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10 October 2017

Christina McKelvie MSP  
Convenor  
Equalities and Human Rights Committee  
The Scottish Parliament  
Edinburgh  
EH99 1SP  
Scotland.

Dear Ms McKelvie,

Please find attached my submission to the Equalities and Human Rights Committee of the Scottish Parliament. I am willing to give provide further evidence should the Committee feel that it would assist them in their deliberations.

Yours sincerely,

Dr Cormac Behan

## **Introduction**

The main objective of my submission is to bring to the attention of the Equalities and Human Rights Committee of the Scottish Parliament the discussions around prisoner enfranchisement which have taken place in a number of jurisdictions where it has been the subject of parliamentary and legal debate. This submission begins with the arguments put forward in favour of disenfranchisement. It then outlines arguments in favour of enfranchisement and invites the Committee to consider the enfranchisement of prisoners. As one of Scotland's nearest neighbours has enfranchised prisoners in recent years, it concludes with an account of the experience of enfranchisement in the Republic of Ireland which may assist the Committee in their consideration of the issue.

## **To Disenfranchise**

Disenfranchisement has its roots in the ancient concept of 'civil death' based in Greek, Roman, Germanic and Anglo-Saxon law. In ancient Greece, 'civil death' meant that certain offenders forfeited all their civil rights, including the right to property and possession, the right to inherit and bequeath, the right to bring suit, the right to vote and the right to appear in court. In Roman law, an individual pronounced 'infamous' was prohibited from serving in the army, appearing in court, making speeches, attending assemblies, and voting. Being declared infamous could be for a criminal or immoral act. In later times, 'outlawry' was used to punish those who committed serious crimes. The outlaw was expelled from the community, their property confiscated and they were denied all rights. During the Middle Ages, the outlaw was deprived of legal existence. Ultimately, in extreme cases, the outlaw being outside society and therefore beyond protection from the realm could be killed with impunity.

English law created its own punishment of *attainder*. In feudal England, the Crown seized the property of felons as part of their punishment. The attained, for a felony or crime of treason, was liable to three penalties: forfeiture – the confiscation of chattels and goods; 'corruption of the blood' – they were unfit to inherit, possess or leave their estate to heirs, and the land was forfeited to the local lord; finally, the attained was 'dead in law', and could not bring suit or appear as a witness in court. They could not perform any legal function, including voting. While most civil death statutes have been abolished in modern democracies, one of the few which remains as a direct result of conviction and sentence to imprisonment is loss of the right to vote.

Those who argue for disenfranchisement of prisoners use a social contractarian model with reference to Hobbes, Locke, Rousseau and Kant. Modern proponents of prisoner disenfranchisement tend to argue that those who have broken the law should not be allowed to elect those who make the law. Some argue that law abiding citizens have a right to decide who they wish to exclude – for example prisoners – from the polity. Indeed, they argue that it is incumbent on a society to define the limits of liberty and create laws that exclude those who will not accept this framework. This indicates that certain activity, such as breaking the

law, is so unacceptable that those who do engage in such activity should be placed outside of the polity by being denied the right to vote.

Those who argue for disenfranchisement believe individuals sentenced to prison lose not only their liberty, but by virtue of being incarcerated, other rights. It is sometimes an intended outcome of imprisonment and at times, one of the unintended consequences. In most countries, on imprisonment, citizens lose many other rights, along with their liberty. Those in favour of disenfranchisement believe that losing the right to vote should be a direct, rather than merely a collateral consequence, of imprisonment. To disobey the law, communally created, undermines the right to influence who makes the law.

Those in favour of prisoner disenfranchisement argue that is the most powerful message, both real and symbolic, to both law-abiding and non-law-abiding citizens of the importance society places on obeying the rules created by representatives of the people. Advocates of disenfranchisement believe it acts as a lesson in civic education. A belief in the democratic process means that those who have not been willing to accept the outcome of that process – the passing of laws – debar themselves from the right to participate in it. Those who argue for prisoner disenfranchisement are convinced that the rights of citizenship are inextricably linked with responsibilities and obligations. Failure to appreciate the responsibilities and obligations takes away the rights of citizenship, central to which, is the right to vote.

### **To Enfranchise**

In contrast to the above arguments, those who would enfranchise prisoners argue that the cornerstone of modern democracy is the right to vote. Depriving any person of this right negates the social contract on which democratic legitimacy is built, as power is wielded without the authority of all citizens. In a modern democracy, without consent being given by all the members of society, the whole polity is undermined.

The concept of civic death on which the denial of the right to vote to prisoners is predicated is an antiquated and outdated idea in a modern democracy. The denial of the right to vote by the judiciary, executive or legislature undermines the consent on which modern democratic authority is built. Society cannot go back to a time when an elite decided on who should be the electorate. Removing the right to vote not only undermines the social contract but damages the social compact on which community and citizenship is constructed. While it is argued that governments have an obligation to those who obey the law to punish those who break the law, this fails to locate the law in a wider social and political context.

Disenfranchising a section of the population tests the limits of liberty in a democracy. Denying the franchise to any section of the population, even because of law-breaking leads to those who have the vote deciding who has the right to the franchise. According to the European Court of Human Rights, to deny the right to vote to prisoners is 'tantamount to the elected choosing the electorate' (*Hirst v. United Kingdom (No.2)*, 2005). It tilts the outcome of elections in favour of those who are allowed to vote.

The denial of the vote to a prisoner for the duration of their sentence is also related to the timing of an election. If an individual is serving a sentence on election day for a minor offence they may be denied the opportunity to exercise their franchise. An individual could serve a number of years in prison for a more serious offence and still have the opportunity to vote, if they were no longer incarcerated on election day. If voting is one of the most important elements of the social contract, then these considerations make denying it in this context somewhat arbitrary.

It is imprisonment that will decide if a prisoner keeps or loses the right to vote rather than their receiving a conviction. In the *Hirst* case, two judges of the European Court of Human Rights observed that 'the reasons for handing down a custodial sentence may vary. A defendant's age, health or family situation may result in his or her receiving a suspended sentence. Thus the same criminal offence and the same criminal character can lead to a prison sentence or to a suspended sentence' (*Hirst v. United Kingdom (No.2)*, 2005). They concluded that the reason the right to vote is denied 'is the fact that the person is in prison'. In different jurisdictions, two individuals may be convicted of the same crime, and one may be sentenced to a term of imprisonment and not allowed to vote, while the other receives a non-custodial sentence and exercises their franchise. As the majority of those sentenced in many jurisdictions do not receive a custodial sentence, this reiterates the point about its arbitrary nature.

There are strong arguments and evidence that prisoners' maintaining a link with society outside, and in particular with their local community and electoral area, can act as stimulus towards reintegration. To remove the right to vote – one of the most important elements of citizenship – adds to the dislocation from, and disconnection with, the world outside prison walls. It creates another layer of punishment beyond the denial of liberty, becomes an instrument of social exclusion, and can have significant longitudinal consequences in terms of voting among ex-prisoners. To deny the right to vote not just undermines an individual's citizenship, it can weaken the fabric of communities that have greater proportions of their citizens incarcerated. Finally, it undermines the universality on which modern democratic authority is built.

Citizens bring rights with them to prison. These are set out in various policy documents and international agreements, including the Revised UN Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules) (2015), the European Convention on Human Rights (1950), European Prison Rules (2006) and Scottish Prison Rules (2011). These include the right to life, to be treated with dignity, the right to legal representation, a free and fair trial, a safe living environment, education, etc. The European Court of Human Rights in the *Hirst* case ruled that: 'Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed' (*Hirst v United Kingdom (No. 2)*, 2005). The right to vote is included in European and international treaties. The European Convention on Human Rights guarantees that: 'The

High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature' (Protocol 1: Article 3). Unless there are substantive reasons otherwise, imprisonment should not remove the right to vote.

Prison is about loss of liberty, not the loss of citizenship. Voting is a cornerstone of the concept of citizenship in a modern democratic polity. For those who would argue that imprisonment should comprise more than the denial of liberty, including the removal of the franchise as a direct or collateral consequence of imprisonment, this changes the nature of that punishment. If imprisonment, rather than conviction, is the deciding feature, this is a very arbitrary way of denying citizenship rights as many of those who receive a conviction are not given a custodial sentence. The majority of those convicted in the courts will not automatically receive a custodial sentence. If imprisonment is a deciding factor, this will only include those who have a custodial sentence at the time of elections.

There is another consideration in favour of enfranchising prisoners unique to Scotland. While noting that the Scottish Parliament banned convicted prisoners from voting in the independence referendum, it also widened the franchise to include 16 and 17 year old citizens. If the political objective of this widening of the franchise by the Scottish Parliament was intended to engage as many citizens in the political process as possible, denying the right to vote to any section of the population seems to go against this aspiration.

## **Republic of Ireland**

The following section briefly outlines the process of prisoner enfranchisement in the Republic of Ireland.

In 2006, the Republic of Ireland passed legislation allowing prisoners to vote. Prior to the passing of the Electoral (Amendment) Act 2006, prisoners in the Irish Republic were in an anomalous position: there was no law on the statute books which specifically barred them from voting; however, there was no facility to allow them to cast their ballot. Under the Electoral (Amendment) Act 1992, prisoners could register to vote at the address where they were ordinarily resident prior to their imprisonment. This position was challenged by a prisoner and held to be constitutionally lawful in the case of *Breathnach v. Ireland (2001)*. According to the Chief Justice, Ronan Keane: 'It is of course clear that despite the deprivation of his liberty which is the necessary consequence of the terms of imprisonment imposed upon him, the applicant retains the right to vote and could exercise that right if polling day in a particular election or referendum happened to coincide with a period when he was absent from the prison on temporary leave' (*Breathnach v. Ireland, 2001*). While prisoners had a right to be registered in the constituency where they lived prior to incarceration, they had no right to postal voting or access to a ballot box. However, if a prisoner was on temporary release on election day, they could vote if they were registered.

In the aftermath of the *Hirst* case, the Minister for Environment, Heritage and Local Government introduced the Electoral (Amendment) Bill 2006 which allowed all prisoners to vote, regardless of sentence or crime. Voting was to take place by means of a postal ballot. A select committee considered many aspects of the bill and their discussions are available at <http://debates.oireachtas.ie/ENS/2006/11/02/>. A number of issues were covered in these discussions, including penal reform, using the electoral process to promote responsibility among prisoners, encouraging civic engagement and prisoner reintegration.

In contrast to other jurisdictions, there was virtually no disagreement about prisoner enfranchisement in the Oireachtas (Irish Parliament), media or wider civic society. The Oireachtas passed the legislation, with no member speaking against enfranchisement; there was negligible media attention and virtually no public debate about the issue. As the discussions were relatively low-key, very few prisoners were aware of the significance of the change in legislation that enfranchised them.

Research in the Republic of Ireland indicates that when enfranchised, prisoners remain part of the hard-to-reach groups. Even after enfranchisement, prisoners are among the groups that will need extra supports to encourage them to participate in the democratic process. There was no significant administrative impact, either on the prison system or the electoral authorities as prisoners registered in their home constituency and became another category of postal voters. Under the legislation, the prison management, in liaison with local electoral authorities, organised voting in each institution. After an individual votes, their ballot paper is put inside an envelope and this envelope and a declaration of identity are then placed in a covering envelope. A designated prison official transmits the ballots to the returning officer and these ballots are opened and counted in the same way as others in the postal voter category. There were no reported administrative difficulties, from either prisoners or prison authorities, with this procedure. If Scotland decides to enfranchise prisoners by means of a postal ballot with prisoners registered in their home constituency, it is unlikely to have a major administrative impact on either the prison system or electoral authorities.

Registration in the home constituency reduces the potential of a 'voting bloc', i.e. all voters in the same prison casting their ballot for a single candidate in the constituency of the prison. If registration is in the home constituency by postal voting, this will dilute the opportunity for prisoners to skew the outcome of a particular constituency, even if they all voted (although there is no evidence that this is the case) for the same candidate. Therefore it should not have an impact on particular constituencies that contain prison/s.

There is another consideration in determining if voting would have a significant impact on particular constituencies. In the Republic of Ireland, various studies have found that the bulk of prisoners come from disadvantaged urban areas, with a number of electoral districts and constituencies containing a higher proportion of those incarcerated in comparison to other districts. If the experience of the Republic of Ireland is similar to Scotland, then because of the disproportionate number of prisoners from certain electoral areas, this could impact on

the outcome of certain constituencies. Nevertheless, in terms of the impact of prisoner voting in general, if the objective of prisoner enfranchisement is not only to facilitate, but as with all citizens, encourage democratic participation, prisoners as voters will have the same impact on election outcomes as other citizens, their input being equal to every other voter on election day.

For the above reasons, I would encourage the Equalities and Human Committee to enfranchise Scottish prisoners.

The following publications might provide the Equalities and Human Committee with further evidence on the experiences of enfranchisement in the Republic of Ireland and elsewhere. Along with my book which was already cited during evidence to your committee, further examination of the international context, the history of prisoner enfranchisement and the experience of voting in the Irish Republic can be found in the following articles:

Behan, C. (2014), 'Embracing and Resisting Prisoner Enfranchisement?: A Comparative Analysis of the Republic of Ireland and the United Kingdom', *Irish Probation Journal*, 11: 156-176.

Behan, C. (2012), "'Still Entitled to our Say": Prisoners' Perspectives on Politics'. *The Howard Journal*, 51(1): 16-36.

Behan, C. (2011), "'The benefit of personal experience and personal study": Prisoners and the Politics of Enfranchisement'. *The Prison Journal*, 91(1): 7-31.

Behan, C. and O'Donnell, I. (2008), 'Prisoners, Politics and the Polls: Enfranchisement and the Burden of Responsibility'. *British Journal of Criminology*, 48(3): 319-36.

### **Author**

Cormac Behan teaches criminology at the Centre for Criminological Research, University of Sheffield. His research interests include penal history, prisoners' rights, comparative penology and prison education. Prior to taking up this position, he taught politics and history in Irish prisons for 14 years. He is the author of *Citizen convicts: Prisoners, politics and the vote*, which was published in paperback by Manchester University Press in 2017.