Constitutionalising the franchise and the status quo: The High Court on prisoner voting rights

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In recent decades, the ability of prisoners to vote alongside other resident citizens has been a something of a political football, and a much kicked around one at that, in federal politics.[1]

Academic debate has tended to favour prisoner enfranchisement, on multiple grounds. In these accounts, the vote is seen as a fundamental, if not inalienable, human right in international law, whose denial to prisoners is indirectly racially discriminatory.[2] Denying the vote is seen as counter-productive to the purpose of incarceration as social rehabilitation, and not sensibly understood as a form of punishment. There is more than a whiff of the discredited idea of 'civil death' about prisoner disenfranchisement.[3]

On the political, and hence legislative front, however, prisoner voting has been fair game. This has chiefly been a symbolic battle, with conservatives seeing prisoners as having seriously breached the social contract. They remain part of the governed, but temporarily forfeit the right to select the governors.

For most of last century, prisoners were disqualified from voting, or nominating or serving as MPs whilst under sentence for an offence with a maximum of one year's gaol. In 1983 the Hawke government expanded the federal franchise to prisoners whose offences carried a *maximum* sentence of less than five years. In 1995, the disenfranchisement was eased to an *actual* sentence of 5 years or more, largely for administrative convenience

But in 2004 the Howard government reduced this to a three-year rule, in a compromise agreed by Labor. Then in 2006, this became a blanket ban on any prisoner under full-time sentence,[4] at least for an Australian offence. Ironically, the voting rights of David Hicks, despite his US conviction on terrorism-related charges, were preserved. A further curiosity of the 2006 legislation was that prisoners were not freed of the compulsion to enrol. Rather, the Australian Electoral Commission (AEC) was to cleanse them from the certified lists for polling day.

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[1] Graeme Orr, 'Ballotless and Behind Bars: the Denial of the Franchise to Prisoners' *Federal Law Review* 26(1998); Sandey Fitzgerald, 2005, 'Ending Prisoner Disenfranchisement' Democratic Audit of Australia Discussion Paper 7/2005.

[2] Ronnit Redman, David Brown and Bryan Mercurio, 'The Politics and Legality of Prisoner Disenfranchisement in Australian Federal Elections' forthcoming in Alec Ewald and Brandon Rottinghaus (eds) *Democracy and Punishment: International Perspectives on Criminal Disenfranchisement*, CUP, 2008; Melinda Ridley-Smith and Ronnit Redman, 'Prisoners and the Right to Vote' in David Brown and Meredith Wilkie, *Prisoners as Citizens,* The Federation Press, 2002.

[3] Lisa Hill, 'Precarious Persons: Disenfranchising Australian Prisoners', *Australian Journal of Social Issues* 35(2000); Graeme Orr, 2003, 'Ghosts of the Civil Dead: Prisoner Disenfranchisement', Democratic Audit of Australia Discussion Paper, 5/2003.

[4] Those on periodic detention were to retain the vote.

The High Court of Australia was invited into this contentious fray by Vicki Roach.[5] An Aboriginal woman who was sentenced in 2004 to six years for burglary including negligent injury and endangerment, Ms Roach had since completed a masters degree. Her case was driven by pro-bono lawyers and run through the Victorian Human Rights Law Resource Centre.

In late August this year, to the great surprise of most commentators, the High Court struck down the ban on prisoner voting.[6] The surprise was a product of both the conservatism of the Court in the past decade, and its longstanding deference to parliamentary sovereignty in electoral matters.[7]

The case was only a partial victory for Ms Roach, however. The 4-2 majority upheld the prior ban on voting by those subject to sentences of three years or more, and hence she will miss voting at the forthcoming federal election.

This note explores the compromise inherent in the Court's reasoning, and reflects on its wider ramifications for the constitutionalisation of the right to vote given the absence of any mention of such a right in the Australian (or State) Constitutions.

The majority reasoning: A blanket ban on prisoner voting is arbitrary

Roach's lawyers framed her claim in a variety of alternative ways. The central claim was that the constitutional requirement that federal Parliament be 'directly chosen by the people' limits the Parliament's power to restrict the franchise. In particular, a guarantee that no class of the 'people' who at least are able to comprehend the significance of the vote should be denied it. It was on this territory that argument was centred, and the judgments concentrated. (Other claims, such as that restricting the franchise denied an implied right to political communication or association, were not formally decided, but the Court doubted their validity.)

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[5] For a gonzo-journalistic account of the High Court hearing, see David Brown, 'The Disenfranchisement of Prisoners: *Roach v Electoral Commissioner & Anor*', *Alternative Law Journal* 32(2007).

[6] *Roach v Electoral Commissioner* [2007] HCA 43 http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html

[7] For a survey of the deferential case law, see Gerard Carney, 'The High Court and the Constitutionalism of Electoral Law' in Graeme Orr, Bryan Mercurio and George Williams, *Realising Democracy: Electoral Law in Australia*, The Federation Press, 2003. Prior to Roach's case, the last successful challenge to an election law was the Political Broadcasting Case, from whose discovery of an implied right of political communication the Court has tended to shy ever since.

The lead judgment brought together Justices Gummow, Kirby and Crennan. The latter two make an odd pair: Kirby J, the oldest judge on the bench, is the greatest dissenter in the Court's history. Crennan J, then the youngest judge on the bench, has so far distinguished herself by never dissenting.

On its face, the disenfranchisement of prisoners is formally within the Parliament's explicit power over federal elections, including the qualifications of electors.[8] However that power is constrained by the structure and text of the rest of the *Constitution*, including the statement in sections 7 and 24 about Parliament being 'directly chosen by the people'.

The Commonwealth asked the Court to follow its traditional path of deferring to parliamentary sovereignty, giving Parliament a broad leeway as to the rules of electoral democracy. The phrase 'directly chosen by the people' is vague. Who are 'the people' – all residents, adult citizens only? The only certainties are that 'directly' was meant simply to exclude an indirect, US-style electoral college, and that it permits systems using the transferable vote, such as preferential voting or Senate ticket voting.[9]

On the Commonwealth's side was the fact that historically, and particularly at the time of Federation, prisoner disenfranchisement was the norm. Whilst in comparable democracies such as the UK and Canada, constitutional courts have recently and significantly reined in the scope for prisoner disenfranchisement, this occurred under charters of rights explicitly guaranteeing a right to vote. Further, many nations – including famously and most egregiously the United States[10] – continue with prisoner disenfranchisement, without losing the character of being electoral democracies with legislatures 'chosen by the people'.

Rather than proceeding from a statement of contemporary values, the lead judgment preferred first to make a detailed survey of the colonial position and federation debates on electoral qualifications. (A method bearing the hallmark of Justice Gummow's historicism, rather than Justice Kirby's human rights sympathies). The justices were particularly focused on the incongruity between section 44(ii) of the Constitution, which provides that an MP or

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[8] Sourced in sections 8, 30 and 51(36) of the *Constitution*.
[9] *McKenzie v Commonwealth* (1984) 57 Australian Law Reports 747.
[10] Rick Hasen, 2004 'Ending Felon Disenfranchisement in the United States: Litigation or Legislation?' Democratic Audit of Australia Discussion Paper 9/2004.

candidate is disbarred whilst under a sentence for an offence punishable by one year or more, and the ban on prisoners merely voting even if their sentence was short.

Their honours then adopted, from related law, the test that a statutory restriction has to be 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'. This is a long-winded way of saying the Court reserves itself the right to second-guess Parliament, but will only do so in flagrant cases.

Echoing the man-and-woman-in-the-street, the Commonwealth argued that whilst prisoners were *capable* of exercising the franchise freely (a requirement justifying not enfranchising minors or those of 'unsound mind'), imprisonment was a serious and generally last option in sentencing. In effect, by their own actions, prisoners absent themselves from 'the people' who form the polity.

The lead judgment characterised the purpose of disenfranchisement as 'further to stigmatise' those imprisoned for offences.[11] It found however that the net of disenfranchisement was cast too wide. In agreement with Chief Justice Gleeson, who found solace in a detailed analysis of contemporary sentencing law and practice, it stressed that whilst imprisonment is meant to be a last resort, a substantial proportion of prisoners are sentenced for short terms, including some for token periods. In short, a blanket ban is arbitrary and too crude to take into account distinctions between levels of culpability.

As ever, Chief Justice Gleeson's reasons were both shorter and more transparent. He stressed his preference for parliamentary sovereignty, even in sensitive matters such as electoral law. However he acknowledged that the Court could not resort to an 'original intent' reading of the *Constitution*, rooted in 1901 understandings. To do so would involve accepting that women, racial minorities and even religious groupings could be disenfranchised today.

Instead, the Chief Justice invoked the hoary idea that a phrase like 'the people' can have a fixed connotation, but a denotation that shifts over time. This was by analogy consistent with the reasoning that Senator-elect Heather Hill was a citizen of 'a foreign power' for maintaining a British passport in 1998, even though in 1901 Britain clearly was not a 'foreign

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[11] *Roach's case*, above n 6, para 89.

power'. In effect, the phrase 'the people' has broadened and hardened over the past century. How a judge is to know the meaning of the phrase at any point in time is unclear: an appeal to popular conceptions of democracy fails since public opinion appears to favour prisoner disenfranchisement, whilst an appeal to any legislative consensus is circular.

The Chief Justice suggests that 'the people' now means all citizens (at least resident citizens) because that forms a marker of membership of the political community. That membership can only be lost due to incapacity, or serious offending 'conduct which manifests … a rejection of civic responsibility as to warrant temporary withdrawal of a civic right'.[12] After examining contemporary sentencing policy and practice, his Honour concluded that disenfranchising 'short-term prisoners' was arbitrary.

In dissent Justice Hayne, with whom Justice Heydon agreed, rejected as indeterminate and constitutionally flawed any appeal to 'common understanding' or 'generally accepted Australian standards' to give content to the otherwise vague term 'the people'.[13] Similarly rejecting appeals to overseas jurisprudence, he expresses fear that the broad notion of 'representative democracy' is left to be injected with meaning from outside the *Constitution*. By default, then, the Constitution leaves the shape of the franchise to Parliament.

Neither dissenter cared to address the obvious hypothetical point about whether a future Parliament could roll-back the franchise on racial or other lines, nor the paradox inherent in leaving electoral law purely to parliaments, given the temptation for a parliamentary majority to rig the rules to entrench itself. Justice Heydon preferred to invert the question, rhetorically asking whether those who appeal to an ethical broadening of 'the people' over the 20th century would therefore claim that because of earlier prisoner disenfranchisement, every election since federation was tainted by constitutionally undemocratic electoral laws.

Conclusion: A shield, not a sword

The Court has held that the Government over-reached by imposing a blanket ban on prisoner voting. Justice Callinan, the seventh justice, did not sit on the case because of retirement. He would surely have joined the dissenters. This fact is irrelevant, since the reasoning of the four

[12] Ibid, para 8
[13] Ibid, paras 158-9.

majority justices was so similar that the case stands as binding precedent on two points. One particular, and one general.

Before examining these points, it should be noted that the judgment has ramifications for some State electoral systems. Both for the practical reason that States often copy the Commonwealth franchise;[14] and for the deeper reason that some State Constitutions contain a requirement that their Parliaments be 'directly chosen by the people'.[15] Western Australia, for instance, does so. Its mirroring of the blanket ban on prisoner voting is now unconstitutional.[16] Voters in Territory elections however have no such protection.[17]

The particular precedent of the case relates to prisoner disenfranchisement. A blanket ban is clearly unconstitutional. A ban on those serving three-year sentences or more is now clearly okay. And something in between may well pass muster, though it is unclear which 'short-term' prisoners are protected. The majority's fixation on the constitutional bar to MPs who are serving a sentence for an offence of one year or more is salutary. Offences punishable by one year or more were traditionally known as 'felonies'. The government can probably return to the drawing-board and disenfranchise anyone serving imprisonment for a felony – although it would be administratively easier to set the rule by actual sentence as otherwise the AEC will have to research the maximum sentence at time of sentencing in each individual case.

Understood this way, Ms Roach's case is a limited victory for the civil rights of prisoners. The voting rights of the bulk of prisoners remain in play in the game of political football.

The greater long-term interest in the case is its affirmation, as a general precedent, that the words 'directly chosen by the people' are words of limitation. At a minimum, any gross attempt to undo universal adult suffrage would be rebuffed by the Court, using *Roach's case* as a shield.

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[14] Given the efficiency of the joint roll arrangements, administered predominantly by the AEC. Thus when prisoner disenfranchisement stood at five years, Victoria, Queensland, the ACT and the Northern Territory followed suit. Most States/Territories, under Labor governments, baulked at following the blanket ban on prisoners, although Western Australia legislated to mirror the same ban in 2006.

[15] Eg *Constitution Act 1899* (WA) s 73(2)(c).

[16] *Electoral Act 1907* (WA) s 18(1)(c) was so amended in 2006. Following *Roach's case*, the law reverts to the former ban on prisoners serving more than one year, a rule which is probably valid following *Roach's* reasoning.

[17] *Bennett v Commonwealth* (2007) 235 Australian Law Reports 1, an unsuccessful challenge to the stripping of traditionally held voting rights from Norfolk Island non-citizen residents. The High Court affirmed that the Commonwealth's power over Territory elections is virtually unrestricted.

In tempering its traditional deference to parliamentary sovereignty, the High Court has not, however handed a sword to those who might litigate for a broader franchise. For instance, in alighting on citizenship as a marker of political community, Chief Justice Gleeson implies that non-citizen permanent residents are validly excluded. Similarly, in stressing political community as a bedrock concept, he suggests Parliament can exclude expatriates as well. And in affirming 'capacity to vote' as a pre-requisite, all in the majority seem to be leaving it to Parliament to exclude minors or people with severe mental impairment.

As Adrian Brooks has observed, it is a conceit that Australia was a paragon of democratic virtue, even though it was a forerunner of first male, then female, suffrage.[18] In the case of Aboriginal Australians, the federal vote was not fully granted until 1962, and not made compulsory in line with other Australians until 1983. In short, as students of the suffragette movement know as well as those who study emerging democracies, the right to vote is not granted from on high, but won through struggle. In that struggle, litigation is a relatively minor tool.[19]

Any battles to further extend the franchise remain matters for the court of public opinion and parliament. If and only if they are won there – and entrenched over time – may the courts of law come to shield them.

[18] Adrian Brooks, 'A Paragon of Democratic Virtues: the Development of the Commonwealth Franchise' *Tasmanian University Law Review* 12 (1993). See further, John Chesterman and David Philips (eds), *Selective Democracy: Race, Gender and the Australian Vote*, Circa Books, 2003).
[19] Compare Hasen, 'Ending Felon Disenfranchisement in the United States: Litigation or Legislation?'.