Disenfranchisement as Punishment: European Court of Human Rights, UK and Canadian Responses to Prisoner Voting

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"No one should be in any doubt: prisoners are not getting the vote under this Government."
David Cameron, Prime Minister (Prime Minister's Questions 24 October 2012)

Whether or not prisoners should enjoy the right to vote is a controversial subject in many democracies but perhaps none more so than in the UK. The issue pits the civil and political rights of some of the most unpopular citizens within society against the strong desire of Parliament to restrict and to limit those rights. In this paper, we examine how the UK has for a decade been able to avoid responding to decisions of the European Court of Human Rights (ECtHR), domestic courts, and the Court of Justice of the European Union (CJEU), that a complete ban on prisoner voting rights contravenes the First Protocol to the European Convention of Human Rights (ECHR), the Charter of Fundamental Rights of the European Union and the Human Rights Act 1998 (HRA). Much of the debate has focused on Parliamentary resistance to the rulings, but we argue that the European and domestic courts bear a good deal of responsibility for this state of affairs.

We make two arguments in this respect. First, although holding the UK ban on prisoner voting to be in breach of the ECHR, the ECtHR in *Hirst v UK (No. 2)*[1] failed to engage fully with the principled arguments around prisoner disenfranchisement, including those set out by the Canadian Supreme Court in *Sauvé v Canada*, a decision it explicitly approved.[2] The majority of the Court in *Sauvé* expressed serious misgivings about whether the state's objectives in promoting respect for the rule of law and civic responsibility, and imposing additional punishment on prisoners, were important enough to justify any prisoner disenfranchisement. However, without assessing fully the legitimacy of these arguments when asserted in *Hirst*, the ECtHR accepted them uncritically, focusing instead on how to ensure that prisoner disenfranchisement was proportionate, rather than confronting the logically prior question of whether *any* prisoner should be denied the right to vote.

Second, in sanctioning prisoner disenfranchisement without any proper assessment of the underlying rationale, the ECtHR has adopted what we suggest is a thin and impoverished form of proportionality reasoning. Through a series of decisions subsequent to *Hirst (No.2)*, the Court has back-tracked from its

[1] *Hirst v UK (No.2)* 74025/01 [2005] ECHR 2260.
[2] *Sauvé v Canada* [2002] 3 S.C.R. 519

initially robust stance, to the point where any restriction short of full disenfranchisement will be considered proportionate. Furthermore, it has weakened its primary means of enforcing the ruling in *Hirst (No.2)*. Despite a decade of stalling on the part of the UK government, the ECtHR's refusal to award damages and costs to British prisoners who continue to be denied the vote removes what the UK government acknowledged was a powerful incentive to enact reform. In this way, the ECtHR has been, in our view, too accommodating to the UK government's opposition to prisoner voting. This has had the unintended effect of rewarding Parliament for its disregard of the decisions of the ECtHR and so its continued breach of the Convention.

Others have written eloquently on the broader context within which the debate on prisoner voting rights has taken place, including the challenges to the role of the ECtHR and to Britain's continuing membership of the Council of Europe.[3] Our focus here is on the flawed approach of the ECtHR and the UK courts in failing to take seriously whether interference with prisoners' voting rights pursues a legitimate aim, directing their attention instead to the second limb of the test, the proportionality of any such measure. Underpinning this approach is an apparent desire to encroach as little as possible on Parliament's legislative powers, and so to appease a UK government hostile to the rulings of the ECtHR as a supra-national court on this issue. In contrast, the Canadian approach has allotted a stronger role for the judiciary in the interpretation of a constitutional bill of rights and so has been more willing to tackle the justifications for prisoner disenfranchisement advanced by the legislature.

The ECtHR's Approach to Prisoner Voting Rights in *Hirst (No. 2)* and Beyond

Whilst prisoners in the UK have been disenfranchised in one form or another since the 19th century (sometimes characterised as a form of 'civic death'), Britain has only recently been found to be in breach of its international human, civil and political rights obligations. Article 3 of Protocol No. 1 of the ECHR sets out the right to free elections:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

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[3] See, for example, Bates, E. "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg" *Human Rights Law Review* 14 (2014) 503; Bryan, G. "Lions under the throne: the constitutional implications of the debate on prisoner enfranchisement" *Cambridge Journal of International and Comparative Law* 2 (2013) 274; Fredman, S. "From dialogue to deliberation: human rights adjudication and prisoners' rights to vote" *Public Law* (2013) 292; Bratza, N. "The relationship between the UK courts and Strasbourg" *European Human Rights Law Review* (2011) 505. Also, discussed below, Finnis, J. "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR" in NW Barber, Richard Elkins and Paul Yowell eds *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016); Finnis, J. "Prisoners' Voting Rights and Judges' Power" Oxford Legal Research Paper 58/2015.

Adopting a purposive approach to the interpretation of the Protocol, the ECtHR has held that this provision guarantees citizens a right to vote. It is accepted by the ECtHR that states enjoy a broad margin of appreciation to define the parameters of enfranchisement – not just for prisoners, but also on other grounds such as age and residency. However, any interference with voting rights must be in pursuit of a legitimate aim and must be proportionate.

The majority of European countries have no disenfranchisement of prisoners;[4] others reserve the power to disenfranchise some prisoners; and a minority of countries automatically deprive all convicted prisoners of the right to vote.[5] Those that adopt an intermediate approach typically impose restrictions when convicted of certain types of crime that are considered either the most serious, or undermine the democratic functioning of the state in some way;[6] or when sentences of a certain length are imposed; and others have restrictions which are relatively harsh and extend even beyond the period of imprisonment, such as Italy's lifetime ban for those sentenced to more than five years' imprisonment. The reason why the UK position has been deemed unacceptable is because it applies to all convicted prisoners irrespective of the nature and gravity of the offence committed or the length of the jail term imposed; the ECtHR has held this to be arbitrary and disproportionate.

In *Hirst v UK (No. 2)*, the Grand Chamber held that the UK was in breach of Article 3 of protocol 1. The Government argued that there is a wide margin of appreciation to decide the conditions under which the right may be exercised and removing prisoners' right to vote falls within this. The Government case was that disqualification is intended to prevent crime, to punish offences, enhance civic responsibility and promote respect for the law. The ECtHR accepted these objectives as legitimate without subjecting them to any critical analysis.

However, the Grand Chamber went on to reject the Government's argument that the ban is proportionate because it affects only those convicted of sufficiently serious crimes warranting immediate imprisonment. This was the first case that dealt with "a general and automatic disenfranchisement of prisoners" (at para. 68) and the Court noted that the Venice Commission had recommended that prisoners should only be deprived of the right to vote on a case-by-case basis by judicial decision. Prisoners retain their Convention rights and any restrictions must be clearly justified. A case-by-case approach would also ensure that the various purposes of punishment were assessed and balanced as applied to specific offenders and their crimes. However, the bulk of the Grand Chamber's

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[4] See the Appendix to White (2014). Also *Hirst (No. 2)*, para 33-34; *Scoppola v Italy (No. 3)* 126/05 [2012] ECHR 868 paragraphs 45-48.

[5] The UK, Armenia, Bulgaria, Estonia, Georgia, Hungary and Russia. Also San Marino and Liechtenstein.

[6] Eg France (specified crimes include crimes against humanity, terrorism, murder, manslaughter, rape and other sexual assaults, drug trafficking, human trafficking, extortion, fraud, criminal damage, espionage, offences against government, breach of duty by civil servants, perverting the course of justice.) Germany's ban extends to prisoners whose crimes target the integrity of the state or the democratic order e.g. political insurgents.

analysis in *Hirst (No. 2)* was directed to its application of principles of proportionality,[7] which require a discernible and sufficient link between the sanction imposed and the conduct and circumstances of the individual disenfranchised. Disenfranchisement was not imposed by the UK trial courts and it is not clear that there is any link between the automatic disenfranchisement of the estimated 48,000 then serving prisoners, and the facts of their cases or the gravity of their crime.[8] Such a general, automatic and indiscriminate ban falls outside of any margin of appreciation.

Moving to an Impoverished Proportionality Analysis

In the 2010 case of *Frodl v Austria*,[9] the ECtHR adopted a bolder analysis. It accepted that there was a wide margin of appreciation, but set several criteria that must be respected if the voting rights of prisoners are restricted. Disenfranchisement may only be envisaged for a rather narrowly defined group of offenders serving a lengthy term of imprisonment; there should be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and such a measure should preferably be imposed not by operation of a law, but by the decision of a judge following judicial proceedings. However, this robust interpretation, which even defenders of prisoner disenfranchisement such as Professor Finnis recognized was a "gain in integrity",[10] as it required disenfranchisement to be imposed by judges as a form of punishment, was not to last.

The UK government was subsequently permitted to intervene in *Scoppola v Italy (No. 3)* urging the Grand Chamber to overrule *Hirst (No. 2).* The ECtHR declined to do so, but held that an automatic lifetime ban (though there is a right of appeal) for Italian prisoners sentenced to more than five years imprisonment was not disproportionate. Again accepting the legitimacy of the legislature's objectives, the Court found that Italian law showed a concern to adjust the application of the ban to the particular circumstances of the case, taking account of factors such as offence gravity and the conduct of the offender, and so was proportionate.

However, although affirming its decision in *Hirst (No. 2)* that a total ban on prisoner voting was disproportionate, the Grand Chamber disapproved the interpretation of that decision by the Court in *Frodl*. It rejected the assertion that prisoner disenfranchisement provisions must be applied by a judge in order to ensure proportionality, noting that only 11 of 24 jurisdictions that deny prisoners the vote require a judicial decision.

> While the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights, such restrictions will not necessarily be automatic, general and indiscriminate simply

[7] The legitimacy of the government's aims is dealt with in *Hirst (No. 2)*, paragraphs 74-75.
[8] Note that the adult prison population has increased significantly since *Hirst (No. 2)* and now stands at around 66,000.
[9] 20201/04 [2010] ECHR 508.
[10] John Finnis "Judicial Law-Making" supra n.3 at 99.

> because they were not ordered by a judge. Indeed, the circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or gravity of the offence committed. (para 99)

This represented a partial climb down from its earlier decision and one that was much more accepting of allowing Parliament, as opposed to the judiciary, to resolve the question of prisoner voting by restricting the vote for a particular subset of prisoners.

The ECtHR's retreat from *Hirst (No. 2)* demonstrates the hollowness of its reasoning. It claims to assess the legitimacy and proportionality of any restriction, but in practice, adopts an arbitrary approach in holding as proportionate anything short of a complete ban on voting. It does not take seriously the requirement to demonstrate that any restriction is in pursuit of legitimate aims. By moving straight to line drawing, the Court avoids the logically prior question of why any prisoner should be denied the vote. This feature makes the jurisprudence unsatisfactory both to defenders of prisoner disenfranchisement, such as Finnis,[11] and those such as ourselves who are not convinced by Parliament's reasons for denying any prisoner a vote.

The Retreat on Damages and Costs

The ECtHR's retreat from *Hirst (No. 2)* was also manifested in its remedial decisions. Initially, the Court seemed likely to take fairly aggressive measures to induce the UK to enact legislation that would prevent repeated violations of prisoners' right to vote. Even modest damage awards for every prisoner denied a vote in every election would add up to considerable sums. In *Greens and M.T. v UK*, however, the ECtHR suspended individual proceedings by the 2,500 prisoners seeking remedies for their disenfranchisement under its pilot judgment procedure, declining to award any damages to prisoners who continued to be denied the vote.[12]

The Court also hinted that contrary to prior *dicta* that suggested that only judicial determinations depriving prisoners of the vote might be found proportionate, any legislative reform would be evaluated on a wide margin of appreciation. It concluded (at paragraph 115) that the UK should introduce legislative proposals within six months of the date on which the judgment became final, subsequently extended to six months from the delivery of the Grand Chamber's judgment in *Scoppola*.

The ECtHR then abandoned another lever it had to persuade the UK government to respond to *Hirst (No. 2)*: the possibility to award thousands of prisoners damages for being denied the right to vote once the suspension of the

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[11] He suggests that the ECtHR's proportionality reasoning "lacks competence and care" and is "empty" and even "irrational". John Finnis "Judicial Law-Making" supra n.3 at 97, 100.

[12] *Greens and M.T. v UK* 60041/08 and 60054/08 [2010] ECHR 182. It did, however, award €5,000 for legal costs.

applications that followed from the use of the pilot judgment procedure in *Greens and M.T. v UK* expired.

In *Firth v UK*,[13] the Court denied ten UK prisoners' claim for damages, tersely concluding that "in the vast majority" of past voting rights cases, "the Court expressly declined to make any award of damages. The Court concluded that the finding of a violation constitutes sufficient just satisfaction for any non-pecuniary damage sustained by the applicants" (paragraph 18). To add insult to injury, it also denied the applicants their legal costs.[14] In the most recent case of *McHugh and others v UK*, brought by 1,015 prisoners, the Court made the same finding of a violation of Article 3 of protocol No. 1, but again rejected the claim for compensation and for legal costs.[15]

The ECtHR's recent decisions in *Firth* and *McHugh* are unfortunate on many levels including on the strategic basis that multiple damage awards had been one of the motivating factors behind the government's claims that they would comply with *Hirst (No. 2)*. The then Prime Minister's comments in Parliament on the issue in November 2010 are most famous for his expression of disgust at the thought of prisoners voting, but they also reveal his concerns about possible damage awards.

> The Prime Minister: I completely agree with my hon. Friend. It makes me physically ill even to contemplate having to give the vote to anyone who is in prison. Frankly, when people commit a crime and go to prison, they should lose their rights, including the right to vote. But we are in a situation that I am afraid we have to deal with. This is potentially costing us £160 million, so we have to come forward with proposals, because I do not want us to spend that money; it is not right. So, painful as it is, we have to sort out yet another problem that was just left to us by the last Government.[16]

In February 2011, legal advice affirming the prospect of large damage awards was also leaked.[17] There were some such as Conservative MP Dominic Raab, who counselled the government simply not to pay any damage award,[18] but such a prospect would have seriously compounded the international discredit to the UK over this issue.

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[13] *Firth and others v UK* 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49003/09 and 49036/09, 2014 ECHR 874 .
[14] The Court considered that lodging these violation applications was essentially repetitive of earlier claims and so straightforward, not requiring legal assistance. The legal costs claimed had not, therefore, been reasonably and necessarily incurred.
[15] 51987/08 and 1,014 others, 10 February 2015.
[16] H.C. Deb 3 Nov 2010 c921
[17] 'Cameron is clear to defy Europe on human rights', *The Times*, 18 February 2011.
[18] He argued: "what happens if we agree to the motion?...There is no risk of a fine and no power to enforce compensation, and absolutely no chance of being kicked out of the Council of Europe." H.C. Deb 10 Feb 2011, c 583-4.

Through these decisions, the ECtHR has accommodated the UK Parliament's determination to allow it, rather than the judiciary, to resolve the controversial prisoner voting right question. By declining to award just satisfaction to prisoners who continue to be disenfranchised, it has also rewarded Parliament's refusal to implement *Hirst (No. 2)*. More substantively, the ECtHR accepted without scrutiny the legitimacy of the legislative objectives for prisoner disenfranchisement both in *Hirst (No. 2)* and subsequent cases. In the next section, we suggest that the Canadian decision cited with approval in *Hirst (No. 2)* (but tellingly not in subsequent cases from Strasbourg) took a much more critical and sceptical view of the claim that Parliament would be justified in denying the vote to prisoners in order to punish them and to increase respect for the rule of law.

The Canadian *Sauvé* Decision

The issue of prisoner voting rights emerged as a legal and political issue somewhat earlier in Canada, and the debate has assumed a more substantive character than that in the UK, interrogating both the aims and the means of disenfranchisement.

Section 3 of the *Canadian Charter of Rights and Freedoms*, a bill of rights added to the Canadian Constitution in 1982, provides that all citizens have the right to vote in federal and provincial elections. Under section 1, all Charter rights are subject to reasonable limits that are demonstrably justified in a free and democratic society. Like the margin of appreciation in interpreting the First Protocol of the ECHR, this limitation clause has been interpreted as requiring the government to demonstrate that any law that places limits on Charter rights is enacted to pursue an objective that is important enough to justify violation of rights and that the law is a proportionate implementation of such objectives. The elements of proportionality are familiar ones: the law must be rationally connected to the objective; limit the rights as little as reasonably possible while achieving the objective; and there must be an appropriate overall balance.[19]

In 1993, the Supreme Court of Canada struck down a ban on all prisoners voting in federal elections, a ban identical to the one found to be incompatible with the ECHR in *Hirst (No. 2)*. The Court was extremely laconic in its reasoning: the law was "drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the s.1 jurisprudence of the Court."[20] It thus avoided engaging with the more substantive reasoning of the Ontario and Federal Courts of Appeal, which the previous year had held unanimously that the ban on all prisoners voting was unconstitutional and that the government's proffered objectives for prisoner disenfranchisement - punishing prisoners and maintaining the sanctity and integrity of the franchise - were not important enough to justify limiting a Charter right.

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[19] *R v Oakes* [1986] 1 S.C.R. 103

[20] *Sauvé v Canada (Attorney General),* [1993] 2 S.C.R. 438

In the Ontario Court of Appeal, Justice Louise Arbour, who would later serve on the Supreme Court of Canada and as UN High Commissioner of Human Rights, expressed doubts that anyone could be deprived of the vote simply because they were judged not to be "decent and responsible"[21]. She noted that women and those who did not own property had previously been disenfranchised on such vague and subjective grounds. She also dismissed the idea that prisoner disenfranchisement was necessary to maintain the integrity of the voting process, pointing out that many prisoners were well informed about political issues while other voters were not. She also expressed scepticism about the retributive punishment rationale for disenfranchisement by noting that disenfranchisement punished people for being in prison when an election was held, not on the basis of the specific nature of the crime.[22] The Canadian Parliament ignored these substantive concerns and quickly put in place a new law, this time only taking the vote away from prisoners serving sentences of two years or more - traditionally the distinction between short-term prisoners who serve their sentences in provincial correctional facilities, and those who serve their sentences in prisons run by the federal government. The applicant, Richard Sauvé, was serving a sentence of life imprisonment for murder and so remained unable to vote. However, he successfully challenged the new law in a controversial 5:4 decision by the Supreme Court of Canada in 2002.

Although cited by the ECtHR in support of their decision in *Hirst (No. 2)*, in our view, the Canadian 2002 decision is best justified not on proportionality principles that focus on whether the legislature has adopted the least restrictive means, but on the basis of the illegitimacy of Parliament's "vague and symbolic"[23] aims in enacting the legislation. Like the UK government in *Hirst (No. 2)*, the Canadian government argued in *Sauvé* that its objectives in prisoner disenfranchisement were to enhance civic responsibility and respect for the rule of law, and to provide additional punishment – the same objectives that two Canadian Courts of Appeal in 1992 rejected as insufficiently important to justify limiting the right to vote. In the second *Sauvé* case, the majority decision of the Supreme Court delivered by Chief Justice McLachlin was also critical of these objectives and considerably more critical than the ECtHR would be in *Hirst (No. 2)*. In other words, the Supreme Court's second *Sauvé* case is best seen as a case not about the line drawing of proportionality, but whether Parliament had advanced sufficiently important objectives to justify depriving any prisoner of the vote.

Chief Justice McLachlin stressed that not all legislative objectives were legitimate and that, "a simple majoritarian political preference for abolishing a right altogether would not be a constitutionally valid objective." She then indicated that Parliament's aims of increasing respect for civic responsibility and the rule of law through disenfranchisement, were "vague and symbolic". All of Parliament's objectives failed to identify "particular problems that require

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[21] *Sauvé v Canada (Attorney-General)*, 1992 CanLII 2786 at para 14 (ON CA)
[22] *Sauvé v Canada (Attorney-General)*, 1992 CanLII 2786 (ON CA). aff'd [1993] 2 S.C.R. 438. See also *Belczowski v Canada*, [1992] 2 F.C. 440; (1992), 90 D.L.R. (4th) 330; 12 C.R. (4th) 219; 9 C.R.R. (2d) 14; 132 N.R. 183 (C.A.).
[23] *Sauvé v Canada* supra. n.2 at paragraph 55

denying the right to vote" and so "make the justification analysis more difficult." The Chief Justice warned that "rhetorical" "abstract" or symbolic" objectives could dilute proportionality reasoning or result in "a contest of 'our symbols are better than your symbols' ".[24] Rather than dismissing the government's objectives outright, the Court reluctantly moved to a proportionality analysis in order to demonstrate how "the difficulties inherent in the government's stated objectives become manifest."[25] Unsurprisingly, the majority of the Court went on to find that there was no rational connection between the ends of enhancing the rule of law and civic responsibility and preventing and punishing crime, and the disenfranchisement of prisoners serving a sentence of two years imprisonment or more if they happen to be in prison when a general election occurs.

Finnis has been very critical of suggestions in the majority's judgment that the legitimacy of laws depends on a universal franchise that includes prisoners. He notes that the Canadian court's "proportionality analysis purporting to measure rational connection between aims and means" in the end "denied the very possibility of legitimately disenfranchising criminals or any criminal however gross or treasonable or subversive of elections".[26] He takes issue with any suggestion that the Canadian court's decision can be justified philosophically and especially on the basis of social contract theory.

We find the Supreme Court of Canada's approach appealing compared with the more mechanical approach taken in the UK and ECtHR jurisprudence which focuses on the arbitrary question of what cut off should be used to define some subgroup of prisoners who have committed a crime that is serious enough to take away their vote. These very different outcomes underline the continued dominance of Parliamentary supremacy in the UK and the margin of appreciation applied in supra-national law, compared with the Canadian approach, which has allotted, or at least accepted, a stronger role for the judiciary in the interpretation and enforcement of rights.[27] The UK lacks "a culture of justification" in which government would be required to give reasons for its policies and legislation, justifying them in terms of rights protection.[28]

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[24] ibid at paragraphs 20- 24.

[25] Ibid at para 26. See also Roach, K. "The Varied Role of Courts and Legislatures in Rights Protection" in M. Hunt and H. Cooper (eds) *Parliament and Rights* (Oxford: Hart, 2015) at 414-415.

[26] John Finnis "Prisoners' Voting Rights and Judges' Power" supra n.3 at 18.

[27] For a comparison of the UK approach with South Africa, another country with a constitutional bill of rights, see Fredman, S. "From dialogue to deliberation" supra n.3.

[28] See, for example, Hunt, M. "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing, 2003); Hunt, M. "The Impact of the Human Rights Act on the Legislature: A Diminution of Democracy or a New Voice for Parliament" [2010] *European Human Rights Law Review* 601. Hunt's work in this regard builds on the work of David Dyzenhaus "and in particular his efforts to build on Etienne Mureinik's conception of legality as 'a culture of justification': see eg D Dyzenhaus, "Law as Justification: Etienne

This would engender a culture of accountability in which judges might be more confident in calling Parliament to account and so require it to justify its blanket ban on prisoner voting in the kind of detail required. That said, courts do not have the power to strike down legislation inconsistent with the Human Rights Act 1998 and, the UK courts have continued their "tendency to defer when defining Convention rights",[29] leaving them reliant instead on the reasoning of the ECtHR which as a supra-national court applies a healthy margin of appreciation.

In contrast, the Canadian Charter of Rights and Freedoms gives courts a clear mandate to strike down legislation that is not consistent with Charter rights. Moreover, the Canadian courts have interpreted section 1 of the Charter to require the state to justify incursions on rights as necessary to fulfil a governmental objective that is important enough to justify a limit on a right. The Canadian courts have played a robust role in enforcing Charter rights especially in the fifteen years after the Charter was enacted in 1982. That said, the 2002 *Sauvé* decision was closely divided with the four dissenting judges stressing the need to defer to Parliament's choice of objectives and means with respect to prisoner disenfranchisement. Some would argue that judicial deference was warranted because the Court was interpreting the right to vote under the Charter, one of the few rights where legislatures cannot derogate or override Charter rights for a renewable five-year period. In any event, it is not clear that the majority of the Supreme Court of Canada would not defer today should the issue be put to it afresh.[30]

The Canadian approach in *Sauvé* evaluates more critically Parliament's objectives in enacting any prisoner disenfranchisement laws, suggesting that European courts and legislatures would be well advised to take a more substantive approach, which focuses not simply on which prisoners should be denied the vote, but on the reasons why *any* prisoners should be denied the vote.

Parliamentary Debate and Deliberation on Prisoner Voting

While the ECtHR became slowly less robust in its assertion of *Hirst (No. 2),* the UK government remained unmoved. On 20 December 2010, the Minister for

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Mureinik's Conception of Legal Culture' (1998) 14 *SAJHR* 11." (Hunt, cited in this note, 2003 at note 7).

[29] Young, A. "Accountability, Human Rights Adjudication and the Human Rights Act 1998" in N. Bamforth and P. Leyland (eds) *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013) 155-179, 156, Young argues (at 162-3) that the courts' conception of deference as respect sometimes collapses into deference as submission, undermining the application of proportionality as the standard of human rights review, contrary to what would be required by a culture of justification.

[30] Roach, K *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* revised ed (Toronto: Irwin Law, 2016) chs. 16 and 17 (arguments that Canadian attempts to appoint more deferential judges betray the logic of dialogic constitutionalism based on a culture of justification that requires the state to justify limits on rights).

Political and Constitutional Reform announced that the government would respond to the *Hirst (No. 2)* judgment by denying the right to vote only for those prisoners serving four years imprisonment or more. This cut off was justified partly because "four years has in the past been regarded as the distinction between short and long-term prisoners" and such a law would allow the government to comply with *Hirst (No. 2)* and avoid having to pay damage awards to prisoners denied the right to vote.[31] In a sense, the four-year cut off would be similar to the two-year cut off in Canada.

A backbench debate on 10 February 2011 resulted in a 234 to 22 vote in favour of a motion to re-affirm the complete ban on prisoner voting that had been found to breach the ECHR in *Hirst (No. 2)*. Although the Attorney General reminded Parliament of the UK's obligations under the ECHR and the possibility that disenfranchised prisoners would receive damage awards, most members who spoke defended the total ban, often on the basis of Parliamentary supremacy, with one member arguing that the ECtHR could not force the UK to pay damages should they be awarded to disenfranchised prisoners.[32]

After much delay, and on the date that suspension of individual claims ceased under the *Greens and M.T.* case (22 November 2012), the Government finally published a draft Bill, the *Voting Eligibility (Prisoners) Draft Bill*, for pre-legislative scrutiny by a joint committee of the Houses of Commons and the Lords. The Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (the Joint Committee) reported on 18 December 2013. Several options were under consideration by the Joint Committee: to make no change, or to impose restrictions based not on the nature or the seriousness of the offence, or the time until release, but on the length of prison sentence imposed – the options being more than four years or six months imprisonment.

The eventual recommendation of the Joint Committee in the final report was that the government bring forward a Bill in order that prisoners serving 12 months or less be entitled to vote in the constituency where they were last registered; and that prisoners be entitled to register to vote six months prior to their release date. This would permit 6,018 of the 66,591 prisoners serving a sentence in 2014 the right to vote – less that one tenth. If the threshold were four years, as originally stated by the Minister, this would enable a further 17,178 prisoners to vote – 35 per cent of the serving prison population.[33] The government did not take forward the Joint Committee's recommendation in the next Parliamentary session and shows no sign of doing so.

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[31] H.C. Deb 20 Dec 2010 c151WS

[32] Conservative MP Dominic Raab, supra n.11. Contrast this with the firm line attempted by the Minister for Political and Constitutional Reform only two months previously when he said of the proposed reform, "this is not a choice: it is a legal obligation." HC Deb 20 Dec 2010 c150-151WS.

[33] Prison population by type of custody, age group and sex, 30 June 2002 to 30 June 2014, England and Wales, available at: https://www.gov.uk/government/uploads/.../prison-population-2014.xls

Despite the abject failure of the UK to make any progress in implementing the ECtHR ruling in *Hirst (No. 2)*, the Council of Europe has been prepared to accept any excuse advanced for inaction. It expressed "profound concern and disappointment that the United Kingdom authorities did not introduce a Bill to parliament at the start of its 2014-2015 session as recommended by the appropriate committee"[34] but nevertheless accepted the UK's explanation that it "continues its active consideration of the most effective way to implement the judgment" and agreed that the matter would be discussed in September 2015, after the general election.[35] However, the government again delayed taking action, this time to await the decision of the CJEU in a French case *Delvigne*,[36] and by August 2015, there was not even the pretence of reform plans, only an affirmation of Parliament's continued "widespread hostility" to prisoner voting and government's belief that "this issue is ultimately a matter for elected representatives in national parliaments to decide."[37]

On 24 September 2015 the Council of Europe's Committee of Ministers published a decision calling on the Government to respond to *Hirst (No.2)* as well as *Greens and MT* and *McHugh*, expressing "profound regret" that the blanket ban remains in place and there is no indication of how the UK intends to abide by the ECtHR judgment against it.[38] An Interim Resolution on the same terms followed in December 2015.[39] The then Justice Minister, Michael Gove, promised a response to the report of the *Joint Committee on the Draft Voting Eligibility (Prisoners) Bill* after publication of the Government's consultation document on reforming the Human Rights Act in 2016. This is yet to materialise and the government agenda may well alter with the new Prime Minister taking office in July 2016.[40]

The UK Supreme Court's 2013 *Chester* Decision

As Parliament continued to delay responding to *Hirst (No. 2)*, the UK government in *R (on the application of Chester) v Secretary of State for Justice*[41] asked the UK Supreme Court not to follow *Hirst (No. 2)*. All of the judges declined this invitation noting that while the issue of prisoner disenfranchisement was controversial, it was not such a fundamental part of UK law as to require that the

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[34] 1208DH meeting of the Ministers' Deputies, 25 September 2014.
[35] Letter from the UK Permanent Representative of the UK Delegation to the Council of Europe, 5 June 2014.
[36] Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc, Préfet de la Gironde* [2015] CJEU (final judgment).
[37] Letter from the UK Deputy Permanent Representative of the UK Delegation to the Council of Europe, 6 August 2015.
[38] Decision of the Committee of Ministers, 1236th meeting, 24 September 2015.
[39] *Interim Resolution CM/ResDH(2015)251* adopted by the Committee of Ministers on 9 December 2015 at the 1243rd meeting of the Ministers' Deputies.
[40] In the meantime, the EU Justice Sub-Committee published its report on *The UK, the EU and a British Bill of Rights* in May 2016 (European Union Committee, 12th Report of Session 2015-16, 9 May 2016). Despite the report's conclusions, the government has announced that it will consider reforming the HRA.
[41] [2013] UKSC 63, paragraph 35

ECtHR jurisprudence not be followed. Lord Mance observed in the lead judgment (at paragraph 34):

> Nothing in *Scoppola* therefore suggests that the Grand Chamber would revise its view in *Hirst (No 2)* to the point where it would accept the United Kingdom's present general ban. There is on this point no prospect of any further meaningful dialogue between United Kingdom Courts and Strasbourg.

For our purposes, the important point is that the Supreme Court followed *Hirst (No. 2)* in accepting at face value that the government's objectives for prisoner disenfranchisement - namely punishing prisoners and enhancing civic responsibility and the rule of law - were legitimate. In short, the Supreme Court simply accepted that restrictions on the right of at least some, and perhaps most, prisoners to vote could be easily justified.

Lady Hale in her opinion noted that while any prisoner disenfranchisement would have arbitrary qualities, she had "no sympathy at all for either of the appellants" because as persons convicted of murder, she could not "envisage any law which the United Kingdom might eventually pass on this subject which would grant either of them the right to vote".[42] This approach demonstrates the type of unthinking deference to the objectives of prisoner disenfranchisement that we have criticized above. Unlike the Canadian court, the UK Supreme Court assumed that vague objectives of increasing punishment and affirming respect for the rule of law would justify, at the very least, prisoner disenfranchisement of those convicted of serious offences.[43] Like the ECtHR, the Court has essentially glossed over the logically and ethically prior question of whether there is a good reason to deny any prisoner a vote, and in a mechanical, superficial and inevitably arbitrary manner, focused instead on which sentence cut-off can be accepted as a proportionate restriction on the right to vote.

One final point merits mention. The UK Supreme Court, like the ECtHR, demonstrated remedial deference in the face of the UK's government continued refusal to respond to *Hirst (No. 2)*. Specifically, it held that "there was no point"[44] in issuing another declaration of incompatibility under s.4 of the HRA, both because one had previously been issued and because the two applicants, both serving sentences for murder, could "with considerable confidence"[45] be denied the vote under the evolving Strasburg jurisprudence. The Court also decided that European Union law did not provide the applicants with the right to vote, but even if it did, a declaration and damages should not be issued as a remedy, for similar reasons related to the proportionality of denying the vote to those such as the applicants who had been convicted of the most serious offences.[46] This

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[42] ibid paragraph 99

[43] In failing to consider the nature of the rationale for disenfranchisement and so its link with the offence or the offender, this also excludes any consideration of rehabilitation – a factor which the ECtHR took account of in *Scoppola*.

[44] *Chester* paragraph 39

[45] ibid paragraph 40.

[46] ibid paragraphs 73 and 83.

decision to disapply EU law has been criticized as contrary to the usual position when there is a finding of incompatibility.[47] As suggested above, it is difficult to escape the conclusion that the remedial deference of both the Strasbourg court and the UK Supreme Court effectively rewarded Parliament for its failure to respond to *Hirst (No. 2).*

The European Court of Justice Decision in *Delvigne*

In *Thierry Delvigne v Commune de Lesparre-Médoc, Préfet de la Gironde*, Thierry Delvigne sought to challenge the indefinite removal of his right to vote in European elections.[48] The outcome of this case was potentially of greater significance than those heard by the ECtHR, because the CJEU was hearing the matter under EU law and its decisions are legally binding on all EU Member States.[49] The Court found (at paragraph 46) that whilst a ban on voting was a clear limitation of Article 39(2) of the EU Charter on Fundamental Rights, this was permissible:

> as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

It added (at paragraph 48) that the limitation under French law is provided for by law; it

> respects the essence of the right to vote referred to in Article 39(2) of the Charter…since it has the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the Parliament, as long as those conditions are fulfilled.

It is proportionate "in so far as it takes into account the nature and the gravity of the criminal offence committed and the duration of the penalty."[50] Furthermore, there was a right of review, where Mr Delvigne could apply to have his rights reinstated. The right of the convicted person to apply to have this additional penalty of loss of civic rights removed, however, introduces the possibility of case-by-case judicial decision-making on the merits of prisoner disenfranchisement.[51] It will be suggested below that if disenfranchisement can be justified as a form of punishment, it will likely require case-by-case treatment.

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[47] See Professor Michael Dougan's evidence to the Select Committee on the European Union Justice Sub-Committee, Potential Impact on EU Law of Repealing Human Rights Act, Evidence Session No.6, Response to Question 61.
[48] supra n.36.
[49] The UK Supreme Court resisted the request for a preliminary ruling from the ECJ in a similar case, *Chester*, supra. n.4, discussed above. Since the UK referendum decision in June 2016, to leave the EU, the future significance of CJEU decisions in UK law is unclear.
[50] *Delvigne* at paragraph 49.
[51] Under Art 702-1 of the French Code of Criminal Procedure.

The Court followed the thin proportionality approach seen in both *Hirst (No. 2)* and *Chester* by assuming that the Charter did not preclude "legislation of a Member State…from excluding, by operation of law…persons who…were convicted of a serious crime".[52] This assumes that disenfranchisement can be justified either as a form of punishment for serious crime or as a form of enhancing respect for the rule of law and civic responsibility, without examining whether these objectives are important enough to take away the right to vote, or would actually be achieved by prisoner disenfranchisement.

Although opening up a new and potentially stronger avenue of challenge (for the moment at least), the decision does not differ substantively from *Hirst (No. 2)* or *Chester* in not examining seriously the legitimacy of the government's objectives in disenfranchising prisoners.[53]

A More Substantive Approach: Scrutinising the Objectives of Prisoner Disenfranchisement

In what follows, we focus on the objectives so far put forward by the UK government to justify prisoner disenfranchisement and we argue that while accepted by the European and UK courts, they are all problematic under the more substantive Canadian approach to scrutinizing the legitimacy of legislative objectives. We recognize that this does not constitute a full normative justification of prisoner voting, the scope of which is beyond this paper, but we do suggest that it should encourage both Parliament and the courts to eschew the impoverished "pick a number" approach to prisoner disenfranchisement that they have so far been pursuing. In other words, we remain open, albeit sceptical, to the possibility that prisoner disenfranchisement could in theory be justified. It is noteworthy in this regard that the Canadian court has not been as absolutist on prisoner disenfranchisement as is commonly perceived. In 1996, the Supreme Court of Canada accepted disenfranchisement, as well as bans on holding public office, as a specific sanction for those who commit electoral fraud.[54] This decision was not overruled by the 2002 *Sauvé* case. We suggest that both the Government and courts should revisit the substantive justifications for prisoner disenfranchisement before simply accepting as proportionate anything short of a total ban on prisoner voting.

Prisoner Disenfranchisement Protecting of the Rule of Law and Promoting Civic Responsibility

The UK government has advanced several arguments defending its position on prisoner voting. It claims that offending of the level of gravity that attracts a prison term, amounts to a breach of the social contract and so removes the entitlement or 'moral authority' to participate in the democratic process until

[52] Paragraph 52.
[53] It is likely that this avenue of challenge will be closed off again if the UK leaves the EU.
[54] *Harvey v New Brunswick (Attorney General),* [1996] 2 S.C.R. 876. We discuss disenfranchisement as a possible punishment below.

that sentence has been served.[55] As the Ministry of Justice explained in a 2009 consultation paper:

> …the removal of the right to vote…is not only a punitive measure…it goes to the essence of the offender's relationship with democratic society. Its removal underlines to the prisoner the importance of that relationship, and his breach of it in committing a serious crime. The reinstatement of the right marks his re-entry into society is aimed at enhancing his sense of civil responsibility and respect for the rule of law.[56]

The Government argues that this policy pursues legitimate aims of respect for the rule of law, and in applying only to those whose offending is sufficiently serious to merit a prison term, it is proportionate.

The Canadian Supreme Court in the case of *Sauvé v Canada* was not persuaded by similar breach of the social contract arguments. Chief Justice McLachlin concluded for the majority that while all must obey the law, there was:

> a vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the Charter, stands at the heart of our system of constitutional democracy… A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.[57]

The above approach implicitly rejects the idea that a prisoner who has committed a crime has violated the social contract in a manner that enables the state to respond by denying the franchise to the offender. In other words, it presumes a more durable social contract than that contemplated by the UK government when it has defended prisoner disenfranchisement on the basis of social contract theory.

We recognize that the Canadian court's argument that social contract theory supports prisoners being able to vote has come under heavy criticism, most notably from John Finnis. Finnis argues that philosophers from Kant to Mill to HLA Hart to John Rawls would all accept prisoner disenfranchisement on the basis of the reciprocity between social rights and duties. But this makes no argument as to why some rights should be removed from prisoners and not

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[55] Baroness Scotland, the Home Office Minister in the House of Lords told the House that: "It has been the view of successive governments that prisoners convicted of a crime serious enough to warrant imprisonment have lost the moral authority to vote." H.L. Deb 20 October 2003 c143 WA.

[56] *Voting Rights of Convicted Prisoners Detained within the United Kingdom – Second Stage Consultation*. Consultation Paper CP6/09, 8 April 2009, paragraph 23.

[57] *Sauvé v Canada* supra n.2 at paragraphs 31, 34

others.[58] To be sure, prisoners have broken a bond with their community, but that is why they are being punished. As the majority in *Sauvé* argued, the idea that prisoners because they are prisoners are outside of the social contract would seem to have no logical end. Chief Justice McLachlin argued that if imprisonment justified denying the right to vote there was "no credible theory" why this logic could not be extended to other rights such as the prisoner's right to freedom of expression or religion.[59]

The argument based on breaching the social contract advances no basis for the assertion that the right to vote should be subject to standards of good behaviour.[60] The modern trend is towards a more expansive franchise. Although it was once assumed that only men who owned property were informed enough to vote, we now generally allow all citizens to vote without regard to how well-informed or worthy they are or their level of education. Given this, it is not clear why prisoners should be the only group denied the franchise on the basis of their worthiness to vote. The Canadian court concluded that "the idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete", related to historically discriminatory practices and inconsistent with the equal dignity of all.[61]

Professor Finnis has suggested that Chief Justice McLachlin ignored what he characterized as "what previous generations, with philosophical support, judged to be prudence and justice"[62] but this hardly takes away from the point that demanding voters be worthy is ancient, obsolete and in tension with modern ideas of equality. If the government is truly prepared to limit the vote to only the worthy, then they should pursue such objectives across the broad and attempt to disenfranchise those who are not informed or those who have only the most tenuous connection to the country in which they cast a ballot. A government objective such as reserving the vote to those who respect the social contract or the rule of law should be applied in a non-discriminatory and rational manner that does not simply pick on prisoners because they are easily identifiable.

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[58] Convicted prisoners are allowed to exercise other civic rights, such as the right to marry. Due process rights are not lost even when criminal liability is admitted or established.

[59] *Sauvé* n. 2 at paragraph 46.

[60] Our discussion of prisoner voting is framed in terms of rights, as we are concerned here with breaches of Convention rights. In some jurisdictions, however, voting might be conceived of not in the language of rights, but as a power, a privilege, or even a responsibility or a duty. Where voting is a legal duty, as is the case in Australia, one consequence of prisoner disenfranchisement is to deny convicted prisoners their chance to do their duty as citizens and so the opportunity to signal their desire to re-establish themselves as responsible citizens. This seems an even more compelling argument for the need to establish clear grounds to prohibit prisoner voting, when it is framed as a citizen-duty.

[61] *Sauvé* n.2 at paragraphs 43-44.

[62] John Finnis "Prisoners' Voting Rights and Judges' Power" supra n.3 at 26 note 6.

Professor Finnis' argument that "*allowing* criminals to vote during incarceration under sentences says to each of the law-abiding that *your* vote … does not count very much…." is an emotive argument that does not hold up. The act of a prisoner voting harms no one. Many societies including the UK and Canada conduct elections based on the universal franchise but without ensuring that ridings all have equal populations and consequently every vote has an equal weight. Professor Finnis' real argument against prisoner voting is his sense that prisoner voting is "decadent".[63] In other words, his objection seems rooted in an emotional sense of offence - or what Lord Devlin would have called disgust - at the thought of prisoners voting. As one of us has argued elsewhere, disgust at the notion that some people can exercise a right is not an important enough objective to deny that right. [64]

Thought should also be given to the reality that in a system that no longer uses capital punishment or exile by transportation as a form of punishment, prisoners remain part of the social contract, like it or not. Offenders should be punished for their offence and their rights such as liberty will be denied to the extent necessary for their imprisonment, but they remain citizens. Excluding prisoners from exercising political rights that are not inconsistent with imprisonment is to reinforce their status as outsiders and passive objects.[65]

Disenfranchisement as Additional Punishment

Part of Parliament's justification for prisoner disenfranchisement, assisted by *dicta* in *Hirst (No. 2)* and *Scoppola*, is that disenfranchisement is required to punish prisoners. This rationale no doubt appeals to the unpopularity of offenders. Nevertheless, it does not hold up to rational analysis based on any of the objectives of punishment.

Disenfranchisement will not assist in the rehabilitation of offenders, indeed it is argued that it achieves the reverse, by isolating and excluding prisoners; nor their incapacitation; nor does it serve as a deterrent.[66] The Court in *Hirst (No. 2)* noted that the punitive aims of disenfranchisement were not met in that case as the ban applied after the punitive part of the sentence had been served, but the applicant was further detained on public protection grounds.

The majority of the Supreme Court of Canada in *Sauvé* concluded that punishing people by denying them their right to vote was not an appropriate form of punishment. In part, the Court stressed the arbitrary nature of legislative disenfranchisement in relation to the legitimate ends of punishment because a prisoner would be disenfranchised:

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[63] John Finnis "Judicial Law-Making" supra n.3 at 101 (emphasis in the original)
[64] Roach, K. "The Varied Role of Courts and Legislatures in Rights Protection"
[65] See A. Duff and S. Marshall "Civic Punishment" in A. Dzur, I. Loader and R. Sparks (eds) *Democracy and Mass Incarceration* OUP, 2016.
[66] As a side issue, it is noted that prisoners are not in general concerned to be able to vote and few of those who can vote, do so. Some MPs have questioned the value of right that is not valued by those to whom it might attach. Is the value of a human right in any way dependent on our desire or ability to exercise it?

> regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct. It is not individually tailored to the particular offender's act. It does not, in short, meet the requirements of denunciatory, retributive punishment. It follows that it is not rationally connected to the goal of imposing legitimate punishment.[67]

The logical implication of this reasoning, consistent with *Hirst (No. 2)* but not subsequent ECtHR jurisprudence, is that disenfranchisement could only be justified as punishment on a case-by-case and offender-by-offender basis. This is a more reasoned approach than found in ECtHR cases which casually accept without question, that disenfranchisement of large groups of prisoners is an acceptable form of punishment.

Prisoner disenfranchisement in the UK and as it was used in Canada is not linked to the blameworthiness of, nor the harm caused by, the offender. It is simply tied to the length of the sentence, something only roughly related to offence seriousness, *plus* the happenstance of when an election is called. If this is punishment, it is an arbitrary form of punishment that is not related to the offender's actions, motivation, or the consequences of the offence. Such arbitrary prisoner disenfranchisement should embarrass retributivists who otherwise assert that the punishment must be carefully calibrated to fit the crime.

The Canadian approach draws an important distinction between punishing prisoners as a group (or even subsections of prisoners) and punishing offenders for particular crimes. The former is a suspect form of symbolic and rhetorical "penal populism" while the latter is a traditional and legitimate function of the criminal justice system. If Parliament is serious about disenfranchisement as punishment then there should be, as hinted in *Hirst (No. 2)* but thereafter rejected, an offender-by-offender approach or at least an approach tied to the commission of specific crimes.

The Canadian jurisprudence contains a much more extensive and critical examination of the alleged objectives of prison disenfranchisement than found in the jurisprudence of the ECtHR or indeed in subsequent cases decided by the UK Supreme Court and the CJEU. It asks what in our view is the right and logically prior question: why should prisoners be denied the vote? It rejects reliance on mechanical or impoverished proportionality analysis that supports anything short of a blanket ban. Chief Justice McLachlin refused to reduce proportionality to a facile "pick a number" approach and was not persuaded when the government's answer to the question of 'why a two year period?' was simply "because it affects a smaller class than would a blanket disenfranchisement."[68]

We recognize that there will be disagreement about whether prisoner disenfranchisement can be justified on social contract, rule of law, civic responsibility or punishment rationales. Professor Finnis in particular would accept both the social contract and punishment rationales for prisoner disenfranchisement that the Canadian courts have found deficient. Regardless of where one stands in such a debate, it should be appreciated that the legitimacy

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[67] *Sauvé* supra n.2 at paragraph 51.
[68] *Sauvé v Canada* at para 55.

(or not) of Parliament's objectives for disenfranchisement are the real and substantive point in issue. This helps explain why neither proponents or opponents of prisoner disenfranchisement are likely to be satisfied by the impoverished "pick a number" approach to prisoner disenfranchisement that is being promoted in both UK courts and its Parliament.

Conclusion

This article has sought to bring new light to the prisoner disenfranchisement debate by arguing that European and British courts have too readily accepted legislative objectives related to punishment, enhancing respect for the rule of law and civic responsibility as legitimate reasons for denying prisoners the vote. The debate in courts and Parliament has moved too quickly and in an arbitrary direction that seems to boil down to a "pick a number, any number" approach to prisoner disenfranchisement. This may also reveal a more general weakness in proportionality analysis that focuses on questions of means and often glosses over the logically prior question of the legitimacy of ends.

These approaches reflect, to some extent, the different constitutional contexts in which the ECtHR, the UK and the Canadian courts operate. Canadian courts have a clear constitutional mandate to strike down laws that have not been justified as reasonable limits on Charter rights enacted for objectives that are important enough to limit rights. In contrast, UK courts do not have strike down powers under the Human Rights Act, 1998. In addition, the ECtHR plays a secondary role to that of national courts in relation to rights protection. Given the lack of consensus in European states about prisoner disenfranchisement, it is perhaps unsurprising that the ECtHR applies a relatively generous margin of appreciation on this issue, but it has retreated even from this both substantively and remedially. The UK's hostility to the ECtHR, including accusations that the Court has overstepped its jurisdiction, has resulted in a political stalemate. The UK has refused to implement the judgment in *Hirst* and the ECtHR has back-tracked from its original ruling in an attempt to retain some semblance of authority and avoid pushing the UK towards leaving the Council of Europe. Coupled with the UK courts' reluctance to challenge policy and legislative reasoning and to issue additional declarations of incompatibility or damage awards for continued prisoner disenfranchisement, we are left with a remedial vacuum

The Canadian Supreme Court in *Sauvé*, though quoted with approval in *Hirst (No. 2)*, took what we find to be a more critical, substantive and helpful approach to this question and found that the objectives offered in that case (enhancing respect for the rule of law and punishment and implicitly responding to a breach of social contract) were all too "vague", "symbolic" and "rhetorical" to justify restricting the fundamental right to vote. To be sure, the Canadian court did not stop there and also applied a form of proportionality analysis, but its conclusion that Canada's restrictions on prisoners serving two years imprisonment was disproportionate was not particularly convincing given that two years serves as a conventional and long-standing marker of serious offences in Canada. Indeed as the UK Supreme Court recognized in *Chester*, there is an arbitrary nature to any number that serves as a dividing line between which prisoners can vote and

which cannot.[69]

Not enough attention has been paid either in UK courts or Parliament to the logically and ethically prior question of why any prisoners should be denied the vote. Instead both courts and Parliament have focused on the arbitrary and somewhat mechanical question of what group of prisoners should be denied the vote. With respect, this puts the cart before the horse. We would encourage both Parliamentarians and judges to pay more attention to the legitimacy of the legislative objectives behind prisoner disenfranchisement and suggest that they might find the Canadian jurisprudence instructive in this regard.

[69] Professor Finnis has expressed skepticism about the courts drawing a line "between disenfranchising eight per cent of convicted criminals-unlawful! And disenfranchising (say) five per cent of them- lawful! or between the whole class of one-year sentences and the whole class of three-year sentences…." John Finnis "Judicial Law-Making" supra n.3 at 102.