Should prisoners have the right to vote?

The recent election of Sir Nicholas Bratza, the British judge to the European Court of Human Rights, as President of the Court, taking over from the French judge, may have caused some members of the British government some relief, as it may be that with his encouragement, the controversial issue of what to do about prisoners' voting rights can be resolved in a way that appeases both the Court in Strasbourg and British politicians. Following two judgments against the UK, and strident debates in the House of Commons, views have become impossibly entrenched, which has not been helped by somewhat inconsistent decisions by Strasbourg judges.

The British political class, supported by a belligerent media, have achieved an unusual cross-party consensus, which was best exemplified by the motion for a Backbench debate in the House of Commons on 10 February 2011, promoted jointly by Jack Straw and David Davis, which contained the twin premises that the current status quo should remain, of no sentenced prisoner being able to vote in any local, national or european election, and that decisions on this issue should remain a matter for democratically elected law-makers. The tone of the debate was set by the firm view of Mr Davis, that "if you break the law, you cannot make the law". Prisoners did not have the same rights as a free British citizen; that if the crime was serious enough for the perpetrator to be sent to prison, then that person has "broken their contract with society to such a serious extent that they have lost all these rights, their liberty, their freedom of association and their right to vote". There was a clear feeling in the House of Commons that the European Court was extending its remit beyond its powers and jurisdiction agreed by the 47 signatory states of the Convention. The motion was agreed on a division by 234 to 22. When the British Attorney-General, Dominic Grieve, visited the Council of Europe in June this year, he issued a subtle but clear warning that Britain considered that the Court in Strasbourg had reached the limits of its jurisdictional mandate and that certain matters such as penal policy, should now be left to national elected legislators.

The issue

The question of whether convicted prisoners should be allowed to retain their right to participate in democratic elections surely boils down to how we view this civic function; as a right or a privilege? If it were an inalienable right, guaranteed by birth into a society that subscribes to a democratic system of government supported by free and fair elections, then surely that right cannot be forfeited, regardless of the way in which the citizen behaves. The

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whole point of human rights is that they are rights by virtue of our humanity, not by virtue of our conduct. However, if a privilege, then it is something earned, deserved, potentially lost or withdrawn as part of society's opprobrium for unlawful or socially unacceptable behaviour. If one were to follow that to its logical conclusion, then surely some form of test should apply to all citizens, to be earned by their worth, wealth, status, intelligence, level of education, commitment to democracy? We would never condone that, yet, if one seriously considers the 70,000 strong population of convicted and serving prisoners, one might notice that many of them are amongst the most unfortunate members of society; the poor, the illiterate, the mentally ill, the unemployed, the drug addicts, those with a history of violent or sexual abuse who have continued to perpetuate the only way of behaving that is familiar to them. Is it not these individuals, who need society's compassionate attention and rehabilitative focus, to be re-educated back into their civic duties and responsibilities and given some form of incentive to participate in a full and meaningful way in the democratic process? As the Director of the Howard League for Penal Reform, Frances Crook, has said; "One of the hallmarks of citizenship is the right to vote. At the same time, voting is both a right and a responsibility. If we want prisoners to return safely to the community, feeling they have a stake in society, then the right to vote is a good means of engaging individuals with the responsibilities of citizenship".

The background

The ban on all convicted prisoners serving a custodial sentence from voting was enshrined in Schedule 3 of the Representation of People Act 1983, as amended by the Representation of People Act 1985. The statute specifies 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 government election*".

The deprivation of the vote is linked to the historic deprivation of land and property rights upon conviction at a time when the franchise itself was linked to property ownership. In 1832, the franchise was given to men who owned land valued at not less than ten pounds. At common law, before 1870, convicted traitors and felons forfeited their lands; the loss of property rights therefore had the consequential effect of excluding them from the suffrage. Persons convicted of a misdemeanour only (a less serious crime) did not lose their property rights on conviction and, accordingly, any imprisonment did not legally disenfranchise them unless they were physically prevented by the fact of being in prison on the day of the poll. The Forfeiture Act 1870 removed the rule by which felons forfeited their land, but section 2 of the Act provided that any person convicted of treason or a felony and sentenced to a term of imprisonment exceeding 12 months lost the right to vote at parliamentary or municipal (local) elections until they had served their sentence. The Act applied to England, Wales and Ireland. The Forfeiture Act 1870 reflected earlier rules of law relating to the forfeiture of

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certain rights by a convicted “felon”. It continued to have effect until the Criminal Law Act 1967, which abolished the distinction between felonies and misdemeanours and consequently amended the1870 Act so that only persons convicted of treason were left disenfranchised.

The Representation of the People Act 1918 brought about changes to the general voter registration requirements. In the nineteenth century, entitlement to the franchise had been exercised by making a claim to the overseers of the electoral roll. Once registered, an elector remained on the roll almost indefinitely (unless they moved to a different place), as it was not annually revised. Under the 1918 Act, new arrangements were put in place to revise the register twice a year following house to house and other inquiries by local authority staff. Electors generally had to be able to prove six months residence at a qualifying address in the parliamentary constituency (or related area) in which they wanted to register. Persons in custody, whether in lunatic asylums or prisons, were specified as not falling within the interpretation of “resident” at those places for the purposes of the new electoral registration requirements. In 1968, a multi-party Speaker's Conference on Electoral Law recommended that convicted prisoners in custody should not be entitled to vote. In consequence, the Representation of the People Act 1969 introduced a specific provision that convicted persons were legally incapable of voting during the time that they were detained in a penal institution. The 1969 Act applied to persons detained in penal institutions even if convicted abroad and repatriated to prisons in the UK. It also specified the types of “convictions” covered by the legal incapacity, including courts-martial, but not those whose detention related to fine defaults or contempt of court. The Representation of the People Act 1983 provided that a penal institution could not be regarded as a place of residence for registration purposes and individuals who were imprisoned could therefore not register as electors as they were not able to establish any other address for registration purposes. The accidental fallout of this provision was the disenfranchisement of prisoners detained on remand prior to any trial outcome or sentence, and this was remedied in the Representation of the People Act 2000; the names of remanded prisoners were to be recorded as ‘other electors’ rather than against any fixed address. Successive governments have held the view that prisoners convicted of serious crimes which have warranted imprisonment have lost the moral authority to vote. Accordingly, the loss of voting rights has been linked to punishment for a misdemeanour against society.

The Strasbourg caselaw

The relevant Article of the European Convention, Article 3 of Protocol 1, like so many articles, does not spell out in specific details how society should accommodate prisoners and the right to vote in free and fair elections. All that the article does is to provide a general principle; that the High Contracting Parties undertake “*to hold free elections at reasonable*

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intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in their choice of the legislature". Of course, the article does not specify how this should be done, how the people should be organised, how large constituencies should be, which kinds of people should be included. It does not appear to grant individual rights and contains no other conditions for the elections. There is a wide margin of appreciation accorded to the Member States, to decide the finer details according to their own traditions and customs. Moreover, the usual principle of Strasbourg law is that any deviation from the fundamental principle must be in pursuit of a legitimate aim and proportionate to the achievement of that aim. It is the specific caselaw of the Court that has expanded upon those principles, to lay down some more specific conditions and provide an acceptable legislative framework. The problem is that Strasbourg has not been entirely consistent in its caselaw and has often declined to determine what sort of provisions would be acceptable, leaving a tricky position for any government trying to implement new legislation to meet its demands.

The first case to be decided against the UK was that of John Hirst, who made his application to Strasbourg on 5 July 2001, an application that resulted in a Grand Chamber Judgment (15 judges) on 6 October 2005. Hirst was a life prisoner, having been convicted of manslaughter on the ground of diminished responsibility. His tariff had expired on 25 June 1994, but his continued detention was based on the Parole Board's consideration that he continued to present a risk of serious harm to the public. The Court considered the position in other European countries; noting that the UK was one of 13 other countries that barred all prisoners from voting, and placed it in the same camp as Russia, Bulgaria, Hungary, Turkey and Serbia. Japan also excludes all convicted prisoners from voting. Other countries tended to limit prisoners in a qualified way, often related to the nature of offence or sentence. The Court agreed with the applicant Hirst in this case that the right to vote is not a privilege, but that universal suffrage has become a basic principle across European nations, departure from which risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Nonetheless, the rights bestowed by Article 3 of Protocol 1 were not absolute and there was room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere. This case was the first occasion the Court had had to consider a general and automatic disenfranchisement of convicted prisoners and it concluded that such a general, automatic and indiscriminate ban, applying automatically to all prisoners, irrespective of the length of their sentence, the nature or gravity of the offence and their individual circumstances must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and therefore as incompatible with Article 3 of Protocol 1. Interestingly, 5 judges dissented from the concluding view, emphasising that the legislation in Europe showed that there was little consensus about whether prisoners should have the right to vote.

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The next case which took caselaw a little further was an Austrian case of ***Frodl***, which led to a final judgment on 4 October 2010, again finding a breach of Article 3 of Protocol 1. In Austria, debarment from voting or standing for election is possible only as a result of a custodial sentence of more than one year on account of one or more crimes committed with malice aforethought. The court defined matters more specifically by stating that 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 the decision of a judge following judicial proceedings.

The ***Frodl*** case was followed by the case of ***Greens and M.T.*** against the UK, upon which the Chamber (7 judges) gave judgment on 23 November 2010. Prior to that judgment, the Strasbourg court had started to feel swamped by thousands of applications from individual prisoners demanding the right to vote and seeking compensation for the fact that they were being deprived of their right. Robert Greens and M.T. were both serving a prison sentence at the time their applications were lodged with the European Court in 2008. The two prisoners had sought to be registered as voters but their applications were refused by the Electoral Registration Officer. Greens and M.T. complained that the refusal to enrol them on the electoral register for domestic and European elections was in violation of Article 3 of Protocol No. 1. The blanket ban on voting had prevented them from voting in elections to the European Parliament in June 2009 and in the general election of May 2010 and could potentially prevent them from voting in the elections to the Scottish Parliament of May 2011. The European Court concluded that there had been a violation of Article 3 for both applicants and criticised the Government's delay in implementing the Court's judgment in ***Hirst***. In an unprecedented pilot judgment, the Court attempted to induce the UK to resolve large numbers of the individual cases that had started to swamp the Strasbourg Court and arose from the same structural problem at the domestic level, namely the need for domestic legislation to end the current incompatibility of the UK's electoral law. The Court gave the United Kingdom Government six months from the date on which the judgment became final to introduce legislative proposals to bring the disputed law in line with the Convention and to enact the relevant legislation within any time frame decided by the Committee of Ministers, the executive arm of the Council of Europe, which supervises the execution of the Court's judgments. In the meantime, the Court would not examine any comparable cases pending new legislation and proposed to strike out all such registered cases once legislation has been introduced. Significantly, the Court made it clear that no financial compensation was payable; the relief available from the Court was of a declaratory nature. The only relevant remedy now is a change in the law which, incidentally, was unable to undo past violations of the Convention in respect of particular individuals.

On 22 February 2011 Robert Greens applied for the case to be referred to the Grand Chamber of the European Court of Human Rights in a bid to get the UK government to change the law more quickly so that prisoners will be able to vote in the Scottish, Welsh and Northern Ireland elections and local elections in England on 5 May 2011. The Government also decided to refer the Greens and MT judgement to the Grand Chamber of the European Court of Human Rights, in effect appealing the Court's decision.

Meanwhile, the Court provided a further judgment in ***Scoppola*** against Italy in January 2011, which interestingly, made no mention of ***Greens and M.T.***, perhaps a symbol of the sometimes disjointed judgments of the Strasbourg machinery. The applicant was an Italian sentenced to life imprisonment for murder amongst other charges and under Italian law, his life sentence entailed a lifetime ban from public office, amounting to a permanent forfeiture of his right to vote. The Court again noted that the ban was automatic and indiscriminate in its application and concluded that there had been a violation.

The current position

The current position is now one that can only be termed a stalemate between the Court in Strasbourg and the British government. Whilst various prison reform charities are continuously urging that change is needed and would benefit the rehabilitation opportunities of thousands of prisoners, members of the legislature on each occasion that a debate is forced, make it well known that they are fundamentally opposed to any change in legislation. Meanwhile, the domestic judiciary are refusing to deal with any further applications for judicial review on the issue or to make any declarations of incompatibility, having concluded that this is now a matter for the legislature (see ***R (Chester) v Secretary of State for Justice and another*** [2010] EWCA Civ 1439). The Government is now shy of forcing the issue, knowing that defeat in Parliament is inevitable, and following a series of futile consultations, has set up a Commission to investigate the issue, whose timetable for providing their conclusions has been put off indefinitely and whose composition is sure to create division and indecision.

Ironically, whilst MPs decry the dictatorial nature of the Strasbourg Court, criticising its arrogance in poking its nose into national political affairs, the Court remains effectively powerless. It can only issue press releases and criticisms from the Council of Europe, urging that something be done but with no real powers of implementation or sanction. Interestingly, after so many judgments with slightly different slants and emphases, the threshold of acceptability has moved on from the first hesitant judgment of ***Hirst*** to more specific standards, requiring the involvement of the judiciary in deciding whether the right to vote should be forfeited according to offence and sentence. This is hardly likely to sit harmoniously with an elected legislature already suspicious of interfering, appointed judges.

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The Court is also now deluged with over 3000 applications from British prisoners demanding compensation. In theory, there should be a cut-off point for applications following six months from the last violation, namely the British General Election of May 2010. Accordingly, any incarcerated clients who make their complaints known to their legal representatives should be firmly advised that they are out of time from November 2010, and need to wait until the next election, local, national or European, when they might have been able to vote if at liberty. They should also be told that there is little or no chance of financial compensation – perhaps this will be the only and genuine test of their commitment to their democratic rights. As those who study the history of revolutions will know, political desires are hardened by deprivation rather than availability. If the Government had acted promptly after ***Hirst*** and granted a few categories of prisoners the vote according to certain qualifications, the media interest might have been temporary and transient and the take-up by those prisoners negligible. Now, positions are hardened and entrenched, and those prisoners persuaded by their lawyers to be interested are determined that the franchise will be theirs whilst the representatives whom they might have voted for are equally determined that the prospect of canvassing a prison for votes remains as remote as possible.

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