

Right to Vote Behind Bars: Is Imprisonment not Enough?

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Abstract:

India has been characterized as the biggest democracy in the world because of the significant nature that take place all over the country. People collectively take participation into choosing their leaders, whether for the national general elections or state elections. Elections are the root of the concept of democracy, as democracy brings out the idea of people's rule and hence a large amount of people goes to the poll to elect members for the Lok Sabha, State legislative assembly, and the legislature of the union territories. One of the basic features of our Constitution is Free and Fair Elections. Election gives a ruling party an immense amount of power and hence it is vital for the sake of protecting democracy that nothing hampers with such process of electing members. Elections in India are almost treated equally to one of the big festivals, as people are collected to celebrate the process of voting and campaigns take place all over the country or state in a grand manner. This paper particularly talks about Right to vote of prisoners. The paper would analyze the concept of right of vote in a democracy and the degree of importance that a mere right can hold. The paper would also be comparing the right to vote for prisoners internationally, so as to reason behind the concept of different opinions when compared to the Indian society. Prisoners are felons of the society and they are treated always lesser than the other citizens but it is important to make sure that how much low they can be treated for what they have done, as taking away right for being a prisoner but not on the basis of the degree of the crime is how far right and how far wrong.

Keywords: Election, Right to Vote, Constitution, Democracy, Fair Elections.

Introduction:

The right to vote is not an absolute right as it can be taken by the country if the rules of being a citizen is not being followed. There are certain duties of a citizen that protects public order. Under the Representation of People's Act, there are certain exceptions to Right to vote. It specifically talks about the people who are exempted from their voting rights and one of the main exemptions are prisoners of the country. Prisoners are being denied a lot of rights in the country, as being detained, they are also denied fundamental rights. This denial of rights is a way to protect the public at large, because making sure that the prisoner doesn't roam safe gives out a hope to people that they particularly can. Prisoners' rights are something that have been talked over and over for years, as it is very difficult to decide as to human rights applies to them or not.

With the process of elections gives the citizens of India a "Right to Vote", that is a basic right that is offered in every democratic society. Right to Vote is a wide concept that gives a citizen the opportunity to choose and be chosen in the concept of democracy, and to access his right, such right granted to him is the first reason behind conducting elections. Right to Vote is a Constitutional Right that has been granted under Article 326 of Indian Constitution, that was introduced by the Motilal Committee, when they came around the concept of Universal Adult Suffrage that gives a right to vote to anyone irrespective of gender, occupation, class, caste, education or any other form that segregate people from people.

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Concept of Right to Vote:

Before independence of India, the right to participate in elections to the legislative bodies then in existence was restricted on grounds like landed property, payment of taxes, educational qualifications and henceforth, and was thus conferred on only some of the privileged sections of the Indian Society.³ Such restrictions on voting, even after independence would have damaged the democracy for the country, as the country was falling down and the only way through it was to keep the people of the country stable and under the same roof. And one way to do it was to grant them rights the are available to everyone there is. In fact, even in the year 1928, the Motilal Nehru Committee⁴, which was set up by the All-Parties Conference to determine the basic principles of Constitution for India, has also advocated for Universal Adult Suffrage in India. Hence, the same was adopted later while finally making the constitution of India, where under Article 326, the Right to vote was granted who was the citizen of India and who is not less than 18 years of age and is otherwise disqualified under this constitution or any law made by the appropriate legislature.⁵

The Supreme Court⁶ from time to time has held that, in our laws, the ‘right to vote’ is a pure and simple statutory right, not a common law right or a fundamental right, though casting of a vote can also form a meaning under the right of expression of an individual that has been provided under Article 19(1)(a) of the Indian Constitution. However, in the case of Rajbala and Ors v. State of Haryana and Ors⁷, that took into consideration the same view that was taken under the case of PUCL⁸ and DMDK⁹, that the ‘right to vote’ at an election for either Lok Sabha or State legislative assemblies is a constitutional Right. The court has further contested that those citizens who are entitled to exercise ‘right to vote’ are not automatically entitled to the ‘right to recourse’ in any of the above elections, as the ‘right to contest’ is subject to laws prescribing both qualifications and disqualifications for candidates.

In India, right to vote and right to be included in the Electoral list don’t go hand in hand. The right to vote is very selective and personal and hence have been left upon the citizens of India whether they want to exercise their right or not. But the fact that government cannot simply take away such democratic right is absolute, so even when the citizen chooses not to use such right, such right, irrespective of anything, should always be available out there. Right to vote is a different right than our fundamental rights, as fundamental can be restricted through reasonable restricts but right to vote is more restricted through eligibility and not on the arbitrary decisions of the ruling government. Democracy defined people’s choice, and hence right to vote stays irrespective of what the government decides.

International view on prisoner’s right to vote:

The Universal Declaration of Human Rights, is a milestone document in the history of human rights. The preamble of the document states that, “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.¹⁰ The document speaks about several rights and defines

³ V S RAMA DEVI S K MENDIRATTA, HOW INDIA VOTES: ELECTION LAWS, PRACTICE AND PROCEDURE 282 (Lexis Nexis, 2017)

⁴ *Id.*

⁵ INDIA CONST. art. 326.

⁶ Jyoti Basu v. Debi Ghosal (1982) 1 SCC 691 (India)

⁷ Rajbala and Ors v. State of Haryana and Ors (2016) 3 SCJ 328 (India)

⁸ People’s Union of Civil Liberties and another v. Union of India and another (2003) 5 SCC 399.

⁹ Desiya Murpokku Dravida Kazhagam v Election Commission of India (2012) 4 SCJ 865.

¹⁰ Universal Declaration of Human Rights, Preamble, (1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

some basic principles of democracy. Article twenty-one¹¹ of Universal Declaration of Human Rights states that,

- a) Everyone you have the right to participate in the Government of your country, directly or through freely chosen representatives.
- b) everyone has the right to equal access to public service in his country.
- c) 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.

The International Covenant on Civil and Political Rights, is one of the documents that has been accepted internationally that also talks about human rights as well, the preamble says that¹² “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. Article twenty-five¹³ of ICCPR states that, every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives.
- 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.

Hence, even this instrument that has been accepted universally states how important voting rights are when human rights are being considered. These rights being included as human rights simply signify the fact that right to vote is a human right when it comes to a democratic country, it has an importance greater than the whole elected government, because that’s what democracy means. When a government chooses to be democratic, they have to understand that the country is not on their discretionary power to choose for the people before the people choose them. The fact that right to vote has been considered as an important aspect to be considered internationally depicts how far important they reach when seen from a perspective of human rights. Hence, right to vote is something that should only be curtailed very reasonably and objectively, as it would mean hampering with human rights directly.¹⁴ To deny such rights has to be justifiable under the law and the degree at which such rights are being denied.

Different countries on prisoner’s right to vote:

While considering prisoner’s right to vote, every country have different aspect to govern such rights. There are countries who have given a complete right to vote to prisoners irrespective of the fact that they are detained and are actually denied from a lot of other rights. There are also countries where such restrictions on voting rights imposed on prisoners are selective. Also, countries where there is total ban on voting rights for prisoners, sometime, even after they are discharged. Hence, the concept of right to vote are dealt with a wide variety of discretionary powers of their specific government. How a country reacts to certain statutes and deal with

¹¹ Universal Declaration of Human Rights, Article 21, (1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

¹² International Covenant on Civil and Political Rights, Preamble, (1976) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

¹³ International Covenant on Civil and Political Rights, Article 25, (1976) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

¹⁴ Felony Disenfranchisement: A Pertinent Issue in the Election Season 5 Center for Advanced Studies in Human Rights 2, 2-3 (2018)

certain rules and restrictions depends a lot of the customs and their domestic jurisprudence of how law was taught and developed and inherited and applied. Hence, the approaches change with the polity.

In 2012 BBC produced a report which specifically talks about prisoners right to vote in European Countries.¹⁵ The report pointed out 18 European Countries that completely allows their prisoners to vote. In Albania, people can vote irrespective of the crime they have committed and there have been no attempts to limit the franchise ever since it was introduced after the Iron Curtain fell. The situation is similar in Bosnia and Herzegovina, where prisoners can vote unless their crimes relate to the war in the wake of Yugoslavia's collapse.¹⁶ Other nations where all prisoners can vote include Croatia, the Czech Republic, Denmark, Finland, Latvia, Lithuania, Macedonia, Montenegro, Serbia, Spain, Sweden, Ukraine and Switzerland. There are countries like Bulgaria, Cyprus and Romania where the judges have discretionary power so as to decide whether a prisoner can vote or not. In Bulgaria, judges can completely take away a prisoner right to vote if he is sentenced for 10 years or more and even if sentence is less than 10 years, the prisoners can still lose their right to vote if the judges decides but it can be given them back after maximum of 20 years of such ban imposed on them.¹⁷ When it comes to France, they have a complex set of rules where such right can be taken away selectively on the seriousness of their crime. Hence, the prisoners just don't lose their right with being imprisoned but such ban on right is an additional penalty imposed with the sentence which does not have to be compulsory for every prisoner.¹⁸ Germany, Norway and Portugal are also very selective with restricting prisoner's rights, as such crime that targets the government itself or are heinous in nature that affects a public at large at once are taken in consideration and then such restrictions on voting rights are imposed on the prisoners.¹⁹ And almost such selective bans concept is used in Italy and Greece.

Slovenia and Ireland have a very liberal views when coming to granting right to vote to prisoners. Where in Ireland such right is exemplary as it was given without any public collectively asking for them. The right was just there without any controversy and hence the country took the rights of human very strictly and have been learning from the best practices all over the world including right to vote as such.²⁰ Countries such as Iran, Israel and Pakistan also provide rights to its prisoners to vote in elections. In the African Continent, South Africa, Ghana, Kenya and Botswana also provide their prisoners with the right to vote in elections.²¹ In countries like United Kingdom, New Zealand and Australia have selectively restricted their prisoners from their right to vote. Australia has restricted it to years of imprisonment, where those who are imprisoned for minimum three years cannot vote.²² In United States of America, the prisoners lose their right to vote even after releasing from their sentence.

These differences are based on certain views that the countries follow and believes that prisoners have broken the social contract and hence they have chosen such exclusion from the society by themselves, hence civil death should be a part of such punishment because being included on the polling system will also take away the purity of the ballot. Such countries and

¹⁵ Prisoners Vote by European Countries, BBC News (April. 6, 2022, 15:02) <https://www.bbc.com/news/uk-20447504>

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Prisoners Vote by European Countries, BBC News (April. 6, 2022, 15:02) <https://www.bbc.com/news/uk-20447504>

¹⁹ *Id.*

²⁰ Cormac Behan, *Learning to Escape: Prison Education, Rehabilitation and the Potential for Transformation*, 1 *Jour. of Pri. Edu.* 20, 22-23 (2014).

²¹ Abebe, Adem Kassie, *In Pursuit of Universal Suffrage: The Right of Prisoners in Africa to Vote*, 46 *CILJ of Southern Africa* 410, 418 (2013).

²² Australian Electoral Commission: https://www.aec.gov.au/Enrolling_to_vote/Special_Category/Prisoners.htm.

the people believe and are of the view that prisoners are morally unacceptable as they have been convicted for crimes that have been told off and hence such people are a danger to the society, so neither the government nor the government feel comfortable into giving prisoners liberties that can be put on the equal platform of other citizens. Whilst the liberal side of thoughts about the same rights are that the concept of civil death is outdated when compared to the emerging human rights because the countries who keep liberal view up to any extend think from the point of view of reasonably restricting human rights and not from the point of view of the convicts, says that the social contract that a country has with its citizens cannot be negotiated and the democracy as a concept cannot be taken for granted and it also works in a form of rehabilitation for the prisoners as they feel liable to be part of the society and hence make them feel the power of responsibility.²³

In the case of *Hirst v. UK*²⁴ before the European Court of Human Rights, the UK government argued that Convicts are people who have forged the duties and have breached the social contract and they should be restricted from taking part in the government. To which the Court therefore held, by 12 votes to five, that there has been a violation of Article 3 of Protocol No. 1 (right to free elections).

Hence, from the above consideration from different parts of the world, we can delude that the fact that prisoners are supposed to be denied their right to vote is not exclusive all over the world and there are countries who take different views either by selectively taking away such rights on the basis of certain specific rules followed in their country or either by giving them their right without any restrictions.

Prisoner's right to vote in India:

India provides its citizens with a right to vote as a constitutional right. It is an absolute right unless said otherwise under statutory provisions. This right has been granted under Article 326 of Indian Constitution. The same right though is not absolute in India. The Right to vote is further taken to a statutory provision under the Representations of the People's Act, 1951. The Act specifically talks about elections and the rules and regulations that has to be followed while the elections are being conducted. The main objective of the Act is to ensure that free and fair elections are being held in our country. The Act is a compliment to the Part XV of the Constitution. The Act includes the candidates that are running for the positions either in respective house of parliament or houses of legislature of each state and have provisions for qualifications and disqualifications for the same position. The act also talks about qualification and disqualification of a voter too. Hence, this act has a specified category under which the citizens qualified as voters are counted.

Under Representations of People's Act, 1951, section 62 talks about Right to vote under which sub clause (5) states that,

“(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.”²⁵

This section is a restriction on the Right to vote given under Article 326 of the Indian Constitution. Hence, this section restricts the prisoners who are serving a sentence or even under trial from voting in the elections. These are of voting are so general that people are sometimes denied of their rights without such degree of crime committed.

²³ Behan, Cormac, *Citizen Convicts: Prisoners, Politics and the Vote*, Manchester University Press, United States (2015).

²⁴ *Hirst v United Kingdom (No 2)* ECHR 681.

²⁵ The Representation of People Act, 1951 (India)

According to the Economic Times in 2019²⁶, it was recorder that around 900 million Indian citizens were set to vote in the Lok Sabha Elections and approximately 4 Lakh²⁷ Indian Citizens at the same time were not given the right to vote and these Citizens were the prisoners who are denied the same right to vote under Section 62(5) of RPA. These 4 Lakh people were all kept under the same umbrella despite some being under trials. An essential right of voting is compromised without any specific segregation as India is one of the few countries that aren't specific about such restriction of right to vote. Under the laws and values of many countries, the right so as to vote is considered as a human right and hence either granted completely without any such restrictions or are specifically restricted for people who really are a danger to the society.

To establish the right to vote of prisoners, it is important to discuss as to who according to the law comes under the definition of a prisoner. According to Section 3 of the Prisoner's Security Act, 1894, means any prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction, or by order of a Court-martial (criminal prisoner) and any other prisoner who is not a criminal prisoner is called as a civil prisoner.²⁸ Hence, it can be easily deluded from the definition that a prisoner is basically any person who is behind the bars of a prison who is either suspected of a crime he might have committed and hence is under trial or is currently undergoing punishment for any unlawful act.

In the case of *Anukul Chandra Pradhan v. Union of India*²⁹, the Supreme court upheld the validity of section 62 of the Representation of People's Act in two ways. The first that the court stated was the Right to vote is not a right which is conferred under Article 14 of the Constitution and the second thing that was states is the right to vote can be bound by certain limitations that are imposed by the legislature, such right is not a fundamental right under the constitution but a constitutional right and hence Section 62(5) is constitutionally valid and does not invalidate the basic structure of the constitution. So, in this judgment, the court clearly stated that denying the right to vote to prisoners does not violate Article 14 or Article 21 of the constitution.

In the Case of *Praveen Kumar Chaudhary v. Election Commission of India and Ors*³⁰, the petitioners contended that the fact that there is no actual distinction between a person who is in jail or the person who has been granted a bail or is out of jail. Second, that the Section 62(5) of the Representation of People's act restrict a person from voting but does not restrict a person from electing which simply means that a prisoner can contest an election but the same cannot actually go ahead and vote if he is in the jail. The petitioner also stated that this kind of distinction is violating Article 14 of the constitution and also the basic structure of it.

The supreme court in the judgment held that the Right to vote per se is not a fundamental right nor a right that can be exercised as a constitutional right, it is a common law right which is conferred upon the people of India through statutes. The court also mentioned that right to vote is subjected to certain limitations and hence Section 62(5) does not violate any of the contentions stated by the petitioner.

Hence, by the above judgments, it can be easy to form a view that neither the legislature nor the judiciary is ready to accept the fact the prisoner's right to vote up to some extent can be subjected to human rights as such. Right to vote is a heart of the democracy and without which the whole concept of democracy remains stale. It is important to have in mind that such restrictions may be necessary for establishing the sense of justice among people, but putting

²⁶ Economic Times (2019): "Indian Voter Population is 900 million," 10 March, http://economictimes.indiatimes.com/articleshow/68345392.cms?utm_source (last visited Jan. 10, 2021)

²⁷ Election Commission of India (2019): "Handbook for Observers," <https://www.eci.gov.in/files/file/9120-handbook-for-observers-march-2019/> (last visited Jan. 10, 2021)

²⁸ The Prisons Act, 1894, (India)

²⁹ *Anukul Chandra Pradhan v Union of India & Ors* (1997).

³⁰ *Praveen Kumar Chaudhary and Ors v. Election Commission of India and Ors* (2020).

the prisoners behind bars itself is a punishment, and taking away their right to act as a proper citizen itself weakens the idea of democracy in the country.

Conclusion:

Considering how right to vote is seen at a different stage of importance in different countries and constituencies. Right to vote has been the heart of the democratic societies and hence it has also been taken under the human rights by the international laws applicable. India completely takes away such right from the prisoners when there are examples of countries that have selective restrictions on the same. Prisoners are that part of the society that could not follow the social rules and hence they are outcasted from the public. When it comes to crime, even the punishments are based on the severity of crime and killing a person constitutionally but not literally is something that is importantly judged and not just randomly kept under the same platform. By the severity, such rights can be restricted. There are many countries who have successfully allowed all the prisoners the right to vote but country with such population where it gets to even control a small part of the country, such freedom would amount to a lot of understandable chaos, and hence the fact that the country can go for selective ban on the right of prisoners should never be taken out of consideration.