

# IMPRISONMENT: A PUNISHMENT OR A MEANS FOR IT : AN ENQUIRY INTO THE PRISONER'S RIGHT TO VOTE

Charu Modi\*

## INTRODUCTION

When India got independence in 1947, it was designed to function as true democratic machinery. The machinery gave equal rights to equals including the right to vote. The issue raised here is the right of prisoners to vote. The moot question is whether a person who is imprisoned (convicted or under-trial), should be allowed to exercise his franchise or not? While talking about this right, there are different views, some in favour and some against. Those who can get bail for any offence are allowed to vote but who cannot get bail are not allowed to vote. Now the anomaly is that if in case of an offence punishable with death or life imprisonment, if bail is granted to a person, he can exercise his franchise. Looking otherwise, it can very safely be said that those persons who cannot manage to get bail or are not able to raise the amount required or the surety required for getting bail and thus remain in jail, cannot exercise their right to vote. Likewise, those who are in lawful or unlawful custody of the police cannot also vote. Even though both are not acquitted of their charges, one is allowed to vote while the other is not.

It has been alleged that this restriction makes them lesser citizens and places them outside purview of privileges that are given to other citizens without there being a demonstrable need to do so. According to the data, percentage of votes cast was just 48.74% in the recent general elections of 2004.<sup>1</sup> But the reality is that close to 2 lakh citizens in the country are eligible to vote but cannot. And it is not because they do not have voter ID cards but because they are prisoners. It is an irony in our election law, that one can contest elections in India behind bars, if your conviction is less than 2 years, but one cannot vote. Mohammad Shahabuddin, one of India's most notorious Criminal-Politicians, is the Member of Parliament from Siwan, Bihar, with the Rashtriya Janata Dal party of Lalu Prasad Yadav. He is currently serving a life sentence for kidnapping with intent to murder, and is facing trial in more than thirty criminal cases including eight of murder, twenty of attempted murder, as well as kidnapping, extortion,

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\* B.A.L.L.B. (Hons) – III Year, Dr. Ram Manohar Lohiya National Law University, Lucknow.

<sup>1</sup> See < <http://www.indian-elections.com/india-statistics.html> > Last accessed on 14 February 2010.

etc and is part of the ruling United Progressive Alliance government of Manmohan Singh.<sup>2</sup> All this makes us reconsider our laws relating to prison reforms and laws giving us the character of being democratic.

## INTERNATIONAL PERSPECTIVE

### Australia

In Australia, the *Commonwealth Franchise Act 1902* disqualified from voting those convicted and under sentence 'for any offence punishable by imprisonment for one year or longer'.<sup>3</sup> The provision remained substantially the same when the *Commonwealth Electoral Act 1918* was enacted, and so it stood until 1983, when the disqualification was amended to apply to persons 'under sentence for an offence punishable under the law of the Commonwealth or of a State or Territory by imprisonment for five years or longer'.<sup>4</sup> The effect of the introduction of that provision was to reduce the numbers of prisoners disqualified from voting.

### Canada

The Canadian Supreme Court in *Sauve v. Canada (Chief Electoral Officer)*<sup>5</sup> with respect to the first objective of promoting civic responsibility and respect for the law said denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than enhance those values. The legitimacy of the law and the obligation to obey the law flows directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.<sup>6</sup> The majority view is summarized in the reasons of the Chief Justice:

"The right of every citizen to vote, guaranteed by s. 3 of the Canadian Charter of Rights and Freedoms, lies at the heart of Canadian democracy. The law at stake in this appeal denies the right to vote to a certain class of people—those serving sentences of two years or more in a correctional institution. The question is whether the government has

<sup>2</sup> <[http://www.metrojoint.com/blog\\_more/Prisoners\\_can\\_stand\\_for\\_an\\_election\\_in\\_India\\_but\\_cannot\\_vote/pid/29837/userid/9421](http://www.metrojoint.com/blog_more/Prisoners_can_stand_for_an_election_in_India_but_cannot_vote/pid/29837/userid/9421)> Last accessed on 31 July 2009.

<sup>3</sup> Section 4, *Commonwealth Franchise Act 1902*.

<sup>4</sup> Act no. 144 of 1983 omitted subsection (4) and added the new subsection (6)(b) in these terms. The provisions was subsequently renumbered (by Act no. 45 of 1984) and became s. 93(8)(b).

<sup>5</sup> *Sauve v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

<sup>6</sup> *Ibid* at para. 26, 42, 43, 46.



established that this denial of the right to vote is allowed under s. 1 of the Charter as a 'reasonable limit demonstrably justified in a free and democratic society.' The right to vote which lies at the heart of Canadian democracy, can only be trammled for good reason."

## United States of America

In the United States the opposite view prevails. In *Richardson v. Ramirez*<sup>7</sup> Supreme Court divided six to three in favour of upholding a Californian provision disenfranchising 'persons convicted of an "infamous crime"'. It should be noted that this provision applied, not only to those serving sentences, but to those who had completed their sentences and been released. The decision of the majority was based largely on a provision (Article 2) to the Fourteenth Amendment to the United States Constitution, which contemplated that persons who had participated in 'rebellion or other crime' might be disqualified from voting. The United States Supreme Court has also upheld a state provision imposing a literacy requirement as a qualification for voting.<sup>8</sup> Only two US states (Maine and Vermont) permit prisoners to vote, although Utah and Massachusetts also did so until 1998 and 2000 respectively.

In France and Germany, courts have the power to deprive people of voting rights as an additional punishment, but this is not automatic. Eighteen European states, including Spain, the Netherlands and the Republic of Ireland, place no formal prohibition on prisoners voting.

## INTERNATIONAL INSTRUMENTS

Academic debate has tended to favour prisoner enfranchisement on multiple grounds. In these accounts, the vote is seen as a fundamental, if not inalienable, human right in International law, whose denial to prisoners is indirectly racially discriminatory.<sup>9</sup>

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<sup>7</sup> *Richardson v. Ramirez* 418 US 24 (1974).

<sup>8</sup> *Lassiter v. Northampton County Board of Elections* 360 US 45 (1959).

<sup>9</sup> Ronnit Redman, David Brown and Bryan Mercurio, 'The Politics and Legality of Prisoner Disenfranchisement in Australian Federal Elections' forthcoming in Alec Ewald and Brandon Rottinghaus (eds) *Democracy and Punishment: International Perspectives on Criminal Disenfranchisement*, CUP, 2008; Melinda Ridley-Smith and Ronnit Redman, 'Prisoners and the Right to Vote' in David Brown and Meredith Wilkie, *Prisoners as Citizens*, The Federation Press, 2002. As referred in Graeme Orr, 'Constitutionalising the franchise and the status quo: The High Court on prisoner's voting rights', Law School, University of Queensland, October 2007, p. 2 visited at <[http://www.democraticaudit.anu.edu.au/papers/20071019orr\\_prisonervotin grights.pdf](http://www.democraticaudit.anu.edu.au/papers/20071019orr_prisonervotin grights.pdf)> Last accessed on 31 January 2010.

Article 21 of Universal Declaration of Human Rights provides for '*the right of every individual to take part in the government of his country, directly or through freely chosen representatives.*'

Article 25 of the ICCPR states:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: To vote and to be elected at genuine periodic elections this shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."<sup>10</sup>

The distinctions mentioned in Article 2 are distinctions 'of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Article 10(3) of the ICCPR provides:

'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.' The International Convention on the Elimination of All Forms of Racial Discrimination requires states to guarantee to everyone, without distinction as to race, political rights, the right to vote and to stand for election, on the basis of universal and equal suffrage.<sup>11</sup>

All these international documents recognize the right to adult franchise not only as a fundamental, inalienable right but also as a human right.

## INDIAN POSITION

In India opposition is basically due to an emotional reflex that the person alleged for committing an offence has violated some or the other right of another *bona fide* citizen of India or has committed a wrongful act against the State and so his rights should be seized. A person who does not abide by the law and the values of the society deserves this punishment of being barred from having any say in the democratic setup of the system.

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<sup>10</sup> Article 25 ICCPR: 'Every citizen shall have the right and the opportunity, without unreasonable restriction: (a) To take part in the conduct of the public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the by the electors;

(c) To have access, on general terms of equality, to public services in the country.'

<sup>11</sup> Article 5 of ICERD.



Even the Constitution of India provides for adult franchise with some restrictions imposed by Article 326 which reads as—

“The elections of the house of people and of the legislative assembly of every state shall be on the basis of Adult Franchise; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non- residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.”<sup>12</sup>

Even according to the Indian Legal System, under section 62 (5) Representation of People Act, 1951 -

“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.”

In *Anukul Chandra Pradhan v. Union of India*<sup>13</sup>, the Supreme Court upheld the validity of the provisions of section 62(5) of the Representation of Peoples Act, 1951 on two grounds; firstly that Article 14 does not affect it, and secondly the Court observed:

“The right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute prescribing the nature of the rights to elect cannot be made with reference to fundamental rights in the Constitution. The very basis of challenge to the validity of sub sec (5) of sec 65 of the Act is therefore, not available and this petition must fail.”

## **Ban on Right To Vote of Prisoners: An Analysis**

Adult Franchise is the very essence of democracy especially in India. This is exercised in a way to express one's will of being governed. This gives a voice to every citizen in India making them a citizen in the true sense. This is a method to show one's consent or dissatisfaction about methodology of governance applied on a person. This gives a Right to choose one's representative in general elections in the name of 'Right to Vote'. Therefore this right to vote in India should emanate from Article 19(1) (a) of the Constitution, i.e., Right to freedom of speech and expression. Likewise it becomes the

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<sup>12</sup> V.N.Shukla, *Constitution of India*, (10<sup>th</sup> Edition, Eastern Book Company, 2006) 812.

<sup>13</sup> *Anukul Chandra Pradhan v. Union of India* AIR 1997 SC 2841.

Fundamental Right to an individual to vote in general elections and choose his representative. In this way Section 62 (5) of Representation of People Act, 1951 becomes violative of one of the major Fundamental Right guaranteed by the Constitution of India. Although the jurisprudence of fundamental rights always provides for exceptions in the name of 'reasonable restrictions'. Article 19 (2) provides for 'reasonable restrictions' on Article 19 (1) (a), i.e., Security of State, Friendly relations with foreign States, Public Order, Decency or Morality, Contempt of Court, Defamation, Incitement to an offence, Sovereignty and integrity of India. The ban on Right to Vote by the prisoners (convicted or under trials) cannot be justified on any of the exceptions to the right guaranteed.

Moreover, this concept of adult franchise is enumerated in Article 326 of Constitution of India. And this is the Article from which the voting rights in general election find its legitimacy. A close look at this article will reveal that it lays some restrictions on right to vote in general elections. This is done by legislature in cases of 'non residence, unsoundness of mind, *crime* or corrupt or illegal practices'. But Section 62 (5) of Representation of People Act, 1951 restricts voting rights of not only convicted but also under trials. This leads to widening of the term 'crime' under this article to such an extent so as to include under trails also. This is against the principles of criminal justice in India as an accused is considered innocent until proven guilty but here before proving guilt punishment of being a lesser citizen is awarded. This causes a serious concern for the legislature to reconsider the law and frame and enforce suitable ones accordingly.

A democracy is premised on the notion that the voters select the politicians and not the other way round. India is considered the second largest democracy in the world. But does India deserve to hold this title in its true sense? The Constitution of India faced emergence of a totally new concept of "basic structure". The concept included lawful components like fundamental rights, federal structure etc which cannot be amended against the spirit of the Constitution. This great concept includes free and fair elections also,<sup>14</sup> in turn including the right of participation in elections. So even this right has been considered in the basic structure of the Constitution of India which is the most sacred document ever made in Indian polity. But simply an Act took away this Right from a few citizens of India making then lesser citizens. This becomes against the spirit of not only the Constitution but also against democracy.

According to the ban on this right, the government must show that allowing prisoners to exercise this right infringes the rights of others. Giving prisoners the right to vote would aid their rehabilitation, which is essential if they are to avoid reoffending after being released. Denying prisoners the right to vote implies that they are lesser citizens

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<sup>14</sup> M.P. Jain, *Indian Constitution Law* (4th ed. Wadhwa and Co Nagpur, New Delhi 2003) 943.



damaging their dignity and sense of self-worth, undermining efforts to help them control their behavior. Voting encourages prisoners to take an interest in current affairs, which will aid their reintegration into society. An offender once punished under the law should not incur the additional penalty of loss of the franchise. The principle aim of the modern criminal law is to rehabilitate offenders and orient them positively toward the society which they will re-enter on their release. It is understandable that this process is assisted by a policy of encouraging offenders to observe their civil and political obligations.

## CONCLUSION

Voting, like other rights, is not a privilege which government grants to citizens. It is something that citizens argue and agree as fundamental to a democratic system and must be placed substantially beyond the reach of politicians to modify. Finally, voting is an act that emphasizes the value of order and the rule of law. By allowing prison inmates to exercise their right to vote, they are allowed to influence law and policy making in a constructive manner. In short, allowing inmates to vote includes them in responsible law-making processes rather than leaving them having no stake in it thereby extending the alienation from society that the offender might already feel.<sup>15</sup> In the entire paper while discussing about the voting rights of prisoners it is easily inferable that stopping a person from his right to vote in a democracy leads to 'civil death'. This concept of restriction on voting rights of prisoners came into existence as they are considered to violate the human and fundamental rights of others. But, has anyone ever thought that this restriction in India is valid even for under trials? Out of the total population of 2.26 lacs of prisoners in the country, 1.63 lacs were under trials.<sup>16</sup> Thus 72% of the prison population is not even convicted of any crime. Secondly, even those who are convicts, a large number of them are first time offenders involved in technical or minor violations of law. Very few are recidivists or hardened criminals.<sup>17</sup> In a society like ours, a tag like prisoner attached with a person in itself is one of the biggest stigmas of all. So, it should not be accompanied the civil death of a person as well. The penal laws have already specified punishments for all types of offences which should not be increased by adding this restriction to it. Imprisonment must remain as a means to an end and not an end in itself. Adult franchise is the surest way of achieving the goals of justice, liberty, equality, brotherhood and dignity enshrined in the Preamble.<sup>18</sup>

<sup>15</sup> <<http://www.jhslmbc.ca/files/articles/RightToVote.pdf>> accessed on 14 February 2010.

<sup>16</sup> Source: Ministry of Home Affairs, Government of India available at [www.mha.nic.in/](http://www.mha.nic.in/)

<sup>17</sup> J Guha Roy, *Prisons and Society: A Study of the Indian Jail System* (Gian Publishing House, New Delhi 1989)

<sup>18</sup> *Ibid.*