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## VOTING RIGHTS OF UNDERTRIAL PRISONERS OF INDIA: A FORGOTTEN DEMOCRATIC RIGHT?

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### **ABSTRACT:**

This article addresses the contentious issue of voting rights for undertrial prisoners and pre trial prisoners in India. Despite the judiciary acknowledging the crucial role of the right to vote in a democracy, the existing law, as outlined in Section 62(5) of The Representation of the People Act, 1951, presents a paradox by restricting voting rights for individuals in police custody. This legislation treats undertrial prisoners on the same footing as convicted individuals, resulting in an arbitrary denial of their right to vote. This article examines the international perspective on voting rights, citing provisions from the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. There is an emphasis on the need for reasonable restrictions on voting rights, criticizing the lack of a nuanced approach in India's legal framework. One of the key arguments revolves around the presumption of innocence, a fundamental principle of criminal jurisprudence. Denying undertrial prisoners the right to vote contradicts this principle, as individuals have not been proven guilty by a competent court. The article calls for a re-evaluation of Section 62(5) to adopt a more nuanced and justifiable approach to restrictions on voting rights for undertrial prisoners. It advocates for aligning legislative provisions with constitutional principles and international standards, urging a balanced consideration of the rights of individuals awaiting trial within the legal system.

**KEYWORDS:** Undertrial Prisoners, Right to Vote, Democracy, Section 62(5) of RPA, Presumption of Innocence.

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**INTRODUCTION:**

India is one of the biggest democracies in the world. Paradoxically, the Right to vote which is fundamental to the functioning of a democracy is afforded the status of a mere statutory right in India. Though the judiciary has expressed an elevated view regarding the constitutional status of the right, the law itself has not been amended to afford the right to undertrial prisoners and pre-trial detainees. The placing of a ban on the right to vote for undertrials and pre-trial detainees while they are in lawful custody of the police is an unreasonable restriction on the right and therefore violates Article 14.2 Moreover, such a restriction is against the basic right to vote, fundamental to a democratic state, as well as the presumption of innocence in favor of an accused under criminal jurisprudence making such a restriction unreasonable and subject to potentially being invalidated as an unconstitutional measure.

Section 62(5) of The Representation of the People Act, 1951 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. Provided further that because of the prohibition to vote under this subsection, a person whose name has been entered in the electoral roll shall not cease to be an elector.”<sup>2</sup>

Prisoners in India can be divided into two distinct categories i.e.-

1. Convicts- who are no longer entitled to the presumption of innocence; and
2. Undertrial Prisoners- who are presumed innocent until found guilty by the court of law.<sup>3</sup>

As per the Model Prison Manual, 2016:

- a) An undertrial prisoner has been defined as *“A person who has been committed to prison custody with pending investigation or trial by a competent authority.”*
- b) A prisoner is defined as *“Any person confined in prison under the order of a competent authority.”*

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<sup>2</sup> The Representation of People Act, 1951, § 62, No. 43, Acts of Parliament, 1951 (India)

<sup>3</sup> Jasvir Singh & Anr. v State of Punjab & Ors, CWP No.5429 of 2010

- c) Furthermore, a convict is defined as *“Any prisoner under sentence of a court exercising criminal jurisdiction or court martial.”*<sup>4</sup>

Therefore, the placement of undertrials and pre-trial detainees in the same category as convicts to restrict the right to vote is inherently arbitrary. The words “confined” and “or otherwise” have a very wide connotation. The provision of law as stated above has been worded in a very ambiguous manner to include all persons in lawful custody of the police within its ambit. The words, “or is in the lawful custody of the police” thus also bring the two categories of prisoners under one. Hence, at present, there exists a blanket ban upon the exercise of their constitutional right to vote<sup>4</sup> under section 62(5).

From the aforementioned definition, an Under-trial is a person who is detained and whose trial has not been completed yet. This implies that such persons have not yet been proven guilty, and therefore, they are innocent. Section 62(5) categorizes such persons together with convicts while placing a ban upon their respective right to vote. This very fact is where the violation lies.

#### **RIGHT TO VOTE-AS A HUMAN RIGHT:**

The right to vote is considered a basic human right because it forms the foundation of a democratic society. It allows citizens to participate in the political process, express their opinions, choose their representatives, and influence how they are governed. Denying this right undermines principles of equality, freedom, and political participation, which are essential elements of human dignity.

Article 21 of the Universal Declaration of Human Rights provides that *“everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”*<sup>5</sup>

Further, Article 25 of the International Covenant on Civil and Political Rights provides that *“every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [i.e race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. and without unreasonable restrictions:*

- a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*

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<sup>4</sup> Model Prison Manual, at 45, Ministry of Home Affairs, Govt. of India (2016)

<sup>5</sup> Universal Declaration of Human Rights, 1948, Art. 21

- b) *To vote and to be elected at genuine periodic elections which 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>6</sup>

The repeated stress on “everyone” and vivid description of possible distinctions, that is, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, clearly indicate that the institutions considered to be guiding the countries on human rights hold the right to vote as almost a natural right that cannot be taken away by governments or the society.

India is a signatory to UDHR and ICCPR and Article 51(c) of the Constitution of India mandates respect for treaty obligations. Precluding under-trials from voting violates the basic principles of UDHR and ICCPR, thereby violating Article 51(c) of the Constitution of India. The UDHR, though not a treaty in itself, is generally considered customary international law and therefore has binding status. These International laws do not imply that the Right to vote is unconditional but allow for certain reasonable restrictions. Although not an absolute right, limitations to the exercise of the right to vote need to be objective and reasonable, and the length of the suspension of this right should be proportionate to the offense and the sentence. The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it.

In *Vishaka & Ors. v State of Rajasthan*,<sup>7</sup> The Supreme Court had held that international rights conventions are relevant in interpreting the fundamental rights provisions of our constitution. It held that “*Any international convention not inconsistent with fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and context thereof, to promote the object of the constitutional guarantee*”. Therefore, due importance must be given to international conventions and principles as have been referred to in this present matter highlighting the rights of every human being, particularly the right to vote as being a fundamental democratic right. The Right to vote is indeed subject to restrictions that a sovereign nation may impose, but such restrictions must be just, fair, and reasonable.

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<sup>6</sup> International Covenant on Civil and Political Rights, 1976, Art. 21

<sup>7</sup> 1997 SCC 6 241

Similarly, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and People's Rights recognise everyone's right to freely participate in election of governments. In addition, the Standard Minimum Rules for the Treatment of Prisoners and The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, stress that prisoners should be treated with inherent dignity, that imprisonment is for their reform, rehabilitation and reintegration to the society and hence prisoners should continue to participate in socio-political activities.

### **CONSTITUTIONAL BASIS FOR RIGHT TO VOTE IN INDIA:**

Elections encourage us to speak about our disappointments and problems with the state of affairs in the country, while also taking the opportunity to campaign for our demands. In each of our policies, the focus should not just be on prevention, deterrence and punishment of crime but more importantly also on the conditions generating crime and reintegration of the lawbreaker into the society. Denial of voting rights pushes the prisoner further away from the society. A citizen without a vote in a democracy has no existence. This is evident in Indian polity as well, where election manifestos barely mention any promises for the betterment of prison conditions or legislation. Prisoners are dependent on others to become their voice and raise issues on their behalf. Hence, one direct impact which prisoners' right to vote will bring is the attention from policymakers regarding needs of prisoners. It might still be a small population as compared to the size of other communities, even then a moral responsibility would stand for vote seekers and subsequent winners of power to be responsive towards demands of the prisoners.<sup>8</sup> Another important distinction to keep in mind is that laws are made and changed with different governments, while rights have been enshrined as fundamental. A crime today, might be legal tomorrow. Hence, the right to vote, should not be dependent on the status of imprisonment or conviction.

Article 325 of the Indian Constitution provides that *"No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex"* It further provides that *"There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any*

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<sup>8</sup> Jyotishka, Prisoners' Right to Vote in India, <https://indconlawphil.wordpress.com/2020/04/09/guest-post-prisoners-right-to-vote-in-india/> (Last Accessed on 4th April, 2025)

*special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.*"<sup>9</sup> It can be said that there is a certain amount of confusion as to whether the right to vote is a constitutional right or not. The character of the right to vote was not something that was given too much attention in the Constitutional Assembly Debates. However, the concept of universal adult suffrage was given a high importance. Dr. B.R. Ambedkar was the one who argued that the adult suffrage needs to be universal in nature and the disqualifications should be narrow and be such that preserve the integrity of the electoral process. KM Panikkar stated that "adult suffrage, the acceptance of the fullest implication of democracy was the most striking feature of the Constitution". It is clear that the right to vote was an integral part of the vision that the makers of the Constitution had for India.

Article 326 of the Indian Constitution provides that *"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>10</sup> Thus, every citizen, eighteen years and above is entitled to be enrolled in the electoral roll and further, is entitled to vote in the constituency in which his name is entered in the electoral roll. The act of voting in an election is not just a civic duty, but also a means of securing one's personal dignity and rights as a citizen. The voting process is a way of acknowledging the worth and value of each individual, regardless of their social status or background. It is a symbol of the inclusivity of democracy, especially in a country as diverse as India, where people come from different cultures, religions, castes, races, and economic backgrounds.

In the case of ***Jyoti Basu v. Debi Ghosal***,<sup>11</sup> The Apex Court observed that, *"A right to elect, fundamental though it is to a democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right"*. Further, in the case of ***PUCCL v. Union of India***,<sup>12</sup> Justice Reddi stated that, "The right to vote for the candidate of one's choice is

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<sup>9</sup> INDIAN CONST, Art. 325

<sup>10</sup> INDIAN CONST, Art. 326

<sup>11</sup> AIR 1982 SC 83

<sup>12</sup> 2003 4 SCC 399

of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act. The right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely the RP Act. it is not very accurate to describe it as a statutory right, pure and simple. In the case of **Kuldip Nayar v. Union of India**,<sup>13</sup> The Supreme Court observed that “*the right to vote is a constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution was not accepted. And the court drew its attention to the fine distinction that has been drawn between the right to vote and the freedom of voting. Freedom of voting is a species of freedom of expression however, the right to vote is only a statutory right*”.

In the case of **Bhim Rao Baswanth Rao Patil v. K. Madan Mohan Rao & Ors.**,<sup>14</sup> the Supreme Court stated that “Democracy has been held to be a part of one of the essential features of the Constitution. Yet, somewhat paradoxically, the right to vote has not been recognized as a Fundamental Right yet; it was termed as a ‘mere’ statutory right”. Notably, even as the Supreme Court had made the said comment, it shied away from declaring the right to vote as a fundamental right. Further in the case of **Anoop Baranwal v. Union of India**,<sup>15</sup> Justice KM Joseph stated that “*holding of free and fair elections constitute a basic feature of the Constitution and approved of the view apparently that the Right to Elect is fundamental to democracy. Even if it is treated as a statutory right...the right is of the greatest importance and forms the foundation for a free and fair election, which, in turn, constitutes the right of the people to elect their representatives*”.

Disenfranchisement of Under-trial prisoners arose concerns about their rehabilitation and reintegration into system. The Criminal Justice System is not only punitive, but also rehabilitative. Denying individuals the right to vote fosters a sense of alienation and exclusion Voting is not merely an electoral exercise but on affirmation of one’s role in governance, a Connection between the citizen and the state. Thus, right to take part in the conduct of public affairs as a voter is the core of the democratic form of government, which is a basic feature of Indian Constitution.

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<sup>13</sup>( 2006) 7 SCC 1

<sup>14</sup> 2023 SCC OnLine SC 871

<sup>15</sup> (2023) 9 SCR 1



## **FROM REPRESENTATION TO EXCLUSION- LOOPHOLES OF SECTION 62(5) OF THE REPRESENTATION OF PEOPLES ACT:**

Section 62(5) of the Representation of the People Act, 1951 imposes a blanket ban on voting rights of individuals confined in prison or police custody, including undertrial prisoners, except those in preventive detention. The ban applies uniformly, without considering the nature of the offence or the duration of custody, leading to the disenfranchisement of a large number of citizens. This provision not only contradicts the principle of equality before law under Article 14 but also undermines the freedom of expression under Article 19(1)(a) of the Indian Constitution.

The National Crime Records Bureau Report of 2021 reveals that out of a total prison population of 5,54,034 individuals, 4,27,165 were undertrial prisoners, an approximate 14.9% increase from the 2020 figures. Further, the April 2024 quarterly report of the National Legal Services Authority (NALSA) indicates that 74.6% of the prison population comprises undertrials. These statistics reflect a consistent and disproportionate presence of undertrial prisoners in Indian jails, often attributable to structural deficiencies such as inadequate legal representation, inability to secure bail due to poverty, and delays in judicial proceedings.

The legislative intent of Representation of People Act is to curb the criminalization of politics. However, the blanket application of section 62(5) to undertrial prisoner who are presumed innocent, violates Article 14, which guarantees equality before the law and the equal protection of laws. Article 14 permits reasonable classification, but such classification must be based on an intelligible differentia, and have a rational nexus to the objective sought to be achieved.<sup>16</sup> In the context of Section 62(5), no intelligible differentia exists between undertrial prisoners and free citizens, as undertrials have not been convicted and are still under the presumption of innocence. By treating undertrials as though they are convicts, the law fails to distinguish between two legally and morally distinct categories. The discriminatory impact is magnified by the fact that those on bail retain their voting rights, irrespective of the seriousness of charges against them, while those unable to afford bail lose their democratic rights. This creates a wealth-based disparity, further undermining the right to equality under Article 14 of the Indian Constitution.

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<sup>16</sup> State of West Bengal v. Anwar Ali, AIR 1952 SC 75, Ajay Hasia & Ors v. Khalid Mujib Sehravardi & Ors, AIR 1981 SC 487; N. K. Bajpai v. Union of India, (2012) 4 SCC 653

Article 19(1)(a) guarantees the right to freedom of speech and expression, which has been judicially interpreted to include the right to receive and impart information, to express political opinions, and to participate in democratic governance. In the case of *Ashwini Kumar Upadhyay v. Union of India*,<sup>17</sup> the Supreme Court observed that voting is not merely a statutory mechanism but a vital expression of an individual's political will, closely linked with the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Section 62(5) of the Representation of the People Act, which disqualifies undertrial prisoners from voting, directly undermines this constitutionally protected expression of political will. Also, this provision fails the test of reasonableness under Article 19(2) as well. The restriction is neither narrowly tailored nor proportionate to the objective sought to be achieved. While preventing criminalization of politics is a legitimate aim, equating undertrials with convicts, and thereby curtailing their political expression without any judicial finding of guilt, is an overbroad and disproportionate restriction

In *Anukul Chandra Pradhan v. Union of India*,<sup>18</sup> the Supreme Court upheld the constitutionality of this section. The Court justified the restriction on logistical grounds and on the premise that individuals in custody had, by their own actions, excluded themselves from the political process. However, this reasoning fails when applied to undertrials, who, by law, are presumed innocent until proven guilty. The logic that may apply to convicts cannot be extended to undertrials without violating the principle of reasonable classification under Article 14. Equating the two those found guilty and those merely accused collapses the distinction between suspicion and guilt, resulting in an inherently unjust application of law. Further, in the case of *Aditya Prasanna Bhattacharya v. Union of India*,<sup>19</sup> a group of law students challenged the constitutional validity of Section 62(5), arguing that it violated the fundamental rights to equality, freedom of expression, and personal liberty. The petition was dismissed by the Supreme Court without detailed reasoning, thereby leaving the constitutional questions unresolved.

In contrast, the Delhi High Court in *Praveen Kumar Chaudhary v. Election Commission of India*,<sup>20</sup> held that undertrial prisoners are eligible to contest elections. This decision exposes a deep

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<sup>17</sup> (2023) 5 SCR 701

<sup>18</sup> (1997) 6 SCC 1

<sup>19</sup> Writ Petition (Civil) No. 462 of 2019

<sup>20</sup> AIR 2020 OnLine Del 602

legal contradiction: an undertrial can stand for election and potentially represent the people, yet is barred from voting for a representative. If the system trusts an undertrial to govern, it is illogical and discriminatory to deny them the basic democratic right to vote.

The legal inconsistency is not only arbitrary but constitutionally untenable, especially when viewed against the backdrop of systemic inequalities in the criminal justice system. As held in *State of Andhra Pradesh v. Challa Ramkrishna Reddy*,<sup>21</sup> “a prisoner whether a convict, undertrial or detenue, does not cease to be a human being while lodged in jail.” Denying undertrial prisoners the right to vote solely on the basis of their custodial status strips them of their dignity and dehumanizes their legal identity. A democracy cannot claim to be inclusive if it silences those who have not even been proven guilty.

#### **DISENFRANCHISEMENT OF UNDERTRIAL PRISONERS AND THE EROSION OF THE PRESUMPTION OF INNOCENCE:**

The presumption of innocence stands as a cornerstone of criminal jurisprudence and is widely recognized as a fundamental human right. Enshrined in both domestic and international legal frameworks, it demands that every individual accused of an offence be treated as innocent until proven guilty by a competent court of law, following due process. Section 62(5) of the Representation of the People Act, 1951, which disqualifies individuals confined in prison from voting in elections, fails to distinguish between convicts and undertrial prisoners. This lack of differentiation results in the categorical misclassification of undertrials who are yet to be convicted and are presumed innocent alongside those who have been found guilty. Such an approach not only contravenes the principle of presumption of innocence but also violates Article 14 of the Indian Constitution by treating unequals as equals, thereby failing the test of reasonable classification.

Internationally, this principle finds strong backing. Article 11(1) of the Universal Declaration of Human Rights asserts that “*everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial.*”<sup>22</sup> Similarly, Article 14(2) of the International Covenant on Civil and Political Rights,<sup>23</sup> to which India is a signatory, reinforces the

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<sup>21</sup> (2000) 5 SCC 712

<sup>22</sup> Universal Declaration of Human Rights, 1948, Art.11

<sup>23</sup> International Covenant on Civil and Political Rights, 1976, Art. 14

same presumption as a non-derogable human right. In the case of *Noor Aga v. State of Punjab*,<sup>24</sup> The Supreme Court recognized the presumption of innocence as not merely a rule of evidence, but a human right protected under international conventions and embedded within the Indian legal framework. The Court observed, “The presumption of innocence is a human right as envisaged under Article 14(2) of the ICCPR,” and emphasized its indispensable role in ensuring fair trial and just treatment of the accused. Further, in *Narinder Singh v. State of Punjab*,<sup>25</sup> the Court held that even if an accused is facing trial, they are to be presumed innocent and are entitled to the dignity and rights accorded to any free individual unless legally restricted with adequate justification.

The blanket disenfranchisement of undertrial prisoners, many of whom may ultimately be acquitted denies them their democratic rights without a conviction, thus imposing a punitive consequence without judicial adjudication. This contravenes Article 21 of the Constitution, which guarantees the right to life and personal liberty except according to procedure established by law. The presumption of innocence becomes even more crucial in the Indian context where undertrial prisoners often languish in jails for prolonged durations due to systemic delays, lack of legal aid, and socio-economic disadvantages. Denying them the right to vote further exacerbates their marginalization and detachment from the democratic process.

## **INTERNATIONAL PERSPECTIVE ON VOTING RIGHTS OF UNDERTRIAL PRISONERS:**

### **CANADA:**

The Canadian Charter of Rights and Freedoms has explicitly guaranteed citizens the right to vote and to qualify for membership in legislative bodies, though this right can be subject to reasonable legal limits. In *Belczowski v. The Queen*,<sup>26</sup> this right and its limitations were examined. Section 51(e) of the Canada Elections Act, which denied voting rights to individuals serving prison sentences, was challenged and found to violate Section 3 of the Charter. The court initially granted relief, striking down the provision.

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<sup>24</sup> (2008) 16 SCC 417

<sup>25</sup> (2014) 6 SCC 466

<sup>26</sup> 330 (1992) 90 DLR

In response, the Canadian legislature introduced a new rule disqualifying individuals imprisoned for two years or more from voting. This amendment was tested again in a 1995 case, and like before, it was struck down at the trial level for breaching the Charter. Although the Crown temporarily succeeded in the Federal Court of Appeals, the Supreme Court ultimately ruled by a narrow 5-4 majority that the law was unconstitutional. The dissenting judges argued that the issue was rooted in philosophical and political views, which couldn't be objectively proven, and believed the restriction was justifiable. However, Chief Justice, representing the majority, disagreed. In 2002, the Supreme Court definitively declared that the section of the Canada Elections Act preventing inmates serving over two years from voting in federal elections was unconstitutional. As a result, all prisoners in Canada are now allowed to vote in federal elections and referendums. By 2006, around 35,000 incarcerated individuals had become eligible to vote, with the Act including various provisions to ensure their participation.

#### UNITED STATES:

In the United States, prisoners are generally denied the right to vote. This position was affirmed in the landmark 1974 case *Richardson v. Ramirez*,<sup>27</sup> where the U.S. Supreme Court upheld a California law that disenfranchised individuals convicted of "infamous crimes." This restriction applied not only to those currently in prison but also to former inmates who had completed their sentences. The Court's majority based its decision on Section 2 of the Fourteenth Amendment, which implies that states may lawfully exclude individuals from voting if they have committed crimes such as rebellion or other serious offenses. The Court emphasized that it was up to the legislature to consider whether restoring voting rights to ex-felons would aid in their rehabilitation. It acknowledged arguments for reintegration but left the decision to democratic processes, suggesting that if the public favors change, it should be enacted through legislation.

The key legal issue was whether denying prisoners the vote could be justified as a reasonable limitation in a democratic society. The state argued that such disenfranchisement was necessary to balance inmates' voting rights against the broader societal interest in maintaining the integrity of the electoral process and punishing lawbreakers. It was also argued that a functioning liberal democracy requires a law-abiding citizenry. However, appellate courts rejected these justifications.

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<sup>27</sup> 418 US 24 (1974)

They found the law both overly broad and too narrow it affected individuals with minor offenses (such as those imprisoned due to unpaid fines), not just serious criminals. Moreover, the courts noted that the punishment of disenfranchisement did not clearly relate to the severity or nature of the crimes committed. It appeared more like a consequence of being imprisoned, rather than a direct penalty for the offense itself.

#### **AUSTRALIA:**

The Australian Constitution does not explicitly guarantee universal suffrage. While it does not bar prisoners from voting, the only express constitutional guarantee is that individuals who have or acquire the right to vote in state elections cannot be denied the right to vote in federal elections. This could have limited the federal government's power to restrict voting rights, ensuring consistency with the most inclusive state laws. However, the High Court has interpreted Section 41 of the Constitution narrowly, ruling that it applies only to those who had the right to vote in state elections at the time of federation. This interpretation has been reaffirmed, making it unlikely that the Court will revisit the issue. Thus, any challenge to prisoner disenfranchisement under the Constitution would need to rely on implied rights or limitations on legislative power. The Constitution supports a system of representative government, as highlighted in Sections 7 and 24, which state that members of Parliament must be "directly chosen by the people." The High Court has recognized this as embedding representative government into the Constitution. In *Australian Capital Television Pty Ltd v. Commonwealth*,<sup>28</sup> the Court held that representative government implies a freedom of political communication. Since voting is a core form of political expression, some argue that a right to vote could also be implied. Justices like Mason, Deane, Toohey, and Kirby have suggested that representative democracy implies such a right, rooted in the idea that government derives its power from the people.

However, this implied right would not be absolute. The Constitution allows Parliament to define voter qualifications, and the phrase "chosen by the people" implies that voters must be capable of making informed choices and must qualify as members of the relevant electorate. Historically, voting rights excluded groups such as women and Indigenous Australians, which could be used to argue for a broad legislative power to restrict voting. Yet, the High Court may interpret the phrase

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<sup>28</sup> (1992) 117 CLR 106

"chosen by the people" in a modern context. As Justice McHugh noted in *McGinty*, and Justice Gaudron in *Langer*, denying the vote to women or racial minorities today would not meet the constitutional requirement of being "chosen by the people." Therefore, the Court might assess contemporary standards, possibly considering international laws and practices, when determining whether electoral laws align with constitutional principles.

#### **SOUTH AFRICA:**

The Constitution of South Africa guarantees that every adult citizen has the right to vote. This constitutional provision naturally sparked debates on whether prisoners are entitled to exercise this right in national elections. In 1999, a group of prisoners challenged a directive issued by the Electoral Commission, which prohibited all prisoners from voting in the national parliamentary and provincial elections. In *August and Others v. Electoral Commission and Others*,<sup>29</sup> the Constitutional Court struck down the Commission's directive, stating that it had not been made under a valid law of general application, and therefore could not be justified under the Constitution's limitation clause. However, the Court did not conclusively rule on whether legislation could legitimately deny prisoners the right to vote. Subsequently, the 2003 amendments to the Electoral Act, which sought to disenfranchise prisoners serving sentences without the option of a fine, faced legal scrutiny. In *Minister of Home Affairs v. NICRO*,<sup>30</sup> the Constitutional Court once again declared the disenfranchisement unconstitutional, holding that such a restriction violated the constitutional right to vote.

#### **UNITED KINGDOM:**

The European Court of Human Rights significantly changed the legal stance on prisoners' voting rights in the UK through its 2004 ruling in *Hirst v. United Kingdom*. The case dealt with the interpretation of Article 3 of Protocol No. 1 to the European Convention on Human Rights, which guarantees the right to free elections. At the time, UK law specifically the Representation of the People Act, 1983 barred all convicted prisoners from voting in parliamentary and local elections.

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<sup>29</sup> [2000] 1 LRC 608

<sup>30</sup> [2004] ZAAC 10

John Hirst, a prisoner, challenged this ban. The domestic courts, including in *Hirst v. Attorney General*,<sup>31</sup> upheld the law, with Lord Justice Kennedy stating that disenfranchisement must serve a “legitimate aim,” though leaving it to Parliament to decide the appropriateness of such aims. However, when the case reached Strasbourg, the European Court of Human Rights held by a majority of 12 to 5 that the blanket ban was a disproportionate measure and violated Article 3 of Protocol No. 1. The Court emphasized that while voting rights can be restricted, such restrictions must be proportionate and justifiable not arbitrary or overbroad. The judgment described the UK’s ban as a “blunt instrument” that unfairly excluded a large and diverse group of individuals. Though the UK government responded by asserting that not all prisoners would automatically receive voting rights, the ruling stands as a powerful statement that democracy must be inclusive even within prison walls.

#### **OTHER COUNTRIES:**

Denmark, Czech Republic, Croatia, Ghana, Kenya, Ukraine, Switzerland, Serbia, Ireland, Spain, Sweden, France, Israel, Finland, Australia, Romania, the Netherlands, Slovakia, Cyprus, and Germany have recognized the importance of upholding the democratic rights of prisoners, especially undertrial detainees. These nations have embraced progressive criminal justice reforms, acknowledging that incarceration should not automatically strip a person of their fundamental rights, particularly the right to participate in the democratic process. Most notably, these countries have exhibited flexibility and innovation in facilitating the voting rights of prisoners. Mechanisms such as postal ballots, electronic voting, mobile polling units, and supervised polling stations within correctional facilities are widely adopted. These systems ensure that prisoners, especially those awaiting trial and presumed innocent, are not unjustly excluded from participating in elections.

#### **VOTING RIGHTS FOR UNDERTRIAL PRISONERS – THE WAY AHEAD:**

India, with its advanced electoral infrastructure and decades of experience in conducting the world’s largest democratic elections, is fully equipped to implement inclusive voting mechanisms—even within prison facilities. The Election Commission of India (ECI) has already demonstrated its administrative capacity and adaptability by successfully facilitating voting

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<sup>31</sup> (2001) EWHC Admin 239, para 40



through postal ballots for various categories of voters, including armed forces personnel, paramilitary forces, and Indian citizens posted abroad in diplomatic missions. This clearly indicates that the logistical challenges often cited as a reason to deny voting rights to undertrial prisoners are not insurmountable. In fact, the establishment of supervised polling stations within prison premises or enabling postal or electronic voting for undertrials is well within the scope of India's electoral capabilities. These polling stations can be set up with the assistance of prison authorities, under the close supervision of election officials, ensuring transparency, security, and integrity of the voting process.

Former Chief Election Commissioner Navin Chawla aptly emphasized the significance of such inclusion, stating, "It is imperative to recognize the voting rights of undertrial prisoners, especially when no court of law has held them guilty. Denying them this right is contrary to the very ethos of democracy and the principle of presumption of innocence."<sup>32</sup> His assertion underlines the urgent need to revisit the current disenfranchisement policy and align it with both constitutional principles and international democratic standards. Given India's successful track record in innovating electoral procedures such as deploying voter-verified paper audit trails (VVPATs), remote area polling booths, and multi-phase elections the inclusion of undertrial prisoners through in-prison polling stations is not a distant reality but a realistic and just goal.

## RECOMMENDATIONS:

The following

1. **Amendment of Section 62(5) of the Representation of the People Act:** It is recommended that Section 62(5) of the RPA, which disqualifies prisoners from voting be revisited and amended. Undertrials, who are yet to be convicted, should not be stripped of their democratic rights, particularly the right to vote. Ensuring this right would uphold the constitutional presumption of innocence.
2. **Reform Bail Provisions:** "Bail is rule, Jail is an exception" There should be a more liberal and accessible approach to granting bail to undertrials. The current conditions and surety requirements are often too stringent, especially for economically disadvantaged individuals.

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<sup>32</sup> Bhakthi Parekh, Denial of Voting Rights To Undertrial Prisoners: An Unreasonable and Unjust Disqualification, LIVE LAW, <https://www.livelaw.in/law-firms/law-firm-articles-/voting-rights-undertrial-prisoners-black-rob-legal-183859> (Last Accessed on 5th April, 2025)

Reforms must aim to simplify the bail process and reduce dependency on financial guarantees.

3. **Allow Voting Through Postal Ballots or E-Voting for Undertrials:** The government should explore and implement secure alternatives such as postal ballots, e-voting, or supervised in-prison voting booths to ensure undertrials can exercise their right to vote without compromising security or trial procedures.
4. **Strengthen Prison Infrastructure for Electoral Participation:** Designated spaces within prison facilities should be adapted to accommodate voting processes for undertrials. The Election Commission, in collaboration with prison authorities, must ensure these environments are secure, accessible, and uphold the secrecy and sanctity of the vote.
5. **Mandatory Legal Aid and Rights Awareness in Prisons:** A significant number of undertrials remain behind bars due to lack of legal knowledge or representation. It is essential to strengthen legal aid clinics in prisons and conduct regular awareness sessions regarding bail rights, legal remedies, and trial procedures, ensuring that no undertrial is left voiceless due to ignorance or poverty.

## CONCLUSION:

*“Democracy is not just the right to vote, it is the right to live in dignity.” - Naomi Klein*

The denial of voting rights to undertrial prisoners in India represents a significant gap between constitutional ideals and actual practice. Despite being presumed innocent until proven guilty, undertrial prisoners are stripped of their fundamental democratic right to vote, as per Section 62(5) of the Representation of the People Act, 1951. This blanket disenfranchisement fails to distinguish between convicts and those merely awaiting trial, raising serious concerns regarding equality, dignity, and the principle of universal adult suffrage enshrined in the Constitution. A rights-based approach, backed by international human rights standards and comparative legal frameworks, demands a re-examination of existing laws. Ensuring voting rights for undertrials is not only a step toward strengthening Indian democracy but also an affirmation of the belief that justice must not only be done but must be seen to be done even within prison walls.