

ANOTHER PRISONERS' DILEMMA: VOTING RIGHTS OF THE INCARCERATED

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1. INTRODUCTION

Prisoner rights usually take one's attention towards the field of criminal law, constitutional law and human rights. Add voting rights to the mixture, and the result invariably falls in the exclusive domain of human rights, and thus by natural implication, constitutional law. Law and economics is an emerging field of analysis in India, and the purpose of this Short Note is to use this specific lens to analyse the question of voting rights of prisoners. While the author has undertaken a limited analysis of constitutional court decisions from other countries, the scope of this Short Note is limited to the Indian policy of disenfranchisement of detainees.

2. JUDICIAL TREATMENT OF THE PRISONERS' RIGHT TO VOTE

The Supreme Court decision in *Anukul Chandra Pradhan v. Union of India*², one of the only judgments in India, and very few in the world, which considered this issue. Under scrutiny in this writ petition was s. 62(5)³ of the Representation of the Peoples Act which, barred those persons from voting who were either in lawful judicial or police custody. The bench, headed by Verma, J. (then Chief Justice of India) ruled that "*the classification of persons in and out of prison separately is reasonable. Restriction on voting of a person in prison result automatically*

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² *Anukul Chandra Pradhan v. Union of India*, AIR 1997 SC 2814.

³ 62. Right to vote—(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.

(5) 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.

(6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorised to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.

from his confinement as a logical consequence of imprisonment...In view of the restriction on movement of a prisoner, he cannot claim that he should be provided the facility to go and vote. Moreover, if the object is to keep persons with criminal background away from the election scene, a provision imposing a restriction on a prisoner to vote cannot be called unreasonable".⁴ Permitting every person in prison to vote will require unnecessary allocation of scarce state resources. Moreover, since the right to vote is only a statutory right, it is open to the legislature to limit it. These limitations do not have the pass the test of reasonableness that similar restrictions on the exercise of fundamental rights would have to.

This decision is one of the few decisions that undertook an economic analysis of the impugned policy, albeit in a minimal manner. While the primary reason for upholding the constitutionality was that it did not violate article 14 of the Constitution of India, a secondary argument used by the Court was that of a scarcity of resources. The Court did not develop this analysis any further.

This decision was taken in the year 1997, and in the intervening twenty-odd years, much has changed. Several jurisdictions have lifted, either partially or wholly, this ban on prisoners voting. In 2002 the Supreme Court of Canada ruled in *Sauvé v. Canada (Chief Electoral Officer)*⁵ that legislation that denied prisoners serving a sentence of two or more years the right to vote violated the Canadian Charter of Rights and Freedoms. This Court did look into the economic reasons for allowing enfranchisement of prisoners. McLachlin C.J. noted that disenfranchisement does not deter crime; it in fact "imposes negative costs on prisoners and on the penal system".⁶

In *Hirst v. United Kingdom*⁷ the European Court of Human Rights held that United Kingdom's disenfranchising of all convicted prisoners was violative of article 3 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court discussed the *Sauvé* decision at length but did not add to the economic analysis of the disenfranchisement policy.

⁴ *Supra* note 1, ¶8.

⁵ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 SCR 519.

⁶ *Ibid* at ¶59.

⁷ *Hirst v. United Kingdom*, [2005] ECHR 681.

The High Court of Australia considered this question in *Roach v. Electoral Commissioner*⁸. The amended Commonwealth Act prohibited anyone serving a sentence of imprisonment from voting, while prior to the 2006 amendment, this disqualification was limited to persons serving a sentence of three years or longer. The Court held that a blanket ban on voting by all convicted persons was unconstitutional, but it was permissible to draw the line at shorter prison terms. While extensive reference was made to the *Sauvé* and *Hirst* decisions, the High Court did not undertake any economic analysis of the policy.

Neighbouring New Zealand also dealt with the question of disenfranchisement of all prisoners in the case of *Taylor v. Attorney-General of New Zealand*.⁹ The impugned provision was held in breach of guaranteed fundamental rights. While this Court also referred to the *Sauvé* and *Hirst* decisions, it focussed its analysis on the declaration of inconsistency and remedies arising from breach of fundamental rights, rather than taking an economic approach to the question.

It is thus apparent that constitutional courts over the world have rarely delved into an in-depth economic analysis of the question of disenfranchisement of prisoners. They have not moved beyond the usual infringement of equality investigation of the issue.

3. IS DISENFRANCHISEMENT OF PRISONERS EFFICIENT?

Economists use rational choice to navigate this world of limited resources, and unlimited human wants. The fundamental principles that underlie a law and economic analysis are opportunity cost, the law of demand and supply, equilibrium and the propensity of resources to move towards their most valuable use.¹⁰ This Short Note will use the usual tools available in an economist's toolbox to answer this question. The analysis will centre itself around three axes: cost-benefit analysis, risk aversion and externalities.

⁸ *Roach v. Electoral Commissioner*, [2007] HCA 43.

⁹ *Taylor v. Attorney-General of New Zealand*, [2015] NZHC 1706.

¹⁰ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 5 (8th ed. 2010).

3.1 How much does Crime Cost?

Question 1: When does a rational human being commit a crime?

Answer: When the expected benefits from committing the crime outweigh its expected costs.¹¹

Question 2: How do we prevent rational human beings from committing crimes?

Answer: By making it more costly for the rational human being to do so, so that s/he is worse off.¹²

Though we can be rest assured that no potential criminal sits down with paper and pencil to do a cost-benefit analysis before doing a socially undesirable act, these calculations are presumed to inform all our actions. The objective behind punishment is to deter criminal activity by increasing the costs and decreasing the benefits of said activity. Punishment in India usually takes the form of either monetary fines or prison sentences or both. This Short Note will only be examining prison sentences. Nonetheless, not all persons found guilty of an offence are disenfranchised. The loss of voting rights operates only on those who are in lawful custody for any reason¹³, whether as convicts serving a sentence, or undertrials unable to furnish bail or even people who are in police custody during investigation, before the commencement of trial.¹⁴ Persons being detained preventively, or those convicted and sentenced but released on bail, do not lose the right to vote.

Imprisonment imposes various private and social costs, alongside reducing the prisoner's human capital.¹⁵ The question to consider here is whether disenfranchising prisoners and detainees is an efficient way of increasing the private costs of committing crimes?

Voting is not a compulsory requirement in India. The right to vote is not a fundamental right, and the Supreme Court thus far has been loath to read it into Part III of the Indian Constitution. In 1982, the Supreme Court ruled that the right to vote is merely a statutory right.¹⁶ This was

¹¹ *Ibid*, at 278.

¹² *Id.* at 280.

¹³ *Supra* note 1, ¶6.

¹⁴ *Supra* note 1, ¶3.

¹⁵ *Supra* note 9, at 284.

¹⁶ *Jyoti Basu v. Debi Ghoshal*, AIR 1982 SC 983, ¶9.

later reaffirmed in the landmark decision of *Union of India v. People's Union of Civil Liberties*.¹⁷ Since the right to vote is neither a right nor a duty, will the loss of such a right make any person worse off?

The author submits that the loss of the right to vote does not impose a cost on the potential criminal. In traditional literature, voting by itself is often seen as an inefficient exercise from a rational individual's perspective. Anthony Downs' seminal work¹⁸ shone a light on this paradox of voting. The costs of voting outweigh the benefits since one's vote is meaningless unless it is the tiebreaker vote, the probability of which happening is low.

Add to this that fact that India is a country where voting culture has not gained much ground. The recent General Elections saw a voter turnout of 67.4%¹⁹, which was celebrated for being the highest ever turnout in independent India.²⁰ Is this figure indicative of voter apathy? The answer changes depending on whom one asks. This author believes that a combination of the two factors (the paradox of voting and absence of voting culture) leads to the reasonable conclusion that the right to vote is not one valued by the rational potential criminal. For this reason, one cannot consider its deprivation as a form of punishment meted out for committing a crime. Thus, its loss does not operate as a private cost.

Of the two kinds of punishment used in India, prison sentences reduce the criminal's non-monetary wealth by placing restrictions on movement, association, bodily integrity, right to vote, and the like. It is not possible to create private costs of such kind without destroying wealth, which necessarily converts them into social costs too.²¹ As argued earlier, the loss of the right to vote does not impose private costs on potential criminals. However, not allowing

¹⁷ *Union of India v. People's Union of Civil Liberties*, (2013) 10 SCC 1.

¹⁸ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

¹⁹ *Highlights*, ELECTION COMMISSION OF INDIA (Oct. 11, 2019), <https://eci.gov.in/files/file/10991-2-highlights>.

²⁰ See generally Gilles Verniers, *Verdict 2019 in Charts and Maps: More Voters Turned out than ever before, More Parties Contested*, SCROLL.IN (May 28, 2019, 12:30 PM), <https://scroll.in/article/924965/verdict-2019-in-charts-and-maps-more-voters-turned-out-than-ever-before-more-parties-contested>; *2019 Poll Records the Highest-ever Turnout of 67.47%*, THE HINDU (May 26, 2019, 12:52 AM), <https://www.thehindu.com/elections/lok-sabha-2019/2019-poll-records-the-highest-ever-turnout-of-6747/article27250281.ece>.

²¹ Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111, 122 (2017). (hereinafter "SALIB")

prisoners to vote imposes a tremendous social cost. The legitimacy of a constitutional democracy is tied with the idea of allowing the maximum number of people to exercise their choice. The more the number of individuals allowed to freely exercise their choice, the more representative that choice is seen to be. Not allowing prisoners to vote results in a loss to society because a sizeable chunk of the population is disallowed from exercising their choice to elect representatives that will later form the body that governs them.

Let us consider the right to vote as a good that one can purchase in the marketplace. Since it is a public good, whose use is non-excludable and non-rivalrous, it does not matter who has been given the right to vote by the state and who has not, because those who value it will be able to purchase it. Let us imagine an individual who is made worse off by losing their right to vote upon imprisonment. Such an individual will either post bail or bribe the police or judge to ensure that they are not incarcerated and thus do not lose their right to vote. In effect, the bail amount or the bribe becomes the price at which this individual buys the right to vote. In a society where the right to vote is supposedly free, the reality of specific individuals buying this right for a price imposes its own social costs.

Thus, not only is the loss of the vote an inefficient method of deterrence but also it results in a substantial social cost. Since society should buy less of any form of punishment that is less effective²², enfranchising prisoners would be the rational thing to do.

3.2 Risk Aversion and Uncertainty

As already established, any rational potential criminal will try to lower the costs of committing a crime, while also maximising the benefit that accrues from said crime. S/he will also attempt to avoid losses more than making gains. The question that arises here is whether the loss of voting rights while incarcerated will deter a potential criminal?

The author submits that it will not, for the simple reason that the right to vote is not a highly valued right, unlike the right to freedom of movement or association, both of which are also curtailed as a consequence of imprisonment. We must not fall in the trap of mirror imaging in

²² *Supra* note 9, at 297.

the course of this analysis. As free individuals, we value our right to vote and participate in a vibrant democracy. It is an essential aspect of experiencing freedom in all its senses, and the loss of the right to vote acts as a real deprivation for us. However, we cannot assume that others attach the same importance to the right to vote as we do. When the right to life and liberty is at stake, the right to vote understandably takes a back seat. A prisoner will value the loss of freedom of movement and association more than the loss of freedom to vote.

It is well established that it is the probability of conviction, and not the punishment once convicted, that deters potential criminals more.²³ While deciding whether or not to commit a crime, the fact that one will not be able to vote if one is caught and sentenced, will not influence the decision of the potential criminal one way or another. As such, it will not deter a potential criminal for committing the crime. It will also not provide the potential criminal with disincentives to conceal the crime once committed.

3.3 Perverse Incentives

Disenfranchisement of persons being criminally sanctioned does not operate uniformly. It only affects those who are in police or judicial custody. An accused out on bail, a convict on parole, and a preventive detainee are treated on par with each other but differently from a suspect in police custody, a prisoner serving a sentence, or an undertrial in judicial custody. This can give rise to incentives to pack the jails with people whom one does not want voting.

Any Indian citizen above the age of eighteen years is allowed to register themselves as voters unless they are of unsound mind or have been convicted of corrupt practices or electoral offences.²⁴ This implies that once a person (let us call them V) has successfully registered as a voter, only these two factors will prevent V from exercising their right to vote. In that case, what are the options in front of someone (let us call them N) who does not want V to vote?

²³ Gary S. Becker, *Crime and Punishment: An Economic Approach*, J. POLITICAL ECON. 169, 178 (1968).

²⁴ The Representation of the People Act, 1950, § 16, No. 43, Acts of Parliament, 1950 (India).

N can directly negotiate with V, pay V a sum of money in return for V not voting, and buy from them their choice to vote. Let us assume V does not agree to sell their vote. N can then convince/manipulate a court of law into declaring V of unsound mind, or an offender under the concerned corruption and electoral laws, and thus have V disqualified from voting. Admittedly, the first option is less costly than the second. Another option is that N get V detained in either police or judicial custody and thus successfully disenfranchise them. This is a costlier option than negotiating with V, but a less costly option than having V declared unsound or a corrupt/electoral malpractice offender.

This is not a fantastical thought experiment picked out of a dystopian novel. During the Emergency imposed by the Indira Gandhi government in 1975, thousands of ordinary citizens were arrested and detained under the Maintenance of Internal Security Act, 1971. Many of these were members of the opposition parties.²⁵ Since it has happened before, what is to say it cannot happen again? The current status of disenfranchisement of prisoners also incentivises political parties to pack the prisons with their opponents, so that the number of their supporters is higher than the number their challengers, ensuring an electoral decision in their favour.

4. A PUBLIC CHOICE ANALYSIS

Much has been written about the inhumane treatment meted out to the incarcerated population. There have been several Public Interest Litigations petitions as well as Supreme Court decisions²⁶ which have tried to improve the situation of those languishing in Indian prisons today. Notable amongst these are exertions by the Supreme Court to reduce the number of

²⁵ KRISTIN VICTORIA MAGISTRELLI PLYS, BREWING RESISTANCE: INDIAN COFFEE HOUSE AND THE EMERGENCY IN POSTCOLONIAL INDIA 145-8 (2020).

²⁶ See, for example, *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535, which outlawed handcuffing of prisoners; *Sunil Batra v. Delhi Administration*, 1978 CriLJ 1741, which held solitary confinement to be unconstitutional; *D. K. Basu v. State of West Bengal*, AIR 1997 SC 610, which ruled against custodial torture; *People's Union for Democratic Right v. Union of India*, AIR 1982 SC 1473, which held that prisoners are entitled to a minimum wage; and *Hussainara Khatoon v. Home Secretary, Bihar*, (1995) 5 SCC 326, which held that speedy trial was a fundamental right.

undertrial prisoners in judicial custody.²⁷ As is expected, such efforts are in vain. Even in the current COVID-19 pandemic, the prison population is amongst the biggest losers.²⁸

The number of prisoners in India at the end of 2018²⁹ stood at 4,66,084. In a population of about 1366 million³⁰, that yields a percentage of 0.0341%. A well-used axis of analysis in public choice literature is that of lobbying or rent seeking by interest groups. Smaller groups are in a better position to lobby for favourable treatment and conditions than larger, diffuse groups.³¹ The author posits that the reason behind the atrocious conditions of the prison population is that it does not vote. Thus it does not get to lobby for improved living conditions, and more efficient sentencing and punishment policies. An end of the disenfranchisement of prisoners would enable them to organise more effectively and bring about desired changes in the criminal justice system. If this group gets the right to vote, they will be able to effectively lobby the legislators and policymakers to enact policies in their favour.

Consider the US prison system. Like in India, prisoners in the US have also been disenfranchised, either partially or absolutely, by legislative action, depending on which state they are in.³² However, unlike in India, where the state maintains prisons, for-profit private prisons are a reality in the US. Unlike the prisoners (who cannot vote), this interest group (which can vote) has very effectively lobbied US politicians and legislators to enact policies that benefit them, at the expense of the prison population.³³ If prisoners had equal voting rights

²⁷ See generally 'Release undertrials who served half term': SC, HINDUSTAN TIMES (Sep. 6, 2014, 01:28 AM) <https://www.hindustantimes.com/india/release-undertrials-who-served-half-term-sc/story-89tAJGywuM6MkDf3XyDOnO.html>; COVID-19: Set Up Panel to Consider Release of Prisoners on Parole, says SC to States, UTs, THE WIRE (Mar. 24, 2020), <https://thewire.in/law/covid-19-set-up-panel-to-consider-release-of-prisoners-on-parole-says-sc-to-states-uts>.

²⁸ Sonam Saigal, *Jails turn into Hotbeds of Disease*, THE HINDU (May 25, 2020, 01:42 AM), <https://www.thehindu.com/news/cities/mumbai/jails-turn-into-hotbeds-of-disease/article31666835.ece>.

²⁹ The National Crimes Records Bureau publishes a yearly report on prison statistics. The latest report to be released was for the year 2018. *Prison Statistics India*, NATIONAL CRIME RECORDS BUREAU (Mar. 3, 2020), <https://ncrb.gov.in/prison-statistics-india>.

³⁰ *Population of India*, STATISTICS TIMES (May 17, 2020), <http://statisticstimes.com/demographics/population-of-india.php>.

³¹ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

³² Daniel A. Gross, *Why Shouldn't Prisoners be Voters?*, THE NEW YORKER (Feb. 27, 2020), <https://www.newyorker.com/news/the-future-of-democracy/why-shouldnt-prisoners-be-voters>.

³³ Michael Cohen, *How for-profit prisons have become the biggest lobby no one is talking about*, THE WASHINGTON POST (Apr. 28, 2015, 03:30 PM),

with non-prisoners, they would be in a better position to counter the dangers posed by the prison-industrial complex.

It is easy to dismiss this argument as a scare tactic since Indian prisons are currently state-run. However, arguments have been made in favour of privatisation of Indian prisons, by high-ranking public officials such as the CEO of Niti Aayog³⁴, by lawyers³⁵, by students of the premier Indian law schools³⁶, among others. Given the trend of privatisation of the Indian public sector³⁷, whether fiscally necessary or not³⁸, Indian prisons remaining public is not a foregone conclusion.

5. CONCLUSION

This Short Note aimed to indulge in an economic analysis of the policy to disenfranchise prisoners and others who are in police custody. We see that this policy does not succeed in optimally deterring potential criminals. It imposes societal costs and not enough private costs and thus cannot be considered an efficient form of punishment.

An economic argument raised against allowing prisoners to vote is in the increased costs of setting up polling booths in prisons and deployment of police forces.³⁹ This is a disingenuous argument. We live in a country where polling officials have trekked close to 500 km to ensure that one single voter in a remote part of Arunachal Pradesh can cast her single vote.⁴⁰ If it is

<https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about>.

³⁴ *Hand over schools, colleges, jails to private sector: Amitabh Kant*, THE HINDU (Jul. 27, 2017, 03:26 AM) <https://timesofindia.indiatimes.com/india/hand-over-schools-colleges-jails-to-private-sector-amitabh-kant/articleshow/59782227.cms>.

³⁵ Sanjeeb Panigrahi, *Revitalising Indian prisons*, DECCAN HERALD (Oct. 23, 2017, 09:50 PM) <https://www.deccanherald.com/content/639051/revitalising-indian-prisons.html>.

³⁶ Yagnesh Sharma, *Privatization of Prisons and the Constitution in India*, THE CRIMINAL LAW BLOG (Feb. 14, 2020), <https://criminallawstudiesnluj.wordpress.com/2020/02/14/privatization-of-prisons-and-the-constitution-in-india>.

³⁷ Asit Ranjan Mishra, *₹20 trillion stimulus: Govt to privatise public sector entities*, LIVEMINT (May 17, 2020, 12:49 PM), <https://www.livemint.com/news/india/rs-20-trillion-stimulus-govt-to-privatise-public-sector-entities-11589699168923.html>.

³⁸ V. Ranganathan & Bhamy Shenoy, *Weighing in on the public sector privatisation debate*, THE HINDU (Jan. 1, 2020, 12:02 AM), <https://www.thehindu.com/opinion/lead/weighing-in-on-the-public-sector-privatisation-debate/article30446194.ece>.

³⁹ *Supra* note 1, ¶8.

⁴⁰ Preeti Soni, *A single vote for election in India comes at the cost of a 300-mile journey by six officers to the remotest jungle terrain*, BUSINESS INSIDER (Jun. 19, 2019, 03:13 PM), <https://www.businessinsider.in/a-single->

possible to hold Aadhaar camps⁴¹ and even Vipassana meditation courses⁴² within prisons, surely it is possible to set up polling booths. Such polling stations will not cater only to prisoners, but also the wardens, workers, security officials and other administrative workers in the prison system, who will be travelling to another polling station in order to vote.

Prison diminishes the economic value of its inmates.⁴³ States have recognised this and sought to reduce social losses by allowing prisoners to work. Tihar Jail in New Delhi runs a restaurant staffed by its inmates⁴⁴, while also enabling prisoners to make and sell baked goods, clothes, furniture and other products in the marketplace.⁴⁵ It is only rational that this social loss be reduced further and prisoners enfranchised.

vote-for-election-in-india-comes-at-the-cost-of-a-300-mile-journey-by-six-officers-to-the-remotest-jungle-terrain/articleshow/69855925.cms.

⁴¹ Shankar Bennur, *Prisons Dept. to issue Aadhaar cards to inmates across State*, THE HINDU (Nov. 7, 2014, 01:37 PM), <https://www.thehindu.com/news/national/karnataka/prisons-dept-to-issue-aadhaar-cards-to-inmates-across-state/article6571496.ece>.

⁴² *Vipassana in Prisons*, VIPASSANA RESEARCH INSTITUTE, <https://www.vridhamma.org/Vipassana-and-Prisons> (last visited Jun. 6, 2020).

⁴³ SALIB, *supra* note 21, at 115.

⁴⁴ Aditi Malhotra, *Delhi's Infamous Tihar Jail Opens Restaurant for Public*, WALL ST. J. (Jul. 18, 2014, 02:37 PM), <https://blogs.wsj.com/indiarealtime/2014/07/18/delhis-infamous-tihar-jail-opens-a-restaurant-for-the-public>.

⁴⁵ TJS A TIHAR JAIL INITIATIVE, <http://tiharj.nic.in/index.asp> (last visited Jun. 6, 2020).