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Viewpoint

Votes for Prisoners

by Tony Rees

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Introduction

I am grateful to Tony Rees who has written this paper for the Unitarian Penal Affairs Panel. Unitarians have always been known as reformers. They led the way with others when it came to Parliamentary reform and votes for all, education for all, the rights of women to equal status in society. More recently many have been engaged in gay rights issues, urging that marriage and personal commitment is not simply a heterosexual right.

We know from history how difficult is to reform anything that is seen as a permanent fact of life. (Let's not bring the NHS into this!). When people have grown up with the status quo, they can see no reason to change it; they accept the value of the institution without being called to question it. It seems right for society. It is the reformers who see that it is not right. It might seem unpalatable at first to see a new mind set emerging - but with thoughtful argument it becomes persuasive.

The idea that prison is civic death, as Tony Rees explains, has been with us for centuries and continues to be seen as the right way to deal with people who have broken the law - that they must be punished by removing them from society for as long as . . . well, for as long as some arbitrary figure of time that will discourage others more than heal the problems of the prisoner.

I hope that after reading this paper, you will feel sufficiently informed to join in this debate.

Tony McNeile
Editor

Votes for Prisoners

Shortly after the Human Rights Act passed into law in 1998, John Hirst, who had been convicted of manslaughter in 1980 and given a discretionary life sentence, initiated proceedings in the British Courts, seeking a declaration that his disenfranchisement was incompatible with the European Convention on Human Rights. In April 2001 the Divisional Court, after a two-day hearing, dismissed Mr. Hirst's application; permission to appeal was refused. Mr. Hirst thereupon took his case to the European Court of Human Rights and a hearing by the Chamber took place in December 2003; the unanimous verdict of the judges which followed declared that a 'blanket ban' on voting by convicted prisoners was in breach of Article 3 of Protocol No. 1 - see notes (1). The United Kingdom Government then asked that the decision be referred to the Grand Chamber of the European Court, where a larger number of judges - 17 - would review the findings. This request was accepted, and on 8th October 2005 the Grand Chamber upheld the conclusions of the lower Court. This time, however, the decision was not unanimous. Seven judges, including the long-term Swiss President of the Court, Luzius Wildhaber, argued that Article 3 did not preclude national Governments from setting their own rules.

The British prohibition is not the norm in Europe. Nineteen countries, including Germany, the Netherlands, Switzerland and the Nordic states, allow prisoners to vote without restriction. (2) Twelve others impose some limitations. In France, for example, disenfranchisement is treated as part of the sentence: prisoners may vote if the right is given by the court. More commonly, it depends on length of sentence - those serving longer terms are more likely to be barred - or on the nature of the offense, conviction for a felony, for example, or for 'crimes against the state' like treason. Sometimes electoral offenses are regarded as the only or principal reason for disqualification. (3) Apart from Russia, the eleven states which join the United Kingdom in depriving convicted prisoners of the vote have relatively small populations, and the list shows a

pronounced bias towards the Eastern edges of the Continent. (4) It should be noted that only if a citizen of a country brings a case before the ECHR, which then results in an adverse determination against the Government of that country, compliance will be required: if there is no such reference, existing laws and practices may continue as before. The legally-aided Mr. Hirst has frequently been slated by British politicians and commentators for his temerity in striving to assert his rights.

British Commonwealth countries and the USA usually take a harder line on this issue. In the latter case, citizenship, which determines eligibility for the vote, is governed by federal law, but where there is no such law or constitutional amendment, as with prisoners' voting, the individual states are allowed considerable discretion in fixing qualifications for suffrage and candidacy. There are thus fifty different systems. Only two small, liberal, North-Eastern states, Maine and Vermont, permit without restriction voting within their own jurisdictions by serving convicted prisoners. At the other end of the scale, three states, Florida, Kentucky, and Virginia, deny the franchise to convicted felons for the whole of their remaining lives; this especially targets Afro-Americans.

If the phrase is taken to mean 'complete and without exception', there is no 'blanket ban' in the United Kingdom. Those imprisoned for contempt of court and by reason of default (e.g. for failure to pay a fine) have never been disqualified, and in 2000 prisoners on remand, prisoners convicted but not yet sentenced, and unconvicted mental patients joined them. The treatment of remand prisoners is instructive about the rather casual attitude which successive British administrations have taken to prisoner disenfranchisement. In 1999 the Home Office Working Party on Electoral Procedures identified the reasons for the disqualification of those on remand as 'accidental'. It arose, it was found, because in the rules which Electoral Registration Officers were required to follow places of detention were not classed as 'residences'. The Working Party was unable to detect any principled arguments for denying the vote to this group of prisoners.

The response of successive British Governments to the Hirst judgement has been cultivated delay. The Labour administrations engaged in

two separate public consultations, to one of which, in January 2007, the Unitarian Penal Affairs Panel responded, arguing that there should be no bar to convicted prisoners voting. The House of Commons mounted its first and only full scale debate on prisoners' voting on the 10th. of February 2011, with a motion sponsored, cross-party, by David Davis, former shadow Home Secretary, Jack Straw, former actual Labour Home Secretary, and Dominic Raab, constitutional lawyer and rising Conservative backbencher.

The debate was bitty and often confusing: exchanges were as much among supporters of the motion as with the few opponents of it. This arose because the motion contained three separable elements - for the full wording see (5). One was the need to counter the ECHR's criticism that the British Government had not since the Hirst judgement laid on a debate on prisoners' voting on the floor of the House. Whether what occurred in February 2011 fully satisfied the Court's objection is doubtful, since the debate was arranged by the Backbench Business Committee, took place in backbenchers', not Government, time, and was presented and spearheaded by backbenchers, however prominent their past ministerial or shadow-cabinet careers may have been.

The problem posed for some members was the conflation of two other issues, the enforceability of the European Convention on Human Rights, and the right of prisoners to vote. (6) Dominic Raab devoted his closing speech in the debate to the former question. He cited the Tyrer case against Britain in 1978, in which the ECHR referred to the Convention as "a living instrument". The Court chose to regard its role, he said, as "not just to interpret and apply Convention rights but to expand and update them. The judges assumed the powers of legislators, without any mandate or any basis in the Convention", thus usurping responsibilities which are properly the prerogative of national Governments.

Other constitutional lawyers vigorously dispute this interpretation. Colm O'Cinneide, Reader in Law at University College London, quotes from a letter on voting rights for prisoners written jointly by David Davis and Jack Straw to the Daily Telegraph (24 May 2012). The two

M.Ps assert that "the job of the (European) Court is to apply the principles of the Convention as originally intended by those who signed it - nothing more, nothing less", and go on to state that the (separate) Vienna Convention on the Law of Treaties requires that "international treaties must be interpreted as their drafters intended". But this, says O'Cinneide "appears to be a straightforwardly incorrect interpretation of international law". After observing that the provisions of the Vienna Convention "are notoriously vague", he notes that Articles 31 and 32 "make it clear that Courts should focus on the 'object and purpose of treaties' and that the intentions of the drafters can only ever be taken into account in a "supplementary' manner". (7) The 'living instrument' approach of the Strasbourg Court is therefore the usual mode of interpretation adopted by other human rights bodies and also by Constitutional and Supreme Courts in Europe, the Commonwealth, and across the world.

Since disenfranchisement of prisoners is the subject of this paper, it would be wrong to view the arguments for and against through the prism of the debate, so these will be left for later discussion. However, the result in the division-lobby does need notice here. The eloquence of some opponents had little impact upon minds probably long made up, since the motion was approved by the staggering margin of 234 votes to 22. The 24 noes, including the tellers, consisted of nine Liberal Democrats, a sprinkling of minority party members and Independents, a lone Conservative - Sir Peter Bottomley - and, perhaps most amazingly, a mere seven Labour M.P.s.

Given this near unanimity, it is important to stress that the ECHR did not demand that all prisoners should be accorded the vote: it recognised that there had to be 'a margin of appreciation', to allow signatory countries to fit ECHR decisions into their individual legal systems and traditions. The Court affirmed that in this instance the 'margin' needed to be wide. The request to the British Government was merely that its response should be 'proportionate', and much has hung on the interpretation of this word. The Prime Minister has told the BBC's political correspondent that he was "absolutely horrified" by the prospect of changing the law, but both he and the Attorney General are well aware that con-

tinued defiance of the ECHR would be costly - not least in financial terms, since the way would be open to claims for compensation.

The Government's first suggestion was that all those who were sentenced to less than four years imprisonment should be permitted to vote. This was thought by many, particularly in the Conservative Party, to be overly generous: one persistent objection has been that it could enfranchise a number of the hobgoblins of our time, convicted paedophiles and rapists, since they might receive shorter sentences. The preferred option then substituted was that the vote should be restricted to those sentenced to one year's imprisonment or less.

This raises the question of why, given the postulate of a part-enfranchisement based on length of imprisonment, it is thought appropriate that those who receive short sentences should retain or obtain the vote. Wouldn't it be more logical, and serve wider social purposes, if it were the long-term prisoners who at some stage could regain the rights of citizenship while still serving their sentences as part of a process of rehabilitation? One aspect of the Hirst case which worried the ECHR judges was that the appellant was a 'post-tariff' prisoner: the punishment or 'tariff' part of his sentence had expired and his continued detention was solely on the grounds of risk. Re-enfranchisement in such circumstances was something which the British Government had apparently not bothered to consider.

Criteria for part-enfranchisement other than length of sentence are available. Type of crime is one obvious possibility. A difficulty here would be that each major category comprises a variety of offences, widely regarded - not least by the general public - as of different degrees of seriousness or culpability. Even murder ranges from mercy killings to serial homicides. Again, decisions on the franchise could be, as in France, left to the discretion of trial judges. However there are objections in principle to disenfranchisement being turned into a penalty, as an explicit part of the sentencing process. In any case, judges would have to be given guidance on the circumstances in which the vote should be retained or withdrawn, so in practice we would be back to categorisation again.

The present state of play remains as messy as ever. In November 2012, a mere 24 hours before the ECHR's deadline for compliance expired, the Justice Secretary, Chris Grayling, published a draft bill, allowing for pre-legislative scrutiny of what "may be cited as the Voting Eligibility (Prisoners) Act 2012". This puts forward three options. Schedule One would remove the current ban on prisoner voting, replacing it with a ban restricted to prisoners sentenced to four years or more. Schedule Two would replace the four year requirement with one of imprisonment for six months or less. (Note that this is only half of that commonly cited beforehand). Schedule Three would re-enact the current general ban on prisoner voting, and would be open defiance of the ECHR's ruling. Furthermore, the draft Bill could tighten some of the current restrictions, notably by providing that a prisoner would remain disqualified from voting while on temporary release from prison.

In the explanatory notes accompanying the draft Bill the Government "considers it more than likely that the provisions in options 1 and 2 would be found to be proportionate and therefore compatible with the convention". This would probably prove accurate about option 1. The Government unashamedly admits that option 3 would be unacceptable to the ECHR. But what about option 2? Would enfranchising only the shortest term prisoners be enough?

In fact, to refer to the need to satisfy the ECHR is rather loose talk. The actual body which has to be 'satisfied' is the Committee of Ministers, the executive arm of the Council of Europe, and the body responsible for supervising the implementation of the Court's judgements. (8) Pre-legislative scrutiny by M.P.s is welcome, but will inevitably drag out the process: the impasse is unlikely to be resolved before the next British General Election in 2015. The civil servants from the member countries who make up the Committee of Ministers will probably accept this further play for time, even if it seems blatant to them.

Prisoner enfranchisement raises some practical problems, mainly concerned with electoral machinery. Where - in what constituency or ward - would convicted prisoners be able to vote? Would the enfran-

chisement apply in all kinds of elections, or only some? M.P.s and councillors with places of detention on their patch agitate against prisoner enfranchisement on the grounds that it could 'distort' the results of elections. This anxiety particularly relates to local government polls which take place in wards with typically small electorates. An answer to such concerns is however readily available: prisoners should vote in the places where they have the closest ties, usually their last place of residence before sentencing. The Republic of Ireland legislated on these lines in 2006 without much commotion or untoward consequences. Not all the difficulties are thereby resolved: some prisoners have no fixed abode before conviction, and those serving long sentences may have lost any local connections they once possessed. However, even with wholesale enfranchisement the numbers in these categories casting a vote are likely to be small. And a few new voters to be propitiated at election time might encourage local representatives to take more interest in the custodial institutions in their areas, surely a desirable outcome.

Opponents of prisoner voting often argue that, apart from a few oddballs like Hirst, there is no demand among prisoners for the vote, citing as evidence the alleged facts that before entering prison many failed to register, have never or rarely cast a vote, and indeed have evinced a singular lack of interest in public affairs. Enfranchisement, they say, would impose an additional burden on prisons, unwanted by staff or most inmates. At the very least, they continue, entitlement to vote should depend on prior or previous enlistment on an electoral roll. What seems to be rather forgotten in these and similar objections is that the franchise is not permission or a privilege: it is a fundamental right of citizenship.

The Victorian justification for disenfranchisement, which was consequential on recourse to the Poor Law as well as receiving a custodial sentence, lay in the notion of 'civic death'. This is too draconian for present-day tastes, and opponents of prisoner voting rarely cite it today, although a whiff of it occurred in some contributions to the 2011 Parliamentary debate. They stress instead other functions of imprisonment as justifying disqualification, usually without explaining exactly how. These might include punishment, deterrence, the reduction of risk to members of the

public while incarceration continues, and the satisfaction of the presumed wishes of the victims of crimes.

Especially noteworthy is the reluctance of supporters of disqualification to engage with the concept of rehabilitation. Perhaps this is not surprising in view of the bad fist which the United Kingdom has made of rehabilitation in recent years - lack of availability of paid and productive work in prisons, limited educational facilities, locking prisoners up in their cells for most hours in the day, and above all sending them out on discharge with a travel warrant and £46 which is supposed to last until the payment of benefits kicks in.

Rehabilitation is, nevertheless, at the forefront of the arguments for enfranchisement. Prisoners tend to be - or become while they are inside - more than averagely uncoupled from stable personal and family relationships, only loosely connected to social and community (non-criminal) networks, and unused to the world of work or rusty in their approaches to it. Restoration of citizenship rights (and their attendant obligations) while incarcerated could therefore play a useful part in reintegrating them into society.

For Christians, another belief which should be relevant is in redemption: human beings should not be treated as incapable of it. Unitarians, along with other religious groups like the Quakers, have been in the forefront of campaigns for penal reform, and prisoner enfranchisement is one, not terribly major, aspect of this concern. Indeed, it is hard to see what all the fuss has been about. Why are so many prominent people so opposed? Enabling prisoners to vote would not mean that any of the walls or struts of society would cave in. The demands of the ECHR are actually rather minimal, and there is a good case for going beyond them and coming into line with our most progressive European neighbours. There might need to be a few exceptions, such as those with some serious mental conditions, but the easiest, cleanest way of complying with the Grand Chamber's decision, productive of the fewest anomalies and presenting no more administrative difficulties than part-enfranchisement, would be to extend the vote to all prisoners.

Tony Rees

Notes:

(1) Article 3 of Protocol No. 1 reads: "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 people in the choice of the legislature".
(2) Norway reserves the right of a Court to revoke the right to vote, although this is very rare and may be restricted to cases of high treason and other major breaches of national security.
(3) This is a bit too logical for British tastes: contributors to the 2011 House of Commons debate affected shock at the ECHR's suggestion that convictions for such offenses could provide acceptable grounds for depriving prisoners of the vote.
(4) The full list reads: Armenia, Belgium, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Russia, Serbia, Slovakia, Turkey and the United Kingdom.
(5) The motion debated on 10 February 2011 read: "That this House notes the ruling of the European Court of Human Rights in Hirst v. the United Kingdom in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions should be a matter for democratically elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand."
(6) Some speakers - not by any means all Conservatives - appeared to have been principally animated by distaste for everything European.
(7) The quotations here come from O'Cinneide's contribution to the blog of the Constitutional Law Group, June 3rd, 2012.
(8) The signatory states, 47 of them in all now, have clearly been reluctant to assign this task to the Court itself

Comments -

We welcome your comments on this issue. With your permission your comments might also be included in the NUF Newsletter.

Please send your comments to the editor,

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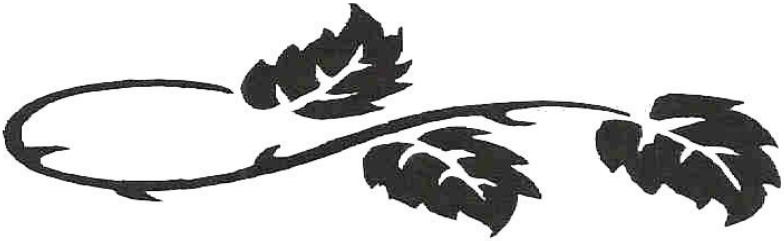

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