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Prisoner voting in Scotland - a short summary

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The European Court of Human Rights held in 2005 in the Hirst case that the UK's blanket ban on prisoners voting in elections breached the European Convention on Human Rights. The judgment has been controversial and the UK Government has yet to amend UK legislation to comply with it. The Scottish Parliament has recently been granted powers over the franchise for local and Scottish Parliament elections and can now legislate on prisoner voting for these elections. This briefing summarises the background to the issue of prisoner voting in the UK as well as current developments in the UK and Scotland.

6 December 2017
SB 17-85

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Executive Summary

1. Section 3 of the UK Representation of the People Act 1983 bans all prisoners serving custodial sentences from voting in parliamentary and local elections

2. The ban applies irrespective of the length of the sentence

3. In 2005, the European Court of Human Rights ruled in the Hirst case that, as the ban was a blanket one, it breached Article 3 of Protocol No 1 of the European Convention on Human Rights which requires states to: “hold free elections (…) under conditions which will ensure the free expression of the opinion of the people”

4. The judgement has led to controversy. UK proposals to amend the rules did not progress to legislation and the UK has still to comply with the judgment

5. On 2 November 2017, the UK Government submitted a new action plan for complying with the judgment to the Council of Europe's Committee of Ministers.

6. As of the date of this briefing, the Committee of Ministers has not responded to the UK's action plan and it is not clear what the Council of Europe's position is on the UK's plans

7. The Scottish Parliament did not have the power to change prisoner voting rules as the rules on the franchise were reserved to Westminster

8. The Scottish Parliament has, however, recently been granted powers over the franchise for local and Scottish Parliament elections and can now legislate on prisoner voting for these elections.

9. On 7 September 2017, the Scottish Parliament's Equalities and Human Rights Committee carried out an evidence session on prisoner voting, as part of a general inquiry into the issue. The Committee will take further evidence on 14 December

10. In its legislative programme for 2016/17, the Scottish Government promised that it would take forward a consultation exercise on future electoral reforms

11. Although the consultation has yet to start, the Scottish Government indicated in correspondence to the Scottish Parliament's Equalities and Human Rights Committee that the consultation will not cover prisoner voting, due to the Committee's consideration of this matter

12. In contrast to the position of the Scottish Government, the Welsh Government has included prisoner voting in its consultation.

The current law

Those found guilty of an offence who are serving a custodial sentence in a prison or other establishment are not allowed to vote in UK elections.

This ban is set out in section 3 of the UK Representation of the People Act 1983 (1983 Act). It applies to:

- **All parliamentary elections** (to the UK Parliament, the Scottish Parliament, the European Parliament and the Welsh and Northern Ireland Assemblies)
- **All local government elections**
- **All prisoners serving custodial sentences irrespective of length** (but not people held in prison on other grounds, such as those remanded in custody pending trial).

Until recently, the Scottish Parliament did not have the power to change these rules as many aspects of substantive electoral law, including rules on the franchise, were reserved to Westminster.[i]

However, the Scotland Act 2016 (2016 Act) gave the Scottish Parliament powers over the franchise for local and Scottish Parliament elections. This means that the Scottish Parliament can now legislate on prisoner voting for these elections.

i Scotland Act 1998, Schedule 5, Part II, B3

Challenges to the UK rules

The UK electoral rules were challenged more than ten years ago in the European Court of Human Rights in the case of Hirst v United Kingdom (No 2).

On 6 October 2005, the court ruled in the Hirst case that the ban breached Article 3 of Protocol No 1 of the European Convention on Human Rights (the Convention) which requires states to:

> "hold free elections (…) under conditions which will ensure the free expression of the opinion of the people".

The court emphasised that electoral legislation differs widely in Europe and that human rights law gives Council of Europe States a wide degree of discretion (known as "margin of appreciation") in setting electoral rules . However, it held that the ban fell outside of any acceptable margin of appreciation as it was a blanket one which applied to all prisoners given a custodial sentence irrespective of length or gravity of the offence. The punishment was therefore not proportionate.

Given that different states have addressed prisoner voting in different ways, the Court did not rule on compliance. It left it to the United Kingdom Parliament to determine the means of complying with its judgment.

Since Hirst, there have been a number of other cases challenging the ban, both in the UK courts and at the Court of Human Rights.

Both the previous Labour and Coalition Governments at Westminster consulted on proposals to change the law to comply with these cases and, in December 2013, a Joint House of Lords and House of Commons Committee recommended that the Government introduce a Bill so that all prisoners serving sentences of 12 months or less would be entitled to vote in all UK elections. [1] However, the proposals did not progress to legislation, in part due to lack of support in the House of Commons. [2]

This lack of progress in complying with the Convention has led to condemnation from the Council of Europe – the pan-European organisation responsible for monitoring compliance with the Convention. For example in 2013, the Council's Commissioner for Human Rights, Nils Muižnieks, stated that:

> " If the UK, a founding member of the Council of Europe and one which has lost relatively few cases at the Court, decides to "cherry-pick" and selectively implement judgments, other states will invariably follow suit and the system will unravel very quickly. Thus, my message is clear: the Court's judgments have to be executed and the automatic and indiscriminate ban on voting rights for prisoners should be repealed. If the Court system is to continue to provide protection, there is no alternative to this for member states, other than leaving the system itself."
>
> Muižnieks, 2013[3]

A comprehensive overview of UK developments in this period (including discussion of the various options for changing the law based on previous UK Government consultations) can be found in the House of Commons Library's:

- Standard Note on prisoners' voting rights (2005 to May 2015)
- Briefing Paper on prisoners' voting rights: developments since May 2015

Recent UK developments

The UK Government was due to send plans for complying with the Hirst judgment to the Council of Europe on 1 September 2017. However, it did not meet this deadline due to delays caused by the June 2017 general election. The UK informed the Council of Europe that it would submit its action plan by early autumn 2017. [4]

On 2 November 2017, David Lidington MP, the Lord Chancellor and Secretary of State for Justice, delivered a statement to the House of Commons on the UK Government's response to the Hirst judgment. [5]

The statement explained that the UK Government, "continues to believe that convicted offenders who are detained in prison should not vote" and consequently did not propose any changes to the 1983 Act.

It did, however, propose changes to Prison Service guidance so that:

1. Those who are in the community on temporary licence can vote. Temporary licence is a form of discretionary and temporary parole aimed at the resettlement and rehabilitation of offenders.

2. It is made clear to those given custodial sentences that they will lose the right to vote in prison. The statement argues that this addresses a concern of the Hirst judgment that UK offenders are not given sufficient clarity that they cannot vote while serving a prison sentence.

The Lord Chancellor's statement notes that the UK Government will work with the three devolved administrations on this issue, in particular to reflect the differences in law and practice in Scotland and Northern Ireland.

It indicates that the changes to temporary licence will affect up to one hundred offenders at any one time and argues that the proposals comply with the legal obligations in the Hirst judgment. [6]

Others have, however, argued that the proposals are simply an attempt at a legalistic fix and do not go nearly far enough. For example, the legal academic, Dr Ruvi Ziegler, notes that

> " The proposal leaves section 3 of the RPA intact: at the time of sentencing, disenfranchisement would still be an automatic consequence of a sentence of imprisonment *of any length*, regardless of individual circumstances. Post-sentencing, enfranchisement will be discretionary, applying to roughly 1 in every 1000 prisoners. This is a far cry from the recommendation of the Joint Committee on the Draft Voting Eligibility (Prisoners)"
>
> Ziegler, 2017[7]

Similarly, in a blog post the English barrister, Matthew Scott, calls the proposals a "dismal, empty gesture", noting that:

> “ Mr Lidington’s proposed solution to the Hirst conundrum is so inconsequential that it would not be unfair to call it frivolous. It does not alter any part of the law that the ECtHR said should be altered; if it has any effect at all (which is doubtful) it will apply to hardly anybody, and those to whom it will apply would probably have been entitled to vote anyway.”
>
> Scott, 2017[8]

The proposals were included in the UK Government's action plan for complying with the Hirst judgment which was submitted to the Council of Europe's Committee of Ministers on 2 November 2017. [9] The Committee of Ministers is a body made up of the foreign ministers of Council of Europe member states whose main role is to ensure that states comply with the judgments of the European Court of Human Rights.

The UK's action plan is due to be considered in the week of 5 December 2017 by the 1302nd (Human Rights) meeting of the Ministers' Deputies (i.e. the member states' permanent ambassadors to the Council of Europe). [10] As of 6 December 2017, it is not clear what position, if any, this meeting has taken.

The Scottish independence referendum

The issue of prisoner voting arose in Scotland in the run up to the Scottish independence referendum. The UK Government used secondary legislation (an Order in Council) to give the Scottish Parliament powers to legislate on the referendum, including on the franchise.

The draft legislation, the Scottish Independence Referendum (Franchise) Bill, followed the UK position, prohibiting prisoners from voting in the referendum. Various amendments were lodged during Stage 3 of the Bill aimed at giving prisoners the right to vote in the referendum. These were debated in the Scottish Parliament on 27 June 2013.

During this debate, the then Deputy First Minister, Nicola Sturgeon, argued that the Convention rules do not apply to referendums. She also opposed the amendments on a point of principle, arguing that:

> " The principle that a convicted prisoner loses certain rights for the duration of their custodial sentence is a fundamental and long-standing part of the prison process."
>
> Scottish Parliament, n.d.[11]

A total of 8 Green, Liberal Democrat and Independent MSPs voted in favour of the amendments. All SNP, Labour and Conservative MSPs present (slightly more than 100 Members) voted against the amendments, and as a result the Bill retained the prohibition on prisoner voting.

Consequently, prisoners serving custodial sentences were not allowed to vote in the independence referendum.

In 2014 the ban was challenged in the Supreme Court on human rights grounds (Moohan v Lord Advocate). The challenge was, however, unsuccessful as the court ruled that the Convention rules (Article 3 of Protocol No 1) only cover elections and not referendums.

Devolution of electoral law in Scotland - super-majority rules

Until recently, the rules on the electoral franchise were reserved to Westminster. The Scottish Parliament did not have the power to legislate on the electoral franchise.

However, section 3 of the 2016 Act devolved much of the powers on electoral law for local and Scottish Parliamentary elections to the Scottish Parliament (including rules on the franchise).

Regulations setting a date for section 3 to come into force were made on 18 May 2017.[ii] This means that the Scottish Parliament now has the power to allow prisoners to vote in local elections and elections to the Scottish Parliament.

The 2016 Act also set up new "super-majority" rules for many electoral law issues, requiring Bills to have a two-thirds majority to pass.[iii] Matters related to "persons entitled to vote" fall within the new super-majority rules. A prisoner voting bill would therefore need a two-thirds majority in the Scottish Parliament to become legislation.

There are rules in the devolution settlement (Scotland Act 1998)[iv] which allow Acts of the Scottish Parliament and Scottish Government action to be struck down if they breach the European Convention on Human Rights. Crucially, the Scottish rules go beyond the UK Human Rights Act 1998 which only allows courts to declare Acts of the UK Parliament incompatible with the Convention (with the UK Parliament retaining the ultimate right whether or not to change the law). [12]

As a result, new Scottish electoral law could be challenged and declared unlawful in the Scottish courts if it does not comply with the Convention. [13]

ii The Scotland Act 2016 (Commencement No. 6) Regulations 2017
iii Section 11
iv Sections 29(2)(d) and 57(2)

Scottish Government consultation on electoral reform - prisoner voting

In its legislative programme for 2016/17 "A Plan For Scotland: The Scottish Government's Programme For Scotland 2016-2017" the Scottish Government promised that:

> “ we will take forward a consultation exercise to find out what electoral reforms Scottish citizens would like to see taken forward in future legislation”
>
> Scottish Government, 2016[14]

Although the consultation has yet to start, the Scottish Government has indicated in correspondence to the Scottish Parliament that it will not cover prisoner voting. On 11 October 2017 the Minister for Parliamentary Business, Joe Fitzpatrick, wrote to the Convener of the Scottish Parliament's Equalities and Human Rights Committee, Christina McKelvie, explaining that this was due to the Committee's current work on the issue:

> “ The scope of the exercise is likely to be reasonably broad covering a range of measures to improve the running of elections and aspects of the new powers devolved in the Scotland Act 2016. Given the Committee’s on-going consideration of the matter the consultation will not cover prisoner voting. ”
>
> FitzPatrick, 2017[15]

Welsh Assembly consultation on electoral reform - prisoner voting

The Wales Act 2017 gives the Welsh Assembly powers to legislate on electoral law for local and Welsh Assembly elections.

The Welsh Government published its consultation on electoral reform on 18 July 2017. [16] The closing date for responses was 10 October 2017.

In contrast to the position of the Scottish Government, the Welsh Government has included prisoner voting in its consultation.

The consultation explains that extending the franchise to prisoners raises complex questions, such as:

- where a prisoner should be deemed resident for the purposes of voting; and
- whether the right to vote should be granted to all prisoners or linked to specific criteria such as the length or type of sentence.

Because of these complexities the consultation does not include any firm policy proposals. Instead it poses the following questions in a separate annex:

- Q41 – Should Welsh prisoners be allowed to register to vote and participate in Welsh local government elections? If so, should it be limited to those sentenced to less than twelve months, four years, or any sentence length?
- Q42 – By what method should prisoners cast a vote?
- Q43 – At what address should prisoners be registered to vote?

The consultation explains that these questions are aimed as a test of public opinion and will be taken into account when considering whether on not to legislate on this subject.

Scottish Parliament - Equalities and Human Rights Committee inquiry into prisoner voting

On Thursday 7 September 2017, the Scottish Parliament's Equalities and Human Rights Committee carried out an evidence session on the issue of prisoner voting, as part of a general inquiry into the issue.

The evidence session examined a wide range of issues, including:

- Moral arguments for and against allowing prisoners to vote
- The legal arguments and underlying Convention law in relation to prisoner voting
- The practical and organisational aspects of changing the law on prisoner voting in Scotland

This session was agreed at the Committee's meeting on 29 June 2017, following receipt of a letter from Patrick Harvie MSP requesting that the Committee consider prisoner voting as part of its work programme. The letter noted that:

> " We now have greater devolved responsibility for the democratic process, and I believe that alternatives to the blanket ban must be actively considered if further legal challenges are to be avoided. A number of options are available, including resumption of voting rights at the end of a longer sentence, sentencing guidelines dealing with restriction of voting rights, or loss of voting rights for specific categories of offence. I would be grateful if you could let me know whether this is something your committee would be willing to explore."
>
> Harvie, 2017[17]

Various stakeholders gave oral evidence at the session, including: the Law Society of Scotland, an academic, an ex-offender, the prison service, penal reform organisations, organisations working on the rehabilitation of offenders, and electoral bodies. Patrick Harvie MSP also attended and gave evidence. The Committee also received a range of written evidence in advance of the meeting.

In his opening statement, Patrick Harvie indicated that the current blanket ban on prisoner voting is in breach of human rights legislation. He also noted that there are a number of ways in which the current legislation could be amended, namely:

- removing the ban altogether;
- removing it at the end of prisoners' sentences as part of the process of preparation for release;
- giving judges discretion over the matter.

Patrick Harvie also argued that the current ban does not have a logical basis as it only applies to those given a custodial sentence but has no application to those who are given a community sentence, even though in some cases the crime can be equally serious. As

an example, he explained that, although there is an argument that, if nothing else, those convicted of electoral offences should not be able to vote, such people will normally not be prohibited from voting under the current system as they will generally not be given a custodial sentence.

Other evidence considered the moral arguments and history surrounding prisoner voting. In that regard it was explained by Lucy Hunter Blackburn of the penal reform organisation, the Howard League, that the current blanket ban is based on a historical concept of "civic death" in which all of a citizen's rights in society were taken away upon conviction of an offence. Lucy Hunter Blackburn, also indicated that the history of the ban is less coherent than is often assumed arguing that:

> “ How we got here was not through a proper democratic debate about the vote and the prison system. The process was more arbitrary. There was no ban for the 20 years prior to 1969, and it was brought in with no parliamentary scrutiny. In 1969 there was a process behind closed doors to look at electoral reform, and the ban was put into legislation with no real debate. Prior to 1949, I think it was, only people in the most serious cases were banned from voting, but from 1969 to 2000 we banned remand prisoners, who were people who had not been convicted of any offence”
>
> Scottish Parliament, 2017[18]

Professor Fergus McNeill of the University of Glasgow examined the issue of civic death in more detail and argued that it was no longer fitting to follow such an approach. He indicated that, in many cases, those in prison are, "already substantially disenfranchised before their formal disenfranchisement by punishment". He also argued that the the idea of civic death or disenfranchisement directly contradicts more modern aims linked to rehabilitating offenders. On this point he noted that:

> “ The problem arises from the fact that we are holding on to ancient and medieval sentiments that drive the desire to exclude while at the same time trying to have a modern conception of reintegration. My fundamental view is that we cannot have both. ”
>
> Scottish Parliament, 2017[18]

The legal arguments against a blanket ban were dealt with, amongst others, by Michael Clancy of the Law Society of Scotland. He argued that the key provision for assuring compliance in the Hirst case (paragraph 82 of the judgment) can be paraphrased as follows:

> “ Don’t be indiscriminate, don’t make it a blanket restriction, don’t apply it automatically, don’t have it irrespective of the length of the sentence and don’t have it irrespective of the nature or gravity of the offence.”
>
> Scottish Parliament, 2017[18]

As regards the practicalities of opening up voting to prisoners, Pete Wildman of the Scottish Assessors Association noted that there would be no fundamental barriers from the perspective of electoral registration, but that thought would have to be given to issues such as:

- where prisoners should be registered; and
- how registration officers will establish whether prisoners are or are not allowed to vote where a ban is linked to the length of a sentence.

Chris Highcock of the Electoral Management Board for Scotland echoed these points and stressed that the main issues relate to who can vote and how they can vote. On this last point Chris Highcock suggested that the obvious approach would be to follow some form of postal voting for prisoners.

Further details of the issues discussed during the session can be found in the Official Report of the meeting [18] and in the one page snapshot of the key issues raised.

Following the evidence session, the Committee agreed to write to the following for further information:

- The Minister for Parliamentary Business
- Dr Cormac Behan - a criminologist and author of "Citizen convicts", a book analysing prisoners and the franchise using the Republic of Ireland as a case study
- The Lord President of the Court of Session
- Victim Support Scotland

The full responses are included on the Committee's website. However, in summary:

- Dr Cormac Behan emphasised that prison should be about loss of liberty, not the loss of rights linked to citizenship and that the experience in the Republic of Ireland is an argument for enfranchising Scottish prisoners
- The Lord President of the Court of Session stressed that the key principles should be decided by Parliament and should not be left to be developed on a case by case basis by individual judges.
- Victim Support Scotland indicated that the blanket ban needed to be reconsidered but stressed that victims need to remain paramount in any discussion on legislative changes and that any changes would have to occur in conjunction with an awareness campaign on the principal purpose of incarceration

As indicated, the Minister for Parliamentary Business responded to inform the Committee that the Scottish Government's consultation on electoral reform will not cover prisoner voting.

The Committee will take further evidence on prisoner voting on Thursday 14 December.

Prisoner voting in other countries

Council of Europe countries

Due to language barriers and a lack of literature on the subject, it is not possible to provide a fully comprehensive or up-to-date overview of each prisoner voting system in the Council of Europe.

However, based on information compiled by the House of Commons Library in its Standard Note on prisoners' voting rights (2005 to May 2015) [v] and more recent work carried out by the human rights organisation Liberty in 2016, and the University of Baltimore, it appears that, in addition to the UK, the only Council of Europe countries which have a blanket ban on prisoner voting are:

- Armenia
- Bulgaria
- Estonia
- Georgia
- Hungary
- Russia

At the other end of the spectrum, many Council of Europe States have no restrictions or virtually no restrictions on prisoner voting. These include:

- Croatia, the Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Norway, Slovenia, Spain, Sweden and Switzerland

There is also a large group of countries which have some form of partial ban on prisoner voting. In countries operating partial bans, the ban is normally based on either:

1. the length of sentence; or
2. the type of offence committed.

For example, in Poland the ban is limited to those convicted of a serious crime with a sentence of more than three years, whereas in the Netherlands prisoners sentenced to one year or more may only have their right to vote removed by the court if they have committed a crime "affecting the foundations of the state".[vi] It appears that the Dutch ban has been applied very infrequently, for example the court refused to allow it in an infamous Islamic terrorism case - the murder of the film director Theo van Gogh in 2004 . [19]

Countries which have partial bans often grant the judiciary varying degrees of discretion in applying or disapplying the ban on voting. Countries following this approach include amongst others: the Netherlands, Belgium, France, Poland, Cyprus, Romania, Slovakia

v The Appendix to this document includes a table (after page 51) with a summary of prisoner voting rules in each Council of Europe country

vi Article 54 of the Dutch Constitution

and Poland. In other countries, such as Greece and Italy, the loss of the right to vote is mandatory for certain serious offences.

Recent changes to the law - Ireland and Austria

Ireland and Austria are two examples of Council of Europe countries which have recently changed their rules on prisoner voting.

Ireland

Up until 2006, prisoners could not vote in Ireland. Although there was no legislative ban on voting, in practice it was impossible for prisoners to vote as there was no method in place for them to cast their vote while in prison - they had a right to be registered in the constituency where they lived prior to incarceration, but had no right to postal voting or access to a ballot box. Therefore, in practice a de facto ban existed. [20]

However, in the wake of the Hirst case, the Irish Minister for Environment, Heritage and Local Government introduced the Electoral (Amendment) Bill 2006 which allowed all Irish prisoners to vote irrespective of the crime or sentence. The Bill was passed by the Oireachtas (Irish Parliament) and since then Irish prisoners have been able to vote by post in their home constituency. [20]

There are suggestions that the level of voting amongst prisoners in Ireland has been low. For example, Dr Cormac Behan notes in his book "Citizen Convicts - prisoners, politics and the law"(page 97) that in the Irish general election of 2007, "the level of registration was quite low at just 451 out of 3,359 prisoners" and that ultimately only 322 prisoners voted (10% of those eligible). [21] Dr Behan explains that the low levels of registration may have been due to:

- The fact that this was the first election where prisoners could vote
- The short period (one month) from the issuing of registration forms to the closing date
- The fact that the majority of sentences in Ireland are short, with the result that prisoners who could have registered had already left prison
- Certain prisons not proactively making prisoners aware of their rights

Based on further data in Dr Behan's work, and a more recent article in the Irish press, [22] it would appear that general levels of voting in subsequent elections have been similarly low. Dr Behan notes in his book that lack of participation appears be a result of low levels of trust amongst many prisoners that their concerns will be listened to or that they can influence change (see page 122). Dr Behan indicates that this is an issue which policymakers need to address when considering changes to prisoner voting rules.

Austria

Up until recently, under Austrian law anyone convicted by an Austrian court of a criminal offence, committed with intent and sentenced to a term of imprisonment of more than one year, automatically lost the right to vote. Disenfranchisement ended six months after the sentence had been served, so continued for a period after the prisoner had been released. [23]

This law was challenged in the European Court of Human Rights in 2010 in the case of Frodl v Austria.

The court held that there had been a violation of Article 3 of Protocol No. 1 of the Convention as the Austrian law was an automatic and blanket restriction. It held that the decision on disenfranchisement should be taken by a judge, taking into account the specific circumstances of the case, and that there must be a link between the offence committed and issues relating to elections and democratic institutions.

Although in a later case the court stepped back from the detailed requirements in the Frodl case (in particular the requirement for a judge to take the decision on disenfranchisement), [24] the Austrian law was amended so that:

- Prisoners sentenced to at least one year would only be banned from voting for certain very serious offences including: treason, offences against the state and military; offences relating to elections and referenda; negatively influencing Austria's relation with foreign states; and genocide
- Prisoners sentenced to more than five years for a criminal offence committed with intent can also be banned from voting
- Judges have to "take into account the special circumstances of the case" – which requires a proportionality test
- Disenfranchisement now normally ends immediately after the sentence has been served [23]

Commonwealth countries

In the last few decades, certain Commonwealth countries have moved to provide prisoners with increased rights to vote. [21]

For example, in 2002 the Canadian Supreme Court ruled in Sauvé v Canada that the Canadian law prohibiting prisoners serving sentences of more than two years from voting in federal elections was unconstitutional.

The court held that the law breached the right to vote in section 3 of the Canadian Charter of Rights and Freedoms and that it could not be justified as achieving a constitutionally valid goal under section 1 of the Charter. Although there was dissenting judgment, five of the nine judges found that

> " The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination "

The court also held that denying the right to vote was unjustified from the perspective of penal policy noting that it, "removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration." It also found that the ban had a disproportionate impact on Canada's Aboriginal people which it indicated are disproportionately represented at all levels of the Canadian criminal justice system.

However, in their dissenting judgement the remaining four judges emphasised strongly that the case was one where the court should respect the wishes of parliament and not

overturn the law as the case was not one which could be subject to "scientific proof" but instead involved competing social and political philosophies which could only be decided on through the democratic process.

A similar challenge to Australia's prisoner voting ban took place in 2007. In 2006 all Australian prisoners were disenfranchised as a result of the Electoral and Referendum (Electoral Integrity and Other Measures) Act. In other words, there was a blanket ban.

In 2007 an Aboriginal prisoner, Vicki Roach, challenged the ban in the High Court of Australia in the case of Roach v Electoral Commission. A majority of the judges held that the blanket ban on voting was unlawful and unconstitutional. Although it was within the Australian Parliament's powers under the Australian constitution to place limits on the franchise, any restrictions had to be for a "substantial reason" and must be "appropriate and adapted" (or "proportionate"') to that reason. A majority of the court held that a blanket ban applying to all prisoners was not an appropriate restriction, noting that it had an arbitrary effect on disadvantaged offenders who are indigent, homeless, or mentally unstable and who would, therefore, be less likely to be given a non-custodial sentence for relatively minor crimes.

The court accepted, however, that the Australian Parliament did have the right to restrict voting rights for prisoners convicted of serious criminal offences as, where an offence was serious, it was permissible to restrict the right to participate in the political life of the community. The court, therefore, refused to annul the pre 2006 law which prohibited a person from voting if they were serving a sentence of imprisonment of three years or longer .

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