

# THE RIGHTS OF PRISONERS TO VOTE: A REVIEW OF PRISONER DISENFRANCHISEMENT IN NEW ZEALAND

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*Approximately half of all prison inmates in New Zealand are unable to vote due to largely archaic disenfranchisement laws. This article argues that a renewed evaluation of our electoral law through the New Zealand Bill of Rights Act 1990 and recent overseas case law would support a widening of the right to vote for those currently in prison.*

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## **I INTRODUCTION**

It is estimated that more than three million New Zealand citizens are eligible to vote.<sup>1</sup> However, approximately 2500 adults<sup>2</sup> are disenfranchised due to their status as long-term prisoners. The provisions in the Electoral Act 1993 that restrict their right to vote are in direct conflict not only with the New Zealand Bill of Rights Act 1990 (NZBORA) but also with a growing number of jurisdictions outside New Zealand that are upholding the value of the universal franchise.

Prisoners serving sentences of life imprisonment, preventive detention or terms of three years or more are barred from electoral registration. However, there is force in the argument that universal suffrage should truly be universal and extend to all prisoners, regardless of the term of their imprisonment. Although Parliament has full power to limit the right to vote, it has not sufficiently addressed this issue in past versions of the Electoral Act. The matter should be re-examined in light of overseas case law and Australia's recent removal of the right to vote from all prisoners.

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1 Elections New Zealand (6 July 2005) Media Release, see Elections New Zealand <[http://www.elections.org.nz/enrolment/check\\_it\\_rolls\\_on\\_display.html](http://www.elections.org.nz/enrolment/check_it_rolls_on_display.html)> (last accessed 21 August 2006).

2 Department of Corrections *Census of Prison Inmates and Home Detainees 2003* (Department of Corrections, Wellington, 2004) 23. According to that census, 2571 out of 5095 sentenced inmates were serving a term of three or more years and were thus caught by the disenfranchisement provisions in the Electoral Act 1993.

This article considers the arguments for and against prisoner disenfranchisement. Part II addresses the histories of prisoner disenfranchisement and universal suffrage, and Part III examines the only New Zealand case on prisoner disenfranchisement, *Re Bennett*.<sup>3</sup> Part IV assesses whether the removal of the right to vote for prisoners can be justified in terms of the NZBORA and international developments, and, consequently, whether such a rule should be retained in New Zealand.

## II HISTORY

### A Civil Death and Prisoner Disenfranchisement

#### 1 Early development

Prisoner disenfranchisement evolved from the ancient concept of civil death, also known as forfeiture. Civil death was prominent in ancient Greece and Rome as the mark of "infamy".<sup>4</sup> Infamy was bestowed upon those guilty of heinous and treasonous crimes involving moral depravity, and resulted in the forfeiture of rights such as voting and holding certain public offices.<sup>5</sup> Civil death developed in medieval Europe as a consequence of punishment for "grave crimes, such as an attempt against the king, desertion from the army, or murder of a relative."<sup>6</sup> A person found guilty of a qualifying offence lost all rights of citizenship, such as the ability to make a will and to be recognised as the legal parent of any subsequent children.<sup>7</sup>

In England, Blackstone stated that civil death arose as a consequence of banishment, abjuration (swearing an oath to leave the country)<sup>8</sup> or when a man entered the monastery: in such cases, the subject was deemed *civiliter mortuus*,<sup>9</sup> or dead in law. Likewise, the punishment of attainder was placed upon a criminal guilty of treason or felony when the judgment applied the death sentence.<sup>10</sup> Attainder resulted in the forfeiture of real and personal estates,<sup>11</sup> which consequently rendered the

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3 *Re Bennett* (1993) 2 HRNZ 358 (HC).

4 Mirjan R Damaska "Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study" (1968) 59 J Crim L C & P S 347, 351.

5 Damaska, above n 4, 351.

6 Carlo Calisse *A History of Italian Law* (Little, Brown, & Co, Boston, 1928) 511.

7 Calisse, above n 6, 511.

8 William Blackstone *Commentaries on the Laws of England* (vol 1, Clarendon Press, Oxford, 1765–1769) 132 [Blackstone, vol 1].

9 Blackstone, vol 1, above n 8, 132.

10 William Blackstone *Commentaries on the Laws of England* (vol 4, Clarendon Press, Oxford, 1765–1769) 381 [Blackstone, vol 4].

11 Blackstone, vol 4, above n 10, 381.

criminal ineligible to vote by reason of the property qualification for electors.<sup>12</sup> Disenfranchisement also applied to the offence of perjury<sup>13</sup> – a direct attack on the integrity of the legal system. It appears from these examples that the penalty of civil death was, for much of ancient and medieval times, reserved for those who committed serious crimes that affected the public welfare. Treason, felonies and attempts against the monarch are certainly more serious crimes than the modern-day offences for which disenfranchisement applies.

## 2 *Statutory formalisation: The United Kingdom and New Zealand*

The Forfeiture Act 1870 (UK) largely abolished the penalties of attainder and forfeiture for treason and felony. Persons guilty of these serious crimes were no longer civilly dead, and instead remained citizens of the State in law. The Act retained, however, the penalty of disenfranchisement for those sentenced to death, penal servitude, hard labour or a period of imprisonment exceeding 12 months.<sup>14</sup>

New Zealand had followed a different path with the New Zealand Constitution Act 1852 (UK), which disenfranchised those incarcerated for "any treason, felony, or infamous offence within any part of Her Majesty's dominions".<sup>15</sup> By 1879, this was modified to further render such a person ineligible for electoral registration for 12 months following the end of their sentence.<sup>16</sup> In 1905, the temporary post-release disqualification vanished, but the scope of disenfranchisement widened to include any person sentenced to death or imprisonment for one year or more:<sup>17</sup> it was no longer necessary to have committed treason or felony to be affected. The one-year cut-off point was abandoned with the passage of the Electoral Act 1956, which disqualified from registration all persons "detained pursuant to convictions in any penal institution".<sup>18</sup> Thus, from a penalty affecting only those guilty of the most reprehensible conduct, disenfranchisement became a universal burden upon all prisoners.

## 3 *A brief period of enfranchisement*

The Electoral Amendment Act 1975 removed the disqualification of prisoners as electors, opening for the first time the door of prisoner enfranchisement in modern New Zealand.<sup>19</sup> During

12 Blackstone, vol 1, above n 8, 171.

13 Blackstone, vol 1, above n 8, 174.

14 Forfeiture Act 1870 (UK), 33 & 34 Vict, c 23, s 2.

15 New Zealand Constitution Act 1852 (UK), 15 & 16 Vict, s 8.

16 Qualification of Electors Act 1879, s 2(4).

17 Electoral Act 1905, s 29(1).

18 Electoral Act 1956, s 42(1)(b).

19 Electoral Amendment Act 1975, s 18(2).

the passage of the Bill, the Labour Government made only one reference to prisoner enfranchisement in the House. The Minister of Justice remarked that:<sup>20</sup>

[T]he imposition of a criminal penalty involves the penalty of deprivation of liberty, but it should not mean a deprivation of all civil rights, and after conscious consideration we have concluded it would be proper to allow people in custody, as this Bill provides, to cast a vote.

This brief statement suggests that imprisonment should restrict as few rights as necessary to ensure effective punishment, and implies that the restriction of voting rights is superfluous. Equally as brief was the Select Committee's reasoning in support of prisoner enfranchisement, when it agreed that "there was no justification for taking away an elector's political rights if detained in a penal institution."<sup>21</sup>

As these comments illustrate, the pro-enfranchisement movement within the Government did not give many public reasons for its decision. It was left to academia to flesh out the pros and cons. An editorial to the *New Zealand Law Journal* praised the measure for focusing on including prisoners as part of society and increasing awareness of their rights:<sup>22</sup>

Prisoners they may be, but they still have rights and responsibilities, and if giving them the vote is to increase parliamentary appreciation of the prisoners' existence it can be no bad thing. Certainly an awareness that they *are* members of society is the very attitude our penal system is working to engender.

Thus, the pro-enfranchisement movement appeared to rely on the minimal restriction of civil rights and increasing awareness of prisoners' positions within society to justify giving prisoners the right to vote.

While in Opposition, the National Party highlighted the supposed incongruity between the crimes committed and the punishment which followed:<sup>23</sup>

[A]n individual who is found guilty of what are known as corrupt practices under this legislation can be deprived of his vote, but if he is in prison for having committed murder he will be given the vote. I do not think that will sit well with most of the people of this country.

It was seen as illogical to impose lesser consequences on those who commit murder and similar heinous offences than those who commit corrupt practices (undermining the free franchise through personation, bribery, treating or undue influence<sup>24</sup>). The franchise was seen as a "fundamental and

20 Hon Dr A M Finlay (17 June 1975) 398 NZPD 2167–2168.

21 Electoral Act Committee "Final Report" [1975] IV AJHR I 15, 20.

22 Jeremy Pope "Voting Inside" [1975] NZLJ 605 (emphasis in the original).

23 Hon B E Talboys (20 August 1975) 400 NZPD 3777.

24 Electoral Act 1993, ss 215–218.

serious right";<sup>25</sup> the enfranchisement of supposedly morally corrupt prisoners meant that the right to vote was "eroded by being treated as of small consequence."<sup>26</sup>

The final comment from the Opposition relied on a social contract argument, in that "people who infringe the laws of society to the extent that they are put into penal institutions should not be entitled to exercise a vote in a general election."<sup>27</sup> According to this view, breaking the law to an extent that warrants imprisonment should mean the withdrawal of the right to participate in the formulation of the law.

After the National Government came to power in 1975, prisoners were again disenfranchised in 1977.<sup>28</sup> Rather than relying on a philosophical or moral argument, as they had while in Opposition, the National Government focused on the practical difficulties of granting prisoners the vote. The question of which electorate should receive the prisoner's vote seemed insurmountable.<sup>29</sup> For example, a prisoner may have few remaining links with his or her former electorate of residence, and the current electorate of residence would contain a disproportionately large number of prisoners.<sup>30</sup>

The 1977 amendments returned the voting status of prisoners to the 1956 position, in that all prisoners remained disenfranchised regardless of their offence or length of time in jail. Thus, the two extremes – complete enfranchisement and complete disenfranchisement – both held sway over a short period of time, with no consideration of a possible middle ground.

#### 4 *Modern legislation*

All prisoners remained disenfranchised until the passage of the Electoral Act 1993. Section 80(1) of that Act disqualifies from registering to vote, and hence from being able to cast a ballot, a person who is being detained in a prison under:<sup>31</sup>

- (i) A sentence of imprisonment for life; or
- (ii) A sentence of preventive detention; or
- (iii) A sentence of imprisonment for a term of three years or more.

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25 Hon David Thomson (20 August 1975) 400 NZPD 3783.

26 Hon David Thomson (20 August 1975) 400 NZPD 3783.

27 J R Harrison MP (20 August 1975) 400 NZPD 3785.

28 Electoral Amendment Act 1977, s 5.

29 Rt Hon R D Muldoon (3 November 1977) 415 NZPD 4159. See Part IV A 1 Scope of the objective.

30 Rt Hon R D Muldoon (7 December 1977) 416 NZPD 5150.

31 Electoral Act 1993, s 80(1)(d).

Thus, the rule of prisoner disenfranchisement was largely upheld, with the important proviso that it does not apply to imprisonment sentences of less than three years.

In promoting this change, the Department of Justice relied on two main sources.<sup>32</sup> The first was the recommendation of the Royal Commission on the Electoral System,<sup>33</sup> which reported to the House in 1986. The Royal Commission noted that imprisonment for a serious crime should include the loss of some rights other than liberty, such as the right to vote.<sup>34</sup> The three-year limit for disenfranchisement, which coincides with the triennial election cycle in New Zealand, was recommended after an analogy with "citizens absent overseas who lose their right to vote if they are away for more than a certain length of time."<sup>35</sup>

This rather troubling link ignores the fact that New Zealand citizens overseas will often have the right to exercise the franchise in their adopted country.<sup>36</sup> Their right to vote has been transferred to their adopted homeland, in which their actions are affected by their adopted legislature as closely as they would be by the New Zealand legislature if they lived in New Zealand. Because the legislature's actions can be affected by that person's vote, a link of representation can be forged. However, a long-term prisoner is similarly affected by the penal policies developed by the New Zealand legislature, but he or she is without recourse to any form of representation in Parliament.

The second source relied upon by the Department of Justice was an opinion from the then Solicitor-General, John McGrath QC.<sup>37</sup> In 1992, the Department asked the Solicitor-General to consider complete prisoner disenfranchisement – as in place under the Electoral Act 1956 – in light of the newly enacted NZBORA.<sup>38</sup> Referring to the recommendations of the Royal Commission, the Solicitor-General favoured a three-year limit in order to "minimise the problem of arbitrary application"<sup>39</sup> of a blanket disenfranchisement rule. He believed disenfranchisement could be justified if it applied to a smaller number of prisoners. This would provide some tailoring to suit the

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32 Department of Justice *Electoral Reform Bill: Report of the Department of Justice* (Department of Justice, Wellington, 1993) 57.

33 Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) para 9.21 and recommendation 42.

34 Royal Commission on the Electoral System, above n 33, para 9.21.

35 Royal Commission on the Electoral System, above n 33, para 9.21.

36 See Sarah Anne McClelland *The Significance of the Franchise: Democratic Choices and the New Zealand Electoral System* (LLM Research Paper, Victoria University of Wellington, 1996) 109 and 112.

37 Department of Justice, above n 32, 57.

38 J J McGrath QC, Solicitor-General, to W A Moore the Secretary for Justice "Rights of Prisoners to Vote: Bill of Rights" (17 November 1992) Letter, para 26.

39 McGrath QC, above n 38, para 26.

"nature of the offence committed".<sup>40</sup> The Solicitor-General drew heavily on Canadian cases to support his argument; however, since 1992, many of these cases have been overruled or extended by the Canadian Supreme Court. Despite this, the disenfranchisement law in New Zealand remains as it was in 1993.

Differences are apparent between the respective opinions of the Royal Commission and the Solicitor-General. Interestingly, the Royal Commission, in drawing an analogy between long-term prisoners and New Zealand citizens overseas, based their three-year limit on the prisoners' supposed disconnection with society. In contrast, the Solicitor-General justified a three-year limit in order to focus on "the seriousness of the offence".<sup>41</sup> When coupled with the lack of comment in the parliamentary debates,<sup>42</sup> the Government's true reason for the three-year limit remains unclear. It seems that the Government was prepared to rely on the recommendations given to them, without an extended policy debate in public.

Furthermore, although the Solicitor-General mentioned Canadian jurisprudence on prisoner disenfranchisement, both he and the Royal Commission neglected to weigh New Zealand's international obligations against their policy concerns.<sup>43</sup> Despite these weaknesses, the Electoral Act 1993 became and remains the relevant electoral law.

## ***B Universal Suffrage***

Conflicting with the notion of disenfranchisement is the emerging right of universal suffrage. As this section illustrates, the legal history of liberal democracies since the Enlightenment shows a trend of granting the franchise to an ever-increasing range of people.

### *1 New Zealand*

New Zealand has often led the way in opening up the franchise. Māori men gained widespread suffrage in 1867,<sup>44</sup> although their allocation of parliamentary seats at the time was proportionately much smaller than that of their Pākehā counterparts.<sup>45</sup> The Qualification of Electors Act 1879, while retaining disenfranchisement for those guilty of serious offences, enabled British men who were

40 McGrath QC, above n 38, para 26.

41 McGrath QC, above n 38, para 26.

42 Understandably, the foci of the debate on electoral reform in 1993 were the mixed member proportional electoral system, the proposed Senate and the Māori seats.

43 McClelland, above n 36, 114 and Part II B 2 International developments.

44 Māori Representation Act 1867, s 6.

45 Neill Atkinson *Adventures in Democracy: A History of the Vote in New Zealand* (University of Otago Press, Dunedin, 2003) 50.

resident in New Zealand for one year to vote.<sup>46</sup> This mitigated the harsh effects of requiring an elector to own freehold property. Women were granted the right to vote in 1893.<sup>47</sup> The voting age settled at 18 years of age by 1974.<sup>48</sup> It is clear that the recurring theme in New Zealand's electoral history has been one of gradually extending the right to vote, rather than removing the franchise from any one sector in society.<sup>49</sup>

## 2 International developments

### (a) Domestic provisions in the Western world

The trend towards universal suffrage, particularly throughout the 20<sup>th</sup> century, has been noticeable. Party competition, ideological shifts and world wars gradually opened up the franchise to groups such as the poor, soldiers and women.<sup>50</sup> However, the battle has been a hard-fought one that is, in many respects, still continuing for some groups such as immigrants and the mentally ill.<sup>51</sup>

In Australia and the United States, certain select committees and bar associations have, since at least 1980, recommended the abolition of disenfranchisement provisions for prisoners.<sup>52</sup> Disturbingly, the legislative trend in Australia is currently towards more extensive prisoner disenfranchisement, where legislation removing the right to vote from all prisoners was recently enacted<sup>53</sup> – despite the forcible opposition to it<sup>54</sup> and the fact that Australia's electoral history has traditionally been one of widening, rather than restricting, the franchise for prisoners.<sup>55</sup>

46 Qualification of Electors Act 1879, s 2.

47 Electoral Act 1893, s 6.

48 Electoral Amendment Act 1974, s 2.

49 Royal Commission on the Electoral System, above n 33, para 9.3.

50 Alexander Keyssar *The Right To Vote: The Contested History of Democracy in the United States* (Basic Books, New York, 2000) 319–320.

51 Jonathan Snelling *Stranger than the Bullet: An Unconventional History of the Vote* (Robson Books, London, 2002) 14–25.

52 Jennifer Fitzgerald and George Zdenkowski "Voting Rights of Convicted Persons" (1987) 11 Crim LJ 11, 34–35.

53 Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth).

54 Of the 53 submissions received on the Bill, 35 were in opposition to the disenfranchisement provision and only three were in support: Australian National University <[http://democratic.audit.anu.edu.au/papers/20060331\\_kelly\\_electoral\\_bill.pdf](http://democratic.audit.anu.edu.au/papers/20060331_kelly_electoral_bill.pdf)> (last accessed 12 September 2006) and Commonwealth of Australia <[http://www.aph.gov.au/senate/committee/fapa\\_ctte/electoral\\_integrity/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/fapa_ctte/electoral_integrity/submissions/sublist.htm)> (last accessed 12 September 2006).

55 Jerome Davidson *Inside Outcasts: Prisoners and the Right to Vote in Australia* (2003–2004) Current Issues Brief No 12, 1–2.



## (b) Universal Declaration of Human Rights

The creation of the United Nations ushered in a new era for human rights, with a particular emphasis on the equality of all peoples. The General Assembly's Universal Declaration of Human Rights 1948 (UDHR) recognises that the will of the people shall be expressed in "periodic and genuine elections which shall be by universal and equal suffrage".<sup>56</sup> This is a clear and unambiguous statement of the importance of the right to vote for all people. Although it is merely recommendatory, it has been acknowledged as being "of great importance in stimulating and directing the international promotion of human rights."<sup>57</sup>

## (c) International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) builds on the UDHR in recognising the universal right of citizens:<sup>58</sup>

[W]ithout unreasonable restrictions ... [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

The ICCPR was the product of more extensive negotiations than the UDHR, and holds a higher legal status as a legally binding international treaty. New Zealand ratified the ICCPR on 28 December 1978.<sup>59</sup> Its main difference from the merely recommendatory UDHR lies in the addition of the words "without unreasonable restrictions".

With regard to unreasonable restrictions, the United Nations Centre for Human Rights has enunciated that "excessive limitations on the voting rights of convicted criminals"<sup>60</sup> are not permissible. Further, the limitations imposed on persons convicted of electoral offences must be limited in time.<sup>61</sup> In its General Comment on Article 25 of the ICCPR, the Office of the High Commissioner for Human Rights stated that convicted persons may have their voting rights

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56 UNGA Resolution 217 A (III) (10 December 1948) art 21(3).

57 Antonio Cassese *International Law* (2 ed, Oxford University Press, Oxford, 2005) 381.

58 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 25(b).

59 Paul Harris and Stephen Levine (eds) *The New Zealand Politics Source Book* (3 ed, Dunmore Press, Palmerston North, 1999) 516.

60 Centre for Human Rights *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections* (United Nations, New York and Geneva, 1994) 11.

61 Centre for Human Rights, above n 60, 11.

suspended on objective and reasonable grounds. It is important, however, that "the period of such suspension should be proportionate to the offence and the sentence".<sup>62</sup>

It is clear from these statements that in order to depart from the starting point of universal and equal suffrage in the ICCPR, restrictions on enfranchisement must be reasonable and proportionate, with their operational period limited in time. The question for consideration is whether section 80(1)(d) of the Electoral Act 1993 satisfies these tests. Arguably, with recent case law extending even further than these decades-old statements, it is possible that even reasonable restrictions are too constraining. Such restrictions may need to be cast aside in favour of a wider conferral of the franchise.

(d) New Zealand Bill of Rights Act 1990

The NZBORA enacts into domestic law New Zealand's obligations under the ICCPR.<sup>63</sup> In clear and unambiguous language, section 12(a) states that:<sup>64</sup>

Every New Zealand citizen who is of or over the age of 18 years ... [h]as the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot[.]

This is a direct adoption of the language and philosophy of the ICCPR. Importantly, every right in the NZBORA is subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>65</sup>

### **III CONFLICTING NOTIONS AND RE BENNETT**

There is an obvious conflict between the idea of universal suffrage and the disenfranchisement of prisoners, as highlighted by the clash between section 80(1)(d) of the Electoral Act 1993 and section 12(a) of the NZBORA. The only New Zealand case to comment on this conflict is the 1993 case of *Re Bennett*.<sup>66</sup>

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62 Office of the High Commissioner for Human Rights "General Comment No. 25: The Right to Participate In Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)" (12 July 1996) CCPR/C/21/Rev.1/Add.7, para 14.

63 New Zealand Bill of Rights Act 1990, preamble.

64 New Zealand Bill of Rights Act 1990, s 12.

65 New Zealand Bill of Rights Act 1990, s 5.

66 *Re Bennett*, above n 3.

### A Judgment

Mr Bennett was detained in a penal institution pursuant to a conviction – at the time, a ground for disqualification for registration under the Electoral Act 1956.<sup>67</sup> On 28 August 1993, he applied to clarify his voting rights for the election to be held on 6 November that year. The application was heard, and the decision was delivered orally by Greig J, on 29 October 1993.

Greig J found a "clear conflict"<sup>68</sup> between the disenfranchising section of the Electoral Act 1956 and section 12(a) of the NZBORA. Applying section 4 of the NZBORA, which ensures the supremacy of clearly rights-inconsistent legislation over the NZBORA, he held that the Electoral Act 1956 must prevail. Greig J found that sections 5 and 6 of the NZBORA – the rules on justifiable limitations and rights-consistent interpretations – were inapplicable because of the clear conflict.<sup>69</sup> It was found that Bennett may have had recourse to the Human Rights Committee of the United Nations, but that such a matter was "outside the jurisdiction"<sup>70</sup> of the Court.

### B Criticism

Due to the timing and hurried judicial scrutiny of the application, the judgment in *Re Bennett* suffers from some inherent weaknesses. Given the straightforward provision for disenfranchisement of all prisoners in the Electoral Act 1956, Greig J may have been justified in dismissing the application by virtue of that Act's clear conflict with section 12(a) of the NZBORA.<sup>71</sup> However, current judicial practice is to turn first to sections 5 and 6 of the NZBORA in order to define the scope of the impugned right and attempt a rights-consistent interpretation before applying limitations. Such practice is seen in the cases of *Ministry of Transport v Noort*<sup>72</sup> and *Moonen v Film and Literature Board of Review*.<sup>73</sup>

Although the Solicitor-General's opinion was not publicly available at the time,<sup>74</sup> the *Noort* judgment was delivered 18 months before the decision in *Re Bennett*. In the judgment, Richardson J

67 Electoral Act 1956, s 42(1)(d).

68 *Re Bennett*, above n 3, 361.

69 *Re Bennett*, above n 3, 361.

70 *Re Bennett*, above n 3, 361.

71 Greig J labelled the statutory conflict "so plain as to give no room for any argument": *Re Bennett*, above n 3, 361. The Solicitor-General also found that the conflict was "clear beyond argument": McGrath QC, above n 38, para 7.

72 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).

73 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) [*Moonen*].

74 The opinion was first brought into the public arena by Sarah McClelland, after the Crown Law Office decided to waive professional privilege in relation to it. See McClelland, above n 36, 110.

stated that a determination under section 4 of the NZBORA must include the question "whether there is any room"<sup>75</sup> for a consistent interpretation under sections 5 and 6. However, Greig J neglected to mention this approach in *Re Bennett*; the fact that no case law was discussed by the learned judge highlights the rushed nature of his decision.

If Greig J had had the advantage of these resources and sufficient time to fully address the issue, his judgment may have included a proper analysis of whether disenfranchisement was a justifiable limit on Bennett's electoral rights.

### ***C Likely Future Procedure***

The most authoritative statement of procedure under sections 5 and 6 of the NZBORA is set out in *Moonen*. The Court of Appeal recognised the "power, and on occasions the duty"<sup>76</sup> to declare an unreasonable limitation on a right contained in the NZBORA. A court will first attempt to find an interpretation that does not unreasonably impinge on NZBORA rights. If this cannot be done, the court retains the power to declare the limitation unreasonable, for the benefit of the legislature and the Human Rights Committee should the case proceed to other judicial avenues.<sup>77</sup> The Court in *Re Bennett* did not have this declaration of inconsistency within its legal armoury, and so did not proceed down this path.

Given the ease with which Bennett's right to vote was dispatched by virtue of the Electoral Act 1956 and in spite of the NZBORA, one must ask whether we are now merely paying lip service to our international obligations to provide as broad a base as possible for the franchise, or whether there are valid reasons for limiting the rights of certain members of society to vote.

With only one rushed High Court judgment directly on the issue, prisoner disenfranchisement has not been considered at length by the judiciary. It is possible that if a similar fact situation were to come before the courts, the long-standing rule would come under intense scrutiny. Although the end result for the prisoner may be the same – due to the dominant effect of section 4 of the NZBORA – the journey to that end through section 5 would be likely to highlight lengthy and controversial policy issues. This may provoke a response from the legislature; the mere acceptance of a rule that disenfranchises some 2500 citizens is hardly satisfactory without some advanced reasoning to support it.

The issue for contemporary consideration is whether prisoner disenfranchisement under the Electoral Act 1993 is a justifiable limitation on the right to vote contained in section 12(a) of the NZBORA. Resolving this issue will help to determine whether we should retain, limit or repeal this

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<sup>75</sup> *Ministry of Transport v Noort*, above n 72, 278.

<sup>76</sup> *Moonen*, above n 73, 17.

<sup>77</sup> *Moonen*, above n 73, 17.

restriction on the right to vote. In determining the question of justification, it is useful to refer to overseas jurisdictions for guidance. Near-identical situations of fact and law have arisen in a number of countries, and it is interesting to note that the recent judicial movements have been, where possible, to regard prisoner disenfranchisement as unconstitutional or undesirable.

1 *Sauvé v Canada (Chief Electoral Officer)*<sup>78</sup>

The 2002 Canadian Supreme Court decision in *Sauvé* provides the debate with two well-reasoned and detailed opinions on the legality of prisoner disenfranchisement. The case involved a provision in the Canada Elections Act which disenfranchised prisoners serving sentences of two years or longer.<sup>79</sup> This was in conflict with section 3 of the Canadian Charter of Rights and Freedoms, which provided every Canadian citizen with the right to vote in an election of the House of Commons.<sup>80</sup> As in the NZBORA, the rights contained in the Charter are subject only to "reasonable limits",<sup>81</sup> but the key difference is that only the Charter is supreme law. The constitutionality or otherwise of prima facie inconsistent legislation is thus more heavily debated in *Sauvé* than in *Re Bennett*.

In a five–four majority judgment, section 51(e) of the Canada Elections Act was struck down by the Supreme Court as unconstitutional. The majority, led by McLachlin CJ, saw the inclusion of prisoners in the electoral process as the best way to improve democracy and the legitimacy of the State.<sup>82</sup> It was considered that the government had failed to provide an objective that justified a limitation on the right to vote, "principally for want of a rational connection between denying the vote to penitentiary inmates and its stated goals."<sup>83</sup> The minority, however, focused on disenfranchisement as a valid punishment to highlight the prisoner's irresponsible acts as a citizen.<sup>84</sup> It is these underlying concepts – the social contract and the rationale of punishment – which frame the disenfranchisement debate.

In a lengthy dissent, the minority also preferred to defer to the legislature on questions involving "competing social or political philosophies"<sup>85</sup> that may reasonably justify a limitation on the right to

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78 *Sauvé v Canada (Chief Electoral Officer)* [2002] SCC 68 [*Sauvé* (SCC)].

79 Canada Elections Act RSC 1985 c E-2, 51(e).

80 Canadian Charter of Rights and Freedoms, s 3, Part I of the Constitution Act 1982 (Canada Act 1983 (UK), sch B).

81 Canadian Charter of Rights and Freedoms, above n 80, s 1.

82 *Sauvé* (SCC), above n 78, paras 31–32 McLachlin CJ for the majority.

83 *Sauvé* (SCC), above n 78, para 19 McLachlin CJ for the majority.

84 *Sauvé* (SCC), above n 78, para 70 Gonthier J for the minority.

85 *Sauvé* (SCC), above n 78, para 67 Gonthier J for the minority.

vote. The question of what is a reasonable limit on the franchise involves policy considerations, and the minority noted that "[l]ine drawing, amongst a range of acceptable alternatives, is for Parliament".<sup>86</sup> However, it is beyond the scope of this article to comment on the appropriate roles of the judiciary and the legislature when weighing social and political philosophies. It is sufficient at this stage to note the majority's objection to this contention:<sup>87</sup>

The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. ... It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*.

This jurisdictional issue aside, both the majority and minority judgments in *Sauvé* are useful in illustrating the competing philosophies of the disenfranchisement debate. Canadian jurisprudence is always of interest in determining NZBORA questions, as New Zealand's legislation and case law in this area borrows heavily from Canada.

## 2 *Hirst v United Kingdom (No 2)*<sup>88</sup>

The recent European Court of Human Rights (ECHR) decision in *Hirst* drew on *Sauvé* in finding that the disenfranchisement provision in the Representation of the People Act 1983 (UK) was contrary to Protocol No 1 of the European Convention on Human Rights. The Protocol provides for a franchise that ensures "the free expression of the opinion of the people in the choice of the legislature",<sup>89</sup> whereas the Representation of the People Act 1983 (UK) disenfranchised all prisoners.<sup>90</sup>

The Grand Chamber of the ECHR agreed with the majority in *Sauvé* that a universal right to vote must be the starting point: "[i]n the twenty-first century, the presumption in a democratic State must be in favour of inclusion".<sup>91</sup> The judgment did not, however, dismiss the United Kingdom's aims of punishing offenders and promoting civil responsibility as illegitimate.<sup>92</sup> These remain as

86 *Sauvé* (SCC), above n 78, para 174 Gonthier J for the minority.

87 *Sauvé* (SCC), above n 78, para 13 McLachlin CJ for the majority.

88 *Hirst v United Kingdom (No 2)* (2005) ECHR 74025/01 (Grand Chamber, ECHR) [*Hirst*].

89 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, and Relating to the Enforcement of Certain Rights and Freedoms Not Included in Section I of the Convention (Protocol I) (20 March 1952) CETS 9, art 3.

90 Representation of the People Act 1983 (UK), s 3.

91 *Hirst*, above n 88, para 59 Judgment of the Court.

92 *Hirst*, above n 88, paras 74–75 Judgment of the Court.

possible justifications for disenfranchisement, but the means of giving effect to those aims in the Act did not pass the proportionality test. This situation was "somewhat improved"<sup>93</sup> by the Representation of the People Act 2000 (UK), which permitted remand prisoners and unconvicted mental patients to vote. Nevertheless, the 1983 Act in question still remained a "blunt instrument"<sup>94</sup> of disenfranchisement.

It was noted that disenfranchisement provisions varied widely between the contracting European states. At the time of the judgment, 18 states allowed all prisoners to vote without restriction and 13 states – mostly in Eastern Europe – did not allow any prisoner enfranchisement.<sup>95</sup> Twelve states had a middle-ground for prisoner enfranchisement, with the removal of the right to vote dependent on the discretion of courts or factors such as length of imprisonment or the severity of the offence.<sup>96</sup> No single option has been favoured by the contracting States; the choice to grant the right to vote to prisoners must often be one of policy.

#### **IV JUSTIFIABLE LIMITATIONS?**

Three broad arguments for prisoner disenfranchisement can be drawn from the New Zealand Parliamentary Debates, the Royal Commission report and the overseas case law:

- (1) Practical and administrative concerns;
- (2) Sanctioning offenders; and
- (3) Upholding the social contract.

The question is whether any of these arguments can demonstrably justify a limitation on the right to vote for the purposes of section 5 of the NZBORA. In answering this question, the test in *Moonen*, although not prescriptive,<sup>97</sup> is highly persuasive. The steps are:<sup>98</sup>

- (1) Identify the objective that the legislature was endeavouring to achieve by the provision in question;
- (2) Assess the importance and significance of that objective;

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93 *Hirst*, above n 88, para 82 Judgment of the Court.

94 *Hirst*, above n 88, para 82 Judgment of the Court.

95 *Hirst*, above n 88, para 33 Judgment of the Court.

96 *Hirst*, above n 88, para 33 Judgment of the Court.

97 *Moonen*, above n 73, 16.

98 *Moonen*, above n 73, 16–17.

- (3) Determine if there is reasonable proportionality with regard to the importance of the objective:
- (a) There must be a rational relationship between the means used and the objective;
  - (b) There must be as little interference as possible with the right or freedom affected (the "minimal impairment test"); and
  - (c) The limitation must be justifiable in the light of the objective.

Value judgments will be made by the court in determining whether these steps have been satisfied. The final determination on whether a limitation is justifiable is made by the court. This is perhaps in contrast to the situation in Canada, where the judiciary has, on occasion, deferred to the legislature on symbolic and philosophical matters of social importance.<sup>99</sup>

#### ***A Practical and Administrative Concerns***

##### *1 Scope of the objective*

The objective of meeting practical and administrative concerns relates to the financial and logistical difficulties encountered by the State in granting prisoners the right to vote. Excessive costs may be incurred in registering and collecting the votes of people who are incarcerated. For example, the Director of Home Affairs in the South African case of *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*<sup>100</sup> argued that the difficulty in ensuring the sanctity of the ballot box in mobile voting stations was an excessive burden on the State.<sup>101</sup>

As identified by the New Zealand National Government in 1977, a second concern associated with this objective is the question of which electorate shall receive the registration and vote of the prisoner. The 1975 election saw prisoners voting in either their former electorate of residence or the electorate in which they were arrested.<sup>102</sup> However, the prisoner may no longer have genuine links with his or her former electorate of residence, or the boundaries may have changed.<sup>103</sup> Similarly, large prisons could have a disproportionate effect on particular electorates if prisoners' votes were to apply there.

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99 See *Sauvé* (SCC), above n 78, paras 186–188 Gonthier J for the minority.

100 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] 5 BCLR 445 (CC) [NICRO].

101 *NICRO*, above n 100, para 40 Chaskalson CJ (Madala and Ngcobo JJ concurring).

102 "They Won't Go Far to Vote" (8 November 1975) *The Auckland Star* Auckland 1.

103 Rt Hon R D Muldoon (7 December 1977) 416 NZPD 5150.



The Royal Commission expressed the fear that prisoner enfranchisement may require concomitant rights, such as the freedom of association and discussion, as part of the democratic process.<sup>104</sup> This concern was also expressed in the Solicitor-General's opinion.<sup>105</sup> Since unbridled assembly is inconsistent with incarceration, prisoner disenfranchisement is seen as the only way to protect the integrity of the electoral system and avoid this administrative nightmare.

## 2 *Importance of the objective*

It is important to note that practical and administrative difficulties are burdens on the State only. The wider public has very little, if any, interest in the cost or administrative difficulties of running an election, as long as it is carried out fairly and democratically. Indeed, the financial cost of making the franchise available to as wide a group as possible could be seen as irrelevant when considering the nature of the right involved. While it is important that public expenditure is kept under control, disenfranchising a sector of society cannot be justified only to achieve a small measure of financial prudence.

## 3 *Proportionality*

### (a) Rational relationship

There is little evidence to support a rational relationship between the practical difficulties of providing the vote to prisoners and long-term prisoner disenfranchisement. Prisoners are already eligible to vote if their sentence is less than three years, or if they are on remand; there is little sense in claiming practical or administrative difficulties as reasons for disenfranchisement when the State is willing to provide the vote to some prisoners and not others based on a largely arbitrary line-drawing exercise. Furthermore, the disenfranchising provisions of the Electoral Act 1993 are inconsistent with the ability of prisoners to vote in municipal elections.<sup>106</sup> The State also provides support for people who are unable to attend polling places on the day of the election due to, among other reasons, hospitalisation, absence from the country or religious objections.<sup>107</sup>

Concerns over which electorate should receive a prisoner's vote have more relevance. Under New Zealand's mixed member proportional electoral system, however, these concerns are somewhat assuaged. The nationwide party vote is the main determinant of the next government, and it applies without regard to the electorate in which the voter lives. Arguments as to which electorate should receive the vote of the prisoner are less relevant today than under the first-past-the-post electoral

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104 Royal Commission on the Electoral System, above n 33, para 9.17.

105 McGrath QC, above n 38, paras 16–17.

106 Penal Policy Review Committee *Report of the Penal Policy Review Committee* (Government Printer, Wellington, 1981) para 208.

107 Electoral Act 1993, s 61 and Electoral Enrolment Centre, above n 1.

system, under which this issue gained more prominence in 1977. Furthermore, people absent from New Zealand for less than three years can still vote, even if they did not visit their electoral district on their last return.<sup>108</sup> Any arguments as to the supposed need for a connection between an elector and his or her electoral district can be countered through these examples.

If suffrage requires the rights to freedom of assembly and discussion as part of the democratic process, then disenfranchisement may be a rationally connected limitation on the right to vote. This was accepted by the British Columbia Supreme Court in *Re Jolivet and Barker and The Queen and Solicitor-General of Canada*,<sup>109</sup> but regarded as irrelevant by the Ontario Court of Appeal in the later case of *Sauvé v Canada (Attorney-General)*:<sup>110</sup>

The evidence indicates that the appellant had access to newspapers and television, including cable television, which provides coverage of House of Commons debates. Many voters may have chosen to live in a universe figuratively not much larger than a prison cell, and many prisoners may be avid and astute consumers of the mass media made available to them.

This statement was undisturbed on appeal.<sup>111</sup>

It is tenable that the right to vote can exist without unlimited freedom of assembly and discussion. Although the State may wish for universal political debate, it is clear that it cannot require all its citizens to engage in such activities. Discretion will always lie with individual voters as to how heavily they participate in the democratic process; some may choose to limit their participation to merely turning up to the ballot box, or not. An indiscriminate disenfranchisement of all prisoners, regardless of their connection with political society, cannot be rationally connected with protecting the integrity of the electoral system when viewed from this perspective.

(b) Minimal impairment

The minority in *Sauvé* argued that the line of minimal impairment can be drawn by the legislature without regard to the individual. In deciding to draw a line at prisoners incarcerated for two years or longer, the legislature was responding to the Supreme Court's earlier decision to rule as unconstitutional disenfranchisement for all prisoners.<sup>112</sup> In the minority's view, the new electoral

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108 Electoral Act 1993, s 80(1)(a).

109 *Re Jolivet and Barker and The Queen and Solicitor-General of Canada* (1983) 1 DLR (4th) 604 (British Columbia SC).

110 *Sauvé v Canada (Attorney-General)* (1992) 89 DLR (4th) 644, 651 (ON CA) Arbour JA for the Court [*Sauvé* (ON CA)].

111 *Sauvé v Canada (Attorney-General)* [1993] 2 SCR 438.

112 *Sauvé* (ON CA), above n 110.

provisions for disenfranchisement minimally impaired the rights of all prisoners to vote while upholding the parliamentary objectives.

The more persuasive position, however, must have regard to the rights of the *individual* prisoner, and not the number of people affected. When viewed from this perspective, the majority in the same case found that the provision did not minimally impair the right to vote:<sup>113</sup>

Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*. It follows that this legislation cannot be saved by the mere fact that it is less restrictive than a blanket exclusion of all inmates from the franchise.

The same must hold true with regard to the Electoral Act 1993. Although the current provisions affect proportionately fewer people than the Electoral Act 1956, the focus must still be on the individual. There can be no minimal impairment of the right to vote when disenfranchisement is conferred on an individual.

With regard to ensuring an informed electorate through assembly and discussion, surely the best way to achieve this objective is to provide more resources to the prisoner, such as newspapers and television reports. The State is obliged to provide educational resources to the general public as it is; there is also no test of general competency in domestic events before an ordinary citizen is eligible to vote. The fact of imprisonment should be used as a rationale for *increasing* access to outside information for the purposes of voting, not as a reason for disenfranchisement.

(c) Justifiable in the light of the objective

Taking these concerns into account, it is hard to see that practical and administrative difficulties can justify disenfranchisement. Financial concerns primarily affect the State. Postal or special votes are already provided for people in hospitals and citizens abroad, while mobile voting stations are provided for those serving less than three years' imprisonment. Extending these measures for the benefit of all prisoners would hardly be an excessive burden on the State, given the nature of the right involved.

Requiring prisoners to be enrolled in their previous electorate of residence would largely answer the practical enrolment question. It would also preclude the fear of a sizeable group of prisoners holding the balance of power in a marginal seat. If there are any lingering fears over proportionality, a possible solution would be to allow only the party vote to be cast by prisoners, with a reinstatement of the electorate vote upon their release.

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113 *Sauvé* (SCC), above n 78, para 55 McLachlin CJ for the majority (emphasis in the original).

The Solicitor-General dismissed the significance of practical and administrative concerns as "not compelling",<sup>114</sup> and the Penal Policy Review Committee expressed the same view.<sup>115</sup> The conclusion on this point must be that no justifiable reasons for disenfranchisement of prisoners can be based on such concerns.

## ***B Sanctioning Offenders***

### *1 Scope of the objective*

Removing the right to vote is seen as a punishment for those who break the law. This is intended to send an educative message to prisoners about their wrongdoing and the consequences it entails. Disenfranchisement as a punishment for offences was the only ground accepted by the Solicitor-General<sup>116</sup> and appeared to be the basis on which the Royal Commission recommended the retention of a limited model of disenfranchisement.<sup>117</sup>

The legislature has identified eight purposes of sentencing,<sup>118</sup> which can be summarised in four broad categories of penal policy: accountability, deterrence, rehabilitation and denunciation. On further examination, however, only denunciation will need elaboration.

#### (a) Accountability

Accountability requires offenders to recognise their wrongdoing. It is unclear how disenfranchisement purports to achieve this. There is conflicting evidence as to how many prisoners are aware of the limitations on their voting rights. While it has been claimed that only five out of 182 inmates voted at one prison in 1975,<sup>119</sup> enrolment at two other prisons was at least 75 per cent.<sup>120</sup> Accountability for a crime cannot be enforced through disenfranchisement if inmates are unaware of the punishment. Disenfranchisement is not widely publicised as a concomitant of imprisonment, and it is not as obvious a feature of sentencing as physical separation from society. It is unlikely that either prisoners or their victims regard disenfranchisement as a means of promoting accountability.<sup>121</sup>

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114 McGrath QC, above n 38, para 18.

115 Penal Policy Review Committee, above n 106, para 208.

116 McGrath QC, above n 38, para 20.

117 Royal Commission on the Electoral System, above n 33, para 9.21.

118 Sentencing Act 2002, s 7(1).

119 Rt Hon R D Muldoon (3 November 1977) 415 NZPD 5150.

120 "They Won't Go Far to Vote", above n 102, 1.

121 Richard L Lippke "The Disenfranchisement of Felons" (2001) 20 Law & Phil 553, 568–569.

## (b) Deterrence and rehabilitation

Deterrence and rehabilitation can be conveniently considered together. It is widely accepted that disenfranchisement serves no deterrent or rehabilitative value. This was highlighted by the editorial in the 1975 *New Zealand Law Journal*:<sup>122</sup>

None of the critics [of prisoner enfranchisement] has yet claimed to know an individual who would have offended but for the provisions [of the Electoral Act]. Nor has any suggested that the ostracising of a prisoner from the electoral process in any way serves as a punishment or contributes to his rehabilitation.

The majority in *Sauvé* acknowledged that "neither the record nor common sense supports the claim that disenfranchisement deters crime or rehabilitates criminals."<sup>123</sup> Its "extremely low visibility"<sup>124</sup> cannot be seriously considered to be a factor in deterrence, nor can removing the franchise from those already separated from society be considered as likely to improve an offender's chances of rehabilitation and social integration.<sup>125</sup>

## (c) Denunciation

Denunciation and punitive measures are symbolic statements, declaring that the community disapproves of the conduct in question.<sup>126</sup> The Solicitor-General accepted that the "deprivation of the right to vote should be part of the sanction for those who have committed offences."<sup>127</sup> Further, this rationale appears to be the main basis upon which the Royal Commission justified prisoner disenfranchisement.<sup>128</sup> Although this article argues otherwise, disenfranchisement as a measure of denunciation has been accepted as a valid objective, and will be the basis upon which the justification analysis will continue.

2 *Importance of the objective*

It is important that prisoners receive an educative message that their conduct is unacceptable, both through the judicial process and through society's condemnation of their actions. Despite this, we must ask whether the benefits of including disenfranchisement as a punishment or denunciation

122 Pope, above n 22, 605.

123 *Sauvé* (SCC), above n 78, para 49 McLachlin CJ for the majority.

124 Note "The Disenfranchisement of Ex-Felons: Citizenship, Criminality and 'The Purity of the Ballot Box'" (1989) 102 *Harv L Rev* 1300, 1307.

125 *Sauvé* (SCC), above n 78, para 38 McLachlin CJ for the majority.

126 Hon Bruce Robertson (ed) *Adams on Criminal Law* (loose leaf, Brookers, Wellington, Sentencing Act 2002) para SA7.04 (last updated June 2006).

127 McGrath QC, above n 38, para 19.

128 Royal Commission on the Electoral System, above n 33, para 9.21.

outweigh the democratic value of ensuring universal suffrage. The majority in *Sauvé* did not think so.<sup>129</sup>

[Disenfranchisement] sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order. If modern democratic history has one lesson to teach it is this: enforced conformity to the law should not come at the cost of our core democratic values.

The counter-argument relies on the premise that to *not* construct a punishment such as disenfranchisement would undermine the rationale of sentencing, and thus a democratic society itself.<sup>130</sup> This is a tenuous link; punishment is surely not a virtue for which democratic societies should strive. Instead, rehabilitation and enforcing an ongoing connection with the community through enfranchisement are the more admirable means of achieving society's goals for sentencing.

### 3 Proportionality

#### (a) Rational relationship

##### (i) Disenfranchisement as a blanket rule

One must ask whether disenfranchisement is the most effective means of enforcing denunciation. The State has other means of sanctioning offenders at its disposal, but – one hopes – would not consider a blanket restriction on the freedoms of expression or religion, or the right to be free from cruel and unusual punishment.<sup>131</sup> It is anomalous that the right to vote should be restricted in order to punish offenders.

The Solicitor-General's acceptance of this objective was based on the brief judgment of Lyon JA in *Badger v Canada (Attorney-General)*<sup>132</sup> in the Manitoba Court of Appeal. In that case, Lyon JA regarded a restriction on voting rights for prisoners as analogous to restrictions on freedom of movement.<sup>133</sup> Restrictions on movement, naturally, are necessary concomitants to imprisonment. Because prisoners' mobility is restricted in prison, it was argued that their voting rights can be limited in the same way. However, indiscriminate disenfranchisement was criticised by the Supreme Court in *Sauvé*.<sup>134</sup>

[The legislation] imposes blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct. It is not

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129 *Sauvé* (SCC), above n 78, para 40 McLachlin CJ for the majority.

130 *Sauvé* (SCC), above n 78, para 73 Gonthier J for the minority.

131 *Sauvé* (SCC), above n 78, para 46 McLachlin CJ for the majority.

132 *Badger v Canada (Attorney-General)* [1989] 1 WWR 216 (MAN CA).

133 *Badger v Canada (Attorney-General)*, above n 132, 233 Lyon JA.

134 *Sauvé* (SCC), above n 78, para 51 McLachlin CJ for the majority.

individually tailored to the particular offender's act. It does not, in short, meet the requirements of denunciatory, retributive punishment. It follows that it is not rationally connected to the goal of imposing legitimate punishment.

Further, the Grand Chamber in *Hirst* stated that:<sup>135</sup>

[A] general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.

For these reasons – a lack of either individual tailoring or a discernible relationship to offending – the Supreme Court of Canada and the Grand Chamber of the ECHR have declared the sanctioning objective of the blanket disenfranchisement legislation to be ineffective and unjustifiable.

These authorities indicate that there is no rational relationship between complete disenfranchisement and punishment. Removal of the right to vote is based on the fact of imprisonment, not the criminal acts themselves. As it currently stands, the three-year limit for disenfranchisement catches offences such as setting traps with intent to injure,<sup>136</sup> feigning a marriage or civil union,<sup>137</sup> and interfering with a computer system without authorisation.<sup>138</sup> Although these examples may be extreme, they highlight the arbitrariness of disenfranchisement and its lack of connection with the nature of the offence. It is difficult to see how the removal of the right to vote relates to these disparate and relatively minor criminal offences, but this is the effect of a largely capricious threshold.

(ii) Corrupt practices

A possible means of justification would be to disenfranchise only those convicted of corrupt practices. This was the situation established by the Electoral Amendment Act 1975. As noted previously,<sup>139</sup> a criminal convicted of murder was eligible to vote, whereas a person convicted of a corrupt practice was not. Indeed, this situation does seem to be anomalous if one merely looks at the *severity* of the offence committed by the prisoner. It is undeniable that the general public would consider murder<sup>140</sup> or treason<sup>141</sup> to be more serious and deserving of punishment than a corrupt

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135 *Hirst*, above n 88, para 82 Judgment of the Court.

136 Crimes Act 1961, s 202.

137 Crimes Act 1961, s 207.

138 Crimes Act 1961, s 250.

139 See Part II A 3 A brief period of enfranchisement.

140 Crimes Act 1961, ss 167–168.

141 Crimes Act 1961, s 73.

practice. With respect to the *type* of offence, however, a corrupt practice aims directly at the integrity of the electoral system itself.

Corrupt practices under the modern legislation constitute undermining the free franchise through personation, bribery, treating or undue influence.<sup>142</sup> If we are to accept that the punishment must fit the crime, disenfranchising only those who directly attack the electoral system seems to be the rational course to take.<sup>143</sup> In the Canadian Supreme Court case of *Harvey v New Brunswick (Attorney-General)*,<sup>144</sup> a disqualification from the legislature for five years for illegal practices under the Elections Act was held to be constitutional. La Forest J, writing for the majority, noted that:<sup>145</sup>

[S]uch a response is appropriate and in no way overreaches the target when the objective of maintaining the integrity of the electoral process is considered. ... Such a penalty indicates that activity that is ultimately inimical to the goal of effective representation and the electoral process underlying our free and democratic society cannot be tolerated.

(iii) Possible extension

It may be plausible to extend this provision to those guilty of crimes against the public order<sup>146</sup> or crimes affecting the administration of law and justice.<sup>147</sup> These crimes, such as treason and perjury, are direct attacks against the stability of our sovereign and democratic system, and can be closely associated with the right to vote. Furthermore, heinous crimes such as murder may be regarded as attacks against society, particularly if repeated or committed through an insidious method.<sup>148</sup> Such attacks against society are more closely related to the democratic system that underpins our community than the slew of offences currently caught. Keeping this in mind, the class of offences for which disenfranchisement applies must be strictly limited in order to ensure minimal impairment of the right to vote.

An application of disenfranchisement to such crimes would also align with the original notions of civil death. It is to be remembered that the removal of the right to vote initially applied to those

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142 Electoral Act 1993, ss 215–218.

143 Heather Lardy "Prisoner Disenfranchisement: Constitutional Rights and Wrongs" [2002] PL 524, 526.

144 *Harvey v New Brunswick (Attorney-General)* [1996] 2 SCR 876.

145 *Harvey v New Brunswick (Attorney-General)*, above n 144, para 45 La Forest J for the majority, Lamer CJ concurring.

146 Crimes Act 1961, Part 5.

147 Crimes Act 1961, Part 6.

148 Lippke, above n 121, 564.



convicted of offences such as treason, perjury and other attacks against the social and legal order.<sup>149</sup> Returning disenfranchisement to its roots enhances its legitimacy and meaningfulness.

(b) Minimal impairment

In order to minimally impair the right to vote, while still upholding the purposes of sentencing, the punishment should fit the crime. This is implicit in the Sentencing Act 2002, as the court "must take into account the seriousness of the type of offence in comparison with other types of offences".<sup>150</sup> The Penal Policy Review Committee also enunciated the view that:<sup>151</sup>

The fundamental principle must be that a prisoner retains the ordinary rights of a citizen, insofar as they are consistent with his loss of liberty, and the requirements necessary for his proper containment and management in the institution.

As a punishment, disenfranchisement cannot minimally impair the right to vote. The least interference with the franchise would be, of course, to accept that the loss of the right to vote has no place in formulating a general sentencing policy, and to once again enfranchise prisoners in all but the most serious cases.

(c) Justifiable in the light of the objective

With regard to enforcing punishment through denunciation, disenfranchisement enjoys little relevance. In its current form, all offences for which the penalty is three years' imprisonment or more involve the loss of the right to vote. The only rational relationship would be to disenfranchise those convicted of more serious crimes, such as electoral offences, crimes against the public order, and crimes against the administration of law and justice. Crimes such as murder may also attract disenfranchisement on the basis of the offender's obvious and deliberate self-detachment from society. In order for the educative message of denunciation to be effective, the punishment must be used explicitly, sparingly, and must more closely fit the crime.

### ***C Upholding the Social Contract***

#### *1 Scope of the objective*

The social contract can be defined as an obligation on citizens "to respect and obey the state, ultimately in gratitude for the stability and security that only a system of political rule can deliver."<sup>152</sup> The social contract was initially used as a means to widen the franchise – civil

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149 Part II A 1 Early development.

150 Sentencing Act 2002, s 8(b).

151 Penal Policy Review Committee, above n 106, para 202.

152 Andrew Heywood *Politics* (2 ed, Palgrave, New York, 2002) 89.

obedience could be promoted, and tax could be legitimately gathered, through allowing a larger sector of society to have a say in how it is governed.<sup>153</sup>

As a corollary, those who do not consent to the laws of the land (such as criminals) are barred from receiving the benefits of society, including the right to vote. The National Party highlighted these concerns when opposing prisoner enfranchisement in 1975.<sup>154</sup> The minority in *Sauvé* also focused on the social contract as a means of justifying disenfranchisement.<sup>155</sup>

As noted in *Sauvé v Canada (Attorney-General)* at first instance,<sup>156</sup> an associated objective is that which protects the notion of a decent and responsible citizenry. A theory of democracy and voting requires the elector to be a responsible and upstanding member of the community, taking an active interest in public affairs, and being adequately informed about public issues.<sup>157</sup> Imprisonment disallows, or is perceived to be at odds with, these values, and thus it is claimed that prisoners should not be allowed to vote. Furthermore, it has been argued that allowing prisoner enfranchisement devalues the votes of others in society.<sup>158</sup> This is a philosophical argument that must be considered in light of the contextual background.

## 2 Importance of the objective

It is undeniably important that society functions in a civil and obedient manner. Anarchy would ensue if the people did not feel obliged to adhere to the rules imposed upon them. Furthermore, ensuring the people have a right to voice their opinions is equally important. It is a notion that underpins democracy and promotes good citizenship.

As noted in *Sauvé*, symbolic objectives must nearly always be considered legitimate.<sup>159</sup> The difficulty arises in considering the proportionality of the claimed objective.

## 3 Proportionality

### (a) Rational relationship

Whether there is a rational relationship between disenfranchisement and upholding the social contract is largely a matter of philosophy. The validity of the objective rests upon whether one sees a wide franchise as necessary for a functioning democracy. The minority in *Sauvé* relied on the

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153 Keyssar, above n 50, 13–14.

154 See Part II A 3 A brief period of enfranchisement.

155 *Sauvé* (SCC), above n 78, para 115 Gonthier J for the minority.

156 *Sauvé v Canada (Attorney-General)* (1988) 53 DLR (4<sup>th</sup>) 595 (ONT HCJ) Van Camp J [*Sauvé* (ONT HCJ)].

157 *Sauvé* (ONT HCJ), above n 156.

158 Hon David Thomson (20 August 1975) 400 NZPD 3783.

159 *Sauvé* (SCC), above n 78, para 22 McLachlin CJ for the majority.

classical view of the social contract, arguing that criminals removed themselves from the community by committing crime. Criminals' attacks on society justify removing their right to influence that society through the franchise.<sup>160</sup> In contrast to this view, the majority in *Sauvé* stated:<sup>161</sup>

A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.

It could be argued, however, that the small number of criminals disenfranchised by the Electoral Act 1993 – roughly 0.1 per cent of the voting population – hardly has a destabilising effect upon the legitimacy of the government as a whole. Nevertheless, laws passed by Parliament affect every sector of society within New Zealand, regardless of its size. Such egalitarianism has been promoted by philosophers such as John Rawls, who acknowledges as the first of two principles of justice that "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."<sup>162</sup>

Arguably, criminals are the citizens most adversely affected by Parliament's most intrusive powers, and thus should be ensured of fair representation in the legislature. The majority in *Sauvé* stated:<sup>163</sup>

The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. ... Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities.

Further, the United Nations Economic and Security Council prefers the inclusion of prisoners in society over complete separation. The *Standard Minimum Rules for the Treatment of Prisoners* state that:<sup>164</sup>

The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. ... Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.

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160 *Sauvé* (SCC), above n 78, paras 115–116 Gonthier J for the minority.

161 *Sauvé* (SCC), above n 78, para 34 McLachlin CJ for the majority.

162 John Rawls *A Theory of Justice* (rev ed, Oxford University Press, Oxford, 1999) 53.

163 *Sauvé* (SCC), above n 78, para 47 McLachlin CJ for the majority.

164 ECOSOC Resolutions 663 C (XXIV) (31 July 1957) and 2076 (LXII) (13 May 1977) para 61.

Therefore, it is implicit that the prisoner should retain some civic duties and democratic rights such as the right to vote. It appears that the social contract argument falls at the first hurdle.

Maintaining a decent and responsible citizenry has been viewed as a requisite feature of a functioning democracy. Prisoners may be seen as outside this group of society, and perhaps should not be allowed to vote. However, the clear trend in modern democracies has been one of enlarging the scope of the franchise to include even those citizens whose political opinions may range from apathetic to treasonous:<sup>165</sup>

By the time the [Canadian] *Charter* was enacted, exclusions from the franchise were so few in this country that it is fair to assume that we had abandoned the notion that the electorate should be restricted to a "decent and responsible citizenry", previously defined by attributes such as ownership of land or gender, in favour of a pluralistic electorate which could well include domestic enemies of the state.

This passage was cited with approval by the majority in the Canadian Supreme Court in *Sauvé*,<sup>166</sup> but was not viewed favourably by the minority in the same case:<sup>167</sup>

[T]here clearly is such a logical connection in the case of distinguishing persons who have committed serious criminal offences [when maintaining a "decent and responsible citizenry"]. "Responsible citizenship" does not relate to what gender, race, or religion a person belongs to, but is logically related to whether or not a person engages in serious criminal activity.

According to this view, the fact of criminal imprisonment is the sole arbiter of whether the elector is decent and responsible, as criminals have "attacked the stability and order within our community".<sup>168</sup> However, there may be equally indecent and irresponsible people outside the prison walls who are eligible to vote; those liable for large civil claims, political activists with strong anti-democratic views and those who regularly indulge in drinking or viewing pornography may all be considered indecent or irresponsible citizens by some people in society, yet their right to vote is not under threat.<sup>169</sup> On this basis, there can be no rational connection with disenfranchising only long-term prisoners on the premise of ensuring a decent and responsible citizenry. Indeed, in the Solicitor-General's opinion, "[no] significant weight can be given to this objective in terms of the public interest."<sup>170</sup>

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165 *Sauvé* (ON CA), above n 110, 650–651 Arbour JA for the Court.

166 *Sauvé* (SCC), above n 78, para 33 McLachlin CJ for the majority.

167 *Sauvé* (SCC), above n 78, para 70 Gonthier J for the minority (emphasis in the original).

168 *Sauvé* (SCC), above n 78, para 116 Gonthier J for the minority.

169 Lardy, above n 143, 532.

170 McGrath QC, above n 38, para 22.

(b) Minimal impairment

Minimally impairing the right to vote through upholding a distorted version of the social contract does not seem plausible. An argument may be made for disenfranchisement of the worst offenders. This was explored above with regard to those who commit serial murder or treason; their crimes may be so heinous or closely tied to the electoral system as to warrant disenfranchisement. However, this should be either investigated by the court on a case by case basis, or statutorily restricted to very few crimes. This echoes the concurring opinion of Judge Cafilisch in *Hirst* as to the requirements for sensible disenfranchisement provisions.<sup>171</sup>

On the subject of a decent and responsible citizenry, a two-year limit in *Sauvé* (disenfranchising those imprisoned for two years or longer) was held to be too broad. The legislation caught "many whose crimes are relatively minor and who cannot be said to have broken their ties to society."<sup>172</sup> In New Zealand, the same is true. As stated above,<sup>173</sup> disenfranchisement catches many relatively minor offences such as feigning a marriage or civil union and interfering with a computer system without authorisation. It is hard to rationalise disenfranchisement for these prisoners: their offences have hardly had a serious destabilising effect upon society when compared with offences such as treason and murder. A minimal impairment designed to catch the most indecent and irresponsible citizens would be best drawn at a much higher or more specific threshold than that which is currently employed.

(c) Justifiable in the light of the objective

It is not justifiable to use the social contract as a basis for prisoner disenfranchisement. Prisoners must be given the opportunity to have a say in the government of their country, regardless of their criminal acts. To do otherwise is to undermine the legitimacy of the power that imposes criminal sanctions.

Prisoners retain the link they have with democratic society by serving their sentences. To disregard their right to vote is a fundamental breach of the social contract. As stated earlier, the only way to justify the social contract as an objective of disenfranchisement is to tie it to specific offences, such as those against the electoral system or the totality of society's norms and laws. The standard of proof for this justification will be high and should be restricted to the rarest of cases. Prisoner disenfranchisement as it currently stands cannot be justified on this ground.

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171 *Hirst*, above n 88, para 8 separate concurring opinion of Cafilisch J.

172 *Sauvé* (SCC), above n 78, para 54 McLachlin CJ for the majority.

173 See Part IV B 3 (a) (i) Disenfranchisement as a blanket rule.

### ***D Conclusion on Justifications***

If a similar situation to that in *Re Bennett* was to come before the courts now, it is likely that the disenfranchisement law as it currently stands in the Electoral Act 1993 would be applied regardless of its rights-inconsistency, due to section 4 of the NZBORA. However, this article has argued that such a law cannot – for the most part – be justified under section 5 of the NZBORA.

There are no pressing concerns relating to the practical and administrative difficulties in providing the vote to prisoners. A modern democratic State has the responsibility – regardless of the expense involved – to grant the franchise to as wide a group as possible. Similarly, such a State can provide sufficient means for a prisoner to be informed about political issues, and thus ensure the integrity of the electoral system.

Disenfranchisement as a result of punishment or the social contract is also unjustifiable in most cases. Liberal democratic theory requires the State to establish a broad base of voters in order to enhance its legitimacy;<sup>174</sup> disenfranchising a group based on irrelevant offences runs counter to this important principle. Similarly, prisoners must be regarded as retaining their membership within society in order to legitimise their sentences: removing a prisoner from the democratic system constitutes an unjust and capricious sanction.

Despite these conclusions, a case can be made for disenfranchisement for the very few offenders who commit specific and highly serious crimes. In each case, disenfranchisement must be carefully monitored and considered – preferably during sentencing, or through more specific legislation – in order to make sure that it is a meaningful consequence of offending.

In considering the current disenfranchisement provisions, a court would do well to issue a declaration of inconsistency between the Electoral Act 1993 and section 12(a) of the NZBORA. Such a state of affairs may seem ineffective for those currently deprived of the right to vote. Calls for reform are, therefore, justified.

### ***V CONCLUSION***

Prisoner disenfranchisement is a carry-over from the ancient concepts of civil death and forfeiture. It is in direct conflict with the emerging notion of universal suffrage, as embodied in documents such as the NZBORA. The disenfranchisement provisions in New Zealand – currently embodied in section 80(1)(d) of the Electoral Act 1993 – have only been tested once in the New Zealand judicial system.

This article has argued that prisoner disenfranchisement in its current form cannot be a justifiable limitation on the right to vote. It is not saved by practical concerns over administrative

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<sup>174</sup> Heywood, above n 152, 30, 68–69.

difficulties or the integrity of the legal system, nor can it be salvaged by reference to rationales behind sentencing or the social contract.

Reform should be forthcoming. In a society that is arguably more concerned with punishment than rehabilitation, complete enfranchisement of all prisoners may not currently be seen as politic. However, as a minimum, section 80(1)(d) of the Electoral Act 1993 should be amended to limit the disenfranchisement restriction to two categories of offenders. The first concerns those who commit corrupt electoral practices, crimes against the public order and crimes against the administration of law and justice. These are found in Part 7 of the Electoral Act 1993 and Parts 5 and 6 of the Crimes Act 1963 respectively. The second category of disenfranchised prisoners should be those who have committed serious crimes – such as murder – on account of their disregard for the totality of the laws and norms of society.

With the legitimacy of the government springing from the free expression of the people as a whole, prisoner disenfranchisement is losing its place in the international arena as a valid concomitant of imprisonment. In time, it is hoped that our legislature extends to all adults an inalienable right to vote, regardless of their criminal convictions.

