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The Benefit of Personal Experience and Personal Study: Prisoners and the Politics of Enfranchisement

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Abstract

Prisoners and ex-prisoners have played a prominent role in modern Irish history. Yet despite using their prison experience for political advancement, on release, few political leaders became vocal advocates of penal reform in general or prisoner enfranchisement in particular. Prior to the passing of the Electoral (Amendment) Act in 2006, Irish prisoners were in an anomalous position: they were allowed to register, but no facility existed, for them to vote. However, this did not prevent prisoners from engaging with, and at times, challenging the political system, both north and south throughout the 20th century. Much has been written about political activity among prisoners in Northern Ireland but relatively little about their endeavors in the Irish Republic. This article begins with an examination of political participation among prisoners in the early decades of the Irish State. Despite the legal and political struggle by prisoners and penal reformers to achieve enfranchisement, when it was granted, it was in the context of electoral, rather than penal reform. Prisoner enfranchisement did not become a major issue in Ireland in contrast to other countries and reasons are examined from a historical and political perspective.

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Introduction

Prisoner enfranchisement is a major source of debate and international controversy. In recent years, there have been both political and legal developments concerning the enfranchisement of prisoners and ex-prisoners (Rottinghaus & Baldwin, 2007). In Israel (Ewald, 2002), Canada (Mofina, 2002), South Africa (Muntingh, 2004), Australia (Redman, Brown, & Mercurio, 2009), Europe (Easton, 2009), Hong Kong (Hong Kong Constitutional and Mainland Affairs Bureau, 2009), and the United States (King, 2006), there have been impassioned political and philosophical discussions and legal arguments about the enfranchisement of the incarcerated. In December 2006, the Oireachtas (Irish parliament) passed the Electoral (Amendment) Act which allowed prisoners to vote by means of postal ballot. As a result, Irish prisoners had the first opportunity to exercise their franchise in a general election in May 2007.

This article examines the case of the Republic of Ireland and prisoner enfranchisement. It begins by outlining the political involvement of prisoners in the early decades of a state founded by prisoners, with much political agitation taking place behind bars. Despite being denied the opportunity to vote, this did not prevent them from engaging with the political system, both north and south of the border throughout the 20th century. (For an examination of the contribution of northern prisoners to the political process, see McEvoy, 2001.) Prior to enfranchisement, Irish prisoners were in a somewhat anomalous position—they were legally allowed to register, but did not have the facility, to vote. When prisoner enfranchisement was achieved in 2006, it was not in the context of penal reform or a civil rights act but rather as a standalone piece of electoral reform after relatively little discussion and almost no controversy that might accompany a similar measure in other countries (Behan & O'Donnell, 2008).

Prisoners of the Past

Political History and Penal Politics

Prisoners and ex-prisoners have played a prominent role in modern Irish history. Many 19th-century political leaders were imprisoned, including John

Mitchel, Michael Davitt, and Charles Stewart Parnell. Michael Davitt (1885), the internationalist and labor leader, was one of the few political leaders who used his prison experience to campaign for penal reform. He spent 7 years in Dartmoor prison for gun-running as part of the Fenian movement. During his year in Portland jail for involvement in agrarian agitation, he wrote *Leaves From a Prison Diary; Or, Lectures to a "Solitary" Audience* (1885), which chronicled prison life and his reflections on penal reform. Davitt was subsequently a member of the Humanitarian League's criminal law and prison's department which "sought to humanize the conditions of prison life and to affirm that the true purpose of imprisonment was the reformation, not the mere punishment, of the offender" (Bailey, 1997, p. 306).

It was in the years immediately after the 1916 Rising that prisoners began to take center stage in Irish politics with an upsurge in republicanism and the rise in support for Sinn Féin and the Irish Volunteers. It is estimated that the British government interned nearly 2,000 prisoners after the Rising (Lee, 1989, p. 37). In the period afterward, many candidates standing at elections wore as a badge of honor their violent (and illegal) opposition to British rule. In 1917, the first bye-election after the Rising returned former prisoner Count Plunkett, (father of executed rebel leader, Joseph Mary Plunkett) as an independent member of parliament (MP) for Roscommon North with Sinn Féin support. In the next bye-election, Joe McGuinness stood as a candidate for the South Longford seat. At the time, McGuinness was serving a sentence in Lewes Gaol, for his part in the Rising and his election slogan was "Vote him in to get him out!" Later that year, future president of the Executive Council, W. T. Cosgrave, won a seat for Sinn Féin in the Kilkenny bye-election from his prison cell.

The first post–World War I election held in the United Kingdom (including Ireland) was under the terms of the Representation of the People Act 1918. This had abolished property requirements and allowed all men above 21 and women above 30 to vote (Foot, 2005, p. 233). The Irish electorate rose from 700,000 in 1910 to just under two million for the 1918 election (Connolly, 1998, p. 206). Of the 105 seats at stake, Sinn Féin won 73. In keeping with their abstentionist platform, instead of taking their seats in the Westminster Parliament, Sinn Féin MPs convened the First Dáil. All 105 MPs elected to the British Parliament in the 1918 election were invited to attend the First Dáil (Lower House of Parliament). However, participation would have been anathema to the six Irish Parliamentary Party and 26 Unionist MPs. At the inaugural meeting in the Mansion House, Dublin, on January 21, 1919, only 27 of the 73 Sinn Féin TDs (Teachta Dála—MPs) were in attendance. Of those who could not attend, 35 were listed in the official records of the Dáil as "fé ghlas ag Gallaibh"

(i.e., "imprisoned by the foreign enemy": Roll of 1st Dáil, 1919). Of the 73 constituencies that returned Sinn Féin MPs, four were elected in two constituencies. Thus, half of the 69 Sinn Féin representatives elected to the First Dáil were in prison. Former prisoner Cathal Brugha presided over the largely symbolic proceedings. In April 1919, after his escape from Lincoln jail, Eamon de Valera was elected as president of Dáil Éireann. Despite the parliament being recognized only by Soviet Russia, this meeting is listed on the Oireachtas website as the First Dáil (see http://historical-debates.oireachtas.ie/D/DT/D.F.O.191901210004.html). The British authorities banned the Dáil in September 1919.

In November 1922, after the Irish Free State was established, the Minister for Home Affairs (with responsibility for justice, including prisons), Kevin O'Higgins, proudly proclaimed in the Free State parliament that there "is not a member of this present Government who has not been in jail . . . We have had the benefit of personal experience and personal study of these problems." He continued,

> I think that everyone here would agree that we should aim at improvement and reform in the existing prison system. I think we would be unanimous in the view that a change and reform would be desirable. Personally I can conceive nothing more brutalizing, and nothing more calculated to make a man rather a dangerous member of society, than the existing system. But one does not attempt sweeping reforms in a country situated as this country is at the moment. (Kevin O'Higgins, TD, Dáil Debates, 1922, Vol. 1, col. 2321-2322)

With so many prisoners and ex-prisoners achieving prominent political positions, there may have been an expectation that this might impact positively on the development of penal policy. Nevertheless, on release, few, if any, championed prisoners' rights or prisoner enfranchisement. Most of these and future former prisoners sought to make a break with their past. Indeed, while many took pride in their penal experience, the released politicians were quick to put their prison past behind them and some who went on to have political responsibility for the penal system became quite punitive, showing little or no interest in reform. Despite the new state being built by prisoners and ex-prisoners, penal reform and prisoners' rights would have to wait for another day. The newly elected and now respectable politicians needed to get on with state building as O'Higgins suggested. Many former prisoners including Arthur Griffith, Eamon Duggan, Gerarld Boland, and Sean MacEoin went on to serve as Ministers for Justice (or Home Affairs) in the new state

(Kilcommins, O'Donnell, O'Sullivan, & Vaughan, 2004, p. 88). In 1928, 7 years after being released, Sean Kavanagh returned to Mountjoy Prison to serve nearly 34 years behind the walls; this time as governor (Carey, 2000, pp. 231-232).

When the Irish Free State was established in December 1922, the electoral laws inherited from the period of British rule still applied. Section 2 of the Forfeiture Act 1870 declared that an individual imprisoned for more than 12 months was "incapable of being elected, or sitting, or voting as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever within England, Wales or Ireland."

In the period before the majority of the people had access to the vote, due to property and gender restrictions, prisoner disenfranchisement was unlikely to have been an issue of much practical concern. The Free State constitution was introduced in 1922 and under Article 14, all citizens "without distinction of sex, who have reached the age of 21 years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Dáil Éireann." The next year, just before a general election, the Prevention of Electoral Abuses Act 1923 provided for a prohibition on voting for those convicted of personation or "aiding, abetting, counselling or procuring the commission of that offence." Depending on whether it was a first or subsequent offence, there were various penalties, from 2 months imprisonment up to 3 years penal servitude. Added to these penalties was an electoral punishment. A person who was guilty of these practices was barred for 7 years from the date of conviction from holding any public or judicial office, being a member of parliament or a local authority, being registered for or voting in general and local elections or voting for any public office (Prevention of Electoral Abuses Act 1923, Section 6(2-4)). This effectively meant that an individual could be incarcerated for a period of up to 3 years and on release not allowed to stand for office or cast their vote for a further 4 years.

Even before the Irish Free State had been formally established, Civil War (1922-1923) had begun. There was widespread internment of antigovernment opponents with estimates of up to 12,000 detainees, including both sentenced prisoners and internees (Lyons, 1973, p. 467). The Civil War was, by international standards, quite short, lasting for less than year, but it left a bitter political legacy. Perhaps understandably, the new state sought to prevent prisoners from using the fact of their confinement to win support for a political cause. The Electoral Act introduced in April 1923 disqualified from being elected or sitting as a member of the Dáil, prisoners undergoing a sentence of imprisonment with hard labor for a period of 6 months or of penal servitude

for any term. Similarly if "any person who has been duly elected a member of the Dáil should, while he is so a member, become subject to any of the disqualifications mentioned . . . he shall thereupon cease to be a member of the Dáil" (Section 51(4)). It was under this section of the 1923 Act that Henry Coyle lost his seat due to imprisonment in May 1924. It is somewhat ironic that it was a TD from the government party that introduced the legislation who is the only parliamentarian in the history of the state to have been disqualified from parliament after he was sent to prison for 3 years for fraud.

Opponents of the new government would soon turn from physical force to politics, but to try to catch them off guard and establish a firmer mandate, the government called an election in August 1923. Even though the Civil War had ended in April 1923, by the time of the election, there were still up to 10,000 internees, some of whom were on hunger strike. Despite pleas from prominent clergymen, the government refused to contemplate mass releases at this stage (Keogh, 1994, p. 17). Prior to the August election, there was a debate in the Dáil on a proposal from Farmers Party TD, Michael Doyle that, "all political prisoners and internees be afforded an opportunity to vote at the coming elections" (Dáil Debates, 1923, Vol. 4, col. 1379). If prisoners were allowed to vote, Independent TD, Alfred Byrne argued, "nobody will be in a position to say that they [parliamentarians] were unrepresentative or that the Dáil elected was unrepresentative" (Dáil Debates, 1923, Vol. 4, col. 1381). Anticipating government inaction on the issue, or arguments about the logistics of the procedure, the leader of the Labor Party, Tom Johnson, suggested that a postal voters' list could be prepared for this purpose and internees could vote in their home constituencies (Dáil Debates, 1923, Vol. 4, col. 1382). If the government felt that it was logistically too cumbersome to create a postal voters list, he had a solution: "I suggest there is a much better way to meet the grievances, and that is release [the internees], not to wait until after the elections but to release before the elections" (Dáil Debates, 1923, Vol. 4, col. 1382). Later in his speech, he anticipated the symbolism discussed in many future debates about prisoner enfranchisement:

> If we are going to encourage the idea that the vote is a matter of importance to the voter, and that he should look upon the vote as something valuable, as symbolic of civic responsibility, then I think we should take this opportunity of adding to the force of that lesson. (Dáil Debates, 1923, Vol. 4, col. 1382)

Responding for the government, former prisoner and now Minister for Local Government, Ernest Blythe, stated that this would entail special

legislation. Setting the scene for future political priorities concerning prisoners and the franchise, he said that while the government was looking into it, "this matter is not one of prime importance." He suggested that while there was no law in place barring prisoners from voting, special arrangements would have to be made and "[t]here is no real reason for that, except the desire to shut mouths" (Dáil Debates, 1923, Vol. 4, col. 1383). The proposal was rejected by the governing party that had just been involved in an inconclusive Civil War with those they had interned and was in no mood to listen to sympathetic pleas on their behalf.

Nevertheless, considering that many prisoners were incarcerated for politically motivated activity, the lack of access to franchise was unlikely to prevent political engagement. Barring a return to a separate or silent system of imprisonment, the government could not prevent debates about the political situation. During the Civil War, prisoners had been politically active. Magazines were produced, including *C-Weed* and *The Trumpeter: When Gabriel Sounds the Last Rally* (Carey, 2000, p. 199). Following the recent tradition, prisoners were nominated to stand as candidates in the election to try to boost support for the anti-Treaty side. In Mountjoy Prison, mock elections were organized by prisoners as a civic engagement exercise, to teach them about proportional representation, the complicated new electoral system introduced in 1920. With a history of civil disobedience, violent political disorder, and noncompliance, many prisoners were understandably ignorant of the finer points of the electoral system. One of those in Mountjoy at the time, Ernie O'Malley, explained how anti-Treaty prisoners reacted to the election:

> Meetings were addressed from the landing-rails or empty butter-boxes in the exercise-rings; waves of oratory flowed to and fro on rocks of interruption and hecklings. Businessmen, farmers, imperialists, separatists, educationalists spoke seriously or in mock parody. Rival candidates offered jail utopias for votes . . . Polling day was a frenzy, a principal difficulty the prevention of impersonation. We discussed the making of box kites carrying election slogans which could be flown from the wings and the strings cut before the Staters could seize them. The kites might have amused the city electors but were never made. (O'Malley, 1978, p. 237)

Even though O'Malley professed little interest in standing for the Dáil, he was elected for the North Dublin City constituency, rather ironically, as he pointed out, with second preference transfers from the Free State Minister for

Defence, Richard Mulcahy (O'Malley, 1978, p. 238). Another of those elected from Mountjoy was IRA leader and Socialist, Peadar O'Donnell. His mother had protested in a letter to the *Derry Journal* the week before Election day that her son and daughter, Bridget, both in prison were not on the electoral register and therefore not entitled to vote (Hegarty, 1999, p. 145).

During the election campaign, leader of the anti-Treaty side, future taoiseach (prime minister) and president, Eamon de Valera, was arrested at a political rally in his Co. Clare constituency and imprisoned for nearly a year (Ryle Dwyer, 1980, p. 73). He was elected a member of the Dáil from his prison cell; the same prison where he had been condemned to death 7 years earlier by the British. The prohibition on prisoners sitting as members of parliament was somewhat irrelevant in practical terms as despite the new political dispensation, de Valera's anti-Treaty Sinn Féin continued to stand on a platform of abstentionism. However, he out-polled his Cumann na nGaedheal opponent from 17,762 to 8,196 (Keogh, 1994, p. 18).

Of 153 members of the fourth Dáil (elected in August 1923), 44 Sinn Féin TDs were elected, of whom 18 were prisoners (O'Malley, 1978, p. 237). The anti-Treaty side would certainly have received more votes, if not seats, had the thousands of internees been allowed to vote. However, the result provided a morale boost in the prisons. "We went half wild with delight . . . they were whacked," recorded a euphoric O'Donnell. "We hadn't lost . . . we felt our release was a remote thing; that there was too much resistance left in the country to risk letting the prisoners loose" (Peadar O'Donnell, quoted in Hegarty, 1999, p. 146). However, after the euphoria of their electoral victory, the prisoners in Mountjoy returned to more traditional methods of achieving freedom. Once more they drew up plans for an escape.

At the first meeting of the new Dáil, the President of the Executive Council and former prisoner, W. T. Cosgrave, spoke of the crack-down on political resistance among his former comrades (now political enemies) in the prisons. He complained about the practice of those on the anti-Treaty side using prisoners as candidates for political gain. He drew on the concept of the social contract, so prominent in the argument of those wishing to disenfranchise prisoners:

> Is the future political history of this country to be written in this manner: that a man or woman has only to get into jail and has only to stand for election and get elected, and our courts and our institutions, and the order of citizenship that we have established, are to be swept away in order that a number of persons returned in a constituency perhaps under false pretences, can order the Courts to open the doors and demand

> their freedom and do and say whatever they like? Forty-four of these people have been elected; eighteen of them are in jail. What are the twenty-six doing? What contribution are they going to make to the stability of this State? What apology have they got to make for the wrongs they have done this country? Until we get some evidence of a real change of heart I say it is not for us to be swept off our feet by sentimentalism because an actual minority of forty-four people say they are going to determine and mark out the progress of this country. (Dáil Debates, 1923, Vol. 5, col. 31-32)

Many of those who went on to form Fianna Fáil governments in the 1930s were former prisoners, including Frank Aiken, Oscar Traynor, and Sean Lemass. In 1937, Eamon de Valera (who had been imprisoned by both Irish and British governments), as Taoiseach, introduced a new constitution, *Bunreacht na hÉireann* (1937). This stipulated that voting for Dáil Éireann was open to every citizen who had reached the age of 21 years and who was "not disqualified by law and complies with the provisions of the law relating to the election of members of Dáil Éireann" (Article 16). This constitutional caveat would have allowed legislation to bar prisoners from voting; nevertheless, no law was enacted in 1937 or thereafter to specifically prevent prisoners from exercising their franchise.

Electoral Reform and Prisoner Litigation

Electoral Reform

Due to the failure of politicians to act on prisoner enfranchisement, prisoners were in electoral limbo, not legally barred from voting, but because of their location and the failure to introduce postal voting or other measures, barred from voting physically. However, as the decades passed, there were opportunities to legislate either, for, or against voting for those incarcerated in Ireland's penal institutions. In 1963, a new Electoral Act was introduced which widened eligibility for a postal vote to include members of the Garda Siochana (police force) and the defence forces (Joint Committee on Electoral Law, 1963). Prior to this, it was only available to the latter. A parliamentary committee had rejected postal voting for prisoners prior to the enactment of legislation. The government was happy to concur with this analysis and the act did not allow for special measures to allow prisoners to exercise their franchise (Joint Committee on Electoral Law [Final Report], 1963, p. 105).

The issue of postal voting or special facilities for those unable to access polling stations was raised during the case of Nora Draper, a registered voter who suffered from multiple sclerosis. Commentators speculated that this case established the state's liability to voters (Gallagher, 2001, pp. 13-17; McDermott, 2000, pp. 332-333). Draper held that the state was in breach of its constitutional obligation to facilitate her in exercising her franchise by way of postal voting. The High Court found that the legislature was justified in striking a balance between the right to vote and protecting the electoral system against abuse. Justice McMahon held that.

> postal voting cannot be regarded as a privilege under our Constitution. Postal voting necessarily involves some risk of abuse and it is for the legislature to strike a balance between the right to vote of the physically disabled and the risks of abuse of postal voting. (*Draper v. Attorney General*, 1984)

The Supreme Court found in favor of the State, Chief Justice Thomas O'Higgins ruled that the facilities available to allow members of the Garda Siochana and the Defence Forces to vote by postal ballot were justifiable because "in these two categories, the probability of the ballot paper reaching the designated address by post is high and the possibility of abuse is low." He concluded,

> In the opinion of the court . . . the Electoral Acts provides a reasonable regulation of elections to Dáil Éireann, having regard to the obligation of secrecy, the need to prevent abuses and other requirements of the common good. The fact that some voters are unable to comply with its provisions does not of itself oblige the State to tailor that law to suit their special needs. The State may well regard the cost and risk involved in providing special facilities for particular groups as not justified, having regard to the numbers involved, their wide dispersal throughout the country and the risks of electoral abuses. (*Draper v. Attorney General,* 1984)

Shortly thereafter, the Minister of the Environment announced that he would introduce legislation to facilitate those unable to attend polling stations due to disability, and limited other categories of voters, although this would not include prisoners. The Prisoners Rights Organisation (PRO) pointed out that with this government decision, "Only one minority grouping in Irish society will be deprived of the right to vote—that is the Prison population."

While criticizing successive Ministers for the Environment for their failure to introduce legislation to allow prisoners to vote, the PRO felt it "was imperative at this point in time, when the postal vote is being extended, that the Government consider the desirability of extending the postal vote to prisoners" (Costello, 1985). Their plea fell on deaf ears. In 1986, the Oireachtas enacted the Electoral. (Amendment) (No.2) Act. It contained no reference to prisoners.

Throughout the 1980s and 1990s there were sporadic parliamentary discussions about whether prisoners should be allowed to vote. In 1981, the Minister for Justice, Gerard Collins in reply to a parliamentary question said that "as far as is known from available records" (Dáil Debates, 1981, Vol. 326, col. 65), there was never any facility to allow prisoners to vote. Unless electoral law was to be changed, this would "involve taking some 1,300 prisoners to polling booths near their normal place of residence. Such a project would be entirely impractical" (Dáil Debates, 1981, Vol. 326, col. 65). Some months later, the Minister for Justice stated that there was no provision in place to allow remand prisoners to vote and it was not practical to escort approximately 120 remand prisoners to polling booths in their constituencies. While conceding that there was "no law which prohibits prisoners from voting at local polling booths" the minister looked for some understanding of the difficulties with such an undertaking. "I am sure the Deputy appreciates that it would be impracticable and impossible" (Dáil Debates, 1981, Vol. 328, col. 1072). If remand prisoners were to be allowed to vote by post, the Minister for Justice replied, that it was the responsibility of the Minister for the Environment to enact legislation. Opposition TD, Michael Keating responded angrily that "the Minister is satisfied that citizens in the circumstances in the question are to be deprived of their right to vote since he does not propose to lift a finger to do anything about it" (Dáil Debates, 1981, Vol. 328, col. 1073). Ten years later, the matter was raised in the Dáil again; this time the Minister for the Environment conceded that "there are no proposals for special voting arrangements for prisoners" (Dáil Debates, 1991, Vol. 404, col. 1824).

In 1992 a new Electoral Act was introduced. The issue of voting rights for prisoners was raised during the Oireachtas debates and Senator Joe Costello, former chairman of the Prisoners' Rights Organisation proposed that prisoners should be allowed to register either in prison or at their home address. The government rejected the amendment, one of the reasons being that "the vast majority of prisoners are short term and that, having regard to the fact that a period of 18 months elapses between the qualifying date for a register and the expiry date for that register." Therefore, "registration of prisoners at the prison where they are detained would be a pointless exercise unless special voting arrangements were put in place to allow them to vote" (Dan Wallace, TD,

Minister for State at Department of the Environment (Seanad Debates, 1992, Vol. 132, col. 1732-1733). While the government was unwilling to introduce special measures for prisoners, Senator Maurice Manning, a senior member of the main opposition party, Fine Gael supported the government in refusing to enfranchise prisoners. He believed that on imprisonment, one should lose "the right to liberty but also the right to vote." He continued: "I think the ordinary humane person outside would find on this particular issue, that it was a step too far" (Seanad Debates, 1992, Vol. 132, col. 1736).

Under the Electoral Act 1992 to be eligible for election to the Dáil, one had to be an Irish citizen and above 21 years of age. Among those not allowed to be members of the Oireachtas was any individual "undergoing a sentence of imprisonment for any term exceeding six months, whether with or without hard labour, or of penal servitude for any period imposed by a court of competent jurisdiction in the State" (Section 41). If, while an individual is a member of the Oireachtas, they are sentenced to the above, they forfeit their seat. The registration of prisoners as electors was specifically set out in Section 11(5), which provided that "where on the qualifying date, a person is detained in legal custody, he shall be deemed for the purposes of this section to be ordinarily resident in the place where he would have been residing but for his having been detained in legal custody."

While the 1992 Act stated explicitly that prisoners had a right to register to vote, with little likelihood of ballot boxes being provided in prisons and no procedure to allow postal voting, the registration was somewhat moot. There was clearly a degree of arbitrariness to this situation. Under some circumstances, serving prisoners would have been able to vote. For example, if a prisoner was on temporary release on the day of the election, and he or she was registered, he or she could have voted in their home constituency. However, there was no legal obligation on the government to put in place provision for voting for those physically present in prison on polling day.

Prisoner Litigation

In 1994, the Supreme Court rejected an application from a prisoner, Patrick Holland, to suspend the European Parliament elections to allow him to pursue constitutional proceedings because he was denied the facility to vote. In 1998, the European Commission on Human Rights (ECmHR) considered his contention that both Irish and European law was being contravened by the refusal of the government to facilitate his right to vote. While acknowledging that the applicant had not exhausted all legal remedies at a national level, it noted that the European Convention on Human Rights had not been enacted

into Irish law. However, the "domestic courts recognise," according to the Commission, "that an inevitable practical and legal consequence of imprisonment is that a great many of the constitutional personal rights of the prisoner are for the period of imprisonment suspended or placed in abeyance" (*Patrick Holland v. Ireland*, 1998). The Irish government argued that it would be impractical to have hundreds of ballot boxes in prisons throughout the country to facilitate prisoners from the different constituencies and it was too much of a security risk and a burden on the prison service to allow the release of all 2,300 prisoners. There was, the government maintained, no constitutional or convention guarantee of a postal vote. Previous opinions from the Commission had found that "the deprivation of the right to vote, pursuant to a conviction by a court for un-citizen-like conduct" was not arbitrary. In rejecting the application, the Commission:

> felt bound to conclude that the legislator in exercise of its margin of appreciation may restrict the right in respect of convicted persons. Such restrictions could, in the Commission's opinion, be explained by the notion of dishonor that certain convictions carry with them for a specific period, which may be taken into consideration by legislation in respect of the exercise of political rights. (*Patrick Holland v. Ireland*, 1998)

Two years after the *Holland* judgment, another prisoner, Stiofan Breathnach, challenged the State on its refusal to provide facilities for prisoners to vote and met with initial success. The High Court ruled that prisoners retained the right to vote under the Electoral Act 1992. The Court declared that the failure of the State to provide a means whereby a prisoner could vote breached the constitutional guarantee of equality before the law. It ruled that prisoners enjoyed a right, which had been conferred on them by the constitution, to vote at elections for members of Dáil Éireann, and no legislation was currently in force that removed or limited that right in any way (*Breathnach v. Government of Ireland*, 2000). During the hearing, the State had acknowledged that the extension of postal voting to prisoners would not impose undue administrative demands, but Justice Quirke noted that no legislative provisions existed for such a facility.

Prior to the government lodging an appeal, opposition politicians sought clarification. The Minister for Justice, Equality and Law Reform, John O'Donoghue TD, acknowledged that the "prison rules do not prohibit the right of a prisoner to vote" (Dáil Debates, 2000, Vol. 523, col. 1145). However, under current legislation, "it would be prohibitive for the Prison Service to

provide a means by which prisoners could exercise their constitutional right to vote at their home polling station" (Dáil Debates, 2000, Vol. 523, col. 1145-1146).

In July 2001, in a reserved judgment, the Supreme Court unanimously rejected the right of citizens to exercise their franchise while serving a sentence in custody. The court found that while prisoners were detained in accordance with the law, some of their constitutional rights, including voting, were suspended. "It is of course clear," Chief Justice Ronan Keane pointed out that:

> despite the deprivation of his liberty which is the necessary consequence of the terms of imprisonment imposed upon him, the applicant retains the right to vote and could exercise that right if polling day in a particular election or referendum happened to coincide with a period when he was absent from the prison on temporary leave. (*Breathnach v. Ireland*, 2001)

Justice Denham acknowledged that the law providing voting facilities for those who could not physically access polling stations had developed in the previous 17 years since the *Drapier* case. However, she ruled that imprisonment was only part of the punishment:

> The applicant in a special category of person—he is in lawful custody. His rights are consequently affected. The applicant is in the same situation as all prisoners: there is no provision enabling any prisoners to vote. Consequently, there is no inequality as between prisoners . . . The applicant has no absolute right to vote under the Constitution. As a consequence of lawful custody many of his constitutional rights are suspended. The lack of facilities to enable the applicant vote is not an arbitrary or unreasonable situation. (*Breathnach v. Ireland*, 2001)

This put sentenced prisoners in a unique but similar situation. They were all prevented from voting, so there was no discrimination against the individual who took the case when the reference group was deemed to be other prisoners, rather than fellow citizens. However, the Chief Justice did point out that remand prisoners were in a different category, as they were not convicted. It was suggested that the state might have to consider putting in place some practical arrangements to allow remand prisoners to vote.

The Supreme Court had set out the constitutional position. Even with this legal clarity, there was still some confusion about the voting rights of prisoners, leading some international and domestic commentators to point out

what seemed like an inconsistency of being allowed to register, but effectively denied the opportunity, to cast a vote. Manza and Uggen (2006, p. 235) included Ireland in the "No restrictions" section in a table on International Disenfranchisement Laws and the Voting Rights of Prisoners. Rottinghaus and Baldwin (2007, p. 697) stated, "Ireland's Constitution, for instance has a provision allowing prisoners to vote but had never in practice established a formal arrangement for prisoners to vote". The U.K. Department for Constitutional Affairs claimed that "Ireland . . . prohibits all prisoners from voting" (Department for Constitutional Affairs, 2006, p. 12) but it later recognized that while there was no legal ban in place, there was no mechanism to allow prisoners to vote (Department for Constitutional Affairs, 2006, p. 20). These observations seemed to concur with the Irish government's position. In response to a parliamentary question, Michael McDowell, TD, Minister for Justice, Equality and Law Reform, pointed out that there was no law on the statute books that prohibited prisoners from voting. However, he noted that the Supreme Court "held that the State is under no constitutional obligation to facilitate prisoners in the exercise of that franchise" (Dáil Debates, 2004, Vol. 586, col. 1345).

With government politicians reluctant to champion the rights of prisoners, and clarification provided by the Supreme Court judgment, it seemed the matter was closed. However, the issue did not go away and there continued to be some low-key debate about the enfranchisement of prisoners. In 2002, a report from a government-appointed forum on the reintegration of prisoners recommended that the development of a "Charter of Prisoner Rights (including consideration of extending voting rights to prisoners)" (NESF, 2002, p. 71).

In 2003, the Irish government introduced the European Convention on Human Rights (ECHR) into Irish domestic legislation (Egan, 2003). Two years later, the Grand Chamber of the European Court of Human Rights (ECtHR) by a margin of 12 to 5, found that the U.K. government was in breach of the ECHR in relation to the voting rights of prisoners. While the ECtHR accepted that each signatory to the ECHR must be allowed a margin of appreciation in this sphere, "the right to vote is not a privilege." The automatic blanket ban lacked proportionality and encompassed those who served from one day to life in prison, from those who were convicted of minor to the most serious offences. According to the ECtHR, to deny the right to vote to prisoners is "tantamount to the elected choosing the electorate" (*Hirst v. United Kingdom [No. 2]*, 2005; for wider examination of the *Hirst* case, see Easton, 2009; Ewald & Rottinghaus, 2009).

In response to the *Hirst* judgment, Fine Gael Member of the European Parliament, Avril Doyle suggested consideration should be given to the enfranchisement of prisoners because, "All citizens shall, as human beings be held equal before the law" (quoted in Hennessy, 2004). In 2005, Gay Mitchell TD, a senior member of the opposition party, Fine Gael, introduced a private members bill on prisoner enfranchisement, but to no avail. The Tánaiste (deputy prime minister) Mary Harney TD, told the Dáil that the "Government has cleared the legislation to provide for prisoners' voting by way of a postal ballot in their own constituencies" (Dáil Debates, 2005, Vol. 612, col. 1115).

Prisoner Enfranchisement

In 2006, the government introduced a relatively small piece of legislation which would allow prisoners to vote by postal ballot. The passage of the legislation and the events surrounding it are dealt with elsewhere (Behan & O'Donnell, 2008) and space only allows a brief outline. Introducing the Electoral (Amendment) Bill to the Dáil in October 2006, Dick Roche, TD, Minister for Environment, Heritage and Local Government proudly stated, "Ireland is one of the most progressive nations in the world" (Dáil Debates, 2006, Vol. 624, col. 1978). The legislation would modernize existing electoral law and referring to the *Hirst* judgment, he argued that while the legal position in the UK differed significantly from Ireland "in light of the judgment it is appropriate, timely and prudent to implement new arrangements to give practical effect to prisoner voting in Ireland" (Dáil Debates, 2006, Vol. 624, col. 1978). During the debates in the Oireachtas, other speakers referred to the *Hirst* judgment and the situation on felon and ex-felon disenfranchisement in the United States.

Rather ironically, the legislation to allow prisoners vote was introduced by a coalition government made up of Fianna Fáil and the Progressive Democrats, centre-right and right-wing parties respectively, not known for their liberal attitude toward prisoners. During the 1997 election, the main party in the coalition, Fianna Fáil, had stood on a zero tolerance platform (O'Donnell & O'Sullivan, 2003). In the Dáil that debated the legislation, four TDs had been imprisoned previously. They included two members of Sinn Féin (linked to the Provisional IRA), jailed for paramilitary activity and Socialist Party TD, Joe Higgins who was imprisoned for a month during the lifetime of the 2002-2007 parliament.

Gay Mitchell TD, who had previously attempted to introduce his own bill for enfranchisement, believed that there was not widespread public support for this measure. However, he was keen to assure his parliamentary colleagues

that we "are not about being soft on criminals . . . People not only have rights but they also have responsibilities. It is time to stop recycling prisoners as if they were some sort of commodity and creating an environment in which prisoners have rights but no responsibilities" (Dáil Debates, 2006, Vol. 624, col. 2004). Previously he had argued that giving votes to prisoners "would acknowledge their rights and also underline their responsibility for themselves and to society." Echoing other advocates of prisoner enfranchisement he suggested that "it might encourage politicians to take a greater interest in penal reform" (quoted in McKenna, 2003). One opposition politician suggested that there was a wider context; the bill concerned not only prisoners but, if enacted, would lead to the enhancement of the democratic system. Fergus O'Dowd TD, proclaimed that, "It is important our prison system forms part of our reform agenda . . . It is an important social step and democratic reform which will . . . strengthen our electoral process" (Dáil Debates, 2006, Vol. 624, col. 1984).

Penal Continuity and Political Developments

Why was there such reluctance on the part of prisoners and ex-prisoners to promote penal reform or prisoner enfranchisement? And why did the issue cause such little controversy when prisoners were eventually enfranchised? There were a number of reasons, political, electoral, and penal. Politicians in the early decades of the state were eager to use their illegal opposition to British rule for political advantage, yet wished to gain respectability by purging their prison past from their present policies. Despite the prevalence of ex-prisoners in Irish political and civic life until the 1960s, there was very little discussion of prisoners' rights or their access to the franchise. On release, few of those political prisoners would have identified with, or showed much interest in the rights of those they left behind. Considering that the state was built on the struggle of both prisoners and ex-prisoners for political rights and representation, it is somewhat ironic that prisoners' issues in general and political enfranchisement in particular, remained low on the political agenda of ex-prisoners. There were exceptions: Dominic Cafferkey spent one month in Sligo prison for land agitation in the 1940s and inspired by this experience campaigned for prison reform during his 9 years in the Dáil (Cassidy, 2001).

Penal Continuity

The creation of the Irish Free State as result of the Treaty in 1922 did not herald a radical change in social, economic, or penal policy. "The most obvious,

long-term effects of independence on the system of government were superficial" argued Coakley (1999, p. 29). "The face and accents were different, but the business of government itself was little changed." In penal policy, the transfer of authority was "relatively unremarkable" and there was "no rush to make alterations to the system or the manner of prison governance" (Rogan, 2009, p. 3). Once "the civil war was over, the now divided Irish prison system faded from view" (Tomlinson, 1995, p. 200). It was not until 1947 that Gerald Boland, ex-prisoner and now Minister for Justice introduced new Prison Rules. During the debate, he reminded the Dáil that "some people in this House know all about prison conditions, first hand, from inside as well as outside" (Dáil Debates, 1947, Vol. 105, col. 594). These Prison Rules were only updated in 2007, despite being criticized by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT) on repeated visits to Ireland, in the Irish courts as outdated and even by the Minister for Justice, Equality and Law Reform, who in 1998 told the Dáil that he was "conscious of the need to implement new Prison Rules . . . at the earliest opportunity" (John O'Donoghue, TD, Dáil Debates, 1998, Vol. 495, col. 806). The attitude of the state toward prisoners and the franchise perhaps mirrors the country's prison policy, which since its foundation has "pursued a somewhat singular and idiosyncratic course" (Rogan, 2009, p. 3). Ireland's closed institutions would only slowly and somewhat erratically open to the influences of social change, international standards and European policies.

The lack of concern with modernizing penal policy was possibly also due to the low numbers incarcerated throughout much of the twentieth century. By 1928, after political prisoners were released, there were only eight prisons and a Borstal in Ireland. By 1947, there were only five prisons in operation with the daily average number of prisoners at 584 of whom 67 were women (O'Donnell, O'Sullivan, & Healy, 2005, p. 147). In 1965, there were just 560 in Irish prisons. By 1984, this had reached only 1,594 (O'Donnell et al., 2005, pp. 150-153) and by the time of the enactment of the legislation to enfranchise prisoners in 2006, the average total prison population was 3,331, with 140 on temporary release (Irish Prison Service, 2008, p. 16). The low level of imprisonment was undoubtedly one reason for the absence of discussion about penal policy or prisoner enfranchisement.

Prisoner Representation and Penal Reform

Irish prisoners do not have a strong tradition of representation and this undoubtedly impacted on lack of improvements in penal policy. The 1960s and 1970s was a period when "prisoners attempted to find a collective voice"

(Ryan, 2003, p. 49) with prisoners' organizations and support groups springing up internationally. Prisoner unions were formed in the United States (De Graffe, 1990; Huff, 1974), Scandinavia (Ward, 1972), and the United Kingdom (Ryan, 2003; Ryan & Sim, 2007), and there were attempts to organize prisoners in Ireland. In the 1970s, a group of Republican prisoners in Portlaoise established a committee to "work for basic human rights for all prisoners" which eventually led to the creation of the Prisoners Union. In 1973, the Prisoners Rights Organisation was established. It published a newspaper—*Jail Journal,* held regular meetings, and demanded that prisons be "rehabilitative rather than punitive" (Kilcommins et al., 2004, p. 71). By the late 1980s, the Prisoners Rights Organisation was moribund. With prisoners' mail censored and lack of prisoner voice within the system, this not only led to stunted understanding and knowledge about imprisonment in the Irish republic (O'Donnell, 2008), it also suggested that whatever grievances prisoners had, individually or collectively, rarely permeated the prison walls.

Although there were "moments" when "republican prisoners brought the prisons into the spotlight" (Tomlinson, 1995, p. 200), these attempts to improve their conditions and status did not always widen out into concern for nonpolitical convicts. As the State responded to protests, it also "deflected a large amount of attention, resources and energies from 'ordinary' prison matters" (Rogan, 2009, p. 8). While the election to the Dáil of two prisoners in Long Kesh in June 1981 highlighted prisoners' grievances in Northern Ireland and their struggle for political status, this did little to raise the issue of penal reform in general. Standing on an abstentionist platform from a prison cell, Paddy Agnew and Kieran Doherty were elected and they hoped to mirror the support generated by the election of Bobby Sands to the Westminster parliament some months earlier. Kieran Doherty TD died on hunger strike on August 2, after 73 days, but his and Agnew's election caused domestic political controversy due to a slender government majority in the Dáil rather than discussion about reforms within the general prison population, north or south (For the 1981 Hunger Strikes, see Beresford, 1987; Campbell, McKeown, & O'Hagan, 1994).

Successive Irish governments have not been receptive to representation on prison reform from inside or outside the prison. In 1973, a Prison Study Group was established in University College Dublin. It was defined as a "voluntary non-political study group," whose purpose was to "find out the factual situation, not to agitate for prison reform" (Prison Study Group, 1973, quoted in Kilcommins et al., 2004, p. 70). It was made up of community activists, solicitors, a priest, and academics. Despite several attempts by the Group to establish relationships, the Minister for Justice, Patrick Cooney, TD, and

his officials declined to cooperate in any way with the Group's work; nor were they allowed to visit any prisons. The Group described a "very closed system" that "imposed severe limitations" on their research (Prison Study Group, 1973, p. 5, quoted in O'Donnell, 2008, p. 125).

In the late 1970s, ex-prisoner, former Minister for External Affairs and winner of the Nobel and Lenin Peace Prizes, Sean MacBride chaired a Commission of Enquiry into the Irish Penal System on behalf of the Irish Section of Amnesty International, the Association of Irish Jurists and the Prisoners Rights Organisation. Members of the Commission included Michael D. Higgins, then Chairman of the Labour Party; Michael Keating TD, Fine Gael Spokesman on Human Rights and Law Reform and a former member of St. Patrick's Institution Visiting Committee and Mary McAleese, Professor of Criminal Law and future President of the Republic of Ireland. The government was unreceptive toward the deliberations of the committee, but with high profile and distinguished members, the potential remained that their final report might carry some weight. The Commission endorsed prisoners' right to form associations and unions "in accordance with Article 40, paragraph 6.1 of the Irish Constitution." It suggested that, "Provision should be made in the Prison Rules for the exercise of their franchise by all prisoners in local and national elections and referenda" (MacBride, 1982, p. 93). Despite the credentials of the chair of this Commission, the involvement in its deliberations of the Prisoners' Rights Organisation led the Minister for Justice, Gerard Collins, to refuse to engage with it, because he did not wish "to be put in a position of appearing to give some form of official approval for an exercise prompted by the organisation" (quoted in MacBride, 1982, p. 108). Prisoners' representatives were, it seems unwelcome in furthering the rights of prisoners.

In 1983, the Council for Social Welfare, a committee of the Irish Catholic Bishops Conference published what they termed an information document, *The Prison System*. While no mention was made of enfranchisement, they set out the rights of prisoners (Council for Social Welfare, 1983). Some debate about the state of Irish prisons and the rights of prisoners surrounded a high level committee's deliberations in the mid-1980s to examine the penal system. It led to the Whitaker Report, a wide-ranging account of conditions in Irish prisons. "The fundamental human rights of a person in prison" the report asserted, "must be respected and not interfered with or encroached upon except to the extent inevitably associated with the loss of liberty" (Whitaker, 1985, p. 12). While there was no mention of the enfranchisement of prisoners, there was recognition of the rights of prisoners with a recommendation that they should be allowed access to the Ombudsman (Whitaker, 1985, p. 16).

Despite this being a government-appointed commission, the "official reception to the Report was not particularly welcoming and its proposals did not translate into official practice" (Rogan, 2009, p. 8).

The Exception Rather Than the Rule

When the Minister for the Environment introduced the Electoral (Amendment) Act 2006 to the Dáil, he argued that this new law would make Ireland "the exception rather than the rule" in terms of prisoner enfranchisement (Dáil Debates, 2006, Vol. 624, col. 1978). What makes the Irish case somewhat exceptional is that when enfranchisement came, it passed so quietly: it went relatively unnoticed. While prisoner enfranchisement internationally is a major issue (Ewald & Rottinghaus, 2009), it was remarkable for its almost invisible passage through parliament. The debates may have made reference to the international situation, but the impetus for reform was more complex and local. In contrast to circumstances elsewhere, the Irish legislature was not instructed by domestic courts to take action; indeed the courts interpreted the law so as to preserve the status quo. In the course of the debates over the bill, no TD or Senator spoke against the enfranchisement of prisoners. Amendments were put forward to make sure prisoners would have trust in the electoral process. Outside parliament, there was little debate about prisoners and enfranchisement in the lead up to, or during the discussion surrounding the legislation (see Behan & O'Donnell, 2008 and Hamilton & Lines, 2009 for discussion on introduction of legislation). In an attempt, perhaps to avoid possible political fallout from such a decision, those who introduced the new law reminded prisoners of their responsibilities and the obligations of citizenship, while reassuring the general public of their abhorrence of crime. But with no political or media opposition to the legislation to enfranchise prisoners and at little cost, this smoothed the passage of a far-sighted and progressive piece of penal reform. However, the legislation succeeded partly because it was promoted as a process of electoral, rather than penal reform. Therefore, this allowed for its successful passage through parliament and avoided the controversy that might occur if it was put forward as a concession to prisoners or enhancing their rights.

In a state built by prisoners and ex-prisoners who proudly proclaimed their time behind bars in their political biography, it was not those who had experience of imprisonment and who reformed the franchise to embrace the incarcerated. That was left to future generations of politicians. The lack of improvements in penal system and the failure to enfranchise the incarcerated reflected a lack of general interest in developing a new modern penal policy when the state

was established. When it came, prisoner enfranchisement was a stand-alone item. It was not part of a program to enhance the electoral system. Nor indeed was it part of a penal reform agenda. The wider agenda of reform and the modernization of the Irish penal system would, as those who founded the State reminded us, have to wait for another day.

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