

CIVIL DEATH OF PRISONER: DISENFRANCHISING THE PRISONER IN REALITY CAUSES HIS CIVIL DEATH

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The author by way of this paper has attempted to argue that disenfranchisement of prisoners often tantamounts to their civil death. In pursuance of the same, the author has attempted to correlate diverse strands of thought such as the principle of universal suffrage, qualifications for voting as well as the comparative positions in other countries. The author has then attempted to correlate the aforementioned strands of thought to the Indian position and the effect of international instruments on the same in an effort to answer the basic question as to whether prisoner disenfranchisement qualifies as a reasonable restriction to universal suffrage

I. INTRODUCTION

Suffrage is a civil right to either vote or exercise that right. From time immemorial, the Franks of ancient France have used the word suffrage to indicate political franchise.¹ The legitimacy of democratic government is usually considered to be derived primarily from suffrage. One of the types of suffrage is 'Universal Suffrage.' It is described as a situation where the right to vote is not restricted on the basis of race, sex, belief or status.²

In the ancient period prisoners who were convicted were denied civil rights. The basis of justification was that a person who has committed an offence divests himself of property and legal rights.³ The prisoner who was not awarded death penalty but nevertheless he would suffer 'civil death' The main idea behind this was to:

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¹ *Political History of France*, available at [www.britanica.com/political history of France](http://www.britanica.com/political%20history%20of%20France) (Last visited on November 26, 2006)

² *Prisoners / Suffrage*, available at <http://en.wikipedia.org/wiki/Suffrage> (Last visited on November 9, 2006)

³ See E. COKE, 1 INSTITUTE OF LAWS OF ENGLAND, n. 41a.

*Emulate the result that natural death would produce, e.g. Succession would be opened. The civil death would not transmit upon intestacy or by will or receive gifts. All family and political rights were forfeited.*⁴

Removal of prisoner's right to vote is a very controversial issue both internationally and nationally. This paper traces the history of the Indian provisions and examines their effects. Arguments offered on both sides of the debate in India will be considered, before looking at similar debates, and their resolutions as per the constitutional provisions and by way of decisions in other countries such as Australia, Canada, United States and U.K. Subsequently, the Constitution of India shall be examined to find whether it affords protection to the right to vote and whether such protection extends to prisoner's right to vote.

II. PRISONERS DISENFRANCHISEMENT IN INDIA

Unlike many countries, India has disenfranchised sentenced prisoners. India being a common law country, the Commonwealth Franchise Act, 1902 was applied disqualifying the convicted persons who were undergoing sentence from voting. The provisions remained substantially the same when the Commonwealth Electoral Act, 1918 was enacted. The position remained unaltered until the Representation of People Act, 1950 and the Representation of Peoples Act, 1951 were enacted.

II. THE PRINCIPLE OF UNIVERSAL SUFFRAGE

One of the requirements for a free and fair election is universal suffrage – that is, the rule that all adults have an equal opportunity to vote. However, this principle has never been interpreted to mean that everyone in the community must have the right to vote. No democratic nation has ever permitted minor children to vote, and no democratic theorist has ever called their exclusion undemocratic. Most democratic nations also exclude aliens,⁵ people confined to mental institutions, and criminals in prison; and few people consider this to violate the principles of universal suffrage⁶. To further elaborate on the same, the eligibility requirements for voting under contemporary laws have been discussed in the following sections.

⁴ M.R. Damaska, *Adverse Legal Consequence of Commutation and Their Removal- A Comparative Study*, 59 J. CRIM. L. 351 (1968).

⁵ David. C. Earnest, *Neither Citizen nor Stranger: Why States Enfranchise Resident AlienS* World Politics –MUSE, Volume 58, Number 2, January 2006, pp. 242-275at 243.

⁶ *Id*

III. QUALIFICATION FOR VOTING

A. CITIZENSHIP

Most democratic nations permit only citizens to vote but do not make any further distinction between native-born and naturalized citizens⁷. India follows single citizenship⁸. Articles 5 to 11 of the Constitution of India lay down provisions as to who are the citizens of India at the commencement of the Constitution, as also various classifications such as 'by domicile', 'by migration' and 'by registration'.

B AGE

According to Article 326 of the Constitution of India the right to vote is a constitutional right. A person who has reached the age of eighteen years is entitled to vote. A person may however be disqualified to vote by a statute. In *P. Nalla Thampy v B.L.Shankar*⁹, the Supreme Court observed:

Outside of statute, there is no right to elect, no right to be elected. Statutory creations they are, and, therefore, subject to statutory limitations.

C. RESIDENCE

Most democratic systems also require voters to live in the country and in their particular voting districts for certain periods of time before they can vote.

D. REGISTRATION

Only a citizen of India can be enrolled as a voter. When the name of a person is to be entered into the electoral roll, he may be required to satisfy the Electoral Registration authority that he is a citizen of India. But if the name of the person has already been entered in the electoral roll, his name cannot be removed from the roll on the ground that he is not a citizen of India unless the concerned officer has given him a reasonable opportunity of being heard according to the principles of the natural justice.¹⁰

No person is entitled to be registered in the electoral roll for more than once. Further, any person convicted of any specified offences punishable with imprisonment, or who, upon the trial of an election petition, is found guilty of any

⁷ *Id*

⁸ M. P. JAIN, INDIAN CONSTITUTIONAL LAW 927 (2003).

⁹ *P. Nalla Thampy vs. B.L. Shankar*, AIR 1984 SC 135

¹⁰ *Lal Babu Hussain vs. Electoral Registration Officer*, AIR 1995 SC 1189; (1995) 3 SCC 100.

orrupt practice, shall be disqualified for voting at any election for 6 years. This disqualification can be removed by the election commissioner for reasons to be recorded by in writing. Subject to these conditions every one who is above the age of 18 years is eligible to be registered on the electoral roll for any constituency¹¹.

IV.COMPARATIVE PROVISIONS IN OTHER COUNTRIES

A. UNITED KINGDOM

The European Court of Human Rights in *Hirst vs. United Kingdom* (No. 2)¹² pronounced in March, 2004, has radically altered the position in the United Kingdom. That case concerned the interpretation of Article 3 of the First Protocol to the European Convention on Human Rights.¹³ As per U.K. law, a prisoner undergoing sentence is legally incapable of voting at any parliamentary or local government elections¹⁴. The validity of that provision was challenged in *Hirst vs. Attorney General*¹⁵. The matter was first heard by the domestic English Court; Lord Justice Kennedy observed that the effect of Article 3 of the Convention was that, if a prisoner was to be disenfranchised, it must be, “*in the pursuit of a legitimate aim*”¹⁶. His Lordship found that the question of the legitimacy of the aims in the case was best left to the legislature. When the matter went before the European Court of Human Right, the court, comprising of seven judges, agreed that the right to vote was subject to exceptions that were imposed in pursuit of a legitimate aim, but held that the English disenfranchisement provision violated Article 3 of the European Convention.

The Lord Chancellor had said: *The ruling of the human rights court against U.K. laws banning prisoners from elections does not mean that all inmates will get the right to vote, The European Court of Human Rights in Strasbourg that banning ex-inmate John Hirst from the polls had breached his rights to free elections.*

The basic human right to vote should not be denied to any prisoner no mater how heinous a crime he has committed. Mr. Hirst had first challenged the vote ban in the High Court, which rejected his plea on the ground that the Representation of Peoples Act, 1983 was incompatible with the Human Rights

¹¹ The Representation of Peoples Act, 1951.

¹² 74025/01 ECHR 2004

¹³ Article 3 of the First Protocol to the ECHR: ‘*The high contracting parties to hold free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*’

¹⁴ Sec. 3 (1) of Representations of Peoples Act, 1983 (UK): ‘*A convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any Parliamentary or local government*’

¹⁵ *Hirst vs. Attorney General*, (2001) EWHC Admin 239, para 40

¹⁶ *Id.*

Convention. However, the Strasbourg court, by a majority vote of 12 to 5, ruled in his favour. The Court stated that that his right had been violated under the Convention on Human Rights, to which Britain is a signatory, and which guarantees the “right to free elections”.

According to the judges of U.K., this applies equally to prisoners, describing the voting ban as a “*blunt instrument*” which affected a significant category of people in a discriminatory way¹⁷.

According to the Director Juliet Lyon of Prison Reform Trust (PRT)

*Prisoner should be given every opportunity to pay back for what they have done, take responsibility for their lives and make plans for effective resettlement and this should include maintaining their rights to vote.*¹⁸

With regard to the second object the Human Rights Court followed the reasoning of the Canadian Supreme Court in *Sauve vs. Canada* (Chief Electoral Officer)¹⁹

With respect to the first objective of promoting civil responsibility and respect for the law, denying penitentiary inmates the right to vote is more likely to send messages that undermines respect for the law and democracy than enhance those values. The legitimacy of the law and the obligation to obey the law flows directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.

B. UNITED STATES

In the United States the prisoners do not have the right to vote. The leading case, *Richardson vs. Ramirez*²⁰ was decided in 1974. The Supreme Court’s decision upheld a provision under the laws of California which disenfranchised ‘persons convicted of an “infamous crime”’. It is worth noting that this provision not only applies to the prisoners undergoing sentence but also those who have already completed their sentence and have been released. The majority decision was based on the Fourteenth Amendment to the United States Constitution Article

¹⁷ Hirst vs. Attorney General, (2001) EWHC Admin 239, para 42

¹⁸ *Id.*

¹⁹ *Sauve vs. Canada* (Chief Electoral Officer) [2002] 3 SCR 519

²⁰ *Richardson vs. Ramirez*, 418 US 24 (1974)

2²¹, which contemplated those prisoners who committed an offence of ‘*rebellion or other crimes*’ might be disqualified from voting. The majority regarded the question as one for the legislature, and observed:

Pressed upon us by the respondents, and by amicus curiae, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he is returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum, which may properly weigh and balance them against those advanced in support of California’s present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view, which they advocate, is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument²²

A reasonable limit is justified in a free and democratic society. The question before the court was to decide whether disenfranchisement of prisoners could be considered a reasonable restriction. The argument put by the state was that the legislature was obliged, “to keep balance with the competing claims of inmates to vote with the claims of the society at large to preserve the sanctity of the franchise and to sanction offenders for violating the social contract.”²³ The next point argued by the state was the need to preserve the sanctity of the franchise based on “the requirement for a liberal democracy to have a ‘*decent and responsible citizenry*’, which will voluntarily abide by the laws or at any rate most of them.” The Courts of Appeal rejected all of the Crown’s stated objectives, stating:

If the purpose is to ensure a decent and responsible citizenry, the legislation is both too broad and too narrow. It is too broad in that the legislation catches not only the crapulous murderer but also the fine defaulter who is in prison for no better reason than his inability to pay..... With regard to the alleged objective of punishment, the legislation bears no discernable relationship to the quality

²¹ U.S. CONST., available at <http://docs.law.gwu.edu/facweb/jsiegel/home/constitution.htm> (last visited Jan. 4, 2007).

²² Richardson, *supra* note 20 at 55

²³ Richardson vs. Ramirez 336 (1992) 90 DLB (4th) 330

*or nature of the conduct being punished. Indeed, on a reading of the text of s. 51 (e) it is difficult not to conclude that, if it is imposing punishment, such punishment is for imprisonment rather than for the commission of an offence.*²⁴

C. CANADA

Since 1982, the Canadian Charter of Rights and Freedoms contain an express right to vote. A citizen of Canada has the right to vote in an election and to be qualified for membership in their legislative houses,²⁵ subject to reasonable limits prescribed by the law. In *Belczowski vs. The Queen*²⁶, this right to vote and the reasonable limits to which it is subject was in question. Section 51 (e) of the Canada Elections Act which did not allow the right to vote was challenged, *Every person undergoing punishment as an inmate in any penal institution for the commission of any offence* was held invalid under Section 3 of the Charter. The relief sought was granted at the first instance.

A new disqualification was introduced by the legislature of Canada in response to the *Belozowski* position by setting up criteria, which disqualifies a person who is imprisoned for a period of two or more years²⁷. This provision was tested in the 1995 case. The fate of the case was same as its predecessor, and in the first instance it was struck down as being in breach of Section 3 of the Canadian Charter of Rights and Freedom. The Crown was successful in appeal to the Federal Court of Appeals, but eventually the provision was held invalid by a ratio of five to four in the Supreme Court of Canada. The minority view was that the case rested upon, “*philosophical, political and social considerations which are not capable of scientific proof*”. The minority thus concluded that the court should uphold the provision as constitutional because the social and political philosophy advanced by Parliament reasonably justified a limitation of the right to vote. The majority view given by Chief Justice was thus:

In 2002 the Supreme Court of Canada ruled out that the section of the Canada Election Act that prevented inmates serving sentence of more than two years from voting in federal elections was against the Canadian Charter of Rights and Freedoms. All incarcerated electors may now

²⁴ *Id.* at 341 – 342

²⁵ Canadian Charter, section 3: ‘*Every citizen of Canada have the right to vote in an election of the House of Commons or of Legislative Assembly and to be qualified for membership therein.*’

²⁶ *Belczowski vs. The Queen* 330 (1992) 90 DLR (4th)

²⁷ Canada Election Act, 2000, sec. 4C: ‘*Every person who is imprisoned in a correctional institution serving a sentence of two years or more*’

*vote in Federal elections and referendums*²⁸ Presently, all prisoners in Canada are entitled to vote, and the Canada Elections Act contains various provisions to facilitate the prisoners' franchise. Near about 35,000 inmates in Canada became eligible to vote in 2006.

D. AUSTRALIA

The Australian Constitution does not guarantee universal suffrage. Australia has no restriction on prisoners' voting. The Constitution does expressly provide guarantee to the extent that those persons who have or have acquired a right to vote in state elections, shall not be prevented from voting in federal elections.²⁹ This provision could have had the effect of forcing the Commonwealth Parliament to prescribe qualifications for electors that were consistent with most liberal of the equivalent state provisions. On one interpretation of S. 41 of the Constitution, the federal disenfranchisement provision, because it purports to prevent South Australian prisoners from voting at federal elections, would be invalid. This is not; however, the effect of the section as it has been interpreted by the High Court. Rather, the provision has been rendered obsolete by a High Court decision to the effect that it applies only to those who had a right to vote in state elections at the time of federation³⁰. Because the decision has since been reaffirmed,³¹ it seems unlikely that the High Court would revise its view. If the Constitution is to have a bearing on prisoner disenfranchisement, it will be because it contains some relevant implied right or implied restriction on the legislative power of the Commonwealth.

The text and structure of the Australian Constitution include provisions for a system of representative government. Indeed, according to Justice Isaacs: *'the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution'*³². This requirement for representative government is brought about, in no small part, by

²⁸ Canada Online, *About Canadian Government*, <http://canadaonline.about.com/cs/election/a/electionfirsts.htm> (last visited Dec. 31, 2006).

²⁹ CONSTITUTION OF AUSTRALIA, Section 41

³⁰ In *R. vs. Pearson*; *Ex-parate Sipka* (1983) 152 CLR 254.

³¹ *Id.*

³² *Federal Commissioner of Taxation v. Munro*, 178 (1926) 38 CLR 153.

the fact that Section 7 of the Australian Constitution³³, dealing with the composition of the Senate, and section 24 of the Australian Constitution,³⁴ providing for the composition of the House of Representatives, both require that the members of those houses are to be '*directly chosen by the people*'. It is established that those provisions entrench in the Constitution a system of representative government³⁵. In *Australian Capital Television Pvt. Ltd v. The Commonwealth*,³⁶ it was accepted by the High Court that representative government requires freedom of communication on matters relevant to public affairs and political discussion, and hence that such freedom was implied in the Constitution. From one angle, the act of voting might be seen as the ultimate mode of political communication, and hence it is arguable that a right to vote falls within the Constitutional implication discussed in *ACT v. The Commonwealth*.³⁷ It seems likely, however, that, given the phrase '*chosen by the people*', the right to vote can itself be directly implied from the constitutional requirement for representative government. Consistent with the implication of a right to vote are the comments of Chief Justice Mason: '*The very concept of representative government and representative democracy signifies government by the people through their representatives*'. According to Justices Deane and Toohey, '*the powers of government belong to, and are derived from,*

³³ See M. V. PYLEE, CONSTITUTIONS OF THE WORLD 46 (2000).

Section 7 – The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate. But until the Parliament of the Commonwealth otherwise provides, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provisions the State shall be one electorate.

Until the parliament otherwise provides there will be six senators for each original State. The Parliament may make laws increasing or diminishing the number for senators for each State, but so that equal representation of several original States shall be maintained and that no Original State shall have less than six senators. The senators shall be chosen for a term of six years, and the names of senators chosen for each State shall be certified by the government to the Governor-General.

³⁴ See M. V. PYLEE, CONSTITUTIONS OF THE WORLD 46 (2000).

“Section 24 – The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators. The number of members chosen in several States shall be in proportion to the respective members of their people, and shall, until the Parliament otherwise provide, be determined, whenever necessary in the following manner: A quota shall be ascertained by dividing the number of people of the Commonwealth, as shown by the latest statistics by the Commonwealth, by twice the number of the Senators; The number of members to be chosen by each State shall be determined by dividing the number of people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State. But notwithstanding anything in this section, five members at least shall be chosen in each Original State.”

³⁵ *Lange v. Australian Broadcasting Corporation*, 104 (1997) 145 ALR 96 .

³⁶ *Australian Capital Television Pvt. Ltd v. The Commonwealth*, (1992) 117 CLR 106.

³⁷ *ACT v. The Commonwealth*, 65 CLR 373 (1942).

the governed, that is to say, the people of the Commonwealth'. A Judge of the High Court, Justice Kirby, writes: *'it seems to me distinctly arguable that, in Australia, there may be a basic right to vote implied in the text of the Constitution itself'*³⁸.

Any right to vote implied in the Constitution would not, however, be unqualified. The Constitution quite clearly provides for the Commonwealth Parliament to legislate with respect to the qualification of electors.³⁹ In addition the term 'chosen by the people' implies two qualifications: that electors would possess, firstly, the ability to make a meaningful choice, and secondly, that they qualify as 'people' of the Commonwealth or, in the case of the Senate, of the relevant State. It might also be argued that the term '*chosen by the people*' must be satisfied by less than universal suffrage because many people were excluded from the franchise, including, in many states, women, and aborigines when the federation came into being. If that argument were to be accepted, then the Parliament's power to exclude voters would be very wide indeed. There are grounds, however, to suppose that the High Court might, in interpreting the phrase '*chosen by the people*' accord it a more contemporary contextual setting:

*The words 'chosen by the people of the Commonwealth' fail to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s. 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth. For instance, the long established universal adult suffrage may now be recognised as a fact and as a result it is doubtful whether, subject to the particular provision in s. 30, anything less than this could now be described as a choice by the people.*⁴⁰

³⁸ See J.M.Kerby, *Upholding the franchise - Contrasting Decision in Philippines, U.S and Australia*, 21 AUSTRALIAN BAR REV. (2001).

³⁹ Section 30& 51 (xxxvi).

⁴⁰ Attorney General (Ch) (Ex. Rer. Mekenlay) vs. The Common Wealth, (1996) 135 CLR 1, 35 & 36

Similar sentiments were expressed by a majority in *McGinty*⁴¹ by Justice McHugh. In *Langer v. The Commonwealth*,⁴² Justice Gaudron expressed the view that:

Notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as ‘chosen by the people’ within the meaning of those words in Sec. 7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.

If the Court adopted this approach, in determining what constituted a choice by the people in contemporary terms, it might have regard to overseas domestic provisions, as discussed above, and also to relevant international laws and principles.

V. INDIAN POSITION

The Preamble of the Constitution declares India to be a Democratic Republic. Democracy is the basic feature of the Constitution and it can be sustained only through free and fair elections. Only free and fair elections to the various legislative bodies in the country can guarantee the growth of a democratic polity. It is the cherished privilege of the citizen to participate in the election process, which makes a person feel in a seat of power⁴³. India has adopted adult suffrage as basis of election to the Lok Sabha and the state Legislative Assemblies. Every citizen who has reached the age of 18 years has a right to vote without any discrimination.

The Indian courts often refer to international instruments on human rights while interpreting the meaning and scope of statutory provisions. The modern effort towards what Winston Churchill called “enthronement” of rights of men began with the founding of the United Nations.⁴⁴ Indian courts have acceded to the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights⁴⁵ (but not the optional protocol) on 27th March 1979, subject to certain declaration that set out as to how it would apply certain provisions of the Covenants.

Debarring persons in judicial custody is not unconstitutional. A person who is in prison for his own conduct and is, therefore, deprived of his liberty

⁴¹ *Id.*

⁴² *Langer vs. Commonwealth*, 424 (1996) 134 ALR 400

⁴³ M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 941 (2006)

⁴⁴ P. CHANDRASEKHAR RAO, *THE INDIAN CONSTITUTION AND INTERNATIONAL LAW* 139 (1993).

⁴⁵ U.N.Doc.ST/LEG/SER.E/10, 124-125

during the period of his imprisonment cannot claim equal freedom of movement, speech and expression⁴⁶. Restrictions on voting of persons in prison result automatically from his confinement as a logical consequence of imprisonment. The object is to keep the person with criminal background away from the election scene and therefore, a provision imposing restriction on a prisoner to vote cannot be called unreasonable⁴⁷.

Preventive detention differs from imprisonment on conviction, or during the investigation of the crime, and the same permits for the separate classification of the detainee under preventive detention.⁴⁸ In *Anukul Chandra Pradhan vs Union of India*,⁴⁹ the Supreme Court upheld the validity of the provisions of section 62(5) of the Representation of Peoples Act, 1951⁵⁰ on two grounds; firstly that Article 14 does not affect it, and secondly the Court observed:

*The right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute prescribing the nature of the rights to elect cannot be made with reference to fundamental rights in the Constitution. The very basis of challenge to the validity of sub sec (5) of sec 65 of the Act is therefore, not available and this petition must fail.*⁵¹

Section 62 (5) of The Representation of Peoples Act, 1957, debars a person to vote in an election if he is imprisoned. Proviso to Sub-section (5) carves out an exception for a person subject to preventive detention under the law for the time being in force. The Court in this case held that the classification made is not violative of Article 14. It also does not violate Article 21 on the alleged ground that the restriction on prisoner's right to vote denies dignity of life. Therefore, classification made for persons in preventive detention is reasonable.

⁴⁶ *A. K. Gopalan vs State of Madras*, AIR 1950 SC 88.

⁴⁷ See D. J. DE, INTERPRETATION AND ENFORCEMENT OF FUNDAMENTAL RIGHTS, 629 (2000)

⁴⁸ *Id.*

⁴⁹ AIR 1997 SC 2841; (1997) 6 SCC 1

⁵⁰ Section 62 (5) of the Representation of Peoples Act, 1951: 'No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police. Provided that nothing in the sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.'

⁵¹ *Id.*

Article 19 (1) (d) of the Constitution of India⁵² guarantees to every citizen of India the right to move freely throughout the territory of India and Article 19 (1) (e)⁵³ guarantees to the citizen of India the right to reside and settle in any part of India. These rights are interrelated. These rights are, however, not absolute and they are subject to Article 19 (5)⁵⁴ of the Constitution which provides that the state may impose reasonable restrictions on these rights by law in the interest of the general public or for the protection of the interest of any scheduled tribe. A citizen has the right to move from one State to another. He also has the freedom to move from one part of the State to another.

When an offender is sentenced to imprisonment he loses his right to movement and residence as a result of such confinement in prison.. In *Sunil Batra vs. Delhi Administration*,⁵⁵ it was held that the restriction imposed on a prisoner under Sec. 30 (2) of the Prisons Act, 1894⁵⁶ was not unreasonable as the restriction is imposed keeping in view the safety and security of the prisoners and the prison, and the same could not be treated as being violative of Article 19 (1) (d) of the Constitution.

It appears from the discussion, that Supreme Court has omitted to give due regard to the provisions of Articles 325 and 326. Article 325, does not exclude membership on the ground of religion, race, caste or sex. Article 326 is related to elections to the House of the people and State legislative assemblies to be on the adult suffrage. The right to vote is neither a common law right nor a fundamental right, and it is also not purely a statutory right either. It is more substantive as the Right to vote is not a gift of the legislature but flows from the Constitution. Free and fair election has been declared basic feature of the Constitution.⁵⁷

VI. IMPACT OF INTERNATIONAL INSTRUMENTS/ LAW

The Indian courts often refer to international instruments on human rights while interpreting the meaning and scope of statutory provisions. The modern efforts towards Winston Churchill called “enthronement” of rights of men

⁵² CONSTITUTION OF INDIA art 19 (1) (d)

⁵³ *Id.*.

⁵⁴ *Id.*.

⁵⁵ *Sunil Batra vs. Delhi Administration* AIR 1980 SC 1597.

⁵⁶ Section 30. Prisoners under sentence of death.— (1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailer and all articles shall be taken from him which the Jailer deems it dangerous or inexpedient to leave in his possession.(2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed, by day and by night, under the charge of a guard.

⁵⁷ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 943 (4th ed. 2003)

with the founding of United Nations.⁵⁸ In *New Crest Mining vs. Commonwealth*⁵⁹ Justice Kirby observed, that the principle applies equally to the interpretation of constitutional law, as to common law⁶⁰. Article 25 of the ICCPR states:

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: To vote and to be elected at genuine periodic elections 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.*⁶¹

The distinctions mentioned in Article 2 are distinctions ‘of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. The term ‘other status’ could arguably include persons serving sentences of imprisonment. The United Nations Human Rights Committee had previously expressed a contrary view that Article 25 does not prevent states from having a non-discriminatory disenfranchisement provision.

More recently, however, the UNHRC has commented, in relation to the UK provision concerning an old law that convicted prisoners may not exercise their right to vote. The Committee has stated that it fails to discern the justification for such a practice in modern times considering that it amounts to an additional punishment and that it does not contribute towards the prisoner’s reformation and social rehabilitation which is contrary to Article 10, paragraph 3, read in conjunction with article 25 of the Covenant. State parties should therefore reconsider laws depriving convicted prisoners of right to vote.⁶² Article 10(3) of the ICCPR provides: ‘The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.’ This is relevant in the present context because it affords primacy to the aim of rehabilitation, whereas those opposed to voting rights for prisoners often assign punishment and deterrence as objects of equal importance.

The International Convention on the Elimination of All Forms of Racial Discrimination, to which India is a party, is also relevant in this context. The Convention requires states to guarantee to everyone, without distinction as to race, political rights, the right to vote and to stand for election, on the basis of

⁵⁸ P. CHANDRASEKHAR RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW 139 (1993)

⁵⁹ 657-8 (1997) 190 CLR 513.

⁶⁰ *Id.*.

⁶¹ Article 25 ICCPR: ‘Every citizen shall have the right and the opportunity, without unreasonable restriction: (a) To take part in the conduct of the public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the by the electors;

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

⁶² CCPR/CO/73/UK

universal and equal suffrage.⁶³ The Convention also obliges states to amend, rescind or nullify any law that has the effect of creating or perpetuating racial discrimination, or of strengthening racial division.⁶⁴ Because of the disproportionate effect that prisoner disenfranchisement has on indigenous Indians: it is arguable that such disenfranchisement conflicts with India's obligations under the Convention.

The principles recognised in the international instruments mentioned here are consistent with the approaches taken in Canada and the United Kingdom (in light of the *Hirst* judgment), and that collective approach may lead the Courts of different countries towards a conclusion that the constitutional requirement for choice by the people is akin to a requirement for universal suffrage, subject to the exceptions mentioned above, and discussed below.

VII. IS PRISONER DISENFRANCHISEMENT A 'REASONABLE RESTRICTION' TO UNIVERSAL SUFFRAGE?

Indian laws that are inconsistent with rights implied by the text of the Constitution can be valid if they satisfy two conditions. First, that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative government. Secondly, that the law is reasonably appropriate and adapted to achieving that legitimate object.⁶⁵ This requirement is, in effect, similar to the test for reasonable exceptions to the Canadian right to vote, and to the 'legitimate aims' exception to the right in the United Kingdom and Europe. Hence in testing any Australian disenfranchisement provision, one can begin with an assessment of its object.

It is no easy task to establish the purpose or object of laws for the disenfranchisement of prisoners. As was discussed in relation to other domestic provisions above, some of the oft invoked reasons are firstly, promoting civic responsibility and respect for the law, secondly, punishment, and thirdly, deterrence. In the Canadian case of *Sauve v. Canada*⁶⁶, the majority held that disenfranchisement attaching to prisoners serving two years or more was not rationally connected to the object of punishment. That finding certainly seems true of the proposed Indian provision: to remove the right to vote from all those serving a sentence. When considering punishment as an object, recall also the requirement in Article 10(3) of The ICCPR: '*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*' This is more consistent with placing rehabilitation above deterrence, and accordingly with an inclusive approach to prisoners in the context of political participation.

⁶³ Article 5 of ICERD,

⁶⁴ Article 2 of ICERD

⁶⁵ 108 (1997) 145 ALR 96

⁶⁶ *Sauve v. Canada*, [2002] 3 SCR 519

As for the assertion that prisoner disenfranchisement can ‘enhance civil responsibility and respect for the rule of law’,⁶⁷ the argument was rejected in Canada and Europe in *Sauve* and in *Hirst* respectively, the respective Courts noting that the provisions undermine respect for the rule of law by detracting from the legitimacy of the legislature from which they emanate. At least it can be said, where prisoners have the franchise, that their fate is sanctioned by a political process in which they continue to play a part. That is a situation more likely to inspire respect than one that separates the prisoner from political society. Again the provision fails to demonstrate a sufficient connection to the object.

VII. CONCLUSION AND SUGGESTIONS

The requirements of the Indian Constitution for representative government are open to be interpreted so as to protect the right of Indians to vote in elections. The proposed provision to remove the right to vote from all prisoners serving a full-time sentence of imprisonment arguably conflicts with the Constitutional requirement, and would accordingly, be liable to be held invalid if challenged in the Court.

There are a variety of ways in which enfranchisement of prisoners could be achieved in practice. Polling stations could be set up in the prisons or special votes could be provided to prisoners. Prisoners are literally a captive population, living in a disciplined and closely monitored environment, regularly being counted and recounted. The Election Commission should have little difficulty in ensuring that those who are eligible to vote are registered and given the opportunity to vote, and achieving the objective of an easily managed poll on the respective Election Day.

⁶⁷ *Hirst vs. United Kingdom*, 2000 EWHC Admin 239.