THE TRAGEDY OF DISFRANCHISED PRISONERS

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Introduction:

The very foundational principles of any law lies in its unambiguous nature, clarity and non-arbitrariness of the same. However taking into consideration the current scenario, the Courts of law are pooled with litigations related to challenging the vires of some or the other legal provision, Act, ordinances, etc. As we see a law which stood the test of time yesterday may not satisfy the same requirement tomorrow, Hence it is obligatory for the legislature to carry out legislative amendments as and when time may demand. However invariably the legislature has conveniently failed to recognize the changing demands of time.

In a constitutional democracy like India, elections provide an opportunity to ascertain the popular will regarding the governance of the country. In ensuring free and fair elections the role of legal system is substantial. In India the provisions for ensuring free and fair elections are generally incorporated in the Constitution itself. There also exist other elaborative statutory provisions and rules. The legal provisions prescribe detailed rules regarding the system of election, delimitation of constituencies, structure, powers and functions of the authorities charged with duties to conduct elections, qualifications and disqualifications of electors and candidates, manner of preparation of electoral roles, procedure for the conducting elections and declarations of results and the forum and procedure for remedying election-related grievances.[1]

The Right to Vote enfranchises a person and entitles him with the right to choose his/her government under the constitution. However a question arises as to whether The Right to Vote, is it a fundamental right or a statutory right. As far as the observation of the Judiciary is concerned, the Hon'ble Supreme Court of India reiterated that the right to vote is not a fundamental right as such, but however a mere statutory right.

"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right."[2]

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[1] Election Laws – Fifty Years of the Supreme Court of India (Oxford University Press)

[2] Jyoti Basu v. Debi Ghosal [1982] 3 SCR 318

The law laid down by the Supreme Court is definitely to be appreciated by virtue of Article 141 of the Constitution, however with due regards to the wisdom of the Supreme Court, it is beyond any stretch of understanding that as to how the Right to Vote cannot be regarded as a fundamental right. When the Right to Education, Right to Information, Right to clean and healthy environment, etc. can be construed as a part contemplated under the fundamental rights, then why is it so that the Right to a popular will, Right to a good governance and mainly Right to be heard, cannot be regarded as a fundamental right under Article 19(1) (a) as well as Article 21 of the Constitution. The language of the legislature in Article 13 of the Constitution is very clear that 'The State shall not make any law which takes away or abridges the fundamental rights" hence, consequently it is also clear that unless and until a provision is regarded to have its base to the foundation of fundamental rights under Part-III of the Constitution. It is the very duty of the Courts to assess the individual laws vis-à-vis the fundamental rights and declare the constitutional validity of that impugned law.

"Article 13 is a key provision as it makes fundamental rights justiciable. It confers a power, and imposes an obligation, on the courts to declare a law void if it is inconsistent with a fundamental right. This is a power of great consequence of for the courts"[3]

As far as the right to vote is concerned, it is provided by the Constitution under Article 326, which deals with qualifications as well as disqualifications related to a bar on adult suffrage. The grounds provided for disentitling a certain class from the right to elect are as follows;

1) Non-residence

2) Unsoundness of mind

3) Indulgence into crime, corrupt or illegal activities

Prisoners disentitled to vote:

A prisoner is a person who is serving time in prison, a person who has been apprehended by a law enforcement officer and is in custody, regardless of whether the person has been put in prison or not.[4]

In accordance to the language of Article 326, it excludes the entire class of prisoners from the right to popular will. On basis of the said Article, the legislature enacted the Representation of People's Act, 1951 with a view to elucidate and corroborate the said constitutional provision, also with the purpose of setting up express directions for free and fair elections, qualifications and

[3] State of Madras v/s V.G.Row (AIR 1952 SC 196)
[4] Black's Law Dictionary 1213 (West Group & Co.ed 7th 1990)

disqualifications for being an elector as well as a being elected to the State legislatures or the Parliament. Now, considering Section 62(5) of the Representation of the People's Act, 1951 (hereinafter to be referred as 'ROPA') contemplates that prisoners are debarred from voting. Section 62(5) reads as follows;

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. 1[(6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorised to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.]

A law is regarded as perfect and useful only if it is reasonable. Merely because a law is being misused, that does not make it fit to be removed from the statute, however at the same time it becomes the duty of the courts to recognize the unreasonability in that law and attempt to inhibit the same. Section 62(5) specifically disfranchises prisoners on the mere basis that they have the tag of prisoners, hence it is argued that this is a blanket ban on the rights of the prisoners with regards to the rights of voting, without making reasonable classification. The judgement of the European Court of Human Rights (ECHR) triggered the world-wide demand for the unjustified blanket ban on the prisoners' right to vote. The ECHR ruled that a blanket ban on the prisoners exercising their right to vote is contrary to The European Convention on Human Rights.[5] **The International Covenant on Civil and Political Rights** prohibits unreasonable restrictions on voting and getting elected, i.e. The Right to equal and universal suffrage through a secret ballot.

Intelligible differentia not appreciated:

In India, we have the concept of reservations, which have been incorporated for social upliftment of a certain class of citizens, however when the constitutional validity of the respective provisions of reservations was challenged before the Supreme Court, the court observed that, "Everyone are not equal, and, therefore, a mechanical equality before the law in accordance to Article 14 may

[5] Hirst v/s United Kingdom [2005] ECHR 685

result into gross injustice. Accordingly it said that 'Equals to be treated equally' and does not mean that unequals ought to be treated equally"[6]

In order to apply Article 14 in a practical manner, the court has evolved that if a law is based upon reasonable classification or intelligible differentia is not to be considered as discriminatory. A classification is rational if it fulfils the following two tests, namely,

1) That it is based on a rational basis

2) The basis should have a rational relation with the object of the law in question.[7]

Now, before dealing with the satisfaction of the rational nexus with the object to be sought, it is to be seen, as to whether there has been reasonable classification or not. It is clearly apparent that the legislature has failed to incorporate reasonable classification in the said provision of the ROPA, 1951. The Indian statute, unlike its British counterpart makes no distinction between convicted, under trials and the ones who are in lawful custody of the police.[8] Whereas prisoners are debarred from voting irrespective of the gravity of the crime committed, offence-based or sentence-based. Hence, a person who is in mere custody of the police on account of false or vexatious complaints, becomes an accused, which consequently disentitles him from exercising his right to vote. It is a principle of criminal jurisprudence that a person is presumed to be innocent until he is proven guilty. Also **The Prevention of Crime & Treatment of Offenders, Geneva (1955)** said that, unconvicted prisoners are to be presumed to be innocent until proven guilty. However this very principle is grossly violated when a person who is merely accused of a certain crime and is in custody of the police is disfranchised under the guise of "preventing criminalisation of politics." On the contrary a person who is out on bail in the course of a pending appeal, is entitled to cast his vote. Additionally persons arrested under 'Preventive detention' are exempted from the bar on prisoners regarding adult suffrage. A preventive detainee is arrested on the basis of his/her past records and precedents, so that commission of a crime can be prevented, here there is certainty of the crime as well as a strong propensity that a crime may be committed in the future. Hence apparently a prima-facie guilt

[6] Indian Constitutional Law – M.P.Jain (1987)
[7] The Supreme Court & Fundamental Rights – Fifty Years of the Supreme Court of India (Oxford University Press)
[8] The draconian ban on prisoner voting – Chintan Chandrachud (The Hindu – 7th October, 2015)

is established. However in case of an accused, the guilt is yet to be established by the prosecution. However the Hon'ble Supreme Court observed that;

"It is sufficient to say that preventive detention differs from imprisonment on conviction or during investigation of the crime of an accused which permits separate classification of the detenus under preventive detention. Preventive detention is to prevent breach of law while imprisonment on conviction or during investigation is subsequent to the commission of the crime. This distinction permits separate classification of a person subjected to preventive detention." [9]

Hence a question arises as to whether has the object to sustain the purity of parliamentary democracy has been satisfied or not. Is the legislature successful in avoiding the criminalisation of politics by such a blanket legislation?

The Right To Vote – A Fundamental Right Or A Mere Statutory Privilege?

As far as the constitutional validity of Section 62(5) of the ROPA, 1951 is concerned. The Hon'ble Supreme Court of India in the case of 'Mahendra Kumar Shastri v/s Union of India and Anr';

"We do not find any merit in the contentions urged by the petitioner in the writ petition. The disability which is imposed under Section 62(5) of the Representation of the People Act is equally applicable to all persons similarly situate mentioned therein and they are even prevented from contesting the election or offering themselves as candidates for such election. The provision is reasonable and in public interest to maintain purity in electing peoples' representatives and there is no arbitrariness or discrimination involved. Rule is discharged and the writ Petition is dismissed." [10]

A full bench of the Hon'ble Supreme Court which constituted of Former CJI Verma, Smt. Justice Sujata Manohar and Shri Justice Kirpal, observed that;

"It is settled that Article 14 permits reasonable classification which has a rational nexus with the object of classification. The question is whether the classification made by sub-section (5) of Section 62 is reasonable or not. There are provisions made in the election law which exclude persons with criminal background of the kind specified therein, from the election scene as candidates and voters.

[9] Anukul Chandra Pradhan vs UOI (9th July 1997)
[10] AIR 1983 SC 299

The object is to prevent criminalisation of politics and maintain probity in elections. Any provision enacted with a view to promote this object must be welcome and upheld as subsisting the constitutional purpose. The elbow room available to the legislature in classification depends on the context and the object for enactment of the provision. The existing conditions in which the law has to be applied cannot be ignored in adjudging its validity because it is relatable to the object sought to be achieved by the legislation. Criminalisation of politics is the bane of society and negation of democracy. It is subversive of free and fair elections which is a basic feature of the Constitution. Thus, a provision made in the election law to promote the object of fight and fair elections and facilitate maintenance of law and order which are the essence of democracy must, therefore, be so viewed. More elbow room to the legislature for classification has to be available to achieve the professed object."[11]

With due reverence to the authority and wisdom of the Hon'ble Supreme Court of India, the Court, under the cover of administrative complexities and excess of expenditure, has not touched upon the unreasonable nature of the law.

"There are other reasons justifying this classification. It is well known that for the conduct of free, fair and orderly elections, there is need to deploy considerable police force. Permitting every person in prison also to vote would require the deployment of a much larger police force and much greater security arrangement in the conduct of elections. A part from the resource crunch, the other constraints relating to availability of more police forces and infrastructure facilities are additional factors to justify the restrictions imposed by sub-section (5) of Section 62. A person who is in prison as a result of his own conduct and is, therefore, deprived of his liberty during the period of his imprisonment cannot claim equal freedom of movement, speech and expression with the other who are not in prison. The classification of persons in and out of prison separately is reasonable. Restriction on voting of a person in prison result automatically from his confinement as a logical consequence of imprisonment. A person not subjected to such a restriction is free to vote or not to vote depending on whether he wants to go to vote or not; even he may choose not to go and cast his vote. In view of the restriction on movement of a prisoner, he cannot claim that he should be provided the facility to go and vote. Moreover, if the object is to keep persons with criminal

[11] Anukul Chandra Pradhan v/s Union of India (9th July, 1997)

background away from the election scene, a provision imposing a restriction on a prisoner to vote cannot be called unreasonable."[12]

The Supreme Court of India has ingeminated on the question as to whether the right to elect is a fundamental right or a statutory right.

"...The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute..."[13]

"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, creations they are, and therefore, subject to statutory limitation."[14]

The Hon'ble Supreme Court has refused to recognize the right to vote as a fundamental right, due to which a person who is deprived of his right to vote, cannot approach the courts for challenging the vires of the said electoral provisions, even if the government introduces certain new arbitrary amendments in the said law, the people are left with no option but to suffer with vulnerability to the whimsical nature of the government.

Article 32 of the Constitution of India was been regarded as the most sanctified and celebrated fundamental right, however the judiciary refusing to construe right to vote as a fundamental right, vanishes the option of remedial resorts in cases of encroachment upon the voting rights. This is a failure on part of the judiciary to uphold the rules of natural justice viz. 'Ubi jus ibi remedium'. This situation corroborates the words of Shri. Nani Palkhivala who said,

"Rights without remedies are good as written upon water"

Law Breakers Can Be Law Makers:

[12]Anukul Chandra Pradhan v/s Union of India (9th July, 1997)
[13]Jumuna Prasad Mukhariya and Others v. Lachhi Ram and Others, [1955] 1 S.C.R. 608

[14] N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, [1952] S.C.R. 218

While justifying the cause and purpose of Section 62(5) of the ROPA, 1951, it was said as to how the law flouters can be eligible to select the law makers, then the question arose as to whether how the same flouters be eligible to become law makers of the country. As it is seen that, a prisoner who is debarred from utilising his voting rights, can be entitled to contest elections at the same time.

The Supreme Court of India apparently attempted to reinstate the confidence of the society on the judiciary by observing that;

"Those who break the law, shall not make the law"[15]

Also, in the landmark **Jan Chaukidar Case,** the division bench of Shri Justice A.K. Patnaik and Shri Justice S.J.Mukhopadhya observed that

"No person in the lawful custody of police shall be allowed to contest elections"[16]

However on account of this decision, the Parliament immediately in 2013 passed an amendment which contemplated that, a person whose name has been entered into the electoral role shall not cease to be a voter, hence a person is entitled to contest elections as long as his name is in the electoral role. Accordingly this amendment was surprisingly and ironically confirmed by the same bench of the Supreme Court in 2013, which had earlier prohibited prisoners from contesting elections. Again the issue arises as to whether, is there a rational nexus between the law and the object to be achieved. If a prisoner, which includes a convict as well as an innocent accused, cannot be entitled to vote to avoid criminalisation of politics and to prevent the scope of politics from the bane of criminalisation, then it is beyond any stretch of imagination as to how the same prisoner be allowed to contest elections. From the above considerations it is very much apparent that the prisoners are cursed with such kind of a draconian law.

The Law Commission has invariably played a prominent role in contributing towards the development of law and jurisprudence, however in its one of the 268 page report, the Commission failed to consider reforms in electoral laws relating to ban of prisoners' right to vote.[17]

Conclusion:

[15] K.Prabhakaran v. P.Jayarajan [2005] 1 SCC 754
[16] Chief Election Commissioner v/s Jan Chaukidar (Peoples' watch)
[17] Law Commission of India Report (2015)

In India, the conviction rate is extremely low, i.e. merely 40% of the prisoners get convicted, whereas 2, 78,503 are languishing in jails as under-trials all over India.[18] Therefore it is seen that the rest of the 60% who face the inordinate delays of their trials for several years, though lastly get acquitted but through all these years are irrationally deprived of their civil rights.

A dead man cannot vote, hence irrational disfranchisement leads to a civil death.

"If we do an eye for an eye and a tooth for a tooth, we will be a blind and a toothless nation"

The above words of Martin Luther King negate the Machiavellian theory of punishment and comments upon the purpose of punishments and prisons in our society. What was the exact purpose of the prisons and punishments? Was it to vehemently isolate and ostracize the alleged law breakers from the society, or was it to reform the criminals and reinstate their confidence to re-enter the society as a law-abiding citizen?

The foundational principle of any law, which determines its usefulness is its reasonability and utility. If a law fails to stand strong on both these parameters, it would be nothing better for the society than to vanish these laws.

India by virtue of being a democratic republic has always aimed to have a country with good governance and have a welfare state. Today if a certain section of the society is deprived of such a substantially important right, which determines the governmental structure of the nation, that too merely on the basis of unreasonably arbitrary law, then it shall not only demolish the democratic structure of our nation, but would also make a mockery of our democracy.

According to the principles of legendary socio-political thinker Jeremy Bentham, "It is the duty of the legislature to have the Greatest Happiness of the greatest number"

Hence, even if the law is not able to render happiness to the whole class of prisoners, however it shall at least attempt to consider the welfare of the maximum number.

[18] Mallimath Committee Report (March 2003)