Australia's High Court rules that voting rights can be abolished

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Australia's supreme court, the High Court has confirmed there is no guaranteed right to vote under the Australian Constitution. While striking down legislation passed last year to strip all prisoners of voting rights, the judges upheld a 2004 law denying the vote to prisoners who have been jailed for more than three years.

The 4-2 decision in *Roach v Electoral Commissioner* was announced in late August, but the full ramifications of the ruling only became clear when the court issued its reasons on September 26. As a result of the majority's verdict, about 8,000 of the country's 20,000 sentenced prisoners will be able to vote in the federal election, due before the end of the year. However, the judgments make clear there is no legal barrier to the disenfranchisement of significant sectors of the voting population, including 18-21 year-olds and anyone convicted of a crime deemed to be "serious".

Vickie Lee Roach, an Aboriginal woman jailed in 2004 for six years over a robbery, took a test case to the High Court. Roach, who has become a highly-articulate university graduate, novelist and poet in jail, argued that her disqualification from voting violated both the Australian Constitution's requirement that parliament be "directly chosen by the people" and the Constitution's implied freedom of political communication.

Roach also contended that indigenous people, who are 13 times more likely to be jailed than other Australian citizens, and make up almost a quarter of the prison population, were unfairly denied their political rights by the prisoner disqualification in the Commonwealth Electoral Act. The Act similarly discriminates against the poor, the homeless, the disadvantaged and the mentally-ill, who are more likely to be imprisoned through a combination of policing practices, inability to pay fines and lack of alternative accommodation.

Roach challenged one aspect of the Howard government's cynically titled Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006, which also automatically de-registered all non-parliamentary parties, as well as potentially disenfranchising hundreds of thousands of voters.

With regard to prisoners, the 2006 Act went further than a 2004 Act that introduced the three-year prison term test. For the previous two decades, under 1983 and 1995 legislation, prisoners were only barred if they had been jailed for five years. Between 1902 and 1983, prisoners were excluded if they had been sentenced to one year or longer. Thus, the 2004 and 2006 laws marked the first reversal of voting entitlements for prisoners since 1902. They were also more draconian than the various state provisions that applied at Federation in 1901.

Significantly, two state Labor governments, those of New South Wales and Western Australia, joined the Howard government in defending the blanket prisoner ban, although only WA currently disqualifies all prisoners from voting at state elections. Labor's support is another indicator of the bipartisan consensus on eroding basic democratic rights.

Two judges, Kenneth Hayne and Dyson Heydon, upheld the outright prisoner ban. They agreed with the Howard government's argument that parliament could wind back much of the extension of the franchise since 1901, when those under 21 and most women could not vote, many states imposed property or income qualifications, and most Aborigines and Pacific islanders and other "coloured persons" were denied the vote.

The reasons given by the majority judges leave future governments, and the parliamentary establishment as a whole, with considerable leeway to wind back voting rights. The four judges stated that prisoners and other categories of people could be denied voting and other citizenship rights if they were involved in "serious offending" or other forms of "civic irresponsibility". More broadly, parliament could disqualify electors for any reason that was "proportionate" or "compatible" with the system of parliamentary representation adopted in 1901.

The tenor of the ruling was set by the opening words of Chief Justice Murray Gleeson's judgment. The Australian Constitution, he pointedly observed, "was not the outcome of a revolution, or a struggle against oppression". Consequently, it "was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon the legislative power for the purpose of protecting the rights of individuals".

Gleeson noted that the Australian Citizenship Act 2007 now defines citizenship, which bestows voting rights, in terms of "reciprocal rights and obligations". Therefore, he said, parliament could legitimately deprive a citizen of "a fundamental political right" for "anti-social behaviour". Citing a recent Canadian case, he argued that "civic responsibility and respect for the rule of law are prerequisites for democratic participation".

This is an extraordinary extension of the "mutual obligation" doctrine that the Howard government, backed by the Labor Party, has imposed on welfare recipients. As a result of "mutual obligation," jobless workers, sole parents, disabled and ill people can be denied payments, potentially making them destitute, if they fail to pass "activity tests" designed to force them to accept low-paid work with sub-standard conditions.

Gleeson's logic goes qualitatively further. It would allow the parties that control the numbers in parliament to suspend or even extinguish basic political rights and freedoms, including the most elementary right of all—the right to vote. The only limit suggested by the chief justice was that there must be a "substantial" and not "arbitrary" reason for the disenfranchisement, with some "rational" connection to "the right to participate in political membership of the community". Those excluded must have engaged in conduct that could not be "tolerated by the community".

The anti-democratic character of these propositions is illustrated by Gleeson's reference to a passage from an American constitutional law professor, Laurence Tribe, whose view was cited in the Canadian Supreme Court. "Although free and open participation in the electoral process lies at the core of democratic institutions, the need to confer the franchise on all who aspire to it is tempered by the recognition that completely unlimited voting could subvert the ideal of popular rule which

democracy so ardently embraces. Moreover in deciding who may and may not vote in its elections, a community takes a crucial step in defining its identity," Tribe wrote.

This reasoning is incompatible with any conception of democracy. How can "popular rule" be genuine unless all can vote? What is democratic about a system if the entrenched political parties can dictate who should be permitted to vote? Tribe's logic also allows an officially-defined "identity" to be used to disqualify citizens who fail to conform to prescribed "national values," including for political, religious or cultural reasons.

Gleeson accepted oral submissions from Solicitor-General David Bennett that it would no longer be constitutionally possible to exclude all members of a particular religion, race or "major" political party. But the very fact that such issues were canvassed is highly significant. The reference to "major" party leaves open the possibility that members of a so-called "minor" party could be stripped of their voting rights.

The chief justice concluded that the 2004 disenfranchisement of prisoners serving three-year sentences was valid, because parliament had marked off "serious criminal offending" as the criterion for disqualification. Without specifying or elaborating, he indicated that a lesser term of imprisonment could also be valid. By this approach, even a one-month term could suffice, as long as the legislation displayed an intention to differentiate between "serious" and "non-serious" offences.

Justices William Gummow, Michael Kirby and Susan Crennan issued a joint judgment agreeing with Gleeson. They delved back into the history of the British Empire to justify the exclusion of "serious" offenders. Their historical review emphasised, in line with Gleeson's opening paragraph, that British colonies had always disqualified categories of people, notably those convicted of treason, felony or "any infamous crime". This latter undefined phrase was first inserted into Britain's 1840 Canada Union Act, following a rebellion in 1837. By implication, anyone seeking to overturn the established order can be disenfranchised.

Likewise, an 1851 book on electoral law in the Australian colonies listed libel, trespass and riot, together with treason, perjury, piracy, swindling and cheating, as offences meriting disqualification. Based on this "long established law and custom," the three judges concluded that voting rights could be denied to anyone convicted of offences that "evinced an incompatible culpability which rendered those electors unfit". While the judges did not explore the issue, anyone accused of sedition, terrorism or other political crimes today could be excluded on this basis.

In discussing the drafting of the 1901 Constitution, Gummow, Kirby and Crennan referred to the "stresses and strains" that affected "the whole subject of the franchise" in the 1890s. These "strains" included the perceived "threat" of the Chartist movement, which arose in the mid-nineteenth century in Britain demanding universal suffrage, and the "democratic pressures" generated by the mining boom of the 1880s that produced a new influx of workers to Australia. In other words, although the judges did not say so, Australia's "founding fathers" were no champions of democracy. Voting rights were only recognised in the face of "democratic pressures" from below.

The three judges gave another reason why the architects of Australian federation did not want to enshrine voting rights in the Constitution: "the thorny issues of the female franchise and racial disqualification (of indigenous Australians and even of immigrant British subjects)". While women won the franchise in every Australian state by 1920 (Tasmania was the last holdout), the infamous "White Australia" policy continued to permit the "coloured races" to be deprived of federal voting rights until 1962.

During the hearing of the case, Solicitor-General Bennett, representing the Howard government, advanced several extraordinary propositions. He suggested that an Australian government could permanently disqualify anyone ever imprisoned, even after their sentence had been served, as happens in some states of the United States, where about four million citizens have been barred for life from voting.

Bennett also insisted that there was no intrinsic legal barrier to raising the voting age to 21, overturning the 1973 extension to 18-year-olds, or reversing any other widening of the franchise since 1901. Eighteen-year-olds won voting rights largely as a result of the depth of opposition to conscription and the Vietnam War, which saw teenagers sent off to fight before they could vote.

Justices Hayne and Heydon agreed with the thrust of the government's case. Hayne emphatically rejected Roach's argument that the franchise could not be "wound back". Parliament had the power to "depart from what now is seen as a commonly understood minimum requirement of the franchise," he stated. Heydon seemed to go further, saying it would not necessarily be unconstitutional to "narrow the franchise on the basis of race, age, gender, religion, educational standards or political beliefs". The judge even suggested that it would be "totalitarian" to deny legislators the ability to carry out "prudent retreats" on the franchise or change other "techniques of government". Heydon also derided the notion that interpretation of the Australian Constitution should be influenced by international law, such as the International Covenant on Civil and Political Rights, which recognises the right to vote.

The reversal of prisoners' rights is part of a broader attack on voting rights. Under the 2006 Act, the electoral rolls close on the same day that an election is called, automatically excluding all voters—about half a million at the 2004 federal election—who have changed address or failed to enrol. Those most affected are the young, recently-arrived migrants and working people living in rental accommodation or employed in insecure or casual jobs. New voters—those turning 18 or due to be sworn in as citizens before the election—have only three days, half the previous seven-day period of grace, to enrol.

In order to enrol, and vote at each election, voters either have to present a form of photo-ID, such as a driver's licence or passport, or statements from two enrolled voters. These requirements are likely to strip voting rights from low-income and young people, particularly those who cannot afford to drive or travel overseas.

Together with the ban on prisoners, these measures represent an historic reversal of the expansion of the franchise since the beginning of last century—starting with secret ballots, then votes for women and postal voting, followed by votes for Aborigines and 18-year-olds—that developed out of significant political struggles.

The 2006 Act also made it more difficult for working people to stand for election, by increasing candidates' deposits by almost 50 percent, from $350 to $500 for the House of Representatives and from $700 to $1,000 for the Senate. At the same time, the legislation made it easier for the wealthy to exercise their political patronage. It increased the disclosure threshold for political donations from $1,500 to $10,000, and the tax deductibility level for political donations 15-fold from $100 to $1,500 per year.

In an attempt by the increasingly discredited major parties to shore up their positions, the Act de-registered all parties that had never been represented in parliament, depriving them of the basic democratic right to have their names on ballot papers beside their candidates. To re-register, "minor" parties have to hand over to the electoral authorities personal details—names, addresses, telephone numbers and dates of birth—of 500 members. By requiring rank-and-file members to identify their political persuasion, this requirement exposes them to surveillance and harassment by government agencies, including the security services.

This year's Citizenship Act further restricted the franchise. Citizenship is allowed only after four years of permanent residency, twice the previous requirement, and only citizens can vote. Applicants must answer questions on so-called Australian values and history, with all questions and responses exclusively in English, and sign a formal statement

declaring their allegiance to “Australian values”. These measures not only discriminate against immigrants from non-English speaking backgrounds, particularly those less able to afford English language classes. They set reactionary, nationalist prerequisites for the most basic civil and political rights.

The electoral and citizenship legislation is part of a sustained attack by the Howard government on democratic rights over the past six years. This includes indefinite detention without trial for asylum seekers, draconian “anti-terrorist” laws and powers to call out the military on domestic soil, all adopted with full support from the Labor opposition.

In every test of these laws thus far, the High Court has sanctioned them, with little media comment. These developments are a measure of the corroded state of Australian democracy. Fundamental legal and political rights are being eroded or repudiated, and blatantly anti-democratic measures introduced, with hardly a whisper of media or judicial dissent.