

# SHOULD PRISONERS BE TREATED AS EQUAL CITIZENS: RIGHT TO VOTE A WAY FORWARD?

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## INTRODUCTION

“Fundamental rights do not flee the persons as he enters the prison although they might suffer shrinkage necessitated by incarceration”<sup>i</sup>.

The prison and persons detained therein have once again come to the forefront of the discussion in the context of the ongoing pandemic and the deteriorating conditions in Indian prisons.

‘Prisons’ are a State subject under Entry 4 of List II of the Seventh Schedule in the Constitution of India. It basically means that administration and law-making falls under the purview of respective State Legislative Assembly. Hence, the prison legislations of different states vary in their content. Although the Ministry of Home Affairs advises the States and UTs on various Prison matters. The Prison Act, 1894 has been an ideal set of rules and regulation for Indian States while formulating their respective Prison Laws. But the issue with this is that the source laws being referred to here are archaic and focus alone on maintaining discipline, prison offences and the punishment for these offences.

Prisoners are forgotten human beings once they enter the gates of a prison. Prisons in India often get a bad name for the inhumane living conditions that the prisoners must face, from torture by prison authorities and fellow inmates, degrading accommodation, nutrient poor food and the list goes on and on. They are denied the most basic needs what to talk of the other higher rights that have been taken away just in the name of them being prisoners.

It has been established from time to time that the prisoners continue to be humans and deserve basic human rights even after being convicted for a crime. Preservation of rights of such people become necessary as their movement is restricted and they are put in isolation away from the society. Thus, prisoners are entitled to the rights like any other citizen of a country except those,

which are taken away or temporarily suspended for the duration of their incarceration hence, establishing that the fundamental rights of the prisoner are not absolute.

## **PRESERVATION OF PRISONERS FUNDAMENTAL RIGHTS**

Judicial Activism has also played an important role in addressing the problems of prisoners. Considering the shift in theories of punishment and treatment of prisoners, in various landmark judgements due recognition has been given to their Fundamental Rights preserving the sanctity of the Indian Constitution.

- The Supreme Court in *D.B.M Patnaik v. State of Andhra Pradesh AIR 1974 SC 2092*<sup>ii</sup> stated that rights of the prisoners stay intact but rights enshrined under Article 19(1)(d) – Right to freedom of movement freely throughout the territory of India are suspended due to the very nature of confinement. But right to life and personal liberty enshrined under Article 21 of the Constitution are available despite such incarceration.
- The shift in focus of the society at large and law in particular towards the preservation and enforceability of basic fundamental rights of individuals lead to the landmark judgement of *Prem Shankar v. Delhi Administration AIR 1980 SC 1535*<sup>iii</sup> wherein the Supreme Court was of the opinion that putting fetters and handcuffing is by nature sadistic and is arbitrary. It again violates the premise of Article 14 and 21 which insists upon justice which must be fair and reasonable. The principle of natural justice is often used by courts while validating the scope of reasonable restrictions.
- Article 39A of the Indian Constitution provides for the State to provide free legal aid with the help of suitable legislations and schemes ensuring equality of opportunity to all citizens irrespective of their economic or other disabilities. The same was upheld by the judgement of *Hussainara Khatoon I v. Home Secretary, State of Bihar (1980) 1 SCC 81*<sup>iv</sup> where the SC held that keeping in mind the problem of overpopulation in prisons due to huge number of undertrials, the State must ensure ‘speedy trials’ as this is blatant violation of the fundamental right under Article 21. Hence Article 39A is the one of the keys to ensure speedy trials as majority of the prison population is languishing in jails due to lack of legal resources.

- “No person shall be deprived of his life or personal liberty except according to procedure established by law”<sup>v</sup>. Torture in correctional institutions has been observed by various research and it was observed in the case of *Sunil Batra v. Delhi Administration AIR 1978 SC 1635* where the 'hands-off' doctrine was rejected and ruled that “fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration.”<sup>vi</sup> The scope of Article 21 has been expanded to the extent of including the rights of prisoners within its ambit. The prisoners have a right against bar fetters and no individual can be tortured and be victim of inhumane treatment in correctional institutions.
- By and large, the judgements of Supreme Court have expanded the rights of the prisoners in the wake of increasing emphasis on the human rights and the deteriorating state of prisons. The Supreme Court Judge Justice Krishna Iyer in the case of *Marie Andre's v. The Superintendent, Tihar Jail* stated that “imprisonment does not spell farewell to fundamental rights although, by a realistic re-appraisal, Courts will refuse to recognize the full panoply of Part III enjoyed by a free citizen.”<sup>vii</sup>
- The Indian Jail Committee Report 1919-20 put forth the proposal to extend ‘vocational training’ and ‘work program’ to the inmates, however, the proposal largely remained limited to manual Labour and the two terms were used interchangeably for long. In 2003, the Model Prison Manual, addressed the vitality of education for the development of prisoners, which could provide enough self-sufficiency and even help in rehabilitation. Hence, prisoners in India have been able to avail their right to education.

The persons detained, in India, have been bestowed upon with rights necessary for their humane existence in the prison cells. It allows them to access equal protection of law and conviction as per the procedure established by law. It gives him access to free legal aid and means to attain fullest potential even during incarceration. A prisoner should also get freedom to express himself freely.

The rules and regulations and the courts of India have maintained that by being sentenced to a punishment for a crime being committed, does not take away a person’s citizenship nor does it subscribe him to animal like treatments. Thus, it can be asserted that prisons are a part of the country like any other territory of the country and thus, continue to be under the jurisdiction of

the Constitution of India and hence, the prisoners detained in these prisons continue to remain citizens of the country, until and unless their citizenship is revoked by law itself.

Hence, I propose a way forward to prison reforms in India by extending the Legal right to vote for those imprisoned.

## **RIGHT TO VOTE A WAY FORWARD**

India, that is, Bharat is the largest Democracy of the world. The Indian Constitution adopted 'universal adult franchise', giving every citizen who is not less than 18 years of age to cast a vote in the elections to the Lok Sabha and the State Legislative Assembly. The right to vote is a 'key-power' that the citizens hold in a democratic setup. Casting a vote implies their expression of right to choose and elect the government. However, a prisoner in India has not been given the right to vote, as under Article 326, of the Constitution of India.

"As per Article 326 of the Constitution of India, read with Article 19 and 16 of the Representation of People Act, 1950 and 11A and 62 of the Representation of People Act, 1951, provides that any person not otherwise disqualified and has attained eighteen years of age and is ordinarily resident in a constituency, has a right to get registered in electoral roll and vote in elections of House of the People i.e., Lok Sabha and Legislative Assembly Elections. The said Article, permits disqualification of a voter under the Constitution or a law on the grounds of non-residence, unsoundness of mind, crime or corrupt or illegal practice."<sup>viii</sup>

However, it should be understood that with the expansion of human rights and several fundamental rights to the prisoners, time has come to make alterations and expand the scope of right to vote to the prisoners in India.

To argue that right to vote should be expanded beyond the walls of prisons, it is important to understand the interpretations associated with Article 19(1)(a) and Article 21, of the Indian Constitution. The scope of both these articles, in recent times have been widened and progressively interpreted by the Supreme Court. Their interpretation has been amplified to give way to several implicit or inferred rights which are guaranteed as the explicit rights under Article 32. According to these interpretations, 'the right to freedom of expression and speech', {Article 19(1)(a)} has come to include the right to express oneself through whichever mode possible. Thus, it can be understood that the Article 326 in the Constitution, provides for the

modalities for voting and the Article 19 (1)(a), provides for the act of casting a vote, the idea of expressing oneself through vote. Furthermore, the very act of expressing oneself helps in ensuring human dignity, which has been further interpreted under Article 21, right to live a dignified life.

The understanding of the above rights helps us throw some light upon the fact that the prisoners in India have been long denied the right to express themselves by not allowing them to cast their votes. As it has been established above, that prisoners even after being convicted, continue to remain the citizens of the country, thus it becomes absolutely necessary to ensure that such rights are extended to prisoners, whose movement is restricted due to confinement under law. There have been restrictions on their freedom to express themselves freely in a free and democratic country. It is important to mention that though, the fundamental rights in India are not absolute in nature, yet the prisoners should be given the right to express themselves. The expansion of voting rights to the prisoners, will expand the democracy and turn it into a more inclusive one. It will allow the prisoners to live a more dignified life by being participative in the decision-making process of the country like any other citizen.

“Right to vote ensures participatory and responsible democratic government that empowers the citizens to influence governmental decision-making, policy and safeguards their other human rights. When the government is elected by the people and consists of their representatives, there will be more co-operation and obedience of laws among the masses. Right to vote encourages civic consciousness as it encourages political participation, and the citizens will thus keep checks on the government.”<sup>xix</sup>

The prisoners, even though confined, are a part of the country. The legislations governing them are made by the governments elected by the people of the country. As seen above, the rules and laws of administration in prisons are not given directly in the constitution rather, are being evolved with time through acts passed by the legislature. Since, the rules governing the prisons and those detained, are being made by a group of elected individuals, it becomes necessary to include those affected by such laws, to be able to elect those governing them. The prisoners being the stakeholders, should be given the right to vote and be allowed to determine who should make rules for them.

To extend, the right to vote to the prisoners, it would require an amendment to the Article 326, of the Constitution, to omit ‘crime or corrupt or illegal practice’. Further, the representation of

People Act 1950 and 1951, would have to be amended to exclude provisions disqualifying the convicted from voting. Hereafter, it would require the Election commission to make provisions for the participation of the prisoners in the electoral process of the country like any other citizen in the country. An important aspect of concern, in relation to the process of voting for the prisoners, is the logistics behind administering such elections. It should be noted here that, the Election Commission has been using, what is called as, Postal Ballot System. It is a system where electors send their votes through post.

At present, the system followed is that Electronically Transmitted Postal Ballot Papers (ETPB) are distributed to electors and returned by post. In the 2019, Lok Sabha elections, the Election Commission, introduced this system for the service voters to allow them to exercise their right to vote. The electronic postal ballots were also used for people under preventive detention. While the prisoners are not allowed to vote, people under preventive detention can cast their votes through postal ballots as well (according to Section 62 (5) of the Representation of the People Act). It is here, that we can extend the system, already in place, from those under preventive detention to other prisoners as well. The idea to introduce Electronically Transmitted Postal Ballot Papers (ETPB) for the non-residents Indians is also underway and can logistically be extended to the prisoners as well, once the necessary amendments and provisions are given way.

## **CONCLUSION**

The association with prisons in Indian history, for long have been about cramped up lockups, centers of torture, unhygienic living conditions, dreaded upon by mankind. There have been several attempts by the courts and the respective governments to introduce necessary changes. There have been several regulations and propositions for the betterment of lives in the prisons. Various Committees at different point in time have been setup to propose reforms considering the prevailing deteriorating conditions and the way forwards for correctional institutions of India. However, there have been a lack on the part of implementation of the proposed rules. In the view of such impediments, the Supreme Court through its judicial activism has made sure that the appropriate and more so necessary rights have been accorded to the prisoners. The scope of Article 21 has been extended by the Indian Judiciary for safeguarding and protecting the fundamental rights of the prisoners and given way for long due prison reforms. Under the

amplified interpretation of the Article 19(1)(a), the expression of one's own opinion, through casting of vote, can be extended to the prisoners and they can be given the right to vote by making necessary amendments.

It is time that the largest democracy in the world makes way to include a significant component of society i.e., Indian Prisoners, who suffers from the brutalities of maladministration and inhumane living conditions, and give them a voice for fair treatment, the expression of their opinion, the right to cast a vote!

## **BIBLIOGRAPHY**

1. <http://www.legalservicesindia.com/article/1616/Role-of-Judiciary-in-Protecting-the-Rights-of-Prisoners.html>
2. D. Bhuvan Mohan Patnaik & Ors vs State Of Andhra Pradesh & Ors, 1974 AIR 2092 (Supreme Court 1974).
3. Hussainara Khatoon I to VI v Home Secretary, State of Bihar, 1 SCC 81 –115 (Supreme Court of India 1980).
4. Prem Shankar V. Union of India , SCR (3) 855 (Supreme Court 1980).
5. Sehgal, D. R. (2021, June 15). Retrieved from I Pledgers: <https://blog.ipleaders.in/rights-prisoners-major-judgments/>
6. Sunil Batra v. Delhi Administration, 4 SCC (The Supreme Court 1978).
7. Tushti. (2021, June 15). *Legal Services India*. Retrieved from <http://www.legalservicesindia.com/article/2266/Voting-Rights-in-India-to-Non-Resident-Indians.html>
8. Constitution of India
9. IGNOU study material for Post Graduate Diploma in Criminal Justice: Prisons and Prisoners

## ENDNOTES

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<sup>i</sup> Sunil Batra v. Delhi Administration

<sup>ii</sup> D.B.M Patnaik v. State of Andhra Pradesh AIR 1974 SC 2092

<sup>iii</sup> Prem Shankar v. Delhi Administration AIR 1980 SC 1535

<sup>iv</sup> Hussainara Khatoon I v. Home Secretary, State of Bihar (1980) 1 SCC 81

<sup>v</sup> Article 21 of the Constitution of India

<sup>vi</sup> Sunil Batra v. Delhi Administration AIR 1978 SC 1635

<sup>vii</sup> Marie Andre's v. The Superintendent, Tihar Jail

<sup>viii</sup> Tushti. (2021, June 15). Legal Services India. Retrieved from

<http://www.legalservicesindia.com/article/2266/Voting-Rights-in-India-to-Non-Resident-Indians.html>

<sup>ix</sup> Tushti. (2021, June 15). Legal Services India. Retrieved from

<http://www.legalservicesindia.com/article/2266/Voting-Rights-in-India-to-Non-Resident-Indians.html>

