



---

## **Voting Rights of Undertrial Prisoners: A Deprivation of Political Rights**

*Astha Thapliyal*

Uttarakhand Technical University, Dehradun

---

### **ABSTRACT**

The vote of every citizen is a badge of dignity and personhood which implies that everybody counts. Prisoners in India are not given a chance to vote. They are denied their right to franchise based on Section 62(5) of the Representation of the People Act, 1951. In this paper we are going to discuss about the under trial prisoners or those individuals who are facing trials in the competent courts. These individuals are technically under judicial custody but for all practical purposes are kept in the same jail where the convicted prisoners are kept. The said act is very vast and has been amended several times but Section 62(5)<sup>1</sup> still stands unreasonable, arbitrary and contrary somewhere as it provides a convict, the right to contest election but not the right to vote.

---

### **INTRODUCTION**

With over 900 million voters, India is the world's largest democracy. Young or old, rich or poor, everyone has a voting right, but perhaps not everyone. A person is considered innocent until he is proven guilty as per the law. Our Indian electoral system is governed by two major provisions. One is Part XVI of The Indian Constitution and the other is Representation of the People Act, 1951. The purpose of criminal justice in our country is to protect not only the rights of the victims but also the convicts, prisoners and undertrials. They cannot be bared of their fundamental and human rights. As per the 78<sup>th</sup> report of the Law Commission, 1979, undertrial prisoners also known as pre-trial detainees refer to unconvinced prisoners, who has been detained in prison during the period of investigation, inquiry or trial for the offence they are accused to have committed. In general, undertrial prisoners are those individuals who are currently on trial or who are imprisoned on remand whilst awaiting trial or who is on a trial in a court of law.

---

### **NCRB REPORT ON UNDERTRIAL PRISONERS**

The latest National Crime Reports Bureau of 2021 shows the data that a total number of 5,54,034 prisoners were confined as on December 31, 2021 across various prisons across the nation and the number of undertrial prisoners has increased from 3,71,848 in 2020 to 4,27,165 in 2021 which means a hike of approximately 14.9%. The state wise data collected shows that Uttar Pradesh has the maximum number of undertrial prisoners in the country which is approximately 90,606, followed by Bihar which is approximately 59,577 and Maharashtra which is approximately 31,752. However, as per the reports of NCRB, undertrial prisoners constitute almost 60%-70% of prison population which points to an underlying issue regarding the rights of the prisoners and whether it is fair to keep these individuals in prison for so long despite a lack of conviction. This report signifies a major point that undertrial prisoners have certain employment rights, educational rights but not the right to participate in a democracy and most of them are not even actually inside the jails for committing offence but are waiting for the final judgement to arrive.

---

### **THE PIL OF 2019**

Recently after a PIL was filed by student of law from National Law University, Bangalore in the case of **Aditya Prasanna Bhattacharya V. Union of India and Ors.**, the Supreme Court has also decided to examine the poll law which deprives under trials, civil prison detainees their right to vote. Moreover, **Section 62(5)** of the Representation of the People Act, 1951 mandates that a person is deprived of his right to vote as per law, in any election if in case he is confined in any prison, is under the service of his imprisonment, transportation, under trial or is in lawful custody of the police. The petitioners are pointing out a valid loophole of the Indian legal system and its interpretation as it gives the citizens who are out on bail, the right to vote but not the individuals on whom the charges have not yet been proved. It raises a question that is this discrimination because some of the alleged individuals lack money and resources for remanding bail.

---

<sup>1</sup> 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 by reason of the prohibition to vote under this sub-section, a person whose name has been entered in the electoral roll shall not cease to be an elector.

The petition is challenging a provision in the election law that imposes a blanket ban on under trials, persons confined in civil prisons and convicts serving their sentence in prison from casting their respective votes. The issue which was raised in this context on comparison with the convicts who were granted bail was that, on one hand convicts who were granted bail could vote but in the other hand under trial prisoners whose innocence or guilt is yet to be determined and those who were confined in civil prisons were deprived of their right to vote. A suggestion was also provided to set up EVMs in the prisons itself. The petition further pointed out that this ban somewhere lacks reasonable classification as it makes no distinction between convicted prisoners, undertrials and those who are in lawful custody of police, rather violates **Article 14**<sup>2</sup>, **Article 19(1)(a)**<sup>3</sup>, **Article 21**<sup>4</sup> and **Article 326**<sup>5</sup> of The Indian Constitution, 1949 majorly on the grounds that it disenfranchises a large segment of the population of the nation.

---

## REASONS FOR HIGH POPULATION OF UNDERTRIALS

Several reasons have been identified as to why there is a large sum of population who is engaged as undertrials. The first and foremost reason is overburdened judiciary. The Indian judiciary still is suffering from this problem of pendency of cases. The low capacity of judicial system has resulted in pendency of 4 crore cases. This pendency causes further delay in serving justice or punishment, whatsoever deems fit to the undertrial prisoners. Not only the judicial system but also the police and prison officials at times fail to fulfil their obligations. Despite of a ruling of the Hon'ble Supreme Court in **Hussainara Khatoon V. Home Secretary Bihar**, on providing the right to speedy trial as a fundamental right under **Article 21** to prisoners or accused persons, still these individuals tend to suffer even if proven innocent at the end. Records have proven that most of the undertrial prisoners poor, illiterate or marginalised communities which makes these prisoners unable to get any legal aid like providing sureties or remanding bail. The lack of educational and economic resources is also one of the major causes for increasing number of undertrial prisoners. Keeping a note on the 268<sup>th</sup> Law Commission Report, it has been observed that 60% of individuals got arrested unnecessarily and the low police-population ratio has further delayed the process of investigation.

---

## CHALLENGES AHEAD

The Bombay High Court in **Anukul Chandra Pradhan V. Union of India** has upheld the constitutional validity of **Section 62** and categorically held that the classification between the person who are in custody and those who are not in custody, is a reasonable classification based on an intelligible differentia. Similarly, there was again a landmark case of **Praveen Kumar Chaudhary V. Election Commission and Ors.**, where the court opined that voting right is neither a constitutional nor a fundamental right but only a statutory right and is also subjected to certain limitations provided under **Section 62(5)** of the said act. A glimmer of hope was seen in the year 2016 when the Indian Election Commission set up a committee of seven members headed by Deputy Election Commissioner to examine the issue. The students then filed an RTI to get to know about the finding of the committee. Further the court also upheld that it would be suffice to note that the concept of democracy transcends electoral democracy. Purity of electoral process and probity of the participants therein, are also of equal significance in strengthening democratic principles. It was stated that right to vote is not merely a statutory right, but has been elevated to the level of a constitutional right though certainly not a fundamental right. The criminal justice delivery system in the Indian subcontinent saw more than 0.2 million undertrial prisoners who are being neglected in prison for many years. In many of the cases it even exceeded the maximum sentence for crime which they had committed. There had been several cases where the amount of bail is disproportionately high. While prisoners are not allowed to vote, people under preventive detention can cast their votes through postal ballots in which a machine named as ETBP (Electronically Transmitted Postal Ballot) is used and ballot papers are distributed electronically to electors and are then returned to the election officers via post.

---

## TRENDS ACROSS THE WORLD

There are several human rights instruments like **Article 21** of UDHR (Universal Declaration of Human Rights) and **Article 25** of ICCPR (International Covenant on Civil and Political Rights) which provide provisions related to voting rights in international context. **Article 21** of the UDHR specifies that every individual have the right to vote or choose a representative of his own choice and participate in the government of a nation either directly by contesting or indirectly by electing. On the same hand, **Article 25** of the ICCPR specifies that every individual must have the right or opportunity to vote or contest elections or public affairs irrespective of the individual's colour, gender, origin, religion, language, nationality, etc. the voting rights of prisoners therefore vary from country to country. Many countries including Denmark, Czech Republic, Serbia, Ireland, Spain, Sweden, Ukraine, Switzerland, Kenya, Ghana, South Africa, France, Croatia, Israel, Finland and Canada have realised the need to bring in a progressive criminal justice reform and have

---

<sup>2</sup> Equality before law-

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

<sup>3</sup> to freedom of speech and expression

<sup>4</sup> Protection of life and personal liberty-

No person shall be deprived of his life or personal liberty except according to procedure established by law

<sup>5</sup> Elections to the House of the People and to the Legislative Assemblies of the States to be on the basis of adult suffrage-

The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, 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.

shown flexibility towards prisoner's voting rights. For instance, in Australia, the prisoners serving their sentences of 3 years or less can vote through post. Similarly in Canada, such individuals can vote through mail or chose to vote inside the prison itself. Talking about China, prisoners standing in death rows are banned from voting. The US context slightly varies in this regard and hence in states like Maine and Vermont, all the individuals including prisoners have the right to vote regardless of whatever criminal acts they have committed. The point here is, can India bring in these prison reforms or not.

---

## **METHODS TO ADDRESS THE ISSUE OF UNDERTRIALS**

The undertrials have been banned to vote due to certain reasons like for keeping the persons with criminal backgrounds away from election scenarios, deploying larger amount of police and security forces while permitting every person in prison to vote and restricting an individual who is in prison to claim equal rights and freedoms. Though there is a large sum of population indulged as undertrials but the problem of at least unnecessary arrests can be curbed. A specified training program must be provided to the police forces to avoid such unnecessary arrests and there must be an increase in capacity of criminal justice system. Further there must be an amendment to the provisions related to bail under the Criminal Procedure Code. The Hon'ble Supreme Court and the reports of the Law Commission has observed at times that "Bail is a Rule, Jail is an Exception" which has not yet been implemented by the authorities. Elections encourage us to speak about our disappointments and problems with the state of affairs across the nation, while also the opportunity to campaign for our demands. Denial of voting rights pushes the prisoner away from society and establishes a retributive system, where citizens are condemned and forgotten. 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.

---

## **CONCLUSION**

It is well said that a citizen having no right to vote in a democratic nation has zero existence and hence this is the beed of the hour to amend **Section 62(5)** and deliver justice to those who must be treated innocent in the real sense as they have not yet been found guilty. India having the largest democracy in the entire globe lays major emphasis on safeguarding fundamental rights, democratic rights, human rights and civil rights of the citizens. With such a broad perspective this is the obligation of the government and the legislature to frame laws regarding rights of undertrials too. It might still be a small population as compared to the size of other communities even when a moral obligation would stand for vote seekers and subsequently winners of power to be responsive towards demands of the prisoners.