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**RIGHT TO VOTE FOR UNDERTRIAL AND PRE-TRIAL PRISONERS
IN INDIA**

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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.

○ 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

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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.”*

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

- a) **Convicts**- who are no longer entitled to the presumption of innocence; and
- b) **Undertrial Prisoners**- who are presumed innocent until found guilty by the court of law.³

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

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

²The Constitution of India, 1950

³ Jasvir Singh & Anr. v State of Punjab & Ors. [CWP No.5429 of 2010]

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within its ambit. The words, “or is in the lawful custody of the police” thus also bringing the two categories of prisoners under one. Hence, at present, there exists a blanket ban upon the exercise of their constitutional right to vote⁴ 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.

○ **ARTICLE 14 OF THE INDIAN CONSTITUTION ENCOMPASSES THE TEST OF REASONABLE CLASSIFICATION**

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”⁵The Supreme Court of India in a plethora of pronouncements has held that Article 14 of the Constitution encompasses a Test of Reasonable Classification. Accordingly, the classification of persons under any law in force should be founded upon certain intelligible differentia to achieve a certain object. Article 14 does not in any way say that all persons are completely equal. It provides for equality in equal circumstances. ‘Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.’⁶

Additionally, in **E.P Royappa v. State Of Tamil Nadu & Anr.**⁷, it was held that “*Para 85. From a positivistic point of view, equality is antithetical to arbitrariness. Equality and arbitrariness are sworn enemies. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.*” In **State of West Bengal v Anwar Ali & Ors.**⁸ the Test of Reasonable classification was laid down which has now been well established as a part of Article 14. The

⁴ Article 326, The Constitution of India, 1950; People’s Union of Civil Liberties v. Union of India AIR (2003) SC 2363; Anoop Baranwal v. Union of India, 2023 SCC ONLINE SC 216

⁵ Article 14, The Constitution of India, 1950

⁶ Maneka Gandhi v Union of India, 1978 AIR SC 594

⁷ 1974 AIR SC 555

⁸ 1952 AIR SC 75

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court stated that “Article 14 does not insist that every piece of legislation must have universal application and it does not take away from the State the power to classify persons for legislation, but the classification must be rational.”⁹To satisfy this test

- i. The classification must be founded on an intelligible differentia that distinguishes those that are grouped from others, and
- ii. that differentia must have a rational relation to the object sought to be achieved by the Act.

The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them.”

Therefore, by the operation of section 62(5)¹⁰, Undertrials are treated unfairly and unjustly in being stripped away of their right to vote. Such persons are treated as though they are convicts even though they have not been found guilty by the competent court of law. *Identical treatment in unequal circumstances would amount to inequality under Article 14.*¹¹Furthermore, a thorough analysis of Article 14 and the principles as have been laid down by this court draw us to the conclusion that what is permitted is a reasonable classification for the achievement of a particular purpose, and what is prohibited is class legislation which makes arbitrary discrimination. ^{[12][13]}*Part of the object of the Representation of the People Act, of 1951 is to prevent the criminalization of politics.*¹⁴However, classifying an innocent person as a criminal simply because they are under trial would be completely unjust.

○ LOOPHOLES IN THE R.P. ACT, 1951

*Under the Representation of the People Act 1951, a person convicted of any offense and sentenced to imprisonment for not less than two years shall be disqualified (from contesting election) from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.*¹⁵Therefore, the law allows for an individual to contest an election if they have been convicted of an offense that carries a sentence of imprisonment

⁹N K Bajpai v Union of India & Anr, 2012 4 SCC 653; Ajay Hasia & Ors v. Khalid Mujib & Ors, 1981 AIR SC 481

¹⁰ The Representation of the People Act, 1951, No.43, Act of Parliament, 1951

¹¹ SHUKLA VN, ‘CONSTITUTION OF INDIA’, (Eastern Book Company, Lucknow, 13th edn, 2016)

¹²Ram Krishna Dalmia vs Shri Justice S. R. Tendolkar, 1958 AIR 538

¹³ Ram Kishore Inspector Central Excise vs Mr. Santosh Anand Inspector, Shillong Central Excise, 2008 SCC ONLINE CAT 735

¹⁴Anukul Chandra Pradhan, Advocate Supreme Court v. Union of India, 1997 6 SCC 1

¹⁵ The Representation of The People Act, 1951, § 8(3), No.43, Act of Parliament, 1951

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for less than two years. It is important to consider the fact that the same individual is not afforded the right to vote. This is perhaps another indication of the lack of rationale in barring undertrials and pre-trial detainees.

Section 62(5) seemingly allows an undertrial person on bail to cast a vote. Such classification of the duration of imprisonment and severity of offense has not been considered in the right to vote and a blanket ban has been imposed. Another distinction, to be considered is that convicted persons out on parole have the right to vote. Allowing undertrials released on bail to vote and disallowing pre-trial detainees and under-trials to vote violates Article 14 of the Constitution and there cannot be seen any reasonable classification having nexus with the object sought to be achieved, i.e. prevention of criminalization of politics.

The expression “arbitrarily” means: in an unreasonable manner; without adequate determining principle. To be described as arbitrary, it must be shown that it was not reasonable and was manifestly arbitrary. ^[16]^[17]Assessing the aforementioned principle in light of the present matter it can be observed that section 62(5) arbitrarily bans undertrials from casting a vote by categorizing them on the same footing as a convicted prisoner. A “*prisoner whether a convict, under trial or detenue, does not cease to be a human being while lodged in jail*”¹⁸

Therefore, it appears that what is violative of Article 14 is not section 62(5) as a provision in itself but is the categorization and subjection of Undertrials and pre-trials to the disqualification under the provision. The provision of law i.e. Section 62(5) seems to have been arbitrarily enacted, permitting loopholes within the legal framework in the form of a blanket ban on undertrials and pre-trial detainees.

○ INTERNATIONAL CONVENTIONS, LAWS, AND JUDICIAL PRONOUNCEMENTS HIGHLIGHT THE RIGHTS OF UNDERTRIALS AND THE RULE OF LAW

In context of the international laws, a closer examination of specific provisions within these conventions and treaties sheds light on the rights of individuals facing legal processes. Article

¹⁶ Sharma Transport v Govt of A.P., 2001 AIR SC 322

¹⁷ Shayara Bano v Union of India, 2017 9 SCC 1

¹⁸ State of Andhra Pradesh v. Challa Ramkrishnan Reddy, AIR 2000 SC 2083

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21 of **The Universal Declaration of Human Rights (UDHR)**¹⁹ states that: “1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” Article 25 of **The International Covenant on Civil and Political Rights (ICCPR)**²⁰ states that: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions: To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage.”

India is a signatory²¹ to UDHR and ICCPR and *Article 51(c) of the Constitution of India 1950 mandates respect for treaty obligations.*²² *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.*²³ The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it.²⁴

Challenging a blanket ban imposed in the UK on the right of prisoners to vote, in **Hirst v the United Kingdom (No 2)**²⁵, the Court introduced a proportionality test, stating that ‘*the severe measure of disenfranchisement must not be resorted to lightly*’, and that to limit the right to vote, as protected under the European Convention of Human Rights, *a discernible and*

¹⁹ [Source: <http://www2.ohchr.org/english/law/index.htm>]

²⁰ [Source: <http://www2.ohchr.org/english/law/index.htm>]

²¹ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?

²² Dr. H.O. AGARWAL, INTERNATIONAL LAW AND HUMAN RIGHTS (Central Law Publication, 20th Edn. 2014)

²³ UN Human Rights Committee, General Comment No.25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12/07/1996.

²⁴ Rule 88(1), UN General Assembly, United Nations Standard Minimum Rules for the treatment of prisoners (The Nelson Mandela Rules)

²⁵ (2005) 42 EHRR 849

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*sufficient link between the sanction and the conduct and the circumstances of the individual concerned, is required.*²⁶In another case in the **Canadian Supreme Court**²⁷, referring to the test of proportionality, McLachlin CJ considered that *'the right to vote was fundamental to the democracy and the rule of law and could not be lightly set aside. Limits on it required not deference, but careful examination.'*

Additionally, in **August v Electoral Commission and others**²⁸, the Constitutional Court of South Africa considered the application of prisoners for a declaration and ordered that the Electoral Commission take measures enabling them and other prisoners to register and vote while in prison. Here, the court recognized that limitations might be imposed upon the exercise of fundamental human rights, provided they were *inter alia* reasonable and justifiable. In 2015, the European Court of Justice decided that EU member states can ban prisoners' voting rights, as long as it *'takes into account the nature and gravity of the criminal offense committed and the duration of the penalty'*.²⁹In other developments, the international Courts have held that Free elections and freedom of expression, and particularly the freedom of political debate, form the foundation of any democracy.³⁰

The Supreme Court of India in **Vishaka & Ors. v State of Rajasthan**³¹ 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.

²⁶Frodl v Austria (2010) 52 EHRR 267

²⁷Sauve v Canada (No 2) [2003] 4 LRC 197

²⁸[2000] 1 LRC 608

²⁹Thierry Delvigne v Commune de Lesparre Medoc and Prefet de la Gironde [2015] OJ C 129.

³⁰Mathieu-Mohin v Belgium [1987] ECHR 9267/81, para 47, and Lingens v Austria [1986] ECHR 9815/82, paras 41 and 42

³¹1997 SCC 6 241

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Furthermore, for comparative analysis: Other countries where prisoners can vote include Croatia, the Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Macedonia, Serbia, Spain, Sweden, Switzerland, Ukraine, Iran, and Israel. Even Pakistan through the Elections Act 2017 also provides the right to its prisoners to vote in elections. In the African Continent, South Africa, Kenya, Ghana, and Botswana also confer to their prisoners the right to vote in elections.³² Many nations have a more-or-less “blanket” ban on prisoners’ voting including the UK, New Zealand, and Russia. However, these nations permit all undertrials to cast a vote.³³

○ PRESUMPTION OF INNOCENCE: A HUMAN RIGHT

Lastly, the author opines that the presumption of innocence being a basic principle of criminal jurisprudence as well as a human right, the existence of legislation or provision of law that essentially overlooks such a principle cannot be allowed to stand. Categorization of undertrial prisoners on the same footing as a convicted offender is a violation of the principle of presumption of innocence. Therefore, going against such a fundamental provision of criminal law, the ban on undertrial voting cannot in any way or form be said to be a reasonable restriction.

The presumption of innocence is a human right. Such presumption gets stronger when a judgment of acquittal is passed.³⁴ The presumption of innocence is available to the accused under the fundamental principle of criminal jurisprudence *that every person should be presumed to be innocent unless he is proven to be guilty by a competent court of law.*³⁵ Under the *Universal Declaration of Human Rights*, ‘everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defense’.³⁶ Similarly, the *International Covenant on Civil and Political Rights*³⁷ provides for such a presumption in favor of an accused.

³²Baljeet Kaur, “Prisoners’ Right to Vote: Citizen without a Vote in a Democracy Has No Existence”, Vol. 54, No. 30 Economic and Political weekly 3 (2019).

³³Brandon Rottinghaus, “Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform”

³⁴ Narender Singh & Anr v State of M.P., 2004 AIR SC 3249

³⁵Chandrappa & Ors. v. State of Karnataka, 2007 AIR SC 1850; Dhanapal v. State by Public Prosecutor, Madras, 2009 SCC 10 401

³⁶Art. 11, UN General Assembly, The Universal Declaration of Human Rights, 10 December 1948.

³⁷Art. 14, International Covenant on Civil and Political Rights, 1966 [General Assembly resolution 2200A (XXI)].

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Further, in the landmark judgment of **Noor Aga v State of Punjab**³⁸, the apex court referred to international conventions and held the Right to be presumed Innocent as a Human Right and a constituent of criminal jurisprudence. In the words of the court, *“Presumption of innocence is a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Rights.”*

○ CONCLUSION

Therefore, on consideration of the principles above and provisions of law, it can be asserted that treatment of any individual, in this particular matter undertrials, as though they are guilty of denying them of their constitutional right before a sentence being imposed upon them by the court of law is a direct violation of the human right to presumption of innocence as well as right to equality as has been enshrined under Article 14 of the Constitution of India. There must be a balance between the possibility of excluding ‘unworthy’ citizens from exercising their right to vote and the requirement of not depriving them disproportionately of a fundamental right.

There is a need to amend section 62(5) of the Representation of the People Act, 1951 thereby clearing the confusion and also recognizing the distinction between the different categories of prisoners concerning voting rights in India. Special votes could be provided to prisoners. Difficulty in feasibility should not be a ground to disallow undertrials from voting. Moreover, the method of ‘Voting by Postal Ballot’ serves as a viable alternative to the general polling method and presents an opportunity to extend voting rights to undertrial and pre-trial prisoners while streamlining the overall electoral process. This will reduce the logistical challenges associated with organizing polling stations within prisons which will benefit both, the prison administration and the election authorities.

³⁸(2008)16 SCC 417

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