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## Citizenship or Civic Death? Extending the Franchise to Convicted Prisoners

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### Summary

Following the decision in *Hirst v UK*, the government indicated a need, as opposed to a desire, to reconsider the disenfranchisement of convicted prisoners. Over eighteen months on, no firm decision as to future policy has been made, although consultation has been undertaken. In view of the government's apparent procrastination, this paper identifies a number of issues that should be given prominence, by critically evaluating the justifications for the current blanket ban on prisoner voting and assessing whether this form of penal sanction is proportionate and legitimate. Through an exploration of these themes, the wider ramifications of disenfranchisement emerge. The suggestion is that serious collateral consequences flow from the withdrawal of voting rights such that members of particular groups in the prison population are a-typically and intensely affected. Of particular concern is the ban's impact on ethnic minority prisoners, given their already failing engagement with the electoral process outside the prison walls. With the government advocating a partial ban, it is

contended that any denial to inmates of their voting rights bestows a ‘civic death’, to the detriment of prisoner rehabilitation and modern democratic principle.

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## Introduction

In October 2005 it appeared that the final salvo had been fired in the UK government’s defence of the disenfranchisement of convicted prisoners. In the conclusion to the long-running saga of *Hirst v UK (R (on the application of Pearson) v Secretary of State for the Home Department and Hirst v Attorney General* [2001] HRLR 39, *Hirst v UK* (2004) EHRR 40 and *Hirst v UK (No. 2)* [2005] Application No. 74025/01; Easton 2006; Powers 2006) the Grand Chamber of the European Court of Human Rights (ECtHR) found the practice of withdrawing the franchise from inmates to be in breach of Article 3 of Protocol 1 of the European Convention on Human Rights,<sup>1</sup> and out of step with both current thinking on penal policy and the requirements of modern democracy. In the course of its judgment the Grand Chamber described the Representation of the People Act 1983’s s3(1) (hereinafter RPA)<sup>2</sup> inhibition on the voting rights of prisoners as a “blunt instrument” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 82) that appeared to exist purely out of an unwarranted “adherence to tradition” (ibid at para 42). Furthermore the ban, as constituted, was deemed disproportionate due to its “general, automatic and indiscriminate” (ibid at para 82) nature. In the Grand Chamber’s view, the legitimation of all forms of punishment may not be seen as an inevitable consequence of a state’s desire for retribution since the doctrine of proportionality acts as a restraint on the power to

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<sup>1</sup> The provision guarantees ‘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>2</sup> Section 3(1) 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 election.’

punish (ibid at para 71). The requirement of proportionality should, therefore, loom large in any future legislative proposals in response to *Hirst*. In the immediate aftermath of *Hirst* the UK government appeared inclined to proceed by limiting the withdrawal of voting rights only to the more serious crimes (Parliament and Constitution Centre 2006, pp 9-10). With this statement of inclination came a promise, by the Lord Chancellor, of a public consultation on prisoners' voting rights following the ECtHR decision (ibid, p10). The consultation paper, published some eighteen months after *Hirst*, declared that the UK government was "wholly opposed" (Department of Constitutional Affairs 2006, p17) to full enfranchisement of the prison population, prompting criticism of the consultation process as a "flawed exercise" that "precludes a legitimate option from consideration" and reveals a government firmly wedded to "the status quo" (Prison Reform Trust 2007, paras 7 and 8). Here we examine critically the government's justifications for denying prisoners the vote and highlight important considerations of proportionality and democratic legitimacy that it is hoped will inform proposals to rectify matters.

## Ancient and Modern Justifications for Disenfranchising Prisoners

The practice of prisoner disenfranchisement may be traced to "anachronistic doctrines of infamy, loss of honour and civic death" (Orr 1998, pp 62-64), the latter dating from Ancient Greece where punishment for a crime often featured the loss of civil rights, including the right to vote.<sup>3</sup> In the absence of a comprehensive prison system, and alongside a range of brutal physical penalties, the original purpose of civic death was to expose offenders to "humiliation, stigmatisation" and "the strongest condemnation by state and society" (Orr 1998, p 63). As such it was a central and important form of punishment that was justified due both to its potency as a means of social control and its public censure of derelictions of civic duty. Modern-day manifestations of these "embarrassing relics" (Bennett 2004, p 17) find their theoretical justification in the idea of punishment for "breaches of the social contract" or for the "dishonouring of civic republican values". Simply put, contractarian arguments for prisoner disenfranchisement proceed on the basis that the commission of a crime constitutes an active and deliberate repudiation of the terms of the social contract. The penalty of exclusion from the franchise thus attaches to that act which signifies the criminal's apparent desire no longer to be considered a member of the state. By contrast, the dishonouring of civic republican values attaches punishment to the character of the criminal since the right to vote is extended only to citizens who demonstrate 'civic virtue'. Those who have failed to put aside their own private interests for the sake of the public good are considered to be of bad character and so, lacking civic virtue, may be excluded from the franchise (Furman 1997; Ewald 2002). The UK government has declared that disenfranchisement is warranted on both counts, as convicted prisoners have "breached the social contract" (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 50) and "lost the moral authority to vote" (Home Office 1999, para 2.3.8). It should be noted, however, that whilst

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<sup>3</sup> In the Administrative Court Kennedy LJ was content to locate the origins of current English law in the Forfeiture Act of 1870 which, in the context of an expanding franchise, imposed statutory inhibitions on the right to vote for those convicted of treason or a felony. See [2001] HRLR 39 at [1]

theoretical justifications provide some explanation for penal policy, they do not amount to 'legitimate aims' in the language of the ECtHR. Before the Grand Chamber in *Hirst*, therefore, the case for prisoner disenfranchisement had to be more specifically stated. The practice was said by the UK government to pursue four identifiable and intertwined aims: the punishment of offenders, the prevention of crime, the enhancement of civic responsibility and respect for the rule of law.

Whilst the Grand Chamber did not find these aims "untenable or *per se* incompatible" (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 75) with Article 3, Protocol 1 of the Convention, it was unconvinced that they could be achieved through a bar on voting. As has been indicated above, the UK's approach to securing these aims was primarily found wanting on grounds of proportionality. With regard to the proportionality of s3(1) RPA, the Grand Chamber's judgment implicitly suggests that the means and ends connection between the voting ban and the aims it pursues is merely faulty in degree but it may be that too intense a focus on the issue of proportionality would permit the perpetuation of the ban without requiring a more generalised consideration of its purpose and utility since, as contended below, the case for prisoner disenfranchisement is by no means made out.

### The Punishment of Offenders

The disenfranchisement of prisoners in English law proceeds on the basis that a civil disability automatically follows a criminal sanction since a convicted prisoner will, for the duration of his sentence, lose the right to vote. According to the Home Secretary, in one sense the withdrawal of the vote from this section of the electorate is purely retributive, there being "more than one element to punishment than forcible detention" (*Hirst* (Divisional Court) [2001] HRLR 39 at para 9). It may be argued, however, that temporary disqualification from the franchise has little retributive value beyond vindictiveness. It is, for the most part, invisible, and thus lacks significance in terms of public condemnation. It does not constitute part and parcel of formal sentencing as it may not be factored in or out of a prison term. Nor is it, as noted in *Hirst*, judicially imposed (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 77). Indeed, Judge Caflisch in his concurring opinion was at pains to point out that prisoner disenfranchisement, being a "complementary sanction" was a "matter to be decided by the judge, not the executive" (*ibid*, at para 8 of Judge Caflisch's concurring opinion). In this respect, the withdrawal of prisoners' voting rights wants for the impact of the full weight of the state's judgment and runs counter to the idea that the withdrawal of political rights should be carried out only by express judicial decision, that being the most appropriate safeguard against arbitrariness (*ibid*, at para 71).

### The Prevention of Crime

In the Grand Chamber's view, it was certainly arguable that the only Convention right that prisoners could legitimately be deprived of was the right to liberty guaranteed by Article 5. It was manifest that prisoners continued to enjoy the majority of their rights under the Convention whilst detained (*ibid*, at para 70) although, equally, in certain circumstances, justifiable restrictions could be

imposed on these rights. The Grand Chamber cited interests in institutional security and the prevention of crime as two such instances, interests which raise problems with prisoner disenfranchisement in two distinct ways.

Turning first to crime prevention, clearly a convicted inmate is intended to be deprived of his liberty to commit crime of any sort. The argument for *incarceration* is thus borne out but it is not immediately apparent that depriving prisoners of their voting rights in addition serves any specific purpose in the prevention of crime above and beyond that which is achieved simply through imprisonment. In order to escape the tautology of incapacitation by the mere fact of incarceration it is argued that there must be a definite, and probably measurable, benefit flowing from the policy of disenfranchisement. If there is not, it seems difficult to justify the additional punishment imposed by the withdrawal of the franchise. Crudely, the question to be answered is whether the average killer would be less likely to kill again because he is incarcerated or because he is incarcerated and has lost the right to vote? On any reading, it would appear that it is his incarceration that is crucial in preventing further crime, and not the loss of his voting rights. If the policy of disenfranchising prisoners is difficult to justify in terms of its benefits in relation to the prison population, it fares little better when cast as a deterrent. Deterrence is aimed at discouraging recidivism in those carrying convictions and at preventing the commission of crimes in the population at large. Again, however, the argument is not easy to sustain when applied to voting rights. Firstly, removing a convicted prisoner's right to vote does not necessarily mean that he will be deterred from committing crimes unrelated to the activity of voting. Secondly, the effectiveness of the removal of the right to vote as a deterrent would appear to depend upon the forfeiture of that right being viewed as significant by he who might lose it. Given that the prison population and much of the criminal class may already view itself as disenfranchised or politically alienated, it might be contended that, in this respect, the strategy is bound to fail. Finally, it may be argued that the loss of voting rights as a form of deterrence is weak compared with other potential consequences of criminal activity, such as the deprivation of liberty.<sup>4</sup> Demleitner maintains that "[i]f the primary sentences threatening the offender ... do not act as sufficient deterrents, disenfranchisement will not either" (2000, p788), such that the prospect of disenfranchisement may be "insufficient to significantly alter the criminal calculus" (Uggen, Behrens and Manza 2005, p311).

The most narrowly tailored fit between crime and punishment would justify disenfranchisement on the basis that the removal of the right to vote would preclude the commission of offences related to the specific activity of voting but certainty here could only be assured by permanent disenfranchisement. Moreover, withdrawing the vote on this basis would seem to make few quantitative gains in terms of crime prevention. Although data is not collected centrally, exchanges in the House of Commons reveal that, since 1995, only four people have been imprisoned for electoral offences.<sup>5</sup> It may, of course, be argued that the potential loss of the vote might serve as a deterrent in respect of the general population, but

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<sup>4</sup> Ewald has difficulty imagining that someone undeterred by the prospect of a long prison sentence would 'stay his hand for fear of losing the vote'. Ewald [2002], p1102

<sup>5</sup> HC Hansard 13 June 2005 Col 181W. Harriet Harman stated that these offences 'though related to electoral matters were not specific electoral offences'.

since the withdrawal of the franchise is, to all intents and purposes, incidental to the process of trial, conviction and punishment the argument lacks substance, it being inherent in the concept of deterrence that disincentives to crime should be apparent and observable by the population at large.

In terms of institutional security, Ewald points to the fact that current human rights standards have generally resulted in the enlargement of prisoners' rights (Ewald 2002, p1113) and argues that those rights should be abridged only insofar as that aids in the management of prisoners by the incarcerating establishment. It might, therefore, be necessary to place certain limits on freedom of association and freedom of expression on the basis of what Lord Steyn has described as 'the need for discipline and control' (*R v Home Secretary ex parte Simms* [2000] 2 AC 115, at p 127A-C) in prisons but, whilst the importance of addressing issues of security in prisons is fully accepted, it is contended that restricting the right to vote serves no useful purpose in this regard. Indeed, it may be argued that *granting* the vote to prisoners could be more straightforwardly refused on the basis of its institutional managerial impact in terms of 'administrative inconvenience' and 'internal order' (Foster 2004, p444) than maintaining its withdrawal.

### Civic Responsibility

The Grand Chamber did not address the issue of civic responsibility beyond noting that the ban on voting was designed to give an 'incentive to citizen-like conduct' (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 74) but the issue probably required more attention than that. The exercise of civic responsibility may be said to display both procedural and substantive hallmarks. Procedurally, civic responsibility would relate to actions associated with democratic governance, such as voting. At a minimum, procedural civic responsibility would simply require that the mechanics of citizenship are observed by enfranchised individuals. The mere casting of a vote would therefore be sufficient to satisfy the responsibilities of citizenship in respect of the electoral process. The UK government's approach, being predicated on notions of moral authority, clearly imports substance to civic responsibility because the withdrawal of the vote is a consequence of 'bad' behaviour. There is, thus, an element of disenfranchisement that speaks to the social conditioning of the prison population and maintaining the purity of the ballot box and not merely to inmates being excluded from the democratic processes.

The argument that withdrawing the vote from prisoners maintains the purity of the ballot box contains two distinct propositions. The first is that the privileges of membership of the polity must be withdrawn from flawed characters. In Furman's view, however, removing voting rights from prisoners on this ground "functions to convert dissonance from an institutional, political problem to an individual, psychological problem" (1997, p1227). Punishing a lack of moral worth in this way has a number of consequences: it appears to excuse the wider community for the part it may have played in creating social and economic conditions in which crime can flourish, obscures the fact that crime and 'bad' characters might be inevitable, even in a well-ordered society (ibid, p1200) and results in the labelling of individuals as 'abnormal' or 'deviant' when they may be no more flawed than

members of the electorate who retain their voting rights or members of the criminal community who have escaped a prison sentence (ibid).

The second proposition is that bad characters might defile democratic processes by misusing the vote to secure the implementation of ‘soft on crime’ policies. Brenner and Caste set out five conditions that must be met before prisoner disenfranchisement may be justified on this ground. First, prisoners must be conscious that they belong to an identifiable group. Second, this group must have common goals that can be achieved or furthered through the use of the ballot. Third, the group must want to employ the ballot for the purpose of furthering those goals. Fourth, the members of the group must have the ability to organise themselves into a coherent unit. Fifth, the group’s goals must be contrary to the common good (Brenner and Caste 2003, p237). To these, a sixth condition might be added, which is that the group would need to locate a candidate, or candidates, whose ideas and policies coincided with the group’s goals. These would be difficult enough conditions to meet in the outside world and there is nothing to suggest that the prison population is any more or less apathetic, or cohesive in its political views, affiliations and motivations than the population at large. In any case, the idea that members of the electorate might vote instrumentally is not exactly novel. What is novel is the idea that because someone has committed a crime, they might vote instrumentally. Moreover, the desire to purify the ballot box is perhaps misguided because the democratic ideal allows for factions and for competing conceptions of the common good to be exposed, explained, debated and voted upon. As Brenner and Caste note

“[i]t is not the state’s role to condition the franchise on the acceptability of any group’s goals, however ‘sinister’ they may be. A democratic state ought to protect the voting rights of groups seeking unusual, unpopular, and even antisocial ends and rely on the protections afforded by constitutional processes to mitigate any harm that might accrue to society” (ibid, p238).

Any conditioning of the vote on the basis of the voter’s likely support for the existing conception of the common good is, therefore, antidemocratic and signifies a lack of faith in the robustness of the electoral process.<sup>6</sup>

## Respect for the Rule of Law

The UK government’s final justification for the disenfranchisement of prisoners was that it would enhance respect for the rule of law. The argument is grounded in the idea that, as a consequence of violating democratically made laws, prisoners must be denied, for the duration of their incarceration, any ‘say’ in the formulation or substance of those laws or who should make them. It may be contended, however, that the withdrawal of voting rights could engender the opposite effect by further alienating a portion of the electorate that has already been internally exiled. The point was well made by the Grand Chamber when it approved the Canadian Supreme Court’s assertion in *Sauvé v Canada* that

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<sup>6</sup> Ewald notes that ‘depicting ballot-wielding convicts as a grave threat to the body politic expresses weakness and doubt, not confidence.’ Ewald [2002], p1114.

denying prisoners the vote was more likely to undermine respect for the rule of law than enhance it ([2002] 3 SCR 519). The position taken by the Canadian Court was that voting constituted an important means of teaching prisoners “democratic values and social responsibility” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 36) through “inclusiveness, equality and citizen participation”. This points, of course, towards rehabilitation, a word that appears to be missing from the UK government’s vocabulary in *Hirst*. Ewald maintains that the strongest challenge to prisoner disenfranchisement may actually be found in the idea of rehabilitation. Because of the “transformative nature of politics” (Ewald 2002, p1110), voting rights are crucial in helping criminals become law-abiding members of society such that “continued deprivation of the vote can only further corrode ... the sense of belonging that encourages compliance with the criminal law” (ibid, p1109).

So far, there has been no suggestion of a Government volte-face on the need to withdraw prisoners’ voting rights. All the indications are that, rather than taking a step back from this aspect of penal policy and assessing its purpose and utility afresh, an evaluation of the ban’s proportionality in relation to the full range of criminal offences will be undertaken. Below, we set out a range of considerations crucial to this exercise and suggest that a properly constituted, proportionate ban on the exercise of prisoners’ voting rights would apply to so few prisoners that it would be divested of any force in the achievement of the UK Government’s stated aims.

## Proportionality in Many Guises

As has been indicated, the Grand Chamber’s principal objection to the RPA s3(1) was that it was disproportionate yet it is abundantly clear that achieving proportionality in the statutory withdrawal of voting rights will be no straightforward matter for Parliament as it goes about bringing the UK into line since there are many ways in which the matter of proportionality may arise with regard to the disenfranchisement of prisoners.

## Disproportionate Numbers

In seeking to uphold the blanket ban on prisoner voting the Government trumpeted the fact that it was proportionate

“as it only affected those who had been convicted of crimes sufficiently serious, in the individual circumstances, to warrant an immediate custodial sentence” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 51)

but this statement obscures the true extent of the UK’s disenfranchisement of its prisoners. The Government’s stance is, by any measure, difficult to defend when it is revealed that, of the current 75,898 voting-age adults in prison, only 11,851 are on remand and therefore still entitled to vote (Home Office 2007, Table 1). The ban is, therefore, applied to nearly eighty five per cent of inmates, which would seem to be clearly disproportionate in the context of the prison population and inattentive in the extreme to ‘individual circumstances’. The second issue arises from the nature of the crimes committed. On grounds of proportionality it



is, surely, “not logically clear” (Ewald 2002, p1100) why a murderer should be treated in the same way as petty thief. If sentencing policy, apparently based on the idea that the punishment should fit the crime, dictates that the murderer is to serve a long sentence and the petty thief a shorter one, what is proportionate about both of them being fully deprived of the right to vote? In the generality of its application the suspension of the franchise appears to effect a prima facie subversion of the retributive principle of ‘just deserts’ that mandates some correlation between the crime and its attendant sanction. The counter-argument may, of course, be made that the petty thief’s voting rights will be restored more quickly due to his earlier release but that is a consequence of time served and not due to voting restrictions being applied proportionately. In this regard, Ewald maintains that

“when the punitive elements of a sentence are premised on proportionality, the collateral consequences should be held to the same standard” (ibid, p1099)

but it is clear that prisoner disenfranchisement falls worryingly short in this regard.

### Collateral Consequences

The RPA s3(1), apparently and avowedly neutral on its face and in its application, masks a gross absurdity because it is not even-handed in its outcomes. The problem is that whilst some prisoners will endure the full effects of disenfranchisement, others will suffer not at all. A prisoner sentenced to, say, three or four years may never face the consequences of the withdrawal of his voting rights if, during the time that he is incarcerated, no election occurs. He has been formally deprived of the right but no substantive punishment flows from that deprivation because the event upon which the punishment depends does not occur. If his prison term coincides with an election, however, he will experience punishment by disenfranchisement in the most direct way possible. The same holds for the prisoner who might be serving just three or four *months* that coincide with an election period. His sentence might be intended to reflect the relative pettiness of his crime but he is, nevertheless, subjected to a substantive punishment that other more serious criminals might escape purely because he is in the right place at the wrong time. In these circumstances it is difficult to maintain that the withdrawal of voting rights is rationally connected to the seriousness of the crime or length of time served. Whilst the claim that prisoner disenfranchisement is retributive in nature may, of course, be made it seems that the *fact* of punishment depends more upon the election cycle than it does upon a commitment to a carefully considered penal policy.

The blanket ban has also been argued to operate proportionately because as soon as a prisoner ceases to be detained the legal incapacity is removed but this is wholly inconsistent with the approach to other elements of penal policy such as categorising offenders for security purposes (Ashworth 2005, p256). If a prisoner is classified as a high security risk then, in all likelihood, he will be sent to a Category A prison. In the same way, a prisoner who is assessed as presenting a low risk to security would usually be detained in a Category D prison. Although

the allocation is largely discretionary and can often reflect concern over available resources rather than the gravity of the offence committed or the nature of the prisoner himself (ibid), to all intents and purposes the idea of proportionality inheres in the classification system. Likewise, the taking account of aggravating and mitigating factors might be argued to reflect a commitment to proportionality in the sentencing process. The same cannot be said of the removal of the right to vote, however, since it has no intimate connection with, or effect upon, sentencing itself. Indeed, in *Hirst*, the disenfranchised claimant had already served his sentence and remained in jail due only to concerns about the potential dangers posed by him should he be released.<sup>7</sup> The assertion that disenfranchisement is proportionate because it lasts only as long as the prisoner's sentence is, in these circumstances, clearly fallacious. These circumstances aside, it is contended that the most that may be claimed is that the disenfranchisement of prisoners is, at best, quasi-proportionate because it is parasitic upon sentences that have, to some extent, been determined on the basis of factors that are, themselves, loosely tied to an inexplicitly articulated concept of proportionality.

### The Racial Dimension

One of the most troubling collateral consequences of the blanket ban on prisoner voting is that it impacts disproportionately on certain sectors of the electorate. Without doubt, it affects more men than women due to the greater numbers of men in the prison population: currently there are 3,333 voting-age women in prison as opposed to 60,714 men (Home Office 2007, Table 1). Moreover, concern over ethnic participation in elections (LeLohe 1998) is magnified when attention is focussed on the disproportionate number of offenders from ethnic minority backgrounds within the prison setting. To support the ban is to reinforce discrimination against particular ethnic groups who may consider themselves disenfranchised outside of prison and are further disenfranchised in greater disproportionate numbers within prison. It has been suggested that "a black person who comes into contact with the criminal justice system has a good chance of being seriously disadvantaged compared with a white person" (Cavadino and Dignan 2001, p319). Studies conducted on stopping and searching (Home Office 1996), prosecution (see Fitzgerald 1993), committals to Crown court (ibid), sentencing (Hood 1992) and treatment within prison (Genders and Players 1989) are not favourable to any suggestion that the system is without racial bias (Ashworth 2005, p221). If the system is biased then it seems that the current ban on prisoner voting would disproportionately affect ethnic minority prisoners, particularly in light of Bowling and Phillips' claim that those from black African or black Caribbean backgrounds are nearly eight times more likely to be imprisoned than whites (Bowling and Phillips 2001, p198). Recent Home Office statistics indicate that 25 per cent of the prison population is from a black or ethnic minority background (Home Office 2005a, p90), confirming a rate of incarceration that, relative to population, far outstrips the imprisonment of whites (ibid).<sup>8</sup> If, as seems to be the case (see Electoral Commission 2002; Electoral

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<sup>7</sup> In 1980 Mr Hirst was sentenced to a term of discretionary life imprisonment for manslaughter. His tariff expired in 1994 but he remained in detention as the Parole Board considered that he continued to present a risk to the public.

<sup>8</sup> Among British nationals, the rate is 7.1 per 1,000 for the black population and 3.2 per 1,000 for people of mixed ethnic backgrounds as compared to 1.4 per 1,000 population for whites.

Commission 2003; Anwar 2001; Leighley and Vedlitz 1999; Saggar 1998), there are concerns at the lack of black and ethnic minority civic engagement on the outside then that concern must be exaggerated significantly when it comes to those who are in prison and would support any suggestion that the current ban on voting disproportionately impacts upon those from minority backgrounds (see Prison Reform Trust 2005).

The relationship between race and elections and race and prisons has long been identified in the United States (US). It has been estimated that, in the 1998 Presidential election, felon disenfranchisement excluded 1.4 million black men from voting.<sup>9</sup> This figure equated to 13 per cent of the black male voting age population<sup>9</sup> and was seven times the national average of people either temporarily or permanently disenfranchised (Ewald 2003, p37). Similarly, the 2000 US Presidential election saw around 400,000 of the Florida electorate disenfranchised as a result of a felony conviction. This figure included 31 per cent of Floridian black men, some 200,000 potential voters, who were excluded from the polls (Human Rights Watch 2006). In terms of impact, these votes could easily have swung the election in favour of Al Gore and potentially altered the course of modern history and Supreme Court precedent. These alarming figures have confirmed for the US that the practice of banning prisoner voting perpetuates racial inequalities and discriminatory practices. Much of the literature suggests that, historically, felon disenfranchisement was used as a method of specifically excluding black voters from democratic processes (see, for example, Mauer 2004; Behrens and Uggen 2003; Ewald [2002]; Furman 1997). This has been a central concern for some of those who argue against felon disenfranchisement, although those who support the practice suggest that any racial discrimination is an unfortunate by-product of a neutral policy (ibid).

This idea of prisoner disenfranchisement having a racial element has received very little attention in the UK<sup>10</sup>. This is perhaps surprising given the nature of our electoral politics and it has been suggested that the ban on prisoner voting should be read as a symbol of weakness since “stronger democracies are slightly less likely to disenfranchise prison inmates” (Blais, Massicotte and Yoshinaka 2001, p58). Concern for voter engagement within black and ethnic minority groups coupled with evidence of racial bias within the criminal justice system would support the need for the two ideas to be linked. The need exists for the UK because, as in the US, “criminal disenfranchisement exists at the intersection of two systems – electoral politics and criminal justice” (Ewald 2002, p1116). Just as race impacts upon the way in which our black and ethnic minorities perceive and engage in elections so the systematic or otherwise racial bias in our criminal justice system, most notably in our prison population, should be recognised as perpetuating that discrimination and disengagement (for an exploration of this issue in the Australian context see Orr 1998).

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<sup>9</sup> ‘Felony Disenfranchisement removes 1.4 Million Black Men from the Voting Rolls’, *Journal of Blacks in Higher Education* No 22, 1998-1999.

<sup>10</sup> Although Easton also identifies ‘a potential disparate impact issue’ in this jurisdiction. Easton 2006, p451

## Punishment and Proportionality

If the foregoing factors and collateral consequences are to be accounted for in the exercise of adjusting the voting rights of incarcerated criminals, and if the withdrawal of those rights is to be achieved without offending the principle of proportionality, the UK Government might well be obliged to go back to basics in terms of locating and selecting a suitably sensitive means of satisfying the requirements of modern human rights standards as articulated by the ECtHR. In the final parts of this paper, we focus on the issues of proportionality and democratic legitimacy as determinative of the future of prisoner disenfranchisement.

### Why Exalt Proportionality?

The government suggests that the RPA s3(1)'s ban is proportionate and the ECtHR suggests that any inhibition on voting rights ought to be proportionate. But why is proportionality so highly prized? In the context of punishment the exaltation of proportionality is not a new phenomenon. Indeed, in the 18<sup>th</sup> century Beccaria (1963, Chapter 23) insisted on its presence in any scaling of punishments and both Bentham and Beccaria suggested a tariff of graded penalties predicated upon preventing crime through deterrence (ibid and see Bentham 1982, p168). In Bentham and Beccaria's schemes, the seriousness of an offence should be reflected in the punishment for it which, in turn, should deter citizens from committing crime. The argument holds that an absence of proportionality would create perverse incentives and engender a belief that committing the more serious offence was more attractive as the punishment would be the same as for the lesser offence or relatively less punitive. In similar vein, Continental scholars who have demonstrated some support for a more modern concept of proportionality have defended it by stressing 'the role of punishment as a reinforcer of citizens' moral inhibitions against crime' (von Hirsch and Ashworth 2004, p133): punishment serves to reinforce societal norms because, as Roxin suggests, a penal system which imposes penalties that are commensurate with the offence committed will be deemed just by a state's citizens, increasing their faith in the rule of law and restraining them from committing offences (ibid). The concept of proportionality as a tool of crime prevention does not, however, meet with universal approval.

Whilst von Hirsch and Ashworth are content that contemporary desert theory moves the concept of proportionality to centre stage in the scaling of punishments they remain unconvinced by either ancient or modern readings of its purpose. With regard to crime prevention justifications in general, they make two observations. The first is that there is a lack of empirical evidence in support of the idea that deterrence-based measures have a positive impact in the reduction of crime (ibid at 132). As such, any utilitarian cost-benefit analysis of the deterrence justification is a hazardous enterprise to undertake and would ultimately be based on guesswork (Brenner and Caste 2003, p237). Secondly, and more importantly, von Hirsch and Ashworth object to proportionality being dependent upon crime prevention rather than being viewed as a principled commitment to 'just deserts' in its own right, arguing that where proportionality is accorded means rather ends status it is divested of any significance as an "independent ethical requirement" or "requirement of justice" and is "subject to whatever dilutions appear to be needed in the name of crime control" (von Hirsch and Ashworth 2004, pp133-134).

Rather than focussing on proportionality as a means of preventing crime, von Hirsch and Ashworth place it in the context of “the blaming character of punishment” (ibid at 134). They maintain that to punish is to deprive and, once an institution can condemn through punishment in the way that the State can, there is a requirement that the deprivation that is symbolic of modern condemnation is justly implemented. If conduct is reprehensible, proportionality acts as a gauge of how reprehensible the conduct actually is. In the von Hirsch and Ashworth model, the achievement of proportionality is comprised of three steps. Firstly the state determines that certain conduct is injurious such that sanctions of a punitive nature should be imposed upon citizens who engage in that conduct. Secondly, the severity of the punishment should reflect the stringency of the blame. Finally, step three demands that punitive sanctions are organised according to the degree of blameworthiness. The process is just in that it ensures that each offending activity has been properly adjudged censurable, the penalty has been considered, adjusted according to its severity, and the punishments organised to reflect the desired impact (ibid at 135). The achievement of proportionality by this method is not, however, without its dangers, particularly where justifications for punishment are, in von Hirsch and Ashworth’s terms “bifurcated” (ibid at 136). This means that the punisher must be wary of the rationale for the punishment: is it based on prevention, censure, or both? Only where a punishment can be said to be based on censure may the subsequent ordering of punishments be deemed to be demonstrating an ethical commitment to proportionality. Any other approach is to create a “Trojan horse” (ibid) and permit the undermining of proportionality. It is this element that, it is submitted, will cause the most difficulty in the calibration of the disenfranchisement of prisoners since none of the UK Government’s stated aims is explicitly aimed at censure.

### Can We Punish Proportionately?

The UK’s blanket ban on voting, whilst it may be said to meet the demands of step one above, does not reflect the balancing and scaling inherent in steps two and three. There is an absence of consideration of censure because the ban is imposed on the murderer, the petty offender and every prisoner in between and, furthermore, there is no apparent hierarchy, nor any properly calibrated reflection of blameworthiness. It has been suggested here that the blanket ban on prisoner voting offends because it knows no limits once the offender has been convicted. The only gauge appears to be the duration of the prisoner’s sentence. Should we recommend a move to emulate that currently being contemplated in response to the *Hirst* decision, it would mean the imposition of a partial ban determined by offence. In the immediate aftermath of *Hirst*, Lord Falconer announced a review of English legislation but made it clear that “in relation to convicted prisoners, the result of this is not that every convicted prisoner is in the future going to get the right to vote” (Ford 2005). On 2 February 2006, the Lord Chancellor announced that there would be a public consultation on prisoners’ voting rights (Parliament and Constitution Centre 2006, p10). It would seem, therefore, that the test for the Government will be in devising a policy of limited re-enfranchisement that also reflects a commitment to the concept of proportionality such that the new regime can meet the Grand Chamber’s requirement of “a discernible and sufficient link

between the sanction and the conduct and circumstances of the individual concerned” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 70).

It is at this stage that, having embraced the idea of some prisoners receiving the right to vote, the criteria upon which they may be awarded the vote must be decided. A number of countries in Europe<sup>11</sup> enforce a partial ban on prisoner voting. If prisoners are serving a sentence over one year in Austria, Malta and San Marino, they are banned from voting. In Belgium, prisoners<sup>12</sup> who are serving over four months are disqualified. In France and Germany (for a comparison of English and German approaches see Lazarus 2004) the judge acts as the custodian of the franchise, imposing the loss of voting rights as a form of additional punishment. Italy considers the crime committed before deciding whether to disqualify prisoners from voting and, in Norway, prisoners who are sentenced for specific criminal offences may lose the right to vote but this is, rightly, a matter of judicial discretion rather than executive command.

Naturally, the halfway house of selective disenfranchisement requires the support of a theoretical framework if the scaling of prisoner voting according to offence is to be effected proportionately. Von Hirsch and Ashworth suggest that one of the most pertinent criticisms of proportionality is that it is believed to “constrain the choice of sanctions” (von Hirsch and Ashworth 2004, p137) because of the lack of distinction between different types of proportionality; namely ordinal and cardinal proportionality. ‘Ordinal proportionality’ refers to how severely a criminal should be punished when compared to someone who has committed a similar offence. ‘Cardinal proportionality’ relates this ordinal ranking to a scale of punishments which is much wider in focus, embracing the full range of criminal offences. It is suggested that any partial ban would probably not allow for an assessment on the basis of ordinal proportionality. If a ban was, for example, imposed on someone who was guilty of manslaughter then it is unlikely that there would be any discretion as to the circumstances of the offence. A guilty verdict would, if it attracted a prison sentence, result in a voting ban. This might be defensible on the grounds of avoiding complexity and constraining judicial discretion but is not defensible if the punishment is to be proportionate. Manslaughter is a widely drawn offence which encompasses most homicides after murder but a failure to distinguish between manslaughters undermines the proportionality-seeking enterprise once more and leaves us with the heavy task of scaling offences according to cardinal proportionality. This is a task of “cardinal magnitude” (ibid at 141) as “there seems to be no crime for which one can readily perceive a specific quantum of punishment as the uniquely deserved one” (ibid at 142). The consequence might then be to argue for leniency whereby fewer offences rather than more are deemed to be serious. Indeed, von Hirsch and Ashworth suggest that

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<sup>11</sup> The UK is one of only eight European countries automatically disenfranchising all sentenced prisoners, the others being: Armenia, Bulgaria, Czech Republic, Estonia, Hungary, Luxembourg and Romania.

<sup>12</sup> It is perhaps worth noting that the UK is one of Europe’s great incarcerators, in England and Wales imprisoning 140.4 per 100,000 head of population. This is a higher rate of imprisonment than any Western European country and, in Europe as a whole, is exceeded only by Ukraine, Estonia, Latvia, Moldova, Lithuania, Azerbaijan, Poland, Romania, the Slovak Republic and Hungary. See Howard League for Penal Reform Press Release 2005.

“the principle calls for parsimonious use of state intrusions into individuals lives ... Raising the overall degree of punitiveness of the sentencing system would ... be undesirable because of the increased suffering and loss of freedom of choice that it visits on those punished” (ibid).

The loss of freedom of choice here would include the right to vote but in light of the Grand Chamber’s assertions that “[u]niversal suffrage has become the basic principle” and “the presumption in a democratic State must be in favour of inclusion” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 59 citing *Mathieu-Mohin and Clerfayt v Belgium* [1987] ECHR 1) it may be argued that any partial ban should be deployed very sparingly in order to avoid conflict with modern readings of fundamental rights.

### Why Punish At All?

The idea that any ban on prisoner voting can only be deemed proportionate if used sparingly seems naturally to beg the question why enforce the ban at all? The Prison Reform Trust notes that Bosnia, Croatia, Cyprus, Denmark, Iceland, Ireland, Finland, Greece, Latvia, Lithuania, Macedonia, Netherlands, Poland, Slovenia, Spain, Sweden, Switzerland and the Ukraine do not ban prisoners from voting (Prison Reform Trust 2005). Given Judge Caflisch’s suggestion in *Hirst* that allowing prisoners to participate in the democratic process would “serve as a first step toward re-socialisation” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 5 of Judge Caflisch’s concurring opinion) and given that a properly and proportionately constructed ban would embrace only a negligible number of inmates, it might be suggested that a ban of any type is unnecessary. There may, however, be other forces at work to prevent the lifting of the ban. In its defence in *Hirst* the UK asserted its own sovereignty, claiming that, by way of Article 3 of Protocol 1, it had a wide margin of appreciation in formulating the rules under which the right to vote was exercised (ibid at para 47). The argument is, in one sense, disingenuous since, by its very nature, a ban is not necessarily a manifestation of a procedural rule, as the UK Government appeared to be suggesting, even though it may legitimately be argued to constitute a legislative response to local conditions and public opinion<sup>13</sup> and, as such, within the margin of appreciation afforded to signatory states. Secondly it has been argued that political and democratic capital might be made were the ban to be lifted. The UK Independence Party maintains that allowing prisoners to vote “would put a significant block of voters in the hands of the government” (Farage 2005) and the Liberal Democrats have been accused of wooing the prisoners’ vote by voicing their commitment to the re-enfranchisement.<sup>14</sup> In the political bear pit, the

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<sup>13</sup> Although, in this regard, the Grand Chamber noted that the Convention system would probably not allow ‘for automatic disenfranchisement based purely on what might offend public opinion’ (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at [70]).

<sup>14</sup> Paul Goggins, Labour MP and Home Office Minister, on a visit to Brixton Prison. See <http://www.lambethlabour.com/news/crime/prisonervotes.html> accessed on 1 February 2006. By contrast, Mark Oaten MP, of the Liberal Democrats, stated that the ruling in *Hirst* was ‘not just about rights ... [but] about ensuring that prisoners return to their communities as responsible citizens. Telling offenders that they have no part to play in our democracy is no way to end the cycle of crime’. See <http://www.libdems.org.uk/news/story.html?id=9072&navPage=news.html> accessed on 1 February 2006 and the *Liberal Democrat Election Manifesto* 2005, pp8-10

possibility of lifting the ban has been dubbed a “danger to democracy” (UK Independence Party, Farage 2005) but the rhetoric merely serves to disguise the unpalatable fact that the greater danger to democracy may be posed by the continued disenfranchisement of convicted prisoners since the absence of a commitment to the universality of the franchise causes a deficit of legitimacy in both the legislature and the legislation it creates.

## Legitimacy

In the case of prisoner disenfranchisement, the issue of legitimacy is manifested in two ways. The first relates to the idea of representative democracy and proceeds on the basis that a legislature can only be said to be truly representative if it is formed out of a universal franchise. Certainly, in the jurisprudence of the ECtHR, the thrust of the modern democratic ideal is towards the universal franchise and to the vote as a right rather than a privilege (see, for example, *Mathieu-Mohin and Clerfayt v Belgium* [1987] ECHR 1, *Matthews v UK* (1998) 28 EHRR 261, *Aziz v Cyprus* [2004] ECHR 271, *Hirst v UK (No.1)* (2004) 34 EHRR 40). Indeed, in *Hirst* the Grand Chamber emphasised that “[a]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 62). The question that must be asked is whether, by delineating the franchise in the manner that it has, and maintaining that that is the preferred position, the UK government undermines the authority of the RPA because that law was made by a legislature which had not been voted into power by the *whole* community. Davidson argues that “[a]t least it can be said, where prisoners have the franchise, that their fate is sanctioned by a political process in which they continue to play a part” (Davidson 2004, p11) but the consequences of limiting the franchise may have a much wider impact than the “emasculated state of citizenship” (Johnson-Parris 2003, p110) that flows from the withdrawal of the franchise and which undermines the notion of individual political equality.<sup>15</sup> Uggen and Manza identify that a “democratic contraction” (2002, p777) occurs through prisoner disenfranchisement whereby the results of elections may be perverted and the composition of legislatures distorted to the extent that the principle of representative democracy is seriously undermined. Any such contraction can only be exacerbated by a growing prison population<sup>16</sup> and expansionist policies with regard to the use of imprisonment (for a discussion of this point see Fionda 2000).

The second manner in which the matter of legitimacy impacts on prisoners’ voting rights issue is by way of the Grand Chamber’s objection to fact that the RPA s3(1) had been implemented “without any substantive debate by members of the legislature” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 79) such that there was “no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote” (ibid). In *Hirst* at first instance, Kennedy LJ took the

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<sup>15</sup> In relation to an earlier episode in the *Hirst* saga, Lardy has noted the strong, symbolic value of prisoner disenfranchisement but argues that ‘[s]ociety purchases this symbolism ... at the expense of its commitment to the principle of political equality.’ Lardy [2002], p528

<sup>16</sup> Home Office projections indicate that, at its highest, the prison population in England and Wales in 2010 may exceed 91,000 inmates. In 2000, the average prison population in England and Wales was 64,600. See Home Office 2005b and Home Office 2001.



view that prisoner disenfranchisement was a no-go zone for judges, who should “defer, on democratic grounds, to the *considered opinion* of the elected body” ([2001] HRLR 39 at [20]). The fact is that, in the case of inmates’ voting rights, the ‘considered opinion of the elected body’ is firmly rooted in the late nineteenth century. Originating in the Forfeiture Act of 1870, the ban on prisoners’ exercise of their voting rights had been put in place in s4 of the RPA 1969 after a multiparty Speaker’s conference on Electoral Law unanimously recommended that a convicted prisoner in custody should lose his entitlement to vote. It has been automatically re-enacted ever since. That is not to say that there has been no Parliamentary cognisance of the matter at all. During the passage of the Representation of the People Act 2000, which enlarged the franchise to include remand prisoners and psychiatric inpatients (RPA 2000 ss2 and 4), Labour’s Harry Barnes suggested that in seeking to “enfranchise people who are dependent on decisions made by elected representatives” (HC Hansard 15 December 1999 Col 293-4) consideration should be given to extending voting rights to all prisoners. George Howarth, representing the Home Office, contended that Mr Barnes was “flying a kite when he suggested that it might be possible, or perhaps even right, to consider extending the franchise to convicted prisoners” (ibid, Col 300) and confirmed that the Government had “no intention” of so doing. In light of successive decisions by the ECtHR in *Hirst*, however, the situation has clearly changed, not only insofar as the need for the issue to be debated is concerned but also in terms of the UK’s freedom to cleave to longstanding policy and legislate accordingly.

In the House of Lords in 2004, the Bishop of Worcester, in his role as Bishop to Her Majesty’s Prisons, questioned why the government had referred *Hirst* to the Grand Chamber at all. Lord Filkin, representing the Department for Constitutional Affairs, responded that, since *Hirst* challenged the position that prisoners should be denied the right to vote, the Government wanted to “ensure that the issues in relation to this important and long-standing policy are fully considered” (HL Hansard 14 July 2004 Col 1242). The problem is that referring important matters of penal policy to the Grand Chamber may, from the UK Government’s point of view, have been counterproductive since it invited an unelected ‘foreign body’ to enter the debate where our own Members of Parliament had been denied the opportunity.

Certainly, the UK’s prisoner disenfranchisement policy was fully considered by the Grand Chamber but the decision in *Hirst* provoked the usual disquiet with regard to the ECtHR meddling in British affairs. On the one hand, the Court dismissed such concerns suggesting that “decisions taken by the court are not made to please....members of the public but to uphold human rights principles” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01, Judge Caflisch at para 4). On the other hand, however, it was clearly conscious of potential criticism in this regard with, in their concurring opinion, Judges Tulkens and Zagrebelsky warning of “difficult and slippery terrain” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01, joint concurring opinion of Judges Tulkens and Zagrebelsky) for the Court where two sources of legitimacy meet (the Court on the one hand and the national Parliament on the other) and the dissentients noting that it was “essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions” (ibid, joint dissenting opinion of Judges Wildhaber,

Costa, Lorenzen, Kovler and Jebens at para 6). In similar vein, in exchanges on the Electoral Administration Bill, Oliver Heald, Conservative MP for North East Herts, demanded that the ruling now be discussed in Parliament since it was “an affront to the House” that the absence of debate on prisoner disenfranchisement had provided “a justification for foreign judges overruling British law” (HC Hansard 25 October 2005 Col 209). He maintained that the RPA reflected the UK’s “political, social and cultural values” and those values demanded that “convicted burglars, muggers, rapists and murderers” (ibid) be denied the vote. Of the demands of our values we cannot, of course, be sure given the lack of Parliamentary attention to the subject but it now seems that despite, or perhaps because of, the Government’s foot-dragging by way of continued litigation in Strasbourg, prisoners’ voting rights have been forced onto the Parliamentary agenda. The decision in *Hirst* appears, however, to have reduced Parliament’s legislative elbow room. It is clear from the Grand Chamber’s majority judgment that a general restriction on prisoners’ right to vote “must be seen as falling outside any acceptable margin of appreciation ...” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 82). In the minority view, that assertion ran counter to Protocol 1, Article 3 jurisprudence which the ECtHR has declared is based on “a wide margin of appreciation” that may vary “according to the historical and political factors peculiar to each State” and which must allow for an assessment of electoral legislation to be made

“in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another” (*Py v France* [2005] ECHR 7).

Indeed, Judge Costa, dissenting, went so far as to suggest that the reality of the *Hirst* decision was to deprive the UK “of all margin and all means of appreciation” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01, dissenting opinion of Judge Costa at para 9). That is, of course, not so but the margin has been appreciably narrowed. The restrictions that are placed on legislative freedom are firmly grounded in Protocol 1, Article 3 precedent, but that precedent sets increasingly stringent criteria for inhibitions on the right to vote because such rights are deemed “crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01 at para 58).

## Conclusion

In 2003 leading international indicators of democracy found the UK to be “at or near the summit” (Beetham, Byrne, Ngan and Weir 2003, p334) of democratic achievement. This reputation has been readily challenged in *Hirst*. If the UK’s withdrawal of the voting rights of prisoners is to pass judicial muster it must now meet certain standards. In light of the impetus towards the universal franchise there is, patently, “no room in the Convention for the old idea of ‘civic death’ that lies behind the ban on convicted prisoners voting” (*Hirst v UK (No. 2)* [2005] Application No. 74025/01, joint concurring opinion of Judges Tulkens and Zagrebelsky). It seems, however, that there is room, for a carefully considered, proportionate and selective ban, which pursues a legitimate aim and which does not “impair the very essence” (*Mathieu-Mohin and Clerfayt v Belgium* [1987]

ECHR 1 at p 23) of the right to vote. Whether this can be achieved with the blunt tools at Parliament's disposal remains to be seen.

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