Ghosts of the Civil Dead: Prisoner Disenfranchisement

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That Australia led the world in enfranchisement is an important conceit. Important, since it reminds us of a more egalitarian past, when trust in the ballot, as a means of social emancipation and community building, was strong. A conceit because enfranchisement was protracted and, when it came to eliminating racial exclusions, a slow and sorry affair.

Today there remains one significant group of citizens who are in large part excluded from voting, though under no intellectual or physical disability. They are persons under sentence of imprisonment. (Technically this includes some not in gaol, but for administrative reasons, in practice this boils down to prisoners.)

As a matter of ancient history, conviction of a serious wrong often carried loss of communal status beyond any physical or pecuniary punishment. Roman law, for instance, applied the concept of *infamy* to deny both rights of suffrage and honour (eg to hold office).

But as incarceration took on as the primary means of punishment, crude notions of 'civil death', for example property forfeiture on a felony conviction, were whittled away. Deprivation of liberty, through imprisonment, is meant to serve inter-related goals: deterrence through punishment by banishment and rehabilitation through control and re-education. Since the recording of the conviction itself is meant to mark the social stigma of sentencing, questions arise as to why a secondary legal consequence, such as disenfranchisement, is justified.

Prisoner disenfranchisement in Australia is not, of course, a new phenomenon. The *Uniform Franchise Act 1902* denied the federal ballot to anyone 'attainted of treason, or who has been convicted and is under sentence or subject to be sentenced for any offence punishable ... by imprisonment for one year or longer'.

Two things are noteworthy in this inaugural federal franchise. First, the disenfranchisment did not cover all prisoners, but set a limit that coincided with the Constitutional barrier to candidacy. Second, the disenfranchisement was limited to the period of sentence. Contrast the position still prevailing in many US states, where any felony conviction leads to a life ban from voting, unless a pardon is given.

The *Commonwealth Electoral Act* currently disenfranchises anyone serving a sentence of five years or more. This was legislated for by a Labor administration, and better approximates community sensibilities of a 'serious' offence than the old one-year rule. The position has thus been liberalized, at least at federal elections and in states that mirror the federal franchise (Qld, ACT and NT). Yet as Australia evolved from penal colony to modern democracy and as penology developed, it might have been expected that prisoner disenfranchisement would have withered away entirely. But that has only occurred in South Australia (since 1976) and, for a time, the NT (1979-1995).

Indeed progress is rarely linear. Several jurisdictions retain harsh disenfranchisements. Eg, Tasmania disenfranchises people under conviction for *any* period – a particularly arbitrary rule given one could to be under a short conviction, say for an inability to pay fines, when an election happens to be called.

Proponents of prisoner disenfranchisement once claimed that prisoner voting 'tainted' elections. Besides being atavistic, the reasoning is implausible as the numbers of prisoners involved in Australia are not so large (cf the US, where disenfranchisement is doubly serious as it historically targeted blacks, and today is a not insignificant boost to Republican candidates). Even if it were felt that electorates containing large gaols might be 'swamped' with disgruntled prisoner ballots, a compromise could require prisoners to enroll in an electorate with a familial or historical connection.

Today, supporters of disenfranchisement tend to argue that criminals have deliberately broken 'the social contract', such that the majority can legitimately disenfranchise them as a symbolic measure. (Since the social contract is fictional, this argument reduces to a purely symbolic one).

Certainly many laws have expressive dimensions – eg anti-drug laws, though hard to enforce, survive because they signal a certain view of the virtuous life. But how can we simultaneously respect the franchise as a birthright and annul it for purely symbolic reasons? By a slim majority, the Supreme Court of Canada recently overturned prisoner disenfranchisement on just this reasoning. Logically, disenfranchisement as a symbolic consequence of wrongdoing would be limited to crimes against democracy itself, such as electoral rorting.

But prospects for further reform in Australia are limited. Federal Labor long held a policy to remove prisoner disenfranchisement altogether, but its legislative measures were quickly swamped by headlines such as 'Killers to Get the Vote' (Sunday-Mail, Brisbane, 9/7/1995). The issue is a classic political football.

Legal challenges would face several barriers. Certainly prisoner disenfranchisement disproportionately deprives Indigenous persons - and males generally - of a fundamental right recognized under the *International Covenant on Civil and Political Rights*. But it is unclear whether anti-discrimination legislation overrides electoral legislation. It would take an activist court to rule that disenfranchisement is 'unreasonable' (the test at international law) given that community sentiment supports legislative policy in disenfranchising prisoners. And whilst the Supreme Court of Canada decision is a weighty precedent, Australia lacks a Bill of Rights entrenching voting as a fundamental, individual *legal* right.

Prison reformers, of course, have more urgent concerns than the franchise. But since voting is a duty in Australia, it seems perverse that some people choose gaol to avoid voting and mobile polling is provided at some gaols for those inmates who are entitled to vote, yet others in neighbouring cells are prevented from enrolling altogether.

FURTHER READING

Melinda Ridley-Smith and Ronnit Redman, 'Prisoners and the Right to Vote', chapter 16 in David Brown and Meredith Wilkie (eds) *Prisoners as Citizens* (The Federation Press, 2002).

Graeme Orr, 'Ballotless and Behind Bars: The Denial of the Federal Franchise to Prisoners' (1998) 26 *Federal Law Review* 55.

Jennifer Fitzgerald and George Zdenkowski, 'Voting Rights of Convicted Persons' (1987) 11 *Criminal Law Journal* 11.

Sauvé v Canada (Chief Electoral Officer) Supreme Court of Canada, 10/12/2002. http://www.lexum.umontreal.ca/csc-scc/en/rec/html/sauve2.en.html

Brennan Center for Justice, class action against felon disenfranchisement in Florida (*Johnson v Bush*) http://www.brennancenter.org/programs/programs_lit_johnson.html