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Assessing Prisoners' Disenfranchisement: Human Rights Legitimacy and A Case for Voting Rights for Prisoners in India

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ABSTRACT

Human rights are inalienable basic rights that apply equally to all individuals. They are defined as ethical principles or norms, comprise specific standards of human conduct that serve as safeguards within domestic and international legal frameworks. They are often regarded as inherent, inalienable rights belonging to all individuals, irrespective of race, ethnicity, language, religion, color, status, or other differences. This article examines the right to vote from a human right-hand perspective. The right to vote or enfranchisement is recognized as a human right under International Human Rights law. However, the right to vote does not apply equally to all individuals in different circumstances or situations. There exist exceptions with respect to certain populations who are subject to loss of the right to vote or disenfranchisement. Extension of enfranchisement to prisoners has been a topic of debate for decades, with ununiform opinions from courts and national legislations of various nations. The present article analyses the rationale behind awarding disenfranchisement by authorities and the substantive claim to support disenfranchisement by such authorities to test its legitimacy particularly in accordance with the principles of the Constitution of India. The article also navigates through various lenses of international instruments and laws of different countries to shed light on the discourse of the right to vote for prisoners particularly in India. This article aims to contribute towards the recognition of the right to vote for prisoners.

KEYWORDS

Disenfranchisement, voting, human rights, prisoners.

1. INTRODUCTION

Human rights are universal and equal for everyone, embodying principles of equality and non-discrimination. Notably, human rights are intertwined with public governance as public participation, public affairs, voting and campaigning is inseparable from other human rights and the free exercise of these rights is vital for a meaningful electoral system that upholds the principles of democracy. For citizens to make collective decisions there must be a set of political institutions and rules which determine who is authorised to make those decisions and which procedures ought to be applied. Insofar as that power is authorized by the basic law of the constitution, it becomes a right for all qualified citizens.¹

The “Universal Declaration of Human Rights” (UDHR) of the United Nations lays out certain fundamental democratic principles, emphasizing the right of every individual to engage in their country’s governance, either directly or through chosen representatives under Article 21.² This right encompasses equal access of public, to ensure that the power of the government power aligns the needs of the people, through regular and transparent elections, characterized by universal suffrage, equal voting rights, and secret ballots or equivalent free voting methods. On the other hand, according to renown philosopher such as John Locke his social Contract theory suggest that, upon consenting to the social contract, men do not give up their natural liberty but rather their natural right to enforce the law of nature and punish violators.³ Therefore, according to John Locke, persons who disobey social norms should not abide to vote or take part in other social meetings.⁴ This belief is the foundation of disenfranchisement.⁵ The term “Criminal Disenfranchisement” was developed from the ancient notion of civil death⁶ to the legal consequences of natural death. It is essentially a deprivation of rights. Civil death was prevalent in ancient Greece and Rome as the mark of “infamy or dishonor”. It was conferred upon those who are guilty of heinous and treasonous crimes involving moral

¹ Norberto Bobbio, *The Future of Democracy* (Roger Griffin trans, University of Minnesota Press, 1987) 24.

² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 21.

³ J.W. GOUGH, *The Social Contract: A Critical Study Of Its development* (2nd edn Oxford Press 1957) 105.

⁴ Eli L. Levine, ‘Does the Social Contract Justify Felony Disenfranchisement?’ (2009)1 Wash. U. Jur. Rev. 193.

⁵ Deepika Thakur and Shobha Gulati, ‘Criminal Disenfranchisement in India: An International Humanitarian Approach’ [2023] 5 IJFMR

<<https://www.ijfmr.com/papers/2023/5/6016.pdf>> accessed 10 March 2024

⁶ Akashdeep Singh, ‘Denial of Right to Vote to the Prisoners in India: A critical Analysis’ (2022) 5 IJLMH 1216.

depravity. It resulted in denial of rights such as voting and holding certain public offices. Deprivation of prisoners from the right to vote varies significantly from one country to another. When it comes to voting rights for prisoners, numerous countries bar convicted criminals from exercising the right to vote in elections, as they have been legally deprived because of their criminal conviction. However, most countries bar those serving prison sentences from voting. Therefore, this practice is generally known as 'prisoners' disenfranchisement. Few countries impose certain restrictions and conditions on voting for prisoners, while others automatically suspend these rights for the duration of their sentence or even to the extent of post-parole. Interestingly, unlike many countries, India disenfranchises prisoners. As a common law country, the Commonwealth Franchise Act of 1902 was applied in India, it disqualified convicted individuals serving sentences from voting. When the Commonwealth Electoral Act, 1918 later came into existence, it remained unaffected. This disposition was mirrored under India's The Representation of The People Act 1951 (Act, 1951) which prohibits prisoners or persons in police custody to exercise voting under section 62 Act, 1951.⁷ The present article scrutinizes the restriction provisioned under section 62 as it contravenes the fundamental principles of the Constitution of India as well as International Human Rights principles. The article draws a critical examination of legal rules and practices related to disenfranchisement to determine the extent of legitimacy and the extent of unreasonableness of disenfranchisement.

2. RADICALISM OF SUFFRAGE TO DISENFRANCHISEMENT

It is within the framework of democratic principles and the notion of citizenship that the justifications for disenfranchisement have been a subject of debate. Proponents of disenfranchisement argue that individuals who commit offences have, in a way, breached the public contract and thus relinquished their right to participate in civil society. This justification is an exceedingly narrow one.⁸ This argument raises questions about the use of criminal law to create a subordinate class of persons subject to lifelong differential treatment.⁹ Disenfranchisement is imposed on a prisoner automatically without substantial official acknowledgment or justification, and with limited consideration of its impact on offenders and democratic political processes. While there may be some moderately persuasive arguments for disenfranchising certain individuals who commit severe crimes,

⁷ Representation of the People Act (Act of Parliament of India) 1951, s 62(5).

⁸ Richard Lippke, 'The Disenfranchisement of Felons' [2001] 20 Law and Philosophy 553.

⁹ Ibid.

sweeping disenfranchisement policies are contentious. Another potential argument is that disenfranchisement deters crime. However, this lacks any concrete evidence, and even if it did, concerns about creating a caste system as a means of deterrence cannot be valid, especially when viewed from the perspective of retributive justice. Arguments for denying the right to vote cannot hold cogent ground, as by being sentenced, prisoners are serving their punishment, and further deprivation only acts as an additional state-imposed punishment. Supporters of disenfranchisement struggle to identify state interests, while proponents cite protection against voter fraud, prevention of harmful legal changes, and safeguarding the purity of the ballot box, mechanisms shortcomings etc. However, these views must be scrutinized as voter fraud prevention is an insufficient rationale when statutes apply to crimes unrelated to elections. Excluding prisoners to maintain the “sanctity” of ballot boxes is not a viable argument, and it is unreasonable to believe that the rectitude and verdict of the electorate are safeguarded by such an exclusion. There is no doubt as to whether states may punish criminals by depriving them of any rights the state opts for. Nonetheless if disenfranchisement is to be considered a legitimate punishment, it should adhere to fundamental principles governing criminal sanctions, such as being imposed by a court pursuant to trials and gravity of crime. Yet, most countries do not require disenfranchisement to be imposed by a court as part of the crime reprisal, and disenfranchisement operates without proportion of the nature of the extent of severity of the offence.

3. RIGHT TO VOTE: AN UNENUMERATED CONSTITUTIONAL GUARANTEE UNDER THE CONSTITUTION OF INDIA

Interpreting natural rights stipulated at the heart of the Constitution of India is a well-established practice of the constitutional law philosophy. The Hon’ble Supreme Court, in a catena of judgments, recognized implied rights to include and extend to fundamental rights. Often described as judicial review, social philosophy or characterizing the Constitution as a living document,⁸ these interpretations have been instrumental in aligning the Constitution with the fundamental principles envisioned by the drafters of the constitution.¹⁰ Over time, unenumerated rights within the constitution have evolved to encompass several essential rights by the Supreme Court. Notably the principles observed in several landmark cases “*Right to life*” under article 21 which was recognized to include the “*Right to*

¹⁰ TK Tope, ‘Supreme Court of India and Social Jurisprudence’ [1998] 1 SCC Jour 8.

travel”,¹¹ “Right to privacy”,¹² “Right to livelihood”,¹³ “Freedom from torture, cruel, inhumane, and degrading punishment”,¹⁴ “Right to a speedy trial”,¹⁵ “Right to legal aid”,¹⁶ “Right to health”,¹⁷ and “Right to a clean and wholesome environment”.¹⁸ The “Procedure established by law” has been judicially interpreted to mean a procedure that is reasonable, fair, and just. Article 14 and 19 have been intricately intertwined with article 21, that came to recognize new rights and freedoms that were not explicitly enumerated in the Constitution. Similarly, the principles enunciated in the Preamble to the Constitution have been recognized as an integral and essential component. The preamble serves not only as a tool of interpreting the articles to the constitution but also encapsulates the features and guiding principles of provisions.

Incorporating these broader interpretations of constitutional guarantees, although not explicitly enumerated, right to vote is implied by the constitutional framework, which revolves around the principles of a “democratic republic”¹⁹ and “adult suffrage”²⁰ dually. Article 326 of the Indian Constitution mandates that all elections to the House of People and the Legislative Assemblies of the States should be based on adult suffrage.²¹ The Right to vote though unenumerated, is a foundational element for the functioning of a democratic nation. In the *Keshvanand* case, the Supreme Court emphasized the core of democracy, asserting that the “Right to vote” cannot be amended, repealed, or abolished by the legislature.²² The court ensured that the Right to vote is recognized as an implicit part of the constitutional framework, much like other unenumerated rights such as the “Right to privacy” and the “Right to a clean environment” making it imperative to safeguard the “Right to vote” as an integral component of democracy, derived from the Constitution itself.

Undeniably, equal to all fundamental rights, “Right to vote” is subject to reasonable restrictions. While the Constitution grants citizens the right to be registered as voters, Act, 1951 establishes

¹¹ *Maneka Gandhi v Union of India* [1978] AIR 1978 SC 597.

¹² *Kharak Singh v State of Uttar Pradesh* [1964] 1 SCR 332.

¹³ *Narendra Kumar v State of Haryana* [1994] 4 SCC 460.

¹⁴ *Inderjeet v State of Punjab* [1979] 4 SCC 246.

¹⁵ *Sher Singh v State of Punjab* [1983] 2 SCC 34.

¹⁶ *Hussainara v Home Secretary, State of Bihar* [1980] 1 SCC 98; *Ranchod v State of Gujarat* [1974] 3 SCC 581.

¹⁷ *State of Punjab v Mahinder Singh Chawla* [1997] 2 SCC 83.

¹⁸ *MC Mehta v Union of India* [1987] 1 SCC 395.

¹⁹ The Constitution of India 1950, Preamble to the Constitution.

²⁰ *Ibid.*

²¹ Manmeet Singh Rai, 'Tracing a Meaningful Right to Vote' (2011) 5 IJCL 127 <<https://www.nalsar.ac.in/sites/IJCL/20/Volume-5>> accessed 6 March 2024

²² *Keshvanand Bharati v State of Kerala* [1974] 4 SCC 146.

provisions for exercising this right.²³ Section 62 of Act, 1951 expressed in the dismissive clause is titled as the “*right to vote*” and in the foregoing lays down the qualifications necessary to be a voter. Taking an assumption without conceding with the language or the provision of the legislation if we assume that the legislation was the only derivation of the “*right to vote*”, then it would create a deviation with the constitutional guarantee as Act, 1951 being a parliamentary legislation, can be amended and repealed by the house of the Parliament in the easiest reasonable manner and could very well take away the right to vote.²⁴ Neither article 326 of the constitution nor section 62 of the Act, 1951 expressly grants the right to vote in its statutory language. However, in accordance with what is stated it can be implied that article 326 of the constitution grants or provides the right for an eligible individual to be recorded as a voter, while section 62 of Act, 1951 states down the rudiments to exercise this right to vote once eligible as a voter.

A. Right to Vote for Prisoners in India

In India while every new election cycle offers a chance to enhance voter’s access for India’s 970 million registered voters as of 2024, prisoners’ right to vote in India remains bitterly stagnant. According to the National Legal Services Authority “*Functioning of the Under Trial Review Committees*” January to March 2025 Report as of January 2025, there were a total of 5,06,660 prisoners in India. Nearly 3,75,000 prisoners were undertrials, comprising 74.2% of the total prison population.²⁵ Therefore, a majority of the Prisoners population are eligible to vote as they have not been convicted and are undertrial. Laws and policies have an impact on Prisoners and although the Supreme Court of India has consistently invoked constitutional fundamental rights to fortify the rights of prisoners, in *Sobhraj*,²⁶ a central place in the realm of human rights in India. These rights constitute the foundational entitlements of citizens that cannot, under any circumstances, be deprived. India extends fundamental rights to prisoners enshrined under the Constitution of India such as the right to equality under article 14, right to freedom of speech and expression under article 19, protection of rights and personal liberty under article 21 albeit certain limitations in exercising these rights.

²³ Rameshwar Dial, *Election Law* (4th edn, ALH 1985) 48.

²⁴ *Shubhankar Dam, Peoples Union for Civil Liberties v Union of India* [2009] 8 SCC 46.

²⁵ National Legal Services Authority, *Functioning of the Under Trial Review Committees* (Report January to March 2025) No. 3

²⁶ *Charles Sobhraj v the Suptd., Central Jail Tihar* (1978) 4 SCC 104.

Individuals under trial and not convicted for offences stipulated under section 8 of the Representation of the People Act, 1951, can contest elections and get elected. The principle notion is participation in elections by a candidate is considered a fundamental right encompassing an individual's autonomy under article 21 of the constitution that provides right to life and personal liberty. This individual autonomy also embodies political expression and participation of citizens in political governance of the country. On the other hand, the same Act, the Representation of the People Act, 1951 explicitly bars prisoners or any individuals in prison even before conviction or for any grave offence committed from exercising suffrage or enfranchisement. As right to vote is not recognized or considered as a fundamental right but merely a statutory privilege that reflects the regulatory authority of the governing body over electoral administration. The relevant section 62(5) of the representation of the People, Act 1951 that bars incarcerated persons or prisoners from exercising right to vote states: *"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."*²⁷ Therefore, the section puts a blanket ban for any prisoners to exercise voting in India. Further also undermines and creates a distinction of the principle of innocent until proven guilty on the same class of individuals by allowing some individuals to contest and participate in election and represent people before proven guilty while restricting other individuals of the same category to exercise their right to vote and participate in the political affairs of what will govern them even before proven guilty further ripping their right to equality under Article 14 despite their position that they have not been convicted. Further, it also creates a distinction as those undertrials, and bail are not barred or restricted from voting despite falling under the same class before conviction. The constitutional validity of the said section 62(5) was challenged in *Anukul Chandra Pradhan*²⁸ where the Hon'ble Supreme Court of India upheld the validity of the provision. The Court reasoned that the section aimed to achieve the laudable goal of decriminalizing politics. It also considered the practical challenges of conducting elections in prison, including the necessary infrastructure and support, as valid reasons for refusing the right to vote for incarcerated individuals. Furthermore, the Hon'ble Supreme Court

²⁷ Representation of the People Act (Act of Parliament of India) 1951, s 62(5).

²⁸ *Anukul Chandra Pradhan v Union of India* [1997] AIR 1997 SC 2814.

emphasized that the right to vote, as established in settled legal principles, is themed to curtailment imposed by the law as such any challenge to a provision defining the essence of the right to vote could not be made based on essential right in the Constitution. Therefore, the challenge to the constitutionality of Section 62(5) was deemed unavailable. Later, constitutionality of the same section was once again challenged before the Hon'ble Delhi High Court in the case of *Praveen Kumar Chaudhary*.²⁹ One of the contentions raised in this case was the distinction and the validity of individuals not on electoral roll who could still contest elections according to the second proviso of sub-section (5) of Section 62 but were prohibited from voting if in jail. However, referencing the earlier judgment in *Anukul Chandra Pradhan*³⁰ the court reiterated the constitutional validity of Section 62(5) of the act, 1951 and concluded that Section 62(5) was intended to prevent the criminalization of politics and maintain integrity in elections. Therefore, any provision furthering this objective was welcomed. This rationale of the court is unfounded and lacks merit by stating to maintain integrity in elections and prevent criminalization of politics while at the same time still allowing politicians to contest election and represent people before conviction or in undertrial process. This rationale paradoxically implies that while one section of prisoners undertrials are deemed undeserving of electoral participation on the grounds of breaching the social contract and threatening democratic integrity, another section of prisoners within the same class is considered deserving merely because they hold representative status. This creates an unjustifiable distinction among similarly situated individuals. Essentially, the courts have created a judicial limitation on a right that needs expansion and recognition.

B. Analysis of the Restriction on Right to Vote Under the Indian Representation of People Act, 1951

The theory of 'civil death' that convicts and criminalised, incarcerated individuals are barred from the right to vote of civil and political rights and of their legal rights,³¹ can be disputed as incoherent in accord of several judgments rendered by Indian Courts. The Supreme Court while discussing on the interpretation of the language and scope of Article 21 of the constitution in *Challa Ramkrishnan Reddy*

²⁹ *Praveen Kumar Chaudhary v Election Commission of India* [2019] WP(C) 2366.

³⁰ *Anukul* (n 28).

³¹ Adem Kassie Abeb, 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013) 46 CILJ of Southern Africa 411.

case³² stated that prisoners are also a person and these individuals as part, will not forego their fundamental constitutional rights. A prisoner whether he/she is a convicted prisoners or an under-trial detainee does not draw a halt as a human just because of being confined in a cell.³³ Subsequent to a conviction or a sentence a prisoner may be deprived of certain fundamental freedom, freedom of movement within the country's territory, right to reside and the right to practise profession.³⁴ But being detained does not deter them from enjoying or exercising other rights such as the right to acquire property, hold and dispose of property, article 21 of the constitution³⁵ including right to life.³⁶ Several judicial precedents have discussed on these aspects. In *Anukul Pradhan*³⁷ the principal question brought before the bench of the Supreme Court was: whether section 62(5) contravenes article 14 of the Constitution by putting a sweeping ban on right to vote for prisoners? article 14 provides exceptions to classification however the exception cannot be valid for class legislation. Classification under article 14 must fulfil the twin test:

- a) Classification must be on the foundation of an intangible differentiation; and
- b) This differentiation must have a cogent connection with the object of classification.

The court in *Anukul Pradhan* found that section 62(5) failed the twin test as observing both the sides of the coin, section 62(5) denies right to vote for prisoners or those detained without consideration as to whether these prisoners are confined in custody under a sentence of imprisonment or under trial or under civil wrong. Contrary, individuals under preventive detention and those who have been convicted and subsequently released on bail are granted the right to vote. Section 62(5) creates a classification of permissible voters and non-voters, within the same category of individuals. Therefore, the intention of the law to avert the infiltration of criminals into affairs while upholding election integrity seems to lack a reasonable connection.³⁸ Additionally, section 62(5) conflicts with another section within the same act, section 8(3), which

³² *State of Andhra Pradesh v Challa Ramkrishnan Reddy* [2000] AIR 2000 SC 2083.

³³ *ibid.*

³⁴ *Akashdeep* (n 5).

³⁵ *Constitution* of India 1950, art 21.

³⁶ JN Pandey, *Constitutional Law of India* (52nd edn, CLA 2015) 285.

³⁷ *Anukul* (n 5).

³⁸ N Prakash and M Yashasvi, 'Disenfranchisement of prisoners' [1998] CULR 334.

allows individuals convicted of offences carrying sentences of less than two years to run for elections or office.³⁹ This presents an ironic situation where prisoners, considered as civilly dead and consequently deprived of their voting rights and the ability to select their representatives, can, under the conditions of section 8(3), run for public office and become representatives themselves. Preposterously Section 8 of the Representation of the People Act, which deals with *disqualification on conviction for certain offences*, and bars individuals convicted of certain offences as contemplated under the section, it disqualifies individuals only after they are actually convicted. Given the notoriously slow pace of India's litigation process, it often takes years or even decades for a conviction to materialise if at all convicted effectively undermining the purpose of the provision and allowing individuals accused of serious crimes to continue contesting elections while their cases remain pending.

It can be critic that prisoners are treated as lesser citizens even before their guilt has been established. Considering the evolving legislative policies and the stance of Indian courts, the criminal code system predominantly operates on the principles of reintegration, reformation, rehabilitation mechanism. Reformation approach focuses on offering treatment and programs to deter offenders from reoffending, with the primary goal of reducing their propensity to commit further crimes. This reformative mechanism concentrates on addressing the needs of offenders, viewing them as individuals who, despite going astray, can respond positively to treatment. The rehabilitation mechanism deters future behaviours of criminals by reforming the individual, contending that crimes are often the result of social pressures, psychological issues, or situational problems. Once reformed within correctional facilities, offenders are reintegrated into society, where they may encounter the same conditions that initially led to their criminal behaviour. Therefore, it is crucial not only to reform them but also to ensure their continued reintegration into society as law-abiding citizens. Regrettably, the legislative intent behind section 62(5), which imposes a blanket ban on prisoners' right to vote are inconsistent with these principles of criminal justice, and Indian courts have not adequately recognized this discrepancy.

4. INTERNATIONAL HUMAN RIGHTS LAW ON RIGHT TO VOTE FOR PRISONERS

The UDHR elucidates key democratic principles, particularly in

³⁹ Akashdeep (n 5).

Article 21,⁴⁰ emphasizing the right of everyone to participate in their country's government, directly or through freely chosen representatives. It also stipulates the right to equal access to public service and mandates that the will of the people must be expressed through genuine elections held by universal and equal suffrage, in a manner that ensures secrecy and free voting procedures.

The International Covenant on Civil and Political Rights (ICCPR) echoes these rights under article 25 of ICCPR,⁴¹ affirming all citizens, without discrimination based on various attributes, has the right to partake in public affairs, vote, and be elected in periodic elections conducted through universal suffrage, secret ballots, and free expression of voters' will. Article 2 of also ICCPR provides that election participation and taking part in voting is a universal right that cannot be denied because of one's 'status'.⁴² At the Council of Europe level, the European Convention on Human Rights (ECHR) contains several articles concerning voting rights. Article 3: Protocol I of ECHR⁴³ obligates state parties to organize free and secret ballot elections at regular intervals, fostering the free expression of public opinion in legislator selection. Nonetheless, in many societies worldwide, millions of people are systematically or inadvertently disenfranchised due to their status, such as prisoners, though some countries do grant voting rights subject to specific requirements.

A. The European Court's Recognition of Right to Vote for Prisoners

Hirst v. the United Kingdom (No. 2),⁴⁴ (62) (Hirst 2) which was decided by the European Court of Human Rights (ECHR) in 2005, had significant impact on voting rights for prisoners in the United Kingdom (UK) and the European Council (EC). The case revolved around the issue of whether UK's blanket ban on prisoner voting was consistent with the ECHR Article 3: Protocol 1, the case built on the precedent established by *Hirst (No. 1) v. the United Kingdom*, which was decided in 2004, but the UK had not fully complied with the ECHR's ruling in that case. Therefore, the court in *Hirst 2* came to establish a precedent that became the foundation for legislative changes in Britain and the EC wherein it was observed and accepted

⁴⁰ UDHR (n 1).

⁴¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 25.

⁴² Ibid, art 2.

⁴³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, Protocol No. I) (ECHR) art 3.

⁴⁴ Case T-74025/01 *Hirst v The United Kingdom* No. 2 [2005] ECHR 681.

that the notion of of the prisoner's civil death is no longer appropriate in a modern democratic society and that the UK's blanket ban on sentenced prisoners voting could not be justified.⁴⁵

Key principles and rationale observed by the court in *Hirst 2*:

- a) **Margin of Appreciation:** the ECHR acknowledged the principle of the "margin of appreciation," which allows member states some degree of discretion in interpreting and implementing the ECHR. And Britain's ban on prisoner right to vote had exceeded this permissible margin.
- b) **Proportionality:** the court emphasized that any restriction on voting rights must be proportionate to the legitimate aim it seeks to achieve. Britain's sweeping ban was considered disproportionate because it applied without regard to the nature or gravity of the offense, the length of the sentence, or the individual circumstances of the prisoners.
- c) **Discrimination:** the ECHR opined that the sweeping ban on prisoner voting constituted discrimination without reasonable justification. It was noted that disenfranchising all prisoners, regardless of their offenses, failed to consider the principle of equality and the individual rights of prisoners.
- d) **Loss of voting rights because of criminal conviction:** the court also highlighted that disenfranchisement should be a direct consequence of a criminal conviction rather than an automatic and indiscriminate outcome of incarceration.

5. CROSS NATIONAL EXAMINATION OF LEGAL FRAMEWORKS FOR PRISONERS' VOTING RIGHTS

Legal jurisdictions around the world still debate on the issue of right to vote for prisoners. Despite being member states of the United Nations, and domestic laws aligned with the principles of International Humanitarian Rights Law, several nations including India, is yet or have denied enfranchisement for prisoners. However, there are notable examples of countries that ensures voting access to prisoners.

⁴⁵ Susan Easton, 'Protecting Prisoners: The impact of International Human Rights Law on the treatment of Prisoners in the United Kingdom' [2013] Prison Journal 93 (4)

A. Active Right Countries

In a 2012 report on European countries conducted by the Broadcasting Corporation, it was found that 18 countries within the council of European Union grants prisoners the right to vote, allowing all prisoners and incarcerated individuals full voting rights. Notably, the whole of the European Union extended voting rights to prisoners in 2016.

Following mentioned are notable model countries that grant right to vote for prisoners in Europe, Asia, America and the Africa.

B. Ireland

The case of Ireland serves a particular illustrative example, Ireland's efforts to secure enfranchisement for prisoners began relatively early. From the 1920s through 20th century, the law had remained inconclusive. As there was no law that restricted prisoners from voting, but the state lacked the mechanism to execute the exercise. Therefore, logistical and political justifications deferred it. Legislative actions throughout 1990s and 2000s to secure voting rights were ineffective. The Hon'ble Supreme Court unanimously rejected the right of citizens to exercise their franchise while serving a sentence in custody. The court found that while prisoners were detained in accordance with the law, some of their constitutional rights, including voting, were suspended.⁴⁶ Chief Justice Ronan Keane observed that *"despite the deprivation of his liberty which is the necessary consequence of the terms of imprisonment imposed upon him, the applicant retains the right to vote and could exercise that right if polling day in a particular election or referendum happened to coincide with a period when he was absent from the prison on temporary leave."* (*Breathnach v. Ireland*, 2001).⁴⁷ The issue gained recognition with the ruling in *Hirst v. United Kingdom*. In response to international pressure and growing political awareness eventually, the Irish government, in 2006, unilaterally granted prisoners the right to vote without necessitating public demands, media controversies, or court interventions. Ireland's approach aligns with its commitment to fulfilling human rights obligations aligned with international civil rights practices to ensure that every citizen, including prisoners, has a voice in the election of

⁴⁶ Cormac Behan, 'The benefit of Personal Experience and Personal Study: Prisoners and the politics of Enfranchisement' [2011] prison journal 91(1)

⁴⁷ *Ibid*

its government.⁴⁸

C. Israel

Under Israel's law, prisoners were allowed to vote however, Yigal Amir an Israeli was proposed to be stripped of his citizenship after he assassinated Israel's then Prime Minister, Yitzak Rabin. The proposition came through a private case filed by an individual against Rabin. It sought to strip him off the right to vote. The court however observed that disenfranchisement of any prisoner would wound Israel's democracy.⁴⁹ Imprisonment or sentence was the punishment given for his crimes. Any additional restrictions such as denial of right to vote would cause "*the base of all fundamental to shake.*" Subsequently in the 2006 general election, more than 9,000 prisoners were eligible and allowed to vote by casting ballots in prisons.⁵⁰

D. South Africa

The debate surrounding the enfranchisement of prisoners in South Africa was deeply influenced by political, social, and historical factors. Many of the individuals who assumed legislative roles in the 1990s had previously been incarcerated as part of the African National Congress movement led by Nelson Mandela. In 1999, the Constitutional Court of South Africa rejected the government's argument that permitting prisoners to vote would pose substantial financial, logistical, and administrative challenges.

The Hon'ble Constitutional Court made a significant declaration, emphasizing that the vote of every citizen represents a significance of dignity and personhood. "*The vote of 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*"⁵¹ It underscored that everyone, regardless of their social or economic status, is an integral part of the democratic South African nation, uniting

⁴⁸ Behan C and O Donnell, 'Prisoners, Politics and the Polls: Enfranchisement and the burden of Responsibility [2008] BJC 319.

⁴⁹ Ewald A, 'Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States' (2002) 9 WLR 10.

⁵⁰ Grayeff Y, 'Yigal Amir among 9,000 Jailed Voters' *The Jerusalem Post* (Jerusalem 27 March, 2006) <<https://www.jpost.com/israel/yigal-amir-among-9000-jailed-voters>> accessed 9 March 2024.

⁵¹ *August v Electoral Commission* [1999] CCT 08/99.

individuals across profound disparities of wealth and power. The court instructed the government to take reasonable measures to facilitate following exercise of voting for prisoners, asserting the right thrust of “*positive obligations on the legislature and the executive.*”

Following the court's order, in 2003, when the government attempted to evade its commitment, the court reiterated its earlier judgment and reaffirmed prisoners' right to vote and the principles that govern it. The government's arguments for lack of legislative provision that granted the same rights and a conveyance that such grant would suggest government being lenient on crime was firmly rejected by the court that the government could not justifiably disenfranchise prisoners to improve its public image or to correct misconceptions about its stance on crime and criminals.⁵² Consequently, the Hon'ble South African Court ordered the South African government to establish mechanisms that will enable detained and incarcerated prisoners to exercise the right to vote.

E. New Zealand

The New Zealand electoral landscape has been distinctive for its inclusiveness. It has been widely regarded as one of the world's most lenient nations regarding voting rights, even allowing non-citizens to participate in national elections and granting voting rights to permanent residents after just one year of residency. New Zealand granted all citizens right to vote including prisoners until 1956 when it disfranchised voting rights for prisoners. However, in 1975, New Zealand expanded its voting rights to include non-citizen residents with the enactment of the Citizenship Act, 1975. New Zealand thus had revoked voting rights for incarcerated individuals until in 2020 the country reinstated voting rights for all prisoners. However, the right is restricted and based on the gravity and type of crime of the incarcerated individual.

F. Canada

In the year 2002 the supreme court of Canada was faced with a verdict of 9 judge bench that led to a majority of 5:4, historically declaring the electoral law, 1993 that created division on exercising right to vote as being unconstitutional and in violation of fundamental rights. In a case brought by an individual against the government of Canada, in *Sauvé*⁵³ the Hon'ble Supreme Court of Canada determined that the law,

⁵² *Minister of Home Affairs v Nicro* (2005) 3 SA 280 (CC).

⁵³ *Sauvé v Canada, Chief Electoral Officer* [2002] 3 SCR 519.

which deprived prisoners serving sentences exceeding two years the right to vote in federal elections, was not in congruence to Canada's Charter on Rights and Freedoms.⁵⁴ The bench highlighted the fundamental nature of the right to vote emphasizing that this right could not be easily disregarded. The Hon'ble Supreme Court of Canada in *Sauve* conclusively held that allowing an elected representative to disenfranchise a part of the population was unacceptable.⁵⁵ This decision led to extensive public debate, with some vehemently criticizing what they perceived as activist judges delving into the realms of politics and penal policy. Critics argued that the ruling ran contrary to the will of the Canadian people and that alternative options, consistent with principles of liberal democracy, should have been considered for incarcerated individuals.

6. COUNTRIES WITH RESTRICTED RIGHTS

A. United Kingdom

Subsequent to *Hirst 2*⁵⁶, Britain's government was required to make legislative changes to comply with the ECHR's ruling. The United Kingdom had to amend its electoral laws and policies regarding voting rights for incarcerated prisoners. Britain's government initially initiated a consultation process to explore possible changes to the legislation. In 2012, the United Kingdom's Parliament passed the "Prisoners' (Voting Rights) Act," which allowed certain prisoners serving sentences of less than 12 months to vote. This change was intended to align with the principles of *Hirst 2*⁵⁷ observed by the ECHR. UK has a restrictive exercise on right to vote, prisoners in custodial, or detained does not have the right to vote by virtue of section 3 of the United Kingdom's Representation of the People Act, 1983. However, not all prisoners are disqualified, UK has a policy that allows certain classes of prisoners to vote. These includes:

- a) Un-convicted prisoners;
- b) Convicted but un-sentenced prisoners;
- c) Civil prisoners;
- d) Detained for wrong of non-payment of fine;
- e) Detained for wrong of contempt of court;
- f) Home detained;
- g) Those released on temporary licenses or on bail.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ *Hirst* (n 43).

⁵⁷ Ibid.

B. Germany

Germany extends voting rights to all prisoners except those for whom the court has explicitly deprived against exercising this right as part of their criminal sentence. These includes those convicted of terrorism.

C. Australia

Australia provides for right to vote for prisoners, however certain restriction and limitation are placed. Those convicted of three years, or more are not allowed or excluded from exercising the right to vote until the full sentence has been served and released.

D. Table Representation of Active, Restricted and Countries with Reasonable Restriction**Table 1.**

Sr. No.	Active Countries	Countries with restrictive rights	Countries with complete restriction
1	Australia	Australia	Argentina
2	Botswana	Brazil	Armenia
3	Ecuador	China	Belgium
4	Germany	Columbia	Bosna
5	Kenya	France	Bulgaria
6	Macedonia	Luxemburg	Chile
7	Moldova	Malta	Costa Rica
8	Germany	Pakistan	Estonia
9	Slovenia	Philippines	Greece
10	Croatia	Poland	Haiti
11	Czech Republic	Portugal	India

12	Denmark	San Marino	Jamaica
13	Ireland	United Kingdom	Japan
14	New Zealand		Kyrgyzstan
15	South Africa		Lebanon
16	Iceland		Malaysia
17	Switzerland		Mexico
18	Italy		Nigeria
19	Finland		North Korea
20	Ghana		Russia
21	Lithuania		South Korea
22	Ukraine		Thailand
23	Spain		Uganda
24	Montenegro		United States (allowed in Vermont and Maine)
25	Austria		
26	Israel		
27	Sweden		
28	Latvia		
29	North Macedonia		
30	Serbia		
31	Norway		
32	Canada		

7. RECOMMENDATIONS FOR REFORMS IN INDIA

Although it may be argued as to what extent rights can be retained for prisoners, it may be a square understanding to incline that deprivation must be proportionate to the crime or offences. For

example, most countries that grant prisoners right to vote are subject to a case-to-case basis by the court, where abrogation of right to vote is imposed by the court as part of the sentence of crime, in most cases for offences that entail imprisonment of three or more years. A blatant denial of the right without a practical justification cannot be sustained before principles of human rights. Law is constantly evolving and a law that does not align with fundamental rights must be addressed.

A. Legislative Reforms

(i) Constitutional Review

Initiating a constitutional review of article 326 to address the issue of voting rights for prisoners involving legal experts, policy makers, and civil societies etc. to ensure incorporation of wide opinions. Recognise the meaning and principle of *adult suffrage* under article 326 to eliminate segregation and distinction of prisoners and to recognise the social legitimacy to bring the right to vote for prisoners.

(ii) Legislative review

Along with a constitutional review, re-evaluating disenfranchisement criteria under the People Representation Act, 1951 to reconsider and determine its fairness and justice by questioning whether prisoners should be entirely deprived of their voting rights or if certain distinctions with restrictions and exceptions must be made out.

(iii) Creating a distinction between categories of prisoners

Categorizing prisoners based on the nature of their offenses. Non-violent offenders and those serving shorter sentences may be given the right to vote, while certain categories of violent offenders may be excluded.

(iv) Enabling voter registration inside prisons

Implementing a mechanism to enable prisoners to register as voters from within prisons. This can include setting up polling stations within correctional facilities to make it easier for prisoners to exercise their voting rights.

(v) Absentee voting

Allow prisoners to vote through absentee ballots, which can be facilitated by the prison authorities in coordination with the Election Commission. This would require a secure and transparent process to ensure the integrity of the vote.

(vi) Liaison with electoral authorities

Encouraging greater cooperation and communication between correctional facilities and election authorities to streamline a voting process mechanism for prisoners.

(vii) Oversight and accountability

Establishing an independent oversight and monitoring mechanisms to ensure that the voting rights of prisoners are respected, and that there is no discrimination or undue influence in the voting process.

(viii) Model international practices

To borrow from international best practices from countries that have successfully implemented a mechanism to safeguard voting rights with reasonable restrictions such as Germany and Australia that allows prisoners with less than two to three years serving period or Brazil that allows detainees and under trials.

(ix) Pilot programs

Considering conducting a pilot program in India in select prisons to test the practicality and effectiveness of allowing prisoners to vote may give an effective direction to draft a bill to adapt it to Indian practices.

B. Societal reforms

(i) Advocacy and Civil Society Engagement

Civil society and Human Rights Organizations can play a crucial role in advocating for social reforms to address the issue of right to vote for prisoners. Such organizations can serve as a platform to voice the marginalized incarcerated individuals to the general public and bring about mobilization of the public to bring reforms at the legislative level. Civil society organizations, human rights groups, and legal experts can advocate for these reforms and work with government agencies to implement them. Further, these organizations can collaborate with policy makers, legal experts as well as the public to contribute to the discourse of social reform aimed to

ensure prisoners like others have a right or participation in their government's decisions.

(ii) Rehabilitation and Reintegration Programs

Reintegration and rehabilitation can be pivotal in ensuring prisoners to seamlessly regain their right or reintegration in the society post sentence. By providing inmates with access to education, vocational training, mental health and substance abuse treatment, and counselling services, these programs must aim to equip them with the necessary skills and support to successfully reintegrate into their communities. Such reintegration strategy can foster a sense of responsibility, engagement, and belonging, ultimately benefiting the broader society as a whole.

(iii) Educational Programs and Forums

Establishing programs within prisons to educate inmates about the importance of voting, the electoral process, and the candidates and issues at stake in local, state, and national elections can be a powerful tool to help these individuals improve their civic and democratic knowledge and overall literacy. Moreover, it can empower prisoners to engage, be informed and have active participation in the political process. Further, also to strengthen the knowledge and awareness of political candidates by engaging them in such programmes to have due information on the needs and problems of Prisoners.

8. CONCLUSION

India's status as one of the world's largest democracies, accentuates the question of prisoners' right to vote in the country. Denying prisoners the right to vote during their imprisonment is viewed as a form of "civil death," one that violates human rights principles. Injudiciously, the impact of such denial extends even to individuals undertrial, who consists of 76% of India's prison population per the National Crime Records Bureau, 2022. Many of these prisoners are first-time offenders, often involved in minor or technical violations of the law. Labelling someone as a convict carry a significant societal stigma, and this should not be compounded by civil disenfranchisement. Voting is not merely a privilege bestowed by the government on its citizen but a right essential to the country's democratic fabric. For an offender, the right to vote is arguably even more vital than for the ordinary citizen, as it serves as a tangible reminder of their duties under the social contract and reinforces the democratic principle of equality. Denying this right diminishes civic respect and weakens adherence to the rule of law, ultimately hindering the

rehabilitation process, which should foster an understanding of the responsibilities of citizenship. Reiterating the value of order and the rule of law, enabling prisoners to exercise their voting rights can even empower them to engage with interest in the formulation of laws and guidelines, making them active participants in legislative processes outside the walls of prisons. Such an inclusion serves to counteract the sense of alienation from society that a prisoner is already facing due to incarceration. Moreover, society as a whole benefits from prisoner enfranchisement, as it promotes social inclusion and supports their reintegration into the community. Imprisonment should be viewed as a means to an end rather than an end in itself. A longitudinal study of a cohort of Minnesota public school students,⁵⁸ found that there were 'consistent differences between voters and non-voters in rates of subsequent arrest, incarceration and self-reported criminal behaviour'.⁵⁹ Although there lacks statistical data or comprehensive study to support this view but it is worth noting that it supports the arguments advanced that participation in political life can promote a sense of citizenship.

India's position that there is no inherent or constitutional right to vote for prisoners is contrary with global democratic principles and India's constitutional philosophies itself. The legislative policies of several countries give an ideal example of embracing a middle path, granting prisoners the right to vote taking into consideration certain conditions, such as the gravity of their offense or the duration of their sentence. Such approach will desist imposing a blanket ban and recognize individual circumstances of prisoners. Denial of right to vote for prisoners pose a threat to the principles of democracy, human rights, and fundamental rights. Ironically in India, where candidates with criminal records or those contesting elections from jail have a substantial presence in the Parliament, it is conspicuous that representation of prisoners in the electoral process is pivotal to political fairness democratic principles.

Addressing the practical challenges of enabling prisoners to vote, a range of mechanisms, such as setting up polling stations within penal institutions and implementing absentee voting with postal ballots, have been recommended in this article. Although logistical hurdles exist, they should not serve as a rationale for denying prisoners their constitutional right to vote, enfranchisement does recognize the prisoner as a citizen and allowing the vote would not entail onerous financial burdens or

⁵⁸ Uggen and Manza 'Voting and subsequent crime and Arrest: Evidence from a community sample' [2004] CHRLR 36

⁵⁹ Susan Easton, 'The Prisoner's right to vote and civic responsibility: Reaffirming the social contract?' [2009] 56 (3)

pose security risks.⁶⁰ It is imperative that India align its legislative provisions with that of International Human Rights standards, by recognizing that denying prisoners the right to vote serves as an additional punishment and hinders their potential for reformation and social rehabilitation or should the contemporary political history of this country reflect the present reality where wealthy politicians, shielded by money, influence, and access to bail, are allowed to contest elections despite serious indictments, while undertrial prisoners accused of petty offences but lacking resources are denied the same electoral rights? It cannot be overstated that Prisoners' rights remain important because prisoners are isolated, cut off from society, physically and socially excluded, and marginalized on the fringes of the polity. A rights-based approach to imprisonment offers the prospect for improvements in the treatment of prisoner.⁶¹ Ultimately, upholding the right to vote for all citizens, regardless of their incarceration status, is a crucial step in building a fair, honest, and open electoral system, one that aligns with the principles of justice, freedom, equality, fraternity, and dignity anchored in the Indian constitution's preamble.

⁶⁰ Susan Easton 'The prisoner's right to vote and civic responsibility' [2009] Probation Journal 56

⁶¹ Ibid