



Right to Vote: A Selected Choice

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ABSTRACT

There has been a very significant debate on our constitution regarding the nature of right to vote, which categorically says about the universal adult franchise that emphasizes every Indian citizen above eighteen years of age and having no discrimination on any ground. But People's Representative Act explicitly denies it saying no person shall have the right to vote if he or she is confined in a prison by any means. Hon'ble Supreme Court also emphatically reiterated the same in its judgments that right to vote is only a statutory right, and the legislator can determine the terms on which right to vote can be enjoyed. But the criminal jurisprudence very categorically says that punishment is a means to reform and not to alienate debarring any person his right to franchise as it is considered an extra punishment which is quite unreasonable and unappreciable. Moreover the right to vote imposes a positive obligation on the state to make proper arrangement to ensure its effective exercise. In this paper an attempt has been taken critically to analyze the said matter.

Keywords: *under trial, right to vote, Democracy, Supreme Court, constitution*

INTRODUCTION

The preamble of our country proclaims that we are the largest Democratic Republic in the world. Democracy, as a form of government, believes in government by the people, for the people, and of the people. The inherent set up of a Democracy is always said to be social equality, where the people choose their representative to form a government just not to rule but to administer them. Our constitution also envisages the right to all its citizens the same i.e. to

elect their representatives who are above 18 years of age¹. The constitution of India and the People's Representation Act both provide the basic foundation of the electoral system in India to meet the objectives. Hence the office of the chief Election Commission plays a very vital role in the election system of the nation. Recently in Nagendra Chidam VS India, case The Hon'ble Supreme court of India in its judgment has given direction to the central government for introducing e-voting rights to all Non-Residence Indians. The government and the Election Commission therefore, all seem to be on board for extending such rights to a greater class of Indian citizens (approximately 11 million in number), who were otherwise deprived of that right. Indeed a very important and welcome step taken by the government to include those persons in the electoral campaign.

But on the other hand what is seemed to be quite a distorting thing is in relation to the reason behind its limitation imposed by the statue towards the under trial persons. It is a common fact that an under trial is a person who has not been convicted of the charge(s) for which he has been detained and is presumed innocent in law. The 78th Report of Law commission² also defines under trial in a similar way that a under trial is a person who is in Judicial custody or remand during investigation. The National Crime Research Bureau's latest figures revealed that there are 2, 78.503 under trials in Indian prisons today³, constituting more than two-third of the total number of persons behind the bar. Besides this at the end of 2013, as per the National Crime Report Bureau (NCRB) report there are 382 persons have been

¹ The constitution 61st amendment.

² Meaning of under trial.

³ The Hindu Oct 30, 2014.

sentenced to death and waiting for either relief or execution and over 3047 i.e. 1.1% of 2.78 lakh under trials have been behind the bar over five years without trials. Close to 1.75 lakh people facing criminal charges are unable to secure bail before three months. Over 40% (1.1 lakh) of the under trials take more than six months to secure bail, while over 30,000 spend more than two years and over 64,000 spend more than a year in jail before they are released on bail. Of the total number of under trials, it is also found that nearly half are under thirty years of age and over seventy percent of them have not completed school education. Of course in this context the apex court of our country passed direction of release of all under trials who have spent more than half of the maximum punishment for the crime they are charged with. Hence one thing comes to our mind automatically and constantly that a person who is under trial if found innocent then what shall happen to him? Can the state compensate for the agony, mental torture, deprivation of family life suffered by them during all these years which they spent in jail and can their lost honour or reputation can be restored by law? Is there any provision for that? Whether the under trial who is deprived from his right to vote be compensated and it is found that he is innocent but remained in jail without any reasonable and probable cause. So it is a very disheartening fact that a person, who is not convicted and only under trial, is deprived from casting vote from jail or from his detention place but can vary well contest election, is not it a mockery of law? That a person who cannot cast his vote can become a M.P and M.L.A or a minister there are of course several instances in our country. It has raised desirous question on the validity of the existing elected system. It can also be said that who are in the lawful or unlawful custody of the police cannot also vote. Now the question is whether a person who is convicted or not but confined in jail as a prisoner or in police custody be barred from casting his vote. Whether such a restriction would violate his fundamental right vested in him under Article 14, 19 and 21 of our constitution and whether such a provision should be declared ultra vires and void to the constitution. The validity of such law which debar a slum dweller accused of even a minor offence debarred him from voting because he is languishing in jail, being too poor to offer bail bonds, while charges of murder, rape or corruption to be elected as member of legislatures. It means this provision labours the rich smugglers and Black

marketers who can offer bail bonds, against poor under trials.

A PIL had challenged Sec 62 (5) of Representation of People's Act 1951⁴ which provides for certain restrictions on voting rights of the prisoners. The provision categorically says that "No person shall vote in any election if he is confined in a prison whether under a sentence of imprisonment or transportation or otherwise or is in the law full custody police." Also provides that nothing in this subsection shall apply to a person subjected to preventive detention under any law for the time being in force. Recently of course an amendment has been added a proviso to sub section (2) of Sec 62 of the said RP Act to state that a person cannot cease to be a voter while in detention as his or her right is only "Temporarily Suspended." Section 8⁵ read with section 11⁶ of the 1951 Representation of People's Act provides (excepting for special offences mentioned therein) a person is not disqualified to stand for election or vote unless he is convicted of any offence, and sentenced to imprisonment for not less than two years, such person even if not released on bail will be entitled to stand for election but not for vote. A case related to this was filed by Mr. Sachar, former president of PUCL on behalf of Anukul Chandra Pradhan⁷ in the supreme court under Article 32 of the constitution. The Hon'ble Supreme court however did not accept this plea and dismissed the write petition in the judgment saying that "a person who is in prison as a result of his own conduct is, therefore deprived of his liberty during the period of his imprisonment cannot claim equal freedom of movement, speech and expression with others who are not in prison"⁸ but this thing raises certain genuine apprehensions in the minds of the human rights activists. The decision in the aforesaid case is to a certain extent a reversal of the ongoing crusade of the court for ameliorating conditions of prisoners do within the prison walls and iron bars now act as barriers. Are not the prisoners entitled to implement even of to the statutory rights? Moreover, out of the total number of prisoners in the country about 72% of them are not even convicted of any crime, secondly even those who are convict, a large number are first time offenders involved in

⁴ 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 lawful custody of the police.....

⁵ Disqualification for conviction for certain offences.

⁶ Removal or reduction of period of disqualification.

⁷ AIR 1997 SC2814.

⁸ 9th July 1997.

technical or minor violation. In Kalyan Chandra Sarkar vs. Rajesh Ranjan alias Pappu Yadav⁹ case it was observed that fundamental right of an under trial prisoner under Article 21 is not absolute and, therefore it may be circumscribed by prison manual and other relevant statute and imposing reasonable restrictions on such right. In this case the apex court ordered the transfer of the accused from his existing jail to another jail in different state. The court held that it had the power to order such transfer in exercise of its powers under Article 142 of the constitution though the jail manual did not provide for such transfer.

In a similar view in the case of Mahendra Kumar Sastri vs. Union of India and another¹⁰ the Hon'ble Supreme Court observed that the restriction imposed by the Representation of people's Act was not unconstitutional and was in public interest. Further, The apex court in Chief Election commissioner vs. Janchaukidar¹¹. This was an appeal from the judgment of the Hon'ble Patna High Court declaring that prisoners and those in lawful police custody would be disqualified from contesting elections to the union. It is also expressed the view that right to vote is a Statutory right and not a fundamental right. The law gives it and can take it away if requires. In the case of Sangram Singh vs. Union of India¹² the Hon'ble Supreme court also reiterated that the right to vote is a statutory right and it is not a common law right. The right to vote or to stand as a candidate for election is not a right but is a creation of Statute or special law which is subject to the limitation imposed on it.

Chapter 43 of the General election 2014 Reference Hand Book also makes it clear saying "Under trial prisoners and persons confined in prison otherwise are not eligible to vote, even though their names are registered in the electoral votes." There seems to be confusion about it in the prison department. It is said that an under trial prisoner wants to cast vote, the post office will help in the procedure. The prisoner will have to ask family to get his or her voter ID card for this purpose. Based on this, the prison official will inform the district election officer who will send the ballot paper and after that only the concerned person will be able to cast the vote on the date of voting. In its draft recommendations on detention the NHRC said "The provision of right to vote should be ensured to the under trials." NHRC also impressed upon the Government to immediately ratify the convention

⁹ AIR 2005 SC 972.

¹⁰ AIR 1983 SC 299.

¹¹ Civil Appeals 3040-3041 of 2004 decided on 10 July 2013.

¹² Sangram Singh V. Election Tribunal, AIR 1955 SC425.

against torture, which India has signed it. Ratification can also be done through an amendment to Indian Penal Code. Article 326 of our constitution categorically says and permits the disqualification of a voter under the constitution or law on the ground of nonresident, unsoundness of mind, crime or corrupt or illegal practice. It is fine, but it would be quite unethical to include crime as suspicion of a crime and/or undergoing trial in respect of crime "Therefore the current practice of conflicting under trials with convicted prisoners in depriving them of voting rights is clearly in correct. Sec 60 (d)¹³ of the People's Representation Act 1951 read with sec. 60 (b)¹⁴ of the Representation of people's Act 1951 allows government servants and certain other class of persons do vote via postal ballot following the Election commission's consent. In another separate and special case it is also permitted to those who are detained under Goondas Act, National Security Act (NSA) and conservation of Foreign Exchange and Prevention of smuggling and Narcotic Traffic Activities Act (COFEPOSA) to cast their vote. In this a special ballot paper is sent to the detaining person and through which he can cast his vote, hence a special provision can be made. Age restriction on

¹³ Sec 60 (d) of RP Act 1951 : any person subjected to preventive detention under any law for the time being in force to give his vote by postal ballot, and not in any other manner, at an election in a constituency where a poll is taken, subject to the fulfilment of such requirements as may be specified in those rules.]

¹⁴ Section 60 (b) of RP Act 1951: any of the following persons to give his vote either in person or by postal ballot, and not in any other manner, at an election in a constituency where a poll is taken, namely:—

- (i) any person as is referred to in clause (c) or clause (d) of sub-section (8) of section 20 of the 1950-Act;
- (ii) the wife of any such person to whom the provisions of sub-section (3) of section 20 of the 1950-Act apply and such wife being ordinarily residing with that person in terms of sub-section (6) of that section;

voting are justified on the basis of electorate's capacity of independent of decision making and residence citizenship requirement are explained by the requirement of community membership or bonds. What explains restrictions based on one's status as an under trial? At present only members of the armed forces, those on election duty, some displaced communities, senior government ministers and Indian diplomats outside the country can vote by postal or through a proxy.

Filing a PIL Mr. M.L. Sharma a learned advocate, in his petition categorically stated that the amendment made by parliament on People's Act 2013 is an unconstitutional. He in his petition filed that a politician of ruling party or party in power would need to prevent rivals from contesting an election by asking police to file a case and to arrest the rival. The bench further clarified that "our criminal justice system is based on the principle of innocent until proven guilty. "We can presume our under trials in custody to be guilty as far as right to contest election is concerned. We are of the view that the impugned People's (Amendment and validation) Act 2013 is within Legislative competence of Parliament."

This discrimination goes against our jurisprudence and also the well-organized human right in the administration of justice as laid down by standard minimum rules for the treatment of prisoners approved by the First United Nations congress held at Geneva in 1955 and approved by the United Nations Economic and Social Council (UNESCO) 1977. Where rule 84 (2) mandates that "unconvicted persons are presumed to be innocent and shall be treated as such". It is clearly amounts to a violation of their rights. The finding of the court also runs counter to the rights guaranteed by Article 25(b) of human rights guaranteed under the international Bill of Human Rights which especially provides that "every citizen shall have the right and opportunity without any of the distinction mentioned Article 2 and without reasonable restrictions to vote and to be elected at genuine periodic election shall by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; which specially recognizes a right to vote and to be elected at genuine periodical election 'Article 21 further provides that the people shall be protected by universal and equal suffrage. Country like U.K the right to vote is denied only if a person is convicted and during the time he is detained in a penal

institution. In Israel even a convicted person in jail is also allowed to vote.

Of course, in this respect another justified point may be mentioned for upholding the law is that it would require deploying of a large police force for the conduct of election. But it was never pleaded that under trials should be taken personally to polling booths to cast their votes. All that are claimed that the right to vote by personal ballot as given to the smugglers and other detainee under the preventive law. This did not require even one extra police man to be deployed.

SUGGESTION AND CONCLUSION

It is universally found, that in all democratic countries, right to Adult Franchise is a fundamental requirement and the foundation of a society. Basing on this, it can very safely be said that an individual casts vote as a part of the society. As a citizen, he always casts his wish and shows that he has a separate and different identity. So, in that respect if he is not allowed to do his duty as a voter, while he is under trial, will seem him as he has no stake in the society and consequence which will be felt as a symbolic separation and disenfranchised member of the society. In addition to that his physical separation from the community will serve to alienate him and his identify further with his fellow convicted mates. Moreover, excluding the s under trials from taking political participation and treating them as secondary citizens, negates their civic capacity and revokes their social status. It is quite unfortunate that after the Union Home Ministry sent out an advisory to States and Union Territories in January 2013 basing on the Supreme Court's kicked off the process of releasing under trials that have undergone half their likely jail terms in prison, many of them remain in detention. The main reason, they are still in judicial custody appears to be poverty, as most of them are too poor to afford bail bonds or provide sureties. "This is certainly not the spirit of the law, and poverty cannot be a ground for incarcerating a person," the Supreme Court observed recently while passing a set of directions. The court found that many of the cases involved were compoundable, and yet many people have been imprisoned without the benefit of compounding being extended to them. It has also reiterated that an under trial review committee, comprising the District Judge, District Magistrate and Superintendent of Police, should be set up in each

district. The onus of constituting such a panel for every district has been put on the National Legal Services Authority; acting in coordination with the State Legal Services Authority. The Code of Criminal Procedure which was amended in 2005 has inducted Section 436A, to reduce overcrowding of prisons. Under this section, an under trial prisoner shall be released on own personal bond if he or she has undergone detention for a period extending to one half of the maximum period of imprisonment specified for that offence.. It is not clear why these measures have not yielded results. One reason could be that there is inadequate legal aid and advice available to poor prisoners. The legal services authorities in various States must play a principal role in inculcating awareness among prisoners about their rights, especially provisions that entitle them to freedom. Democracy which ensures the participation of the people in the election process as the best guarantee of human rights. But unfortunately, if one critically examines the functioning of democratic governments one will find that peoples' freedom and democratic rights are stultified. The Supreme Court while enunciating the doctrine of basic structure in Kesavananda Bharati¹⁵ case has observed that Republic form of Government is an example of basic structure. Right to vote is a very important part in the Republican form of Government. So, can the same be denied on the ground of confinement or incarceration? In the Indira Gandhi¹⁶ case also, The Hon'ble Supreme Court observed that free and fair election is also a part of basic Structure. The denial of the right to vote to a particular group on the ground that they are in prison whereas according the same right to other persons who have committed the same offence but are staying out because of their greater access to values is a travesty of justice. Are all persons inside the bar are criminals? Is an affluent person, who is charged but who has been released on bail, to be accord a preferential treatment? Another interesting facet is that a person who is inside prison cannot vote but can contest because Sec(8) read with sec 11(a) of the Representation of People's Act 1951¹⁷, clearly states that " Except for special offences mentioned therein a person is not disqualified to stand for election or vote unless he is convicted of any offence and sentence to imprisonment for not less than Treatment of Prisoners (1977) clearly mention that

unconvicted persons are presumed to be innocent and they have right to communicate (Rule 84 (2). The other thing is that when electoral reforms are on the anvil to make democracy more meaningful, the recent judgment of the Supreme Court of India upholding a statutory provision depriving the under trials of their voting rights, appears a bit retrograde. It is a fact that a democracy is premised on the notion that the voters select the politicians and not the politicians the voters. We consider, India is the second largest democracy in the world. But does India deserve to hold this title in true sense? The constitution of India faced emergence of a totally new concept of "basic structure". The concept which includes lawfully concept like fundamental rights, federal structures etc. which cannot be amend against the spirit of constitution. This great concept includes the free and fair election and the right of participation in election. So even though the right is considered as the basic structure of our constitution. But simply taking away this right from limited citizens and making them lesser citizens than others, becomes against the spirit of not only the constitution but also against democracy. This shows that India is a state which talks about giving all kinds of fundamental rights to not only criminals but also those who are just alleged of an offence, but still has never thought about giving this to them. Voting like other rights is not a privilege which government grants to citizens. It is something that citizen argue and agree as fundamental to a democratic system which must be played substantially beyond the reach of the politicians to modify. Finally voting is an act that emphasizes the value of order and the rule of law. By allowing inmates to exercise their rights to vote, can influence law and policy making in a constructive manner. In short allowing inmates to vote includes them in responsible law making process rather than leaving them having no stake in it there by extending the alienation from society that the offender might already feel in a society like ours, a tag even an under trial prisoner attached with a person in itself is one of the biggest stigma of all. Adult franchise is the surest way of achieving the goals of Justice, Liberty, equality, Brotherhood and dignity enshrined in our constitution. So it is rightly and emphatically says that denial of voting right is a negation to his citizenship which may lead to his civil death. Here one more think may come to mind such as " resources crunch "or administrative inconvenience that may lead to a case of disenfranchising the under trials .But that can be also avoided just by introducing the system of e-ballot voting as it is going to be implemented for

¹⁵ (1973) SC 1461. Basic Structure Doctrine.

¹⁶ Appeal (Civil) 887 of 1975.

¹⁷ Disqualification arising out of conviction and corrupt practices.

NRIs. In another prospective if we find the jurisprudence of fundamental rights which always provides for exceptions in the name of “reasonable restriction” i.e. security of state, public order, contempt of court, friendly relation with foreign countries, decency, defamation or incitement of an offence, sovereignty and integrity of the country, the ban on right to vote by the under trials cannot be justified on any of the exception to the right guaranteed. So the concept of restricting on voting right of a under trial person has no other reasonable explanation, and it is rightly urged that all under trial prisoners should be permitted to vote irrespective of his crime unless and until he is specially barred or disqualified from tendering the same. The right to vote imposes a possible obligation on the state to make proper arrangement to ensure its effective exercise. Looking into the human right movements and Article 14, 19 and 21 of our constitution, this restriction upon right to vote of under trials should be removed by the government itself and if this restriction is not removed by the government, our courts, especially the Apex court should not hesitate in delivering this provisions as null and void and ultra vires to the constitution. The court should also show its regards and respect to the human rights as shown by it in the past, so that the right to adult franchise can be utilized by all citizen of India.

