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Denial of Right to Vote to the Prisoners in India: A Critical Analysis

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ABSTRACT

This paper assesses the legislative policy in India on the right of prisoners to vote. Being a democratic country, there is always an increasing recognition of the right to vote in India at national and local level. Article 326 of the Constitution of India provides for the adult suffrage which means every person who has completed the age of eighteen years is entitled to vote at an election subject to disqualifications as provided by the statute. Despite that, India has imposed a blanket ban on the voting right of the prisoners under Section 62 (5) of the Representation of People Act, 1951. By enacting this provision India in fact opted for criminal disenfranchisement. The decisions of the Courts in India are also in favour of this indiscriminate criminal disenfranchisement law. This paper critically examines the criminal disenfranchisement law in India by analyzing International instruments and law of the other countries on this topic. It also recommends that India should change its legislative policy regarding criminal disenfranchisement by removing blanket ban on the voting right of the incarcerated population.

Keywords: *Disenfranchisement, Civil Death, Incarcerated Population, Blanket Ban, Right to Vote, Criminal Disenfranchisement.*

I. INTRODUCTION

The vote of each and every citizen in an election is a security of dignity and personhood. Voting is a process in which everybody counts. In a country of great disparities of culture, religion, regionalism, caste, race, wealth and power it declares that whoever we are, whether rich or poor, privileged or disgraced, we all belong to the same democratic country i.e. India.² Article 326 of the Indian Constitution provides that “The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen 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

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² Marc Mauer, “Voting Behind Bars: An Argument for Voting by Prisoners”, Vol. 54, No. 3 *Howard Law Journal* 549 (2011).

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.”³ This right is in accordance with International instruments such as, Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (the ICCPR) which lay emphasis on the right of everyone in the participation of the Government of his or her country by securing equal voting right to all so that the will of the people shall be expressed in periodic elections.⁴

However, when it comes to the voting rights of the prisoners, many convicted offenders around the world do not have voting right in elections; they have been legally deprived of their voting rights as a result of their criminal convictions. Most countries restrict voting right to those who are undergoing prison sentences. That is why this practice is generally referred to as “Prisoner Disenfranchisement”.⁵ The Term “Prisoner or Criminal Disenfranchisement” developed from the ancient notion of civil death, also known as forfeiture. Civil death was prevalent in ancient Greece and Rome as the mark of “infamy or dishonour”. Infamy was conferred upon those who are guilty of heinous and treasonous crimes involving moral depravity, and resulted in the denial of rights such as voting and holding certain public offices.⁶

Depriving the prisoners from right to vote varies widely from country to country, and even within some countries like, USA. In some countries voting rights for prisoners are subject to restrictions and/or conditions, whereas in other countries the right to vote of the prisoners is automatically suspended for the period of their term of sentence, or even after the completion of their parole period.⁷ Surprisingly, unlike many countries, India has disenfranchised sentenced prisoners. Being a common law country, the Commonwealth Franchise Act, 1902 was applied disqualifying the convicted persons who were undergoing sentence from voting. The provisions remained considerably the same when the Commonwealth Electoral Act, 1918 was enacted. The position remained unaltered even under Representation of People Act, 1950 and the Representation of Peoples Act, 1951.⁸

³ The Constitution of India, Article 326.

⁴ Universal Declaration of Human Rights, Article 21.

⁵ Pablo Marshall, “Voting from Prison: Against the Democratic case for Disenfranchisement”, Vol. 11 *ETHICS & GLOBAL POLITICS* 1 (2018).

⁶ Greg Robins, “The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand”, Vol. 4 *New Zealand Journal of Public and International Law* 166 (2006). Available at <https://www.wgtn.ac.nz/public-law/publications/nz-journal-of-public-and-international-law/previous-issues/volume-4-issue-2-december-2006/robins.pdf> (Visited on November 09, 2021).

⁷ Allen & Overy et. al. “The right of prisoners to vote: a global overview”, 1 (2016). Available at https://cdn.penalreform.org/wp-content/uploads/2016/08/The-right-of-prisoners-to-vote_March-2016.pdf (Visited on November 09, 2021)

⁸ Kavita Singh, “Civil death of prisoner: disenfranchising the prisoner in reality causes his civil death”, Vol. 1,

II. PRISONERS' RIGHT TO VOTE: INTERNATIONAL SCENARIO

There are several international human rights instruments relevant for the right to vote. The most important for our purposes here are the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights (the ICCPR).⁹ Article 21 of Universal Declaration of Human Rights provides that;

(1) Everyone you have the right to participate in the Government of your country, directly or through freely chosen representatives.

(2) Everyone has the right to equal access to public service in his country.

(3) The will of the people is the basis of a government authority; this will, shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.¹⁰

Further, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that every citizen has the right and the opportunity, without any of the distinctions mentioned in Article 2, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

(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;

(c) To have access, on general terms of equality, to public service in his country.¹¹

Although there is no official data collection showing a clear pattern of the right to vote for prisoners in every country in the world, a report by the BBC published in 2012 lists 18 European countries that have given all prisoners full voting rights.¹² On the other hand, there are nations which ban prisoners from voting, and this policy of disenfranchisement varies country to country. Many countries restrict right to vote to certain groups of prisoners.¹³

No. 2 *NUJS Law Review* 240 (2008), Available at <http://www.commonlii.org/in/journals/NUJSLawRw/2008/16.html> (Visited on November 09, 2021).

⁹ Tom Theuns, "A Comparative Study on the Right to Vote for Convicted Persons, Disabled Persons, Foreigners, and Citizens Living Abroad", *Horizon 2020 Framework Programme of the European Union* 3 (2019).

¹⁰ Universal Declaration of Human Rights, Article 21.

¹¹ The International Covenant on Civil and Political Rights, Article 25.

¹² S. Abubacker Sidhic, "A Critical Analysis on Right to Vote of Prisoners", Vol. 2, No. 1 *Indian Journal of Law and Legal Research* 3 (2021).

¹³ Mandeep K. Dhami, "Prisoner Disenfranchisement Policy: A Threat to Democracy?", Vol. 5, No. 1 *Analyses of Social Issues and Public Policy* 2 (2005).

(A) Countries Which Ban Prisoners From Voting

Many nations have a more-or-less “blanket” ban on prisoners’ voting (e.g., UK, New Zealand and Russia).¹⁴ The prisoners in United Kingdom are excluded and disqualified for voting under the section 3 of the Representation of the People Act 1983 law, which states that, ‘A convicted person during the time of his detention in a penal institution as a result of his sentence or unlawfully at large when he would otherwise be so detained is legally not capable of voting at any parliamentary or local election. On the other hand, the European Court of Human Rights claims it as against their charter and also a breach of the terms of human rights. In December 2013, the PM of United Kingdom said that prisoners should not be allowed to vote and the powers of The European Court of Human Rights should be limited in this regard who claim the act to be unlawful. As of August 2014, despite the court ruling that the prisoners’ rights of human were broken as whenever they were literally not permitted to vote, the prisoners in the U.K, are not allowed to vote.¹⁵ In 2010, the New Zealand government restricted the rights of all prisoners to vote in election by making them ineligible to register on the electoral roll. Despite being in breach international law, no justifiable objective was provided for the measure.¹⁶ However, On February 25, 2020, the New Zealand government introduced the Electoral (Registration of Sentenced Prisoners) Amendment Bill in the Parliament. This bill amends the Electoral Act 1993 to enable people sentenced to imprisonment of less than three years to vote in the country’s general elections. This law now restores the rule that applied prior to late 2010.¹⁷

Originally, In Russia there was an automatic and indiscriminate ban on convicted prisoners’ voting rights, However in the case of *Anchugov and Gladkov v. Russia*, The European Court of Human Rights held that blanket ban on the voting right of the prisoners imposed by the Russian federation violated article 3 of the protocol 1 of the European Convention on Human Rights. In 2016, the Constitutional Court while deciding a case noted that despite the above constitutional provision, the penal system could be developed so that some freedom-restricting criminal sanctions would not lead automatically to restrictions on voting rights. A law that

¹⁴Brandon Rottinghaus, “Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform”, Charles and Kathleen Manatt Democracy Studies Fellow International Foundation for Election Systems 22 (June-July 2003). Available at https://www.prisonpolicy.org/scans/08_18_03_Manatt_Brandon_Rottinghaus.pdf (Visited on November 14, 2021).

¹⁵ Anyanwu Ikenna ESQ, “Prisoners Fundamental Right to Vote: The UK Example”, Vol. 3, No. 1 *Journal of Law and Global Policy*, 34, 39 (2018).

¹⁶Alex Mackenzie, “Lock Them Up and Throw Away the Vote: Civil Death Sentences in New Zealand”, Vol. 19 *Auckland University Law Review* 197 (2013).

¹⁷ Available at: <https://www.loc.gov/item/global-legal-monitor/2020-03-06/new-zealand-bill-to-restore-voting-rights-for-some-prisoners-introduced/> (Visited on November 17, 2021)

came into force in 2017 introduced community work as possible criminal sanction which was applied in approximately 3000 cases in 2017 – 2018. Under this law now it is possible for these prisoners to vote in federal, local and municipal elections, accordingly ending the previous blanket ban on the voting right of the prisoner.¹⁸

In some countries, there are limitations related to severity or type of offence like, in Australia prisoners serving a sentence of 3 years or more continue to be deprived of the right to vote in Federal elections, with one exception in Victoria State where prisoners serving a sentence of over 5 years cannot vote, while in China prisoners on death row are banned from voting¹⁹. In United States, states vary widely on when voting rights are restored. In Maine and Vermont states everyone has right to vote including prisoners irrespective of their criminal acts. On the other hand, Kentucky and Virginia are the two remaining states that permanently disenfranchise all people with felony convictions, unless they receive individual, discretionary, executive clemency.²⁰

(B) Countries where prisoners can vote

The situation in other countries is far from uniform. Former communist states are the most liberal regimes in this regard. Albania gives right to vote all prisoners irrespective of their crime or sentence. Since its inception there have been no attempts to restrict the franchise. In Bosnia and Herzegovina the situation is similar, where prisoners can vote unless their crimes relate to the war in the wake of Yugoslavia's collapse.

Other countries where all prisoners can vote include Croatia, the Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Macedonia, Serbia, Spain, Sweden, Switzerland, Ukraine, Iran and Israel. Even Pakistan through Elections Act 2017 also provides right to its prisoners to vote in elections. In the African Continent, South Africa, Kenya, Ghana and Botswana also confer to their prisoners the right to vote in elections.²¹

III. POSITION IN INDIA

India is a Democratic Republic. Democracy can be sustained only through free, fair and fearless

¹⁸ Available at: <https://www.coe.int/en/web/execution/-/russia-abolished-blanket-ban-on-prisoners-voting> (Visited on November 17, 2021).

¹⁹ Lisa Hill and Cornelia Koch, "The Voting Rights of Incarcerated Australian Citizens", Vol. 46 *Australian Journal of Political Science*, 3, 4 (2011). Available at: https://www.researchgate.net/publication/233195800_The_Voting_Rights_of_Incarcerated_Australian_Citizens (Visited on November 18, 2021).

²⁰ Erika Wood, "Restoring the Right to Vote" *The Brennan Center for Justice at New York University School of Law* 3 (2009). Available at https://www.brennancenter.org/sites/default/files/2019-08/Report_Restoring-the-Right-to-Vote.pdf (Visited on November 18, 2021)

²¹ Baljeet Kaur, "Prisoners' Right to Vote: Citizen without a Vote in a Democracy Has No Existence", Vol. 54, No. 30 *Economic and Political weekly* 3 (2019).

elections. Only free, fair and fearless elections to the various legislative bodies in the country can guarantee the growth of a democratic polity. According to Article 326 of the Constitution, India has adopted adult suffrage as basis of election to the Lok Sabha and the state Legislative Assemblies.²² Every citizen who has reached the age of 18 years has a right to vote without any discrimination.²³

However, Section 62(5) of the Representation of People Act, 1951 categorically bars the prisoners from voting in an election. It provides “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.” It means that section 62(5) of the Representation of People Act, 1951 imposed a blanket ban on the voting right of the convicted persons.²⁴ The Constitutional Validity of this provision was challenged before Supreme Court in the Case of *Anukul Chandra Pradhan v. Union of India*,²⁵ Supreme Court in this case upheld the Constitutional validity of Section 62(5) on the ground that it seeks to achieve the objective of decriminalization of politics. The practical realities of holding election in prison and the kind of infrastructure and support needed for the same was also held to be valid justifications for denying the right to vote.²⁶ Further, Supreme Court held “that in view of the settled law on the point, it must be held that the right to vote is subject to the restrictions imposed by the law and it can be exercised only in the manner as provided by the statute; and that the challenge to any provision in the statute laying down the nature of right to elect cannot be made with reference to a fundamental right in the Constitution. The very basis of challenge to the validity of sub-section (5) of Section 62 of the Act is, therefore, not available and this petition must fail.”²⁷

The constitutional validity of Section 62 (5) of the Representation of People Act, 1951 was again challenged before Delhi High Court in *Praveen Kumar Chaudhary & ors. v. Election Commission of India & ors.*²⁸ on the ground that there is no valid classification between the persons who are in jail and the persons who are on bail or out of jail therefore violative of Article 14 of the Constitution. It was further argued before the court that as

²² Kavita Singh, “Civil Death of Prisoner: Disenfranchising the Prisoner in Reality Causes His Civil Death”, Vol. 1 *NUJS Law Review* 249 (2008).

²³ The Constitution of India, Article 326.

²⁴ N. Prakash and M.Yashasvi, “Disenfranchisement of prisoners”, *Cochin University Law Review* 334 (1998).

²⁵ AIR 1997 SC 2814.

²⁶ Human Right Communique, Vol. 5, No. 8 *Casihr Newsletter*, 3 (2019)

Available at: <https://www.rgnul.ac.in/PDF/0e6cab38-4027-43e6-b2b5-be5c69b00b16.pdf> (Visited on January 10, 2022)

²⁷ Available at: <https://main.sci.gov.in/jonew/judis/13934.pdf> (Visited on January 10, 2022).

²⁸ W.P.(C). No. 2336 of 2019. Decided on, 11 February 2020.

per second proviso of sub section (5) of section 62 of the Act, by reason of prohibition to vote under this sub-section, a person whose name has not been entered in the electoral roll shall not cease to be an elector meaning thereby that such person can contest election but he/she cannot cast his/her vote if he/she is in jail. However, the Division bench of Delhi High Court by referring to the judgment of *Anukul Chandra Pradhan v. Union of India*, held “that the object of section 62(5) is to prevent criminalization of politics and maintain probity in elections and that any provision which furthers that aim and promote the object has to be welcomed, as sub-serving a great constitutional purpose.” Accordingly Court upheld the constitutional validity of Section 62(5) of The Representation Act 1951.²⁹

IV. CRITICAL ANALYSIS

Prisons cannot be considered a place in which authoritarianism and arbitrariness are tolerated especially in a democratic country.³⁰ It is a place where persons are confined, remanded, or held in custody by a judicial authority or who have been deprived of their liberty subsequent conviction of a crime.³¹ The concept of Prisoner’s Disenfranchisement has been based on the idea of Civil Death.³² Even though the right to vote has gradually been extended to all adult citizens of sound mind, the imposition of limitation on the right of individuals in legal custody to vote (criminal disenfranchisement) is an accepted and common practice. Under this old notion of 'civil death', convicts were deprived of their legal, political and civil rights.³³ However this concept of Civil Death in relation to Prisoner’s disenfranchisement is not in consonance with the judgments given by the Supreme Court of India while interpreting Article 21 of the Constitution of India.³⁴ In *State of Andhra Pradesh v. Challa Ramkrishnan Reddy*³⁵, The Supreme Court held that the prisoners are also a person and they will not lose their basic constitutional rights. A “prisoners whether a convict, under- trial or detenu, does not cease to be a human being while lodged in jail”.³⁶ Following the conviction of a convict, he may be

²⁹ Available at: <https://www.casemine.com/judgement/in/5e6e17ff9fca19104525e55d> (Visited on January 10, 2022).

³⁰ Pablo Marshall, “Voting from prison: against the democratic case for disenfranchisement”, Vol. 11 *Ethics & Global Politics* 6, 7 (2018).

³¹ <https://www.britannica.com/topic/prison>

³² Anyanwu Ikenna ESQ, “Prisoners Fundamental Right to Vote: The UK Example”, Vol. 3, No. 1 *Journal of Law and Global Policy*, 39 (2018).

³³ Adem Kassie Abeb, “In pursuit of universal suffrage: the right of prisoners in Africa to vote”, Vol. 46, No. 3 *The Comparative and International Law Journal of Southern Africa* 411 (2013).

³⁴ *Sunil Batra (No. 1) v. Delhi Administration*, AIR 1978 SC 339. Supreme Court held that Section 30 of the Prison Act did not empower the prison authorities to impose solitary confinement upon a prisoner under sentence of death. In *Prem Shankar v. Delhi Administration*, AIR 1980 SC 1535. Supreme Court held that Punjab Police Rules under para 26, 22 authorising that every under trial who was accused of a non-bailable offence punishable with more than three years jail-term would be handcuffed, were violative of Article 14, 19, 21 of the Constitution.

³⁵ AIR 2000 SC 2083

³⁶ Paridhi Verma. “Rights of Prisoners under Indian Law”, Vol. 2 *Pen Acclaims*, 3 (2018).

deprived of fundamental freedoms like the right to move freely throughout the territory of India, right to reside and right to practice a profession. But he can enjoy other freedom like the right to acquire, hold and dispose of property as mentioned by the constitution including Article 21 i.e. right to life.³⁷

In the case of *Anukul Pradhan case*³⁸ the main question before the Supreme Court was whether Section 62 (5) of R.P. Act 1951 violates Article 14 of the Constitution by imposing a blanket ban on the voting right of prisoner in India. It is well settled now that article 14 permits classification but it prohibits class legislation. However the Classification must be reasonable and for reasonable classification it must fulfil twin test i.e., (1). The classification must be founded on an intangible differentia, and (2). The differentia must have a rational nexus with the object of classification.³⁹ It is submitted that Section 62 (5) fails this test as on the one hand denies voting right to the person confined in the prison whether under a sentence of imprisonment or even to under-trials or in the lawful custody of the police. On the other hand a person subjected to preventive detention under any law for the time being in force and a person convicted and sentence to imprisonment but released on bail is permitted to vote. Under Section 62 (5) the classification between those who can vote and those who cannot vote and the object of the law to prevent criminalisation of politics and maintain probity in election bear no reasonable nexus.⁴⁰

Further Section 62(5), comes in conflict with another section of the same act i.e. section 8(3) of the R.P. Act 1951, which says a person convicted of an offence which carries imprisonment of less than two years is eligible to contest an election. This creates a confusing situation where a prisoner considered as civil dead and accordingly cannot vote in election and has no right to choose his/her representative, but on the other hand the same prisoners if he fulfills the conditions of Section 8 (3) can contest election and become himself/herself representative in the government. In this situation, the prisoners are considered to be lesser citizens even before their crimes have been proven.⁴¹

In view of the changed legislative policy and the attitude of the Courts in India, Criminal justice system in India works on the principle of Reformative and Rehabilitative justice. Reformative efforts are an attempt, through treatment or programming, to stop offenders from continuing to offend. The main objective of the reformative theory is that they offer such treatment to

³⁷ J.N. Pandey, Constitutional Law of India 285 (Central Law Agency, Allahabad, 52nd edition, 2015).

³⁸ *Anukul Pradhan, Supra*, p. 6.

³⁹ Narender Kumar, Constitutional Law of India 108 (, Allahabad Law Agency, Allahabad , 7th edition, 2008).

⁴⁰ N. Prakash and M.Yashasvi, "Disenfranchisement of prisoners", *Cochin University Law Review* 335 (1998).

⁴¹ Representation of People Act, Section 8 (3).

offenders which reduce offender's tendency to reoffend. This correctional service actually focuses on the needs of the offenders. The image of offenders in these correctional services is like a good person who has unfortunately gone astray but will respond to treatment.⁴² Whereas, the basis of Rehabilitation theory is that punishment can prevent future crime by reforming the individual. It advocates that criminal behaviour is not a rational choice, but determined by social pressures, psycho-logical difficulties or situational problems of various kind.⁴³ After getting reformed at the correctional facilities when the offenders go back to the society, they are again exposed to the same conditions which caused the criminality in them in the first place. So besides reforming them it is also extremely necessary to make it sure that they continue with their reformed personality when they are reintegrated to the society like a normal being. Unfortunately the legislative intent in Section 62(5) of the R.P. Act 1951 by imposing a blanket ban on the voting right of the prisoners comes in conflict with these criminal justice theories and courts in India also failed to appreciate this fact.⁴⁴

V. CONCLUSION

India is considered as one of the biggest democracy in the world. Democracy has armed people with a powerful weapon that is right to vote. It gets more strength and stability when more and more people take part in the formation of the government by exercising their right to vote. In this modern society disenfranchisement of the incarcerated cannot be justified. Countries like Australia, China, USA (in few states), Germany, Iceland opted for a middle path by providing right to vote to the prisoners subject to certain conditions such as quantum of sentence served. The right to vote is restricted as an additional penalty based on the gravity of the crime. Russia also changed its legislative policy by introducing a new law in 2017 that made it possible now for the certain category of prisoners to vote in federal election. It become more important for a country like India where all the institutions of the government lay emphasis on the protection of fundamental, democratic, civil and human rights of the citizens, to also take care of the right of another section of the citizens who are lodged in prisons. There should be no blanket ban on the right to vote of the prisoners in India. The law must make reasonable classification between the prisoners on the basis of severity or type of offence and other social and psychological factors. In this direction, section 62 (5) of the Representation of People Act, 1951 needs to be

⁴² Dip Jyoti Bez, "Reformative and Rehabilitative Treatments of Offenders: A General Overview", Vol. 2, No. 1 *MSSV Journal of Humanities and Social Sciences* 72 (2018).

⁴³ India's Crime Justice System: Reforming Institutions for Delivering Justice, Vo. 38 *Weekly focus* 3 (2021). Available at: https://d19k0hz679a7ts.cloudfront.net/value_added_material/a1181-indias-criminal-justice-system-reforming-institutions-for-delivering-justice.pdf (Visited on January 11, 2022).

⁴⁴ Dip Jyoti Bez, "Reformative and Rehabilitative Treatments of Offenders: A General Overview", Vol. 2, No. 1 *MSSV Journal of Humanities and Social Sciences* 73 (2018).

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