VRP05

Ymchwiliad i hawliau pleidleisio i garcharorion

Inquiry into voting rights for prisoners

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Executive Summary

- The historical record of legislation affecting prisoner voting does not indicate a long-standing ban on the prison franchise in the UK's legal systems. Many prisoners held in Welsh prisons were able to vote by postal ballot between 1949 and 1969.
- The right to vote is a human right which is fundamental to not only to democracy in Wales but also to the National Assembly of Wales's obligations under the ECHR. It is, however, a qualified right, the removal of which can be justified as a punishment for serious criminality.
- The UK will not be in compliance with Article 3 of Protocol 1 ECHR as interpreted by the European Court of Human Rights in *Hirst* and *Scoppola* as a result of the UK Government's policy of permitting prisoners on day-release to vote.
- Following the transfer of competences to the National Assembly of Wales to determine Welsh electoral law under the Wales Act 2017 it is incumbent upon the Assembly to fulfil its duty as a rights-respecting institution and introduce measures to tackle this breach of rights.
- The UK Parliament's 2013 Joint Committee report provides a model of what minimal compliance with the requirements of Article 3 of Protocol 1 could involve, but it would be open to the Assembly to enfranchise a greater proportion of prisoners in Assembly elections.

Author Information

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Challenging the Ban on Prisoner Voting

[1] The courts have recognised that 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'.[1] One of the rights currently expressly removed upon imprisonment is the right of prisoners (other than individuals imprisoned for contempt, default or on remand) to vote.[2] The historical justifications for the current restrictions on prisoner voting are nonetheless questionable. As the UK Government acknowledged in the notes accompanying the Voting Eligibility (Prisoners) Draft Bill, there has been no constancy in the UK's approach to prisoner disenfranchisement since the Victorian era. The most that can be said is that '[t]here has been *some form* of bar on prisoners voting in UK legislation for *most* of the past 140 years'.[3]

[1] *Raymond* v *Honey* [1983] 1 AC 1, 10 (Lord Wilberforce).

[2] Representation of the People Act 1983, s. 3(1).

[3] C. Grayling, *Voting Eligibility (Prisoners) Draft Bill* (London, HMSO: 2012), 3 (Emphasis added).

[2] The Victorian legislation which banned prisoners from voting only explicitly applied to individuals convicted of crimes classed as felonies and sentenced to more than 12 months imprisonment. Other prisoners faced the more prosaic difficulty of being unable to attend polls by virtue of their imprisonment. This changed with the Representation of the People Act 1948, which introduced postal ballots for individuals 'no longer resident at their qualifying address'.[4] As such, prisoners serving short sentences who remained listed on the latest electoral register could vote by post in the constituency of their home address.

[3] On the recommendation of the Law Reform Commission the UK Parliament ended the classification of offences as felonies and misdemeanours England and Wales in 1967.[5] The Law Commission explicitly recognised the consequences of this change for prisoner enfranchisement, and indeed justified the change as bringing England and Wales into line with the law in Scotland (where the abolition of outlawry in 1949 had the effect of enfranchising most prisoners).[6] That this liberalisation of the restrictions on prisoner voting took place with little debate, on the recommendation of expert bodies such as the Law Reform Commission, is entirely in keeping with other largely de-politicised reforms of the criminal justice system in this era.[7]

[4] By contrast, when the Home Secretary James Callaghan introduced legislation banning any UK prisoner from voting in 1969,[8] that move marked the start of an era in which criminal justice policy became intensely politicised. Today's restrictions on prisoners' right to vote are not a near "immutable" feature of Wales's electoral arrangements. They are a product of the turn in recent decades towards an increasingly punitive criminal justice system. Nonetheless, in the words of Baroness Hale, prisoners 'have all committed an offence deemed serious enough to justify their removal from society'.[9] Successive UK Governments have therefore justified prisoner disenfranchisement on grounds of '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 for the duration of their sentence'.[10]

[5] The European Court's Grand Chamber did not dismiss these concerns in its *Hirst* judgment, asserting that there is 'no reason in the circumstances of this application to exclude these aims as untenable or *per se* incompatible with the right'.[11] In its *Scoppola* decision, the Grand Chamber reaffirmed that efforts to enhance civic responsibility constituted 'legitimate aims'.[12] The European Court is therefore hardly insensitive to these concerns. The touchstone of the UK's breach of human rights in denying prisoners the vote lies not in the philosophical reasoning behind mass disenfranchisement, but in the fact that this rationale was not subject to debate in light of human rights standards in the course of the legislative process[13] and that the present restrictions are disproportionate in light of their stated aim.[14]

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[4] Representation of the People Act 1948, s. 8(1)(e).
[5] Criminal Law Act 1967, s. 1.
[6] Criminal Law Revision Committee, 'Felonies and Misdemeanours' (1965) Cmnd. 2659, para.79.
[7] See I. Loader, 'Fall of the "Platonic Guardians": Liberalism, Criminology and Political Responses to Crime in England and Wales' (2006) 46 *British Journal of Criminology* 561.
[8] Representation of the People Act 1969, s. 4.
[9] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [91].
[10] *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, [50].
[11] Ibid., [75].
[12] *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [92].
[13] *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, [79].
[14] *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [104].

The right to vote as a human right

[6] The right to vote is enshrined as one of the UK's international human rights commitments. Under Article 3 of Protocol 1 of the European Convention on Human Rights, the UK accepted the responsibility to 'ensure the free expression of the opinion of the people in the choice of the legislature'. Article 25 of the International Covenant on Civil and Political Rights provides a right for individuals to take part in public affairs in their country of citizenship. Furthermore, under Article 40 of the EU Charter of Fundamental Rights, 'every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State'.[15]

[7] Even if the UK repudiated these international commitments this would not undermine the status of the vote as constitutional right. In domestic law, into the early-twentieth century, the ability to vote was hedged by property- and gender-based restrictions. Additional votes for business owners and university graduates were only removed for general elections in 1948[16] (and indeed remained a factor in Northern Ireland Parliament elections until 1968).[17] Through this process of gradual legislative reform the UK moved towards Jeremy Bentham's principle of one person, one vote, of equal worth.[18] Although senior UK judges recognise that democracy in the UK 'is founded on the principle that each individual has equal value',[19] the ease with which the UK Parliament removed the right of prisoners to vote in 1969, demonstrates the enduring fragility of democratic rights under the UK Constitution.

[8] The Welsh Assembly therefore has an opportunity to address this important issue. The Assembly has been at the forefront of human rights developments in the UK, as demonstrated in its legislative approach to the UN Convention on the Rights of the Child.[20] Moreover, as the devolution legislation affirms, Assembly legislation must adhere to the ECHR's requirements.[21] Any legislation passed in breach of the ECHR will be struck down by the courts as exceeding the Assembly's competences. This means that if the Assembly is to legislate in a way which adapts the franchise, and does so to the exclusion of some prisoners, it must be confident that its measures will be ECHR-compliant.

Prisoners' right to vote

[9] Advocates of an absolute prohibition on convicted prisoners voting maintain that individuals convicted of offences warranting imprisonment have disregarded their civic responsibility and thereby forfeited their vote. Supporters of the enfranchisement of all prisoners, by contrast, maintain that the right to vote is foundational to the UK's democracy and should not be withdrawn from adult citizens under any circumstances. The former position disregards the requirements of the right to vote (particularly in terms of the ECHR), whilst the latter position risks overstating them.

[15] See *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [16] (Lord Mance).
[16] Representation of the People Act 1948, s. 21(a)(ii).
[17] Electoral Law Act (Northern Ireland) 1968, s. 1 and s. 3.
[18] See P. Norton, *The Commons in Perspective* (Blackwell, 1981) 53.
[19] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [132] (Baroness Hale).
[20] Rights of Children and Young Persons (Wales) Measure 2011, s. 1.
[21] Government of Wales Act 2006, s. 108A(2)(e).

[10] Even though the right to vote is a human right, it does not follow that it is an *absolute* right. Foreign nationals and children, for example, can legitimately be denied the vote without violating the UK's ECHR commitments. The issue for the European Court is one of proportionality. In the context of prisoners, it is willing to concede that restrictions on the ability of some prisoners to vote are justifiable (provided that the rationale underpinning such legislative restrictions is the basis of the relevant legislative restrictions). But to impose an essentially blanket ban upon prisoners voting fails to give adequate regard to the fundamental importance of the vote in a democracy.

[11] The importance of the vote is such that it cannot be removed as a punishment which is a mere adjunct to depriving a prisoner of their liberty. For example, one problem with conceiving of the loss of the right to vote as a punishment that runs in parallel with the loss of an individual prisoner's liberty is that some prisoners continue to be deprived of their liberty not primarily as a punishment, but in the interests of public safety.[22] Moreover, criminals sentenced to very short periods of imprisonment may lose their right to vote if that imprisonment happens to coincide with an election, introducing an element of arbitrariness into the punishment.[23]

[12] The UK Government claim to have addressed the issue of prisoner voting by enfranchisement of a very limited number of prisoners who are released on temporary licence or home detention curfew on election day, which were communicated to the Council of Europe's Committee of Ministers in December 2017.[24] The Committee of Ministers subsequently closed the prisoner voting cases as having been effectively resolved.[25] This support, however, is far from determinative of the issue. In its prisoner voting jurisprudence, the European Court has required that a specific rationale must be identified for imposing voting restrictions upon particular prisoners, as opposed to an 'automatic and indiscriminate' rule with a general effect on a large body of prisoners.[26]

[13] The UK Government's minimal response to prisoner voting does not, therefore, effectively address the principles underpinning the European Court's jurisprudence, even taking into account the 'the wide margin of appreciation in this area'.[27] The margin of appreciation is a tool employed by the European Court to acknowledge that domestic institutions are sometimes better placed than it is when it comes to assessing the application of the ECHR within a particular legal system. It does not necessarily insulate these new arrangements from challenge in the domestic courts. The *Hirst* case might have been resolved, but the issue is sure to produce further litigation.

[14] Following the enactment of the Wales Act 2017 the National Assembly of Wales gained the competence to alter its own electoral arrangements and those applicable to local government in Wales.[28] Use of the powers to alter the franchise are subject to a super-majority; 40 of the

[22] For example, indefinite sentences of imprisonment for public protection under the Criminal Justice Act 2003, s. 225, continue to apply to large numbers of prisoners even after the use of such sentences ended in 2012. As with life imprisonment, 'post tariff' incarceration of such prisoners is based on parole board assessments of risk to the public. See *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, [76].
[23] Ibid., [76].
[24] Council of Europe Committee of Ministers, 1302nd meeting, 5-7 December 2017 (DH), H46-39.
[25] Council of Europe, Committee of Ministers, 1324th meeting, 7 September 2018 (DH), para. 18.
[26] *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [108].
[27] Council of Europe Committee of Ministers, 1302nd meeting, 5-7 December 2017 (DH), H46-39, para. 3.
[28] Wales Act 2017, s. 5.

60 Assembly Members would have to back a change for it to become law.[29] If it is to use these powers to legislate to alter the franchise for its own elections and local elections in Wales the Assembly must recognise that any attempt to maintain the current restrictions on prisoner voting will amount to a legislative action in breach of its ECHR obligations. As such, it would be acting beyond its competences, and such an action will inevitably attract legal challenge. This does not, however, imply that the Assembly must extend the right to vote to all prisoners to comply with its legal obligations, and the next section of this submission sketches possible models by which the Assembly can achieve compliance with the ECHR's requirements.

Legal bases for maintaining some restrictions upon prisoner voting rights

[15] The European Court does not reject the idea that removal of the vote can, in some cases, constitute an appropriate additional penalty to removal of an individual's liberty. In various decisions relating to prisoner voting the Court has mentioned giving the power of judges on sentencing to remove the vote,[30] or removing the vote for particular crimes in which the nexus of criminality serves to undermine the democratic process ((broadly, offences striking at the operation of democracy such as offences related to electoral fraud, abuse of office by elected representatives or political violence),[31] as being justifiable approaches to withdrawing the franchise from particular prisoners.

[16] Neither approach is without its shortcomings. Upon conviction for a criminal offence, a sentencing decision personal to an individual (following a fair trial before an independent tribunal) is necessary to legitimately remove her liberty,[32] but a separate judicial direction as to the length of deprivation of the vote might prove difficult for prisons to administer. It might even, in line with *Scoppola*, permit a legislature to deprive individuals of their right to vote even after their liberty has been restored.[33] The Scottish Government have been sceptical of this approach in their latest consultation, noting opposition from the Scottish judiciary (on the basis that voting rights should not be settled on a case-by-case basis).[34]

[17] Removal of the right to vote for particular classes of offences, regardless of the seriousness of the criminality at issue, smacks of the adoption of individuated reciprocal penalties within the legal system.

[18] In short, these approaches were mere suggestions from the Court on potential options for how to comply with Article 3 of Protocol 1, and need not be followed by the Welsh Assembly must necessarily in order to comply with its ECHR obligations.[35] Instead, sentence length stands as an indicator of the seriousness of a criminal wrong committed by an individual which

[29] Wales Act 2017, s. 9.
[30] *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [113].
[31] See *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, [71].
[32] ECHR, Article 5(1)(c) and Article 5(3).
[33] See *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [109].
[34] Scottish Government, *Consultation on Prisoner Voting* (14 December 2018) 13. Available at: https://consult.gov.scot/elections/prisoner-voting/.
[35] See *Toner and Walsh* [2007] NIQB 18, [9(iii)].

was frequently mentioned in responses to the 2017 Welsh Government Consultation on electoral reform.[36]

[19] The rationale of a sentence for a criminal conviction in the domestic legal systems is ordinarily to remove an individual's liberty in proportion to the seriousness of the criminal offence he has committed (for Hegel, 'the concept and measure of [a criminal's] punishment are derived from his act'[37]). Sentence length therefore potentially serves as a measure by which to divide criminality so serious that it warrants removal of the vote from lesser criminality. The difficulty lies in drawing the line where a prisoner has so damaged social norms as to warrant this additional punishment.[38]

Legislating in compliance with the Welsh Assembly's legal obligations

[20] Removal of the right to vote on the basis of sentence length will likely be regarded by the European Court as a proportionate restriction upon the qualified right to vote, in light of the *Scoppola* decision's acceptance of the Italian disqualification from voting of prisoners serving sentences of more than three years.[39] Much would depend on the chosen point at which such a disqualification would apply. In 2013 the Joint Committee's majority report to the UK Parliament proposed that the enfranchisement of prisoners serving less than one year (and prisoners serving longer sentences in the final six months of their incarceration) would satisfy the UK's legal obligations under the ECHR.[40]

[21] Minimum compliance with ECHR obligations is, by definition, compliance. In light of the protracted nature of the prisoner voting saga, the domestic courts deciding cases under the Wales Act (and ultimately the ECHR) would likely accept that such a position, being based upon the Welsh Assembly's careful consideration of the issues at stake, falls within the discretion open to a legislative body deciding such questions. This legislative response, however, does not necessarily carry with it the virtue of longevity (especially in light of paragraph 15 above). The ECHR is a 'living instrument',[41] and what is accepted by the Court as minimal compliance today would not necessarily remain so in the medium term as a European consensus develops on the voting rights of prisoners. By the same virtue, "doing nothing", and simply retaining the current arrangements under the Representation of the People Act 1983, will likely come under further pressure.

[22] Removal of the vote from prisoners sentenced to more than four-years' imprisonment would be more clearly justifiable in light of the level of criminality of such individuals (and thereby the societal harm they have caused). The removal of the vote in such instances could be justified as a proportionate punishment; in *Chester and McGeoch*, for example, Baroness Hale recognised that there was no reason under the Article 3 of Protocol 1 ECHR jurisprudence to

[36] Welsh Government, *Consultation – Summary of Responses, Electoral Reform in Local Government in Wales* (April 2018) 48. Available at: https://beta.gov.wales/sites/default/files/consultations/2018-04/180526-summary-of-responses.pdf.

[37] G. Hegel, *Philosophy of Right* (T. Knox, trans., OUP: 1965) 71.

[38] For an alternate approach, excluding the vote from prisoners convicted of violent offences, see Political and Constitutional Reform Committee, *Prisoner Voting*, February 2011, HC 776, Q6 (Lord Mackay).

[39] See *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [106].

[40] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* (2013) HL103/HC924, 67.

[41] *Tyrer v UK* (1978) 2 EHRR 1, [31].

presuppose that two murderers had suffered any breach of their own human rights in being deprived of the vote.[42] Nonetheless, the Committee should recognise that any approach short of full enfranchisement will likely give rise to litigation.

[23] If prisoners are permitted to exercise the vote by post or by proxy in the constituency in which they were resident prior to their incarceration such an approach would impose no special burdens on the administration of prisons in Wales or upon the electoral process. Permitting prisoners to vote in the constituency in which they were last resident prior to their incarceration would also prevent any disproportionate impact of reform upon constituencies which contain prisons.

Conclusions: Wales as a European liberal democracy

[24] Ireland and Canada, both countries with comparable legal systems to Wales, have since the beginning of the twenty-first century enfranchised their entire prison populations without manifest administrative difficulty.[43] Ireland legislated in reaction to the *Hirst* decision, whereas Canada legislated in response to a ruling by its own Supreme Court. The rationale behind the Canadian Supreme Court ruling should provide pause for thought for legislators tempted to dismiss outright the right of prisoners to vote. As the majority ruled, 'the wholesale disenfranchisement of all penitentiary inmates, even with a two-year minimum sentence requirement, is not demonstrably justified in our free and democratic society'.[44]

[25] Wales is no less confident or mature a liberal democracy than Canada or Ireland. In light of their example it is all but impossible to maintain that societal norms or the democratic process will be threatened by the National Assembly of Wales permitting a broad measure of prisoner enfranchisement. The Assembly should use its new competences to assert its commitment to liberal democratic values which the UK Parliament has been so reluctant to uphold.

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[42] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [87].
[43] See, with regard to Ireland, Cormac Behan and Ian O'Donnell, 'Prisoners, Politics and the Polls' (2008) 48 *British Journal of Criminology* 319.
[44] *Sauvé v Canada* [2002] 3 SCR 519, [64].