

Embracing and Resisting Prisoner Enfranchisement: A Comparative Analysis of the Republic of Ireland and the United Kingdom

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Summary: This paper examines prisoner enfranchisement in the Republic of Ireland and United Kingdom. Despite being close neighbours, having similar legal and political traditions, both being members of the Council of Europe and European Union, and latterly politicians tending towards similar rhetoric on 'law and order', the debates and outcome in the two states have been significantly different on prisoner enfranchisement. The paper considers why the two states took such diverging approaches. Not only did the attitudes of governments and legislators differ on prisoner enfranchisement, but the debates revealed variance in portrayal of prisoners. Media interest was very different in the two states and discussions over parliamentary sovereignty, European influences, and judicial activism were central to the outcome of the deliberations on prisoner enfranchisement.

Keywords: Ireland, United Kingdom, European Union, prisons, elections, prisoner enfranchisement, penal policy, European Convention on Human Rights, European Commission of Human Rights, European Court of Human Rights.

Introduction

Prisoner enfranchisement remains one of the few contested electoral issues in twenty-first-century democracies. It is at the intersection of punishment and representative government. In recent decades, prisoner enfranchisement has been a source of controversy in many countries, from Israel to South Africa and Australia to Canada (Ewald and Rottinghaus, 2009).

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Outside the United States of America (Manza and Uggen, 2006; Uggen *et al.*, 2012), prisoner enfranchisement has caused most debate in the United Kingdom (Easton, 2011). In December 2006 the United Kingdom's Department for Constitutional Affairs (DCA; 2006, Foreword) launched a consultation process with the statement that 'The government is firm in its belief that individuals who have committed an offence serious enough to warrant a term of imprisonment should not be able to vote while in prison'. Some days earlier, the Oireachtas¹ had quietly introduced legislation to allow prisoners to vote.

This paper will examine why governments and legislators in the United Kingdom have resisted and their counterparts in the Republic of Ireland have embraced prisoner enfranchisement. It then explores other issues that become embroiled in the deliberations about prisoners' access to the franchise. The paper concludes by considering whether this indicates more than a different attitude to prisoner enfranchisement, but something deeper in penal policy.

Republic of Ireland

Prior to the establishment of the Free State, legislation governing prisoners and voting was covered by the Forfeiture Act 1870, which barred from voting anyone serving a sentence over 12 months. Legislators in the early decades of the state were reluctant to deal with penal reform in general (Rogan, 2011; Tomlinson, 1995) and were even less interested in prisoners' rights (Behan, 2014).

Even though no law was introduced to bar prisoners' access to the franchise, before the passing of the Electoral (Amendment) Act 2006, Irish prisoners were in an anomalous position. They could register to vote, but there was no facility to allow them to cast their franchise. The registration of prisoners as electors was specifically set out in Section 11(5) of the Electoral Act 1992, which provided that: 'Where on the qualifying date, a person is detained in any premises in legal custody, he shall be deemed for the purposes of this section to be ordinarily resident in the place where he would have been residing but for his having been so detained in legal custody.' With little likelihood of ballot boxes being provided in prisons and no procedure to allow postal voting, the

¹ The Oireachtas, also referred to as Oireachtas Éireann, is the legislature of Ireland. www.oireachtas.ie

registration was moot. However, it left open the possibility that if a serving prisoner was on temporary release on election day, and registered to vote, they were legally entitled to do so (McDermott, 2000, p. 335).

Supreme Court rejects prisoner voting

Two years after the passing of the Electoral Act 1992 the Irish Courts rejected an application from a prisoner, Patrick Holland, to suspend the European Parliament elections to allow him to pursue constitutional proceedings because he was denied the facility to vote (Hamilton and Lines, 2009, pp. 209–10). He pursued the case to the European Commission of Human Rights (ECmHR), where the Irish government maintained that there was no constitutional or convention guarantee of a postal vote. It argued that it would be impractical to have hundreds of ballot boxes in prisons throughout the country to facilitate prisoners from different constituencies, and it was too much of a security risk and a burden on the Prison Service to allow the release of all prisoners to vote.

In rejecting the application, the ECmHR felt bound to conclude that:

the legislator, in the exercise of its margin of appreciation, may restrict the right to vote in respect of convicted persons. Such restrictions could, in the Commission's opinion, be explained by the notion of dishonour that certain convictions carry with them for a specific period. (*Holland v Ireland*, 1998)

Accordingly, the Commission concluded that the suspension of the right to vote was not arbitrary and did not contravene Article 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR), which binds signatories 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'.

Two years after the *Holland* judgment, the High Court ruled in the *Breathnach* case that prisoners retained the right to vote under the Electoral Act 1992. The court declared that the failure of the state to provide a means whereby a prisoner could vote breached the constitutional guarantee of equality before the law. It ruled that prisoners enjoyed a right, which had been conferred on them by the constitution, to vote at

elections for members of Dáil Éireann, and no legislation was currently in force that removed or limited that right. Drawing on European human rights standards, Mr Justice Quirke stated that not providing the necessary machinery to enable Breathnach to exercise his right to vote:

comprises a failure which unfairly discriminates against him and (a) fails to vindicate the right conferred upon him by article 40.1 of the Constitution of Ireland to be held equal before the law and; (b) fails to vindicate the right conferred upon him by article 14 of the European Convention on Human Rights to vote in national and local elections without discrimination by reason of his status. (*Breathnach v Ireland*, 2000)

During the hearing the state had acknowledged that the extension of postal voting to prisoners would not impose undue administrative demands, but Justice Quirke noted that no legislative provisions existed for such a facility.

On appeal, the Supreme Court unanimously overturned this judgment. The Supreme Court ruled that while prisoners were detained in accordance with the law, some of their constitutional rights, including voting, were suspended. ‘It is of course clear’, Chief Justice Ronan Keane concluded, that ‘despite the deprivation of his liberty which is the necessary consequence of the terms of imprisonment imposed upon him, the applicant retains the right to vote and could exercise that right if polling day in a particular election or referendum happened to coincide with a period when he was absent from the prison on temporary leave’ (*Breathnach v Ireland*, 2001). After outlining the jurisprudence, Susan Denham, future Chief Justice, ruled that imprisonment was only part of the punishment.

The applicant [Stiofán Breathnach] is in a special category of person – he is in lawful custody. His rights are consequently affected. The applicant is in the same situation as all prisoners: there is no provision enabling any prisoners to vote. Consequently, there is no inequality as between prisoners. The inequality as between a free person and a person lawfully in prison arises as a matter of law. It is a consequence of lawful custody that certain rights of the prisoner are curtailed, lawfully. Many constitutional rights are suspended as a result of the lawful deprivation of liberty. It is a consequence of a lawful order not an arbitrary decision. (*Breathnach v Ireland*, 2001)

Oireachtas enfranchises prisoners

The Supreme Court had set out the constitutional position. With government politicians reluctant to champion the rights of prisoners, and clarification provided by the courts, it seemed the matter was closed. However, despite the Supreme Court judgment, there continued to be some muted debate about the enfranchisement of prisoners. In 2002, a report from the National Economic and Social Forum (NESF) on the reintegration of prisoners recommended that the Department of Justice, and the Prison Service, should ‘develop a Charter of Prisoner Rights (including consideration of extending voting rights to prisoners)’ (NESF, 2002, p. 71). In 2005 Opposition TD, Gay Mitchell, proposed a private member’s bill on prisoner enfranchisement. With the possibility of this bill being discussed in the Oireachtas, the Tánaiste, Mary Harney, told the Dáil that the ‘Government has cleared the legislation to provide for prisoners’ voting by way of a postal ballot in their own constituencies’ (Dáil Debates, 2005, vol. 612, col. 1115).

In December 2006, the Oireachtas passed the Electoral (Amendment) Act to allow prisoners to vote by postal ballot. The legislation to enfranchise prisoners was introduced by a coalition government of Fianna Fáil and the Progressive Democrats, neither known for their liberal attitude to prisoners, and the former party responsible for popularising ‘zero tolerance’ discourse in the Irish political lexicon (O’Donnell and O’Sullivan, 2003).

Introducing the Electoral (Amendment) Bill to the Dáil, the Minister for Environment, Heritage and Local Government, Dick Roche, stated that the legislation would modernise existing electoral law and meet the government’s obligations under the provisions of the European Convention on Human Rights, which had been incorporated into Irish law in 2003 (Egan, 2003). Referring to the *Hirst* judgment (see next section), he argued that while the legal position in the UK differed significantly from Ireland, ‘in light of the judgment it is appropriate, timely and prudent to implement new arrangements to give practical effect to prisoner voting in Ireland’ (Dáil Debates, 2006, vol. 624, col. 1978).

During the Oireachtas debates on the bill, no parliamentarian spoke against the enfranchisement of prisoners. Amendments were put forward to make sure prisoners would have trust in the electoral process. Outside parliament, there was little discussion about prisoners and enfranchise-

ment in the lead-up to, or during, the passing of the legislation. In stark contrast to the role played (especially by the tabloid press) elsewhere, particularly when it comes to the issues of crime and prisoners' rights, the Irish media was remarkably silent on the legislation, with very few newspapers even mentioning it (Behan and O'Donnell, 2008).

The Irish government decided to introduce legislation to allow prisoner voting, even though neither the prison population nor the general public were clamouring for it, the courts did not require it and little political capital could be expected in return. The passing of the legislation to enfranchise prisoners in the Republic of Ireland went against the international trend in recent years, as 'much prison policy strengthens the "criminal" as an identity rather than an incarcerated "citizen"' (Stern, 2002, p. 137). Nevertheless, perhaps equally significant was the lack of controversy among policymakers, politicians and media compared to other jurisdictions.

Advocated as an electoral rather than a criminal justice reform and with no legislation to be repealed, it was easier to introduce a relatively minor piece of legislation. It also did not use up any political capital for the minister initiating the measure. So with a minister with responsibility for the franchise professing electoral reform as a priority, this progressive piece of legislation passed quietly through the Oireachtas. This stands in stark contrast to the experience in the United Kingdom.

United Kingdom

Outside of the United States of America (Manza and Uggen, 2006), no country in the world has been as concerned by prisoner enfranchisement as the United Kingdom (Easton, 2011). It has been contested in the courts (both domestic and European), considered in a number of consultative processes, debated in parliament and had a parliamentary committee established specifically to consider the subject. At the time of writing, the issue has not been settled and prisoner enfranchisement remains a matter of some controversy.

When the United Kingdom increased the franchise threefold with the Representation of the People Act 1918, the Forfeiture Act 1870 still barred from voting anyone sentenced to over 12 months. Effectively all prisoners were disenfranchised because they were unable to register, as they were not in a position to attend polling stations (Murray, 2013, pp. 515–16). While various electoral acts mentioned prisoners, the

Representation of the People Act 1983 stated explicitly 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'. As there was no facility to allow them to vote, all prisoners (whatever their status) were in effect excluded from the franchise. This was amended to allow remand prisoners to vote with the Representation of the People Act 2000.

George Howarth MP, for the Home Office, stated that while the legislation was being amended to allow remand prisoners to register to vote, 'it should be part of a convicted prisoner's punishment that he loses rights and one of them is the right to vote' (*Hansard*, HC Debates, 15 December 1999, vol. 341, col. 300).

ECtHR rejects blanket ban on prisoner voting

In 1998, the Human Rights Act incorporated the ECHR into United Kingdom law. Three years later, the High Court rejected an application from three prisoners that denying them the vote contravened their rights under the ECHR. Lord Justice Kennedy concluded that 'there would seem to be no reason why Parliament should not, if so minded, in its dual role as legislator in relation to sentencing and as guardian of its institutions, order that certain consequences shall follow upon conviction or incarceration' (*Pearson and Martinez v Secretary of State for the Home Department* EWHC [2001] Admin 239).

One of those involved in the case, John Hirst, appealed and in March 2004, the European Court of Human Rights (ECtHR) ruled that there had been a breach of Article 3 of Protocol No. 1 of the ECHR. The rights to vote and participate in elections are 'central to democracy and the rule of law', the court ruled, but it conceded that 'they are not absolute and may be subject to limitations'. However, it rejected as 'arbitrary' and 'disproportionate' a ban on all convicted prisoners. It accepted that while this is 'an area in which a wide margin of appreciation should be granted to the national legislature ... It cannot accept however that an absolute ban on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation' (*Hirst v United Kingdom (No. 1)*, 2004). In effect, the court decided that some prisoners in the United Kingdom had their human rights contravened by being denied the vote.

The UK government appealed to the Grand Chamber of the ECtHR on the basis that under the ECHR the right to vote was not absolute.

Convicted prisoners, it argued, forfeited the right to take part in deciding who should govern as they had ‘breached the social contract’. The government claimed that disqualification would achieve the aims of preventing crime, punishing offenders, and enhancing civic responsibility and respect for the rule of law by ‘depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made’. Disenfranchisement only affected those who had been given a custodial sentence and, thus, the duration was ‘accordingly fixed by the court at the time of sentencing’ (*Hirst v United Kingdom (No. 2)*, 2005).

In October 2005, the Grand Chamber of the ECtHR, by a margin of 12 votes to five, found against the British government. While the Grand Chamber accepted that each signatory to the ECHR must be allowed a margin of appreciation, ‘the right to vote is not a privilege’. The automatic blanket ban lacked proportionality and encompassed those who served from one day to life in prison, from those who were convicted of minor to the most serious offences. Rejecting the UK government’s argument that parliamentary approval had been given for this measure, the Grand Chamber ruled: ‘It cannot be said that there were any substantive debates by members of the legislature on the continued justification in light of modern-day penal policy and human rights standards for maintaining such a general restriction on the right of prisoners to vote’. As for the plea from the UK government that the lower court’s ‘finding of a violation was a surprising result, and offensive to many people’, Judge Calfisch remarked that ‘decisions taken by the court are not made to please ... members of the public but to uphold human rights principles’ (*Hirst v United Kingdom (No. 2)*, 2005).

Resisting enfranchisement I: Executive

In December 2006, in response to the court’s judgment and the criticism of lack of substantive debate on prisoner enfranchisement, the UK government issued a consultation paper (DCA, 2006). Lord Falconer, the Lord Chancellor, continued to argue that the loss of the vote ‘is a proper and proportionate punishment for breaches of the social contract that resulted in imprisonment’. Successive governments held that the ‘right to vote forms part of the social contract between individuals and the state’ (DCA, 2006, Foreword). The consultation document laid out a number of options: retain the current ban on voting rights for convicted

prisoners; enfranchise prisoners sentenced to less than a specified term; allow sentencers to decide on withdrawal of the franchise; or enfranchise all tariff-expired life sentence prisoners (DCA, 2006, pp. 23–5).

The government had completed the first phase of the consultation process by March 2007, and in April 2009 it launched the second stage after giving ‘careful consideration’ to how to respond to the ECtHR judgment. By this stage, the government had reached ‘the preliminary conclusion that to meet the terms of the judgment a limited enfranchisement of convicted prisoners in custody should take place’ (Ministry of Justice, 2009, p. 21). Postal voting was the most likely mechanism, with prisoners declaring a ‘local connection’, and eligibility would be based on sentence length. This consultation paper put forward four options – those sentenced to less than one, two, or four years would retain the right to vote. The final option was that those sentenced to two years or under would automatically retain the right to vote and prisoners who received a sentence of between two and four years could apply to vote, but only where a judge allowed it. The government was nevertheless ‘inclined towards the lower end of the spectrum of these options’ and the seriousness of the offence should determine eligibility to vote. But ‘no prisoners sentenced to 4 years’ imprisonment would be eligible to vote’ (Ministry of Justice, 2009, p. 25).

Despite repeated criticism of the UK government from the Council of Europe’s Committee of Ministers (see White, 2013, pp. 20–1), a general election took place in May 2010 without any measures to include prisoners in the franchise. While the Liberal Democrats had previously voiced support for prisoner voting (White, 2013), their coalition partner and Conservative Prime Minister, David Cameron, set the tone for the new coalition government’s position: ‘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.’ However, he conceded that some prisoners would have to be enfranchised, because of pending litigation by prisoners, ‘painful as it is’ (*Hansard*, HC Debates, 3 November 2010, vol. 517, col. 921).

Resisting enfranchisement II: Parliament

In February 2011, a backbench debate was held on prisoner enfranchisement which the initiators hoped would satisfy one of the ECtHR’s

rulings, that the lack of political discussion undermined the legitimacy of disenfranchisement. The debate was proposed by high-ranking members of the Conservative and Labour parties. David Davis, Conservative MP, believed that there ‘have been many important debates in this slot, but I lay claim to this one being unique, because it gives this House – not the Government – the right to assert its own right to make a decision on something of very great democratic importance, and to return that decision to itself’. He suggested there were two different issues at stake: firstly, the right of the ECtHR or the UK parliament to decide on the matter and secondly, voting rights for prisoners. While rejecting European interference on the matter, he took up the latter subject. He supported the concept that ‘if you break the law, you cannot make the law’. If a crime is serious enough for a perpetrator to be sent to prison, ‘a 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’ (*Hansard*, HC Debates, 10 February 2011, vol. 523, col. 494).

Former Labour Home Secretary Jack Straw was one of those who proposed the motion. He asked whether ‘through the decision in the *Hirst* case and some similar decisions, the Strasbourg Court is setting itself up as a supreme court for Europe with an ever-widening remit’ (*Hansard*, HC Debates, 10 February 2011, vol. 523, col. 502). After much discussion, the House of Commons noted the *Hirst* ruling and by a majority of 234 to 22 passed a motion acknowledging the ‘treaty obligations of the UK’, but believed that ‘legislative decisions of this nature should be a matter for democratically elected lawmakers; and [the House] supports the current situation in which no sentenced prisoner is able to vote except those imprisoned for contempt, default or on remand’ (*Hansard*, HC Debates, 10 February 2011, vol. 523, col. 586). Despite the House of Commons giving its answer to the ECtHR, it was still up to the government to respond to the *Hirst* judgment.

After the *Hirst* judgment, a number of countries introduced legislation to enfranchise some or all prisoners, including the Republic of Ireland, Cyprus, Belgium and Moldova (White, 2013, pp. 45–57). Subsequently, the ECtHR heard similar cases on prisoner voting (*Frodl v Austria* and *Scoppola v Italy*). While these cases were ongoing, the UK government was allowed more time to respond to *Hirst*. Finally, after the ruling of *Scoppola v Italy* in May 2012, the UK government was given another six

months by the ECtHR after it was reminded that ‘the Court has repeatedly affirmed that the margin in this area is wide’ (*Scoppola v Italy*, 2012).

On 22 November 2012, over seven years after the *Hirst* judgment and just over 24 hours before the deadline set by the ECtHR, the UK government introduced the Voting Eligibility (Prisoners) Draft Bill. The bill, to be considered by a committee of both Houses of Parliament, proposed three options: prisoners sentenced to less than four years would be allowed to vote; prisoners sentenced to less than six months would retain the franchise; and the final option – a restatement of the existing ban on voting for all sentenced prisoners. In his statement to the House of Commons, the Justice Secretary, Chris Grayling, argued that the court had gone beyond the original intention of the ECHR. He was giving parliament the authority to consider the bill as its response to the ECtHR, because, while he recognised that it was his ‘obligation to uphold the rule of law seriously ... Equally, it remains the case that Parliament is sovereign’ (*Hansard*, HC Debates, 22 November 2012, vol. 553, col. 745). While he would ask a parliamentary committee to consider legislative proposals, ‘Ultimately, if this Parliament decides not to agree to rulings from the ECtHR, it has no sanction. It can apply fines in absentia, but it will be for Parliament to decide whether it wishes to recognize those decisions’ (*Hansard*, HC Debates, 22 November 2012, vol. 553, col. 754). Nevertheless, he was conscious that there was a case to be heard in the Supreme Court in summer 2013 on the right to vote in European elections and the nearly 3,000 cases taken by prisoners for compensation, which were on hold pending implementation of the judgment.

The Labour Party supported the government’s approach. This was, according to Shadow Justice Spokesman, Sadiq Khan, ‘not a case of our Government failing to hold free or fair elections, or an issue of massive electoral fraud; it is a case of offenders, sent to prison by judges, being denied the right and the privilege of voting, as they are denied other rights and privileges’ (*Hansard*, HC Debates, 22 November 2012, vol. 553, col. 746–7). As a draft bill is published to enable consultation and pre-legislative scrutiny, it can take years to reach the statute books. This move by the government was seen by some commentators as an attempt to play for time with the ECtHR and the Council of Ministers of the Council of Europe (Rozenberg, 2012; Jenkins, 2012). Nevertheless, the UK government could legitimately argue that it had brought forward legislative proposals and it was now for parliament to decide.

While this bill was being considered, another case came before the UK Supreme Court when prisoners challenged their right to vote under EU law. This was rejected by the Supreme Court because it considered eligibility to vote under EU law as a matter for national parliaments. Lord Mance ruled that relevant EU treaties were concerned with ‘ensuring equal treatment between EU citizens residing in member states other than that of their nationality, and so safeguarding freedom of movement within the EU’. Lord Sumption echoed this: ‘In any democracy, the franchise will be determined by domestic laws which will define those entitled to vote in more or less inclusive terms.’ He believed that the Strasbourg court had ‘arrived at a very curious position’, concluding that ‘Wherever the threshold for imprisonment is placed, it seems to have been their view that there must always be some offences which are serious enough to warrant imprisonment but not serious enough to warrant disenfranchisement. Yet the basis of this view is nowhere articulated’ (*R (Chester) v Secretary of State for Justice and McGeoch v Lord President* [2013] UKSC 63).

Meanwhile, the Joint Select Committee on Draft Voting Eligibility (Prisoners) Bill began taking oral evidence in April 2013. At the opening session, chair of the committee, Nick Gibb MP, explained that ‘All the main parties in the UK, and the vast majority of Members of Parliament and the public, are opposed to allowing prisoners to vote’. However, the committee would ‘examine these issues in great depth, to form a view about the draft Bill and to consider how the public’s position on this issue can be squared with that of the European Court of Human Rights’.

The committee believed that the vote should ‘not be removed without good reason’, but argued that those guilty of ‘heinous crimes’ should be disenfranchised. After considering a range of evidence from a wide range of organisations and individuals (including this author), the majority report (with dissension from three members, including the chair) recommended enfranchising prisoners serving 12 months or less and that those with longer sentences should be entitled to apply for registration six months before their scheduled release date (Report of the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill 2013, pp. 62–3). It recommended that a bill to this effect be presented to parliament during the 2014–15 session. However, with no mention of prisoner enfranchisement in the Queen’s Speech setting out the legislative agenda for the 2014–15 parliamentary session, it is unlikely that the bill, even if introduced, will pass all parliamentary stages in time for the next general election in 2015.

Penal policy, politics and enfranchisement

Despite their close proximity and similar legal and political traditions, the approach to prisoner enfranchisement was significantly different in the Republic of Ireland and the United Kingdom. This section will consider whether this indicates something deeper about levels of punitiveness, penal policy and the treatment of prisoners. While ‘law and order’ language may have become more punitive in the Republic of Ireland (Rogan, 2013; O’Donnell and O’Sullivan, 2003) in recent decades, this rhetoric had a greater impact on the discussions about prisoner enfranchisement and, more generally, prisoners’ rights in the UK (Drake and Henley, 2014).

Other differences that influenced the debates were attitude to European influences, media interest and the political dynamic behind the issue. The courts in the Republic of Ireland and the United Kingdom were in agreement that prisoner disenfranchisement was a political rather than a legal matter, and should be left to legislators to decide. Therefore, to allow or deny prisoners access to the ballot box was, in both states, down to politics and policy.

Despite diverging in their approach to prisoner enfranchisement, the two states were similar in terms of imprisonment rates, treatment of prisoners, and conditions of confinement (Bell, 2013; Rogan, 2013). While it is recognised that using imprisonment rates to determine punitiveness is fraught with difficulty (Pease, 1994; Ruggiero and Ryan, 2013), the two states have experienced a similar upward trajectory in the numbers incarcerated in the past two decades. In England and Wales, the number increased from 45,817 (90 per 100,000) in 1992 to 84,977 (149 per 100,000) in 2014. The prison population in Northern Ireland, having dropped significantly in the wake of the prisoner releases under the Good Friday Agreement, is at a similar level to 1992. In Scotland, the number of prisoners increased from 5,257 (103 prisoners per 100,000) in 1992 to 7,797 (146 per 100,000) in 2014. Imprisonment rates went in a similar direction in the Republic of Ireland, rising from 2,185 (61 per 100,000) in 1992 to 4,104 (89 per 100,000) by 2014 (International Centre for Prison Studies, 2014).

Old, inadequate prison estate, overcrowding and poor conditions characterise the prison systems of England and Wales and the Republic of Ireland (Bell, 2013; Jesuit Centre for Faith and Justice (JCFJ), 2012). Despite enfranchisement, conditions in prisons in the Republic of

Ireland remained unchanged. The practice of ‘slopping out’, condemned regularly by both national and European reports (Committee for the Prevention of Torture, 2011; Inspector of Prisons, 2009a), was still in operation in the older prisons, with the ‘great majority’ who did not have access to proper toilet facilities having to share a cell (JCFJ, 2012, p. 29). While legislators concerned themselves with prisoner enfranchisement, prison rules dated from 1947;² the Inspector of Prisons, established in 2002, had yet to be put on a statutory footing; and prisoners had no access to the Ombudsman, or a designated Prisoner Ombudsman, which even the government-appointed Inspector of Prisons pointed out ‘seems to suggest a lacuna in the system’ (Inspector of Prisons, 2009b, p. 37). The UK had a more robust system of oversight and monitoring (Owers, 2006).

Plans have been announced to tackle some deficiencies in Irish prison oversight and to make improvements in the Irish prison estate – especially the ending of ‘slopping out’ in Ireland’s largest prison, Mountjoy. Nevertheless, the practice of ‘slopping out’ and overcrowding was still blighting the Irish penal landscape during this period of electoral reform. The lack of penal reform was cited by many prisoners as one of the reasons for abstaining from voting in the 2007 general election (Behan, 2012).

The Irish discussion about prisoner voting was intertwined with the debate around creating the ‘responsible’ prisoner. During the debates on enfranchisement, politicians were keen to stress that this legislation could be used to rehabilitate prisoners and encourage them to behave more responsibly and appreciate the implications of citizenship (Behan, 2012). In 2007, the Irish Prison Service (IPS) mission was to help ‘prisoners develop their sense of responsibility’ and to enable them ‘to return to live as a law abiding member of the wider community having reduced the risk to society of further offending’ (IPS, 2001, p. 34). Voting, it was hoped, would become part of the process of developing a pro-social, responsible identity.

However, policies that seek to encourage prisoners to behave responsibly are not confined to Ireland. The Council of Europe (2006, Rule 102) suggests that ‘the regime for prisoners shall be designed to enable them to lead a responsible and crime-free life’. The ‘rehabilitated’

² Ireland implemented new Prison Rules in 2007 (S.I. No. 252 of 2007).
www.irishstatutebook.ie/2007/en/si/0252.html

and 'responsible' prisoner has come into vogue in international prison policy and management (see Bosworth, 2007; Crewe, 2012; Garland, 2001). The concept of individual responsibility pervades prison management discourse internationally (Bosworth, 2007) and reflects the wider drive towards responsabilisation that is characteristic of attempts to respond to crime in late modern societies (Garland, 2001). It is also prevalent in attitudes to prisoners in the United Kingdom (Crewe, 2012). However, clouded in other political issues, the discussion in the UK did not get as far as discussing enfranchisement as a way of encouraging prisoners to behave responsibly.

The deliberations on prisoner enfranchisement revealed very different attitudes to European standards, conventions and institutions. In the Republic of Ireland, the discourse around 'Europe' was generally positive, emphasising European jurisprudence and human rights standards (see Griffin and O'Donnell, 2012) and the desire to locate Ireland in a progressive European setting. Indicating a much more positive tone towards the *Hirst* judgment, Dick Roche believed that there was 'an obligation under the European Convention of Human Rights and Fundamental Freedoms which guarantees the right to vote', and there 'is a moral responsibility on member states that if you sign the Charter, you abide by the Charter'. While recognising that Ireland's position was different from that of the UK, he thought it was 'better to deal with it at our pace, of our own volition than have a challenge to us in the Court of Human Rights' (interview with author, November 2007).

In the UK, discussion around European influences has been somewhat negative. The debate on prisoner enfranchisement has been framed primarily around powers and jurisdiction of 'Europe' and its institutions. Many politicians and commentators rather carelessly intermingled discussion about the Council of Europe and the European Union, either unaware or unconcerned that it was a Council of Europe rather than an EU court that ruled in *Hirst*. In the February 2011 backbench debate, Bernard Jenkin, Conservative MP, suggested that votes for prisoners 'was never an issue in the British prison system until the lawyers got hold of it through the European Convention on Human Rights, and to that extent it is completely irrelevant to the real issues that face our prison system and the prisoners in it' (*Hansard*, HC Debates, 10 February 2011, vol. 523, col. 494). While David Cameron personally believed that prisoners should lose the right to vote, 'it should be a matter

for Parliament to decide, not a foreign court' (*Hansard*, HC Debates, 23 May 2012, vol. 545, col. 1127).

Combined with the hostility towards what was deemed European interference was an argument that this was a case of judicial activism. One Conservative MP believed that prisoner voting was 'fabricated by judicial innovation contrary to the express terms of the ECHR' by the 'Strasbourg Court' (Rabb, 2011, p. xiii). He believed that the UK government should inform the ECtHR that it 'cannot – rather than it will not – enact legislation to give prisoners the vote, in light of the contrary express will of parliament' (Rabb, 2011, p. 31; emphasis in original). During a previous parliamentary debate, the Conservative peer Lord Tebbit railed against 'judicial imperialism, to which we are becoming accustomed'. He argued that the British people through 'the Parliament of this Kingdom has not yet been invited to give its view on this matter' (*Hansard*, HL Debates, 20 April 2009, vol. 709, col. 1248). As Yasmin Qureshi MP pointed out, the debate began about whether prisoners should have the right to vote, 'but it seems to have been turned into an opportunity to bash the European Court of Human Rights' (*Hansard*, HC Debates, 10 February 2011, vol. 523, col. 535).

Politicians in the UK claimed to be following the public mood in resisting enfranchisement, perhaps reflecting a more embedded 'populist punitiveness', which conveys 'the notion of politicians tapping into, and using for their purposes, what they believe to be the public's generally punitive stance' (Bottoms, 1995, p. 40). In October 2005, in the wake of the *Hirst* judgment, the *Manchester Evening News* found that 74% of respondents in its poll were against giving prisoners the right to vote (Easton, 2011, p. 220). Five years later, 76% of respondents believed that prisoners should not be allowed to vote. Only 17% believed that they should retain the right to exercise their franchise (YouGov/The Sun, 2010).

In another sign of widespread political rejection of *Hirst*, the Scottish parliament in preparation for the referendum on independence in 2014 passed the Scottish Independence (Referendum) Bill, which included a clause banning convicted prisoners from voting. The Scottish government relied on legal advice that Article 3 of Protocol No. 1 of the ECHR applied only to elections, not to referenda. The Scottish National Party, as it made much of its desire to widen the franchise to include 16- and 17-year-olds, sought to limit voting eligibility with the exclusion of

prisoners: Deputy First Minister Nicola Sturgeon argued that the government was ‘not persuaded’ of the case for allowing convicted prisoners to vote (cited in Robertson, 2013, p. 44).

The lack of media interest in the Republic of Ireland (even in Irish editions of UK tabloids) is in stark contrast to much of the comment in the tabloid press in the UK (Behan and O’Donnell, 2008, p. 328). In the latter, the debate was constructed around the argument that giving prisoners the right to vote would be an attack on victims’ rights, with many papers coming out against prisoners’ access to the franchise (Drake and Henley, 2014). In reporting the launch of the second consultation process in 2009, the *Daily Express* in an outraged front page article suggested: ‘Europe Says: Give Votes to Convicts’ (Milland, 2009). It reported that: ‘Thousands of rapists, killers and paedophiles will get the right to vote after ministers caved in to pressure from Europe.’ This was the perfect storm of a story for some sections of the media, combining the ‘law and order’ issue with European interference and judicial activism.

In the Republic of Ireland, in contrast to most other jurisdictions, prisoner enfranchisement was framed as an electoral rather than a penal reform issue. During the early years of the twenty-first century, the Irish government proclaimed its desire to create a more progressive electoral system, and voting for prisoners was one such measure, along with a much criticised and subsequently abandoned introduction of electronic voting. Mary Rogan (2013, p. 106) has argued that ‘it is difficult to state what precisely is the particular ideology – or political or penal philosophy – driving change within Irish penal policy’. She suggests that a ‘confluence of factors must be examined’ and ‘individual ministers and civil servants have enormous influence’. Although it is not a criminal justice measure, the role of the minister in charge of the franchise had a considerable bearing. Dick Roche professed himself personally committed to, and publicly extolled, electoral reform. As a former Chairman of the Irish Commission for Justice and Peace, he believed that prisoner enfranchisement was ‘intrinsically the right thing’. He thought that ‘every citizen has the right to vote, even citizens that found themselves locked up’. So at minimal cost, with no political and media opposition, and an eye to Europe, Dick Roche believed it was ‘one of those serendipitous moments’ and concluded: ‘it just struck me that we had an opportunity to introduce this and the sky didn’t fall down’ (interview with author, November 2007).

Conclusion

While the debates on the introduction of legislation to allow prisoners to vote in the Republic of Ireland made reference to the international situation, the impetus for reform was more complex and local. In contrast to many other jurisdictions, where ‘disenfranchisement is a punitive sanction’ (Uggen *et al.*, 2012, p. 64), the Republic of Ireland had legislation specifically setting out the practicalities of registration, making enfranchisement easier to legislate for rather than having to repeal other legislation. With no political or media opposition and at little cost, this eased the passage of legislation and did not need to use up any political capital.

In an attempt perhaps to avoid possible political fallout, those who introduced the legislation reminded prisoners of their responsibilities and the obligations of citizenship, while reassuring the general public of their abhorrence of crime. This short piece of enabling legislation allowed a measure that has been controversial in many other jurisdictions to be passed relatively unnoticed in political or public discourse. In contrast, prisoner enfranchisement in the United Kingdom has been intertwined in the wider discourse around European influence, judicial activism and a zero-sum dichotomy between prisoners’ and victims’ rights. Politicians both used and played to media hostility towards ‘European interference’. At the time of writing, the debate is ongoing and perhaps the UK government will introduce legislation to allow some prisoners to vote, not because it wants to, but rather to remain uncensured within the Council of Europe or to avoid the potential of compensation for prisoners.

Despite similarities in legal and political traditions, the Republic of Ireland and the United Kingdom have taken very different approaches to prisoner enfranchisement. Rising levels of imprisonment and conditions of confinement were somewhat similar in the two states. Nevertheless, even with enfranchisement, penal policy remained unchanged in the Republic of Ireland. More than revealing differences in penal policy or approaches to criminal justice, the deliberations on prisoner enfranchisement indicated significant distinctions in the role of the media and a marked divergence in attitudes to European influences, judicial activism and parliamentary sovereignty among governments and legislatures in the Republic of Ireland and United Kingdom. These issues, along with those concerning penal and criminal justice policies, may help us understand why legislators in the Republic of Ireland

embraced prisoner enfranchisement and their counterparts in the United Kingdom continue to resist enfranchisement of its confined citizens.

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