

Right to vote of convicts in India (GS Paper 2, Polity and Governance)

Context:

- In States with bicameral legislatures, **seats in the Legislative Council are filled following an indirect election** in which members of the Legislative Assembly cast votes.
- Recently, the members of the Maharashtra Legislative Assembly were scheduled to convene at the Vidhan Sabha to elect the members of the Vidhan Parishad.
- Nawab Malik and Anil Deshmukh, who are in prison in connection with money laundering offences, approached the courts with a prayer: despite their incarceration, they should be **temporarily released to cast votes in the election**, so that they may discharge their duty as sitting MLAs.
- Their prayer was rejected, first by a special Judge under the Prevention of Money Laundering Act, then by the Bombay High Court, and finally by the Supreme Court.

The yardstick for disenfranchisement:

- Interestingly, before dismissing the applications, the apex court observed that it is open to reconsidering the legal provision, **Section 62(5) of the Representation of the People Act, 1951**, which prevented the two MLAs from casting their votes.
- In the past, the Supreme Court has observed that the intent of this provision is to maintain the integrity of elections by excluding 'persons with criminal background' from participating in them.
- Ideally, this objective can be achieved through a provision which disenfranchises persons who have been convicted of certain kinds of grave offences.



High Court dismisses petition seeking voting rights for prisoners:

- However, **Section 62(5) does not use conviction as the yardstick for disenfranchisement**; it uses confinement.
- As a result, undertrial prisoners (who constitute over 75% of India's nearly 5 lakh prisoners) cannot vote. Neither can persons detained in civil prison for failing to repay a debt.
- But remarkably, a person who has been convicted for a criminal offence and has managed to secure bail can vote. If the objective is to keep criminals away from elections, this is an anomaly.

- Indeed, it appears that as a result of a poor choice of words, an otherwise well-intentioned law has snatched away the **right to vote from an undertrial** who is presumed to be innocent and from a civil offender, but has granted it to a criminal convict (out on bail) whose guilt has been determined.

Collision with Article 14:

- This puts Section 62(5) in direct collision with Article 14 of the Constitution (equality before the law to all persons).
- Whenever a law treats two groups of persons unequally, it must satisfy a **set of basic tests under Article 14 to be valid**: the distinction created by the law must be based on coherent differences between the two groups of persons, and **these differences must have a rational link** with the objective that the law seeks to achieve.
- Section 62(5) treats a group of people differently by stripping them of the right to vote. What sets this group apart from those allowed to vote is their confinement in prison.
- This has no rational link with the purported object of the law, i.e., keeping criminals away from the electoral process.
- As alternatives, the provision **could have disenfranchised persons convicted of certain heinous offences** or those sentenced for a minimum duration.

Rule in other countries:

- In the U.K., for instance, only convicts sentenced to prison for four years or more cannot vote.
- In Germany, only persons convicted of certain political offences are disenfranchised.
- Where the law formerly restricted all prisoners from voting (Canada, for instance), constitutional courts intervened and struck it down for being arbitrary and disproportionate.

SC to reconsider constitutionality of the provision:

- Section 62(5) has survived many challenges before the courts. Each time, the courts have lauded the objective of weeding out criminal elements from the electoral process, but have stopped short of examining whether the provision, in the manner in which it is worded, can claim to achieve this aim.
- In a welcome move, while dismissing Mr. Malik and Mr. Deshmukh's bail applications, the Supreme Court observed that it is open to reconsidering the constitutionality of the provision.
- The reason for this shift is that the voters who were deprived in this instance were not seeking to act as ordinary citizens but **as constitutional functionaries**.
- Through the MLAs' votes, the residents of their constituencies indirectly exercise their franchise in the election to the Vidhan Parishad. **By preventing the two MLAs from casting their votes, the court has inadvertently stripped all their constituents of their franchise.**

Way Forward:

- Finding fault with Section 62(5) for only this reason would be missing the forest for the trees. As a result of its sweeping nature, the provision suffers from a deeper malaise.
- The question cannot be whether the voter is an ordinary citizen or an MLA, but whether the voter, given their conduct, deserves to participate in the electoral process or not.
- A constitutional inquiry into Section 62(5) with the former question as its only basis is set for failure.
- The apex court must re-examine the issue in the totality of its circumstances and Parliament must replace the provision with a tightly worded version disenfranchising only certain classes of prisoners.