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## **A Ban Behind Bars: A Critical Analysis of Britain's Blanket Ban on Prisoner Voting**

**ABSTRACT-** Away from the politicised debate concerning parliamentary sovereignty too often associated with the decision in *Hirst v United Kingdom (No 2)*, this article examines whether the blanket ban on prisoner voting is appropriate in Britain. It demonstrates how there is a right to vote protected in international law. In so doing, this article discredits the paradox between those who moot the importance of voting in society, whilst simultaneously claiming that the vote is only a privilege. This article challenges the historic notion of a civic death and asserts that the connection between the enjoyment of fundamental rights and virtue is weak. The extent to which prisoners retain their citizenship status and associated human rights is studied, ultimately concluding that they retain full citizenship whilst incarcerated. It is argued, therefore, that the current ban is inconsistent with a prisoner's ongoing fundamental right to vote. Whilst the court will allow some limited interference if adequately justified, this article will demonstrate how the blanket ban fails to meet either of the aims maintained by the government in *Hirst*. The disproportionate application of the ban will also be highlighted. By concluding that the ban, far from punishing or enhancing civic responsibility, actually undermines the rehabilitation of those in custody, this article will assert that prisoner disenfranchisement is not appropriate in Britain. It is conclusively argued that it would be more appropriate to give all prisoners the vote.

**KEYWORDS** – Prisoner, human rights, virtues, rehabilitation, responsibility, vote, incarceration.

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## **A Ban Behind Bars: A Critical Analysis of Britain's Blanket Ban on Prisoner Voting\*\***

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### *1. Introduction.*

Two first-time offenders appear in court on a Monday morning to be sentenced, having both pleaded guilty to burglary. The circumstances are identical, but they appear in different courts. The first offender's custodial sentence is suspended for one year. The other offender, however, is given a short, immediate custodial sentence. Notwithstanding the obvious injustice surrounding the disparity between the sentences, a more subtle but equally unfair consequence has emerged. Whilst the offender whose sentence has been suspended retains his fundamental right to vote, the other, completely unconnected to his offence and *just* by virtue of his incarceration, *loses his right to vote*.

In light of this inequity, and away from the politicised debate on parliamentary sovereignty frequently associated with the prisoner

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voting narrative, this article seeks to examine the extent to which the current blanket ban on prisoner voting is appropriate in Britain. Chapter One of this article will provide an overview of the law on prisoner disenfranchisement, highlighting how the blanket ban materialised over time and how the contemporary contention evident above has intensified following the European Court of Human Rights (ECtHR) ruling in *Hirst v UK*<sup>1</sup>. Next, in evidencing the meaning of the vote, Chapter Two will discuss whether there is a legally recognised right to vote, or whether the right is only a privilege. Chapter Three challenges the extent to which a prisoner is subject to a ‘civic death’, and in so doing determines that prisoners retain their human rights throughout incarceration. Whilst there has been an occasional judicial willingness to permit *some* interference with human rights in prison so to ensure good order and discipline, Chapter Three will demonstrate how the removal of the vote is inconsistent with the prisoner’s ongoing status as a holder of rights. Finally, Chapter Four, in examining the extent to which the aims asserted in *Hirst* are truly legitimate, will argue that the ban fails to punish or enhance the civic responsibility of those in prison. This chapter will also confirm, in accordance with the decision in *Hirst*, that the blanket ban is not proportionate to any such aims<sup>2</sup>. Ultimately, this article will suggest that the *cause célèbre* that is the debate on prisoner voting requires consideration so to fully respond to both the legal and practical arguments *in favour* of prisoner enfranchisement<sup>3</sup>.

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<sup>1</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004.

<sup>2</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 82.

<sup>3</sup> E. BATES, *Analysing the Prison Voting Saga and the British Challenge to Strasbourg*, in *Human Rights Law Review*, 14/2014, 503.

## 2. Prisoner disenfranchisement in Britain

The aim of this chapter is to provide an analysis of the current law on prisoner disenfranchisement in Britain. This chapter will examine how the ban on prisoner voting has evolved and developed over time, culminating with the current *blanket ban*. The chapter will explain the landmark decision of *Hirst v UK*, in which the ECtHR held that Britain's blanket ban was a breach of the European Convention on Human Rights (ECHR)<sup>4</sup>. In so doing, this chapter will demonstrate how successive governments have attempted to ignore the ruling, arguing instead that the ban serves to punish and enhance the civic responsibility of those imprisoned.

### 2.1 Universal suffrage in Britain: A myth or reality?

Whilst it is widely acknowledged that the right to vote is a foundational aspect of any democracy, the British government worryingly continues to disenfranchise a significant proportion of the prison population<sup>5</sup>. The starting point here is section 3 of the Representation of the People Act (RPA) 1983, as amended by the RPA 1985, which provides 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 elections’<sup>6</sup>.

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<sup>4</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004.

<sup>5</sup> *Minister of Home Affairs v National Institute for Crime and the Re-integration of Offenders and Others* (CCT 03/04) [2004] ZACC 10, 47.

<sup>6</sup> Representation of the People Act 1983, as amended by the Representation of the People 1985, s 3 (1) [Emphasis added].

The Act does, however, allow those incarcerated for either contempt of court or failing to pay a fine, to vote<sup>7</sup>. Moreover, following a Home Office Report in 1999 that concluded that the removal of the vote from those remand was an ‘accident’ considering the presumption of innocence, the RPA 2000 altered the law to allow remand prisoners to vote<sup>8</sup>.

Described as a ‘relic of the 19<sup>th</sup> century’, the roots of the ban on prisoner voting can be traced back to the Forfeiture Act 1870 and the belief that those found guilty of committing a crime were subject to a loss of rights through their ‘civic death’<sup>9</sup>. Although cited as the source of the objectionable ban, the Forfeiture Act 1870 actually liberalised much of the law on punishment and forfeiture. For example, most significantly, felons no longer automatically forfeited their land following incarceration<sup>10</sup>. Despite this, the Act stated that *all* those convicted of a felony and subsequently sentenced to prison for longer than 12 months, would be disenfranchised<sup>11</sup>. Significantly, however, those guilty of a misdemeanour, or anyone sent to prison for less than 12 months for a felony, retained their right to vote.

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<sup>7</sup> Representation of the People Act 1983, as amended by the Representation of the People Act 1985, s 3 (2).

<sup>8</sup> Home Office, *Working Party on Electoral Procedures* (National Archives, 1999) in < <http://www.dca.gov.uk/elections/reports/procs/report.htm>>, accessed 2 March 2016; Representation of the People Act 2000, s 5.

<sup>9</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, Forfeiture Act 1870.

<sup>10</sup> C. MURRAY, *A Perfect Storm: Parliament and Prisoner Disenfranchisement*, in *Parliamentary Affairs*, 66/2013, 511, 515; WING HONG CHUI, ‘Prisoners’ Right to Vote in Hong Kong: A Human Rights Perspective’, and in *Asian Journal of Social Science*, 35/2007, 179, 181.

<sup>11</sup> Forfeiture Act 1870, s 2.

Aside from the provision contained within the Forfeiture Act, it is often mistakenly believed that the universal disenfranchisement of prisoners has been a stable, ongoing feature of Britain's democracy<sup>12</sup>. In fact, throughout the 20<sup>th</sup> century the ban has been subject to a number of exceptions. Most expressively, as shown above, the Forfeiture Act did not disenfranchise everyone found guilty of a felony, nor *any* of those guilty of a misdemeanour. Nevertheless, following attempts to curb prisoner voting by the Victorian judiciary, the RPA 1918 placed a restriction on those incarcerated from being able to state the prison they were occupying as their 'place of residence'<sup>13</sup>. This meant that whilst not statutorily disenfranchised, even those serving less than 12 months were incapable of holding an address necessary for the purposes of registering on the electoral role<sup>14</sup>. Clearly departing from what the drafters of the Forfeiture Act had intended, a blanket ban on *all* serving prisoners materialised. Notwithstanding the universal disenfranchisement of prisoners, the petition for universal suffrage in Britain has been an historical struggle<sup>15</sup>. Slowly gaining momentum, the debate over the electoral franchise culminated following the First World War in the RPA 1918<sup>16</sup>. This Act abolished any remaining property disqualifications on voting, allowed all men over the age of 21 to vote and most radically, allowed women over the age of 30 to vote for the first time<sup>17</sup>. Ten years later, the age restriction for women was lowered to

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<sup>12</sup> C. MURRAY, *A Perfect Storm: Parliament and Prisoner Disenfranchisement*, in *Parliamentary Affairs*, 66/2013, 513.

<sup>13</sup> Representation of the People Act 1918, s 41 (5).

<sup>14</sup> HC Debate 20 November 1917, vol 99, col 1118; L. FOX, *The English Prison and Borstal* (Routledge & Kegan Paul, 1952) 220.

<sup>15</sup> S. EASTON, *Prisoners' Rights: Principles and Practice*, Routledge, 2011, 229.

<sup>16</sup> Representation of the People Act 1918.

<sup>17</sup> *Ibid.*

match that of the male restriction<sup>18</sup>. Following the Second World War, and in order to return to a state of affairs the drafters of the Forfeiture Act had intended, all prisoners serving a sentence of less than 12 months were administratively able to vote following the RPA 1948<sup>19</sup>. The Act stated that the postal vote was available to those ‘no longer resident at their qualifying addresses’<sup>20</sup>. Thus, in accordance with the Forfeiture Act, all those sentenced to less than 12 months could register to vote through a postal ballot. However, the real liberalisation of the ban on prisoner votes came, although perhaps unintentionally, following the enactment of the Criminal Law Act 1967<sup>21</sup>. This Act removed the distinction between felonies and misdemeanours construed within the Forfeiture Act<sup>22</sup>. As all offences were now classed within the same category, the restriction based on the distinction between those found guilty of a felony or a misdemeanour became obsolete. It was soon argued so to promote equality within Britain, that as there were ‘no similar [disenfranchisement] consequences’ following a conviction in Scotland, all prisoners in England and Wales should also be allowed to vote<sup>23</sup>. Significantly, therefore, between 1968 and 1969 all prisoners in Britain, regardless of their crime or sentence length, could vote through a postal ballot.

In the spirit of the apparent social and political appetite for universal suffrage, it is unsurprising that Harold Wilson’s government lowered

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<sup>18</sup> Representation of the People (Equal Franchise) Act 1928.

<sup>19</sup> Representation of the People Act 1948.

<sup>20</sup> Representation of the People Act 1948, s 8 (1) (c).

<sup>21</sup> Criminal Law Act 1967.

<sup>22</sup> Criminal Law Act 1967, s 1.

<sup>23</sup> *Report of Committees Criminal Law Revision Committee: Seventh Report* (Cmd 2659, 1965) [79].

the voting age from 21 to 18 in 1969<sup>24</sup>. It is surprising, however, that the same government – scarcely without any debate – abruptly decided to reinstate the blanket ban on *all* prisoners in Britain<sup>25</sup>. The reversion back to the ban was justified at the time so to ‘give full effect’ to the recommendations of the private Speaker’s Conference Review of Electoral Law<sup>26</sup>. The relevant provision articulated in section 4 of the RPA 1969 has been repeatedly affirmed, stipulating that all prisoners, notwithstanding the narrow exceptions explained above, are unable to vote<sup>27</sup>.

Whilst there had been a positively clear and definite trend within Britain towards universal suffrage, it is unfortunate that within the space of two years, all prisoners went from being able to vote, to not<sup>28</sup>. At the time, the decision to disenfranchise the prison population ran directly against the populist movement towards equal, universal suffrage. More recently, it has been asserted that Britain’s blanket ban continues to ‘fly in the face of the [contemporary] international consensus’ on the *right* to vote, the ongoing status of prisoners as holder of human rights, and penal punishment and rehabilitation<sup>29</sup>.

## 2.2 *Hirst v UK*.

Given the significant implication of section 3 of the RPA 1983 on prisoners, it is somewhat surprising that it took until 2001 before the

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<sup>24</sup> Representation of People Act 1969.

<sup>25</sup> Representation of People Act 1969, s 4.

<sup>26</sup> HC Debate 18 November 1967, vol 773, col 918.

<sup>27</sup> See Page 8.

<sup>28</sup> G. ROBINS, *The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand*, in *New Zealand Journal of Public and International Law*, 4/2016, 165, 172.

<sup>29</sup> S. FREDMAN, *From dialogue to deliberation: human rights adjudication and prisoners’ rights to vote*, 2013, 292, 309.



ban was legally challenged. Nevertheless, when it was contested firstly in the domestic court, and then more successfully in the ECtHR, a 'landmark' ruling provided the impetus for the contemporary debate on whether prisoners should have the vote<sup>30</sup>. Along with two others, John Hirst sought a declaration stating that section 3 of the RPA 1983 was incompatible with the ECHR<sup>31</sup>. In rejecting the claim in the Divisional Court, Kennedy L.J. relied on the ECtHR judgment in *Mathieu-Mohin v Belgium*: whilst under Article 3 of Protocol No. 1 of the ECHR (A3P1) there is a right to vote, the right could be subject to implied limitations<sup>32</sup>.

Hirst decided to further pursue his claim, seeking permission to appeal to the ECtHR. In a decisive decision, the ECtHR held that whilst Member States did hold some margin of appreciation on how to implement A3P1, because the blanket ban disproportionately affected *all* prisoners, it was in breach of the Convention<sup>33</sup>. Disappointed with the decision, the UK government requested that the case be referred to the Grand Chamber for review. Although accepting that there could be *some* impediment on the right to vote, the Grand Chamber held that any such interference had to be in pursuit of a legitimate aim and proportionate to the fulfilment of that aim<sup>34</sup>. The government argued that the restriction on prisoner votes pursued the legitimate aim of 'preventing crime and punishing

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<sup>30</sup> A. LESTER, *The ECHR after 50 Years European Human Rights Law Review*, 2009, 461, 474.

<sup>31</sup> *R v Secretary of State for the Home Department, ex parte Pearson and Martinez; Hirst v Attorney-General* [2001] EWHC (Admin) 239.

<sup>32</sup> *R v Secretary of State for the Home Department, ex parte Pearson and Martinez; Hirst v Attorney-General* [2001] EWHC (Admin) 239 citing *Mathieu-Mohin v Belgium* App no 9267/81 (ECtHR, 2 March 1987) [52].

<sup>33</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 31.

<sup>34</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 73.

offenders [as well as] enhancing civic responsibility and respect for the rule of law'<sup>35</sup>. The Grand Chamber established that Britain's margin of appreciation, whilst wide, was not all encompassing<sup>36</sup>. Therefore, the Court concluded that 'such a general, automatic and indiscriminate restriction' on a fundamental Convention right was not proportionate and must be viewed as 'falling outside any acceptable margin of appreciation'<sup>37</sup>. The Grand Chamber found against the government and upheld the Chamber's decision that the British blanket ban on prisoner voting was incompatible with the right to vote under A3P1.

### 2.3 A poor response to *Hirst v UK*

Following Strasbourg's politically unpopular decision in *Hirst v UK*, governments of all colours have used numerous schemes so as to avoid any change in the law<sup>38</sup>. The desire of those sitting in the House of Commons to obstruct the adoption of even a slightly more nuanced approach culminated in 2011. In the process of debating an adjustment in the law, David Davis MP and Jack Straw MP introduced a cross-party motion rejecting the proposal to give prisoners serving less than four years the vote<sup>39</sup>. Although there was overwhelming support for the motion and the maintenance of the blanket ban on prisoner voting, subsequent ECtHR judgments have continued to restate the need for Britain to reform the law because of

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<sup>35</sup> Ibid., 50.

<sup>36</sup> Ibid., 74, 75, 82.

<sup>37</sup> Ibid., 82, 85.

<sup>38</sup> A. TICKELL, *Prisoner Voting Gambits: Disappointment all round in Chester, McGeoch and Moohan*, in *The Edinburgh Law Review*, 18/2014, 289, 290.

<sup>39</sup> HC Debate, 10 February 2011, vol 523, 495.

the A3P1 breach<sup>40</sup>. Most obviously, following Attorney-General Dominic Grieve QC's attempt to persuade the Grand Chamber to reverse the *Hirst* ruling in *Scoppola v Italy*, the ECtHR maintained that the automatic and indiscriminate nature of the ban meant that modification was non-negotiable<sup>41</sup>. The Council of Europe's Committee of Ministers has also expressed 'serious concern' that change has not occurred, calling on the UK government to 'rapidly adopt' measures so to allow prisoners to vote<sup>42</sup>.

In the shadow of growing pressure from Strasbourg, and following the aforementioned vote in the House of Commons in 2011, the Coalition government established the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill to look again at what reform, if any, should be implemented<sup>43</sup>. In his capacity as Justice Secretary, Chris Grayling superficially welcomed the politically pragmatic and considered recommendation of the Committee that the vote should be given to those in prison for 12 months or less<sup>44</sup>. Fuelling claims that the Joint Committee was set up just so the government was seen

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<sup>40</sup> For example: *Frodl v Austria*, App no 20201/04, ECtHR, 8 April 2010, 25; *R (Chester) v Secretary of State for Justice*; *McGeoch v The Lord President of the Council & Anor*, 2013, UKSC 63; *Frith and Others v United Kingdom*, App no 47784/09, ECtHR, 12 August 2014; *McHugh and Others v United Kingdom* App no 51987/08, ECtHR, 10 February 2015.

<sup>41</sup> *Scoppola v Italy No. 3* App no 126/05, ECtHR, 22 May 2012, 78.

<sup>42</sup> The Council of Europe's Committee of Ministers Interim Resolution CM/ResDH (2009) 1601 (3 December 2009); The Council of Europe's Committee of Ministers Decisions CM/Del/Dec (2010) 1078.

<sup>43</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL 103, HC 924) [1-2].

<sup>44</sup> Rt Hon Chris Grayling, 'Draft Voting Eligibility (Prisoners) Bill (*parliament.uk*, 25 February 2014) in <http://www.parliament.uk/documents/joint-committees/Draft-Voting-Eligibility-Prisoners-Bill/Grayling-letter-to-Chair.pdf>, accessed 27 October 2015.

to being doing something, no further action has been, nor looks likely in the immediate future to be taken, so to change the law<sup>45</sup>.

It is conclusively apparent that notwithstanding the reluctance of the British government to change the law on prisoner disenfranchisement following the ruling in *Hirst*, Britain remains under sustained pressure from the ECtHR to alter the indiscriminate implementation of the blanket ban on prisoner voting. In order to do this, it is necessary to put aside the criticisms surrounding parliamentary sovereignty that too often hijack the significance of the *Hirst* ruling, and look rationally at the credible arguments in support of prisoner enfranchisement.

### *3. The status of the vote.*

Whilst the significant, long-standing struggle to widen the electoral franchise in Britain has been crucial to the development of the democracy she enjoys, the government still assert that it is appropriate to take the vote away from prisoners<sup>46</sup>. In order to highlight the significance of the removal of the vote, this chapter will evaluate whether there is a right to vote protected under international law. Next, this chapter will critique the view that the vote is a mere privilege. Finally, in considering the significance of the vote as a right and not a privilege, this chapter will point to examples in which judges from around the world have reiterated a prisoner's right to vote, regardless of their crime. In so doing, this chapter will decisively assert that the right to vote is a *fundamental* right.

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<sup>45</sup> D. SCOTT, *The Politics of Prisoner Legal Rights*, in *The Howard Journal*, 52/2013, 233, 242.

<sup>46</sup> C. MURRAY, *Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom*, in *Kings Law Journal*, 22/2011, 309, 310.

### 3.1 *Is there a legal right to vote?*

Much of the contention surrounding whether the blanket ban on prisoner voting is appropriate centres around the debate on whether the right to vote is a fundamental right or only a privilege. It was compellingly and successfully argued in *Hirst* that under A3P1, a right to vote exists<sup>47</sup>. Article 3 of the First Protocol of the Convention states that:

The High Contracting Parties undertake 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<sup>48</sup>.

The courts have continued to construe A3P1 so to include a right to vote, emphasising how the rights guaranteed under A3P1 are ‘crucial to establishing and maintaining the foundations of an effective and meaningful democracy’<sup>49</sup>. The Joint Committee on the Draft Voting Eligibility (Prisoners) Bill similarly confirmed the status of the vote as a right as opposed to a privilege<sup>50</sup>. The wording of A3P1 is, however, different to almost all the other substantive clauses within the Convention, leading some to question that as the Article does not specifically say ‘everyone has the right to free elections and the right to vote’, there is no individual right to free elections or to vote<sup>51</sup>. However, the ECtHR sturdily confirmed that there is no difference in

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<sup>47</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 56.

<sup>48</sup> Article 3 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended) ECHR 1952, [Emphasis added].

<sup>49</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 58; *Lingens v Austria*, App no 9815/82, ECtHR, 8 July 1986, 41, 42.

<sup>50</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) (n 43) [155].

<sup>51</sup> *Mathieu-Mohin v Belgium* App no 9267/81, ECtHR, 2 March 1987, 48.

the significance of the rights protected under A3P1 than the other substantive rights contained within the Convention, and that there is a *right to vote*<sup>52</sup>.

Various other international treaties heighten the status of the vote as a fundamental right. For example, Article 25 of the International Covenant on Civil and Political Rights, to which the UK acceded to in 1968, provides that:

*Every citizen shall have the right and opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions...to vote at genuine periodic elections which shall be by universal and equal suffrage*<sup>53</sup>.

The distinctions set out in Article 2 are ‘of any kind’ and thus intentionally broad so to promote complete equality and universal suffrage, dependent on nothing other than being a human being<sup>54</sup>. Therefore, legally speaking, it can confidentially be stated that there is strong evidence indicative of a universal right to vote, central to democracy<sup>55</sup>.

Although the right to vote is plainly protected under international law, it can occasionally be limited. It is acknowledged that within international law a ‘tier’ of rights exist, differentiating between absolute rights and general rights<sup>56</sup>. For example, the prohibition of torture under Article 3 of the ECHR offers absolute protection and is

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<sup>52</sup> Ibid., 50.

<sup>53</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 25 (b), [Emphasis added].

<sup>54</sup> Ibid., Article 2.

<sup>55</sup> HC Debate 10 February 2011, vol 523, col 543.

<sup>56</sup> S. CHAKRABARTI and D. RABB, *Should Prisoners Have the Right to Vote?*, in Prospect <http://www.prospectmagazine.co.uk/regulars/duel-should-prisoners-be-able-to-vote>, 2/2014, accessed 30th October 2015,.

thus an absolute right, whereas under Article 5 of the ECHR, a person can be deprived of their liberty if ‘lawfully detained’<sup>57</sup>. Thus, not all rights protected under the ECtHR are unqualified. Specifically, notwithstanding the assertion that A3P1 provides for a right to vote, the ECtHR in *Hirst* proclaimed that the right to vote is a *general* right and not absolute<sup>58</sup>. The vote can in certain circumstances, therefore, be limited. This was confirmed in *Scoppola* when the Grand Chamber accepted the Italian’s seemingly more considered approach to prisoner disenfranchisement, in which only those imprisoned for 3 years or more are automatically disenfranchised<sup>59</sup>. However, in order to ensure that any limitation is warranted, the courts have made clear that a fundamental *general* right, including the vote, cannot be restricted unless the restriction has a legitimate aim and that any restriction is proportionate to that aim<sup>60</sup>. The extent to which Britain’s limitation on the vote fulfils this criterion will be evaluated in Chapter Four, pointing to the severe weaknesses of the government’s argument in *Hirst*. Whilst it must be conceded that in certain instances general rights, including the vote, may be legally limited, the presumption *does* and *must* remain that everyone,

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<sup>57</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended) ECHR 1950, Article 3, Article 5 (1).

<sup>58</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 60.

<sup>59</sup> *Scoppola* (n 43); Pablo Marshall ‘Scoppola v Italy on Prisoners’ Disenfranchisement (European Court of Human Rights): Consequences for the UK Debate (*Social Science Research Network*, 17th February 2013), in <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1886439](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1886439)>, 5/2016, accessed 8 April.

<sup>60</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 74-75, 76-86, confirmed in *R (on the application of Barclay) v Secretary of State of Justice*, UKSC, 9/2009, 58.

regardless of their race, wealth, social class, sexuality or even status as a prisoner, has a legally protected right to vote.

### 3.2 “The vote is only a privilege”.

Even though those who argue that the vote is a right do so convincingly, with strong legal authority, supporters of prisoner disenfranchisement predominately base their argument on the premise that the vote is not a right, but a privilege<sup>61</sup>. This view was most evident during the 2011 debate on the cross-party motion on whether to maintain the blanket ban in the House of Commons. For example, Angie Bray MP dissuasively argued that the vote is a privilege because historically, individuals had to ‘fight so long and hard’ to get it<sup>62</sup>. It would seem, however, that Ms Bray misses the point made by those who did indeed fight so long and hard for universal suffrage: everyone, regardless of individual circumstances, should enjoy the right to vote<sup>63</sup>. In light of this, it appears more plausible to argue that branding the vote a privilege in order to rationalise its removal is actually what undermines the fight for universal suffrage Bray professes to support.

Many other MPs from all sides of the House of Commons spoke in a similar way<sup>64</sup>. However, there would appear to be a paradox within the parliamentary discussion on the status of the vote. For example, the Prime Minister, David Cameron, was quoted in an interview

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<sup>61</sup> D. McNULTY, N. WATSON, G. PHILO, *Human Rights and Prisoners’ Rights: The British Press and the Shaping of Public Debate*, in *The Howard Journal*, 4/2014, 360, 363.

<sup>62</sup> HC Debate 10 February 2011, vol 523, col 537.

<sup>63</sup> S. EASTON, *Constructing Citizenship: Making Room for Prisoners’ Rights*, in *Journal of Social Welfare & Family Law*, 30/2008, 127, 129.

<sup>64</sup> HC Debate 10 February 2011, vol 523, col 534.



stating that he wants his children to grow up in a world where Britain champions ‘democracy, freedom and rights’<sup>65</sup>. In light of those comments, it would not be unreasonable to assume that Cameron would be in favour of sponsoring the expansion of the vote to more people as a means to promote democracy, freedom and rights. Nonetheless, whilst on the one hand endorsing the importance of democracy and voting in the 2016 European Referendum, Cameron also memorably claimed that the thought of giving prisoners the vote made him feel ‘physically ill’<sup>66</sup>. It would seem, therefore, that the significance of the vote as a right and the fundamental crux of our democracy is clearly affirmed when it suits those in power, especially when they want individuals to go out and vote for them and their beliefs. Conversely, the status of the vote is ‘downgraded’ to a mere privilege by the same people to justify the continuation of the ban on prisoner votes. In reality, politicians cannot have it both ways. It is argued that this parliamentary paradox and inconsistency weakens the credibility of those who maintain that the vote can be withdrawn from prisoners because it is only a privilege. Such arguments are further undermined in light of the express judicial affirmation that in the 21<sup>st</sup> century the vote is classed as a right and strictly not a privilege<sup>67</sup>.

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<sup>65</sup> T. McTAGUE, *David Cameron interview: Prime Minister urges people to vote in EU referendum or you’ll find we’re out*, *The Independent* (London, 19 March 2016), in <http://www.independent.co.uk/news/uk/politics/david-cameron-interview-prime-minister-urges-people-to-vote-in-eu-referendum-or-youll-find-were-out-a6941436.html>, accessed 11 April 2016.

<sup>66</sup> ‘Cameron urges young people to vote in EU referendum’ (*4 News*, 7 April 2016), in < <http://www.channel4.com/news/cameron-urges-young-people-to-vote-in-eu-referendum>>, accessed 7 April 2016; HC Debate 3 November 2010, vol 517, col 921.

<sup>67</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 59.

### 3.3 *The right to vote in a democracy.*

It was previously maintained by the Supreme Court of Canada that the core democratic rights – most vividly expressed through the right to vote – ‘do not fall within a range of acceptable alternatives among which Parliament may pick and choose to apply at its discretion’<sup>68</sup>. Although Britain and Canada enjoy different constitutional backgrounds, the significance of the Canadian decision in *Sauvé*, a case cited frequently in *Hirst*, provides constructive insight to the issue of prisoner votes. It was held in *Sauvé* that the disenfranchisement of prisoners serving sentences of longer than two years unjustifiably infringed their right to vote under the Canadian Charter of Rights and Freedoms<sup>69</sup>. Although the ECtHR in *Hirst* noted that Britain did have some margin of appreciation when implementing A3P1, the ECtHR largely adopted the same approach as the Court in *Sauvé*. Most markedly, the ECtHR confirmed that any deviation from the presumption of universal suffrage and there being a right to vote profoundly undermined democracy<sup>70</sup>. Though not going so far as to label *any* infringement inappropriate, in recognising the weight of the vote, the decision in *Hirst* illustrates a welcomed resistance to the impediment on the right to vote principally because of its status as a fundamental right, central to democracy.

Furthermore, the lengths to which some States have gone to in order to protect the vote strengthens its internationally recognised standing as a *universal* human right. For example, an Israeli court refused to

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<sup>68</sup> *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC68, [13].

<sup>69</sup> Ibid.

<sup>70</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 62; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC68, 34.

remove the vote from one of the most publicly despised individuals, Yigal Amir, found guilty of assassinating Prime Minister Rabin, because of the irrevocable harm removing it could do to democracy<sup>71</sup>. It was credibly argued that when the vote is denied, ‘the base of *all* fundamental rights is shaken’<sup>72</sup>. In order to protect and promote democracy, the Court rightly declared that the law’s respect for Amir’s rights should be prioritised over any ‘contempt for the act’<sup>73</sup>. The desire to protect an individual’s power to vote over the actions of that individual implies a suitable confirmation that elsewhere in the world, the vote is categorised as a fundamental right. In a similar move, the South African Constitutional Court made a thoughtful contribution when it held that the right to vote represents a badge of citizenship and confirms to society that ‘everybody counts’, *regardless* of whom he or she is or what he or she has done<sup>74</sup>. Whilst it is not within the scope of this article to discuss exhaustively the specific national conclusions on whether there is a right to vote, or their justifications for doing so, the above examples are *indicative* of an acceptance – not exclusive to Britain – that a fundamental right to vote does exist.

### 3.4 Conclusion.

This chapter has demonstrated how, as decisively confirmed in *Hirst*, there is an internationally protected right to vote under A3P1. In light of this, those who suggest that the vote can be withdrawn from

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<sup>71</sup> A. EWALD and B. ROTTINGHAUS (eds), *Criminal Disenfranchisement in an International Perspective*, in Cambridge University Press, 62/2009, 45, 46.

<sup>72</sup> C. BEHAN, *Prisoners, Politics and the Polls*, in *The British Journal of Criminology*, 48/2008, 319, 320, citing *Hilla Alrai v Minister of the Interior* (HC 2757/96; 1996).

<sup>73</sup> *Hilla Alrai v Minister of the Interior* (HC 2757/96; 1996).

<sup>74</sup> *August and Another v Electoral Commission and Others* (CCT 08/99), 1999, ZACC 3, 17.

prisoners because it is only a privilege should face a strong and convincing rebuttal. A concerning paradox within the parliamentary debate has been identified which undermines the credibility of those who maintain that the vote is only a privilege. It must be accepted that although not absolute, within a democratic nation there is a fundamental, *human right to vote*. These facts, therefore, immediately illustrate why the removal of a prisoner's right to vote is not appropriate in Britain.

#### *4. Prisoners are still people.*

Winston Churchill famously called for the 'dispassionate recognition of the rights' of those incarcerated<sup>75</sup>. In considering this, this chapter will firstly assess the extent to which a prisoner retains their citizenship, challenging the historic yet contemporary presented idea of a 'civic death'. In establishing that prisoners retain their citizenship, this chapter will argue that *prima facie* prisoners retain all of their human rights. However, this chapter will demonstrate how there has been a judicial willingness to permit some limited interference with the rights of prisoners in the name of good order and discipline. Despite these limited instances, this chapter will assert that the blanket ban on prisoner voting is fundamentally inconsistent with a prisoners' ongoing status as a citizen and, therefore, legally inappropriate.

##### *4.1 Citizenship, virtue and the vote.*

When an individual is incarcerated, it is inevitable that some interference with his rights will occur. However, it is compellingly asserted that whilst a prisoner may legally lose his right to liberty due to his crime, it should be presumed that he retains his citizenship and

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<sup>75</sup> HC Debate 20 July 1910, vol 19, cols 1326-27, col 1354.

attached fundamental rights, including the already established right to vote<sup>76</sup>. Despite this contention, some continue to argue that owing to a criminal act serious enough to warrant a custodial sentence, a prisoner should not be entitled to exercise their fundamental right *as a citizen* and vote<sup>77</sup>. Those who prescribe to this view believe that through his wrongful actions, he has committed himself to a civic death and consequently forfeited the rights allegedly ‘exclusive’ to citizenship<sup>78</sup>. The notion of a civic death can be traced back to ancient Greece and Rome, where those found guilty of offences were ‘relegated’ to the status of the common man<sup>79</sup>. The Greeks and Romans saw fit to punish those guilty of a crime by revoking all previously held citizenship rights, including most significantly, the right to own property and the accompanying right to vote<sup>80</sup>. Importantly, these rights were not enjoyed universally because citizenship was not enjoyed universally. Greek women, for example, were incapable of holding citizenship, viewed merely as the ‘bearers’ of future ‘citizens’<sup>81</sup>. Equally, because of their position in society, slaves were viewed as too unworthy to enjoy citizenship status<sup>82</sup>. Thus, through his wrongful actions, he was now a common man, or a

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<sup>76</sup> S. EASTON, (n 65) 129; See Chapter Two.

<sup>77</sup> Z. PLANINC, *Should Imprisoned Criminals have a Constitutional Right to Vote?*, in *Canadian Journal of Law and Society*, 2/1987, 153, 154.

<sup>78</sup> M. DHAMI, *Prisoner Disenfranchisement Policy: A Threat to Democracy?*, in *Analyses of Social Issues and Public Policy*, 5/2015, 235, 239.

<sup>79</sup> S. FOSTER, *Reluctantly Restoring Rights: Responding to the Prisoner’s Right to Vote*, in *Human Rights Law Review*, 9/2009, 489, 490.

<sup>80</sup> GRAEME ORR, *Ballotless and Behind Bars: The Denial of the Franchise to Prisoners*, in *Federal Law Review*, 26/1988, 55, 62.

<sup>81</sup> S. EASTON, (n 65) 130.

<sup>82</sup> S. EASTON, *Electing the Electorate: The Problem of Prisoner Disenfranchisement*, 2006, MLR, 443, 444.

‘slave of the state’, rather than an active citizen<sup>83</sup>. Owing to an apparent unwillingness to ‘serve the common good’, it was accepted that the common man lacked the necessary virtue to vote<sup>84</sup>. The unworthiness attached to the common man, and by implication the prisoner, supposedly threatened the purity of the ballot box and undermined the value of the vote of those who positively sought to serve society<sup>85</sup>. Whilst this may seem somewhat archaic, it is still sketchily argued that due to a perceived lack of virtue – resulting in a civic death – prisoners are unsuitable to vote.

Although it may be plausible to assume that on the whole those in prison are less concerned about society than those not in prison, the apparent connection between virtue, worthiness and the constraint on the right to vote is weak<sup>86</sup>. Following the *Hirst* decision, the Joint Committee on Human Rights confirmed that the enjoyment of one’s fundamental rights, including the right to vote, is not dependent on good citizenship<sup>87</sup>. Accordingly, regardless of how unvirtuous or otherwise an individual in prison is perceived to be, they should not be deprived of their fundamental human rights<sup>88</sup>. Grounding the

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<sup>83</sup> M. MUSHLIN and N. GALTZ, *Getting Real About Race and Prisoner Rights*, in *Fordham Urban Law Journal*, 36/2008, 27, 32.

<sup>84</sup> Q. SKINNER, *The Paradoxes of Political Liberty* in Sterling McMurrin (ed), *The Tanner Lectures on Human Value Volume VI*, 1/1986, in *Cambridge University Press*, 57/2011, 242.

<sup>85</sup> G. ROBINS (n 30) 190.

<sup>86</sup> A. MACKENZIE, *Lock Them Up and Throw Away the Vote: Civil Death Sentences in New Zealand*, in *Auckland University Law Review*, 19/2013, 197 - 204.

<sup>87</sup> Joint Committee on Human Rights *Monitoring the Government’s Response to Human Rights Judgments: Annual Report 2008* (2007-08, HL 173, HC 1078), 58.

<sup>88</sup> K. SINGH, *Civil Death of Prisoner: Disenfranchising the Prisoner in Reality Causes His Civil Death*, in *National University of Juridical Sciences Law Review*, 1/2008, 239 - 242.

extent to which an individual has a right to vote on their perceived virtue risks implying that a certain ‘character’ is necessary to vote<sup>89</sup>. Such a concept, however, undermines the historically welcomed moves in Britain towards universal, equal suffrage analysed in Chapter One<sup>90</sup>. For example, it is suggested that to try and justify a restriction on the franchise on the basis of land ownership in the 21<sup>st</sup> century would thankfully fail because voting qualifications are viewed as archaic and discriminatory<sup>91</sup>. The right to vote is not dependent on home ownership. By implication, therefore, it would seem similarly absurd in the 21<sup>st</sup> century to try and justify the ban on prisoner voting because of apparently missing ‘hypothetical’ moral worth, somehow required to participate as a citizen.

The alleged link between the right to vote and virtue is further weakened considering the fact that there are individuals currently not serving a prison sentence whom society may view as less virtuous than some of those resident in prison. For example, it is probable that those who legally avoid paying what is judged to be a ‘fair’ amount of taxation are seen as morally unworthy to partake in society. Notwithstanding their implied immorality, if such individuals act within the letter of the law, they retain their right to vote and their ability to seemingly threaten the purity of the ballot box<sup>92</sup>. Likewise, it is worth considering that there are many people who commit a crime and demonstrate a lack of civil integrity, but who do not receive

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<sup>89</sup> M. MAUER, Voting Behind Bars: An Argument for Voting by Prisoners, in *Howard Law Journal*, 54/2011, 549 - 557; S. BRENNER and N. CASTLE, *Granting the Suffrage to Felons in Prison*, in *Journal of Social Philosophy*, 34/2011, 228 - 238.

<sup>90</sup> See Pages 8-9.

<sup>91</sup> M. MAUER, (n 91) 557.

<sup>92</sup> A. MACKENZIE, (n 88) 204.

a custodial sentence. Whereas in reality there is not always a concrete connection between a lack of virtue and imprisonment, justifying the ban on the basis of a lack of virtue troublingly classes, for example, a mass-murderer and petty thief – *just by implication their incarceration* – as equally immoral<sup>93</sup>. Such insinuations do not appear fair. Moreover, practically speaking and in the interests of equivalence, focusing solely on the virtue of the individual would necessitate the removal of the right to vote from *all* those who, despite not being found guilty of a criminal offence, lack the necessary character apparently required to engage in society<sup>94</sup>. It is, therefore, asserted that justifying the removal of the right to vote from everyone in prison just because they apparently lack adequate morality is flawed<sup>95</sup>. The superficial and out-dated notion of a civic death is clearly an inadequate means in which to justify a blanket ban on prisoner voting.

#### *4.2 The prisoner as a citizen: a holder of rights.*

Notwithstanding those who unsatisfactorily assert that a convicted prisoner is subject to a civic death and a consequential loss of fundamental rights, the general judicial and scholarly consensus looks to accept that whilst in prison, an individual retains his citizenship and human rights<sup>96</sup>. The judicial basis for such a claim in

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<sup>93</sup> A. EWALD, *Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, in *Wisconsin Law Review*, 5/2002, 1045, 1100.

<sup>94</sup> P. RAMSAY, *Voters should not be in prison! The rights of prisoners in a democracy*, in *Critical Review of International Social and Political Philosophy*, 16/2013, 421.

<sup>95</sup> A. MACKENZIE, (n 88) 204.

<sup>96</sup> Stephen Livingstone, Time Owen and Alison Macdonald, *Prison Law* (4th edn, OUP 2008) 21.



Britain is rooted in the decision in *Raymond v Honey*<sup>97</sup>. Following the approach taken by the United States Court of Appeal in *Coffin v Reichard*, Lord Wilberforce famously held that a prisoner retains all rights not removed ‘expressly or by [the] necessary implication’ of his incarceration<sup>98</sup>. Although it has been argued that the decision in *Raymond* rightly opened prison life and the concerns of prisoners into the realm of judicial scrutiny, the qualification of ‘expressly or by necessary implication’ has unfortunately left significant scope for politicised discretion<sup>99</sup>. For example, Jack Straw MP has argued that ‘whilst every effort is rightly made to treat prisoners with dignity’, disenfranchisement is a justifiable implication of incarceration because of the link between liberty and the vote<sup>100</sup>. While to some extent the physical act of suffrage may be linked to liberty, removing the vote solely on that basis is unsound<sup>101</sup>. There would likely be an outcry if a prisoner were unable to practice their religion because doing so was dependent on liberty. Just like the right to freedom of ‘thought, conscience and religion’ under Article 9 of the ECHR, it was demonstrated in Chapter Two that the vote is a fundamental right under A3P1, dependent on *nothing* other than being a human being<sup>102</sup>.

Fortunately, the courts have interpreted ‘necessary implication’ in *Raymond v Honey* so as to only permit the removal of rights

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<sup>97</sup> *Raymond v Honey*, 1983, 1 AC 1.

<sup>98</sup> *Coffin v Reichard* 143 F.2d 443/1944; *Raymond* (n 97) [10] (Lord Wilberforce).

<sup>99</sup> S. EASTON, (n 65) 135-136.

<sup>100</sup> HC Debate 10 February 2011, vol 523, col 504.

<sup>101</sup> A. MACKENZIE, (n 88) 209.

<sup>102</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended) ECHR 1950, Article 9 (1); See Page 14.

explicitly related to the functioning of penal institutions<sup>103</sup>. For instance, administrative considerations may require that a prisoner's freedom of assembly and association is limited, but through the necessary implication of ensuring order within the prison<sup>104</sup>. Although some argue that it is somewhat artificial to assert that prisoners enjoy the same rights as those free in society, the extent to which disenfranchisement is a 'necessary implication' of imprisonment is questionable<sup>105</sup>. It is especially questionable owing to the fact that following *Raymond*, the courts are obliged to give greater weight to the rights of prisoners<sup>106</sup>. Though the 'necessary implication' caveat implies some limitation on rights may be legitimate, the overarching presumption from *Raymond* remains that a prisoner retains his ability to exercise his fundamental rights, including the right to vote.

The Grand Chamber confirmed in *Hirst* that there was 'no question that a prisoner forfeits his Convention rights' just because he is in prison, and thus any interference has to be suitably justified<sup>107</sup>. It is suggested that the ECtHR commitment to protect the rights of prisoners is indicative of an increasing willingness over the last 30 years to more adequately reconcile fundamental rights with the inevitable restrictions associated with imprisonment<sup>108</sup>. Plainly taking inspiration from Lord Wilberforce in *Raymond*, Lord Steyn

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<sup>103</sup> D. SCOTT, (n 47) 239

<sup>104</sup> The Prison Rules Order 1999, SI 1999/728, Rule 6.

<sup>105</sup> P. RAMSAY, *Faking Democracy with Prisoners' Voting Rights*, in LSE Law, Society and Economy Working Paper, 7/2013, in <[https://www.lse.ac.uk/collections/law/wps/WPS2013-07\\_Ramsay.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2013-07_Ramsay.pdf)>, accessed 8 April 2016.

<sup>106</sup> S. FOSTER, (n 81) 499.

<sup>107</sup> *Hirst* (n 1) [70], [69].

<sup>108</sup> S. EASTON, (n 65) 136.

held in *R v Secretary of State for the Home Department ex parte Leech (No 2)* that any restriction on a prisoner's rights would only be acceptable if there was an 'evident and pressing need' warranting it<sup>109</sup>. Leech challenged the provision within the Prison Rules that allowed prison governors to read all the letters an inmate received, including, those from a lawyer until legal proceedings began<sup>110</sup>. Whilst the Court of Appeal held that Section 47 (1) of the Prison Act 1952 did not expressly authorise such interference, some 'screening of correspondence' was permitted through the *necessary implication* of ensuring correspondence was not 'unobjectionable'<sup>111</sup>. The Court ruled that any such intrusion must only be the 'minimum necessary' so as to meet the suggested aims<sup>112</sup>. As such, whilst the Court *prima facie* accepted that some interference might be permissible, it must be measured so as not to go too far.

The House of Lords reaffirmed Lord Steyn's approach in *R v Secretary of State for the Home Department ex parte Daly*, holding that imprisonment does not 'wholly deprive the person' of the rights enjoyed by those outside of prison<sup>113</sup>. Moreover, any restriction on rights must only interfere in a way required to meet the ends justifying the restriction<sup>114</sup>. Lord Bingham elaborated, stating that although rights may be qualified to ensure the effective operation of a particular prison, they 'survive the making of the custodial order'<sup>115</sup>.

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<sup>109</sup> *R v Secretary of State for the Home Department ex parte Leech*, QB 198, 2/1994, 212 (Lord Justice Steyn).

<sup>110</sup> *Leech* (n 111) 218.

<sup>111</sup> *Leech* (n 111) 218; Prison Act 1952, s 47 (1).

<sup>112</sup> *Leech* (n 111) 218.

<sup>113</sup> *R v Secretary of State for the Home Department ex parte Daly*, 2001, UKHL 26 [5] (Lord Bingham).

<sup>114</sup> *Ibid*.

<sup>115</sup> *Ibid*.

Therefore, evident within a series of cases heard in the domestic courts that challenge the premise that a prisoner is subject to a civic death, is a clear judicial appetite to protect the fundamental rights of prisoners and their ongoing status as a citizen. The principal accord seems to hold that each prisoner – regardless of how offensive their criminality is – remains a human being and thus a holder of fundamental rights<sup>116</sup>. Obviously owing to incarceration some curtailment of rights is inescapable, but the courts in both Strasbourg and Britain will justly resist any groundless intrusion on the rights of prisoners. Hence, given the status of the vote as a fundamental right, and owing to the fact that it is not suggested anywhere that removing the vote from a prisoner is a necessary implication of incarceration, a prisoner *should* retain his legal right to vote.

Despite clear judicial statements emphasising the fact that rights extend beyond the prison walls, there have been instances where the courts have shown a worrying readiness to alter the balance against the rights of the prisoner so to guarantee ‘good order and discipline’ within prisons<sup>117</sup>. Though seen as the protector of human rights, Lord Woolf explained that it is ‘not for the courts to run the prison’ and as such they must afford some discretion to those who do<sup>118</sup>. The belief that the courts should refrain from getting too involved in the running of a prison stems from Goddard L.J.’s declaration that ‘it would be fatal to all discipline in prison if governors and wardens had

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<sup>116</sup> See for example: *R v Secretary of State for the Home Department ex parte Simms and O’Brien* in WLR, 3/1999, 328; *Frodl* (n 42) [25].

<sup>117</sup> *Wolff v McDonnell* 418 US 539 (1974), 556; D. EADY, *Prisoners Rights since the Woolf Report: Progress or Procrastination*, in *The Howard Journal*, 2007, 264.

<sup>118</sup> *The Queen on the application of “P” and “Q” v The Secretary of State for the Home Department* EWHC, 2001, 357 (QB), 57 (Lord Woolf).

to perform their duty...in the fear of an action before [the court]’<sup>119</sup>. It is argued that if the courts show too much enthusiasm to get involved, they risk undermining the effective management of the prison system. However, it is probable that the preparedness of the court to accept an impediment on a fundamental right is indicative of a wider issue centred on the debate over ‘institutional competence’<sup>120</sup>. The discussions surrounding institutional competence essentially hinge on the proposition that one branch of government may be better equipped to perform a particular function than another<sup>121</sup>. In terms of running the prison, the courts look to agree that the government is more suited to overseeing the overall management of the prison system. In accepting this, it would seem that the judiciary prefer to be seen as merely *supervising* and ensuring the preservation of human rights within prison walls<sup>122</sup>. The judicial reluctance to get too involved in the specificity of managing the prison system is not a problem in itself; however, the extent to which this develops into a failure to provide adequate protection against illegitimate interference *is*, and thus risks undermining the judicially accepted opinion that prisoners retain their human rights. Ultimately, it is asserted that the debate over institutional competence *should not* discourage or impede judges from performing their *duty* in upholding the shared humanity of the prison population.

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<sup>119</sup> *Arbon v Anderson*, KB, 1943, 252, 255.

<sup>120</sup> A. CHILTON and C. WHYTHOCK, *Foreign Sovereignty Immunity and Comparative Institutional Competence*, in *University of Pennsylvania Law Review*, 2015, 411.

<sup>121</sup> *Ibid* 414.

<sup>122</sup> D. SCOTT, (n 47) 247.

Whilst the court is only ready to allow an interference with a prisoner's rights if it is justified, the interpretation of what amounts to a 'justification' has, in some cases, regrettably proven to be considerably wide. Though it is accepted that there are practical instances in which prisoners legitimately have their rights limited, too much focus on ensuring good order and discipline can produce occasions where rights are undermined and individual prisoners are, for example, subject to 'appalling conditions of segregation'<sup>123</sup>. Although of course it is right that the courts show a suitable level of deference towards parliament, and notwithstanding the fact that judges are often labelled the '*unelected and unaccountable*' guardians of the law, they maintain a responsibility to protect the rights of *everyone*<sup>124</sup>. It is further asserted that owing to the significance of the right to vote as the 'right of rights', the duty to protect the vote is intensified<sup>125</sup>. The occasional inadequacy of the protection of the fundamental rights of prisoners has led some to credibly argue that the court's attitude in allowing an interference fails to commit appropriately to the judicially and scholarly acknowledged status of prisoners *as people*<sup>126</sup>. As previously explained, the ECtHR in *Hirst* was clear that there was 'no room' for the out-dated, historic idea of a civic death purely because of a prisoner's enduring status as a citizen<sup>127</sup>. Thus, despite occasional judicial tendencies to prioritise the management of a prison, the premise that those incarcerated continue to enjoy rights by virtue of

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<sup>123</sup> D. EADY, (n 119) 272.

<sup>124</sup> S. FREDMAN, (n 31) 296.

<sup>125</sup> J. WALDRON, *The Right of Rights*, Proceedings of the Aristotelian Society, 1998, 307.

<sup>126</sup> D. SCOTT, (n 47) 245.

<sup>127</sup> *Hirst* (n 1) [O-115].

their ongoing citizenship status prevails. The suggestion that prisoners only enjoy privileges capable of being ‘withdrawn at the whim of management’ is plainly inconsistent with the examined jurisprudence on the status of the prisoner, holder of rights<sup>128</sup>.

#### 4.3 Conclusion.

It would appear that the suggestion that when incarcerated one is subject to a civic death is legally inaccurate and out-dated. It is correct to assert that all prisoners, whoever they are, whatever they have done, remain citizens of the state and thus *prima facie* retain *all* fundamental rights. The loss of the right to vote cannot be justified as a necessary implication of incarceration. In light of this, unless in proportionate pursuit of a legitimate aim – the subject of the next chapter – the removal of the prisoners’ right to vote is legally flawed and inappropriate. Instead, considering the established right to vote, it seems legally necessary, and consequently more appropriate, to re-enfranchise the prison population.

#### 5. *The practical implications of the blanket ban on prisoner voting*

Whilst a prisoner retains his human rights during incarceration, the previous chapter signalled that the courts *may* accept some interference with the fundamental right to vote if such interference is proportionately applied in pursuit of a legitimate aim. In light of this, this chapter will demonstrate how the ban is further inappropriate because it fails to meet the aims professed in *Hirst*. This chapter will briefly argue that the ban is not justified on the basis of punishment. Next, this chapter will evaluate the extent to which the vote can encourage proactive citizenship and thus deter future criminal

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<sup>128</sup> S. SHAW, *Conviction politics: a plan for penal policy*, Fabian Society, 1987, 9.

activity. Finally, this chapter will assert that the ban is unsuitable because it is disproportionately applied. From this analysis, it will be clear that it would be *more appropriate* to re-enfranchise the entire prison population.

### *5.1 Does the blanket ban have a legitimate aim?*

It is argued that although the court is equipped to permit an interference with a fundamental right, it will do so reluctantly. In order to justify a restriction on an individual's right, the government must fulfil two conditions set by the courts. Firstly, any interference must be limited in pursuit of a legitimate aim, and secondly, the interference must be proportionate to that aim<sup>129</sup>. As set out in Chapter One, the government stated in *Hirst* that the aim of the ban on prisoner votes was two-fold: it sought to punish offenders and enhance civic responsibility<sup>130</sup>. Although the ECtHR rejected the government's argument that when imprisoned an individual forfeits his rights, with little reasoning the ECtHR found that ban 'may be regarded as pursuing the [legitimate] aims identified by the government'<sup>131</sup>. Unsurprisingly, this part of the *Hirst* decision has been criticised for not adequately recognising the status of the prisoner as equal to every other human being in Britain.<sup>132</sup> On the basis that the ban, however it is justified, undermines both the significance of the vote as a fundamental right, and the common humanity of the prisoner, the ECtHR acceptance of the government's

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<sup>129</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 74, 75, 76 - 86, confirmed in *R (on the application of Barclay) v Secretary of State of Justice*, 2009, UKSC 9 58.

<sup>130</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 75.

<sup>131</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 76.

<sup>132</sup> S. FOSTER (n 81) 497.



aims as legitimate is immediately concerning. More notable, however, is the questionable extent to which the ban even meets the aims signalled by the government.

### *5.2 Prisoner disenfranchisement as a punishment*

Although the government argues that withdrawing the vote from prisoners serves to both punish and enhance civic responsibility, it is credibly claimed that disenfranchisement is fundamentally inconsistent with both aims<sup>133</sup>. Firstly, it is contended that the justification for the removal of the vote on the basis that it punishes those in prison is unfounded<sup>134</sup>. The most obvious problem with disenfranchising all prisoners on the basis of punishment centres on its blanket application. Notably, the blanket application ignores the requirement that there must be some causal link between an individual's specific crime and their punishment<sup>135</sup>. Taking the vote away from all prisoners without taking into account the specific offence fails to adhere to the punitive principle of just desert<sup>136</sup>. According to this theory, any punishment should be proportionate to the offence committed<sup>137</sup>. Considering this, it may be accepted that removing the vote from those guilty of electoral offences could serve

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<sup>133</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 74, Orr (n 80), 69.

<sup>134</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (n 43) [156].

<sup>135</sup> *Ibid.*, 140.

<sup>136</sup> 'Prison Reform Trust Submission to the Joint Select Committee Consultation on the Draft Voting Eligibility (Prisoners) Bill' (*Prison Reform Trust*) in <[http://www.prisonreformtrust.org.uk/Portals/0/Documents/PRT%20Submission%20Joint%20Committee%20Voting%20Eligibility%20\(Prisoners\)%20Draft%20Bi](http://www.prisonreformtrust.org.uk/Portals/0/Documents/PRT%20Submission%20Joint%20Committee%20Voting%20Eligibility%20(Prisoners)%20Draft%20Bill.pdf)ll.pdf>, accessed 7 April 2016, 4.

<sup>137</sup> D. ANDREWS and J. BONTA, *Rehabilitating Criminal Justice Policy and Practice, Psychology*, in *Public Policy and Law*, 10/2016, 39, 40.

as a proportionate punishment, and thus satisfy the just desert principle<sup>138</sup>. However, the removal of the vote from someone incarcerated for assault, for example, seems unrelated and disproportionate to the offence. Removing the vote so as to punish those in prison also ignores the fact that they are already punished through their incarceration<sup>139</sup>. Easton, therefore, questions the suitability of further separating those in prison from society through disenfranchisement when unlike every other punitive measure handed down by the court, it is not relative to the criminal act<sup>140</sup>. Considering this, it is surprising that the ECtHR in *Hirst* accepted that withdrawing the right to vote could be used as a punishment<sup>141</sup>. In reality, the only time in which withdrawing the vote may tenuously be justified as a means of punishment is when a prisoner's offence relates *specifically* to voting. In light of this, trying to justify the *blanket* ban on prisoner voting on the basis of punishment is inappropriate.

### 5.3 Prisoner disenfranchisement and civic responsibility.

It is further contended that contrary to the assertion that prisoner disenfranchisement enhances civic responsibility, removing the vote undermines efforts to rehabilitate offenders<sup>142</sup>. As a recognised aim of

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<sup>138</sup> S. EASTON and C. PIPER, *Sentencing and Punishment: The Quest for Justice* (OUP 2013).

<sup>139</sup> G. SLAPPER, *The Ballot Box and the Jail Cell*, in *The Journal of Criminal Law*, 1/2011, 1.

<sup>140</sup> S. EASTON, *Protecting Prisoners: The Impact of International Human Rights Law on the Treatment of Prisoners in the United Kingdom*, in *The Prison Journal*, 32/2013, 475, 477.

<sup>141</sup> *Hirst* (n 1).

<sup>142</sup> J. MANZA and C. UGGEN, *Locked Out: Felon Disenfranchisement and American Democracy* (OUP 2006) 37.

sentencing, rehabilitation seeks to enhance the character of the criminal in a way that will allow him to function as a law-abiding, proactive member of society<sup>143</sup>. In so doing, rehabilitative measures seek to promote the ongoing citizenship status of those in prison. Despite this aim, Cheney stresses that prisoner disenfranchisement actually only serves one true end: to further alienate those incarcerated from wider society<sup>144</sup>. Owing to the aforementioned connection between the right to vote and citizenship, it is said that political participation promotes social inclusivity<sup>145</sup>. Therefore, by implication, removing the right to vote undermines the enduring citizenship status of a prisoner and discourages the sense of social inclusion essential for effective rehabilitation<sup>146</sup>. This cogent line of argument was persuasively presented and accepted by the Canadian Supreme Court<sup>147</sup>. In confirming the risk of taking away an individual's ability to assert their collective identity and vote, the Court declared that 'disenfranchisement is more likely to become a self-fulfilling prophecy than a spur to reintegration'<sup>148</sup>. As such, it appears more likely that to the detriment of both the prisoner and the wider community, the blanket ban will *further* distance an already strained connection with society.

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<sup>143</sup> Criminal Justice Act 2003, s 142 (c); H. ITZKOWITZ and L. OLDAK, *Restoring The Ex-Offender's Right to Vote: Background And Development* (1972-1973), in *American Criminal Law Review*, 721, 731.

<sup>144</sup> D. CHENEY, *Prisoners as Citizens in a Democracy*, in *The Howard Journal*, 47/2008, 134, 139.

<sup>145</sup> M. NASH, *Voting as a means of social inclusion for people with a mental illness*, in *Journal of Psychiatric and Mental Health Nursing*, 9/2002, 697, 698; See Page 18.

<sup>146</sup> M. MAUER, (n 91) 562.

<sup>147</sup> *Sauvé* (n 70)

<sup>148</sup> *Ibid* [37].

Again, a paradox between what the British Government says and what it does is evident. Whilst on the one hand, the government professes the significance of the right to vote as a valued element of citizenship, it simultaneously continues to argue that withdrawing the right to vote from a prisoner – the symbolic manifestation of citizenship – will enhance civic responsibility<sup>149</sup>. In truth, it is convincingly argued that removing the vote figuratively severs the relationship between society and the prisoner<sup>150</sup>. In undermining the prisoners' ties with the community the government expects them to reintegrate into, a 'message of rejection' is potentially conferred.<sup>151</sup> Contrary to the notion that all prisoners remain equal citizens, it is apparent that the ban endorses a system that essentially promotes an inequality between those in prison and the rest of society. In considering this, it is illogical to claim that the removing the vote serves to enhance civic responsibility. Instead, the ban *isolates* the prisoner even further from society.

More specifically, there is evidence to suggest that if prisoners were given the vote, they would be less likely to reoffend<sup>152</sup>. In a well-cited study, Uggen and Manza examined the extent to which a correlation between political participation and criminal activity exists<sup>153</sup>. Based on those arrested and incarcerated in America, the study looked at

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<sup>149</sup> S. EASTON, (n 84) 451.

<sup>150</sup> C. BENNETT, *Penal Disenfranchisement*, in *Criminal Law and Philosophy*, 1/2014, 10.

<sup>151</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL 103, HC 924) Oral and Written Evidence *The Archbishop's Council, Church of England* (VEP 0018) 69.

<sup>152</sup> J. MANZA and C. UGGEN, (n 144) 127.

<sup>153</sup> J. MANZA and C. UGGEN, *Voting and Subsequent Crime And Arrest: Evidence From A Community Sample*, in *Columbian Human Rights Law Review*, 2004-2005, 193, 194.

the behaviour of those who had voted in the previous Presidential election. Significantly, they found that those who voted were less likely to be arrested and imprisoned<sup>154</sup>. For example, approximately 16 percent of non-voters were arrested between 1997 and 2000, compared to 5 percent of those who had voted<sup>155</sup>. Moreover, 12 percent of non-voters were imprisoned between 1997 and 2000, compared to less than 5 percent of voters<sup>156</sup>. In concluding that those who had voted were less likely to be arrested or imprisoned, the study identified a notable correlation between voting and positive, conscientious citizenship<sup>157</sup>.

In light of this, whilst it is maintained that the current ban serves only to distance prisoners from society, Uggen and Manza's study illustrates how enfranchising prisoners may discourage reoffending and promote rehabilitation by symbolically reminding them of their ongoing commitment to society. Such inferences are strengthened when reconviction rates in the UK are compared to those in Denmark, where all prisoners retain their right to vote<sup>158</sup>. 45 percent of those released from prison in Britain are reconvicted within 12 months, compared to 29 percent in Denmark<sup>159</sup>. It is stressed in

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<sup>154</sup> Ibid., 205.

<sup>155</sup> Ibid., 204.

<sup>156</sup> Ibid., 205.

<sup>157</sup> Ibid., 206.

<sup>158</sup> A. STORGAARD, *The Right to Vote in Danish Prisons* in A. EWALD (ed.) *Criminal Disenfranchisement in an International Perspective*, Cambridge University Press, 2009.

<sup>159</sup> Ministry of Justice, *Proven Re-offending Statistics Quarterly Bulletin, April 2013 to March 2014*, (gov.uk, 28 January 2016) in [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/495758/proven-reoffending-2014q1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495758/proven-reoffending-2014q1.pdf), accessed 10 April 2016; S. FAZAL and A. WOLF, *A Systematic Review of Criminal Recidivism Rates Worldwide: Current*

Denmark that prisoners must retain their right to vote so to ensure that as an equal citizen, ‘they continue to feel part of society’<sup>160</sup>. Accordingly, the difference in reconviction rates may be explained in light of the way the two countries respond to incarcerated individuals. Compared to Denmark, the fact that reconviction rates are much higher in Britain may be indicative of the isolation and disconnection prisoners feel from society. It may, therefore, be concluded that reminding every prisoner of his or her enduring connection with society – through the act of voting – may promote proactive, law-abiding behaviour *beneficial* to the advancement of rehabilitation.

Sceptics suggest that although the evidence presented by Uggen and Manza is interesting, any insinuation drawn from the relationship between the right to vote and rehabilitation should not be overstated<sup>161</sup>. It is submitted that while removing the vote from prisoners may undermine rehabilitation, claiming that all prisoners are going to become law-abiding citizens solely because they can vote in prison is unsubstantiated<sup>162</sup>. Instead, in order to properly reduce the likelihood of reoffending, those leaving prison need to have a stable home, a job or appropriate training scheme and support from their families<sup>163</sup>. Thus, it is anticipated that in considering the things

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*Difficulties and Recommendations for Best Practice* in PLoS One <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0130390>, 10/2015, accessed 10 April 2016.

<sup>160</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL 103, HC 924) Oral and Written Evidence, *Her Majesty’s Government* (VEP 0033).

<sup>161</sup> C. BEHAN, (n 74) 333.

<sup>162</sup> HC Debate 11 February 2011, vol 523, col 548.

<sup>163</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL 103, HC 924) Oral and Written Evidence,

that may actually deter a prisoner from reoffending, being able to vote is unlikely to have an extensive impact<sup>164</sup>. Such assertions, however, misconceive the significance of the vote and the aforementioned importance of ensuring that prisoners still feel connected to the community they will one day re-join.<sup>165</sup> Whilst it may be true that giving prisoners the vote will not instantly rehabilitate them, promoting their ongoing ties with society is more likely than not to promote reintegration and rehabilitation.

Moreover, although giving the vote to prisoners *alone* may not instil a sense of reformation, it is stated that enfranchising prisoners could be *central* to a package of educative tools that seek to promote conscientious citizenship<sup>166</sup>. Undeterred by this, critics of prisoner enfranchisement claim that there is little point giving prisoners the vote because very few of them have any interest in voting.<sup>167</sup> While it is true that many prisoners will not have voted in the past, this is more likely due to a societal disconnection, rather than total electoral apathy.<sup>168</sup> For example, analysis suggests that prisoners are three

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Nick Hardwick (*Her Majesty's Chief Inspector of Prisons*) Oral Evidence QQ 120-125, Q 120.

<sup>164</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL 103, HC 924) Oral and Written Evidence, Nick Hardwick (*Her Majesty's Chief Inspector of Prisons*) Oral Evidence QQ 120-125, Q 120.

<sup>165</sup> See Chapter Two.

<sup>166</sup> J. MANZA and C. UGGEN , (n 144) 125.

<sup>167</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL 103, HC 924) Oral and Written Evidence, Rt Hon David Davis MP and Rt Hon Jack Straw MP Oral Evidence QQ 93-109, Q 99.

<sup>168</sup> M. Dhami, *Prisoner Disenfranchisement Policy: A Threat to Democracy?*, in *Analyses of Social Issues and Public Policy*, 5/2015, 211, 222.

times more likely to come from the most deprived areas of society.<sup>169</sup> As such, though not always, prisoners typically come from a part of society that does not tend to engage in the political process at all.<sup>170</sup> Nevertheless, promoting political engagement – as part of a wider rehabilitative programme – and allowing prisoners to vote, therefore, presents a crucial opportunity to engage individuals who are often disillusioned because of their social background for the first time. Considering the belief that many of those who break the law do so primarily because they feel so disconnected from society, promoting political engagement may positively contribute to breaking the cycle of reoffending.<sup>171</sup> Rather than further marginalising an ‘already marginalised section of society’ by withdrawing the right to vote, encouraging voting in prison should be viewed as an *opportunity* to instil a sense of citizenship, beneficial to both the individual’s rehabilitation and society as a whole.<sup>172</sup> The current ban, far from serving a legitimate aim, seems only to discourage the promotion of civic responsibility and rehabilitation of offenders.

#### *5.4 The disproportionate application of the blanket ban.*

Although it has been demonstrated that the purported aims, surprisingly accepted by the ECtHR, fail to stand up to a critical assessment, the Grand Chamber did agree that the blanket application of the ban to all prisoners meant that it was

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<sup>169</sup> I. O’DONNELL et al., *When prisoners go home: punishment, social deprivation and the geography of reintegration*, in *Irish Criminal Law Journal*, 17/2007, 3, 4.

<sup>170</sup> C. BEHAN, *Still Entitled to Our Say: Prisoners’ Perspectives on Politics*, in *The Howard Journal*, 5/2012, 16, 22.

<sup>171</sup> M. DHAMI, (n 80).

<sup>172</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL 103, HC 924) Oral and Written Evidence *Leigh Day Written Evidence* (VE 0024); Uggen and Manza (n 153) 198.



disproportionately applied.<sup>173</sup> The ECtHR held that in order to fulfil the proportionality test, there should be a ‘discernible and sufficient’ link between the sanction and the specific conduct of that individual.<sup>174</sup> The majority, however, agreed that the ‘general, automatic and indiscriminate’ nature of the ban produced very arbitrary and thus unjust outcomes.<sup>175</sup> The Grand Chamber in *Scoppola* illustrated the significance of the proportionality test when it held that the Italian ban on prisoner votes was permissible just because it did not ban all prisoners, irrespective of the seriousness of their crime.<sup>176</sup> From this, it would appear that for the ECtHR, it is the lack of mitigation in Britain’s blanket ban which offends the right to vote under A3P1. Whilst the British government argues that the withdrawal of the vote is proportionate to any crime serious enough to warrant a custodial sentence, others compellingly argue that there is a spectrum of offences for which people are incarcerated, and as such are not all deserving of the same, *unrelated* punishment.<sup>177</sup> Asserting that an individual should lose the right to vote because they are in prison, just like relying on the premise that voting should be restricted to property owners or those who are viewed as wholly virtuous by society, is too weak a connection to satisfy the proportionality test applied by the ECtHR. It is recognised that some curtailment on the right to vote, such as age, is legitimate and proportionate, and by definition, somewhat arbitrary. However, a

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<sup>173</sup> *Hirst v United Kingdom*, App no 74025/01, ECtHR, 30 March 2004, 82.

<sup>174</sup> *Ibid.*, 71.

<sup>175</sup> *Ibid.*, 76.

<sup>176</sup> *Scoppola* (n 43) [90].

<sup>177</sup> S. EASTON, (n 84) 444; M. LEECH, *Prisoners Should be Allowed to Vote Because in a Democracy Everybody Counts* (prisons.org) in <<http://www.prisons.org.uk/votesforprisoners.pdf>>, accessed 1 November 2015.

curtailment applied universally to prisoners is so arbitrary it is not appropriate.

### *5.5 Conclusion.*

Whilst accepting that the right to vote is not absolute, the removal of the right to vote from prisoners does not meet the test set out by the court which could permit an interference. Despite what the ECtHR said in *Hirst*, it is apparent from this chapter that the ban on prisoner voting is not justifiable on the basis that it punishes or enhances civic responsibility. The blanket ban fails to adhere to the principle of just desert, and rather than enhancing civic responsibility and promoting rehabilitation, the ban symbolically weakens the ongoing ties prisoners' have with society. Although the positive effect of giving prisoners the vote should not be overstated, it is suggested that those who vote are less likely to reoffend because they are reminded of their ongoing connection with society. Moreover, the blanket application of the ban is not proportionate to the aims. In light of this, and in practically undermining the rehabilitation of prisoners, it is clear that prisoner disenfranchisement is not appropriate *at all*. It would be more beneficial to the aim of rehabilitation, and by implication to the prisoner and society, to change the law so to enfranchise all prisoners.

### *6. Conclusions.*

Away from the contentious political debate on parliamentary sovereignty often associated with prisoner votes, this article set out to examine the extent to which the blanket ban on prisoner voting is appropriate in Britain. In so doing, this article sought to highlight that a right to vote did exist. Next, this article challenged the notion that a prisoner is subject to a civic death. In so doing, the extent to

which a prisoner remained a holder of fundamental rights was scrutinised. Finally, this article sought to examine whether the interference with the right to vote could be justified as having a legitimate aim, and whether the interference was proportionate to those aims.

Chapter One provided an overview of the current law in Britain. The chapter highlighted the controversies of the British approach to the disenfranchisement of prisoners, explained most extensively in *Hirst* by the ECtHR. Chapter Two demonstrated that there is an internationally protected right to vote under A3P1. As such, those who continue to argue that the vote can be withdrawn from prisoners on the basis that it is a privilege should face a strong and credible rebuttal. A concerning paradox within the parliamentary discourse has been identified which undermines the credibility of those who maintain the vote is only a privilege, whilst simultaneously promoting its importance for self-interest. Chapter Two concluded that although the vote is not an absolute right, within a democratic nation such as Britain, there is a fundamental, *human right to vote*.

It is clear from Chapter Three that the historic notion of asserting that a prisoner is subject to a civic death is incorrect. Instead, every prisoner retains his or her citizenship and associated fundamental rights. Therefore, whilst some interference with a prisoner's rights is inevitable through incarceration, the judiciary will rightly resist the extent to which this is permitted. Chapter Three argued that prisoner disenfranchisement is inconsistent with the ongoing citizenship status and associated human rights of those imprisoned. In applying the right to vote to the prisoner, a holder of rights, it is conclusively argued that it would be more appropriate, as well as legally necessary, to change the law and re-enfranchise the prison population.

In assessing the extent to which the aims of the ban on prisoner voting are legitimate, Chapter Four asserted that the blanket ban is not justified as a punishment or as a means to enhance civic responsibility. Rather than enhancing civic responsibility and promoting rehabilitation, the ban symbolically weakens the ongoing ties prisoners have with society. In so doing, it seems that removing the vote *actively* undermines efforts to enhance civic responsibility. Evidence presented within this chapter suggested that those who vote are less likely to re-offend *because* they are reminded of their ongoing connection with society. It is argued, therefore, that the ban does not fulfil the aforementioned aims purported by government. Latterly, this chapter highlighted how the ECtHR in *Hirst* was correct when it held that the blanket application was disproportionate. Similarly opposed to the retention of the current ban, this chapter concluded that it would be more beneficial to the rehabilitation of prisoners, and thus to society, to reform the law and enfranchise all prisoners.

To conclude, this article has demonstrated that the blanket ban on prisoner voting is not appropriate in Britain. There is a human right to vote. Individuals retain their humanity whilst in prison and thus continue to hold fundamental rights. The court is clear that a fundamental right can only be limited if done so in pursuit of a legitimate aim, and if the limitation is proportionate to that aim. However, this article has highlighted how the current ban fails both such tests, and instead actively undermines rehabilitation. It is evident, therefore, that both legally and practically speaking, the ban is inappropriate.

In light of the potential benefits re-enfranchisement may have on the individual incarcerated, as well as wider society, it would instead seem *more appropriate* to allow prisoners to vote. Whilst the Joint

Committee on the Draft Voting Eligibility (Prisoners) Bill suggestion to enfranchise all prisoners serving sentences of 12 months or less is politically pragmatic, this article has demonstrated that it does not go far enough to solve the problem. Instead, it is clear that the only way to credibly respond the *cause célèbre* that is prisoner voting is to repeal section 3 of the RPA 1983 and give all prisoners the right to vote using a postal ballot. Allowing *all prisoners* to vote is the *only* way the law can show appropriate respect for the prisoners' fundamental right to vote, their ongoing status as a citizen and their rehabilitation back into society.

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### **List of Abbreviations**

<b>Expansion</b>	<b>Abbreviation</b>
The European Court of Human Rights	ECtHR
European Convention on Human Rights	ECHR
Representation of the People Act	RPA
Article 3 of Protocol No. 1 of the European Convention on Human	A3P1

Rights	
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### **List of Statutes and Cases**

#### **Statutes**

##### **England**

Forfeiture Act 1870

Representation of the People Act 1918

Representation of the People (Equal Franchise) Act 1928

Representation of the People Act 1948

Prison Act 1952

Criminal Law Act 1967

Representation of People Act 1969

Representation of the People Act 1983, as amended by the  
Representation of the People 1985

Representation of the People Act 2000

Criminal Justice Act 2003

#### **International Law**

Convention for the Protection of Human Rights and Fundamental  
Freedoms (European Convention of Human Rights, as amended)  
ECHR 1950

First Protocol of the Convention for the Protection of Human Rights  
and Fundamental Freedoms (European Convention of Human  
Rights, as amended) ECHR 1952

International Covenant on Civil and Political Rights (adopted 16  
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*R (Chester) v Secretary of State for Justice; McGeoch v The Lord President of the Council & Anor* [2013] UKSC 63

*R (on the application of Barclay) v Secretary of State of Justice* [2009] UKSC 9

*R v Secretary of State for the Home Department ex parte Daly* [2001] UKHL 26

*R v Secretary of State for the Home Department ex parte Leech (No 2)* [1994] QB 198

*R v Secretary of State for the Home Department ex parte Simms and O'Brien* [1999] 3 WLR 328

*R v Secretary of State for the Home Department, ex parte Pearson and Martinez; Hirst v Attorney-General* [2001] EWHC (Admin) 239  
*Raymond v Honey* [1983] 1 AC 1

*The Queen on the application of "P" and "Q" v The Secretary of State for the Home Department* [2001] EWHC 357 (QB)

## **European Court of Human Rights**

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*Frodl v Austria* App no 20201/04 (ECtHR, 8 April 2010)

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*Lingens v Austria* App no. 9815/82 (ECtHR, 8 July 1986)

*Mathieu-Mohin v Belgium* App no 9267/81 (ECtHR, 2 March 1987)

*McHugh and Others v United Kingdom* App no 51987/08 (ECtHR, 10 February 2015)

*Scoppola v Italy No. 3* App no 126/05 (ECtHR, 22 May 2012)

## **Israel**

*Hilla Alrai v Minister of the Interior* (HC 2757/96; 1996)

**South Africa**

*August and Another v Electoral Commission and Others* (CCT 08/99) [1999] ZACC 3

*Minister of Home Affairs v National Institute for Crime and the Re-integration of Offenders and Others* (CCT 03/04) [2004] ZACC 10

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*Coffin v Reichard* 143 F.2d 443 (1944)

*Wolff v McDonnell* 418 US 539 (1974)

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