

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's Briefing on Prisoners' Voting Rights**

**October 2016**

## About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

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## **Introduction**

1. Remarkably, it is now over 10 years since the European Court of Human Rights (ECtHR) ruled, in the case of *Hirst v United Kingdom*,<sup>1</sup> that this country's blanket ban on prisoners voting put it in breach of its human rights commitments. A number of judgments – both at Strasbourg and in the UK courts – have since confirmed that decision. However, the UK Government has yet to implement the ruling. In 2013, the Government published a Draft Bill on prisoner voting eligibility and set up a Joint Committee on the Draft Voting Eligibility (Prisoners) Bill. Liberty submitted written evidence to the Committee. The Committee recommended that the Government introduce legislation to allow all prisoners serving sentences of 12 months or less to vote in all UK Parliamentary, local, and European elections, the recommendations of which have yet to be acted upon.

## **Background**

2. The political response to the judgment in *Hirst* has been characterised by hysterical rhetoric and practical inertia. Following the Grand Chamber's decision in 2005, it took over a year for the Government at the time to launch a consultation.<sup>2</sup> A second stage consultation followed in April 2009, mooting four options for lifting the indiscriminate ban, three of which were based on sentence length and one of which created a role for judges in granting permission to vote to certain categories of prisoner.<sup>3</sup> This second lengthy consultation period, extending to September 2009, produced no commitments on the part of the Government, leaving the judgment conspicuously unimplemented at the 2010 general election. This lack of decisive action attracted criticism from Parliament's Joint Committee on Human Rights in successive reports.<sup>4</sup>

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<sup>1</sup> (2005) 19 BHRC 546. In particular, section 3 of the Representation of the People Act 1983, which provides that any convicted person detained in a penal institution is disenfranchised, was declared to be in breach of Article 3 Protocol 1 of the European Convention on Human Rights.

<sup>2</sup> 'Voting rights of convicted prisoners detained within the United Kingdom- the UK Government's response to the Grand Chamber of the European Court of Human Rights judgment in the case of *Hirst v. the United Kingdom: consultation paper*', Department for Constitutional Affairs, 14 December 2006, accessible here: <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/voting-rights/cp2906.pdf>.

<sup>3</sup> 'Voting rights of convicted prisoners detained within the United Kingdom: second stage consultation'. Consultation Paper CP6/09, Ministry of Justice, 8 April 2009, accessible here: <https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/MoJ---Voting-Rights-of-Convicted-Prisoners-Detained-within-the-United-Kingdom---Second-Consultation--Apr-09.pdf?ext=.pdf>.

<sup>4</sup> See 'Monitoring the Government's response to court judgments finding breaches of human rights', sixteenth report of the House of Commons and House of Lords Joint Committee on Human Rights. HC 728, 2006-07, accessible here: <http://www.statewatch.org/news/2007/jul/uk-jhrc-echr-law.pdf>, and 'Monitoring the Government's response to human rights judgments: annual report 2008', thirty-first report of the House of Commons and House of Lords Joint Committee on Human Rights. HC 1078, 2007-08, accessible here: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/173/173.pdf>.

It also prompted an Interim Resolution from the Committee of Ministers (CoM), the body responsible for overseeing the implementation of ECtHR judgments, expressing “serious concern” as to the compliance of what was then the upcoming election with the ECHR.<sup>5</sup>

3. The former Prime Minister, David Cameron, confirmed, on 3 November 2010, that proposals would be brought forward to overturn the blanket ban. In February 2011 the Commons Parliamentary and Constitutional Reform Committee reaffirmed the deeply concerning legal implications of the UK failing to implement a judgment against it.
4. In March 2011, in the case of *Greens and MT v United Kingdom*,<sup>6</sup> the Government sought to challenge the deadline for implementation of the judgment in *Hirst*. This appeal was rejected by the Grand Chamber of the ECtHR, but in September 2011, the Court did grant the UK an extension, pending the decision in the related case of *Scoppola v Italy*.<sup>7</sup>
5. Final judgment in *Scoppola* was given in May 2012, triggering a further six month deadline for the Government to act. In October 2012, the then Attorney General, the Right Honourable Dominic Grieve QC MP, stated in evidence to the Justice Select Committee that, whilst parliamentary sovereignty remains intact, the question for the Government was whether it wished to be in breach of its international obligations.<sup>8</sup> A month later a draft Bill – the Voting Eligibility (Prisoners) Bill – was finally brought forward setting out three possible responses to the Court’s ruling on prisoner voting. Those were as follows: (i) lifting the ban for prisoners serving less than four years, (ii) lifting the ban for those serving less than six months, or (iii) restating the existing blanket ban.
6. The draft legislation was thereafter subject to a period of pre-legislative scrutiny by the Joint Committee on the draft Voting Eligibility (Prisoners) Bill. Its report was published in October 2013, and recommended that the Government introduce legislation to allow all prisoners serving sentences of 12 months or less to vote in all UK Parliamentary, local, and European elections.<sup>9</sup> The Government offered no

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<sup>5</sup> See Interim Resolution CM/ResDH (2009) 160, Execution of the judgment of the European Court of Human Rights *Hirst v The United Kingdom No. 2*, 3 December 2009, accessible here: <https://wcd.coe.int/ViewDoc.jsp?id=1556821&Site=CM>.

<sup>6</sup> Applications nos. 60041/08 and 60054/08.

<sup>7</sup> *Scoppola v Italy* [2012], Application no. 126/05.

<sup>8</sup> Attorney General, oral evidence to the Justice Select Committee, 24 October 2012.

<sup>9</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, ‘Draft Voting Eligibility (Prisoners) Bill: Report’, Session 2013-14, HL Paper 103, 16 December 2013.

substantive response to the Committee, and no Bill was introduced in the Queen's Speech of 2014.

7. In October 2013, the Supreme Court handed down judgment in *R (Chester) v Secretary of State for Justice*,<sup>10</sup> and, in December 2014, it handed down judgment in the Scottish case of *Moochan and another v The Lord Advocate*.<sup>11</sup> Both upheld the ECtHR's judgment in *Hirst* but gave the Government another opportunity to put the situation right.
8. The ECtHR has clarified the issues further in reaching decisions in several additional cases: *McClea and Cole v United Kingdom*,<sup>12</sup> *Firth and others v United Kingdom*,<sup>13</sup> *McHugh and others v United Kingdom*, and *Anchugov and Gladkov v Russia*.<sup>14</sup> In addition, the Court of Justice of the European Union (CJEU) handed down judgment in *Delvigne v Commune de Lesparre-Medoc and another*,<sup>15</sup> stating the position in EU law, which mirrors that of *Hirst*.

### **Why give prisoners the vote?**

9. The disenfranchisement of prisoners in the UK may be rooted in the medieval notion of 'civic death'. As the Joint Committee noted,

"In the Middle Ages those found guilty of felony or treason were subject to 'attainder', entailing the loss of all civil rights—in effect, "civic death". Attainder was an assertion that those guilty of either treason or felony were so 'tainted' by their actions that they could not own or transfer property. Property owned by them was forfeit to the Crown and, since the entitlement to vote prior to 1918 derived from property-based qualifications, there was a legal bar upon those convicted of such serious offences voting."<sup>16</sup>

10. Prior to the 1870 Act, prisoners did not lose their vote because of any law against prisoner voting. Instead, a *de facto* ban arose because those convicted of felonies – more serious crimes than mere 'misdemeanors' in UK law of the period – had their property confiscated by the state. This resulted in the loss of what the UK

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<sup>10</sup> [2013] UKSC 63.

<sup>11</sup> [2014] UKSC 67.

<sup>12</sup> Applications nos. 12626/13 and 2522/12.

<sup>13</sup> Applications nos. 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09.

<sup>14</sup> Applications nos. 11157/04 and 15162/05.

<sup>15</sup> C-650/13, ECLI:EU:C:2015:648.

<sup>16</sup> Joint Committee Report, p. 7.

government of the day deemed the appropriate qualification for having the vote: being a wealthy man.

11. Thankfully the UK has progressed from a time when only a tiny fraction of the population was permitted to participate in the democratic process. Over the centuries the categories of people granted voting rights in the UK has expanded. Between 1948 and 1969, some prisoners were in fact permitted to vote, and did so in elections during that period.<sup>17</sup> In 1969, all citizens over the age of 18 were given the right to vote. The only adult nationals who cannot vote in general elections are now prisoners, hereditary Members of the House of Lords, Life Peers, and patients detained in psychiatric hospitals.<sup>18</sup>
12. Successive governments in the UK have held the view that those who have committed crimes serious enough to warrant imprisonment have lost the 'moral authority' to vote. Liberty does not underestimate the significance of these strongly-held views. We do, however, believe that the notion of 'civic death' implicit in this view has become an anachronism across the world. In excluding a whole subsection of society from the right to vote, it is out of place in any modern democracy. It may be worth remembering Abraham Lincoln's dictum that government be "of the people, by the people, for the people".<sup>19</sup> As Director of the Prison Reform Trust, Juliet Lyon, has stated, "It's time to stop pretending that people in prison don't exist."<sup>20</sup>
13. Some crimes are clearly serious enough to warrant the loss of liberty by custodial sentence. Not only is this part and parcel of a functioning, civilised democracy, it has long been accommodated under internationally-recognised human rights law. However, when those convicted of crime lose the right to liberty, they do not cease to exist as citizens. They rightly remain subject to the protection afforded by the laws of the country – it being unlawful to steal from, assault, or torture a prisoner, just as it would be anyone else. Prisoners also remain bound by other obligations our laws impose, including continuing liability for taxation on earnings and savings. They still play crucial roles in the lives of their loved ones. If rehabilitation is to succeed, it could hardly be otherwise.

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<sup>18</sup> Prison Reform Trust, *Barred from voting: the right to vote for sentenced prisoners*, February 2011, p. 1.

<sup>19</sup> See Abraham Lincoln's address at the dedication of the Soldiers' National Cemetery at Gettysburg, Pennsylvania, USA, 19 November 1863, accessible here: <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>.

<sup>20</sup> *BBC News*, 'Calls to Give Votes to Prisoners', 8 August 2005, accessible here: [http://news.bbc.co.uk/1/hi/uk\\_politics/4406585.stm](http://news.bbc.co.uk/1/hi/uk_politics/4406585.stm).

14. The UK's prison population makes up a minority group not well-represented by Parliament – no doubt in part as a result of the blanket violation of prisoners' voting rights. Allowing at least some of the prison population to vote would help to ensure that conditions in British prisons remain on the political agenda. Overcrowding and poor prison management will undermine efforts to rehabilitate those in prison. Even worse, continual reports of abuses in prison demonstrate that much more must be done to protect inmates from dehumanisation and neglect. The failure of the UK's prison regime to better treat those of transgender status, as evidenced by the suicide of Vicky Thompson in an all-male prison,<sup>21</sup> and the continuing, egregious failure to combat rape and sexual assault behind bars,<sup>22</sup> are only two examples of the deficit of oversight by government and Parliament. In the words of former Conservative Home Secretary, Lord Hurd:

“If prisoners had the vote then MPs would take a good deal more interest in conditions in prisons.”<sup>23</sup>

15. Indeed, studies of sexual abuse in prisons appear to demonstrate a massive disparity between rape reported through 'official' channels and through NGOs on the ground, the latter registering up to 4,000 rapes behind bars each year. This alone demonstrates a failure of representation through the political process. Prison conditions are of huge social and political significance, stymying the objectives of the UK's prison regime and harming the inmates themselves. Enfranchising at least some prisoners will help to ensure that these issues receive the attention they deserve.

16. Moreover, it is impossible to ignore the reality that minority ethnic groups are disproportionately affected by disenfranchisement. Black prisoners make up 15% of the prison population, compared to 2% of the country in total – a shocking statistic, by any standard.<sup>24</sup> Black prisoners are thereby over seven times more likely to be barred from voting than white inmates. By continuing with blanket disenfranchisement, the UK government disproportionately denies voting rights to an already-disadvantaged group, perpetuating their marginalisation from political and

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<sup>21</sup> See *The Guardian*, 'Partner of transgender woman found dead in prison calls for law change', 20 November 2015, accessible here: <http://www.theguardian.com/society/2015/nov/20/partner-transgender-woman-found-dead-prison-law-change-vicky-thompson>.

<sup>22</sup> See, *BBC News*, 'Thousands sexually abused in prison', study suggests', 15 September 2014, accessible here: <http://www.bbc.co.uk/news/uk-29180234>.

<sup>23</sup> Cited in Leech & Shephard, *Prisons Handbook*, 2003/4 Manchester: MLA press.

<sup>24</sup> See the report of the Equality and Human Rights Commission, 'How Fair is Britain?', 11 October 2010, accessible here: <http://www.equalityhumanrights.com/about-us/our-work/key-projects/how-fair-britain>.

social life. This is a concern in other countries, including those with the same common-law traditions as our own. For example, the Canadian Supreme Court in its 2002 decision expressly relied on the disproportionate incarceration of Aboriginal citizens in reaching their conclusion that prisoner disenfranchisement was unlawful.<sup>25</sup>

17. Comparison with the USA is inescapable, it being the only major country to operate widespread, sweeping prisoner disenfranchisement. It may be no coincidence that it also faces longstanding and severe problems of marginalisation and discrimination. In 2001, an expert member of the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) stated his concern that “one and a half million African-Americans were deprived of their voting rights for penal reasons.”<sup>26</sup> Other studies suggest that nearly 13% of all adult black men in the USA – amounting to around 1.4 million people – have lost the right to vote, a rate seven times the national average for prisoner disenfranchisement.<sup>27</sup> The UK’s significantly better history of race relations overall remains tarnished by its comparable record on prisoner voting.

18. Effective rehabilitation serves both the welfare of prisoners and the interests of society. Liberty believes that encouraging prisoners to take an interest in life beyond the prison gates will aid effective reintegration. Evidence from other countries suggests that prisoners exercise their right to vote where given the opportunity. In Belgium, Lithuania, and Romania, around 60% of eligible prisoners vote. In Italy and the Netherlands, the figures range between 20 and 60%, whilst voter turnout in the Canadian prison population has been between 22 and 33%. 53% of prisoners eligible to vote in Israel did so during that country’s March 2006 Parliamentary elections.<sup>28</sup>

19. As stated by Scotland’s former Chief Inspector of Prisons, Clive Fairweather, “Even if you lose your freedom you should still have the right to say something about the running of the country.”<sup>29</sup> Similarly, a former Chief Inspector of Prisons for England & Wales, Sir David Ramsbotham, believes that prisoners “remain citizens...they’ve had

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<sup>25</sup> See *Sauvé*, paragraphs 14, 15, and 60.

<sup>26</sup> CERD, ‘Summary Record of Meeting of 6 August 2001’, CERD/C/SR.1476, 22 May 2003, paragraph 57.

<sup>27</sup> See Human Rights Watch and The Sentencing Project, ‘Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States’, October 1998, accessible here: [http://www.sentencingproject.org/doc/file/fvr/fd\\_losingthevote.pdf](http://www.sentencingproject.org/doc/file/fvr/fd_losingthevote.pdf). See also Huffington Post, ‘Felon Voting Laws Disenfranchise 5.85 Million Americans With Criminal Records: The Sentencing Project’, 7 December 2012, accessible here: [http://www.huffingtonpost.com/2012/07/12/felon-voting-laws-disenfranchise-sentencing-project\\_n\\_1665860.html](http://www.huffingtonpost.com/2012/07/12/felon-voting-laws-disenfranchise-sentencing-project_n_1665860.html).

<sup>28</sup> See Isaphami, pp. 26 and 47-50.

<sup>29</sup> *Edinburgh News*, ‘Prisoner’s legal fight to vote may open floodgates’, 1 November 2004, accessible here: <http://www.edinburghnews.scotsman.com/news/politics/prisoner-s-legal-fight-to-vote-may-open-floodgates-1-560441#ixzz3sh7Q6FH6>.

their liberty removed, nothing else...62,000 of them are going to come out as citizens and one of the jobs of prisons is to make them better citizens.”<sup>30</sup> This is precisely what the exercise of the vote will help prisoners to become.

20. Indeed, the limited statistical evidence available indicates a significant connection between a propensity to reoffend and the ability to vote. A study in Minnesota – a US state which disenfranchises some of its prisoners even after release – found that, between 1997 and 2000, former prisoners who voted in the 1996 Presidential elections were significantly less likely to be rearrested than those former prisoners who did not. Approximately 16% of nonvoters were rearrested compared with only 5% of those who remained eligible to vote.<sup>31</sup>

21. As the Canadian Supreme Court has stated:

“...disenfranchisement is more likely to become a self-fulfilling prophecy than a spur to reintegration. Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility.”<sup>32</sup>

This is a view reiterated by the Catholic Bishops of England, who argued, in a report predating the decision in *Hirst*, that:

“Prison regimes should treat prisoners less as objects, done to by others, and more as subjects who can become authors of their own reform and redemption. In that spirit, the right to vote should be restored to sentenced prisoners.”<sup>33</sup>

22. Finally, there are no coherent policy reasons for maintaining the current ban. We can expect – and our human rights framework demands – that, where fundamental rights are restricted, a compelling public policy justification is provided, such as crime prevention or public protection. However, there is no evidence that the loss of the right to vote constitutes a material deterrent to the commission of crime, nor is there

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<sup>30</sup> *BBC News*, ‘Calls to Give Votes to Prisoners’, 8 August 2005, accessible here: [http://news.bbc.co.uk/1/hi/uk\\_politics/4406585.stm](http://news.bbc.co.uk/1/hi/uk_politics/4406585.stm).

<sup>31</sup> See Uggen, C., and Manza, J., ‘Voting and Subsequent Crime and Arrest: Evidence from a Community Sample’, 36 *Columbia Human Rights Law Review* 193, 2004.

<sup>32</sup> *Sauvé*, paragraph 37.

<sup>33</sup> Department for Christian Responsibility and Citizenship of the Catholic Bishops’ Conference of England & Wales, *A Place of Redemption: A Christian approach to punishment and prison*, 2004, accessible here: <http://www.cbcew.org.uk/CBCEW-Home/Departments/Christian-Responsibility-and-Citizenship/Prison-Ministry/Bishops-Document/Place-of-Redemption-2004>.

any evidence that it assists with rehabilitation. In none of the court decisions cited above have governments succeeded in showing that disenfranchisement provides any practical benefit. As the Joint Committee found, the comparison between the reasons for and those against prisoner voting is clear:

“No argument was advanced to us that disenfranchisement acts either as a deterrent, that is protects the public, or that it contributes to the rehabilitation of prisoners.”<sup>34</sup>

“There are no convincing penal-policy arguments in favour of disenfranchisement; but a case has been made that enfranchisement might assist prisoner rehabilitation by providing an incentive to re-engage with society.”<sup>35</sup>

23. Similarly, prison voting is not difficult to implement; indeed, the Joint Committee heard “no evidence” to suggest otherwise.<sup>36</sup> For example, in Finland, Italy, Portugal, and the Netherlands, prison voting is facilitated by mobile polling stations brought into prisons by government. It is sometimes argued that retention of the blanket ban can be justified on the ground that prisoners will disproportionately influence the vote in constituencies with a large prison population. The simple answer is to provide for prisoners to vote in their home constituencies by postal ballot. This, for example, is the approach taken in Ireland where legislation passed in 2006 gave all prisoners the right to vote by post in the constituency where they would ordinarily live.<sup>37</sup> Lithuania, Slovenia, and Switzerland also employ a postal vote system.<sup>38</sup>

### ***The right to vote***

24. The right to vote is protected by Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR). It states that a State must provide “free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in their choice of legislature.”<sup>39</sup> As part of this right, individuals have both the right to vote and to stand for election. However, these rights are qualified, and it does not prevent a state from imposing conditions on the

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<sup>34</sup> Joint Committee report, p. 41.

<sup>35</sup> Joint Committee report, p. 4.

<sup>36</sup> Joint Committee report, p. 52.

<sup>37</sup> See Irish Penal Reform Trust, ‘Prisoners in Ireland and Election 2011’, accessible here: <http://www.iprt.ie/contents/1983>.

<sup>38</sup> Ispahani, p. 51.

<sup>39</sup> Article 3, Protocol 1 of the European Convention on Human Rights.

right to vote, provided restrictions pursue a legitimate aim, do not impair the essence of the right, and are not disproportionate.

25. To reflect the broad spectrum of approaches adopted by different member states the ECtHR affords a wide margin of appreciation to national authorities. In other words, the UK has significant leeway in deciding how to protect the right to vote at a national level. In *Hirst*, the Court took issue with the blanket and arbitrary nature of the ban imposed in the UK, which applies regardless of the offence committed or the length of sentence. The Court did not require that the UK enfranchise those convicted of very serious crimes nor the prison population at large, nor was it prescriptive about the steps which should be taken by the UK to bring itself in line with its domestic and international legal obligations.
26. None of this represented any novel development on Strasbourg's part. It is clear from the negotiations prior to the writing of the ECHR – reflected in records known as the 'travaux préparatoires' – that the drafters intended the Convention to safeguard citizens' rights to vote.
27. This is not to say that restrictions were not contemplated. Indeed, the record shows consideration of multiple drafts of the text to take states' concerns into account. Moreover, the record of the negotiations is replete with references to real *rights* to vote and stand for election. The travaux préparatoires "frequently refer to 'political freedom', 'political rights', 'the political rights and liberties of the individual', 'the right to free elections' and 'the right of election'."<sup>40</sup> Indeed, it should not escape the notice of any reader of the Convention that Article 3 of Protocol 1 comes with the following heading: 'The Right to Free Elections'. As the Court explained, the wording of the provision as a whole is explained by "the desire to give greater solemnity to the commitment undertaken and in the fact that the primary obligation in the field concerned is not one of abstention and non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to 'hold' democratic elections."<sup>41</sup> It is a special provision not because it fails to grant any rights, but because the rights it grants require special, positive measures for its implementation: the democratic election of legislative representatives accountable to the citizenry.
28. In any event, just like the UK's common law, the ECHR is a living instrument. As has been clear for almost half a century, the Convention is designed to meet the

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<sup>40</sup> See *Mathieu-Mohin and Clerfayt v. Belgium* (Application no. 9267/81), paragraph 49.

<sup>41</sup> See *Mathieu Mohin*, paragraph 50, and *Hirst*, paragraph 57.

challenges we face today, not those of 1950.<sup>42</sup> This is a constitutional and international law truism: law and its interpretation are not forever strait-jacketed by the social mores of previous generations.

29. Moreover, the ECtHR had made clear, as early as 1987, what Article 3 of Protocol 1 required. In *Mathieu-Mohin and Clerfayt v. Belgium*, the Court stated that the ECHR protects the right to participate by both voting in elections of members of the legislature and standing for political office in it. Whilst these rights are not absolute, the Court found that restrictions on them – in pursuit of legitimate aims – must not impair their very essence or be disproportionate.<sup>43</sup> This had in fact been the explicit position of the Council of Europe’s Commission since 1976.<sup>44</sup> Indeed, the incompatibility of the a blanket ban on prisoners voting was found by the Northern Irish High Court to be incompatible with the ECHR 8 years before the decision in *Hirst*.<sup>45</sup>
30. *Hirst* itself – despite media rhetoric – was limited in its effect. Far from providing that all serious criminals – such as the claimant, Mr Hirst – must be enfranchised, it found that section 3 of the 1983 Act was incompatible with the right to vote. In disqualifying every prisoner in the UK from the having the vote, the Court found that the ban was arbitrary and, therefore, a disproportionate interference. It clearly held, as it had in *Mathieu-Mohin*, that the right can be limited in pursuit of clear public policy objectives, such as the prevention of crime. This allowed, in the Court’s view, the disenfranchisement of those convicted of serious crimes as part of states’ wide margin of appreciation to decide matters for themselves.<sup>46</sup> However, as it stated, it had never before faced a ban which was of (i) blanket and (ii) automatic application to individuals sentenced to custody.<sup>47</sup> There remains a highly significant difference between disenfranchising those convicted of serious crimes and banning all those sentenced to custody, for however short a period.<sup>48</sup>
31. There was, in its view, little to suggest that the mere imposition of custody – without anything more to indicate the seriousness of the crime – were rationally related to the public policy objectives outlined by the government.<sup>49</sup> It is, necessarily, a “blunt instrument”. Indeed, quoting Baroness Hale’s judgment in *Chester*, the Joint

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<sup>42</sup> See *Tyrer v. United Kingdom*, (Application No 5856/72).

<sup>43</sup> See *Mathieu-Mohin and Clerfayt*, paragraphs 51-3.

<sup>44</sup> See *W, X, Y, and Z v Belgium* (Application Nos 6745/76 and 6746/76, 30 May 1975, p. 111).

<sup>45</sup> See *R v Secretary of State ex parte Toner and Walsh* [1997] NIQB 18.

<sup>46</sup> See *Hirst*, paragraphs 60-71.

<sup>47</sup> *Hirst*, paragraph 68.

<sup>48</sup> *Hirst*, paragraph 70.

<sup>49</sup> *Hirst*, paragraphs 77 and 82.

Committee agreed with *Hirst* that “[t]here is an element of arbitrariness in selecting the custody threshold as the unique indicator of the type of offence that is so serious as to justify loss of the vote.”<sup>50</sup> For example, it will often be a matter of chance whether the ban on voting takes effect. A person convicted of a series of minor thefts may be imprisoned, by chance, over the course of a general election, imposing on him or her the same penalty for those convicted of far more serious crimes.

32. The case against disenfranchising all prisoners would have been overwhelming with or without the judgment in *Hirst*. As the Joint Committee concluded:

“The Government has failed to advance a plausible case for the prohibition in terms of penal policy—disenfranchisement linked to detention is an ineffective and arbitrary punishment, particularly for the tens of thousands of prisoners serving short sentences who pass through the prison system each year. There is no evidence that disenfranchisement plays any part in deterring crime. Insofar as penal policy has a bearing on prisoner voting, the strongest argument we have heard is that there could be potentially a mild rehabilitative effect if some prisoners were to be enfranchised.”<sup>51</sup>

33. As the Committee further concluded, “The public has yet to be presented either with the clear evidence that the current prohibition is both arbitrary and ineffective, or with the arguments in favour of granting some prisoners the vote.”<sup>52</sup> It may therefore be worth remembering the words of the South African Constitutional Court, as it struck down a similar law to that in the UK:

“A fear that the public may misunderstand the government’s true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration. It could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its image.”<sup>53</sup>

34. The same is reflected in other international human rights documents. For example, the right to vote is enshrined in Article 21 of the Universal Declaration of Human Rights and in Article 25 of the International Covenant of Civil and Political Rights (ICCPR). The UN body dedicated to interpreting the ICCPR, the Human Rights

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<sup>50</sup> Joint Committee report, pp. 4 and 48.

<sup>51</sup> Joint Committee report, p. 61.

<sup>52</sup> Joint Committee report, p. 61.

<sup>53</sup> See *National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO), Erasmus and Schwagerl v Minister of Home Affairs* (CCT 03/04 2004).

Committee, provided further foundation for the decision in *Hirst*, finding that restrictions on the right to vote are subject to a similar requirement of proportionality.<sup>54</sup>

35. And Strasbourg's decisions on the right to vote have brought real victories to marginalised groups of all kinds. As recently as 2010, for example, the Court released a landmark judgment for the right to vote of those with mental disabilities. Hungary's constitution discriminatorily denied the right to vote to anyone subject to guardianship as a result of their mental health, regardless as to whether they had capacity to make their own choices. Strasbourg found that this was an unjustified interference with the right to vote under Article 3 of Protocol 1.<sup>55</sup>
36. While different countries take a variety of approaches to the issue, the vast majority of democracies across the world do not operate a blanket ban on all prisoners voting. Within the Council of Europe, the number of countries which grant all or some prisoners the right to vote stands at 37, out of a total of 47. Those countries having *no* restrictions on prisoners voting include Denmark, Ireland, Finland, Spain, Sweden, and Switzerland.<sup>56</sup> Those countries with partial restrictions include France, Germany, Poland, and Romania.<sup>57</sup> Those countries which maintain a blanket ban are many of the former countries of the Soviet Union, such as Georgia, Moldova, and Russia, alongside the United Kingdom.
37. In countries operating partial bans, the disenfranchisement of prisoners is based on the length of sentence or the type of offence committed. A judge usually has the power to impose (and also remove) a ban as part of the sentencing process. In Belgium, France, and Norway, for example, disenfranchisement is imposed by the sentencing judge. In Malta and Poland, bans are limited to those convicted of serious crimes, such as murder, whilst in Austria prisoners can vote unless their crime involves the undermining of electoral processes, such as electoral fraud.<sup>58</sup>
38. The ties between greater political freedom, economic development, and the extension of suffrage to prisoners cannot be denied. Almost all countries which

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<sup>54</sup> See General Comment no. 25(57) adopted by the Human Rights Committee under Article 40 § 4 of the International Covenant on Civil and Political Rights on 12 July 1996, paragraph 14, and the Human Rights Committee's decision in *Gorji-Dinka v Cameroon*, CCPR/C/83/D/1134/2002, 10 May 2005, paragraph 5.6.

<sup>55</sup> *Alajos Kiss v Hungary* (App. No. 38832/06).

<sup>56</sup> Croatia, Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Slovenia, Spain, Sweden, Switzerland,

<sup>57</sup> Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Cyprus.

<sup>58</sup> See the comparative analysis in *Scoppola v Italy (No. 3)*, in particular paragraphs 45-8.

practice blanket prisoner disenfranchisement are either authoritarian states, such as Zimbabwe and Egypt, or countries emerging from dictatorship, such as Kenya. The only statistical study undertaken on this subject is clear. Prisoner disenfranchisement is “concentrated in less democratized nations with high incarceration rates and low levels of economic development.”<sup>59</sup> They are significantly more likely to suffer from ethnic, racial, and political tension, and three times more likely to operate the death penalty.<sup>60</sup> In Europe alone, those countries which operate disenfranchisement “have the lowest GDP, are the least democratized, and have the highest incarceration rate.”<sup>61</sup>

### ***Courts in the Commonwealth and elsewhere***

39. There is a clear trend in the world’s international and transnational courts towards the protection of prisoners’ right to vote. Almost all constitutional courts across the world which have evaluated the disenfranchisement of prisoners have found blanket bans to be a violation of democratic principle. Indeed, the courts of Commonwealth countries with whom the UK and its legal system have greatest affinity have spoken, in effect, with one voice: blanket bans on prisoner voting are unlawful.

40. The High Court of Australia – the country’s highest court – found in 2007 that its blanket ban on prisoner voting was arbitrary, having no rational connection between the seriousness of the offending and the disqualification from voting.<sup>62</sup> In other words, “The net was cast too wide” with a blanket ban.<sup>63</sup> As Justices Gummow, Kirby, and Crennan stated,

“...the exercise of the franchise is the means by which those living under that system of government participate in the selection of both legislative chambers, as one of the people of the relevant State and as one of the people of the Commonwealth. In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic. Such notions are not extinguished by the mere fact of imprisonment. Prisoners who are citizens and members of the Australian

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<sup>59</sup> Uggen, C., Van Brakle, M., and McLaughlin, H., ‘Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement’, in *Criminal Disenfranchisement in International Perspective*, 2006, pp. 59-75, p. 59.

<sup>60</sup> Uggen, C., Van Brakle, M., and McLaughlin, H., pp. 66-7.

<sup>61</sup> Uggen, C., Van Brakle, M., and McLaughlin, H., p. 70.

<sup>62</sup> *Roach v Electoral Commissioner* [2007] HCA 43.

<sup>63</sup> *Roach*, paragraph 95.

community remain so. Their interest in, and duty to, their society and its governance survives incarceration.”<sup>64</sup>

41. In South Africa, where all prisoners can vote, the Constitutional Court has affirmed that “[t]he universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts.”<sup>65</sup> It reaffirmed this view in a later decision in which it found that any ban on prisoners voting was contrary to the constitutional right to vote.<sup>66</sup>
42. Similarly, the Canadian Supreme Court, in striking down all restrictions on prisoners’ right to vote, affirmed that denying the vote to prisoners denies the proposition, fundamental to democracy, that “everyone is equally worthy and entitled to respect under the law”.<sup>67</sup>
43. In New Zealand, its High Court made its first ever Declaration of Incompatibility under its Bill of Rights by holding in 2015 that the country’s blanket ban was a violation of the right to vote, being arbitrary and disproportionate in just the same way.
44. The Israeli Supreme Court made its position even clearer. In 1996, facing the question of whether Yigal Amir, the person convicted of assassinating Israeli Prime Minister Yitzhak Rabin, should have the right to vote in prison, it strongly asserted prisoners’ right to vote. Notwithstanding public revulsion at Amir’s crime. It enjoined that society “separate contempt for his act from respect for his right”, finding that “disenfranchisement would hurt not Amir, but Israeli democracy”. For “without the right to vote, the infrastructure of all other fundamental rights would be damaged”.<sup>68</sup>

### ***The legal consequences of ignoring human rights***

45. One suggestion made by critics of the ECHR is to re-legislate for the present position to be maintained. Re-legislating for an automatic, blanket, and indiscriminate ban on prisoners voting would put the UK directly in breach of its obligations under international law. The legal and diplomatic repercussions of such a step, both domestically and internationally, cannot be overstated.

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<sup>64</sup> See *Roach*, paragraphs 83-84.

<sup>65</sup> *August & Ano v. The Electoral Commission and Others*, 1999 (3) SA 1 (CC), para. 17.

<sup>66</sup> See *NICRO*.

<sup>67</sup> *Sauvé v Canada (Chief Electoral Officer); McCorrister v A-G of Canada and others* 2002 SCC 68 para 34.

<sup>68</sup> *Alrai v Minister of Interior* (HC 2757/96, 2 June 1996).

46. The consequences of not complying with the ECtHR's judgments are grave. By Article 46 of the Convention, the UK has committed to abide by the final judgment of the Court in any case to which it is a party. Protocol 14 of the ECHR came into force in 2010, amending Article 46 to allow referrals by the Committee of Ministers (CoM) to the Grand Chamber where the CoM considers that a Member State has failed to comply with a Court decision. If the Court agrees and finds a violation of Article 46, it will refer the case back to the CoM which can then take action against the Member State. Action may include suspension or expulsion from the Council of Europe. If the UK chooses to enact legislation which the ECtHR has explicitly found to be unlawful, it is difficult to see how the CoM could resist a referral to the Grand Chamber. Indeed, such a referral would likely be necessary to ensure that the integrity of the Convention system is maintained.

47. As the Joint Committee stated, the UK's refusal would be an entirely unprecedented step, even among countries whose compliance we rightly call into question:

“...Human rights abuses are indeed widespread in many Council of Europe member states, and the governments of those states frequently drag their feet—sometimes for many years—in complying with judgments of the ECtHR against them. But that is not the situation in which the UK finds itself: rather than simply leaving the *Hirst* judgment to drift the Government, in Option 3 in the draft Bill, has invited Parliament to consider enacting legislation re-stating a law that has been found to be in breach of the Convention. To the best of our knowledge, such a course of action would be without precedent in the history of the Council of Europe. Mr Jagland confirmed that he was not aware of any case in which “any country has said that they do not have the will to execute a judgment ... we have never had anyone say, ‘We will not execute the judgment.’”<sup>69</sup>

48. Important, too, is the UK's crucial role in upholding what has been the most successful rights protection mechanism to arise out of the horrors of the Second World War. Member States with particularly poor human rights records – such as Russia and Turkey – would likely welcome the UK's non-compliance. It would plainly enable them to justify their own evasion of Court judgments against them and to dishonour the Convention. As the Joint Committee stated in 2013, “A refusal to implement the Court's judgment, which is binding under international law, would not only undermine the standing of the UK; it would also give succour to those states in

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<sup>69</sup> Joint Committee report, p. 31.

the Council of Europe who have a poor record of protecting human rights and who could regard the UK's actions as setting a precedent for them to follow."<sup>70</sup>

49. In short, the UK could set in train a process which would see gradual diplomatic withdrawal from adherence to the post-World War Two human rights framework. The consequences for the continued protection of human rights in Europe and across the world would be severe. As a sovereign international power which shapes and is bound by international law, the UK has important duties in both abiding by and overseeing the Convention system. They are, in this respect, its trustees. The UK is under an obligation of trust to make sure the Convention system continues its work without fail. The conclusion of the Joint Committee is a stark one:

“The enfranchisement of a few thousand prisoners is far outweighed by the importance of the rule of law and the desirability of remaining part of the Convention system.”<sup>71</sup>

50. In addition, a referral to the Grand Chamber – let alone any sanction that may follow – would be deeply embarrassing and damaging to the UK's international reputation. The UK's compliance with the ECHR is a cornerstone of its international platform for the respect of the rule of law and human rights. It is badly undermined by non-compliance: rights-abusing countries would be granted a platform from which to make the charge of hypocrisy. Moreover, suspension or expulsion from the Council of Europe would be catastrophic for other key UK interests. For example, it would jeopardise the UK's efforts at cross-border initiatives in fields such as asylum and security, and even threaten its continued membership of the EU.

51. Governments and legislatures will, from time to time, disagree with decisions of courts of whatever kind. However, it is a source of pride that, despite understandable political frustrations, the UK has for decades distinguished itself from despots and dictators by respecting the rule of law. To do so, it must not seek to evade or subvert its obligations under international law. Like any actor subject to the requirements of law, the UK must comply with judgments against it. As the former Lord Chancellor, the Right Honourable Kenneth Clarke QC MP, has commented, “The rule of law is one of our greatest exports”.<sup>72</sup> Non-compliance with the *Hirst* judgment would call into question a legacy of which the UK is rightly proud.

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<sup>70</sup> Joint Committee report, p. 3.

<sup>71</sup> Joint Committee report, p. 4.

<sup>72</sup> Speech by the Lord Chancellor and Secretary of State for Justice Rt Hon Kenneth Clarke QC MP, CityUK Future Litigation event, Clifford Chance, 14<sup>th</sup> September 2011, available at

52. The domestic legal implications of non-compliance would be similarly problematic. There are around 63,000 people serving time in UK jails, and thousands have made applications to the ECtHR. In one of the cases subsequent to *Hirst, Greens and MT v UK*,<sup>73</sup> the Court applied the pilot judgment procedure<sup>74</sup> and granted the UK time from the judgment becoming final to bring forward proposals to change the law, adjourning the remaining cases. The judgment awarded costs and expenses but – contrary to widespread media myth – held that damages were not appropriate in the case and that in future cases no financial compensation would be payable. Just satisfaction would instead be achieved by a change in the law.
53. However, if the UK does not change the law, these cases will eventually be unfrozen, with the result that costs and expenses may be payable by the UK Government for cases brought against it. If the blanket ban remains in place it is also highly likely that further litigation will be brought by those who continue to be disenfranchised in a manner that explicitly breaches the Convention. Whilst the courts have declined to order punitive damages for its failure to implement *Hirst*,<sup>75</sup> the UK faces the prospect of further costs in refusing to comply with the law.

### **What are Parliament's options?**

54. In *Hirst*, the Strasbourg Court did not require full enfranchisement of all prisoners, nor did it prescribe any hard and fast rules for compliance with the Protocol. Instead, the Court found that the general, automatic and indiscriminate disenfranchisement of all serving prisoners, irrespective of the nature or gravity of their offences, is incompatible with the right to vote under Article 3 of Protocol 1 of the ECHR.
55. Importantly, the Court did not decide that the individual who even brought the case in *Hirst* – a person convicted of manslaughter – must be given the right to vote in prison. Rather, the Court found that the rule *as a whole* was a disproportionate interference with the right to vote. This was so whether or not the individual claimant was to be re-enfranchised. In fact, it is clear that Member States' disenfranchisement

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<http://www.justice.gov.uk/downloads/about/moj/our-ministers-board/speeches/clarke-speech-future-litigation-140911.doc>.

<sup>73</sup> Application nos 60041/08 & 60054/08.

<sup>74</sup> A procedure introduced by the ECtHR to deal with applications making claims that have been previously litigated and found to be breaches of the Convention in other cases, whereby the Court identifies the systemic problem giving rise to the problem of compliance by examination of a selection of those applications. It allows for the adjournment of such cases to allow the Member State time to address the situation, with the proviso that the adjourned cases may be reopened in future.

<sup>75</sup> See, for example, *Tovey and others v Ministry of Justice* [2011] EWHC 271 (QB). No damages under the HRA have been awarded in later cases.

of prisoners convicted of serious offences is within the margin of appreciation afforded them under the ECHR.

56. Since 2005, the Court has provided a number of judgments clarifying Member States' obligations under Article 3 of Protocol 1:

- a. In *Scoppola v Italy*,<sup>76</sup> the Court found that a life-long ban on those subject to life imprisonment was compatible with the right to vote. It was found to fall within the state's margin of appreciation. The ban, unlike that of the UK, was not "automatic and indiscriminate" in the manner rejected in *Hirst*. It was imposed only on those who had been convicted of certain serious offences, rather than on all receiving a custodial sentence, notwithstanding the fact that the ban was imposed for life. The Court clarified that Article 3 of Protocol 1 requires, at a minimum, a basis for disenfranchisement which is not arbitrary. Judicial involvement in disenfranchisement, it found, is one means by which this can be remedied, but it left considerable margin to states to find other ways of meeting this minimum requirement. Italy did so without judicial oversight and rather with legislation which distinguished between certain kinds of offences on the basis of certain criteria. This too is permissible.
- b. The Court has further clarified the extent of the obligations under Article 3 of Protocol 1. In *Anchugov and Gladkov*, the First Section of the ECtHR reiterated the approach of *Hirst*, *Scoppola*, and subsequent cases. In particular, it found that Russia's blanket disenfranchisement provision – materially identical to that of the UK, it too dating back to the 19<sup>th</sup>-century – breached the right to vote for the same reasons as in *Hirst*.
- c. The same approach was taken by the CJEU in the case of *Delvigne*, which found that French law providing for an indefinite voting ban was not contrary to EU law. In line with the reasoning of the ECtHR, it was not automatic or excessively rigid: rather, the ban only applied to those convicted of specified serious offences and prisoners could apply to have it removed.<sup>77</sup> Nonetheless, France has since liberalized its voting disqualification laws.

57. Therefore, the common minimum standard set by the ECtHR can be met in a number of ways, and the basic threshold of compliance is not a high one. The chief options available to Parliament in legislating in this area are as follows:

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<sup>76</sup> Application no. 126/05.

<sup>77</sup> See also the Opinion of Advocate General Cruz Villalón, 4 June 2015, paragraphs 117-24.

- a. Provide for a threshold sentence length beyond which prisoners are to be disenfranchised.
- b. Specify a category of custodial offences deemed sufficiently serious to carry disenfranchisement as an additional penalty.
- c. Specify a category of offences, custodial or otherwise, deemed sufficiently related to the electoral process to carry disenfranchisement as an additional penalty.
- d. Provide magistrates and/or judges with the power to disenfranchise as part of the sentencing process on a case-by-case basis.
- e. Provide magistrates and/or judges with the power to re-enfranchise on application after the expiry of the minimum tariff of a prisoner's sentence, or after the expiry of a certain part of the tariff.

58. A widely-canvassed option for reform is that of rendering disenfranchisement dependent on the length of custodial sentence. The period of custody handed down in an individual case is traditionally intended to reflect the gravity of the offence for which the individual has been convicted, taking into account all the circumstances of the offending. Linking disenfranchisement to sentence length would remove the excessive width present in current law and therefore may fulfil the requirements of Article 3 of Protocol 1. With a threshold for offences of sufficient seriousness to merit, for example, 12 months' imprisonment, no longer would a convicted murderer receive the same punishment as a person who receives a few months for theft.

59. Of course, the period of custody does not track the seriousness of offending with anything approaching complete accuracy, especially where the threshold for custody is low. This is why the preponderance of states which disenfranchise prisoners tie the loss of voting rights to specified serious, and/or electoral, offences rather than merely the length of time to be served. Indeed, given the severity of the disenfranchisement penalty, and the broad range of cases in which a sentence of more than six months may be imposed, the UK may risk future breaches of the Convention if a threshold is set at a very low level. A threshold of disenfranchisement for those receiving sentences of over four years, for example, is far more likely to achieve compliance in individual cases than one of 6 months.

60. Of course, none of the above suggestions are mutually exclusive, and it may well be safer to make provision for some combination of them – for example, a voting ban

imposed by way of sentence length or offence type, but with the potential for a judicial 'override' where disenfranchisement would not be proportionate to the offending in the individual case.

61. However, what must be stressed is that the means of rendering our legislation compliant with human rights remain straightforward. We must simply replace the blanket ban contained in section 3 of the Representation of the People Act 1983 with an alternative that is simply *not arbitrary*. Whilst it is Liberty's view that all prisoners should have the vote, it is clear that the margin of appreciation granted to states by the ECtHR in this area is wide. Even a low threshold for prisoner disenfranchisement – such as 12 months – may be sufficient.

### **Conclusion**

62. With the consideration of the Draft Voting Eligibility (Prisoners) Bill, Liberty hoped that the hyperbole was to be replaced by dispassionate consideration of the available options. It is deeply regrettable that no efforts have been made to comply with the recommendations of the Joint Committee overseeing the Bill. It suggested extremely modest reform of our prisoner voting laws in favour of mild liberalisation, the imperative of compliance with the rule of law massively outweighing any perceived disbenefit in enfranchising a subsection of the UK's prison population.

63. The implications of non-compliance with the judgments of an international court are extremely serious. The UK's worldwide reputation for human rights compliance and our commitment to the rule of law are at stake.

64. Since the middle of the 20<sup>th</sup>-century, a worldwide movement towards prisoner enfranchisement has grown. It has wholly overtaken the small and shrinking minority, of which the UK remains a part, which clings to undemocratic, 19<sup>th</sup> century ideas. Liberty urges the Government and Parliament to throw off the vestiges of an outdated political philosophy which, rather than guaranteeing democracy as of right, requires citizens to prove their worthiness to vote. Prisoners remain human beings and citizens of this country, even behind bars. They are not exiled or banished; the UK is a country in which prisoners' reform is rightly premised on their continued stake in society. British democracy is built on principles of equality, inclusion, and participation. They are impossible to square with blanket disenfranchisement of a whole subsection of society. The right to vote is not a privilege to be deserved, but a fundamental right.

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