ISSN (Print): 1060-6076
ISSN (Online): Applied

The Journal of African Development
2025; Vol 6: Issue 1
https://www.afea-jad.com/

The Franchise and the Fetters: A Comparative Jurisprudential Analysis of Prisoner Voting Rights in India and South Africa

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Cite This Paper as: Mrs. Anshika Gupta , Prof. (Dr.) Sushil Kumar Singh (2025) The Franchise and the Fetters: A Comparative Jurisprudential Analysis of Prisoner Voting Rights in India and South Africa. *The Journal of African Development l, Vol.6, No.1* 585-590

KEYWORDS
Civil Death, Comparative Jurisprudence, Disenfranchisement, Prisoner Voting Rights, Undertrials

ABSTRACT
The relationship between the state and the incarcerated individual serves as a litmus test for the depth of a nation's democratic commitment. This research paper undertakes an exhaustive comparative analysis of the legal frameworks, judicial philosophies, and sociopolitical realities governing prisoner voting rights in two major democracies of the Global South: India and South Africa. While both nations share histories scarred by exclusioncolonialism and apartheid, respectivelytheir post-independence trajectories regarding the franchise of the incarcerated have diverged sharply. This study scrutinizes the Indian adherence to the doctrine of civiliter mortuus (civil death), manifested in Section 62(5) of the Representation of the People Act, 1951, which disenfranchises not only convicts but also the vast population of undertrials. It contrasts this with the South African jurisprudence of universal inclusion, where the Constitutional Court has consistently struck down bans on prisoner voting as violations of human dignity. Drawing on extensive case law, including the seminal Anukul Chandra Pradhan judgment in India and the August and NICRO judgments in South Africa, as well as critical developments in 2024 and 2025, this paper argues that India's blanket ban is an anachronistic violation of the social contract that fails to withstand the scrutiny of modern constitutional morality, especially when juxtaposed with South Africa's successful implementation of prisoner voting in its 2024 general elections. ..

INTRODUCTION

The act of casting a vote is the singular moment where the state surrenders its power to the individual, yet it is precisely this power that is often the first to be stripped away when an individual enters the prison system (Manza &Uggen, 2006). "The question of whether a prisonera person who has broken the social contract by violating the lawshould retain the right to shape that law is one of the most contentious debates in modern political philosophy (Locke, 1980, Rousseau, 1997). This is not merely a legal technicality, it is a fundamental inquiry into the nature of citizenship and the limits of state punishment (Dworkin, 1977). When a state deprives a person of liberty, does it also have the moral authority to deprive them of their political voice? This paper explores this tension by placing two giants of the developing world side by side: India and South Africa. Both nations have constitutions that are celebrated for their transformative potential (Bhatia, 2019), yet their treatment of the unfree citizen could not be more different. In India, the prisoner is effectively a political non-entity, silenced by a statutory framework that prioritizes administrative convenience over fundamental rights (Singh, 2020). In South Africa, the prisoner is viewed as a citizen who, despite incarceration, retains the residual dignity of the franchise (Murray, 2013). To understand this divergence, we must grapple with the ancient concept of *civiliter mortuus*, or civil death. Historically, in English common law, a person convicted of a felony was considered dead in the eyes of the law, they lost their property, their rights to contract, and their standing as a citizen (Ewald, 2002). While modern democracies have largely abandoned the property aspects of civil death, the disenfranchisement of prisoners remains its most stubborn ghost (Chin, 2004). Proponents of this view argue that by harming the community, the criminal forfeits the right to direct

its futurea retributive stance that views the vote as a privilege earned by good behavior rather than a right inherent to personhood (Lardy, 2011). On the other side of the ideological divide lies the rehabilitationist perspective, which suggests that voting is a tool for reintegration (Rottinghaus, 2003). By allowing prisoners to vote, the state signals that they are still part of the civic fabric, encouraging them to take responsibility for the collective good (Behan, 2014). South Africa has embraced this latter view, weaving it into the very texture of its post-apartheid identity. India, however, remains tethered to the former, trapping millions of citizensincluding those not yet convicted of any crimein a state of political limbo (Law Commission of India, 2015)."

2. The Indian Context: Statutory Exclusion and the Undertrial Paradox

India's approach to prisoner voting is defined by a rigid statutory exclusion that has, until very recently, enjoyed the protection of the judiciary. The primary legal weapon of disenfranchisement is Section 62(5) of the Representation of the People Act, 1951 (RPA). The text of this section is sweeping and unforgiving, stating that "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 (*Representation of the People Act*, 1951). The inclusion of the phrase or otherwise and lawful custody of the police creates a dragnet that catches not just convicted criminals, but also undertrials (those awaiting trial) and even those in police custody before a charge sheet is filed (Kumar, 2021)." The only exception carved out is for those in preventive detention, a paradox that allows individuals detained for being threats to national security to vote, while denying that same right to a person jailed for a petty theft who cannot afford bail (Deshpande, 2018).

2.1 The Shadow of Anukul Chandra Pradhan

The constitutional validity of this blanket ban was cemented in 1997 by the Supreme Court of India in the landmark case of "*Anukul Chandra Pradhan v. Union of India*. The Court's reasoning in this judgment has essentially frozen the debate for nearly three decades (*Anukul Chandra Pradhan v. Union of India*, 1997). The Court offered three primary justifications for upholding the ban, each of which deserves critical dissection. First, it accepted the resource crunch argument, agreeing with the government that the logistical burden of allowing prisoners to voterequiring police escorts and special securitywas too high a price for the state to pay (Quraishi, 2014). Second, it leaned heavily on the criminalization of politics narrative, suggesting that allowing prisoners to vote would taint the purity of the electoral process (Vaishnav, 2017). Third, and perhaps most philosophically telling, the Court argued that the forfeiture of the right to vote is a logical consequence of the deprivation of liberty, a person who bars themselves from civilized society by their conduct cannot claim the equal freedom of speech and expression that voting implies (Hasan, 2021)." This judgment effectively reduced the right to vote in India from a constitutional entitlement to a mere statutory privilege that the legislature could grant or withhold at will (Sathe, 2002).

2.2 The Undertrial Crisis: Punishment Before Conviction

The most glaring injustice in the Indian framework, and the one that distinguishes it most sharply from other democracies, is the disenfranchisement of undertrials. "In India, the legal system is notoriously slow, and bail is often a function of financial capability rather than flight risk (Law Commission of India, 2017). According to the National Crime Records Bureau (NCRB) data cited in recent 2025 petitions, nearly 77% of India's prison population comprises undertrials NCRB, 2024. These are individuals who are legally presumed innocent. By stripping them of their right to vote, Section 62(5) effectively creates a wealth qualification for the franchise: a wealthy accused person who can afford a good lawyer and secure bail retains their right to vote, while an indigent accused person charged with the same offense remains in jail and loses their vote (Bhattacharya, 2022). This reality turns the "criminalization of politics" argument on its headthe ban does not filter out criminals, it filters out the poor (Alexander, 2010). The High Court of Delhi, in the 2020 case of *Praveen Kumar Chaudhary v. Election Commission of India*, reiterated this exclusionary stance, dismissing the distinction between convicts and undertrials and deferring once again to the wisdom of the legislature and the precedent of *Anukul Chandra* (*Praveen Kumar Chaudhary v. Election Commission of India*, 2020)."

2.3 The Winds of Change: The 2024-2025 Supreme Court Challenges

However, the legal landscape in India is currently in flux. As of late 2025, the Supreme Court of India is seizing the opportunity to revisit this settled doctrine. "A bench led by Chief Justice B.R. Gavai and Justice K. Vinod Chandran has issued notices to the Union Government and the Election Commission in response to a petition by Sunita Sharma and others, represented by advocate Prashant Bhushan (*Sharma v. Union of India*, 2025). The petitioners argue that the resource crunch argument from 1997 is no longer tenable in a digital India capable of managing massive logistical exercises

(Bhushan, 2025). They contend that the blanket ban violates Article 14 (Equality) and Article 21 (Right to Life and Liberty) by arbitrarily grouping innocent undertrials with convicted felons (*Constitution of India*, 1950). The petition highlights the absurdity that while a person in prison cannot vote, a person in prison can contest an election and become a Member of Parliament, a contradiction that exposes the hypocrisy of the probity in public life"defense (Chhokar, 2018). These hearings mark a critical moment where the Indian judiciary might finally align itself with international human rights norms, potentially dismantling the edifice of civil death that has stood for over 70 years (Human Rights Watch, 2023).

3. The South African Context: A Constitutional Imperative of Dignity

If India represents the model of statutory restriction, South Africa represents the model of constitutional expansion. "Emerging from the shadow of apartheid, where the denial of the vote was the central instrument of oppression, the new South African state placed a premium on universal suffrage (Sparks, 2003). The right to vote is enshrined in Section 19(3) of the Constitution, not merely as a rule, but as a foundational value of the republic (*Constitution of the Republic of South Africa*, 1996). This constitutional commitment has led to a jurisprudence that actively protects the rights of the marginalized, including those behind bars (Currie & De Waal, 2013)."

3.1 August v. Electoral Commission: Breaking the Silence

The first major test for prisoner voting in South Africa came in 1999 with the case of "*August and Another v. Electoral Commission*. At the time, the Electoral Act was silent on whether prisoners could vote, and the Independent Electoral Commission (IEC) had simply failed to make arrangements for them, citing logistical difficultiesa mirror image of the Indian resource crunch argument (*August and Another v. Electoral Commission*, 1999). However, the South African Constitutional Court took a diametrically opposite view to its Indian counterpart. Justice Albie Sachs, writing for the Court, held that the right to vote is a badge of dignity and personhood. He famously argued that the vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts" (*August and Another v. Electoral Commission*, 1999, para. 17). The Court ruled that administrative inconvenience could never justify the suspension of a fundamental right. Because Parliament had not explicitly disqualified prisoners, the IEC had a constitutional obligation to facilitate their voting (Sachs, 2009). This judgment established the principle that rights follow the citizen into the prison cell, incarceration takes away liberty, but it does not take away citizenship (Pete, 2000).

3.2 Minister of Home Affairs v. NICRO: The Final Barrier Falls

Following the *August* judgment, the South African government attempted to strike back. In 2003, Parliament amended the "Electoral Act to explicitly disenfranchise convicted prisoners serving sentences without the option of a fine, hoping to reassert the social contract view that serious criminals should not vote (*Electoral Laws Amendment Act*, 2003). This led to the 2004 case of *Minister of Home Affairs v. NICRO* (National Institute for Crime Prevention and the Re-Integration of Offenders). The government argued that allowing prisoners to vote would send a message that the state was soft on crime and that it was unfair to spend resources on prisoners when law-abiding citizens faced hurdles (*Minister of Home Affairs v. NICRO*, 2004).The Constitutional Court rejected these arguments in their entirety. Chief Justice Chaskalson, delivering the majority judgment, dismantled the soft on crime narrative. He held that the government cannot deprive citizens of valuable rights merely to improve its public image or to make a symbolic statement against crime (Chaskalson, 2004). The Court emphasized that in a country with a history of disenfranchisement, the franchise must be guarded jealously. It ruled that the blanket ban was not a reasonable and justifiable limitation under Section 36 of the Constitution (Brickhill & Breen, 2005). The Court noted that the resource" argument was weak because the IEC already had to set up voting stations for awaiting-trial prisoners (who were allowed to vote after *August*), extending this to convicts was a marginal additional cost. Since this judgment, South Africa has had no legal barriers to prisoner voting (Ziegler, 2018).

3.3 Implementation in Reality: The 2024 Elections

Moving from theory to practice, the 2024 general elections in South Africa served as a robust demonstration of this inclusive jurisprudence. "The Department of Correctional Services (DCS) collaborated with the IEC to ensure that inmates were not just allowed to vote, but actively enabled to do so DCS, 2024. In January and February 2024, voter registration drives were conducted inside prisons. The authorities even facilitated the transfer of identity documents from families to inmates to ensure they met the technical requirements for registration (Electoral Commission of South Africa, 2024). On election day, mobile voting stations were deployed to correctional facilities across the nation. Reports confirmed that voting was completed successfully in all correctional centers, with no significant security breaches (Institute for Security Studies [ISS], 2024). This practical success serves as a powerful empirical counter-argument to the Indian Supreme Court's fear

of logistical chaos." It proves that when the state treats the vote as a non-negotiable right, the administrative machinery adapts to deliver it (Clegg, 2024).

4. Comparative Analysis: Diverging Paths of Democracy

The comparison between India and South Africa reveals a profound divergence in how democracy is conceptualized in relation to the "undesirable" citizen. This divergence is visible across three key dimensions: the legal status of the vote, the validity of logistical defenses, and the philosophy of punishment (Whitman, 2005).

4.1 Statutory Privilege vs. Constitutional Right

In India, the right to vote has historically been interpreted as a statutory righta gift from the legislature that can be regulated or revoked (Khaitan, 2018). This interpretation, stemming from the "*Anukul Chandra* doctrine, allows the judiciary to show high deference to Parliament. If Parliament says prisoners can't vote, the Courts have largely said "so be it" (Reddy, 2016). In contrast, South Africa views the vote as a fundamental human right intrinsic to the Constitution. The state bears the burden of justification for any limitation. In *NICRO*, the state failed to meet this burden because it could not prove that disenfranchisement served a legitimate government purpose that outweighed the harm to the right (Roederer, 2009)". This fundamental difference in legal classification explains why the Indian judiciary has been passive while the South African judiciary has been interventionist (Klug, 2000).

4.2 The "Resource Crunch" Myth

The "resource crunch argument is accepted as a valid defense in India but rejected as an excuse in South Africa. The Indian Supreme Court in 1997 accepted that the state could not spare the police force required to secure prisoner voting. However, the South African experience proves this is a question of priority, not possibility. South Africa, a developing nation with its own fiscal constraints and high crime rates, manages to set up polling stations in prisons (Schultz-Herzenberg, 2024). The *August* judgment clarified that if the state takes custody of a person, it assumes the duty to facilitate their rights. The Indian position, by contrast, penalizes the citizen for the state's lack of infrastructure (Mehta, 2021). The 2025 hearings in India are challenging this precise point, arguing that postal ballotswhich require zero police deployment for transportcould easily solve the resource crunch," rendering the 1997 logic obsolete (Election Commission of India, 2025).

4.3 The Undertrial vs. The Convict

The most damning comparison lies in the treatment of the unconvicted. South Africa has never disenfranchised awaiting-trial prisoners, even before *NICRO*, the *August* judgment ensured they could vote. The South African system recognizes that a person presumed innocent cannot be stripped of citizenship rights (Mujuzi, 2009). India, however, lumps the undertrial with the convict under the umbrella of "confinement. This results in a gross violation of the presumption of innocence (Tadros, 2014). As noted in the recent *Aditya Prasanna Bhattacharya* petition, the fact that 77% of Indian prisoners are undertrials means that the ban is primarily punishing people who have not been found guilty (*Bhattacharya v. Union of India*, 2025). This creates a situation where the right to vote is determined not by guilt, but by the ability to secure bail", effectively disenfranchising the poor and marginalized castes who disproportionately populate Indian prisons (Karlan, 2004).

5. Conclusion

The comparative study of India and South Africa offers a stark lesson in the evolution of democratic values. South Africa has demonstrated that a democracy is strengthened, not weakened, by extending its reach into the darkest corners of the state. By enfranchising prisoners, South Africa affirms the human dignity of every citizen and rejects the archaic notion of civil death. It treats the vote not as a reward for moral purity, but as a tool for civic engagement and rehabilitation. India, by contrast, stands at a crossroads. Its current legal framework is an embarrassing anomaly for a nation that prides itself on being the world's largest democracy. The blanket ban on prisoner voting, particularly the disenfranchisement of undertrials, is legally incoherent and morally indefensible. It relies on logistical excuses that have been disproven by other developing nations and philosophical arguments that belong to the colonial era. The ongoing Supreme Court hearings in 2025 offer a glimmer of hope. If the Indian judiciary can look to the South African examplerecognizing that administrative convenience cannot trump constitutional rights and that the "purity" of the ballot box is not threatened by the participation of the incarceratedit may finally dismantle the chains that bind the political voice of half a million citizens. Until then, the Indian prisoner remains a "ghost in the machine" of democracycounted for the census, counted for the crime, but uncounted when it matters most..

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