

PRISONERS AND THE RIGHT TO VOTE Prof Jeremy Waldron

1. DAVID CAMERON: “It makes me physically ill even to contemplate having to give the vote to anyone who is in prison.” (Prime Minister’s Questions, November 2010)

2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

- ECHR 1st Protocol
- European Court of Human Rights decision in *Hirst v. United Kingdom (No. 2)* 2005

3. WALDRON GOES TO WESTMINSTER

4. THE NATURE OF THE RIGHT TO VOTE

i.) liberty or responsibility or duty?

ii.) liberty or power?

iii.) right or privilege? A privilege=

1. the absence of duty
2. an exemption from a duty or liability
3. a permission
4. discretionary vs. entitlement
5. not constitutionally protected
6. an honor

iv.) an absolute right? Non-absolute =

- derogable – in ECHR
- regulated
- conditional
- forfeitable

v) fundamental or non-fundamental right?

5. SOCIAL CONTRACT

- i. Hobbes, Locke, Rousseau
- ii. modern hypothetical contract

- iii. vertical versus horizontal contract
- iv. the informal idea of a social contract

6. RIGHTS IN PRISON

rights that are lost

- basic liberty
- freedom of movement
- freedom of occupation /labour
- privacy
- freedom of speech (?)
- family life (?)

rights that are retained:

- religious freedom
- access to law and due process
- no torture etc.
- no discrimination
- nationality
- medical care

7. VOTING AND THE AIMS OF PUNISHMENT

1. deterrence
2. rehabilitation
3. retribution
4. denunciation
5. prevention

8. AN ARGUMENT FOR DISENFRANCHISEMENT

9. PRAGMATIC POINTS: a. length of sentence to avoid arbitrary distinctions
b. administration of prisoner voting

10. THE CONTROVERSY ABOUT JUDICIAL REVIEW

- strong versus weak judicial review
- judicial dialogue
- John Hart Ely’s arguments
- despised minority—is virtual representation possible?

REPRESENTATION OF THE PEOPLE ACT 1983

section 3: Disfranchisement of offenders in prison etc.

(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence [or unlawfully at large when he would otherwise be so detained] is legally incapable of voting at any parliamentary or local government election.

(2) For this purpose— (a) “convicted person” means any person found guilty of an offence (whether under the law of the United Kingdom or not)... but not including a person dealt with by committal or other summary process for contempt of court;

ECHR: PROTOCOL 1 (3) 1952

The Governments signatory hereto, being Members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950 ...

Have agreed as follows:

... ARTICLE 3: The High Contracting Parties undertake 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.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 25: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [*non-discrimination clause*] and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

THE PROPOSED BILL

A Bill to make provision about the voting rights of prisoners.

Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Options for reform

- 1 Option 1: ban for prisoners sentenced to 4 years or more
Schedule 1 replaces the current ban on prisoner voting with a ban on voting for prisoners sentenced to 4 years or more.
- 2 Option 2: ban for prisoners sentenced to more than 6 months
Schedule 2 replaces the current ban on prisoner voting with a ban on voting for prisoners sentenced to more than 6 months.
- 3 Option 3: ban for all prisoners
Schedule 3 re-enacts the current general ban on prisoner voting, but with a few minor changes.