The right to vote and the restriction on the incarcerated in India

Shruthi Nair[1]

Abstract

The right to vote is generally agreed to be the fundamental building block of a flourishing democracy. It is a way in which people elect those who represent their best interests. Therefore, all factions in a democracy, by way of casting a vote, allow their voices to be heard. However, laws in India restrict prisoners from casting votes in elections, thereby cutting out a large portion of the population from having their voices heard. This paper looks at the current legal standpoint of the right to vote of the incarcerated in India. It then goes on to draw comparative analysis with other countries and their stances on the voting rights of the incarcerated. Here, comparisons will be drawn with countries that do not allow prisoners to vote, and countries that do. Finally, looking at the legal standpoint along with the socio-political currents in India, the author will attempt to analyse the problems that arise from the existing stance, and suggestions as to remedy the problems that it causes. The analysis of problems will be in two parts; one from a purely legal standpoint, and the other from a socio-political standpoint. Lastly, the paper will address the importance of acknowledging the right to vote of prisoners, and will attempt to reconcile the idea of democracy with the concept that even prisoners should have the freedom to choose who they are governed by.

Keywords: *Voting rights, Prisoners, Representation of People's Act, criminal disenfranchisement, alternate model*

Introduction

As recent as the concept of universal adult suffrage may have been conceived, it is undeniably and essentially a major component of a full and functioning democracy. In its simplest sense, universal adult suffrage means that every member of a society has the right to vote in the government of their choice. Although it may seem on the face of it that this definition is the best suited to any democracy, there still remain many conditions on which

[1] Student, School of Law, Christ University, Bangalore

this suffrage is granted, therefore it is not universal in its strictest sense. For instance, most democracies do not allow non-citizens, children, or the mentally ill to cast their vote. The extent to which these conditions are reasonable is up to debate, and continually changes as we progress.[2]

The concept of democracy rests on people's participation. Unless the government works in favour of all people, groups, and communities within a nation, a state cannot be a full and flourishing democracy.

Suffrage was earlier not a right but a privilege granted to those of a certain class, financial status, education, or sex. Slowly, it has changed to become more inclusive in nature. The extent of this inclusiveness is different in each democracy.

Casting a vote allows a member of a society to vote in favour of their interests. An amalgamation of such votes will lead to the best suited government for all in a democracy. In this regard, when a whole class of citizens are disenfranchised, there is no one that can vote in their interests, and therefore, nothing that incentivises political actors to attempt to make policies in favour of those communities. For the longest time, those communities that lacked such a political power were the ones who were most marginalised.

This paper will discuss one such restriction on universal adult suffrage, which is the disenfranchisement of prisoners in India.

Section 62 (5) of the Representation of the People Act, 1951 disallows a person from voting at any election if they are confined in a prison at the time. This includes both people undergoing imprisonment and those in the undertrial stage. This has been further elucidated in The Chief Election Commissioner and Ors. v Jan Chaukidar (Peoples Watch) and Ors[3], where the Supreme Court upheld the view that the right to vote is merely a statutory right and not a fundamental right nor a constitutional right, therefore such a privilege can be taken away by law.

It is this very view of the Court, that to vote is a privilege rather than a right, which allows scope for this to be taken away. The author respectfully defers from such a view taken by the Supreme Court. Such a view is wholly inconsistent with the ethos of democracy.

[2]Ludvig Beckman, *Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy*, (2008).
[3]The Chief Election Commissioner and Ors *v.* Jan Chaukidar (People's Watch) and Ors, (2013) 7 S.C.C 507.

Comparative analysis with other countries

In order to understand conflicting perspectives on prisoner disenfranchisement, four widely varying models are seen below.[4]

Sweden

In Sweden, the right to vote was given to prisoners as part of the general wave of suffrage expansion in 1937. The right to vote of the prisoners in Sweden is without any restrictions, and they can usually vote either by proxy or by in-prison polling.

Sweden is one of the prime examples of a universalist democracy. Everyone above the age of 18 has the right to vote, and it is the burden of the government to ensure that everyone can exercise this right.

One of the reasons why legislators in Sweden believed that prisoner enfranchisement was so important was because they believed that it would positively impact their standing in society. By disallowing prisoners from voting, they would be removed from an important aspect of public participation, making reintegration into society far more difficult by laying emphasis on their past wrongdoings. This is because Sweden's approach to crime is more defined by rehabilitation and re-entry of these criminals back into society.

Sweden's stance on prisoner enfranchisement is an amalgamation between its liberal and universal stance on the right to vote, and its treatment of prisoners and approaches to criminal justice.

Germany

Germany's policy on prisoner enfranchisement is not as liberal as Sweden's, but to the most part quite permissive. German laws allow for the participation of most groups, with few restrictions. This corresponds with its prisoner enfranchisement policy, which was instituted in the late 1960s.

Prisoners can be disenfranchised, but only by judicial decree, and if the crime is such that is deemed to be damaging the democratic order. Although there is a possibility for disenfranchisement, its highly limited, and vast majority of prisoners can still vote.

[4]Alyssa Bonneau, *A Comparative Study of Prisoner Disenfranchisement in Western Democracies*, a thesis submitted to the faculty of Wesleyan University in partial fulfilment of the requirements for the Degree of Bachelor of Arts with Departmental Honors in Government, 2014.

One of the major reasons political participation is so important to German democracy is because of its turbulent history. Therefore, while wide political participation is important for the continuance of democracy, the state also retains the right to disenfranchise those that threaten this very continuance. One of the arguments for such disenfranchisement is that since criminals may act in self-interest, they may utilize this vote to weaken democracy.

UK

In UK, all prisoners are disallowed from voting, regardless of the severity of the crime or the time spent in prison, other than unconvicted prisoners on remand, those pending trial, and those sent for contempt of court or for not paying a fine. Since 2005, UK has been in violation of Hirst v United Kingdom (No.2)[5], where the European Court of Human Rights held that UK's blanket ban breached the right to free and fair election.

UK's restriction is one of the strictest in Europe.

US

Prisoner voting policies in US are drafted by each state for itself, therefore there are wide differences in each state and whether they disenfranchise prisoners. Almost every state except Vermont and Maine have a prisoner disenfranchisement policy, and 32 states ban prisoners from voting for some period of time after their incarceration is over.

In 1974 in Richardson v Ramirez, the court found a defense for prisoner disenfranchisement laws in the Fourteenth Amendment, however many critics claim that the mention of "crime" was only for Confederate soldiers. To the most part, US policies on disenfranchisement are extreme. In Hunter v Underwood, 1985, the Supreme Court for the first time ruled against a prisoner disenfranchisement policy on the basis that it disproportionately affected minorities.

Such is the case of felony disenfranchisement in US, where mostly minority communities, especially African American Communities, are found to be strongly discriminated against. It was seen that almost 13% of the African American male community was disenfranchised as compared to a mere 2.3% of the population at large.

Analysis

Legal and constitutional analysis

[5]Hirst*v.* The United Kingdom, (No. 2), 19 BHRC 546, (2006) 42 EHRR 41. (U.K.)

The Representation of the People Act lays down two kinds of disqualifications to prisoner voting rights. One is under Section 62 (5), and the other is under 11A.[6]

Section 62 (5) lays down that any person in custody of the police is debarred from casting vote, whether they are sentenced, in transportation, or even those undertrial who have not been proven guilty, except for those under preventive detention, as is given in the proviso clause. These provisions have time and again been questioned in the courts, however they have been held to be legal and constitutional. An important fact to understand this is that the right to vote is neither a Fundamental nor a constitutional right, it is merely a statutory right. Therefore, the courts have viewed it as a "privilege" that can be revoked at any time. The courts have also said, in Anukul Chandra Pradhan v Union of India[7], that prisoners are deprived of certain liberties during imprisonment and cannot be held to be on the same footing as other citizens.

Section 11A lays down specific offenses which bars the criminal accused from voting in elections. These offenses include bribery, undue influence, election fraud, etc. Section 11B allows, however, the Election Commission, at any given point, to remove any disqualification under Section 11A. To the most part, there does not exist any judicial literature on this particular disqualification.

In order to analyse these disqualifications, we must look at certain existing theories or reasons as to why prisoner disenfranchisement exists.

The concept of "civil death" of the prisoner plays a major role, wherein once a person is incarcerated, they are deemed to stop being part of the society in which they live in (hence, civil death). In ancient Greek democracies, it usually meant that those in the voting class ceased to be allowed to vote (thereby degraded to slaves or women) after imprisonment. In most European monarchical countries, this meant that after imprisonment, the property of the ex-convict would lapse to the Crown, and they would lose the right to inherit or succeed property. In extreme cases, they would lose all rights (thereby making it legal to even murder them).

Another continuing view is that any citizen that violates the social contract must bear repercussions. Since society is founded on a "social contract", any person, by committing a crime, goes against that very social contract. This social contract takes away certain rights and gives certain rights, therefore by violating it, the prisoner forfeits those rights.

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[6]Amal Sethi and Prakruti Joshi, *"KNOCKING ON THE LEGISLATURE'S DOOR"-A PROPOSAL TO REFORM THE CRIMINAL DISENFRANCHISEMENT LAWS IN INDIA,* SACJ (2014) Vol 1.1, 2014.

[7]Anukul Chandra Pradhan *v.* Union of India, (1996) 6 S.C.C. 354.

In S Radhakrishnan v Union of India[8], the Court relied on the purity of ballot concept to defend prisoner disenfranchisement. The main argument put forward in such a view is that a "ballot box" should be free from any kind of corruption, which is exactly what prisoner enfranchisement might lead to. In India, the major argument against prisoner enfranchisement seems to be that allowing prisoners to vote would result in criminalisation of politics.

This however, seems to be a highly contentious line of argumentation. Criminalisation of politics takes place when criminals enter positions of political power. Providing criminals with voting rights does not equal the same, and it is only an assumption on part of the court that criminals may attempt to vote in similarly criminal candidates.

Firstly, to understand why it is that taking away the right to vote is valid or invalid, we must understand the nature of such a right, and why it is a statutory right rather than a constitutional right. The right to vote is enshrined not in the Constitution of India, but in the Representation of the People Act, 1951, which is a statute, making the right to vote a statutory right.

However, such a right cannot just be viewed in a strict and simplistic way. As asserted by the author above, the right to vote is one of the very pillars on which a healthy democracy rests. Most developed democracies and liberal states opt for a more universal model of enfranchisement, because a larger political participation is essential to ensure that the government is accountable.

Democracy is for the most part the heart and soul of the Constitution, and the principles that govern it are inalienable aspects of the Constitution. Therefore, it is a huge over sight on part of the Courts to not enlarge the scope of Article 21 to include the right to vote. Voting is a highly important aspect of public life, and every government that takes democratic institutions seriously takes the right to vote seriously. Therefore, the very basis on which the courts have decided that prisoner disenfranchisement, in the opinion of this author, is erroneous, and if the court had decided to make the right to vote a fundamental right as it should be, prisoners would have had, to some degree, the right to vote.

Secondly, Section 62 (5) of the Representation of the People Act fails to make a distinction between those who are convicted, and those undertrial. This is glaringly a mis-grouping of different classes into one without taking into consideration the inherent differences. There is no conceivable reason why a person who is not accused of a crime should be barred from voting. By such a provision, the Act makes a false dichotomy between people in jail not

[8]S. Radhakrishnan *v.* Union of India, S.C. 265 (1999).

accused, and people not in jail. According to our principles of criminal justice, any person must be deemed to be innocent before proven guilty. The provision also allows accused who are on bail outside prison to vote, whereas those who are not on bail cannot vote. This again, treats the same class of people differently. None of the repercussions above are in consonance with Article 14 of the Constitution of India. However, yet again the legislature has not made an attempt to change it, nor have the courts.

Social and political analysis

Prisoner disenfranchisement first and foremost, affects prison populace from public participation, and the effects of this is two-fold. Firstly, prisoners are denied the right to participate in their own society, further driving them away from recovery. It comes with a sense of shame and punishment, neither of which is ideal for prisoner rehabilitation. Rehabilitation is important because it prevents high levels of recidivism, reducing crime rates.

Secondly, prisoners cannot vote for those who push for prisoners' rights. Prisoners are one of the most entrenched class of people in society, and disallowing them the opportunity to make changes to their public life ensures that their oppression continues.

A way of understanding this may come from drawing parallels from how the American model works to the Indian model. The American disenfranchisement model disproportionately affects minorities, especially African American and Hispanic communities, who were adversely affected especially by the War on Drugs.

The incarceration rates of minorities such as Muslims and Sikhs are higher compared to their total population rates. Muslims have an incarceration rate of 21% compared to them consisting of 14% of the population, which is a 7% increase. This is contrasted with the Hindu population; whose incarceration rates are 69% compared to their population percentage of nearly 79%. Certain policies of criminal disenfranchisement, therefore, may affect certain communities more than it may affect the majority, and there is huge scope for misuse, like the case with the US.

Prison inmate statistics also rise as education levels fall. This highlights a huge problem, as those who are poorer and are from a lower educational background tend to gravitate more towards crimes, both as a method of livelihood and an act of contempt against society. Disenfranchising them, therefore, is counterintuitive, as it would prevent them from rising in political power and attempting to come out of their poverty.

While on the topic of criminal disenfranchisement, it is also pertinent to note that the part of Section 62 (5) that disenfranchises those not convicted, but in custody of the police, is also highly discriminatory to those who cannot afford to go out on bail, thus affecting poorer communities more than the others.

Conclusion

It is more obvious than not that today there is a need for a revisit to prisoner disenfranchisement policies. In order to understand what kind of model works best, there needs to be an analysis of different policies around the globe and understand what suits the Indian scenario the best.

With the steep entrenchment of vote bank politics, it is not unreasonable to assume that prisoners may vote for criminals. However, the fact remains that any conjecture on part of the court cannot be used as a holistic reason to prevent criminals from voting.

First and foremost, the very concept of the right to vote must be revisited and revamped. Only if we take the right to vote to be a concept inalienable to democracy can we begin to practice and propagate full and free political participation.

Secondly, the unreasonable provision of not allowing detainees and undertrials from voting must be removed. Not only is it arbitrary, but it provides much scope for misuse.

Thirdly, prisoner enfranchisement policies must be looked into, and they must be slowly integrated into our wider prison policies. This becomes especially important in a discussion on a rehabilitative rather than a punishment oriented penal system.

Only once these barriers are removed can we ensure a healthy and all rounded democracy.