



## **Punishment, prisoners and the franchise**

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## **Abstract**

In 2005, the European Court of Human Rights ruled that the UK law banning all convicted prisoners from voting contravened the European Convention on Human Rights. Despite numerous court cases – both domestic and European – extensive consultations and a parliamentary committee established specifically to consider the issue, successive UK governments have rejected this judgment and resisted changing the law to allow prisoners access to the franchise. This paper begins by considering the key arguments for and against the enfranchisement of prisoners, many of which have been used in the debates on the issue. It analyses why prisoner voting has caused so much controversy in the UK and why parliament continues to maintain a blanket ban. It examines the experience of prisoner voting in other jurisdictions and finds little evidence for the contention that allowing prisoners access to the franchise will have a detrimental impact on the democratic process. It concludes with an argument in favour of allowing prisoners to vote.

## **Introduction**

Prisoner enfranchisement has been a source of much controversy in the United Kingdom over the last decade. Outside of the United States of America no other country in the world has been as concerned with prisoner enfranchisement as the United Kingdom. This paper begins by considering the arguments against allowing prisoners to vote which are usually couched around a punitive discourse before moving on to examine the more rehabilitative approach which underpins the arguments in favour of prisoner voting. It then examines the debates in the United Kingdom which have been embroiled in the deliberations around European influence in the UK's domestic affairs and law and order policies. It analyses levels of voting in jurisdictions that permit prisoners to vote and while there is no evidence that extending the franchise to prisoners has undermined the democratic process, the paper concludes by arguing that allowing prisoners' access to the franchise might encourage wider civic participation and contribute to their process of change and transformation.

## **Prisoner voting: A contested concept**

The cases for and against voting rights for prisoners have been widely examined in academic literature and political discourse (see for example, Abramsky, 2006; Manza and Uggen, 2006; Ewald and Rottinghaus, 2009; Easton, 2011; Ramsay, 2013; Behan, 2014). It is widely accepted that even in the most advanced liberal democracies there are limitations on the right to vote, depending on citizenship, age, mental competency and residency. What should these limitations be and who should decide on them? In the case of prisoners, should the withdrawal of the franchise be determined by a judge, decided on by the executive with legislative approval or settled by the people? Should the denial of the vote be a collateral consequence of imprisonment or part of the penalty for breaking the law? Should prisoners be denied the right to vote at all? These debates yield a number of insights into the objectives of imprisonment, the desire for penal reform, the complexities of citizenship and what restrictions, if any, there should be on participation in a democratic polity. This section briefly considers some of the key arguments for and against prisoner voting. It begins with the case for the right to vote being removed from prisoners.

## **The case for prisoner disenfranchisement**

Based on the ancient concept of 'civil death', proponents of prisoner disenfranchisement argue that prisoners (and in some cases ex-prisoners) should be stripped of their rights of citizenship, especially voting. They suggest that those who have committed a crime have broken the social contract, put themselves outside the law voluntarily, and therefore, should be denied the opportunity to decide who will make the law.

Disenfranchisement should be used to remind prisoners that citizenship is a privilege and must be earned by civic virtue. Removing the right to vote from prisoners will deter others from committing a crime. Disenfranchisement, those in favour argue, also

expresses society's symbolic denunciation of criminal activity with the removal of civil rights to accompany the denial of liberty.

### ***Civil death***

Disenfranchisement has its roots in the ancient concept of 'civil death' based in Greek, Roman, Germanic and Anglo-Saxon legal traditions. In ancient Greece, 'civil death' meant that certain offenders forfeited all their civil rights, including the right to property and possession, the right to inherit and bequeath, the right to bring suit, the right to appear in court and the right to vote. In Roman law, an individual pronounced 'infamous' was prohibited from serving in the army, appearing in court, making speeches, attending assemblies, and voting. Being declared infamous could be for a criminal or immoral act. In later times, Germanic tribes used 'outlawry' to punish those who committed serious crimes. The outlaw was expelled from the community, their property confiscated and they were denied all rights. During the Middle Ages, the outlaw was deprived of legal existence. Ultimately, in extreme cases, the outlaw being outside society and therefore beyond protection from the realm could be killed with impunity.

English law created its own punishment of *attainder*. In feudal England, the Crown seized the property of felons as part of their punishment. The attained, for a felony or crime of treason, was liable to three penalties: forfeiture – the confiscation of chattels and goods; 'corruption of the blood' – they were unfit to inherit, possess or leave their estate to heirs, and the land was forfeited to the local lord; finally, the attained was 'dead in law' – they could not bring suit or appear as a witness in court. The convicted could not perform any legal function, including voting. While most civil death statutes have been abolished in modern democracies, one of the few which remains as a direct result of conviction and sentence to imprisonment is loss of the right to vote (for further discussion, see Itzkowitz and Oldak, 1973 and Ewald, 2002).

### ***Strengthening the social contract***

Those who argue for disenfranchisement of prisoners and ex-prisoners use a social contractarian model with reference to Hobbes, Locke, Rousseau and Kant. In social contract theory, the stripping of any citizen of political rights is problematic. But for those who break the social contract there must be a sanction. Hobbes argued that whoever 'breaketh his Covenant [...] cannot be received into any Society' (cited in Plannic, 1987: 155). Locke believed that a murderer has 'declared War against all Mankind, and therefore may be destroyed as a Lyon or Tyger' (cited in Plannic, 1987: 156). Rousseau believed that 'since no man has a natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority over men' (Rousseau, [1762] 1973: 185). However, there were exceptions as 'every malefactor by attacking social rights, becomes on forfeit a rebel and a traitor to his

country; by violating its laws he ceases to be a member of it; he even makes war upon it' (Rousseau, [1762] 1973: 209). For Kant, those who transgress the criminal law are unfit to be citizens. They have lost their citizenship by their own 'own criminal act, in which case, although he is allowed to stay alive, he is made into a mere tool of the will of someone else, either of the state or of another citizen' (cited in Plannic, 1987: 157).

One modern theorist on disenfranchisement, Peter Ramsay (2013: 11) argues that prisoners have 'themselves repudiated their democratic citizenship rights by the implicit denial of citizenship entailed in their offence'. Disenfranchisement is a proportionate punishment because it is for the period of time an individual is in prison, presumably for an offence serious enough to warrant incarceration. He argues that allowing prisoners to vote is 'faking democracy', because while incarcerated they are not part of the process of 'collective self-rule' (Ibid.: 11). The democratic process is undermined by allowing to vote those who cannot contribute to collective self-government and would be 'a contribution to counterfeiting democracy, extending the outward form of democratic government as a cover for the absence of the political substance of democracy – the self-government of the people' (Ibid.: 11). Finally, he argues that: 'Prisoner disenfranchisement, by ensuring that the political playing field is formally equal and free of executive control, is one of the institutional forms of political equality' (Ibid.: 14).

### ***Corrupting the democratic process***

Those in favour of disenfranchisement – especially in the US – regularly quote an 1884 judgment in the Alabama Supreme Court. This ruled that the 'manifest purpose' of disenfranchisement is to 'preserve the purity of the ballot box, which is the only sure foundation of republican liberty [...] one rendered infamous by conviction of felony [...] is unfit for the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship'. The judgment continued: 'It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself' (*Washington v Alabama*, 1884). Allowing prisoners and in some cases ex-prisoners to vote taints elections by corrupting the entire democratic process. A democratic polity that excludes prisoners will be much healthier and robust for all citizens, even wayward ones, because, according to Plannic (1987: 163) if prisoners:

*were exercising civic rights, they would not have become criminals in the first place; and if they had acquired democratic political virtue as a result of their punishment, they would themselves insist that criminals not be allowed to exercise any civic rights until their release. Democratic regimes should recognise that the more criminals desire to exercise the rights of citizens, the more it*

*benefits both the democracy and the criminals to deny them; and that this is true whether or not criminals desire civic rights for virtuous reasons.*

Proponents of disenfranchisement argue that those who have abided by the law should be given the right to decide on who should become law makers because they are the only ones who value that privilege.

Prisoners, and in some cases ex-prisoners, advocates of disenfranchisement argue, should be treated differently to other citizens because they have acted in a way that indicates they are deficient in civic character. They have proved that they cannot be trusted because they have shown little respect for the law. To participate as an equal in society, according to Manfredi (2009: 274), 'requires, in other words, self-control over impulsive behaviour'. He continued:

*The nexus between prisoner disenfranchisement and the preservation and promotion of liberal democratic values is thus found in the exclusion from political participation of individuals who manifestly demonstrated that their character is self-regarding, present orientated, and impulsive. In short, disenfranchisement is reasonable because criminal offenders are, in general, less empathetic and more impulsive than other citizens.*

(Manfredi, 2009: 274)

Altman (2005: 264 and 266) believes 'not that criminals should be disenfranchised because they fail to show the appropriate respect to the outcomes of democratic processes' but rather that 'the citizens of a legitimate democratic state have a broad collective right to order their affairs as they so choose'. The citizenry are entitled to disenfranchise convicts while imprisoned. 'Such a decision may fall short of some ideal of political virtue, but it is a morally permissible choice for a democratic state to make' (Altman, 2005: 271).

### ***Setting norms through punishment***

Those who argue for disenfranchisement believe individuals sentenced to prison lose not only their liberty, but by virtue of being incarcerated, other rights. It is sometimes an added punishment on top of imprisonment and at times one of the unintended consequences. And those in favour of disenfranchisement believe that losing the right to vote should be a direct, rather than merely a collateral consequence of imprisonment. Christopher Manfredi (1998: 297) in his review of prisoner disenfranchisement argued that:

*[C]riminal disenfranchisement does not require that individuals prove in any positive sense that they possess liberal democratic civic virtue. Instead it merely uses serious criminal conduct to indicate the absence of civic virtue. Moreover where criminal disenfranchisement is not permanent, it recognises the presumptive capacity of all citizens to acquire civic virtue by restoring full political rights to individuals on release from custodial supervision.*

Only citizens should have the right to vote and ‘it would not be reasonable to consider criminals as citizens’ (Plannic, 1987: 154). Abiding by the law is as important a part of good citizenship as voting. To disobey the law, communally created, undermines the right to the benefits of that mutuality. Citizens should only be allowed to vote if they have demonstrated a commitment to respect the will of the people and abide by the law. Indeed, disenfranchisement can communicate to prisoners that ‘the rights of liberal citizenship entail a responsibility to avoid conduct harmful to other citizens’, according to Manfredi (2009: 277). Further, it ‘promotes the use of punishment to form character by supporting the moral norm-setting of criminal law’.

For proponents of enfranchisement, to deny the vote to untrustworthy citizens will inspire respect for the law, and may even deter some who are considering engaging in criminal activity. Judge Madala of the South African Constitutional Court, in a case where the government tried to restrict voting rights, reminded prisoners that they had put themselves outside the body politic voluntarily by engaging in criminal activity: ‘If the prisoner loses the chance to vote, that will cause him or her to remember the day he or she could not exercise their right to vote because of being on the wrong side of the law’ (*Minister of Home Affairs v Nicro*, 2004).

In short, proponents of disenfranchisement believe it is the most powerful message, both real and symbolic, to both law-abiding and non-law-abiding citizens of the importance society places on obeying the rules created by representatives of the people. A belief in the democratic process means that those who are not willing to accept the outcome of that process – the passing of laws – debar themselves from the right to participate in it. ‘The disenfranchisement of criminals’ according to Plannic (1987: 162), ‘is one of the surest signs of the political virtues of democracy’. Those who argue that allowing prisoners to vote is more egalitarian ‘would be betraying its own principle and corrupting its political virtue with the “spirit of extreme equality”’. The polity must be kept pure, even for those who are currently denied the right to vote. Those who argue for prisoner disenfranchisement are convinced that the rights of citizenship are inextricably linked with responsibilities and obligations. Failure to appreciate these responsibilities takes away some rights of citizenship, central to which is the right to vote.



### **The case for prisoner enfranchisement**

Those who argue in favour of allowing prisoners to vote usually make the case around a number of themes: democratic legitimacy, the nature of citizenship, inclusion and rehabilitation. They believe that without consent being given by all members of a society, the whole polity is undermined. Allowing prisoners to vote communicates to the wider population that they are still part of the community, encourages prisoners to maintain their connection with society inside and prepares them better for life on the outside. It may go some way to creating a penal system built on inclusion, normalisation and the potential for transformation. Allowing prisoners to engage in the electoral process will encourage them towards a sense of community spirit and support them in becoming law-abiding citizens. Proponents of prisoner enfranchisement argue from an egalitarian perspective – prisoners are in greater proportion from poorer socio-economic areas and therefore their communities are under-represented and become more marginalised. They argue that removing prisoners' rights, in this case voting, becomes another of the 'collateral consequences' of punishment, 'that is accomplished through the diminution of the rights and privileges of citizenship' (Travis, 2002: 15).

### ***Undermining the social contract***

Those who would enfranchise prisoners argue that depriving any person of the right to vote negates the social contract as power is wielded without the authority to do so. The stripping of the right to vote undermines the social contract that should always be mutual. Taken one step further, they question whether individuals should be obliged to obey laws created by people who were not given authority to rule over them. This raises an important philosophical question on the moral authority of rule without consent. Those who are incarcerated are removed from society, and if disenfranchised, are stripped of the right to vote. Subsequently, this 'reduces people from citizens to subjects' (Reiman, 2005: 13).

Advocates of enfranchisement believe that individuals bring citizenship rights with them to prison. These are set out in various policy documents and international agreements, including the United Nations Standard Minimum Rules for the Treatment of Prisoners (1955), the European Convention on Human Rights (1950), European Prison Rules (2006) and various national prison rules. These include the right to legal representation, a free and fair trial, a safe living environment, etc. In *Raymond v Honey* (1983 1 AC 1), Lord Wilberforce stated that: 'under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'. The European Court of Human Rights has ruled that prisoners 'in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty' (*Hirst v United Kingdom (No. 2)*, 2005).



### ***The limits of liberty***

Disenfranchising a section of the population based on their actions, even if they are illegal, tests the limits of liberty in a democracy. It leads to those who vote making a judgment on deciding who has the right to the franchise and subsequently who will be legislators and ultimately, the executive. According to the European Court of Human Rights, to deny the right to vote to prisoners is 'tantamount to the elected choosing the electorate' (*Hirst v United Kingdom (No.2)*, 2005). It tilts the outcome of elections in favour of those who are allowed to vote. Cheney (2008: 144) concluded that 'the issue of votes for prisoners goes to the heart of those who are given the power to participate in the political process and those who are dis-empowered'. Those arguing in favour of stripping prisoners of voting rights have historically drawn on similar arguments that have been used to restrict voting rights for women, the working class, and people of no property and minority communities.

### ***Social construction of criminality***

Advocates of prisoner enfranchisement locate the law and lawbreakers in a wider context. A legalistic examination of disenfranchisement is too narrow. The debate on enfranchisement is intertwined with the social construction of criminality. Those who make laws, prosecute wrong-doers, judge the accused and sentence the guilty, all have an impact on whether an individual will be sent to prison. Coyle (2005: 11) points out that internationally, 'the marginalised groups in any society are invariably over represented in prisons'. Some law-breakers are more likely to be imprisoned than others. The bias evident in prison populations internationally indicates that a disproportionate number of people from poorer and minority communities are arrested for wrong-doing, prosecuted, end up before the courts, and imprisoned. This point had been raised in the political and legal debates in Australia, Canada and especially, the US (For Australia: see *Roach v Electoral Commission*, 2007; Canada: *Sauvé v Canada* (Chief Electoral Officer), 2002, and the US: NAACP, 2011).

### ***The prisoner as 'other'***

Proponents of enfranchisement suggest the issue goes beyond the right to vote. It says something about a society's attitude toward those who break the law. Those who argue that prisoners and ex-prisoners contaminate the 'purity of the ballot box' tend to label prisoners as other, separate; deviants who act out of the ordinary, with distinct values and who would vote differently from the rest of society. As the judge in *Washington v Alabama* put it: 'this class should be denied a right' (emphasis added). They are somehow impure, and, if allowed to vote, prisoners will taint the rest of the law-abiding electorate. Prisoners can then be placed outside the electoral process. Once they are so positioned, it becomes easier to exclude. Prisoners then become 'othered' (see

Garland, 2001: 184–6). As Mauer (2011: 554) notes, disenfranchisement ‘generally is premised on assumptions about people in prison that portray them as qualitatively distinct from citizens in the outside world’. Imprisonment defines the person, sometimes while they are incarcerated, and in many countries, even on their release. The label can be attached to them for the rest of their lives. ‘If prisoners are without a vote, without a citizen status’, argues Easton (2011: 230), ‘they are effectively non-persons, which legitimates the view that prisoners should be forgotten and marginalises them in the minds of governments and the public’.

In rejecting the ‘othering’ of prisoners, some advocates of prisoner enfranchisement argue that as stakeholders in the penal system and as citizens, prisoners should have a voice in the debates about criminal justice policies. As prisons are important public institutions, it is essential to encourage those who are housed in penal institutions to contribute to the debate on the role and function of prison and wider penal policy. Prisoners are rarely asked for their opinion and are usually spoken at, for, or more often, about. Marc Mauer of the US advocacy group, the Sentencing Project (2011: 558) asks ‘why would we not want to have the perspectives of the people who have experienced those conditions more directly incorporated into the electoral discussion?’ Those with direct experience of the criminal justice system have insights that could inform the public and enrich policy debates about the strengths and weaknesses of the penal system. There is a widespread belief among advocates of prisoner enfranchisement that allowing prisoners to vote will stimulate a more informed public debate on penal reform and lead to a more humane prison environment and a progressive penal system (Cheney, 2008; Easton, 2011; Richards and Jones, 2004).

### ***Connecting with community***

Reintegration is a prominent theme for those who argue in favour of prisoner enfranchisement. Permanent disenfranchisement (as can potentially happen in some US states) suggests that an individual will never change and indeed is incapable of so doing. Engaging in the political process might create more respect for laws and lawmakers. The vast majority of those incarcerated will return to society and exclusion from the political process may be counter-productive for the purposes of reintegration (Uggen *et al.*, 2004). Disenfranchisement provides a practical impediment to the objective of promoting respect for the law. This is essential for a more pro-social outlook, encouraging prisoners to lead law-abiding lives. Crutchfield (2007: 711) acknowledged that while ‘no solid evidence exists to show that disenfranchisement causes re-offending’ there is little to suggest that it benefits the objectives of the criminal justice system, in particular the desire to reduce recidivism. There is evidence to imply that it may be counter-productive as part of a crime-control mechanism, as it alienates ex-prisoners even further from law-abiding conformity (Crutchfield, 2007: 708).

### ***Unequal distribution of punishment***

The denial of the vote to a prisoner is also related to the timing of an election, the date of which is not set out in law in many jurisdictions. If an individual is serving a sentence on election day for a minor offence they may be denied the opportunity to exercise their franchise. An individual could serve a number of years in prison for a more serious offence and still have the opportunity to vote, if they were no longer incarcerated on election day. If voting is one of the most significant features of the social contract, these considerations make it somewhat arbitrary in relation to that contract. It is a very capricious way of dealing with a citizen, especially in countries where few sentencing guidelines exist.

It is imprisonment that will decide whether a prisoner keeps or loses the right to vote rather than their receiving a conviction. In the *Hirst* case, two judges of the European Court of Human Rights observed that ‘the reasons for handing down a custodial sentence may vary. A defendant’s age, health or family situation may result in his or her receiving a suspended sentence. Thus the same criminal offence and the same criminal character can lead to a prison sentence or to a suspended sentence’ (*Hirst v United Kingdom (No.2)*, 2005). They concluded that the reason the right to vote is denied ‘is the fact that the person is in prison’. In federal jurisdictions, two individuals may be convicted of the same crime in two different states, and one may be sentenced to a term of imprisonment and not allowed to vote while the other receives a non-custodial sentence and exercises their franchise. This has particular impact in US elections with such large numbers imprisoned and wide variations between states on voting rights for prisoners and ex-prisoners.

In short, those who would enfranchise prisoners believe that allowing prisoners and ex-prisoners to participate in civic activities will encourage them to embrace a citizen role. Removing the right to vote is part of a process of ‘othering’ prisoners, reducing them from citizen to subject. Enfranchisement is inclusionary and sends out a powerful moral message that all are acceptable, even those who have broken the social contract. Allowing prisoners to vote will, proponents of enfranchisement argue, encourage respect for laws. It affirms prisoners’ membership of the wider social order, strengthens community and social bonds, and is part of the rehabilitative process of re-connecting with society. Table 1 sets out the arguments for and against prisoner voting.

**Table 1: Arguments for and against disenfranchisement of prisoners**

<b>For disenfranchisement</b>	<b>Against disenfranchisement</b>
Civil death should be part of punishment	Civil death is out-dated
Prisoners have broken the social contract and voluntarily put themselves outside the social order	Social contract cannot be negotiated away
To preserve the purity of the ballot box	Undermines the democratic polity by denying the vote to a section of the population
Prisoners will vote collectively to change laws in their favour	Prisoners should not be debarred from the electoral process because of their voting preferences
Majority of people against allowing prisoners vote	Elected should not be allowed to decide the electorate
Government has an obligation to those who obey laws to punish those who break laws	Allowing prisoners to vote will encourage respect for laws
To disallow those who have broken laws to engage in the political process shows how much respect society has for laws	Prisoners will be less inclined to obey laws that they have had no role in deciding upon
Powerful moral symbol from society that the prisoner's behaviour is unacceptable	Symbolic statement to the prisoner that they are acceptable
Punishment can be used to form character	Allowing prisoners to vote will be a lesson in civic education
It will act as a deterrent	It is rehabilitative
Expressive punishment and moral condemnation	Retribution should have no place in modern penalty
Disenfranchisement is exclusionary	Enfranchisement is inclusionary

Source: Behan, 2014: 23

## **The politics of enfranchisement**

Some or all of the above arguments have been used in the deliberations about prisoner voting in the United Kingdom. They have acquired particular resonance since the issue has become a matter of judicial, political and public debate over the last decade. This section will outline how the issue of prisoner enfranchisement has been played out in the UK, which began when a number of prisoners sought access to the franchise.

### ***United Kingdom and prisoner voting***

Prior to mass suffrage with the Representation of the People Act 1918, prisoner voting was not an issue. The Forfeiture Act 1870 barred from voting anyone sentenced to over 12 months. Effectively all prisoners were disenfranchised because they were unable to register, as they were not in a position to attend polling stations (Murray, 2013: 515–16). While various electoral acts mentioned prisoners, the Representation of the People Act 1983 stated explicitly that a ‘convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any parliamentary or local government election’. As there was no facility to allow them to vote, all prisoners (whatever their status) were in effect excluded from the franchise. This was amended in 2000 to prevent only convicted prisoners from voting.

### ***Europe and prisoner voting***

The debate on prisoner enfranchisement in the United Kingdom has been caught up in a wider controversy around the powers and jurisdiction of ‘Europe’ and its institutions. After the Human Rights Act incorporated the European Convention on Human Rights (ECHR) into United Kingdom law, the High Court rejected an application from three prisoners that denying them the vote contravened their rights under the ECHR. Lord Justice Kennedy concluded that ‘there would seem to be no reason why Parliament should not, if so minded, in its dual role as legislator in relation to sentencing and as guardian of its institutions, order that certain consequences shall follow upon conviction or incarceration’ (*Pearson and Martinez v Secretary of State for the Home Department* EWHC [2001] Admin 239). One of those involved in the case, John Hirst appealed and in March 2004, the European Court of Human Rights (ECtHR) ruled that there had been a breach of Article 3 of Protocol No. 1 of the ECHR which obliges countries to ‘hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. The court ruled that the right to vote and participate in elections are ‘central to democracy and the rule of law’, but it conceded that, ‘they are not absolute and may be subject to limitations’. However, it rejected as ‘arbitrary’ and ‘disproportionate’ a ban on all convicted prisoners. It accepted that while this is ‘an area in which a wide margin of appreciation should be granted to the national legislature [...] It cannot accept however that an absolute ban on voting by any serving prisoner in any circumstances falls within

an acceptable margin of appreciation' (*Hirst v United Kingdom* (No. 1), 2004). In effect, the court decided that some prisoners in the United Kingdom had their human rights contravened by being denied access to the franchise.

On appeal to the Grand Chamber of the ECtHR, the UK government argued that the right to vote was not absolute. Convicted prisoners forfeited the right to take part in deciding who should govern as they had 'breached the social contract'. The government claimed that disqualification would achieve the aims of preventing crime, punishing prisoners, enhancing civic responsibility and respect for the rule of law by 'depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made'. Disenfranchisement only affected those who had been given a custodial sentence and, thus, the duration was 'accordingly fixed by the court at the time of sentencing' (*Hirst v United Kingdom* (No. 2), 2005).

The Grand Chamber of the ECtHR, by a margin of 12 votes to five, found against the British government. While it accepted that each signatory to the ECHR must be allowed a margin of appreciation, '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. Rejecting the UK government's argument that parliamentary approval had been given for this measure, the Grand Chamber ruled: 'It cannot be said that there were any substantive debates by members of the legislature on the continued justification in light of modern-day penal policy and human rights standards for maintaining such a general restriction on the right of prisoners to vote'. As for the plea from the UK government that the lower court's 'finding of a violation was a surprising result, and offensive to many people', Judge Caflisch remarked that 'decisions taken by the court are not made to please or indispose members of the public, but to uphold human rights principles' (*Hirst v United Kingdom* (No. 2), 2005).

### ***UK Parliament or European Court?***

In response to the court's judgment, the UK government began a series of consultations (Department for Constitutional Affairs (DCA), 2006; Ministry of Justice, 2009).

Introducing the consultative process, the government continued to argue that the loss of the vote 'is a proper and proportionate punishment for breaches of the social contract that resulted in imprisonment'. Successive governments held that the 'right to vote forms part of the social contract between individuals and the state' (DCA, 2006: Foreword). However, by the time it got to the second stage of consultation the government had reached 'the preliminary conclusion that to meet the terms of the judgment a limited enfranchisement of convicted prisoners in custody should take place' (Ministry of Justice, 2009: 21). Postal voting was the most likely mechanism, with



prisoners declaring a 'local connection', and eligibility would be based on sentence length. This second stage consultation paper put forward a number of options, including those sentenced to less than one, two, or four years retaining the right to vote. The government was nevertheless 'inclined towards the lower end of the spectrum of these options' and the seriousness of the offence should determine eligibility to vote. But it was determined that 'no prisoners sentenced to 4 years' imprisonment would be eligible to vote' (Ibid.: 25).

Nearly five years after *Hirst* and with the government seemingly in no great rush to deal with the issue, the Committee of Ministers of the Council of Europe 'strongly urged the authorities to rapidly adopt measures, of even an interim nature, to ensure the execution of the Court's judgment before the forthcoming general election' (Committee of Ministers, 4 March 2010: cited in Horne and White, 2015: 22). However, the 2010 general election was held without any measures introduced to allow convicted prisoners access to the franchise. Despite the Liberal Democrats having previously voiced support for prisoner voting, David Cameron set the tone for the new coalition government's position: 'It makes me physically ill even to contemplate having to give the vote to anyone who is in prison. Frankly, when people commit a crime and go to prison, they should lose their rights, including the right to vote' (Hansard, HC Debates, 3 November 2010, vol. 517, col. 921).

A number of months later, a backbench debate was held on prisoner enfranchisement which the initiators hoped would satisfy one of the ECtHR's rulings, that the lack of political discussion undermined the legitimacy of disenfranchisement. The debate was proposed by among others, David Davis, Conservative MP, who believed that there 'have been many important debates in this slot, but I lay claim to this one being unique, because it gives this House – not the Government – the right to assert its own right to make a decision on something of very great democratic importance, and to return that decision to itself'. He suggested there were two different issues at stake: firstly, the right of the ECtHR or the UK parliament to decide on the matter and secondly, voting rights for prisoners. While rejecting what he believed was European interference on the matter, he took up the latter subject. He supported the concept that 'if you break the law, you cannot make the law'. If a crime is serious enough for a perpetrator to be sent to prison, 'a person has broken their contract with society to such a serious extent that they have lost all these rights: their liberty, their freedom of association and their right to vote' (Hansard, HC Debates, 10 February 2011, vol. 523, col. 494).

Former Labour Home Secretary, Jack Straw – another of those who proposed the motion – asked whether 'through the decision in the *Hirst* case and some similar decisions, the Strasbourg Court is setting itself up as a supreme court for Europe with



an ever-widening remit' (Hansard, HC Debates, 10 February 2011, vol. 523, col. 502). After much discussion, the House of Commons noted the *Hirst* ruling and by a majority of 234 to 22 passed a motion acknowledging the 'treaty obligations of the UK', but believed that 'legislative decisions of this nature should be a matter for democratically elected lawmakers; and supports the current situation in which no sentenced prisoner is able to vote except those imprisoned for contempt, default or on remand' (Hansard, HC Debates, 10 February 2011, vol. 523, col. 586). Even though the House of Commons gave its reply to the ECtHR, it was still up to the government to respond to the *Hirst* judgment.

Despite the court ruling on prisoner voting a number of other cases were being heard on the issue (*Frodl v Austria* and *Scoppola v Italy*). While these cases were ongoing, the UK government was allowed more time to respond to *Hirst*. Finally, after the ruling of *Scoppola v Italy* (No.3) in May 2012, the UK government was given another six months by the ECtHR after it was reminded that 'the Court has repeatedly affirmed that the margin in this area is wide' (*Scoppola v Italy*, (No.3) 2012). On 22 November 2012, just over 24 hours before the deadline set by the ECtHR, the government introduced the Voting Eligibility (Prisoners) Draft Bill. The bill, to be considered by a committee of both Houses of Parliament, proposed three options: prisoners sentenced to less than four years would be allowed to vote; prisoners sentenced to less than six months would retain the franchise; and the final option – a restatement of the existing ban on voting for all sentenced prisoners. In his statement to the House of Commons, the then Justice Secretary, Chris Grayling, argued that the ECtHR had gone beyond the original intention of the ECHR. He was giving parliament the authority to consider the bill as its response to the ECtHR, because, while he recognised that it was his 'obligation to uphold the rule of law seriously [...] Equally, it remains the case that Parliament is sovereign' (Hansard, HC Debates, 22 November 2012, vol. 553, col. 745). While he would ask a parliamentary committee to consider legislative proposals, 'Ultimately, if this Parliament decides not to agree to rulings from the ECtHR, it has no sanction. It can apply fines in absentia, but it will be for Parliament to decide whether it wishes to recognize those decisions' (Hansard, HC Debates, 22 November 2012, vol. 553, col. 754). The Labour Party supported the government's approach. This was, according to Shadow Justice Spokesman, Sadiq Khan, 'a case of offenders, sent to prison by judges, being denied the right and the privilege of voting, as they are denied other rights and privileges' (Hansard, HC Debates, 22 November 2012, vol. 553, col. 746–7).

While this bill was being considered, another case came before the UK Supreme Court when prisoners challenged their right to vote under EU law. This was rejected by the Supreme Court because it considered eligibility to vote under EU law as a matter for national parliaments. Lord Mance ruled that relevant EU treaties were concerned with

‘ensuring equal treatment between EU citizens residing in member states other than that of their nationality, and so safeguarding freedom of movement within the EU’. Lord Sumption echoed this: ‘In any democracy, the franchise will be determined by domestic laws which will define those entitled to vote in more or less inclusive terms’. He believed that the ECtHR had ‘arrived at a very curious position’, concluding that: ‘Wherever the threshold for imprisonment is placed, it seems to have been their view that there must always be some offences which are serious enough to warrant imprisonment but not serious enough to warrant disenfranchisement. Yet the basis of this view is nowhere articulated’ (*R (Chester) v Secretary of State for Justice and McGeoch v Lord President* [2013] UKSC 63).

In another sign of widespread political rejection of *Hirst*, the Scottish parliament passed the Scottish Independence (Referendum) Bill, which included a clause banning convicted prisoners from voting in the 2014 referendum. The Scottish government relied on legal advice that Article 3 of Protocol No. 1 of the ECHR applied only to elections, not to referenda. The Scottish National Party, as it made much of its desire to widen the franchise to include 16 and 17 year-olds, sought to limit the franchise with the exclusion of prisoners. Deputy First Minister Nicola Sturgeon argued that the government was ‘not persuaded’ of the case for allowing convicted prisoners to vote (cited in Robertson, 2013: 44).

Meanwhile, the Joint Select Committee on Draft Voting Eligibility (Prisoners) Bill began taking oral evidence in April 2013. At the opening session, chair of the committee, Nick Gibb MP, explained that: ‘All the main parties in the UK, and the vast majority of Members of Parliament and the public, are opposed to allowing prisoners to vote’. The majority report of the committee (with dissension from three members, including the chair) recommended enfranchising prisoners serving 12 months or less, and those with longer sentences should be entitled to apply for registration six months before their scheduled release date (Report of the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, 2013: 62–3). It suggested that a bill to this effect be presented to parliament during the 2014–15 session. Six months later, the then Secretary of State for Justice, Chris Grayling (2014) thanked the committee for its consideration of the issues and assured them that the matter is ‘under active consideration within government’.

In February 2015, three months prior to the UK general election the European Court of Human Rights again ruled on prisoner voting in *McHugh and Others v UK* (2015). The case concerned 1,015 prisoners who were unable to vote in elections because they were prevented from exercising their franchise. The Court ruled that there was a violation of Article 3 of Protocol No. 1 to the Convention but it rejected their claim for compensation. Despite finding in their favour, in a significant move that may have major

implications for prisoners and their legal advisors in future proceedings, the court also rejected awarding the prisoners their legal costs.

With the general election imminent, the Joint Committee on Human Rights (JCHR) condemned the government for its failure to legislate in response to *Hirst*, pointing out that ‘the matter will continue to be pressing in the new Parliament’ and noted that elections to the devolved assemblies in 2016 will likely mean more court challenges both domestically and in Europe (JCHR, 2015: 14). The JCHR believed that government inaction on prisoner enfranchisement undermined the reputation and credibility of the United Kingdom on the international stage. It continued:

*Judgments of the European Court of Human Rights are not merely advisory. States are under a binding legal obligation to implement them, an obligation voluntarily assumed by the UK when it agreed to Article 46(1) of the European Convention on Human Rights. Compliance with the judgments of the Court concerning prisoner voting is therefore a matter of compliance with the rule of law.*

*(JCHR, 2015: 14)*

The Committee recommended that the next Government should introduce legislation at ‘the earliest opportunity in the new Parliament to give effect to the recommendation of the Joint Committee on the Draft Prisoner Voting Bill’. This should be done not only to prevent further court cases and the potential for damages, ‘but, above all, to demonstrate the UK’s continuing commitment to the principle of the rule of law’ (Ibid.: 15).

Despite the rulings in the European Court of Human Rights, censure by the Council of Ministers, pleas from the Joint Committee on Human Rights, and a parliamentary committee report advocating some form of prisoner enfranchisement, the 2015 general election took place without any convicted prisoners having access to the franchise. It will be up to the new government to respond to the *Hirst* ruling. Alone among the English based Westminster parties the Greens have pledged to: ‘Grant prisoners the right to vote’ (Green Party, 2015: 76). But as most other major political parties have either come out against prisoner voting (Conservative Party, 2015: 60; UKIP, 2015: 55) or did not mention it in their general election manifesto (Labour Party, 2015; Liberal Democrats, 2015), but have come down against prisoner voting in the past it seems unlikely that any convicted prisoners in the United Kingdom will be allowed access to the franchise in the near future.

### **What if prisoners could vote?**

Although the United Kingdom is not alone in banning all prisoners from voting, it is in a minority in the Council of Europe, alongside, among others, Armenia, Georgia and Russia (Horne and White, 2015: 52–62). After the *Hirst* judgment, a number of countries introduced legislation to enfranchise some or all prisoners, including the Republic of Ireland, Cyprus, Belgium and Moldova. Many of the United Kingdom's European other partners in the Council of Europe allow some or all prisoners to vote, including Albania, Bosnia, Norway and Poland (Horne and White, 2015: 52-62). Other jurisdictions outside Europe that allow some or all prisoners to vote include Canada, Israel and South Africa. Even in the US, where over 5.8 million prisoners and former prisoners are disenfranchised (Uggen et al., 2012), two states – Maine and Vermont – allow prisoners to vote. This section considers what might happen if prisoners in the United Kingdom were allowed to vote.

### ***Prisoner voting***

There is only limited data available to give some indication of what happens when prisoners are allowed access to the franchise. The information is sketchy as few electoral authorities collect data specifically on voting in prison. Evidence available indicates that turnout varies, but is generally low. In the Canadian province of Quebec, voting by prisoners in three elections in the early 1990s reached 74 per cent, but in 1992 only 29 per cent of eligible prisoners in the Canadian province of Ontario voted in a constitutional referendum. In the Canadian Federal elections in 2000, 5,194 (22.5 per cent) of eligible prisoners cast their ballots (Parkes, 2003: 101). In a survey of Danish prisons, Storgaard (2009: 254) estimated varying levels of turnout in different prisons, between 20 and 80 per cent at parliamentary elections, between 5 and 70 per cent at local elections and between 10 and 50 per cent at European referenda. Mauer (2011: 564) found that in Italy and the Netherlands, turnout was between 20 and 60 per cent. In Belgium, Lithuania and Romania, Mauer (Ibid.: 564) reported that more than 60 per cent of prisoners vote. In a 2011 vote among the San Francisco County jail population (who are entitled to vote), 79 per cent of eligible voters cast their ballots in elections that included ballots for district attorney and sheriff (Roberts, 2011). In the Republic of Ireland, in the first election that allowed prisoners to vote in 2007, 14 per cent registered and approximately 10 per cent of the prison population cast their ballots (Behan, 2014: 97).

The turnout of those incarcerated reflects the trends among similar groups outside. Internationally, there is remarkable similarity in the demographic of those who are sent to prison, with a greater proportion of young, urban, males with low levels of traditional educational attainment from lower socio-economic and minority communities in prison. This section of the population has low rates of civic engagement, political participation

and subsequent voting. All things being considered, those who end up in prison are unlikely voters.

However, regardless of the level of political participation among prisoners, there is no evidence that the democratic process has been undermined or elections tainted by including prisoners in the franchise. Many of the UK's partners in the Council of Europe and others throughout the world which allow prisoner voting would position themselves in the liberal democratic family of nations. While there may be democratic deficiencies in these states, there is no evidence that these are a result of prisoner voting.

### **Conclusion: To disenfranchise or enfranchise?**

The decision to enfranchise or disenfranchise the imprisoned usually derives from differing notions of citizenship, contrasting interpretations of democracy and a range of perspectives on the use/s of punishment. Denying the right to vote 'is a symbolically serious matter, as marking one's temporary and permanent exclusion from the rank of full citizen, and thus from full membership of society' (Duff, 2005: 213). Civil death is generally considered an antiquated and outdated concept and anathema to the modern ideals of universal representative government. The denial of the right to vote to prisoners by the judiciary, executive or legislature raises serious questions of consent on which modern democratic authority is built. It expands punishment from denial of liberty to removal of the most significant manifestation of citizenship in a modern democracy, the right to vote. To remove that right undermines the universality and mutuality of citizenship, which affects not just prisoners, but all citizens.

The social contract, universally agreed, is central to modern democracy and without universality, the social contract is diminished. Removing the right to vote not only undermines the social contract but damages the social compact on which community and citizenship is constructed. While prisoners may have broken the social contract and therefore, as proponents of disenfranchisement argue, voluntarily put themselves outside the social order, others who have damaged the social compact are less likely to appear before the courts and subsequently, end up in prison and therefore be denied the franchise.

To disenfranchise because of presumed voting preference – the voting bloc argument – undermines the concept of democracy. Diversity is the oxygen of democracy where laws are open to change and modification through decisions of the people, determined by voting. Individuals come together as aggregates to engage in the political process. They co-operate in the formation of political parties that lie at the heart of democratic society. However, there is no evidence of a voting bloc amongst prisoners. Indeed, the only national survey of prisoners' voting preferences – carried out in the Republic of

Ireland – found that the most favoured party amongst prisoners was also the most popular party among the voting population outside (Behan, 2014: 102). Nevertheless, even if evidence suggested a voting bloc, surely both sides in the debate would agree that exclusion because of political preference in a modern democracy is unacceptable.

For those who would argue that imprisonment should comprise more than the denial of liberty, including the removal of the franchise as a result of the ‘collateral consequence’ of imprisonment, this changes the nature of that punishment. Prison has traditionally been about loss of liberty, not the loss of citizenship. If imprisonment, rather than conviction, is the deciding feature, this is a very arbitrary way of denying citizenship rights as in numerous jurisdictions, including the UK, many (in some cases, the majority) of those who receive a conviction are not given a custodial sentence.

Denial of the vote also says something about society’s treatment of prisoners. It encourages the prisoner to be treated as ‘other’. The US and the UK are the two liberal democratic countries where disenfranchisement seems most entrenched, and this possibly reflects the more punitive tone of their penal policies (see Garland, 2001). There are strong arguments and evidence that prisoners’ maintaining a link with society outside and in particular with their local community, can act as spur towards reintegration. To remove the right to vote, one of the most important aspects of citizenship, adds to the dislocation from, and disconnection with, the world outside prison walls. It creates another layer of punishment beyond the denial of liberty, can become an instrument of social exclusion, and can have significant longitudinal consequences in terms of voting among ex-prisoners. To deny the right to vote not only undermines an individual’s citizenship, it can weaken the fabric of communities that have greater proportions of their citizens incarcerated. Prison populations tend to be young, at a time in their lives when the voting habit is weaker. Therefore, losing the right to vote at a young age does not necessarily deter an individual from committing a crime. In those countries that disenfranchise prisoners and ex-prisoners, there is no evidence to suggest that it has been a catalyst for reduced levels of crime or imprisonment.

As the new government considers its response to the *Hirst* judgment, it might reflect on allowing prisoners access to the franchise. It could consider this not because it has been instructed to do so by a European or any other court, but rather because the new parliament is a chance for politicians and policymakers to think anew. There is little evidence that the current policy of denying prisoners the right to vote has achieved the goal which a previous UK government argued in *Hirst* of ‘preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law’ (*Hirst v UK* (No. 2) 2005). In his first major policy speech as Secretary of State for Justice, Michael Gove argued that ‘prison is a place where people are sent as a



punishment, not for punishments’, and called for a ‘new approach to prison’. This recognises that prisoners ‘can become assets – citizens who can contribute’ (Gove, 2015). Part of this new approach could be to consider allowing prisoners to contribute as citizens by giving them access to the franchise. With a new parliament, a new government and a new Justice Secretary, this is a chance to consider alternatives, sometimes hitherto unthinkable ones, such as enfranchising prisoners. It offers an ideal opportunity to re-imagine penal policy.



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