Written Submission by C.R.G. Murray, Newcastle Law School, Newcastle University

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. Almost all prisoners in Scotland were able to vote by postal ballot between 1949 and 1969.
- The right to vote is a human right and it is not peripheral in nature, but fundamental to the UK's democracy. Nonetheless, it is a qualified right, the removal of which can be justified as a punishment in cases of serious criminal wrong-doing.
- 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 new policy of permitting prisoners near the end of their sentences on day release to vote
- As a result of the transfer of competences to the Scottish Parliament to determine electoral law for Scotland under the Scotland Act 2016 it is incumbent upon the Scottish Parliament to fulfil its duties as a rights-respecting institution and introduce measures to address this ongoing breach of human rights. The 2013 report of the UK Parliament's Joint Committee provides a model of what minimal compliance with the requirements of Article 3 of Protocol 1 would involve, but it would also be open to the Scottish Parliament to enfranchise all prisoners for the purpose of Scottish Parliament elections.

Author Information

Colin Murray is a senior lecturer in law at Newcastle University, having been a lecturer at Newcastle from 2006 to 2012. His research examines the concepts of citizenship and democracy in the UK. He has contributed several academic articles to the debate on prisoner enfranchisement in the UK and in 2013 served as Specialist Advisor to the UK Parliament's Joint Committee on the Draft Prisoner Voting Bill.

Justifications for the UK's Blanket Ban on Prisoner Voting

[1] The historical justifications for the current restrictions on prisoner voting are questionable. In the context of Scotland the process of outlawry, which imposed a form of "civic death" on individuals for the duration of their incarceration, was ended in 1949. Since these reforms, imprisonment has come to be regarded as a punishment which primarily deprives convicted criminals of their liberty.

[2] 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 is the right of prisoners (other than those imprisoned for contempt, default or on remand) to vote.[2] But, as the UK Government acknowledged in the notes accompanying the Voting Eligibility

[1] *Raymond* v *Honey* [1983] 1 AC 1, 10 (Lord Wilberforce).
[2] Representation of the People Act 1983, s. 3(1).

(Prisoners) Draft Bill, there has not been any 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]

[3] In Scotland, following the abolition of outlawry in 1949, no prisoner (regardless of the seriousness of their offence) was legally barred from voting. This did not, however, mean that all prisoners could vote, because of the existence of administrative restrictions upon exercises of the franchise. Prisoners were not permitted to register the prison in which they were incarcerated as their home address. The only way in which prisoners could vote was by post, under the Representation of the People Act 1948, which for the first time made postal ballots available to individuals 'no longer resident at their qualifying address'.[4]

[4] Such voting depended upon a prisoner remaining upon the electoral register for their home address. Provided that this condition was met, the only formal restriction on postal voting from prisons under the 1948 Act was that prisoners held in prisons in their "home" parliamentary constituency could not be issued with a postal vote. Some inmates of HMP Edinburgh were so aggrieved with this restriction on a right freely exercised by their fellow inmates that they brought an unsuccessful legal challenge to these arrangements in the mid-1960s.[5]

[5] 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.[6] 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.[7] 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.[8]

[6] By contrast, when the Home Secretary James Callaghan introduced legislation banning any UK prisoner from voting in 1969,[9] that move marked the start of an era in which criminal justice policy became an intensely politicised matter. Today's restrictions on prisoners' right to vote are therefore not a long-established, near "immutable" feature of Scotland's electoral arrangements. They are a product of recent political obsessions with maintaining a punitive criminal justice system and, as with other aspects of the

[3] C. Grayling, *Voting Eligibility (Prisoners) Draft Bill* (London, HMSO: 2012), 3 (Emphasis added).
[4] Representation of the People Act 1948, s. 8(1)(e).
[5] Due to the rules then applicable to postal voting prisoners held in prisons in their "home" parliamentary constituency could not use this means of voting. See *Donnelly v Edinburgh Electoral Registration Officer*, 1964 SLT (Sh. Ct.) 80.
[6] Criminal Law Act 1967, s. 1.
[7] Criminal Law Revision Committee, 'Seventh Report: Felonies and Misdemeanours' (1965) Cmnd. 2659, para.79.
[8] 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.
[9] Representation of the People Act 1969, s. 4.

criminal justice policy, should today be brought into conformity with the UK's human rights commitments.

[7] As Laws LJ has recognised, 'there are deep philosophical differences of view between reasonable people upon the question of prisoners' suffrage'.[10] In the words of Baroness Hale, prisoners 'have all committed an offence deemed serious enough to justify their removal from society'.[11] The UK Government, in opposing the *Hirst* claim before the European Court of Human Rights, justified the restrictions 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'.[12]

[8] The European Court's Grand Chamber did not dismiss the importance of 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'.[13] In its *Scoppola* decision, the Grand Chamber reaffirmed that these constituted 'legitimate aims'.[14] The European Court is therefore not insensitive to these concerns. The touchstone of the UK's breach of human rights in denying prisoners the vote lies not in the underlying philosophical reasoning behind 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[15] and that the present restrictions are disproportionate in light of their stated aim.[16]

<u>The right to vote as a human right</u>

[9] 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'.[17] As the devolution legislation affirms, in its legislation the Scottish Parliament is obliged to respect the

[10] *R (Chester) v Secretary of State for Justice* [2010] EWCA Civ 1439, [4].
[11] *R (Chester) v Secretary of State for Justice; R (McGeogh) v The Lord President of the Council and Another (Scotland)* [2013] UKSC 63, [91].
[12] *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, [50].
[13] Ibid., [75].
[14] *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [92].
[15] *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, [79].
[16] *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [104].
[17] See *R (Chester) v Secretary of State for Justice; R (McGeogh) v The Lord President of the Council and Another (Scotland)* [2013] UKSC 63, [16] (Lord Mance).

ECHR's requirements.[18] Any legislation in breach of the ECHR exceeds the Scottish Parliament's competences and can be struck down by the courts.[19]

[10] Even the UK repudiated all of these international commitments this would not of itself dispel 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[20] (and indeed remained a factor in Northern Ireland Parliament elections until 1968).[21] Only through a process of gradual legislative reform did the UK came to embrace Jeremy Bentham's principle of one person, one vote, of equal worth.[22] The ease with which the UK Parliament removed the right of prisoners to vote in 1969 stands as testament to the enduring fragility of these rights in the context of the UK Constitution.

[11] Senior UK judges recognise that democracy in the UK 'is founded on the principle that each individual has equal value'.[23] In the Scottish case of *Moohan* Lord Hodge, sitting in the UK Supreme Court, recognised that if 'a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise … the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful'.[24]

<u>Responding to prisoners' right to vote</u>

[12] Advocates of an absolute prohibition on convicted prisoners voting maintain that any person convicted of an offence warranting imprisonment has disregarded his civic responsibility and thereby forfeited his vote. Advocates 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 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.

[13] 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 legislative evaluation). 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.

[18] Scotland Act 1998, s. 29(2)(d).
[19] See A. O'Neill, 'Stands Scotland Where it Did?' (2006) 57 NILQ 102, 106.
[20] Representation of the People Act 1948, s. 21(a)(ii).
[21] Electoral Law Act (Northern Ireland) 1968, s. 1 and s. 3.
[22] See P. Norton, *The Commons in Perspective* (Blackwell, 1981) 53.
[23] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [132] (Baroness Hale).
[24] *Moohan v Lord Advocate* [2014] UKSC 67, [35] (Lord Hodge).

[14] The importance of the vote is such that it cannot simply be removed as an adjunct to the deprivation of a prisoner's 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 as a punishment, but in the interests of public safety.[25] 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.[26]

[15] The UK Government have introduced proposals to address the issue of prisoner voting by enfranchisement of a very limited number of prisoners who are released on temporary licence on election day, which were communicated to the Council of Europe's Committee of Ministers in December 2017.[27] The Scottish Government consultation on electoral reform suggests that the Committee of Ministers supported these steps.[28] But this support is far from determinative of the issue. The European Court requires 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.[29] The UK Government's minimal response to prisoner voting does not effectively address the principles underpinning the European Court's jurisprudence, even taking into account the 'the wide margin of appreciation in this area'.[30]

[16] Following the enactment of the Scotland Act 2016 the Scottish Parliament gained the competence to alter its own electoral arrangements and those applicable to local government in Scotland.[31] If it is to use these powers to legislate to alter the franchise for its own elections and local elections in Scotland the Scottish Parliament 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 rapid legal challenge. This does not, however, imply that the Scottish Parliament 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 Holyrood can achieve compliance with the ECHR's requirements.

<u>Legal bases for maintaining some restrictions upon prisoner voting rights</u>

[17] 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

[25] *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, [76].
[26] Ibid., [76].
[27] Council of Europe Committee of Ministers, 1302nd meeting, 5-7 December 2017 (DH), H46-39.
[28] Scottish Government, Consultation Paper on Electoral Reform (December 2017) 25.
[29] *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [108].
[30] Council of Europe Committee of Ministers, 1302nd meeting, 5-7 December 2017 (DH), H46-39, para. 3.
[31] Scotland Act 2016, s. 3 to s. 10.

the power of judges on sentencing to remove the vote,[32] 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),[33] as being justifiable approaches to withdrawing the franchise from particular prisoners.

[18] 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,[34] 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 (not an approach I would advocate following).[35] 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.

[19] In short, these were mere suggestions from the Court on potential options for how to comply with Article 3 of Protocol 1, and are not approaches that the Scottish Parliament must necessarily adopt in order to comply with its ECHR obligations.[36] Instead, sentence length stands as an indicator of the seriousness of a criminal wrong committed by an individual. 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]

<u>Achieving compliance with the Scottish Parliament's legal obligations</u>

[20] Removal of the right to vote on the basis of sentence length will potentially be regarded by the European Court as a proportionate restriction upon the qualified right to vote, especially 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 point selected by Scottish Parliament 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

[32] *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [113].
[33] See *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, [71].
[34] ECHR, Article 5(1)(c) and Article 5(3).
[35] See *Scoppola v Italy (No 3)* (2012) App. No. 126/05, [109].
[36] See *Toner and Walsh* [2007] NIQB 18, [9(iii)].
[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].

(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 Scotland Act (and ultimately the ECHR) would likely accept that such a position, being based upon the Scottish Parliament's careful consideration of the issues at stake, falls within the margin of appreciation open to a legislative body on such questions. It must be emphasised, however, that this legislative response 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.

[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 (and thereby societal harm) of such individuals. Scotland classifies prisoners sentenced to four-years or more as long-term prisoners, recognising the seriousness of the societal harm associated with such offending.[42] In *Chester and McGeoch* Baroness Hale recognised that there was no reason under the Article 3 of Protocol 1 ECHR jurisprudence to presuppose that two murderers had suffered any breach of their own human rights in being deprived of the vote.[43] The removal of the vote could be justified as a proportionate punishment in relation to serious long-term prisoners, but the Committee should recognise that any approach short of full enfranchisement is sure to be attended by protracted 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 Scotland 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.

<u>Conclusions: Scotland's position as a European liberal democracy</u>

[24] Ireland and Canada, both countries with comparable legal systems to Scotland, have since the beginning of the twenty-first century enfranchised their entire prison populations without manifest administrative difficulty.[44] 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

[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].
[42] Prisoners and Criminal Proceedings (Scotland) Act 1993, s. 27(1).
[43] *R (Chester) v Secretary of State for Justice; R (McGeogh) v The Lord President of the Council and Another (Scotland)* [2013] UKSC 63, [87].
[44] See, with regard to Ireland, Cormac Behan and Ian O'Donnell, 'Prisoners, Politics and the Polls' (2008) 48 *British Journal of Criminology* 319.

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'.[45]

[25] Scotland 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 Scottish Parliament permitting a broad measure of prisoner enfranchisement. The Scottish Parliament 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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[45] *Sauvé v Canada* [2002] 3 SCR 519, [64].