their guilt is not proved yet. Also in many cases, the under trial convicts have been spent extra time in jail than actual sentence of their suspected crime. Therefore, restricting the voting rights of hardcore or habitual offenders is justifiable but not for other prisoners. If the European countries can give the voting rights to their prisoners then why India does not? The voting rights to under trials prisoners can be proved to be an important feature of the rehabilitative justice. Thus, the Law Commission of India and the Judiciary should relook upon the voting rights of prisoners in India.