

PRISONER'S CONUNDRUM: ANALYZING SECTION 62(5) OF THE REPRESENTATION OF PEOPLE'S ACT 1951

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ABSTRACT

The foundational stone of any democracy is the sacrosanct right of the people to choose their own leaders. The nuance of this unassailable right is defeated when there are demarcations carved out and nitpicking of “those who can choose” versus “those who cannot.” Therefore, restricting people, especially those against whom the alleged charges have not been proven before the court of law thus rendering them innocent yet goes against the constitutional postulates. Prisoners, whether declared convicts or not still have most of their fundamental and legal rights intact. This raises a pertinent question- why to devoid them of their right to vote? This paper discusses the position of the right to vote in India and scrutinizes whether the law granting people this right, videlicet, section 62 (5) of the Representation of People's Act 1951 goes against the democratic threads of the rule of law. It also brings out the various discriminatory provisions in the law thus highlighting the lacunae in the system altogether.

Keywords: Democracy, Right to Vote, Discrimination, Prisoners.

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INTRODUCTION

Imagine a country, basking in 76 glorious years of independence, sipping 76 years of the freedom potion,¹ and yet caught in the chains of orthodox mechanisms, retarding the actual growth of the nation. The essence of any true democracy is giving its people the right to choose who can govern them. It is only plausible that if we are to give up certain rights, get restricted for certain activities, and surrender them to a “handful”, giving them the power to rule over us, the right to choose such individuals must necessarily be vested in every individual. India is renowned as one of the biggest democracies in the world, giving such a right to its people. The principle of a universal adult franchise² is widely recognized by the Supreme Law of the Land. The Preamble or the source key to our Constitution grants India the permanent stature of

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¹ Saima Andrabi, “76th Independence of India: History, Significance, Celebration and Facts”, *The Quint*, (India, 13th August 2022).

² The Hindu Bureau, “India proved sceptics wrong, says President Droupadi Murmu”, *The Hindu*, (India, 14th August 2022).

democracy, making this particular characteristic immune from getting amended. It is no hidden truth that the Constitution also recognizes the principle of punishment- or, retributing people for their wrong deeds.³ An implicit convention, rather, a law read in consonance with the postulates of the Constitution is the principle of presumption of innocence⁴, or simply put, the right of being seen innocent until proven guilty before the law. This is jarringly in contravention of the law in section 62 (5) of the Representation of People's Act 1951⁵ (hereafter referred to as the RPA Act), which essentially restricts the right of prisoners from participating in the elections of the country. The contours of the right to vote and granting the same to a prisoner have always been a bone of contention in the constitutional jurisprudence of the nation. Several arguments have been pleaded in numerous cases before the courts of law. Each time, the bench always held that the exemption of prisoners from voting in the electoral process of the nation is a valid law. Besides, the courts have had a plethora of cases discussing the true nature of the right to vote, is it purely a statutory right, or additionally has a constitutional genesis as well? The author, of this article, makes an attempt to not only analyze the abovementioned section in great detail but also to assert that the right to vote besides being a statutory right also has a constitutional basis and it is high time, that the judiciary accepts the waves of temperamental changes and puts an end to the prisoner's dilemma by giving them an opportunity, long-denied, to embrace themselves as being members of an independent judiciary.

NATURE OF THE RIGHT TO VOTE

The courts time and again have reminded us that the right to vote is only a statutory right. These rights are manifestations of a statute.⁶ They are exercised in accordance with the provisions of their parent statute.⁷ They have no existence outside the statute which procreated them.⁸ When a right is created by a statute that provides for a special remedy to enforce it, the said remedy must be of service.⁹ It has been held in a catena of judgments that the right to vote is a genesis

³ Indian Penal Code, 1860, s 53.

⁴ *Ranjitsingh Brahmajeetsingh Sharma v State of Maharashtra*, (2005) 5 SCC 294. The court held that the presumption of innocence is in granted the status of a human right protected under Article 21 of the Constitution.

⁵ Representation of People's Act, 1951, s 62(5)- No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police: Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.

⁶ *P. Nalla Thampy Thera v. B.L. Shankar*, (1984) Supp SCC 631.

⁷ *Ibid.*

⁸ *N. P. Poonuswami v. Returning Officer, Namakkal Constituency*, AIR (1952) SC 64.

⁹ *Ibid.*

of a statute.¹⁰ The Hon'ble Court in the case of **Jyoti Basu v. Debi Ghosal**¹¹ held that the right to vote is neither a fundamental nor a common law right. The right is strictly a statutory right, limited to the provisions of the RPA Act.¹² Similarly, in the case of **People's Union for Civil Liberties v. Union of India**¹³, the majority held that the right to vote can be wielded limited to the statute¹⁴. The view of Justice P. Venkatarama Reddy stood in disparity with his brother judges, as he went on to opine that the right to vote has a constitutional basis shaped by the RPA Act 1951¹⁵. However, the 3-judge bench in the majority stood in incongruity and held that the right to vote is strictly limited to the statute.¹⁶

The Hon'ble Court in the case of **Kuldip Nayar v. Union of India**¹⁷ aptly distinguished between the right to vote and freedom of voting¹⁸, and while upholding the decision of the court in *Jyoti Basu* (supra) held that the right to vote is straightlaced a statutory right. In the same case, the Hon'ble Court held that although the right to vote is congruous to the concept of a free and fair election, it is not (sic) an ingredient of the same¹⁹, it is imperative but not incumbent. Henceforth, the right to vote as granted under section 62(1)²⁰ of the RPA Act 1951, has statutory limitations under sub-section (5)²¹ which disqualifies persons confined in prison or an accused under the lawful custody of police for an offense punishable by at least 3 years of imprisonment from voting.

While this has been the view of the courts, the author would like to argue that the right to vote also stems from constitutional provisions. The Constitution of India is the supreme law of the land.²² It is the grundnorm of all other laws. Any law made by the legislature has to essentially be in conformity with the provisions of the Constitution.²³ Any statute which appears to

¹⁰ *Kabul Singh v. Kundan Singh & Ors.*, AIR (1970) SC 340; *Rama Kant Pandey v. Union of India*, AIR (1993) SC 1766; *Mohan Lal Tripathi v. Dist Magistrate Rae Bareilly*, AIR (1993) SC 2042; *Thampanoor Ravi v. Charupara Ravi & Ors.* AIR (1999) SC 3309.

¹¹ *Jyoti Basu & Ors. v. Debi Ghosal & Ors.*, AIR (1982) SC 983; *G. Narayanaswami v. G. Pannerselvam*, (1972) 3 SCC 717; *C. Narayanaswamy v. C.K. Jaffer Sharief* (1994) 6 SCC 632.

¹² *Javed v. State of Haryana*, (2003) 8 SCC 369.

¹³ *People's Union for Civil Liberties v. Union of India*, AIR (2003) SC 2363.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Kuldip Nayar* (supra).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Representation of the People Act, 1951, s 62 (1).

²¹ *Supra* at 5.

²² *Manoj Narula v. Union of India*, (2014) 9 SCC 1.

²³ The Constitution of India, 1950, Art. 13(1).

desecrate the constitutional provisions is struck down as being unconstitutional.²⁴ Thus, all laws act subservient to the highest law of the land. The concept of a universal adult franchise is the linchpin of any democracy.²⁵ It has been the focal point of our historic Constituent Assembly debates, where members unanimously favored the notion that the right to vote is an integral part of the democratic process of the nation²⁶ required to break down the walls which confine men.²⁷

It is true that the right to vote is a statutory right.²⁸ However, the notion that it is strictly a statutory right is untenable as it brings the significance of Article 326 to a minuscule.²⁹ Articles 325 and 326, when read together, provides for the foundation of the right to vote in the Constitution. While Article 325 provides for equality to all in the spectrum of inclusion in electoral rolls³⁰, Article 326 guarantees a universal adult franchise.³¹ It also contains the grounds on which citizens may be disqualified from voting.³² Henceforth any statute that seeks to restrict the said right must necessarily be circumscribed within the walls of the said articles. In the case of **Rajbala & Ors. v. State of Haryana**³³, the Hon'ble Court held the right to vote to be a constitutional right. Furthermore, free and fair elections have been held as sacrosanct to the basic structure of the Constitution.³⁴ Thus, out of necessary implication, no statute can completely negate the right to vote.³⁵ The Constitution places the right to vote on a higher standing than ordinary statutory rights.

There have been instances wherein justices have come up and extended their support to declare the right to vote as a constitutional right. Justice P Venkatarama Reddi J, in a dissenting opinion, held that the right to vote flows from the Constitution. Similarly, Justice Jasti Chelameswar opined³⁶ that in a parliamentary democracy, it is unacceptable how the right to

²⁴ J. Venkatesan, "Court: no statute can violate Constitution", *The Hindu* (India, 17th November 2021).

²⁵ *Mohinder Singh Gill v. Chief Election Commissioner*, (1978) AIR 851.

²⁶ KM Panikkar, "*Hindu Society at Crossroads*" (1955) quoted in Granville Austin, "*The Indian Constitution: Cornerstone of a Nation*", (2002).

²⁷ S Radhakrishnan, Foreword in B Shiva Rao, "*The Framing of India's Constitution: A Study (1968)*" quoted in Granville Austin, "*Working of a Democratic Constitution: The Indian Experience*", 18 (2002).

²⁸ *Supra* at 20.

²⁹ The Constitution of India, 1950, Art. 326.

³⁰ The Constitution of India, 1950, Art. 325.

³¹ *Supra* at 29.

³² Legislature can confine the right only on grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice.

³³ *Rajbala & Ors. v. State of Haryana & Ors.* AIR (2016) SC 33. Also see *Desiya Murpokku Dravida Kazhagam (DMDK) & Anr. v. Election Commission of India*, (2012) 7 SCC 340.

³⁴ *Rampakavi Rayappa Belagali v. B.D Jatti*, (1970) 3 SCC 147,

³⁵ MP Jain, *The Indian Constitutional Law* (7th ed., Lexis Nexis 2014).

³⁶ *Justice K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

vote is not granted the status of a fundamental right. He consequently supported the contention that the said right is beyond a mere statutory right and has Constitutional force.

Furthermore, Article 21³⁷ of the Universal Declaration of Human Rights (UDHR) promotes the participation of citizens in their democracy directly through elected representatives. Article 51³⁸ of the Constitution places an obligation on the state to respect the international treaties India is a part of. Similarly, the global practice prevalent in the world demonstrates that many prominent democracies such as Canada, South Africa, and Switzerland permit prisoners to vote³⁹. Certain countries like Japan have provisions wherein prisoners are granted conditional voting rights⁴⁰. Amidst such a scenario, the example that India is setting, being one of the largest democracies, is alarming. It is difficult to have a provision that stands in dissonance with the concept of popular sovereignty⁴¹ in the largest democracy in the world. Thus, the author opines that the right to vote besides being a statutory right is also a constitutional right protected under the conjoined reading of Articles 325 and 326 of the Constitution. The impugned section 62 (5) of the RPA Act transgresses the very essence of these provisions and is demonstrative of its unconstitutional nature and thus must be struck down in toto.

QUESTION OF ARTICLE 14-

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While supporting the constitutionality of the impugned section, the courts have by large held that the section stands in consonance with the postulates of Article 14. They have argued that the article does not permit abstract treatment for all.⁴² It advocates for like treatment for all similarly placed.⁴³ Equality before the law or equal protection of laws is not synonymous with the symmetry of treatment for all.⁴⁴ It permits classification which is reasonable and free from arbitrariness.⁴⁵ When the reasonability of any action taken by the legislature⁴⁶ is challenged before a competent court, the decision is left to the discretion of the court, which has an obligation to consider the political and social needs of the society before delivering its

³⁷ Universal Declaration of Human Rights, 1948, Art 21- "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives".

³⁸ The Constitution of India, 1950, Art. 51.

³⁹ Bhakti Parekh, "Voting rights of undertrial prisoners", *Live Law* (India, October 18, 2021).

⁴⁰ *Ibid.*

⁴¹ Tushar Kanti Saha, "Democracy in Danger: Criminality and Corruption in Lok Sabha Elections", 1922 (2000).

⁴² *Supra* at 35, p 884.

⁴³ *Ibid.*

⁴⁴ *Arun Kumar & Ors vs. Union of India & Ors.* (2007) 1 SCC 732.

⁴⁵ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁴⁶ It can be the executive or any authority under Article 12 (Constitution of India, 1950).

judgment. Any classification seeking immunity under Article 14 must necessarily pass the test of reasonability to demonstrate that the differential treatment meted out is lawful. It must be based on an intelligible differentia having a reasonable nexus to the purpose sought to achieve.

Any valid classification must necessarily be based on the object for which it was created. While equality permits the legislature to practice differentiation, it creates an obligation on the latter to exercise this right bona fide, videlicet for the progress of the society. There have been many instances wherein the Hon'ble Court has upheld the said section. In the case of **Anukul Chandra Pradhan v. Union of India & Ors**⁴⁷, while upholding the constitutionality of the section, the court observed that such restriction on the voting of a person in incarceration is a logical consequence of their imprisonment.⁴⁸ Once he is confined because of his own conduct, he cannot claim equal standing on grounds of freedom of movement and expression with the ones who are outside prison⁴⁹. Additionally, the resource crunch⁵⁰ arising due to the unavailability of an adequate police force⁵¹, greater security, and other infrastructure to ensure that the prisoners do not use this opportunity to escape is another reason for their subjugation of the right to vote. Furthermore, any law made which distinguishes amongst persons or things against others must be so applied, that everyone in the same group must be subjected to the same law. The impugned section is applicable to all persons confined in prisons⁵², thus making for a reasonable classification. All persons so confined are equally placed therein⁵³ and hence are subjected to equal treatment under the provision.

It has also been laid down that the section passes the criteria of having a reasonable nexus sought to achieve. Any classification based on a differentiation must have a prudent relation with the purpose the legislature intends to achieve.⁵⁴ The intention of the legislator behind introducing such a law is imperative to determine the reasonability of the law in question. The sole purpose of the section is to keep in check the growing criminalization of elections.⁵⁵ It aims to prevent prisons from turning into a "vote bank" for influential politicians. In the case

⁴⁷ *Anukul Chandra Pradhan v. Union of India*, AIR (1997) SC 2814.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, the same police needed to be deployed to ensure fair and free elections.

⁵² Except persons detained due to preventive detention, *Mahendra Kumar Shastri v. Union of India & Anr.*, (1984) 2 SCC 442.

⁵³ *Ibid.*

⁵⁴ *Prabodh Verma v. State of U.P.*, (1984) 4 SCC 251.

⁵⁵ *Supra* at 47.

of **S. Radhakrishnan v. Union of India & Ors.**,⁵⁶ the Hon'ble Court held that any law which is made in light to protect the sanctity and purity of elections, and in the public interest⁵⁷ is of great constitutional significance and must be held to have a lawful objective. It is well-settled that the courts cannot strike down any law if it seems to be unjustified.⁵⁸ Only if the law is violative of the Constitution, can such a law be declared ultra vires.

The author would like to present a different view of this settled proposition. There is no doubt that Article 14 of the Constitution speaks for equality and equal protection of laws.⁵⁹ It recognizes that naturally people are distinct, and consequentially they are all at different footings. Henceforth, it practices the abstract concept of treating the likes similarly, and not all similarly.⁶⁰ While indulging in such practice, the law permits the legislature to classify persons or things accordingly to suit the purpose of the special law created.⁶¹ However, it obligates them to be mindful and allow for only a reasonable classification having a rational nexus with the objective.⁶² It is the argument of the author that the impugned section fails to pass the test of reasonableness needed for sustaining Article 14.

Any classification made must necessarily be reasonable.⁶³ The law which differentiates must be equally applied to all similarly placed.⁶⁴ Any distinction further made cankers the provision and makes it arbitrary. The impugned provision does not qualify as a valid classification for it places dissimilar groups of people on an equal footing. It arbitrarily treats all categories of prisoners in the same league. Treating an undertrial on an equal level with a convict while making an exception for the ones preventively detained is highly unjustified and whimsical. Additionally, prisoners who get bail are allowed to vote while the ones who could not⁶⁵ are devoid of their voting right. The logic that an accused on bail while voting will not attack the election probity, while an accused voting inside the prison wall, is highly irrational. Thus, subjecting different categories of people to the same law while allowing exceptions to some is not only absurd but arbitrary. Additionally, the objective of the legislature must rationally have

⁵⁶ *S. Radhakrishnan v. Union of India & Ors.* (2018) 9 SCC 725.

⁵⁷ *Supra* at 52.

⁵⁸ *Supra* at 6.

⁵⁹ The Constitution of India, 1950, Art. 14.

⁶⁰ *Supra* at 35.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *State of West Bengal v. Anwar Ali* (1952) SCR 284.

⁶⁴ *Ibid.*

⁶⁵ *Supra* at 39.

a nexus to the classification so made.⁶⁶ If the law so made fails to support the intent of the legislature, the differentiation so caused by it is deemed to be arbitrary. An undertrial is one who has been in judicial custody or remand during his investigation wherein he stays an accused. He is presumed to be innocent until his guilt is proven otherwise. Whereas a convict is any person under the sentence of court or a court martial.⁶⁷

The concept of prison disfranchisement⁶⁸ germinated from the old notion of civic death wherein persons found guilty of crimes were stripped of their civil rights as a consequence of their unlawful conduct. However, the concept is rigidly followed in India for in the case of **State of Andhra Pradesh v. Challa Ramakrishna Reddy**⁶⁹, the Hon'ble Court held that prisoners while being lodged in jail do not cease to be human⁷⁰, with certain restrictions they still have some of their rights whether civil or fundamental intact. The RPA Act 1951 has certain provisions which disqualify convicts from contesting elections in view to protect the sanctity of elections. Along similar lines, while the stripping of a convict's right to vote is justified, subjecting an undertrial to the same punishment is grossly unjustified. It digresses the principle of presumption of innocence and arbitrarily strips down the accused from his rudimentary right to freely participate in the electoral process. The section vehemently attacks the rights of almost millions of undertrials who are still awaiting justice.

Additionally, the RPA Act 1951 in section 8⁷¹ provides for disqualification from contesting elections upon conviction. Section 8(3)⁷² however stipulates that if any individual is convicted for less than 2 years, for any offense not listed in either sub-section (1) or (2), he will still be an eligible contestant for elections. The impugned section in the present case goes against the said section. While in the Act, convicts are allowed to contest in the elections⁷³, the undertrials who are to be presumed innocent are stripped of their right to vote on the pretext of curbing the criminalization of politics. Furthermore, there are Acts like the Presidential and the Vice-Presidential Elections Act 1952⁷⁴ and the Presidential and the Vice-Presidential Elections rules

⁶⁶ *Supra* at 63.

⁶⁷ Prison's Act, 1894.

⁶⁸ Pablo Marshall, "Voting from Prison: Against the Democratic case for Disenfranchisement", (1, vol. 11 Ethics & Global Politics 2018).

⁶⁹ *State of Andhra Pradesh v. Challa Ramkrishnan Reddy*, (2000) 5 SCC 712.

⁷⁰ *Ibid*.

⁷¹ Representation of the People Act, 1951, s 8.

⁷² Representation of the People Act, 1951, s 8 (3).

⁷³ Wasim Beg, Swarnendu Chatterjee, Garvish Jain & Monika Prajapat, "Decriminalisation Of Politics: Does Section 8 Of The Representation Of The People Act, 1951 Pass The Muster Of Rationality", *SCC Online*, (India, 10th September, 2021).

⁷⁴ Vice Presidential Elections Act, 1952.

1971⁷⁵ which do not prohibit an undertrial from voting in the Presidential election.⁷⁶ While such acts allow undertrials to vote in Presidential elections which are considered to be of great prestige in any democracy, the existence of a contrary provision in the same democracy is highly ambiguous. Thus, it is contended that the impugned provision does not meet the hybrid amalgam of Article 14 as there is an absence of an intelligible differentia having a reasonable nexus to the objective sought to achieve.

CONCLUSION

The denial of the voting rights of prisoners on the grounds above stated by both the state and judiciary is rusted. With society changing, it is time that the state stops hiding behind excuses and acknowledges prisoners' rights. It is imperative to recognize that mere confinement does not strip them away from being members of a democracy, where everyone should be given the chance to participate in the electoral process. Just like a normal citizen, even prisoners should naturally have the right to choose their representative. It is only saddening to see that, prisoners who consist of a major chunk of our population are deprived of being a part of the voting group. This also, if not directly, reduces the meaning of the election- the entire purpose of this was to ensure the participation of all, not a group. Thus, the author hopes that the prisoners soon get to see the silver lining and be a part of the electoral process- a sine qua non of any democracy.

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⁷⁵ Presidential and Vice-Presidential Election Rules, 1971.

⁷⁶ Hinduja, "Is right to vote a fundamental or a constitutional right", The Leaflet, (India, 12th June, 2022).