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ALSO

Albie Sachs and Andrew Coyle on prisoner voting

Interview with former Cabinet Secretary for Justice Kenny MacAskill MSP

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The right to vote

'Prisoners voting, South Africa, 1994' (Andrew Coyle)

Albie Sachs and **Andrew Coyle** discuss prisoner voting rights in South Africa and their denial in the UK.

IN DECEMBER 2014 Justice Albie Sachs, formerly of the South African Constitional Court and a key figure in the long struggle against apartheid, gave the Nelson Mandela - Oliver Tambo lecture at Strathclyde University. In questions following the lecture, Professor Andrew Coyle asked about prisoner voting rights in South Africa. This is a note of the exchange recalled recently by Albie Sachs.

Andrew: "I remember being with you 20 years ago at the first gathering in South Africa of the African Society of International and Comparative Law, when you told me how you had convinced your fellow drafters of the South African Constitution that universal adult suffrage should indeed be universal and that prisoners should not constitutionally be denied the right to vote. You said that one of the comparisons you had used to advance your argument was that prisoners in the United Kingdom had the right to vote. You later discovered that was not the case and it is still not the case. Do you ever regret the fact that persons who are in prison in South Africa retain their right to vote?"

Albie: No, I don't regret it at all. I'm amused that I mistakenly assumed that the UK, the land of the Magna Carta and tolerance, would automatically place itself with those nations that saw imprisonment as being about depriving offenders of their liberty and not about crushing their souls. And saddened at the same time that the British approach could be so archaic. When it came to how South Africa should approach the matter, our Constitutional Court unanimously upheld the right of prisoners to vote. If I can be excused for citing myself, in the case of August I wrote for the Court that:

"Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power, it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity." [August v Electoral Commission and Others (1999)]

At a technical level, the decision was based on the notion that Parliament could perhaps limit the right of prisoners to vote, but not the administrative authorities. In a case heard a few years later the Court again unanimously struck down a Parliamentary

statute that sought to deprive all prisoners of the vote except for those awaiting trial or those in prison because they could not pay a fine. Re-affirming the fundamental value of the right to vote, the Court held that the justification advanced by the government for curtailing voting rights of prisoners was unsustainable, namely, that prisoners were unpopular and the general public would rather see electoral resources expended on facilitating voting by the elderly and the unfirm. The judgment pointed out that:

"In the light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected." [Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others (2004)].

Finally, it was interesting to note that the Canadian Supreme Court has decided (by a narrow majority) that the prisoner's right to vote could not be taken away even by Parliament. In doing so, it quoted the statement in the August decision that the right to vote literally said that everybody counted. Which prompts me to entertain the droll idea that one day in the UK the powers-that-will-be will correctly cite South Africa as an example of a country where prisoners exercise the right to vote.

Cape Town February 2015

"The vote of each and every citizen is a badge of dignity and of personhood"

Albie Sachs

Andrew: Reading Justice Albie Sachs' response to the question which I put to him after his Nelson Mandela - Oliver Tambo lecture in Strathclyde University in December 2014 one is struck by the measured and thoughtful tone of his words which are as judicial as one would expect from a former justice of the South African Constitutional Court and also as full of humanity as befits one who has suffered personally as much as he has in order to bring democracy to his country. He takes the debate about whether men and women should be entitled to vote while they are in prison to a level which we have not so far heard in the United Kingdom. A few phrases have stuck in my mind: "Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order… (It) says that everybody counts… it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation."

Contrast the tone of Justice Sachs with the emotional words of Prime Minister David Cameron who told the House of Commons in November 2010 that it made him "physically ill to even contemplate giving the vote to anyone who is in prison". It is to be welcomed that on occasion our politicians should demonstrate well-placed emotion but anyone who is familiar with debating techniques would be cautious when someone, not least a politician, bases his argument on physiological symptoms rather than sound reasoning.

Note the Prime Minister's use of the word "anyone" for that goes to the nub of the confused debate which has taken place in the United Kingdom since the European Court of Human Rights issued a ruling in 2004. It is important to understand that the Court did not rule that all convicted prisoners have a right to vote in elections. Rather, it ruled that a complete prohibition on convicted prisoners voting was incompatible with the European Convention on Human Rights. The ruling did not imply that the Convention required that all convicted prisoners must be given the right to vote. How voting is arranged is a matter for individual states.

In the majority of countries in Europe there are provisions for all or some convicted prisoners to vote. The United Kingdom is one of a minority, alongside countries such as Armenia, Bulgaria, Hungary and Romania, which have an absolute ban on voting by such prisoners. In 2002 the Supreme Court of Canada ruled that to ban prisoners serving over two years from voting was too broad a measure, stating that "Denial of the right to vote … countermands the message that everyone is equally worthy and entitled to respect under the law". In both Australia and New Zealand, length of sentence determines whether or not convicted prisoners retain voting rights. In South Africa, as Justice Sachs explains, all prisoners have the right to vote.

The UK Government has a good record of complying with European Court decisions and it has now accepted that it should respond on the issue of prisoner voting. In December 2013 it published the Draft Voting Eligibility (Prisoners) Bill. The draft Bill contains three options. The first is that all prisoners serving sentences of less than four years should be able to vote; the second that this should apply to all those serving six months or less; and the third would preserve the existing prohibition. The Government has chosen not to allocate parliamentary time to the draft legislation and it will be for a new Government after May 2015 to decide how to proceed.

In the Scottish Independence Referendum (Franchise) Bill, subsequently passed by Parliament in November 2013, the Scottish Government chose not to include any provision which would allow convicted prisoners to vote. Speaking to the Bill Committee in June 2013 the Deputy First Minister said that the "Government does not believe that convicted prisoners should be able to vote while they are detained in custody". That statement could not have been clearer. However, the arguments presented by Nicola Sturgeon were nuanced and it may well be that the Government wished above all to ensure that the franchise legislation contained no provision which might affect the outcome of the referendum itself.

At some point, hopefully in the near future, we will have genuinely universal suffrage in the United Kingdom which, to paraphrase Justice Albie Sachs, will "declare that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic nation".

London, Feburary 2015.

Databases of media reports, court decisions and other material on the question of prisoner voting rights, can be found on www.cjscotland.co.uk/2014/12/votes-for-prisoners-in-scotland/; www.cjscotland.co.uk/2011/02/uk-prisoner-vote-reform-outlined-four-year-sentence-disqualification/ and www.cjscotland.co.uk/2007/04/prisoner-votes-march-2004-to-april-2007/