"KNOCKING ON THE LEGISLATURE'S DOOR"-A PROPOSAL TO REFORM THE CRIMINAL DISENFRANCHISEMENT LAWS IN INDIA

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India is the world's most populous democracy whose constitution guarantees individuals with essential rights and freedoms. The exercise of the right to vote at public elections for each and every level of governance is indispensable for the sustenance and smooth functioning of the democratic system in India. Restrictions, if they must be imposed, on the right to vote should not be arbitrary or excessive but must be proportional to the measure sought to be achieved by imposing the restriction. The Representation of the People Act, 1951 through section 62(5) thwarts the right to franchise of each and every individual who is confined to prison-whether a convict or a mere undertrial. This ban on prisoner's right to vote does not serve any penological purposes and is not tested against the touchstone laid down by International Conventions and jurisprudence. This article with a view of "knocking on the legislature's door" to replace the 'prisoner' disenfranchisement system in India with a more rational and reasoned 'criminal' disenfranchisement system identifies the defects that the Indian prisoner disenfranchisement system is plagued with, and formulates a legislative amendment that reconciles the right to vote with the concepts of punishment, principles of criminal jurisprudence, India's Human Rights treaty obligations and provisions of domestic law.

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I. INTRODUCTION

The very essence of a democracy lies in the ability of all the people to have a say that counts, whether such a democracy is "*direct or indirect*".[1] Regional human rights' *instruments* and jurisprudence have been propagating the existence

[1]Graeme Orr, *Ballotless and Behind Bars: the Denial of the Franchise to Prisoners*, 26 FEDERAL LAW REVIEW , 56(1998)

of a customary norm of suffrage[2] which has attained such paramount importance in the twenty-first century, that it is no more a mere privilege but has emerged as a basic right. The Right to Vote at public elections has become essential to the concept of citizenship and participation in the life of the community.[3]

It has come to be presumed that a modern *democratic* state must always be in favor of universal suffrage.[4] This scenario has incited democracies, today, to take a step forward and extend franchise to those groups which were once disallowed from voting i.e. women, racial and ethnic minorities, the impoverished and the illiterate.[5] In recent years, discussions regarding the nature of this right have transpired and jurists have asserted that the most basic civil and democratic rights stand illusory if the right of franchise is undermined.[6] Contemporary legislatures can no longer try to curb this right without attracting great political controversy.[7]

Despite the fundamentality of the right, various jurisdictions deprive individuals in prisons from exercising this right thereby breaching various human rights and at the same time not serving any penological goals. India, a *modern* state whose constitution shunned foreign rule and incorporated the ideologies of a people's government with the right to a free and fair election being a part of the basic structure of the constitution[8] still conforms to the archaic law[9] of depriving

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[2]RICHARD J. WILSON, *The Right To Universal, Equal, And Non-Discriminatory Suffrage As A Norm Of Customary International Law: Protecting The Prisoner's Right To Vote*, In ALEC EWALD AND BRANDON ROTTINGHAUS (ED) ,CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE, 109-136 (Cambridge University Press 1st ed)(2009)

[3]*Id*

[4]Mathieu-Mohin and Clerfayt v. Belgium ,9/1985/95/143, Series A no.113,51(1987)[Mathieu-Mohin]

[5]SAMUEL ISSACHAROFF, PAMELA KARLAN AND RICHARD PILDES, THE LAW OF DEMOCRACY, (Foundation press 1st ed),17(1998)

[6]Wesberry v. Sanders,376 U.S. 1, 17(1964),

[7]Michael Plaxton And Heather Lardy,(2010) *Prisoner Disenfranchisement: Four Judicial Approaches*, 28 (1) BERKELEY JOURNAL OF INTERNATIONAL LAW,1

[8]Indira Gandhi v Raj Narain,2 SCR 347 at ¶22(1975)

persons voting merely because they are confined to the four walls of prison. Moreover, the scope of the ban that Indian statutes prescribe appears irrational and broader than that imposed by other democratic governments. Further, the adherence to such a law has been repeatedly inadequately justified by Indian courts.

This article examines the flawed Indian prisoner *disenfranchisement* laws in India and suggests suitable reforms to correct the same. Part II of this article provides an overview and discusses the purview of prisoner disenfranchisement in India, which finds its roots in statutory law. Part III proceeds to present arguments which elucidate how the denial of the right to vote in such an absolute fashion emasculates the imprisoned citizens and transgresses India's international obligations as well as the cemented principles of democracy and criminal law. Part IV suggest a legislative amendment that remedies indiscriminate disenfranchisement, borrowing from the well-established system of discretionary sentencing that is prevalent in foreign jurisdictions and which has been looked upon favorably by courts. Part V of this article recommends a mechanism for voting from prisons, which is most convenient, cost effective and efficient for the Indian prison systems as well as addressing the question of registration of prisoners in electoral rolls.

II. THE DISENFRANCHISEMENT MODEL IN INDIA

In India, the nature of the right to vote has been held to be a statutory right and not a common law right.[10] The right to vote depends on the nature of rights conferred by the statute and is subject to prescribed statutory limitations. It

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[9]Criminal disenfranchisement has a very long rooted history: such laws having found place in ancient Greece, where citizens' voting rights were arrested if they committed crimes that threatened "political harmony."(See Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARVARD BLACKLETTER LAW REVIEW, 53-55(2006)[Schall]. Further Criminal disenfranchisement laws had reached heightened significance during the medieval times in Europe where conviction for crimes was regarded as falling within the concept of 'civil death'.(See George Brooks, , *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32(5)(3) FORDHAM URBAN LAW JOURNAL, 101-148(2004))

[10]N.P. Ponnuswami v. Returning Officer, Namakkal Constituency and Other S.C.R. 218 at ¶236(1952)

is the law that gives this right and it is the law that is empowered to take it away.[11] Indian statutory law has specific provisions dealing with voting ban for prisoners. Disenfranchisement of prisoners in India may be analyzed under two heads 1) disqualification as a result of being confined to prison 2) disqualification as a result of conviction for certain offences.

1. Disqualification As A Result Of Being Confined To Prison

Section 62(5) of Representation of Peoples Act 1951 (henceforth "the Act") debars persons confined to prisons as a result of a sentence, transport or otherwise[12] and under lawful police custody from exercising franchise. A purview of section 62(5) disregards the necessity of conviction by a competent court and does not exclude under trial prisoners who have not been pronounced guilty. The legal position in India is such that a blanket is cast over the right to vote of any individual behind bars, except when imprisonment is as a result of preventive detention.[13] When a person is behind bars, his name is not struck off the electoral roll, but the privilege to vote, when imprisoned, is taken away.[14] Indian Courts have palpated upon the issues of being behind bars and ballotless and provided significant jurisprudence on this provision. Time and again, it has been argued that such a blanket ban on voting by prisoners violates fundamental rights to life, dignity and equality enshrined in the Indian Constitution and every time the courts have repudiated such arguments, upholding the constitutionality and legality of the disqualifications section 62(5) entails.[15] The reasoning given by the courts for such provisions of law is that a person who is in prison is deprived of his liberty

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[11]Jan Chaukidar (Peoples Watch) vs Union Of India and Others 2 BLJR 988 at ¶33(2004) [Jan Chaukidar] and reiterated by the Supreme court in the unreported appeal of this case to the Supreme court in Chief Election Commissioner Etc. vs Jan Chaukidar (Peoples Watch) and Others on 10 July, 2013 at ¶5

[12]The scope of the term "or otherwise" is vague and there is not much judicial authority to throw light on this

[13]The Proviso to section 62(5) states "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."

[14]Jan Chaukidar, *supra* note 11

[15]See Jan Chaukidar, *supra* note 11.Also see Anukul Chandra Pradhan vs Union Of India & Ors INSC 585(1997)

during the period of his imprisonment and cannot claim equal rights with the others who are not in prison.[16] Even though the constitutionality of categorization or grouping of people in such a manner was challenged as violative of the right to equality it was held that such grouping of persons "in and out of prison" is reasonable and not ultra vires of the Constitution.[17] Additionally, courts have stated that crime is a stigma that attracts disqualification and persons convicted or accused of crime should be "kept away" from elections to the State Legislature, Parliament as well as all other public elections during imprisonment or lawful police custody because allowing them to vote effects the sanctity of elections as a whole and taints democracy.[18]

2. Disqualification As A Result Of Conviction for Certain Offences.

Apart from stipulating franchise disqualification, on grounds of imprisonment, section 11 lays down some other specific offences that result in automatic disenfranchisement for a period specified therein.[19] On a perusal of the aforementioned section, it can be seen that the offences referred to here are public

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[16]Anukul Chandra Pradhan, Advocate Supreme Court vs Union Of India & Ors INSC 585(1997)

[17]*Id*

[18]Jan Chaukidar, *supra* note 11at ¶19

[19]Article 11A of the Representation of Peoples Act 1951 states that

(1)If any person, after the commencement of this Act,— is convicted of an offence punishable under section 171E or section 171F of the Indian Penal Code (45 of 1860), or under section 125 or section 135 or clause (*a*) of sub-section (*2*) of section 136 of this Act, he shall, for a period of six years from the date of the conviction or from the date on which the order takes effect, be is qualified for voting at any election.

2) Any person disqualified by a decision of the President under sub-section (*1*) of section 8A for any period shall be disqualified for the same period for voting at any election.

(*3*) The decision of the President on a petition submitted by any person under sub-section (*2*) of section 8A in respect of any disqualification for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State shall, so far as may be, apply in respect of the disqualification for voting at any election incurred by him under clause (*b*) of sub-section (*1*) of section 11A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), as if such decision were a decision in respect of the said disqualification for voting also.)

offences. It includes the offences of bribery[20], undue influence[21] and personation at or in connection with election[22]. Also certain offences under the Act like promoting enmity between classes at elections, removal of ballot papers from polling station, booth capturing and other electoral offences result in such disqualification. [23] In the above cases the individual shall for a period of six years from the date of the conviction or from the date on which the order takes effect, be disqualified for voting at any election. In contrast with 62(5) of the Act which provides for disqualification from voting during the term of imprisonment, 11A enlists specific offences for the conviction of which the disability to vote results automatically as a collateral sentence of punitive nature. The term of the disability to vote in many instances extends well beyond the period of imprisonment. However section 11B empowers the Election Commission to remove these disqualifications. Thus, disqualification that occurs as result of conviction by virtue of section 11A is automatic, unless intervened into by the Election Commission. As far as the

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[20]Indian Penal Code, Section 171E

[21]*Id* at Section 171F

[22]*Id*

[23]Article 136 of the Representative of peoples act states that a person shall be guilty of an electoral offence if at any election he—

(*a*) fraudulently defaces or fraudulently destroys any nomination paper; or

(*b*) fraudulently defaces, destroys or removes any list, notice or other document affixed by or under the authority of a returning officer; or

(*c*) fraudulently defaces or fraudulently destroys any ballot paper or the official mark on any ballot paper or any declaration of identity or official envelop used in connection with voting by postal ballot; or

(*d*) without due authority supplies any ballot paper to any person 2(or receives any ballot paper from any person or is in possession of any ballot paper) ; or

(*e*) fraudulently puts into any ballot box anything other than the ballot paper which he is authorised by law to put in; or

(*f*) without due authority destroys, takes, opens or otherwise interferes with any ballot box or ballot papers then in use for the purposes of the election; or

(*g*) fraudulently or without due authority, as the case may be, attempts to do any of the foregoing acts or wilfully aids or abets the doing of any such acts.

judicial validity of section 11A is concerned, Indian courts have not deliberated upon it and there exists no judicial literature with regard to this section.

III. THE INDIAN DISENFRANCHISEMENT MODEL- A 'LEAKY CAULDRON'

As stated earlier, in India persons confined to prisons, transport as a result of a sentence *or* otherwise and under lawful police custody are precluded from exercising franchise. In addition conviction for specific offences also results in automatic disenfranchisement for a period of 6 years which often extends beyond the term of imprisonment. Such a system of criminal disenfranchisement is plagued with fallacies, which have been discussed under this section.

1. *Faulty Reasoning of the Supreme Court for denial of Voting Rights to prisoners*

States tend to defend disenfranchisement by averring that it keeps the "purity of the ballot box" intact. In the United States, the debate about the disenfranchisement of prisoners and ex-*prisoners* centered on a discussion wherein the Supreme Court of Alabama coined the term "purity of the ballot box."[24] Although it could be said that laws seldom provided for 'morality' as a criterion for voting qualification, one of the arguments advanced by States is that the voters must be "moral persons".[25] Propagating a similar view and observing that the criminalization of politics is the bane of society and negation of democracy, the Supreme Court of India rejected the challenge to the validity of the Section 62(5). It had been opined that the object of Section 62(5) is to prevent criminalization of politics and maintain probity in elections and that any provision which furthers that aim and promotes the object has to be welcomed, as sub-serving a great constitutional purpose.[26] This theory seems to stem from the belief that keeping prisoners from voting prevents the infiltration of politics by criminals,

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[24]See KEYSSAR ALEXANDER, THE RIGHT TO VOTE: A CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES, 163(Basic Books), (2000); See also, BRANDON ROTTINGHAUS, INCARCERATION AND ENFRANCHISEMENT: INTERNATIONAL PRACTICES, IMPACT AND RECOMMENDATIONS FOR REFORM, 27(2003)

[25]*Id*

[26]S. Radhakrishnan vs Union of India & Ors SC 265(1999)

preventing criminality from seeping into the system. It is unlikely that prisoners would constitute a sufficiently large and cohesive group anywhere to be able to elect a crime perpetrator as a representative in order to further their interests[27]. Even otherwise, it is quite paradoxical that candidates facing criminal charges were not disqualified from holding office as a Member of Parliament or a Member of a State Legislative Assembly.[28] The 'purity of the ballot box' is thus a weak argument.

2. *Criminal Disenfranchisement in India-In violation of India's International Obligations*

The International Covenant on Civil and Political Rights (ICCPR) is one of the most crucial treaties that guarantee human rights and India is one of its signatories. The ICCPR draws upon fundamental principles of international law embodied in the Universal Declaration of Human Rights and the United-Nations Charter to establish legal standards for the protection of fundamental individual rights among all member countries.[29] It represents the most basic and fundamental civil and political rights to which all member countries must adhere to.[30] India's own domestic law requires it to confirm to the provisions of the

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[27]Alec Ewald, *'An 'Agenda for Demolition': The Fallacy and the Danger of the 'Subversive Voting' Argument for Felony Disenfranchisement*, 36 COLUMBIA HUMAN RIGHTS LAW REVIEW, ,110-143(2004)

[28]SC approves amendment to RPA, those in jail can now contest polls, First Post India, Nov 19 2013 available at http://www.firstpost.com/india/sc-approves-amendment-to-rpa-those-in-jail-can-now-contest-polls-1238571.html?utm_source=ref_article (last visited on 26 January 2014)

[29]VRATISLAV PECHOTA, *The Development of the Covenant on Civil and Political Rights*, in LOUIS HENKIN (ED), THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS,),32-64(Columbia University Press 1st ed (1981) (describing the drafting history of the ICCPR and the importance of the Covenant in relation to other existing human rights documents).

[30]Currently, 164 countries are parties to the ICCPR. See ICCPR Parties and Signatories ,http://treaties.un.org/Pages/UNTSOnline.aspx?id=1 (last visited Nov. 19, 2012) (search for ICCPR under "International Agreement by Popular Name")

ICCPR.[31] However the Indian law on disenfranchisement comes into conflict with ICCPR and the same has been elucidated below:

a. Absolute Ban on Prisoner Voting-Article 62(5) Violates Article 25 of the ICCPR

The right to vote is said to be the most indispensable foundation of a democratic system and the rule of law and cannot be callously undermined.[32] The ICCPR guarantees the right and *opportunity* without unreasonable restrictions to every citizen to participate in the conduct of public affairs and to freely exercise universal suffrage.[33] Article 25 does not completely ban voting restrictions and a limitation on the ICCPR's right to vote is permissible if it does not constitute an "unreasonable restriction." State induced disentitlement of this right to elect their Government must be guided by substantial reason and rationale[34] and such disentitlement should be carried out only after careful examination.[35] The grounds for such deprivation should be objective[36] and in pursuance of a legitimate aim[37] and the government needs to identify the particular act that requires denying the right to vote. This measure must also satisfy the proportionality test.[38] In particular, government has to establish a rational connection between the right to

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[31]The Directive Principles of State Policy as enshrined in Article 51 of the Indian Constitution enjoin upon the State to endeavour, inter alia, to foster respect for treaty obligations in the dealings of organized people with one another. Further it is a fundamental principle of statutory interpretation in Indian domestic law that, wherever possible, a statutory provision must be interpreted consistently with India's international obligations, whether under customary international law or an international treaty or convention(See Dr. Sunil Kumar Agarwal, Implementation Of International Law In India: Role Of Judiciary- Dean Maxwell & Isle Cohen Doctoral Seminar In International Law available at http://oppenheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf(last visited 20 January,2014)

[32]Sauve v. Canada (Chief Electoral Officer) 3 S.C.R. 519,at ¶9, ¶14(2002) [Sauve]

[33]International Covenant on Civil and Political Rights 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 25[ICCPR]

[34]Roach v Electoral Commissioner 233 CLR 162 at ¶8(2007)

[35]*Id*

[36]Sauve *supra* note 32 at 438

[37]Mathieu-Mohin *supra* note 4 at ¶52

[38]Hirst v the United Kingdom (No 2) ECHR 681,32(2005) [Hirst]

vote and its stated objectives.[39] If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence as well as the sentence.[40] Further any such measure should essentially involve a decision of a judge following judicial proceedings.[41] Thus, a blanket ban on prisoners can never meet compliance with the convention standards. In India, the government has not made careful examinations regarding the purpose, if at all any, that it seeks to achieve by denying this right. Disenfranchisement in India is also disproportionate as can be seen from the fact that the measure strips a large group of people of the vote and that it applies automatically irrespective of the length of the sentence or the gravity of the offence.[42] Further the complete ban is arbitrary as at it is not tailored to the facts and circumstances of the individual offender and bears no relation to the offender's particular crime.

b. Absolute Ban on Prisoner Voting Section 62(5) Violates Article 10 of the ICCPR

Article 10 of the ICCPR provides that the penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation.[43] The Human Rights Committee (HRC) has clearly stated that blanket criminal disenfranchisement laws do not give an impetus to the "reformation and social rehabilitation" of prisoners[44]. In fact

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[39] See Sauve *supra* note 32 at 7 where the Canadian Supreme court upheld the two-fold test as laid down in *R. v. Oakes*, (1986) 1 S.C.R. 103 for justifying an infringement of any right enshrined in the *Canadian Charter of Rights and Freedoms* by the government.In *Sauve,* The court more specifically discussed an infringement in terms of sections 1 and 3 of the Charter, which guarantee the "rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" and the right to vote at public elections respectively.

[40]General Comment No. 25 on article 25, para. 14, Official Records of the General Assembly, Fifty-first Session, Supplement No. 40 (A/51/40), Vol. I, annex V, ¶14(1996) [General Comment 25]

[41]Hirst *supra* note 38 at ¶82

[42]*Id*

[43]I CCPR *supra* note 30, Article 10(3)

[44]Human Rights Committee(HRC), Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, , U.N. Doc. CCPR/CO/73/UK, ¶ 10(2001)

blanket discrimination had been observed as being arbitrary and not fulfilling of any of the traditional goals of incarceration, such as deterrence, retribution, nor rehabilitation.[45] On the contrary, it increases social disadvantage by gesturing to the prisoners that for the duration of their sentence, they are 'dead' to the society.[46] Denial of the franchise is also known to *create* feelings of guilt within the offender and such emotions may lead to the offender's further exclusion from society or at least an inability to reintegrate.[47] As regards to the objective of promoting civic responsibility and respect for law, denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for law and democracy than messages that enhance those values.[48] The legitimacy of the law and the obligation to obey the law flow directly from every citizen's right to vote.[49] To deny the prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility and run counter to the democratic principles of inclusiveness, equality and citizen participation and is inconsistent with the dignity of every person.[50] Therefore, it can be stated that the policy of completely banning prisoners from voting is not in compliance with the provisions of the Covenant.

c. Section 11A- Disenfranchisement As A Consequence Of Conviction For Certain Offense Violates Article 10 Of The ICCPR

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[45]See Sauve *supra* note 32 discussing the ends of punishment as laid down by R. v. M. 1 S.C.R. 500, at ¶82(1996)

[46]House of Commons Political and Constitutional Reform Committee, 2013–14, House of Lords reform: what next? Ninth Report of Session 2013–14 Volume II Written evidence Ordered by the House of Commons to be published 18 April 2013 in the previous Session of Parliament and 2, 27 June, 4 and 18 July 2013, London: The Stationery Office Limited,4

[47] Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement As an Alternative*, 84 MINNESOTA LAW REVIEW, 753-766 (2000) (Demleitner)

[48]Elena Saxonhouse, *Unequal protection: comparing former felons' challenges to disenfranchisement and employment discrimination*, 56(6) STANFORD LAW REVIEW, 1597-1639(2004)

[49]Sauve *supra* note 32 at 31

[50]Hirst *supra* note 38 at 36

Section 11A automatically bans persons convicted of certain offences from voting. The sanction imposed by this section exceeds even the contours of section 62(5), as it inflicts disenfranchisement which extends beyond the term of imprisonment or any sentence that the court gives. The HRC has strongly disapproved of such provisions, which extend the denudation of the right to vote beyond the term of sentence. It has been stressed by the HRC that it is a matter of concern that those who are no longer deprived of liberty are still subject to disenfranchisement. The HRC made it clear that measures must be adopted to restore the right to vote to offenders who served their sentences. [51] A second ground of invalidity of such provisions is that they undermine the objective of Article 10, which states that rehabilitation and reformation of prisoners must be the goals of the penitentiary system.[52] The system in place does nothing to uphold the principles of restoration and societal re-integration and instead, extends criminal stigma beyond the legally prescribed punishment and fails to rehabilitate the criminal. [53]

3. Disenfranchising Under Trials-A Conflict In Every Way

Undertrials have been defined as persons who have been committed to prison custody with pending investigation or trial by a competent authority.[54] In India, undertrials that have *been* imprisoned are deprived of their franchise.[55] The HRC in General Comment 25 has explicitly stated that persons who are deprived of liberty but who have not been convicted should not be excluded from exercising

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[51]Human Rights Comm. (HRC), *Concluding Observations of the Human Rights Committee: United States of America*, , U.N. Doc. CCPR/C/USA/CO/3/Rev.1, ¶ 35(2006)

[52]ICCPR *supra* note 33, Article 10.

[53]Pamela S. Karlan, , *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STANFORD LAW REVIEW, 1147, 1166(2004)

[54]Model Prison manual for the superintendence and management of Prisons in India *Prepared By* Bureau of Police Research and Development Ministry of Home Affairs Government of India New Delhi,30(2003)

[55]Section 62(5), by extending disenfranchisement to "persons confined to prison", eclipses the right to vote of undertrials in prison, as a result of judicial custody.

the right to vote.[56] Furthermore, it has been reasoned that an absolute ban on persons who have been detained, but have not been convicted is a violation of the ICCPR.[57]

The disenfranchisement of undertrials lacks any merit even when looked at from the domestic law perspective. As discussed earlier the genesis of the disability of prisoners in terms of exercising franchise has been enunciated by the Supreme Court as being related to "criminality and stigma". With respect to this The Supreme Court has lain down that a person who is in prison is so as a result of his own conduct and is, therefore, deprived of his rights and liberties during the period of his imprisonment. This reasoning of the court designates a premature sense of criminality to the undertrial which contradicts every *known* fundamental tenet of criminal law. Legal principles enunciate that till a trial is concluded, criminal conduct can neither be presumed nor be attributed to the undertrial.[58] Every criminal trial begins with the presumption of innocence of the accused and the provisions of the Criminal Procedure Code and the Indian Evidence Act are so framed that a criminal trial should begin with and remain governed throughout by this essential presumption. [59] The UDHR and the ICCPR unequivocally reiterate this principle.[60] Further it is stated that this principle is of cardinal importance in the administration of criminal justice.[61] An undertrial is thus not on the same footing as a convict in terms of criminality. The Supreme Court seems to have erred in its findings in so far as it justifies depriving under trials the right to vote on the grounds of 'criminality'.

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[56]General Comment 25 *supra* note 40 at ¶14 states "Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote"

[57]Yevdokimov and Rezanov v. Russian Federation case, no. 1410/2005, ¶7.5 (2011)

[58]ANDREW CARL STUMER, THE PRESUMPTION OF INNOCENCE: EVIDENTIAL AND HUMAN RIGHTS PERSPECTIVES, HART PUBLISHING LIMITED (1st Ed) (2010). Also see Woolmingnton v. DPP A.C. 462(1935)

[59]See Indian Evidence Act, 1872, Sections 101-104

[60]See Universal Declaration of Human Rights, Article 11. Also see ICCPR *supra* note 33, Article 14(2).

[61]Simeneh Kiros Assefa, *The Principle of The Presumption Of Innocence And Its Challenges In The Ethiopian Criminal Process*, 6(2) MIZAN LAW REVIEW, 273-310(2010)

Additionally, another anomaly that must be noted is that this restriction extends only to undertrials that have been confined to *prisons*. Undertrials that have been released on bail have not been subjected to this restriction. The provision thus carves out two classes of undertrials and creates a disparity. Venkata Rao writes "Is an affluent person who has been charged but has been released on bail to be accorded preferential treatment? A poor person who languishes inside jail is being discriminated from a rich person and thus does his poverty eject him out of the democratic process."[62] This right to vote thus comes to rest solely on the ability of a person to obtain bail and thereby is impervious to criminality. Such an unfair and discriminatory mechanism is a grave travesty of justice.[63]

IV. CURING THE MALADY-SUGGESTING A CONVENTION COMPLIANT DISENFRANCHISEMENT LEGISLATION FOR INDIA

1. Finding an Exemplar Disenfranchisement Model

The previous section illustrated how a blanket voting ban on prisoners is in breach of India's international obligations and is over inclusive and overbroad.[64] This section tries to analyze the various 'partial' disenfranchisement models implemented worldwide and then suggests the ideal and most convention *compliant* model for the Indian setup.

a) Disenfranchisement based on length of sentence.

Numerous countries disenfranchise prisoners based on the length of their sentence. Malta[65], Australia[66], Austria[67], Belize[68], Benin[69], Jamaica[70], Mali[71],

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[62]R. VENKATA RAO, *The right to vote of Undertrials- the supreme court 'under trial* ,In S. N. CHAUDHARY(ED), HUMAN RIGHTS AND POVERTY IN INDIA: THEORETICAL ISSUES AND EMPIRICAL EVIDENCES ,245-50, (Concept Publishing Company 1st Ed), (2005),

[63]*Id*

[64]Demleitner *supra* note 47

[65]Sentences over one month cannot vote

[66]Twelve months or less can vote; five months and under can vote in federal elections

[67]Length of sentence

[68] No voting for sentences over one year

Papua *New* Guinea[72], Netherlands[73], Trinidad & Tobago[74], Turkey[75], Zimbabwe[76] are among some of the countries whose disenfranchisement legislations are based on the term of sentence. Such models do not take into account the nature of crime and disenfranchise criminals solely on the length of the sentence. They do not allow for proportionality determination with respect to specific crimes and hence, do not withstand the 'strict scrutiny' requirement set forth by the HRC in General Comment 25.[77] The Canadian Apex court has aptly highlighted the fallacy with such models- "it is difficult to substantiate the proposition that a two-year term is a reasonable means of identifying those who have committed 'serious,' as opposed to 'minor,' offences ….[T]he question is why individuals in this class are singled out to have their rights restricted."[78] Thus laws in this category are flawed because there is no relationship between the substantive offenses committed and the resulting disenfranchisement. Implementation of disenfranchisement models based on length of sentence may lead to bizarre situations as seen in *Soyler vs Turkey*, where an individual was deprived of his right to vote merely on the ground that he had drawn cheques without having sufficient funds in his bank account.[79] Minor offenses such as the ones considered in *Soyler* are not of such nature as to have individuals being denied of one of their most fundamental rights of citizenship. Therefore, such a model is not ideal in light of the requirements imposed by section 25 of the covenant.

b) Disenfranchisement Based on the Crime Committed

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[69]Sentences over three months cannot vote

[70]Sentences over six months cannot vote

[71]Sentences over one month cannot vote

[72]Sentences over nine month cannot vote

[73]Sentences over one year cannot vote

[74]Sentences over one year cannot vote

[75]Sentences over one year cannot vote

[76]Only those serving less than six months can vote

[77] HRC General Comment No. 25, *supra* note ¶14.

[78]Sauve *supra* note 32 at ¶55

[79]Soyler v Turkey, ECHR, Application No. 29411/07 (2013)

This is a method of disenfranchisement based on the nature of the crime committed. In countries that conform to such a model, there is a legislative determination stating that disenfranchisement is an appropriate punishment for *the* commission of certain offenses. France and Italy among others are countries which follow this model. The European Court of Human Rights has also upheld the validity of such provisions on the reasoning that in such legislations there are no general, automatic, indiscriminate taking away of voting rights.[80] Even such models have their own legal lacunae and legislations should be drafted carefully if they are to stand the scrutiny test of the HRC. The HRC has indicated that if a country disenfranchises all criminals who commit a broad or ambiguous group of crimes, such categorizations may fail to meet the proportionality requirement of Article 25. For example, in its concluding observations to Luxembourg, the HRC recommended that the country reform its law, which mandated disenfranchisement for anyone convicted of "serious crimes."[81] Thus from an understanding of the HRC's comment it can be inferred that broadly sweeping category has a high likelihood of being invalidated under Article 25 and that compliance with the article requires more specificity. [82] However, it is not specificity alone that would make such legislations legally compatible- as discussed earlier, there should be a discernible and sufficient link between the sanction, and the conduct and circumstances of the individual concerned. Another fallacy that appears in such a model is the lack of a case-by-case determination in cases of denial of human rights.[83] Thus even this model is not one of a suitable nature.

c) Disenfranchisement based entirely on judicial discretion.

This model involves those countries where disenfranchisement is totally based on judicial discretion. Portugal is an example of a country that imbibes this

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[80]Scoppola v Italy,ECHR, Application no. 126/05,¶108(2012)

[81]Human Rights Committee (HRC),, Report of the Human Rights Committee, U.N.Doc. A/48/40 (Part I),¶132(1993)

[82]Morgan Macdonald, *Disproportionate Punishment: The Legality Of Criminal Disenfranchisement Under The International Covenant On Civil And Political Rights*, 40 THE GEORGE. WASHINGTON INTERNATIONAL LAW REVIEW, 1375-1408 (2009)(Macdonald)

[83]*Id*

model in its disenfranchisement legislation.[84] Even though international courts have looked upon this model very favorably,[85] it suffers from an inherent defect. It provides judge's complete discretion to disenfranchise offenders at will and would thus, be likely to lead to the same problems of under- and over inclusiveness *caused* by the laws that disenfranchise based on the length of an offender's sentence. Such a model will not be compliant with international standards of non-arbitrariness which provide for restrictions on human rights to be in accordance with law. [86] To meet the test of "in accordance with laws", restrictions should also have basis in statues and not be guided by mere judicial or administrative discretion.[87] Thus, leaving disenfranchisement completely up to judges has more disadvantages than advantages.

d) Model where Disenfranchisement is an Explicit Component of the Sentence (Collateral Sentencing)

Certain countries impose disenfranchisement as a collateral sentence. An example of a *country* that follows such a model is Greece. The Greek penal code provides that complicity in high treason[88] and offenses by officials (e.g., bribery and abuse of office)[89] are those for which a court *may* impose voting disenfranchisement as an additional punishment. Such models allow for both judicial and legislative considerations for the purpose of proportionality. The legislature makes an initial determination of the crime and assesses the character in it which calls for voting disfranchisement to be an appropriate punishment. The second stage of consideration is during the sentencing when once an individual offender falls within one of the legislatively predetermined categories the judge makes a final individualized determination of whether the specific offender in

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[84]Electoral Law for the Portuguese Parliament Election, Law No.14/179 of May 16,Article 2

[85]Hirst *supra* note 47 at ¶71

[86] OLIVER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW,292(Cambridge University Press 1st ed), (2010)

[87]*Id*

[88]Poinikos Kodikas (P.K.) (Criminal Code) Article 61 (Greece), In The American Series Of Foreign Penal Codes: The Greek Penal Code 57 (Dr. Nicholas B. Lolis Translation.,1973)

[89]*Id* at Article 263

question deserves disenfranchisement. Therefore, since these models allow for a proportionality consideration that take into account the specific nature of an individual's offense on a case-by-case basis, criminal disenfranchisement laws in this category fulfil the requirements prescribed by the HRC and hence this model can be said to be an ideal one.

2. Proposed Amendments to the Indian Legislations of Prisoner Voting

From the above, the model, *which* is the most convention compliant and ideal for the Indian scheme, would be a disenfranchisement model where disenfranchisement is an explicit component of the sentence (collateral sentencing). This section will suggest amendments to the existing Indian statutes to fit in a scheme of providing disenfranchisement as an explicit component of sentence.

a) Amendment to 62(5) of the Representation of People Act 1951

Section 62(5) of the Act reads as-

> *"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."*

In order to fit in the Collateral Sentencing Model and become Convention Compliant this *section* should be amended so as to read

> *"Every person who is confined in a prison shall have the right to vote unless a disqualification is imposed upon him as a part of the sentence given by a competent court, if he is proven guilty of the crimes to which law expressly entails disqualification and if the court deems it fit to do so"*

The above suggested amendment withstands the scrutiny of Article 25 of the ICCPR. If the *proposed* amendment is adopted, there would be no automatic ban on voting. Any disenfranchisement would be done on a case by case basis by an order of a competent judicial authority and would only extend to crimes which

the legislation has deemed to require a punishment of stripping the individual of his right to vote.

b) Amendment to 11A(l) of the Representation of the People Act 1951

11A (l) of Act reads as

"*If any person, after the commencement of this Act, — is convicted of an offence punishable under section 171E or section 171F of the Indian Penal Code (45 of 1860), or under section 125 or section 135 or clause (a) of sub-section (2) of section 136 of this Act, he shall, for a period of six years from the date of the conviction or from the date on which the order takes effect, be disqualified from voting at any election.*"

The major flaw that this section suffers from is that it extends denuding the right to vote beyond the term of sentence which the HRC has held to be a *contravention* of both Article 10 and Article 25 of the ICCPR. Therefore it is proposed that this sub-section be struck off. There might be averments that the ban on voting should extend beyond the term of sentence because the sentence prescribed for offences listed in this section is of very short duration however this should not be held to be a reason to extend the ban on voting beyond the sentence. Though it is imperative that such grave offences be given harsher punishments, harsher punishments cannot be replaced by denial of franchise. The more appropriate remedy would be that the legislature reconsider and work out prison terms especially considering the increase in corruption in India and the highlighted necessity and urgency in tackling it.

c) Addition of new Section providing for Crimes to which a court can decide on disenfranchisement.

In light of the proposed model for prisoner disenfranchisement and the amendment suggested to section 62(5) of the Act it is necessary that the legislature identify the crimes which a competent court can deliberate upon and impose the denial of the right to vote. A convenient approach would be to enlist crimes leading to such denial of the right to vote under a new subsection, which has been discussed below:

I. Election Related Offences.

Election related offences are covered under Chapter IX A of the Indian Penal Code and Chapter III of the Act. Crimes that threaten the harmony of electoral procedures have been held to have a sufficient nexus with denying individuals the right to vote.[90] The European Court of Human Rights has stated that such crimes are most proportionate to the sanction of criminal disenfranchisement because they harm political process and undermine the democratic foundations of the country.[91] The legislature can thus, provide for disqualification of individuals convicted for electoral offences.

II. Crimes involving Public Offices

Crimes falling under the category of abuse of public offices would be of the same nature as those which harm political process and undermine the democratic foundations of the country. Such crimes are known to weaken the rule of law.[92] Therefore the legislature can impose disenfranchisement for offenders convicted of crimes involving abuse of public positions. Individuals convicted for offences under Chapter IX of the Indian Penal Code or under the Prevention of Corruption Act, 1988 would fall under this category.

III. Crimes against the state

Other crimes that meet the above laid down standards would be crimes against the state. Historically, traitors were considered to have forfeited their status as citizens and could be denationalized.[93] Even though that is no longer the case, disenfranchisement may be an appropriate additional punishment for any person convicted of treason. Such crimes are of dispositions that threaten the very foundation of society and the entire governmental structure. Even legislative determinations in foreign jurisdictions have made similar findings.[94] Therefore, crimes as those that are provided for in Chapter VI of the IPC or listed under Terrorist and Disruptive Activities (Prevention) Act, 1987 and Prevention of

[90]Schall *supra* note 8

[91]Hirst *supra* note 38 at ¶71

[92]*Id*

[93]BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON,747(1968)

[94]Macdonald *supra* note 82

Terrorism Act, 2002 would fall under the category of those crimes for which disenfranchisement is an appropriate punishment.

IV. International Crimes

In certain jurisdictions individuals convicted of international crimes are denied of their right to vote.[95] Since international crimes shake the moral foundations of the international community and concern states in a larger context, shall any citizen be convicted of a crime of such nature his right to vote should be taken away from him.

V. Additional Crimes

As stated above crimes should have a nexus with disenfranchisement and when it comes to non-political crimes is difficult to see the connection between them and the punishment of disenfranchisement[96]. However, there are some other serious crimes which should also be considered by the legislature as those offences for whose conviction an individual's franchise can be taken away. In India, certain crimes of non-political nature may be considered grave enough to disqualify individuals from public offices. Since even after legislative determination the final order of disqualification is to be taken by a court of law which would examine each offence on a case by case basis, grave crimes can be listed among crimes whose punishment can extend to disenfranchisement. In regards with what exactly would constitute such crimes, is a legislative prerogative. Nonetheless, in the backdrop of the Indian social setting, crimes such a rape, murder, dowry, offences relating to Sati among others may be considered among those crimes for which the punishment of disenfranchisement can be imposed.

Therefore the new subsection 62(6) can be drafted so as to read

"If the court deems it fit to do so, individuals convicted of the following offences

(a) Offences Under Chapter VI,IX, IX A Of The Indian Penal Code

(b) Offences Under Chapter III Of The Representative Of Peoples Act

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[95]Bosnia and Herzegovina is an example of a country where individuals convicted of international crimes are denied of their right to vote

[96]Schall *supra* note 8

(c) Offences Under Terrorist And Disruptive Activities (Prevention) Act,1987

(d) Offences Under Prevention Of Terrorism Act, 2002

(e) Offences Prevention Of Corruption Act 1988

(f) Offences of Grave International Human Right Violations as declared by an international court or tribunal

Can be denied of the right to vote, from the date of the conviction or from the date on which the order takes effect, for the period of the continuance of the sentence"

d) Amendment to 11B of the Representation of the People Act 1951

Section 11B of the Act empowered the election commission to remove the disqualifications under 11A. 11B reads as

*"**Removal of Disqualifications-**The Election Commission may, for reasons to be recorded, remove any disqualification under sub-section (1) of section 11A."*

Since this paper proposes changing the inherent nature of the sanction from an automatic ban to a collateral sentence imposed by a court of law, it is no longer desirable that the election commission, a non-judicial body, exercise judicial powers capable of reversing or setting aside orders of component courts. Existence of such a provision would be violative of an essential characteristic of the Indian Constitution i.e. the separation of powers. Therefore, it is desirable that this section be removed.

Since the sanction of disenfranchisement is optional and is imposed by the court depending on the facts of the case, if the court is of the opinion that circumstances no longer exist calling for such a sanction, the court should be able to remove the same.

Thus, an additional section/subsection can be added on the Removal of a sanction of Disenfranchisement. Such a section can be drafted so as to read

"**Removal of a sanction of Disenfranchisement**

If a component court is of an opinion that circumstances do not exist calling for convicted individuals to be denied of their right to vote it can reinstate their right to vote

For the purpose of this section a competent court is a court which is same as the one passing the initial order or one of a higher nature"

V. JUMPING HURDLES- ADDRESSING PRACTICALITY ISSUES

Allowing Prisoners to vote is not the end of the road. It's just the start. Numerous issues regarding the viability and feasibility of Prisoner Voting are bound to arise if the above proposed reforms come into order. This section tries to solve some of the apparent practical issues and suggest suitable suggestions to address those issues.

I. Mechanism for Voting from Prisions.

An issue that is so far unaddressed in legal practice and academia, and would arise if prisoner voting is made legal, is the voting mechanism of persons confined in prisons in India. A legislation endowing the right to vote upon the imprisoned would be infructuous if unaccompanied by a procedure that enables them to vote.[97] Since Indian prisons house a large number of inmates and under trials, a feasible mechanism to enable them to vote becomes difficult to instill. Further due to the magnitude of prisoners and undertrials conducting elections in prisons will warrant a parallel and independent system, which will give rise to problems of feasibility and viability. Several countries have adopted the procedure of conducting voting inside prisons; which include casting vote by postal ballot[98], setting up a special polling place[99], mobile polling stations[100] , proxy voting[101] etc.

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[97]Although Slovakia does not disqualify prisoners from voting, an inevitable' bar' operates on the vote of prisoners due to the absence of a mechanism that would enable prisoners to vote

[98]Countries that administer ballot in prison through postal ballot include Sweden.

[99]Countries that administer ballot by setting up a special voting place include Kosovo, Ukraine and Macedonia.

The voting mechanism for prisoners in India must accommodate within the subsisting rules of election procedure in India since devising new mechanisms such as proxy voting or special voting places will be burdensome on the budget of the EC, and will also lack transparency. The already existing frame work of postal ballot is a viable answer to the question of voting by a person situated outside his or her constituency, and who is unable to vote therefrom. [102] This system emerges as best suited from among other practices discussed herein above, since it is labor and cost efficient, less resource intense, practical and convenient. If the Indian electoral system is reformed in accordance with the proposed policy, then the prisoners registered on the electoral vote and not subject to disqualification should be allowed to cast their vote via this postal ballot system.

II. Registration of Prisoners in Electoral Rolls

Apart from the voting mechanism another issue that arises is registration of the voter in the electoral roll of the constituency. Generally ordinary voters are registered in the electoral roll of the constituency of their ordinary residence.[103] This idea is founded on the fact that individuals base their vote upon political, developmental and social factors endemic to their area of residence. The ordinary residence of prisoners during the term of their imprisonment would be the areas in which the prison is located. Prisoners do not have any political nexus or social interaction within the latter. Hence, a logical approach to the issue of registration of voters in the electoral roll of the constituency would be to continue having the prisoner's name on the electoral roll in which he had his name prior to his sentencing. A similar method is resorted to when ascertaining the constituency

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[100] Municipal elections in the Republic of Montenegro were administered by setting up mobile polling stations in 2002.

[101]Swedish Election Act, Chapter 14, Section 2

[102]A list of persons competent to vote through postal ballot includes service voters, electors subjected to preventive detention, voters on election duty and notified voters(See Election commission of India, Handbook for Returning Officers on ballot papers and ballot boxes, Available from http://eci.nic.in/archive/handbook/returning-officer/rch10/rch10_1.htm, last visited 13th February 2014)

[103]Representation of the People Act 1950, "Condition for registration" Section 19

of service voters in India.[104] This method has been implemented with a fair degree of success in other jurisdictions where prisoners are provided with the right to vote. [105]

VI. CONCLUSION

From the foregoing paragraphs it is clear that the current Indian disenfranchisement model contravenes Articles 10 and 25 of the ICCPR. It restricts the right to vote by disqualifying 'prisoners', but does not do so as collateral sentence as a result of which it fails to meet any of the goals of punishment. More often than not, it results in a sentence that is grossly disproportionate to the act for which it is meted out. As elucidated by this article, it also suffers from another major discrepancy-it effectively bases an important democratic right on the ability to obtain bail.

The need of the hour is therefore to take steps towards correcting the inordinate penalty that the Indian model imposes on persons confined to prisons-whether as a result of conviction or otherwise. The first step would be correcting the method of imposing disenfranchisement. This article has evaluated the legal inconsistencies in the Representation of the People Act, 1951, which has in turn helped in suggesting the best way to cure these inconsistencies. A discretion-based collateral sentencing model is ideal, for it incorporates a component of legal discretion apart from mere legislative consideration in the procedure for disenfranchisement. Pre-defining a class of crimes that would call for disenfranchisement ensures that judicial discretion does not remain the sole determinant of such a sentence. Lastly as far as all the sceptics who state that voting in Indian prisons is a cumbersome process that would send spiralling

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[104] While an ordinary elector is registered in the electoral roll of the constituency in which his place of ordinary residence is located, person having service qualification can get enrolled as 'service voter' at his native place even though he actually may be residing at a different place (of posting). As per the existing arrangements, members of Indian Army, Navy and Air Force and personnel of General Reserve Engineer Force (Border Road Organization), Border Security Force, Indo Tibetan Border Police, Assam Rifles, National Security Guards, Central Reserve Police Force, Central Industrial Security Force and Sashastra Seema Bal are eligible to be registered as service voters

[105]Countries that have implemented postal ballot as a mode of voting for prisoners successfully include U.K., Australia and Pakistan.

upward the cost curves and at the same time being a procedural disaster the already prevalent method of "Postal Ballot" is the utopian answer.

In summation it is most apt to say that the legislature must revisit its stand on prisoner voting. The Legislature right from its inception has taken strides in the direction of correcting the loopholes in the Indian system. There has been no better time for the legislative to pay heed to this "knock on the door" calling for reforms in the voting system.