



 THE CHURCH
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ARCHBISHOPS'
COUNCIL

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**The Parliamentary Joint Committee on the Voting Eligibility (Prisoners) Bill:
Call for evidence**

**Response by the Mission and Public Affairs Division of the Archbishops'
Council of the Church of England**

The Mission and Public Affairs Division welcomes the opportunity to respond to this call for evidence, in the pages that follow.

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The Mission & Public Affairs Council of the Church of England is the body responsible for overseeing research and comment on social and political issues on behalf of the Church. The Council comprises a representative group of bishops, clergy and lay people with interest and expertise in the relevant areas, and reports to the General Synod through the Archbishops' Council

Submission on voting rights for prisoners

Mission and Public Affairs Division, The Archbishops' Council

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1 Introduction

The debate on prisoners' votes is often conducted as a clash of two broad and incompatible principles. One is that imprisonment constitutes a loss of liberty and, as a corollary of that, a range of opportunities to participate in civil society, as well as in normal social patterns of activity, are forfeited, including the right to vote. The other is that the right to vote, as a bulwark of genuine democracy, is essential both in respecting the full humanity of the prisoner and in encouraging each prisoner to achieve full reintegration into society. Because these two incompatible positions are held strongly by many of their adherents, and because the history of cases in the European Court of Human Rights, which in historical terms is driving the present discussions, has centred on whether a 'blanket ban' is just, the debate has become polarised. It is helpful, therefore, that the draft Bill, like government consultations which preceded it, presents a range of views rather than a binary choice.

The whole range of views is represented among members of the Church of England, and the starting-point of this submission is the suggestion that the choice is not about deciding whether all or no prisoners should vote, but about balancing, without caricature, the arguments tending towards either end of the spectrum of views. Christians believe in justice, and that it is the duty of the state to maintain justice by, among other things, punishing offenders justly (1Peter 2:14). They also believe that every individual is made in the image of God and loved unconditionally by God, and is for those

reasons worthy of the respect of their fellow-citizens; and that no one is beyond hope, beyond redemption.

The debate, as framed in the draft Bill, is not between those for and against an artificial threshold which measures severity of offence by the nature of the sentence, and those against such a threshold. The choices given are simply three thresholds: imprisonment, imprisonment for six months, and imprisonment for four years. It remains possible to reject these terms of debate, and argue against any general threshold.

In this submission we briefly consider the context of the current debate, especially the European dimension; then go on to consider and assess the arguments for and against a blanket ban on prisoners voting, before considering the case for each of the intermediate options presented in the draft Bill, and finally drawing our conclusions.

2 The UK in the context of Europe

Relevance of the European Court of Human Rights

The present discussion has been brought about by the need to react to judgments in the European Court of Human Rights. It is not our view that the discussion should be shaped by a desire to react on the basis of any general view of the actions of that court, still less to subsume it under the heading of 'European institutions' and base the response on a generalised attitude to those institutions. Rather, the court's judgments are to be taken as the spur for us in the UK to discuss the substantive issue in terms of what we as a nation believe to be right. If we emerge convinced that a blanket ban is right, we are very unlikely to be decisively swayed even by the undoubted weight of the European Court's authority.

Nevertheless, we do not believe it right to dismiss the various judgments of the European court as of no relevance. This debate is undoubtedly about the extent of human rights, and the many aspects of human rights are inseparably connected with one another. In signing up to the ECHR, the UK Parliament agreed to secure to everyone within its jurisdiction the rights and freedoms defined therein, and to comply with all the judgments of the ECtHR. To derogate on this matter could risk weakening the authority of the ECtHR, and could provide cover for other nations wishing to justify non-compliance with other human rights requirements laid on them by European institutions.

Principles governing thresholds for prisoners' franchise

More specifically, the question in relation to the European court turns on the extent of the 'margin of appreciation' allowable to individual states - what arrangement might be sufficiently far from a blanket ban to remove the perception that it is 'general and automatic' in such a way as to be arbitrary and disproportionate in its effects. The successive judgments in the European Court - especially Hirst, Frodl and Scoppola - have left a measure of uncertainty about where the boundaries of the margin lie. Scoppola, at least, has removed the bar on setting any threshold in terms of sentence length alone. Although some in the Church of England believe that disenfranchisement should only follow from a decision by a judge in the individual case (as envisaged in the Hirst judgment), this view is not widespread in view of the difficulties both of principle - this seems to enact the view, criticised by the UN Human Rights Committee, that disenfranchisement 'amounts to an additional punishment' - and of practice, in laying an additional and perplexing burden on the judge in every sentencing decision.

International comparators

There is a rich variety of practice among different countries - including European states - as to which, if any, prisoners can vote. About 18 European states have no ban on prisoners voting, while others debar some prisoners on the basis of sentence length, or type of offence, or both. There are no clear patterns, no critical mass, no obvious overall direction of travel from which we might draw any lessons.

The UK situation

No prisoner is able to vote except those imprisoned for contempt, default or on remand, and this has been the case for almost all of the last 140 years since the question was first made explicit in law. The weight of public opinion in the UK seems to tend towards retention of this ban - in a November 2012 YouGov of 1812 British adults, 63% of respondents said that 'no prisoners should be allowed to vote at elections', versus only 8% saying that 'all prisoners should be allowed to vote', 9% who said 'prisoners serving sentences of less than 4 years should be allowed to vote', and 15% saying 'prisoners serving sentences of less than 6 months should be allowed to vote'.

There are no significant practical issues in enabling prisoners to vote – it already happens for those on remand. It is generally accepted that each prisoner would vote in the constituency in which they were last resident.

3 For and against a blanket ban

Explanations given in the draft Bill

Breach of the social contract

The current draft Bill gives a succinct reason for denying the vote to prisoners:

‘Successive Governments have maintained the position that when an individual breaks their contract with society by committing an offence that leads to imprisonment, they should lose the right to vote while they are incarcerated.’ (Introduction, para 9).

This argues that the right to vote is not absolute, but presupposes a degree of compliance with the law, as the citizen’s side of the unwritten contract. The key phrase is ‘an offence that leads to imprisonment’; - i.e. the operative criterion is not the imprisonment per se but the offence. The threshold of the seriousness of the offence is defined as that which attracts a prison sentence. ‘Seriousness’ is a judicial category which is defined in official terms in a document of the Sentencing Council.

‘Contract’ has a metaphorical sense here, since there is no suggestion that the grant of citizenship is legally conditional on full compliance with the law. A power does exist for someone to be stripped of citizenship: under section 40 of the British Nationality Act 1981, as amended in 2006, the Home Secretary may make an order depriving a person of citizenship status if they are "satisfied that deprivation is conducive to the public good". This has only been used in a small number of terrorism-related cases. Being metaphorical, the ‘contract’ statement describes rather than explains or justifies the established position. But it describes it helpfully: many people see prisons as a sort of ‘sin bin’, such that anyone consigned to it cannot take any part in the action on the field of play until they return. The difficulty is that society treats prisoners as still on the field of play for taxation of earnings and savings, and there is always some force in ‘no taxation without representation’ (see below).

Deterrence and retribution

The draft Bill further says: ‘The ban on prisoner voting pursues the legitimate aims of preventing crime by punishing offenders, and enhancing civic responsibility and respect for the rule of law’. (Explanatory Note 92).

‘Preventing crime by punishing offenders’ is naturally read as implying a deterrent effect. However, no one has argued that the threat of losing their vote is likely to deter anyone from criminal action. ‘Preventing crime by punishing offenders’ is also naturally read as stating that the withdrawal of suffrage is itself a punishment. This risks playing into one argument of ECtHR in the Hirst judgment, that disenfranchisement is a further punishment, and should be specified as such by the sentencing judge in each case. This question would hinge on whether disenfranchisement is an

‘additional punishment’, or so closely linked to imprisonment (as a natural implication or corollary of it) that it simply adds a further resonance to the shame and incapacitation constituted by the imprisonment itself. It is difficult, in the face of the wide variety of practice in different countries as to disenfranchisement of those in prison, to assert as intuitively evident the proposition that losing one’s freedom naturally involves losing one’s vote.

‘Enhancing civic responsibility and respect for the rule of law’ implies that the removal of the franchise from prisoners will add solemnity and weight to the significance of the vote for those who do possess it. This is quite a high-level proposition, not easily susceptible of proof or disproof.

Is disenfranchisement a separate penalty, or an implication/corollary of imprisonment?

It is notable that the UK debate has been confined entirely to the question of prison. There has been no call to disenfranchise permanently, as in some countries, those who commit certain very serious crimes, so that even when released from prison they cannot vote. This illustrates the close association in the public mind between prison and exclusion from voting. We trust the judges to sentence correctly; and if during the prison sentence, even a short one, an election happens to occur, then it is the luck of the draw that the person serving perhaps a couple of months at that very time is not able to cast their vote.

Opposed to this is the view that prisoners remain citizens while in prison, and imprisonment cannot by itself be grounds for removing the vote. This implies that a judge should decide in each case, quite separately from the question of imprisonment. It is possible in principle that someone convicted of an electoral fraud offence, for example, but not imprisoned, could be disenfranchised for a period while most prisoners were not.

The ECtHR can no longer insist on this individualised approach (which the Hirst judgment backed) because of the Scoppola judgment which legitimised thresholds based on sentence length alone. It is unreasonable to expect that in every case, the judge in fixing a custodial sentence should also have to consider the question of disenfranchisement. In legal terms disenfranchisement would have to become a separate penalty; in practical terms the criteria for disenfranchisement would have to be defined clearly.

Exclusion and incapacitation

Prison is seen by many as a place of removal from society and from participation in society. In this light, disenfranchisement is a corollary or implication of incarceration, not a punishment additional to it. Prison is often defended partly on the simple ground that it takes people out of society so that they cannot commit crime. Prisoners can hold bank accounts and driving licences, get married and pay taxes – but all of these under carefully controlled conditions. Possession of a vote would be a much more unconditional denial that the prisoner has been definitively excluded from society. It would add to what is sometimes called the ‘declaratory’ function of imprisonment: expressing in action the severity of society’s disapproval of crime.

Some campaigners, including some within the Church of England, have argued that this status quo and consensus are alike based on an obsolete notion of ‘civic death’, dating back to the days of Edward III. ‘Lock them up and throw away the key’ does not usually mean ‘throw away the key’, but it does imply as absolute as possible a removal from society. Bishop Peter Selby has put his objection to this forcefully:

‘Denying prisoners the right to vote serves no purpose of deterrence or reform. What it does is to state in the clearest terms society’s belief that once convicted you are a non-person, one who should have no say in how our society is to develop, whose opinion is to count for nothing. It is making someone an ‘outlaw’, and as such has no place in expressing a civilised attitude towards those in prison’.

The ECtHR's objection is that the ban is 'general, automatic and indiscriminate', and this may reflect the experience of prisoners – all lumped together in a category of outcasts. In that case the example and teaching of Jesus comes strongly into focus, in terms of not rejecting, pillorying and stigmatising any individual. The Bible contains insistence on proportionality in punishment – the limits of the lex talionis are set at 'an eye for an eye', etc. - Exodus 21:23-4. It also contains warnings against excessive punishment – e.g. Deuteronomy 25:3 'He must not give him more than 40 lashes. If he is flogged more than that, your brother will be degraded in your eyes' (NIV).

This view that automatic disenfranchisement is an unnecessary humiliation of the convicted person is not universal among church members; some would share the view that is a proportionate corollary of the exclusion that prison signifies. However, the Mission and Public Affairs Division indicated the viewpoint of many others within the church in its report to the General Synod of the Church of England in 2007, 'Taking Responsibility for Crime', which included a pointer in favour of giving at least some prisoners the vote:

Classical criminology and penology, often backed by Christian beliefs about human freedom and dignity, treated the offender primarily as a rational agent who could be influenced by the prospect of punishment or helped and encouraged to change his – mostly "his" – attitudes and behaviour. An excessive concentration on the protective function threatens both justice and the principle that the offender or potential offender remains a citizen and is not deprived of all civil rights. The current argument over the restoration to prisoners of the right to vote is a litmus test of the application of this principle. (p.8)

Prisoner franchise and the integrity of democracy

For those in favour of a blanket ban, disenfranchisement of prisoners enhances democracy. The argument would be that the fact that one's vote can be forfeited is likely to raise the value placed on the franchise by the community in general, whereas the possession of the vote by hardened criminals in prison might cheapen it in public estimation. A responsible democracy will thus benefit from the exclusion of those who have committed imprisonable offences, for the duration of their custody, with the safeguard that the vast majority will in due course reassume their civic rights when they leave prison.

For those against, prisoners are a minority in society who need to be heard. If those standing for election have to give attention to the votes of prisoners (although a tiny minority of any constituency electorate), that will raise the profile of prisons in democratic debate, as well as perhaps taking some candidates into prisons to experience the reality. The Canadian Supreme Court has said that '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, jeopardises its claim to representative democracy and erodes the basis of its right to convict and punish law-breakers.'

Rehabilitation and the vote

Those who advocate a blanket ban do not, in general, regard rehabilitation as a factor in deciding on the franchise. Rather, the restoration of the right to vote on release is a sign of the person returning to society, since the sentencers and/or Parole Board have decided that this is the proper time to do so.

For others, however, rehabilitation is the key to understanding why the issue of voting is important. For them, to take away the right to vote of every prisoner weakens their ties to civic society, and conveys a message of rejection which is unlikely to support their rehabilitation. The purpose of rehabilitation, to which almost everyone is committed as an integral aim of imprisonment, is that people should leave prison with better resources for living as law-abiding citizens. There is a strong emphasis now on 'through-the-gate' approaches to rehabilitation, i.e. a continuity of service and support in and out of prison. Imprisonment at its best creates conditions where people can, within the restrictions of a secure institution, learn and practise habits of responsibility and mutuality. In that way prisons might become colleges of citizenship rather than universities of crime. According

to this view, to tell all prisoners that they are not citizens, by stripping them of their vote, hardly reinforces that message. The Catholic Bishops' Conference 2004 report, *A Place of Redemption*, came out very clearly in favour of giving the vote to prisoners 'except in the most serious of cases'. (paras 107-111). 'It would restore to prisoners some sense that they have to become the author of their own transformation' (p.66). 'Prison regimes should treat prisoners less as objects, done to by others, and more as subjects who can become authors of their own reform and redemption. In that spirit, the right to vote should be restored to sentenced prisoners' (ibid). Lord Mackay of Clashfern once suggested that prisoners in the last six months of their sentence should be given the vote, as a way of easing them back into full membership of the community, though this would, no doubt, be too complex in practice to administer.

4 Options for a partial ban

There is no knock-down argument showing that those in prison should have their vote taken away. Equally, the weight and consistency over time of public opinion in favour of denying prisoners the vote has to be taken seriously. Those campaigning for votes for prisoners frequently assert that voting is 'a right, not a privilege', and they have international law on their side in that respect. Certainly, to take away that right is a serious matter. But then imprisonment is a serious matter, and should be reserved for serious offences – as is in principle the case, although the numbers in prison raise questions about it.

There are relatively few who have argued that all prisoners should have a vote; one area of virtual consensus seems to be that there are some people who have committed crimes so wicked, or sustained, or both, that they have forfeited the right to be considered as full voting members of the state. It would be possible to hold that disenfranchisement should be reserved as an additional sanction in the sentencer's toolbox, to give extra weight to the condemnation of those most serious crimes. This has not, however, been advocated to any significant extent, and we would not advocate a further complicating of the responsibilities laid on the sentencer.

A partial ban on allowing those in prison to vote is, therefore, the position taken by many who are unhappy with the blanket ban. This is a way of holding together on the one hand a perception of prison as exclusion from society, and on the other hand a wish to avoid cutting off the possibilities for reintegration implicit in treating prisoners as citizens. In any event, there are no arguments for a partial ban that can carry the absolutist rhetorical weight of the other two positions, since compromise is inevitably involved. To define a threshold in terms of sentence length is the only practicable option, but any such criterion is a net which will catch both the deserving and the undeserving in the eyes of some beholders.

The four-year option

The principle underlying this option is most likely to be that those who have taken or wrecked the life of one or more other people should not be allowed an equal place with their fellow-citizens. Almost all of these, of course, will regain their vote on release, even if they are on a life sentence. The four-year-sentence option in the current proposals approximately meets this point, since those with a sentence of four years or more are likely to have done some serious damage. It is reasonably clear that the four-year option would fall within the 'margin of appreciation' allowed by the ECtHR, since the Italian three-year option has passed the test of examination in the Grand Chamber

The six-month option

It is widely accepted that short-term sentences offer almost no opportunity for rehabilitative work, but on the contrary tend to disrupt the person's life – especially in terms of employment, housing, college courses and family ties – so as to make it if anything more likely that they will re-offend. To lose one's vote, should an election fall during the custodial period, seems a minor but still an additional element of alienation of the offender from society, to no particular purpose since, on the basis of so short a sentence, it is unlikely that they pose a high risk of harm. This option is a minimal response to ECtHR, in that it enables the UK to argue that there is no longer a blanket ban, while

giving as little ground as possible on the government's part (it enfranchises about 6% of the prison population at any one time).

5 Conclusions

The weight of public opinion tells in favour of a blanket ban, while the weight of the judgements of the European Court of Human Rights tells against it; it would be a serious matter to ignore that court, since that would weaken any claim by the UK to exercise moral leadership in the context of varying standards of respect for human rights, within Europe and beyond it.. There is no clear reason to suppose that a prison sentence naturally entails loss of one's vote; the variety of practice in European and other states illustrates the lack of an international consensus. There is a range of views on whether the element of exclusion from society which is inherent in imprisonment should extend to suspension of the franchise; on the impact of prisoner franchise on the integrity of our democracy; and on the relevance of rehabilitative considerations.

A member of our MPA Council reflects the view of several colleagues in saying that they are not convinced of the arguments for a blanket ban, but going on to observe: 'However, introducing enfranchisement for those who have caused great harm to society and individuals will I think be genuinely distressing for victims (and others). I would therefore be in favour of the four year rule and encourage the Government to use the opportunity of prisoner voting to strengthen its efforts to encourage reform and promote citizenship within the prisoner population.'

Nevertheless, there is no 'Church of England view' as between the options presented in the Bill. What is shared among the Church's members is a refusal to dismiss anyone as a pariah, as less than human; a commitment to universal suffrage as broadly defined as possible, since all are created in the image of God and none is beyond his love; a recognition of the calling to 'administer true justice; show mercy and compassion to one another' (Zechariah 7:9); and an acknowledgement that to balance the punitive and rehabilitative purposes of imprisonment will men striking difficult balances on many issues, not least the issue of votes for prisoners.