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SHOULD VOTING PRISONERS MAKE YOU SICK?

Developing the legal through the theoretical to find the cure for
Europe's ailing right to vote.

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ABSTRACT

In November 2010, United Kingdom Prime Minister David Cameron defiantly declared himself “physically ill” at the thought of convicted prisoners being given the vote. Five years previously, in 2005, the U.K’s blanket ban on prisoner voting had been declared disproportionate and arbitrary by the European Court of Human Rights at Strasbourg in the case of Hirst (No. 2). But fast-forward nine years to 2014 and defiance on disenfranchisement shows little sign of abating.

This thesis, inspired by the multitude of questions raised by the UK’s continuing reluctance to enfranchise prisoners, uses a multidisciplinary approach to explore why the position is so strongly held, and finds a series of reasons. It draws upon human rights theory and takes the opportunity to present one possible approach to human rights that exposes the UK justifications’ reliance on background political considerations and a misunderstanding of human rights. The thesis goes on to show how the position of defiance is encouraged by the weakness of the provision for a right to vote in the European human rights system, in Article 3 of Protocol 1 to the European Convention on Human Rights.

Article 3 of Protocol 1 is formulated in collective rather than individual terms and uncertainty has always surrounded the related jurisprudence. This thesis considers that the unfortunate and vague wording has led to the right to vote’s de facto shift from right to privilege, given that the entitlement is not universal and the Strasbourg Court allow the state a wide margin of appreciation even in denying a large majority of prisoners the vote.

This thesis then sets about attempting to reverse the shift from right to privilege by identifying the problem; that the overuse of the margin of appreciation clouds important elements of the proportionality test that the Court fails to properly explore. The disenfranchisement of prisoners, for the most part, is not based on a sufficiently proportionate, legitimate aim that has a discernible and logical link with the means employed. It is asserted that adding more structure to these tests, as well as drawing on a balancing exercise inspired by the human rights theory developed throughout, can swing the balance back in favour of rights.

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CHAPTER I

HUMAN RIGHTS: THEORY AND LIMITS.

THE RIGHT TO VOTE IN A MODEL OF INTERESTS PROTECTING DIGNITY.

1.1. Preface: The Prisoner Voting Problem

It is difficult to recall a situation inspiring as much defiance, in the form of anti-Strasbourg, anti-European and anti-human rights sentiment, as the now moderately long-standing impasse between the European Court of Human Rights (ECtHR) and the United Kingdom (UK) over the debate concerning possession of the right to vote for certain prisoners.

In the 2005 case of *Hirst (No. 2)*,¹ (“the *Hirst* case, or simply “*Hirst*”, hereafter) the ECtHR decided that the UK’s blanket voting ban for jailed offenders² was disproportionate, had arbitrary effects, and had not been the subject of considered debate in the UK Parliament.³ It was therefore deemed incompatible with the provision for “free elections...under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”, found in Article 3 of Protocol 1 (Art3Prot1) to the European Convention on Human Rights (ECHR). The UK has been given a series of extended deadlines, for introducing draft reforms, with a view to making concrete legislative changes, in moving from a blanket ban, to some form of proportionate, scaled system that allows a certain, but not yet specified number of prisoners the vote.⁴

¹ ECtHR *Hirst v The United Kingdom (No. 2)* (Application no. 74025/01), 6 October 2005.

² The UK imposes a ban, pursuant to Section 3 of the Representation of the People Act 1983, which is usually termed “blanket”, although remand prisoners, people imprisoned for contempt of court and those imprisoned for defaulting on fines are eligible to vote.

³ The matter has since been debated in Parliament, in the House of Commons on Thursday 10th February 2011, (HC) Deb. 10 February 2011, Vol, 523, Columns 493 – 586. <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110210/debtext/110210-0001.htm#11021059000001>.

⁴ One criticism is that the ECtHR has given very limited guidance as to what will be considered acceptable. The prisoner voting line of jurisprudence seems to lead to the conclusion (although not

Despite rumbling on for close to a decade,⁵ the debate continues, as the UK Supreme Court unanimously dismissed two further appeals by prisoners in October 2013, given the present lack of legislative changes.⁶ The UK Parliamentary Joint Committee on the Draft Voting Eligibility (Prisoners) Bill published its report on the 18th of December 2013, conceding the need for reform, and giving proposals for changes.⁷ And yet concrete legislative reform would seem to be completely at odds with the current political climate, and the vast majority of public opinion. The most extreme and divisive expression of such disapproval is perhaps David Cameron's now infamous line that the prospect of prisoner voting made him feel "physically ill".⁸ The deadline, before which the ECHR stated that it would not consider any of the pending 2,354 cases against the UK⁹ has now passed, and the Court would therefore be entitled to consider them anew, at its discretion. It is unclear whether it is likely to do so, whilst the UK Government gives assurances that it is working on the legislative proposals, and yet the idea of those proposals becoming reality seem far away.

Nationalism is on the rise across Europe. Elections are coming, both, at the time of writing, in Europe, and next year in the United Kingdom. Anti-European, anti-immigration and nationalistic rhetoric is informing the debate in certain countries. In the UK, support for the European Union and the ECtHR has arguably never been lower,¹⁰ and there is a genuine and worrying chance of a UK referendum in the near future on leaving the European Union. Introducing concrete reform to allow even *some* prisoners

without contradictions) that anything less than blanket disenfranchisement would fall under the High Contracting Party's margin of appreciation.

⁵ The *Hirst* case, ignited the debate in the UK in 2005.

⁶ *R (on the application of Chester) (Appellant) v Secretary of State for Justice (Respondent); McGeoch (AP) (Appellant) v The Lord President of the Council and another (Respondents) (Scotland)* [2013] UKSC 63.

⁷ The Draft Bill can be found here: <http://www.justice.gov.uk/downloads/legislation/bills-acts/voting-eligibility-prisoners/voting-eligibility-prisoners-command-paper.pdf>.

⁸ Prime Ministers Questions, House of Commons, Wednesday 3rd November 2010, (HC) Deb. 3 Nov. 2010, Vol. 517, at Column 921, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101103/debtext/101103-0001.htm>.

⁹ This is the figure given in the Draft Voting Eligibility (Prisoners) Bill - Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, prepared 18th December 2013, states that the cases have now been "unfrozen". (*supra*, n. 7), Conclusions and Recommendations, at 4.

¹⁰ Stylianou, N, 'Trust in EU at an all-time low latest figures show', The Telegraph, 22nd January 2014, <http://www.telegraph.co.uk/news/worldnews/europe/eu/10586961/Trust-in-EU-at-an-all-time-low-latest-figures-show.html>.

the vote, would be seen, particularly by the Conservative side of the coalition government as tantamount to political suicide, combining, as it does, the “bêtes noires”¹¹ of ‘prisoners’ and ‘Europe’.¹² Considering that the most likely outcome of the next General Election in 2015 is another coalition government, it would not take an unimaginable swing in order to push the Conservative Party out of power.

Meanwhile, UK defiance of the prisoner voting line of case law continues to open up new, and serious questions as to the relationship between Contracting Parties to the European Convention and the Strasbourg Court, and undermines the legitimacy of the system as a whole. The prisoner voting problem itself poses serious questions concerning the nature and limits of human rights, democracy and sovereignty. More specifically, the question is also raised as to whether the lack of a right to vote may undermine the political legitimacy of human rights themselves.¹³

The thesis that follows is thus inspired by a number of serious and present dangers facing the ECHR system and its relationship with the high contracting parties (HCPs), and aims to bring a fresh, current, and multidisciplinary approach to bear upon the debate.

1.2. Introduction: Outline and Approach

1.2.1. The Aim

This thesis will aim to show, that Article 3 of Protocol 1 to the ECHR, offers limited “added value” to the Convention insofar as it is conceived of as an individual right. In fact, certain interpretations of the provision seem to beg the question as to whether the right *de facto exists* in a real and tangible way, in the European human rights system. Given the weak, and ambiguous nature of the article, and the Court’s apparent openness

¹¹ Crook, F in Saner, E, ‘Should prisoners be allowed to vote?’ *The Guardian*, 23 April 2011. (Bêtes Noires – translates literally as “Black Beasts” but translates idiomatically as “bugbears”.)

¹² In the parliamentary debate on 10th February 2011 (*supra*, n. 3) there were a considerable amount of comments concerning the “unpalatable” nature of giving the vote to prisoners “convicted of such serious crimes as murder, rape and paedophilia”. As Conservative Member of Parliament Gordon Henderson stated, “[I]t is unacceptable that unelected European judges think that they can tell elected Members of this British Parliament how we should treat British criminals who break British laws”, at Column 572.

¹³ Indeed Fabienne Peter makes this argument in his article, Peter, 2013, at 1.

to a deferential use of the proportionality and the margin of appreciation (MOA) tests, it seems that the individual right will be compromised by the more collective focus of the article, aiming to ensure “the free expression of the people in the choice of the legislature”. The aim is to show that this formulation, and these tests, as currently operated in this line of cases, will continue to prohibit a concrete right to vote in the European regional human rights system.

1.2.2. The Theoretical Perspective

The prisoner voting line of cases highlights the fact that political considerations have entered into the Court’s balancing of the competing interests at stake. It is argued that theory of rights and limits ought to play a greater role in the court’s “balancing exercise”, in order to show that in a theory where human rights operate as the strongest interests to be protected, there is no rights-based justification for restricting the franchise, swinging the balance back in favour of rights. The margin of appreciation, whilst important and useful when used in its correct place, has often become a tool for deference, and in this case, threatens to be used even where the very essence of the right is impaired.

The right to vote will be assessed, through an interpretation of the theory of human rights and their limits. In this interpretation, rights are construed as claims generated by the strongest interests to be protected against harms threatening dignity, development and capability. This leads us to the conclusion that the right to vote, if indeed it qualifies as such an interest/claim and thus a *human* right, can be justifiably restricted in only exceptional circumstances.

1.2.3. The Legal Perspective

This thesis will move to explore the prisoner voting line of case law, and Art3Prot1 in more detail, analysing different interpretations of the provision. It will note the problems with the formulation of the provision as well as the problems with the legal argumentation asserted in the case law and the approach taken by the ECtHR. This approach as well as the formulation of Art3Prot1 has led to a serious undermining of the right to vote such that, in practice, it reflect a privilege rather than a right. The thesis

will argue that the most promising avenue for protection lies in a more structured and rights-based approach to the margin of appreciation (MoA) and proportionality tests.

1.2.4. The Democratic Perspective

Throughout, this thesis will keep in mind the ideals of democracy. It will argue that the European Court's "necessary in a democratic society" test fits well with a conception of rights protecting against harm and implies the need to balance against certain collective harms. Whichever conception of democracy is taken, it is asserted that it cannot be necessary in a democratic society to protect against prisoner voting, unless democracy itself needs to be protected.

1.3. The beginnings of human rights: origins.

The UK Government has stated that it views the "right to vote" as a privilege, forfeited by prisoners.¹⁴ To conflate a (human) right, and a privilege is inherently contradictory since one refers to an entitlement or claim, and the other to an earned interest. A "right" cannot by definition be a right at all, if it can be viewed also as a privilege, and vice versa. What the UK argument must mean then, is that the "right" is not a right at all, but *only* a privilege. On the basis of this argument, no one would have the right to vote, but all of us possessive of it, would qualify to hold it merely by privilege (because of our lack of misdeeds.) This section attempts to show that this view must be wrong and to claim that it implies a misunderstanding or an outdated notion of the theory of rights. That is not to say that limitations may not in some circumstances be justified, but that it should not be justified by an appeal to right as privileges.

Firstly, a brief history of human rights will be explored, in order to assess whether the limitation on the right to vote can be justified by a certain reading of rights and their justified restrictions. This theory will be used later in order to assess and inform the proportionality and MOA tests in the ECHR.

To take human rights as a starting point, is to presuppose their existence and justification. This is to presume a great deal, considering that to do so would be to skip a

¹⁴ *Hirst supra, n. 1.*

notoriously complex task, and one which has generated fierce debate.¹⁵ It will help to consider the history and theory of rights, in order to inform later discussion on the most common arguments for disenfranchisement, and most importantly, the interests that ought to be given greater weight in the European Court's balancing exercise.¹⁶

1.3.1. Natural Rights: Life, Liberty, Property, Dignity?

It is usually accepted that although institutionalised after the Second World War, human rights have their origins in the idea of "natural rights", a concept whose first definition is attributed to William of Ockham in the 14th Century, but developed considerably by Grotius¹⁷, and subsequently Hobbes and Locke through the 17th Century.

Throughout the "Age of Reason" and the Enlightenment,¹⁸ the concept of rationality and reason influenced, and were influenced themselves, by natural law thinking. Periods of conflict including the French and American Revolutions also had clear impacts on many, notably in the writings of Hobbes, who described human beings in the state of nature as "bella omnium contra omnes", "a war is as of every man against every man", a state he characterised as "continual fear, and danger of violent death; And the life of man solitary, poor, nasty, brutish, and short."¹⁹ John Locke famously held that in a "state of nature", man's natural rights were those of "life, liberty and property."²⁰ The idea of natural rights contributed to the idea inherited by modern-day notions of rights, of equality, universality and inalienability; that rights that exist in respect of the humanity of persons and are not conferred by, or presupposing of any political system

¹⁵ Imprescriptible, natural rights, from which human rights drew much inspiration were criticised by Jeremy Bentham as "nonsense upon stilts" and "imaginary", in his 1843 work, *Anarchical Fallacies*. Bentham, 1843, p. 501.

Other scholars have not disputed the existence, but the proliferation of rights, highlighting the importance of determining not just whether, but which human rights exist. c.f. Wellman, 1999.

¹⁶ The Court's assessment of the different considerations in a certain case, is not always conceived of as a "balancing act", and some, including Andrew Legg, even view the terminology as "dangerous". It is claimed here however, that the "balancing" metaphor is the best way to focus on the way that the Strasbourg Court has generally dealt with the importance of different values. C.f. Legg, 2012, p. 187.

¹⁷ Grotius appears to be the first to link the idea of rationality in "determining what is right" to possessing a right. He stated that "Natural right is the dictate of right reason." Grotius, 1814, Book I, at X.

¹⁸ Crudely speaking, [T]he "Age of Reason" is often used to describe early 17th Century Philosophy and "The Enlightenment" to describe philosophy through the late 17th Century, towards the middle of the 18th.

¹⁹ Hobbes, 1909–14, Chapter XIII, at 9.

²⁰ Locke, 2010, Book II, Chapter VII, Section 87.

or society. Such ideals have come to heavily influence contemporary thinking on human rights.

Indeed, with the post-war institutionalisation of human rights in the mid-20th Century, through the Universal Declaration of Human Rights (UDHR) in 1948 and the European Convention on Human Rights (ECHR) in 1950, came a host of attempts to justify the strength, importance and foundations of human rights, often heavily inspired by theories and characteristics of natural law and natural rights. With the contemporary literature, came perhaps the most important notion to inspire debate and theory of human rights in the 20th and into the 21st Century: dignity. According to Osiatynski, the connection between human rights and dignity was first examined by Jacques Maritain, philosopher, and one of the drafters of the UDHR.²¹ Maritain claimed that “[t]he dignity of the human person...means nothing if it does not signify that by virtue of natural law the human person has the right to be respected, [and] is the subject of rights.”²²

The discussion has since moved on to question whether the concept of dignity may suffice to justify all human rights. This seems a strong philosophical position, despite the vague and amorphous²³ nature of the term.

Dworkin, who has also explicitly held this position, claims that:

[i]t makes sense to say that a man has fundamental rights against the government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise.²⁴

This leads some to the view that “human rights are distinguished by the fact that they were designed specifically for the protection of dignity.”²⁵ Indeed, the word “dignity” is the sixth word in the preamble of the Universal Declaration of Human Rights, whereas the 1966 Covenants on Civil and Political Rights and Economic Social and Cultural

²¹ Osiatyński, 2009, p. 190.

²² Maritain, 1986, p.65.

²³ Tasioulas, 2012.

²⁴ Dworkin, 1977, p199.

²⁵ Osiatyński, 2009, p. 189.

Rights state that its rights “derive from the inherent dignity of the human person.”²⁶ Furthermore, UN General Assembly Resolution 41/120 of 1986 reaffirms dignity as the basis of human rights.²⁷ Is this enough to conclude that human rights are based upon dignity? It is certainly difficult to effectively philosophically undermine this position, but this may be because of its basis in a concept that is in itself difficult to define.

Interestingly, Dworkin has claimed there to be “a right to be treated as a human being whose dignity fundamentally matters”²⁸ which, if true, could create some form of basic²⁹ or fundamental right, forming a basis, perhaps, for all other human rights. Indeed, we could advance the theory that there exists a natural right to dignity, existing independently of political society, from which we may be able to derive other rights. Tasioulas construes Dworkin’s view as:

[A] basic human right to a certain attitude of good faith on the part of one’s political community...a right which...bears on the legitimacy (and not only on the justice) of a government’s rule. Although governments inevitably make mistakes regarding what dignity requires, and to that extent act unjustly, human rights violations are committed only when these mistakes manifest contempt for the dignity of some or all its members.³⁰

Could refusing to grant prisoners the vote and declaring that to do so would be sickening, show contempt for their dignity? This is another debate, but it seems likely.

1.4. The ends of human rights I: purpose

The connotations of the word “right” have perhaps become increasingly ambiguous as literature on the subject has grown. This has a lot to do with the fact that, as famously illustrated by Wesley Hohfeld, the word is not possessive of one sole meaning.³¹ In

²⁶ *International Covenant on Civil and Political Rights*, Adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, Preamble, and *International Covenant on Economic, Social and Cultural Rights*, Adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, Preamble.

²⁷ U.N. Doc A/Res/41/120 4 December 1986, “Setting international standards in the field of human rights”. Available at <http://www.un.org/documents/resga.htm>

²⁸ Dworkin, 2011, p.333.

²⁹ The idea of basic rights is often associated with Henry Shue, and the right to vote could arguably fall under his theory. C.f. Shue, 1980, p. 231.

³⁰ Tasioulas, 2012, p. 354.

³¹ Hohfeld, 1920, p.35 et seq.

Hohfeldian analysis, rights can be privileges, claims, powers or immunities. A privilege, or “bare liberty”, for example, implies an absence of a corresponding duty *not* to exercise that privilege. A claim, may be a “right” arising through some previously settled agreement, but in any case, contrary to a privilege, implies a duty on the person who must honour the claim. Powers and immunities are slightly more complex. A power belongs to someone who is able to alter the privileges or claims of himself or another, confers upon some person a privilege, or other Hohfeldian “right”, which they would not otherwise have had, and may remove from the conferrer a claim that she otherwise *would* have had. An immunity, conversely, corresponds to the lack of a power to alter another’s Hohfeldian “rights” so explained.

But where do human rights fit in this dichotomy? This is a much trickier question. The most realistic explanation is perhaps that human rights “are not single or atomic claim rights but tangled clusters of Hohfeldian elements, each of them involving all sorts of privileges, powers, claim rights, immunities and so on.”³² Jeremy Waldron has stated that:

Hohfeld’s claim right is generally regarded as coming closest to capturing the concept of individual rights as used in political morality. To say that P has a natural right to free speech for example, is usually to say...that people owe a duty to him not to interfere with the free expression of his opinions.³³

Waldron captures the necessity to answer this question when he continues:

[b]ut this raises the question of what it is for a duty to be *owed to* someone in particular, the question of how the idea of *a duty to P* differs from the simple idea of a duty. When a person’s rights are violated, we say not only that something wrong has been done but that the right-bearer himself has been wronged.³⁴

Waldron then, captures here the need to explain *why* such a “wrong” would arise in the neglect of a duty to provide or protect the interest of the right-bearer. If we can explain

³² Waldron, Jeremy (ed.), 1984, p.10.

³³ *ibidem.* p. 8.

³⁴ *ibidem.*

why this wrong arises in relation to the denial of human rights, then we may be a good way towards explaining their justification.

1.4.1 “Nowheresville”: What’s wrong with a world without rights?

In Joel Feinberg’s essay “The Nature and Value of Rights”, he draws his famous example of “Nowheresville”, where he asks the reader to imagine a town without rights.³⁵ He further states that we should “[f]ill this imagined world with as much benevolence, compassion, sympathy, and pity as it will conveniently hold without strain.”³⁶ The reason that people do things for each other then, is not because of rights or duties that they hold, but instead because of their moral virtue.

While the virtuous nature of Nowheresville’s residents makes a world without rights easier (and more pleasant) to imagine, it still leaves open the door for pursuit of selfish interests by all of the people, who have no rights themselves, but are aware also of the absence of rights in others. In the real world, a town without rights would surely not lead to a situation of moral virtuousness in all of its people but instead would put all residents in a constant state of vulnerability and fear of losing anything that they did own, despite having no right to own it, and no right to defend themselves. They would have no right to speak out against these actions of others and even, no right to live.

Adding rights in this sense then, would be seen as a form of protection against vulnerability or harm. A lack of rights would also affect the development of people drastically. They would, among many other things, not have the confidence or capabilities to speak their minds, or develop through receiving an education. Why would this be an issue? It is argued here that we ought to be able to agree on the development of people’s cognitive capacities, capabilities and skills to be both inherently and instrumentally good. In this sense, development reinforces the protection of dignity, by bestowing upon people forms of autonomous self-expression, as well as reducing vulnerabilities to dignity-threatening harms. Amartya Sen has famously

³⁵ Feinberg, 1970, p. 243.

³⁶ *ibidem*.

argued, that when looking to a theory of justice or equality, we ought to have regard to people's basic capabilities. Because what matters, is not only the equality of basic goods (in the Rawlsian sense)³⁷, but how those basic goods are able to be transformed into capabilities in each person.³⁸ This matters because development of people matters, and is one of the main indicators of a well-being that provides protection from vulnerability and harms that threaten the dignity of a person.

1.4.2. Leading Theories of Human Rights – Autonomy vs. Interests

The justification of human rights is no easy task. The need to justify their philosophical foundations means that we must be able to show *why* human rights exist and ought to be protected. Thinking on a world (or town) without rights may begin to help us to imagine why we need human rights and all that they confer. But thinking about this example arguably only justifies the need for some form of rights, and not human rights themselves. It will be helpful to briefly consider here two dominant theories; the interest theory and the will theory. These theories do not in and of themselves, justify human rights, but may provide a basis upon which to build and develop a cogent theory.

The will theory, holds that whenever a duty-bearer exists, a right arises in the prospective rights-holder when he or she has the ability to control the performance of that duty. Sometimes this is conceived of in the sense that the rights-holder is someone with the ability to waive the right, i.e. discharge the duty-bearer from his or her duty. Essentially, the strength of this argument is that whenever we act, we do so relying on our equal right of freedom and the ability to act autonomously. Once this capacity for autonomy or agency is admitted, other rights may be hence derived. The most philosophically simple and reducible conception of this theory was proposed by Hart, who suggested that there exists at least one natural right; “the equal right of all men to be free”.³⁹ The idea being that all other rights can be derived from this fundamental freedom.

³⁷ Rawls, 1999, pp. 347-392.

³⁸ Sen, 1980.

³⁹ Hart, 1955, p. 175.

Whilst the will theory appears to provide an extremely strong and philosophically tidy justification for rights, it helps us less with what should and should not be considered a human right, and with who should and should not be considered rights holders. The equal right of all men to be free, could in fact be used to justify all manner of things, that do not interfere with the freedom of others, yet that we would not necessarily conceive of as rights. The idea of having a basis in autonomy, or “rationally purposive agency” also raises worries about those who do not have the capacity for agency, such as young children, or the mentally disabled, and may not be apt to explain why such people should also be rights-holders.

The interest theory, as the name suggests, confers a right on the prospective rights-holder when it is recognised that an interest that he holds is sufficient to generate some duty to protect or further it.⁴⁰ The interest itself is sufficient to hold there to be a duty to protect it. The interest theory has the advantage of “concentrating on the single interest which underlies and generates all the detailed Hohfeldian elements.”⁴¹ This approach is sufficient to justify individual rights separately, but may still leave us with some work to do as regards the systematic justification of human rights.

One of the weaknesses of the interests theory, appears to be that, in order to justify the protection of these interests, we may have to “appeal to some account of human nature”⁴², likely to be controversial, or some appeal to interest in a good life, which may be difficult, given that, as Sen has stated “the minimal conditions for a decent life are socially and culturally relative.”⁴³

Rather than appeal to an aspect of morality or human nature, Nickel has raised the interesting point that such interests should be respected by all, because it benefits all to have a system whereby there is an assurance of mutual self-respect of interests. Put another way, respecting the interests of others, necessarily leads to a system whereby others also respect *your* interests. This seems to remove to some extent, the need for

⁴⁰ For more on interest theories of rights, c.f. Waldron, J (ed.), 1984, p. 6. Several interest theories are presented throughout this work.

⁴¹ Waldron, 1984, p. 11.

⁴² Fagan, A. Human Rights, Internet Encyclopaedia of Philosophy, <http://www.iep.utm.edu/hum-rts/>.

⁴³ Sen, 1999.

reliance on a morality-based justification or an aspect of human nature which may be disputed. As Nickel writes:

A prudential argument from fundamental interests attempts to show that it would be reasonable to accept and comply with human rights, in circumstances where most others are likely to do so, because these norms are part of the best means for protecting one's fundamental interests against actions and omissions that endanger them.⁴⁴

Given that the State is the only institution capable of fully giving effect to a framework of protection against harms, it holds the responsibility for aiming to ensure the dignity and development of each individual through the creation of a system that ensures minimum vulnerability against harms which may threaten these values.

1.4.3. A basis for rights in "interests of protection against dignity-and-development-threatening harms"

If the argument that there exists a natural right to liberty appears strong, then so, it is argued here, does the argument that there exists a natural right to dignity. If accepted, this could raise a whole host of claims for each person, in the interests of the protection of dignity against harms. The strongest of these claims, could constitute human rights.

We saw, in considering Feinberg's 'Nowheresville', that a place without rights would be one where the people were vulnerable to certain harms and would thus have strong interests in being protected from these harms. But we must go even further than this, to think about how this harm affects us, and why we would consider it to be undesirable. In other words, why does being vulnerable or having the potential to be harmed in these ways, warrant the generation of a strong interest and corresponding duty to minimise the vulnerability or to protect against the harm?

The answer to this question, I believe, is that a state of vulnerability, inherent in the disrespect or lack of rights, leaves one susceptible to harms that may endanger the development and the very dignity of a human being, in such a way that is sure to diminish the quality, and welfare that one can find in life. Our vulnerability justifies a

⁴⁴ Nickel, 1987, p. 84.

system to protect against harms. Every human being, is to some extent vulnerable, and without human rights, would be considerably more vulnerable to the possibility of harms affecting the very core of the person; to dignity, development and capabilities, to a person's most important "beings" and "doings" This in turn justifies the creation of a system that protects our interests, and with it, our behaviour in fulfilling our duties to others, in the self-interest sense described by Nickel. Systemic vulnerability in this sense, therefore can be seen as a justification for systemic protection. Human rights are, on this model, an attempt to create a situation of minimum vulnerability to the greatest and most intimate of harms, protecting against infringements to these harms (in a negative sense of rights protection), and promoting development (in a positive sense of rights protection) in order to safeguard human dignity.

Bryan Turner has put forward a theory of universal human rights based on, among other things, vulnerability. Turner states that "[h]uman beings are ontologically vulnerable and insecure, and their natural environment, doubtful....Because we are biologically vulnerable, we need to build political institutions to provide for our collective security".⁴⁵

And furthermore that:

Such a theory...embraces a set of Hobbesian assumptions, in which life itself is vulnerable – that is, nasty brutish and short. Yet it does not follow that we are forced to accept the individualistic assumptions of a Hobbesian social contract. Instead human and social rights are juridical expressions of social solidarity, whose foundation rest in the common experience of vulnerability and precariousness.⁴⁶

It is argued that the views presented above, to a great extent correlate with the context within which human rights were institutionalised, given that they were largely conceived in international instruments following the two worst wars ever to strike Europe. Indeed, the Preamble to the Charter of the United Nations, upon its conception in 1945, states, the peoples of the United Nations as determined, to reaffirm faith in

⁴⁵ Turner, 2006 (kindle edition), at location 318/1778 (18%).

⁴⁶ *ibidem*. at location 331 (19%).

fundamental human rights, in the dignity and worth of the human person.⁴⁷ The UDHR, following three years later, appears perhaps, to be influenced by such desires.

The model I would thus like to advance is that:

Human Rights are the claims generated by the strongest interests to be protected against harms, in pursuance of the dignity, development and capabilities of persons, entailing, and correlative with their living a life of minimum vulnerability.

This theory may not necessarily speak to equality with the same strength as for, example, grounding human rights on “the equal right of all men to be free”. This can perhaps be avoided by allowing the concept of dignity to do the work here, although some would surely argue that this may be to place too much reliance upon it. It is true that some are more vulnerable than others but given that we wish to pursue “minimum vulnerability” and given that we are all, to some extent, vulnerable to harms, this could only be achieved by granting each individual the full spectrum of rights, in the interests of our equal dignity, to the maximum degree possible, where they do not come into conflict with other, interests that generate claims of equal strength. Within this theory the importance of autonomy and capabilities may be considered within the importance of a person’s development and dignity.

Martha Nussbaum conducted further work on the “capabilities approach”, taking what Sen had primarily linked to economics, and linking it to development and to human rights.⁴⁸ Nussbaum proposes a list of core and central human capabilities in a way that aims to make them political goals, essentially suggesting that every person should be in the possession of these core “beings and doings”. The strength and appeal of this position is that it is intuitively informed by an “idea of a life that is worthy of the

⁴⁷ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 3 May 2014].

⁴⁸ Nussbaum, 2000.

dignity of the human being”,⁴⁹ and that it is a practical and realistic theory, appealing to “real” ideas of “what people are actually able to do and be”.⁵⁰

Within Nussbaum’s list of core human capabilities, what is of particular interest for our purposes is her capability of “affiliation”. This capability requires that a person be able to engage in interaction, socially and institutionally. This includes, Nussbaum states, political speech.⁵¹ She further states that this principle encompasses, “[h]aving the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that others.”⁵²

This could be presented as a great strength for any theory of human rights basing itself on the dignity of the human being. It would appear that dignity, and the capabilities of human beings are intrinsically linked and mutually reinforcing. Any denial of core human capabilities may fail to respect a person’s dignity and cause a harm, against which, on the theory above, human rights are designed to protect.

The above does not, by any means purport to expound a full and comprehensive theory of rights, but merely aims to lay one conception of a framework in which I view rights as operating. In a later section, the idea of limits within this framework will be considered. Together, the framework will be borne in mind throughout the rest of this paper, and will be used in an attempt to inform the interest balancing tests used by the European Court of Human Rights, predominantly in the cases of prisoner voting.

1.5. The right to vote – The right of rights?

What of the right to vote? And does it satisfy the model above? According to some, it may be “the right of rights”⁵³, whereas others have held that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws.”⁵⁴ Indeed, there does seem to be some special nature which characterises the right

⁴⁹ *ibidem*. p.5.

⁵⁰ *ibidem*.

⁵¹ *ibidem*. p. 79.

⁵² *ibidem*.

⁵³ Waldron, 1998, pp. 307–337.

⁵⁴ *Wesberry v. Sanders* (No. 22) 376 U.S. 1, at 25.

to vote, perhaps because it is arguably more valuable symbolically than instrumentally, or perhaps because generations of people in different times and different places have fought and died for their franchise, for the rights of suffrage and participation.

Let us ponder John Stuart Mill's view, in "Considerations on Representative Government":

Whoever, in an otherwise popular government, has no vote, and no prospect of obtaining it, will either be a permanent malcontent, or will feel as one whom the general affairs of society do not concern; for whom they are to be managed by others; who has "no business with the laws except to obey them."⁵⁵

Compare with this a view, some one hundred and fifty years later, of Sachs J, in a South African case concerning prisoner voting, where he stated: "The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts"⁵⁶

As indicated by Mill, a society which removes your voting rights, appears to be saying, at the best, that it does not care for your opinion, and at the worst, that your opinion does not matter; that you cannot have an input or a political voice, but ought to be dictated to; that you should abide by the laws, but not contribute to making them. It does not seem a stretch to argue from here that "other rights, even the most basic, are illusory if the right to vote is undermined."⁵⁷ In theory, the ability to vote and participate politically, gives one the ability to fight for one's rights and is another means of ensuring respect of such rights. Without this right, or would seem that one does not possess a potentially powerful form of political defence against further abuses. It may provide a check, albeit a small one in an individual capacity, against other rights and interests that you value.

1.5.1. The nature of political rights and the right to vote, in context

⁵⁵ Mill, 2004, *Chapter VIII—Of the Extension of the Suffrage*.

⁵⁶ *August and Another v Electoral Commission and Others* (CCT8/99) [1999] ZACC 3, Sachs J, at 18

⁵⁷ *Wesberry v. Sanders* (No. 22) 376 U.S. 1, at paragraph 25.

What is the nature of political rights in general? Marx viewed such rights as “collective” in their character and their exercise.⁵⁸ The ability to participate politically, implies the sharing of this participation with others. This seems to speak to the importance of equality in political rights. This was certainly the position of Rawls when he stated that [e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”⁵⁹

Waldron helpfully explains that, for Rawls:

It is important not only that liberty be equal for all, but also that the scheme of basic liberties secured for each be “adequate” at an individual level. It must be adequate that is, for the purposes for which each individual wants and requires liberty – namely, self-development and the living of a life in accordance with his own conception of the good.⁶⁰

Indeed, the idea of self-development seems to be an extremely important one in the field of political rights and rights of expression. This was something often argued for in the work of John Stuart Mill, in ‘On Liberty’, where he claimed that only with the liberty to express oneself freely, may one’s mind be “stirred up from its foundations”, citing a notion of dignity that is gained by a “thinking being”⁶¹, and more specifically on the right to vote, in “Considerations on Representative Government”, where he holds that:

[F]irst...the rights and freedoms of every or any person are only secure from being disregarded when the person interested is himself able and habitually disposed to stand up for them...[S]econd...the general prosperity attains a greater height, and is more widely diffused, in proportion to the amount and variety of the personal energies enlisted in promoting it.⁶²

Furthermore, as Brenner and Caste⁶³ explain, “[p]articipation in government is important for Mill because it prevents human beings from becoming mere “machines”

⁵⁸ Marx, in Jeremy Waldron (ed.) 1988, p. 147,

⁵⁹ Rawls, 1999, p.220.

⁶⁰ Waldron, 1998, pp.312-313.

⁶¹ Mill, 1869, Chapter II, at 20.

⁶² Brenner & Caste, 2003, 228, at 230, citing Mill, 1991, p. 65.

⁶³ *ibidem*, at 230.

and allows them to “invigorate their faculties” and develop a desire to participate further.⁶⁴

Although the theory of rights as protection against harms and vulnerabilities seems intuitively to be more powerful when we consider certain economic, social or cultural rights, rather than when we consider political rights,⁶⁵ we should not take too narrow a view of the sorts of vulnerabilities and harms that may undermine development, capabilities and ultimately dignity. As Osiatyński states “[t]he individual who has a right to participate lives in his community in a more dignified way than the one who finds him or herself under even the most benevolent paternalistic order.”⁶⁶

The two positions above, expressed by Mill, could be combined here to view voting as a form of expression through which one develops politically, and develops also a desire for further political education and participation”⁶⁷. This is perhaps where the importance and special nature of the right to vote lies. Certainly, practically speaking, my vote will, in combination with millions of others, combine to produce a net effect that will alter the interests, influence, power, policies and duties of others, but that does not mean to say that the action of voting, and more importantly, my possession of this right, cannot also have an educative and expressive effect at the same time. The instrumental part speaks to the ability to actively protect my own interests, partly explaining the above view that “[o]ther rights...are illusory if the right to vote is undermined”, whereas the latter part speaks to the developmental and educative aspect that possession of the right to vote may promote.

The right to vote, therefore appears to be a power-right, with the ability to alter others’ Hohfeldian “rights”, and an extremely symbolic one. The strength is not entirely symbolic however, as the right to vote, quite simply underpins the democratic legitimacy of political systems which operate as democracies. In fact, it *is* the legitimacy of such systems. The fact that the people participate freely in the election of

⁶⁴ Mill, 1991, p. 63.

⁶⁵ Turner, 2006, at 448/1778 (25%)

⁶⁶ Osiatyński, 2009, p. 191.

⁶⁷ For criticism of “expressivist” theories of political rights, c.f. McFarlane, 1985, p.141.

representatives to govern the country, is the very reason why such representatives are permitted to make decisions on that country's behalf. Once the right to vote begins to erode in anything more than an exceptional sense, that legitimacy begins to be chipped away, because it is not representative of all groups of society.

Indeed, as mentioned earlier, Peter argues that human rights are essentially linked to political legitimacy, and the right to political participation ought to appear on even minimalist lists of human rights.⁶⁸ If we consider that some form of a stable democracy is the most effective way of institutionalising and providing protection for rights,⁶⁹ we would surely be inclined to agree that there are strong arguments for including the right to vote in a basic and fundamental list of human rights, given that it is the most important concrete expression of will that we have, in the way in which the system that we live in functions. One may counter this by saying that there are more effective ways of protecting one's rights than by voting, and this is probably true. But it does not make sense to guarantee these other means of participation, without guaranteeing the fundamental basis of voting.

The right to vote may not be perceived as instrumentally valuable in terms of affecting the political status of a democracy in a meaningful way – a perception that may be heightened when general disillusionment with politics grows⁷⁰ – this does but not mean to say that the right is not extremely important, in terms of the “badge of dignity” that it confers, as well as in terms of the ability to represent one's views, and to claim other rights. A person with no right to vote, will not be respected in the same way by the political system, who suffer no costs if their voice is ignored. Deprivation of the right to vote not only says that your view does not matter, but that in fact, none of your interests matter enough to be borne in mind when deciding how the country should be run. In this

⁶⁸ Peter, 2013, p.1.

⁶⁹ Indeed the preamble of the European Convention on Human Rights states that fundamental freedoms are “best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.

⁷⁰ General disillusionment with politics and politicians, is arguably widespread in the UK, as democracy ‘representative’ nature is questioned. C.f. Jowit, Juliette. “British democracy in terminal decline warns report”, *The Guardian*, 6th July 2012, <http://www.theguardian.com/uk/2012/jul/06/british-democracy-decline-report>.

sense, the universal right to vote is a form of check and balance, a form of the protection of the minority of non-voters against the tyranny of the majority of voters. The absence of this right thus runs the risk of a lack of protection of the interests and therefore, rights of the vote-less.

As Osiatyński states:

[C]ivil liberties... permit the individual to make her own decisions, to predict the consequences such decisions may have, and, thus, to be able to plan ones actions and to create one's own life. Civil liberties also provide space for the individual to grow. By setting boundaries around that space and granting the individual freedom of choice, civil liberties permit a person to give sense and meaning to one's own life, to be the author of one's destiny. As it happens, being the autonomous owner of one's own life and having the ability to give meaning to one's own life are essential elements of dignity.⁷¹

1.6. The ends of human rights II: limits

If human rights are taken to be inalienable, in that they exist qua humanity, then we must reconcile this with the limits that are imposed. Prisoners are humans. Prisoners thus possess human rights, and “one cannot stop being human, no matter how badly one behaves nor how barbarously one is treated.”⁷² However, it is true that when one is imprisoned, one is not necessarily the recipient of the full spectrum of rights. How then, if human rights are those which we possess in respect of our humanity, can the restriction of such rights be justified?

When we consider the limits of human rights, we may have two things in mind. We may refer to the proliferation of human rights; a phenomenon seen by some as endangering rights' very essence and diluting their conceptual justification. The limit considered in this case, is therefore the point at which we draw the line. The point at which, for example, we cease to push for the creation of fourth and fifth generation

⁷¹ Osiatyński, 2009, p. 191.

⁷² Donnelly, J, 1980, p. 10.

rights,⁷³ because we perceive that the spectrum of rights is growing too broad, and compromising the integrity of human rights themselves.

The second conception of limits that we may have in mind, and that which is more relevant for our purposes, relates to the point at which an individual right, is restricted because it comes into conflict with some other value(s). These sorts of limits, I would contest, are more suitable, both lexically and symbolically, to be called “justified restrictions” on rights; a terminology implying a more context-specific and individual analysis, rather than a fixed ceiling.

In the theory of rights laid out above, I asserted that human rights are *Human Rights are the claims generated by the strongest interests to be protected against harms, in pursuance of the dignity, development and capabilities of persons, entailing, and correlative with their living a life of minimum vulnerability.* Sometimes claims and interests will clash and one may need to yield to the other. Determining which interest should yield is not always easy. But first one must prove that we are able to compare such things in the first place.

1.6.1. Consequentialist vs. deontological theories of limits

Dworkin famously wrote that rights should be conceived as “trumps” over background political considerations, and states that in cases of conflict, we should look, “not to the terms of the formulation of the right, but to the values and deep considerations that back it up.”⁷⁴

This view highlights a debate between consequentialist and deontological thinking on limits to rights. Views such as Dworkin’s may be conceived as “reason blocking” theories, and have been developed strongly by George Letsas.⁷⁵ Their links to deontological (or duty-based) reasoning is often asserted by pointing to the strength of duty that may be inherent in a right. Treating human beings as “ends in themselves” as

⁷³ Broadly speaking, the first generation of rights is usually seen as civil and political, the second, economic, social and cultural, the third, collective rights of peoples and development, and the emerging fourth, the rights of people of future generations.

⁷⁴ Dworkin, pp 153-168 in Waldron (ed) 1984.

⁷⁵ For more on “reason blocking” theories of rights c.f. Letsas, 2007, pp. 99-104; Legg, 2012, p. 189.

conceived of by Kant in his *Groundwork for the Metaphysics of Morals*,⁷⁶ is arguably contrary to the idea of balancing competing interests in a consequentialist manner.

This links strongly to the idea that rights are not “commensurable”⁷⁷ with other interests and public goods and reject consequentialist balancing exercises in favour of the idea that “the right is prior to the good”.⁷⁸ I will assume here however, that such things are commensurable, and through the course of this section, will attempt to show why I believe that to be the case

I would suggest that the reason ‘background considerations’ should be trumped by rights is because they cannot be justified by the prevention of any harm or vulnerability, the importance of which we have already seen. They can therefore not be formulated in terms of a claim generated by an interest to be protected against harms, and therefore do not justify the balancing exercise. The reason goods can enter into the balance, and be comparable with rights is for precisely the opposite reason. Goods, by definition, stand in favour of collective benefit, and therefore stand against a collective harm. Given that rights necessarily involve protection against more proximate, or more intimate harms⁷⁹, they ought usually to prevail.

1.6.2. The ‘symmetry of harm vs. harm

The above, consequentialist view, could be interpreted as stating that we ought to consider restricting rights only against those things that might cause harm to the rights of others. The influence for this being to some extent, the Libertarian theory of John Stuart Mill. Mill’s essay, ‘*On Liberty*’, published in 1859, considers the “struggle” between authority and liberty, and indeed the underlying thesis in much of his

⁷⁶ Kant, 2002, p.51.

⁷⁷ Joseph Raz has been a strong proponent of the theory that rights and goods are not commensurable. c.f. Raz, 1986, pp. 321-368.

⁷⁸ Letsas, 2007.

⁷⁹ A harm being proximate or intimate is conceived of here as implying such a closeness to a person as to be intertwined with an effect to their beings and doings; their capabilities, and development, and thus their dignity.

argumentation is that the potential “tyranny of government” ought to be controlled by liberty of the citizens.⁸⁰

Mill presents his famous “harm principle” which states that “[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”⁸¹ Harms to others generate interests and therefore claims to protection that may necessitate limiting the claims (rights). There is therefore, a form of symmetry that validates the balancing act, but not necessarily the restriction.

The limitations clause in the Universal Declaration of Human Rights at Article 29(2) holds that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Again, there is a certain symmetry here between the right, and the political, or collective restriction, in order to prevent harms to others, either directly, or indirectly, through harm to their rights. The requirements of morality, public order, and general welfare in a democratic society are also ideals that are generative of interests to be protected by the state in the strongest sense, and they may sometimes be invoked as protections against harms or potential harms. The requirement of proportionality necessitates that a fair balance be struck between the two interests, or the means and ends of the restriction.

1.6.3. The balancing exercise

The claim that such interests should be weighed, is perhaps open to the argument that this undermines a certain “special nature of rights”. Certainly deontological thinkers would claim that rights cannot be reduced to such interests and compared. What makes rights special in this account is their link with the concept of dignity, to be protected. There is, as deontologists would hold, a certain duty to protect this dignity, but this does

⁸⁰ Mill, J.S, 1869, reproduced 1999, Chapter I, at 4.

⁸¹ *ibidem*. Chapter I, at 9.

not instantly make the right itself beyond comparison and balancing. The concept of dignity is generative of the interest which the state has a duty to protect. Insofar as the state has a duty to protect against a great many other harms, this cannot be the end of the story. Undermining public goods will also cause harms, some of which could indirectly harm the dignity or development of persons. The balance will usually be *prima facie*, in favour of rights, given that the comparison (in the example just given) will often be between a proximate harm and a potential harm, but this is not conclusive. If my right of freedom of expression in publishing state secrets comes into conflict with the interest in protecting national security, despite the less proximate, and greater *potentiality* of this level of harm arising through the non-protection of national security, it is still creates a vulnerability that could conceivably lead to a proximate harm.

It is for these reason why it is not disrespectful to dignity, or necessarily contrary to the idea of treating people as “ends in themselves” to consider balancing interests. Because the balancing act requires the interests to be formulated in terms of protections of harms to persons, it necessarily takes everyone’s interests in protection, into account, and will lead to more intuitive results than holding a duty or a right to trump all other interests, when some of those interests may also cause significant harms. It is likely that the former will outweigh the latter, but we ought at least to consider the relevant factors. It is also noted that when one states that a right should “trump” another value, one has already arguably made an assessment weighing the factors, albeit a very fast and skewed assessment.

It is argued here that in the case of prisoner voting, the collective public’s distaste and dislike at the idea of prisoners voting, would not allowed into the balancing exercise, given that it cannot be formulated as a harm. Feeling sick about prisoners voting then, is irrelevant when it comes to rights as moral judgments cannot outweigh the protection that rights provide. In the *Hirst* case, the UK government invoked the legitimate aims of the prevention of crime and encouraging civil responsibility and respect for the rule of law. The prevention of crime can certainly be formulated in terms of a certain protection against harms to others and so may enter into the balancing exercise. The problem

however with this interest, is that it does not appear to be necessary or proportionate to restrict the right to vote for this reason. This link will be explored in more detail later.

This chapter has attempted to explore and present one theory of the way in which human rights can be conceived and argued that the idea of rights, when considered as protection against harms to dignity through (inter alia) capabilities, development and autonomy is compatible with the right to vote.

The right to vote can therefore be considered as an interest-claim to a power which protects a certain element of dignity in the sense of “worth” as well as in the sense of indirectly through capabilities, self-determination and the autonomy to make choices about one’s own life. Joseph Raz in particular has argued that the principle of dignity can be offended by “expressing disrespect for people’s autonomy”⁸² The theory considered also argued that rights can only be restricted by similar interests to protect against harms or vulnerabilities and that as such, political considerations and moral judgments are irrelevant and do not justify any form of balance between right and restriction.

The following chapter will consider the right to vote as located within the European human rights system. International norms, arguments for disenfranchisement and the legal tests in the ECHR will be considered against the backdrop of what has been discussed in Chapter One. All of this will attempt to show why such the right to vote is inadequately protected in the ECHR and has therefore contributed to the political stand-off following *Hirst*

⁸² Raz, 2009, p.222.

CHAPTER II

DISENFRANCHISEMENT: VOTING FROM RIGHT TO PRIVILEGE. JUDGEMENTS, JURISPRUDENCE AND JUSTIFICATION EXPOSING EUROPE'S AILING RIGHT TO VOTE.

2.1. Introduction

The vote, for the workers of this, and the next decade, was a symbol whose importance it is difficult for us to appreciate, our eyes dimmed by more than a century of the smog of “two-party parliamentary politics”. It implied first...equality of citizenship, personal dignity, worth.⁸³

In Chapter One, we saw one way in which human rights can be conceived; as claims (implying duties) that are generated by strong interests to protect against dignity and development-threatening harms. This interest-based model, it is argued, corresponds well with the approach of the ECtHR, as it does not hold rights to be “trumps” per se, but will necessitate a form of balancing act, albeit one where rights act as the most important considerations or weigh as the heaviest interests.⁸⁴ Some may be sceptical of a balancing analogy, arguing that it is either an impossible, or undesirable task to perform. Here, it is simply conceived of as a way of assessing the most important and relevant factors in a case, given as Letsas concedes, that “[t]here are many important interests that people have and many ways in which those interests can be served or harmed.”⁸⁵ “Balancing” does not imply that a Court will take a formulaic approach, identifying the factors, assigning them certain “weights” and balancing them against each other. However, when any decision is made, it is sensible, prudent and intuitive to consider the relevant and most important factors and come to a decision on the basis of these factors. In this sense, *all* decisions that we ever make are formed through some form of “weighing the options.”

⁸³ Thompson, E, 1966 p. 827.

⁸⁴ The Court has often spoken of the need to balancing the competing interests in the case, for example in ECtHR, *Hatton and others v United Kingdom*, Application no. 36022/97, 8 July 2003, at 122-129 and ECtHR, *Von Hannover v. Germany (No. 2)* Applications nos. 40660/08 and 60641/08, 7 February 2012, at 115-126.

⁸⁵ Letsas, 2007, p. 103.

Through this theory, and a study of the ways in which different interests ought to be construed as varying forms of harms to be protected against, this chapter will attempt to show that reasons for restricting the right to vote, based on this model are extremely limited. If we were to use a “reason-blocking” model, and consider the strength that ought to be accorded to the right to vote in all circumstances, it might be easier to argue the lack of justifiable restriction on enfranchisement. However, it seems that this does not take a realistic view of the way in which the court operates, or a realistic view in the sense of allowing no room for “balancing”; a position which would be inherently problematic.

On the “interests protecting against harms” model, it makes sense if the interests to protect are restricted only by other similar or proportionate interests against harms. For us to take this balancing seriously, there must necessarily be an assessment of the link between the two interests. There is no point in a restricting a right, if that restriction does not fulfil its stated purpose. It makes little sense for example, to restrict a prisoner’s freedom of expression to write a novel, by balancing it against my interest to be protected from harms in the form of crime. The right would be deemed the more important consideration, given the negligible or non-existent protection provided in the prevention of crime. In fact, many would argue that the educative, developmental and potentially reformative benefits to writing, would make this a counterintuitive restriction. Likewise it is argued, that it does not make sense to restrict a prisoner’s right to vote for similar reasons.

This chapter will now consider relevant international norms and guidance on the right to vote, in comparison with the predominantly disappointing interpretations and subsequent non-protection of the right to vote. The chapter will then move on to consider common arguments for disenfranchisement.

2.2. International norms and guidance on the right to vote

2.2.1. The Venice Commission’s Guidelines

The European Commission for Democracy through Law (The Venice Commission) is an advisory body of the Council of Europe on the question of constitutional and

democratic issues. The Commission's Code of Good Practice in Electoral Matters Guidelines ("the guidelines") therefore hold great legitimacy and "high moral value"⁸⁶ despite being non-binding. Given the ECHR's status as an instrument adopted by the Council of Europe, the Commission's guidelines hold a particular relevance and importance for our purposes however.

The guidelines states that "the five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage." On universal suffrage, it elaborates that in principle "all human beings have the right to vote and to stand for election", but that this principle may be subject to restrictions; the most common and uncontroversial of which, is age. There is also provision for the deprivation of the right to vote and to be elected, for which the following cumulative conditions are specified:

- ii. [I]t must be provided for by law;
- iii. [T]he proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;
- iv. [T]he deprivation must be based on mental incapacity or a criminal conviction for a serious offence.
- v. [F]urthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.⁸⁷

It appears then, according to the guidelines of the Venice Commission, that disenfranchisement should not be seen as a rule, but the exception. Furthermore, a blanket ban would seem to be contrary to the guidance, given that an express decision of a Court only, ought to be the only arena for the restriction on political rights. Anything else risks dangerous accusations of being "tantamount to the elected choosing the electorate."⁸⁸

⁸⁶ Blokker, & Schrijver, (eds.), 2003, p.153.

⁸⁷ European Commission For Democracy through Law (Venice Commission) Code Of Good Practice In Electoral Matters Guidelines And Explanatory Report, Adopted by the Venice Commission at its 51st and 52nd sessions (Venice, 5-6 July and 18-19 October 2002)

⁸⁸ This was an argument asserted by the Applicant in *Hirst, supra*, n. 1, at 46.

2.2.2. Article 25 ICCPR

The Guidelines draw on Article 25 of the International Covenant on Civil and Political Rights (ICCPR), as the relevant international norm governing political rights. Article 25 states as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned ... 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.

Here then, the right to vote is explicitly conferred, with restrictions to be construed reasonably. The UN Committee on Human Rights, in its General Comment 25, elaborates slightly on the “reasonable restrictions” requirement:

In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence.⁸⁹

2.2.3. Guidelines of the ODIHR

Finally, the Office for Democratic Institutions and Human Rights (ODIHR) published commitments for OSCE participating states, in 2003,⁹⁰ which state that:

⁸⁹ UN Committee on Human Rights, General Comment 25, "The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service," 1510th meeting (57th session), CCPR/C/21/Rev.1/Add.7, at 14

⁹⁰ Existing Commitments for Democratic Elections in OSCE Participating States, Warsaw: OSCE Office for Democratic Institutions and Human Rights (ODIHR), October 2003.

The European Court of Human Rights subsequently observed that the words of the Preamble are of primary importance since they enshrine a characteristic principle of democracy, developing “[f]rom the idea of an ‘institutional’ right to the holding of free elections ... [moving] to the concept of ‘universal suffrage’ and then, as a consequence, to the subjective rights of participation – the ‘right to vote’ and the ‘right to stand for election to the legislature.

This lengthy exposition of legal norms and guidelines is intended to show that in international legal instruments, and within recommendations of official, high level working bodies and commissions the right to vote is clearly taken seriously. One of the problems upon which this chapter will focus, is that there is a conflict between the strength of such guidance, and the weakness of the provision for the right to vote in the European Convention, stated under Art3Prot1.

In the latter elaboration of the ODIHR guidance, the interpretation of Art3Prot1, is of the strong type needed, to provide protection to the right to vote. However, the fact that it *is needed* is the problem. It is noteworthy that such an interpretation involves the need to “develop” from the initial principle, the idea of universal suffrage, and then, from this principle of universal suffrage, the right to vote, rather than being able to take as a given, the explicit conferral of a universal voting right.

2.2.4. Article 3 of Protocol 1 to the European Convention on Human Rights

Article 3 of Protocol 1 States, “[t]he 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.”

This does not look, at first glance, to be the sort of Article that would protect the right to vote, in the sense spoken of in the guidelines above. A literal reading would certainly be compatible with the ideas of universal suffrage, and exceptional disenfranchisement. However, its formulation is vague and expressed in terms of state obligations rather than individual rights. It therefore calls into question and undermines the strong ideals of universal suffrage that are captured in the above guidelines. How did this come to be the case?

2.3. The History of the right to vote

2.3.1. In the European Convention: an afterthought?

The “right to vote” was not initially included in the original text of the European Convention, but was added two years later in the First Protocol to the Convention in 1952. Controversy surrounded the existence and formulation of this provision.⁹¹ States’ concerns about different conceptions of democracy and other practical difficulties inherent in ensuring compliance with certain proposed formulations of the article led to its being “watered-down” and weakened, and included only in the later Protocol. Compare the above, accepted formulation of Art3Prot1, with the first draft of the relevant provision, which would have had states undertake, “to hold free elections at reasonable intervals, with universal suffrage and secret ballot, so as to ensure that Government action and legislation is, in fact, an expression of the will of the people.”⁹²

The two main differences in the original draft, are firstly the inclusion of the words “universal suffrage” and secondly, the subtle but important change from “under conditions which will ensure the free expression of the opinion of the people”, to “so as to ensure that Government action and legislation is, in fact an expression of the will of the people”. The latter, rejected formulation can be seen as expressing in stronger terms, the link between the unelected people and the Government. It expresses a conception of democracy that considers all governmental action as based upon the foundations of the free expression of the electorate, and thus necessarily legitimised by the people. This is arguably, a classic, symbolic conception and despite not being formulated in the language of an individual right, would have led to a significantly stronger and superior version of Art3Prot1. The accepted formulation, “under conditions which will ensure the free expression of the opinion of the people” leaves greater room to the State to implement a system of free elections which does not necessarily rely on the importance of the people’s legitimising government action and legislation, but merely requires

⁹¹ This is noted by Marks, 1995, p. 221.

⁹² European Court of Human Rights, Preparatory Work on Article 3 of Protocol 1 to the European Convention on Human Rights (Travaux Préparatoires) Council of Europe, Strasbourg, September 5th 1986, p.5. accessible at [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-3-Cour\(86\)36-BIL1221606.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-3-Cour(86)36-BIL1221606.pdf).

some form of elections where the electorate may express their free will in choosing the legislature. It could be argued that the free expression of the people, in choosing the legislature, in and of itself, legitimises all subsequent government action in any case, but the removal of this explicit link seems to remove some of the force from Art3Prot1, especially when taken in tandem with the removal of the term “universal suffrage”.

Through the use of, “universal suffrage”, the original formulation would have given much greater legitimacy to those minorities arguing that their political rights had been violated.

The result is such that the two changes taken together, seems to leave a formulation that tells the state to ensure the free expression of the people (but not all of the people), in choosing the legislature, ensuring at most, a weak link (in fact) between choice of the legislature, and the subsequent action of the legislature, in reliance upon the legitimacy of the people. This leaves us, reading the provision literally, with an exceptionally weak and unfortunately vague formulation. Lexically speaking, it appears to impose a duty upon the High Contracting Parties (HCPs) to hold free and fair elections, but little more than that. It does not seem to confer an individual right upon the members of that HCP. This was the position taken by the former European Commission on Human Rights, before the case law began to establish otherwise.⁹³ It is unfortunate that the drafters did not adopt a provision conferring an explicit right to vote, such as that seen in Article 25 of the ICCPR. It may have avoided a lot of difficulties. Indeed, Binder has stated that:

The clearer the respective standard is framed, the easier and less controversial it is for the international monitoring institution to hold states accountable in case of violation. Conversely, weaker and more openly formulated provisions reduces the guidance provided: the monitoring institution is given more leeway – it has to become more active and thus take a stronger and supposedly more difficult stance vis a vis the respective states.⁹⁴

⁹³ *X v Federal Republic of Germany, Appl. 530/59*, in *Yearbook of the European Convention on Human Rights, III (1960)* p184, as cited in van Dijk, P & van Hoof, G.J.H. 1998, p. 658.

⁹⁴ Binder, 2012, p. 510.

Later in this section, it shall be argued that, in fact, Art3Prot1 is often still viewed as not conferring an individual right to vote, despite subsequent recognition to the contrary.⁹⁵ Certainly this argument is used to substantiate the UK's arguments for prisoner disenfranchisement, and is sometimes used to legitimise positions taken by the ECtHR which invoke a wide MOA and claim the acceptability of a position where the vast majority of prisoners still cannot vote.⁹⁶

2.3.2. In the UK. Never a thought (at least for prisoners)

Enfranchisement in the UK was historically linked to property ownership, with only the elite sections of society, property and estate owners, eligible to vote. As David Feldman helpfully explains, the right to vote itself was seen as a form of property. In that sense, there was very little controversy surrounding those who were eligible to vote, especially prisoners, who would almost exclusively come from backgrounds of poverty, and even when free would not have had the vote.⁹⁷ Over time, eligibility grew through to a position of “universal adult suffrage”, yet it seemed to be taken as a given that prisoners should not vote, as they had never enjoyed this right. Indeed, as Feldman, explains, it was not conceived of a refusal of a right, but a mere failure to grant a new right,⁹⁸ and there was little to no discussion during the passage of the Representation of the People Act 1983, which states, at article 3(1) that:

“A convicted person during the time that he is detained in a penal institution in pursuance of his sentence...is legally incapable of voting at any parliamentary or local government election.”

⁹⁵ Recognised in ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, Application no. 9267/81, 2 March 1987.

⁹⁶ This was the case particularly in ECtHR, *Scoppola v Italy (No 3)*, Application no. 126/05, 22 May 2012.

⁹⁷ Feldman, D, ‘Votes for Prisoners? Democracy and the European Convention on Human Rights’, Online Discussion, Cambridge University, 29 November 2012, accessible at <http://www.cam.ac.uk/research/discussion/votes-for-prisoners-democracy-and-the-european-convention-on-human-rights>.

⁹⁸ *ibidem*.

2.4. What is the essence of Art3Prot1?

The removal of “universal suffrage” from the provision, is sometimes interpreted as proof that certain States were not prepared to guarantee suffrage for all. This argument would be to claim that it was the intention of the drafters not to include a right to vote, per se, envisioning the exclusion of certain groups including prisoners,⁹⁹ in view of the fact that suffrage was not, in any state, universal.

Notwithstanding that it would seem odd, in a human rights convention, to include a provision that conferred a non-universal vote, that could be regarded more as a privilege than a right, it ought also to be noted that “[w]hile the ‘intent of the framers’ must occupy its rightful place as a standard of interpretation, it is clearly a supplemental standard under the Vienna Convention [on the Law of Treaties 1969 (VCLT)]”¹⁰⁰

As explained by Yourow “a literal reading of a supplementary means of interpretation (Article 32 VCLT) may be contrasted with the...progressive or evolutive interpretation of the Article...which looks to “context and “object and purpose”...within the Convention system as a whole.”¹⁰¹

Whilst the intent of the drafters is clearly important, and there were obvious disagreements as to the formulation of Art3Prot1, which have left it weak and unclear, it is for the Court to take a strong and evolutive interpretation which considers that the “object and purpose” of the Convention would surely be undermined without the effective protection of the right to vote, inherent in democratic system. Unsurprisingly in some cases, as we shall see later, the Court has been “afraid of the ground it stands on”¹⁰², a symptom partially, but directly attributable to the uncertain status of Art3Prot1.

⁹⁹ Raab, D. 2011, (Kindle Edition) 2011, “Did Britain Sign up to give Prisoners the vote?” at location 249 of 1003

¹⁰⁰ Yourow, 1996, p. 139.

¹⁰¹ *ibidem*.

¹⁰² These were the words of Colin Murray, specialist advisor to the Parliamentary Committee on the Draft Voting Eligibility (Prisoners) Bill, during a Prisoner Voting conference at University College London, 18 June 2014.

2.4.1. Early Case Law on Article 3 of Protocol 1

This uncertainty was clearly present in the European Commission on Human Rights' early case law. At first, they seemed to exclude the idea of an individual right to vote for citizens, and of an individual application based on Art3Prot1, in the 1960 case of *X v Federal Republic of Germany*.¹⁰³

Given that Art3Prot1 is primarily formulated in terms of a state obligation to ensure free and fair elections, the exclusion of any individual right to vote appeared not to compromise this obligation and such an interpretation was (although not desirable), fairly understandable on a literal reading of the article.

The Commission, perhaps realising that this approach would run into problems, seemed to interpret an individual right in later cases. Van Dijk and Van Hoof recount how, in *W, X, Y and Z v Belgium* the Commission held that:

It follows both from the preamble and from Article 5 of protocol 1 that the rights set out in the Protocol are protected by the same guarantees as are contained in the Convention itself. It must, therefore, be admitted that, whatever the wording of Article 3, the right it confers is in the nature of an individual rights, since this quality constitutes the very foundation of the whole Convention.¹⁰⁴

In other words it seems, it would provide little value to have added an Article to a human rights Convention that was not generative of any right. This was, I believe, the correct, and sensible interpretation. But the fact that it had to be interpreted in this way at all, raises worries. The provision had to, in effect, be “saved” by the activist elucidation of the Commission. Perhaps in an attempt to draw a compromise, the Commission did recognise, despite the need to ensure “universal suffrage”, that the right was liable to be subject to limitations; a view that required considerably less interpretation to derive from the provision.

¹⁰³ *X v Federal Republic of Germany*, *supra*, n. 93.

¹⁰⁴ *W, X Y, and Z v. Belgium*, *Appls. 6745 and 6746/74*, in *European Convention on Human Rights Yearbook 1975, XVIII*, p. 236, as cited in Van Dijk & Van Hoof, 1998, p. 659.

In 1987, the European Court of Human Rights itself considered the meaning of Art3Prot1 for the first time, in *Mathieu-Mohin and Cleyrfayt v Belgium*,¹⁰⁵ aligning itself with the Commission's view in *W, X, Y and Z v Belgium*, which had evolved to treat subjective participation as a valid individual application under Art3Prot1.¹⁰⁶ The Court stated that, "the rights in question are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations."¹⁰⁷ This is a clear example of how the vague and weak drafting undermines the right itself. The court takes upon itself to introduce the idea of implied limitations, given the failure to stipulate them in the Article itself.

The Court further held that the reason for the formulation of the Article in terms of State obligations rather than individuals' rights lay:

...in 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 or 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.¹⁰⁸

Whilst explaining that free and fair elections are a vitally important part of ensuring individual rights in this area, this interpretation does not seem quite satisfactory to explain why the language of a right to vote, or a right to participate politically is entirely omitted. The right to vote could surely be conceived of as a "negative" freedom, not to be interfered with, just as the right to freedom of expression is, both rights requiring positive steps to be taken by the state to ensure their de facto effectiveness. Although it is accepted that in the case of the right to vote, the positive obligations involved are greater, ensuring free elections is just one, albeit a very significant, positive measure to be taken in assurance of this right; in other words, a necessary but not sufficient condition for ensuring that the right to vote is protected. Including no mention of the individual right then, can only undermine the strength of this provision.

¹⁰⁵ *Mathieu-Mohin, supra*, n. 95.

¹⁰⁶ *ibidem.*, at 52.

¹⁰⁷ *ibidem.*

¹⁰⁸ *ibidem.*, at 50.

The Court did also concede that States would be afforded a wide margin of appreciation (MOA) in this context but that the Court must “satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.”¹⁰⁹ This language of the Court, whilst speaking promisingly of rights and their effectiveness, seemed to imply a “light-touch review”, which would allow any infringement of the right to vote that does not violate the essence of the right itself.

The case of *Mathieu-Mohin* related in a much greater way, to the particularities of an electoral system that was arguably discriminatory; the question being whether these specificities impaired the freedom of expression of the electorate in the choice of the legislature. The case of *Hirst* however, and the prisoner voting line of case law, involves the validity of a direct restriction of a significant group of persons, on the right to vote itself. The danger with the formulation of the right, is that there may be a tendency to have regard to its literal wording and conclude that, even the restriction of an entire group’s voting rights, is not sufficient to impair the free expression of the people, given that the words “*universal suffrage*” were omitted, and thus, the acceptable exceptions to “*the people*” are not apparent.

In the Divisional Court judgment of the *Hirst* case in 2001, four years before it reached the ECHR in 2005, Lord Justice Kennedy stated:

I return to what was said by the European Court in para 52 of its judgment in *Mathieu-Mohin* Of course as far as an individual prisoner is concerned disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and the “free expression of the opinion of the people in the choice of the legislature.”

This seems to be a worrying interpretation of Article 3 and showcases the confusion, or perhaps in this case, opportunism, that may be caused by its ambiguous formulation. Either Article 3 is generative of an individual right to vote, or it is not. It should not be possible to say that, the Article protects the right to vote, but when the essence of the

¹⁰⁹ *ibidem*, at 52.

right to vote is impaired, it only offers protection insofar as free expression of the opinion of the people is also impaired”. For the right then, to offer any protection at all on an individual level, an individual’s right would have to be impaired in conjunction with an entire group of others, so as to undermine the free expression of the people.

It is argued that this view would be tantamount to the nonexistence of a real and tangible right to vote in the European regional human rights system. And it is this view, among others, that continues to threaten the protection of the right itself.

2.4.2. The Doctrine of Implied Limitations

In his above statement in the Divisional Court in *Hirst*, Lord Justice Kennedy’s view drew upon that in *Mathieu-Mohin* at paragraph 52; whereby the Court stated that Art3Prot1 conferred an individual right, but one which is “not absolute...there is room for implied limitations”.

Van Dijk and Van Hoof explain in their seminal book on the ECHR, that the Commission, before the Court, held that the scope of rights in the Convention, may be subject to implied or inherent limitations (as opposed to those limitations that are listed explicitly in certain rights in the Convention).¹¹⁰ As the authors explain:

[t]he Commission developed this doctrine specifically with respect to persons of a special legal status, such as detained persons, psychiatric patients, soldiers...This special status was assumed to entail for persons of these categories a more limited scope of certain rights and freedoms than for those outside these categories.¹¹¹

If this interpretation is correct, then this doctrine would seem to be contrary to the spirit and essence underlying human rights, and the Convention itself. Van Dijk and Van Hoof hold that the approach of the Court, when it has applied the doctrine:

appears to us to be wrong. It results from Article 1 that the Convention applies equally to everyone within the jurisdiction of one of the contracting states. If the drafters should have wanted to permit special restrictions in relation to particular categories of persons, they could

¹¹⁰ Van Dijk & Van Hoof, 1998, p. 763.

¹¹¹ *ibidem*.

have stated this in each individual article, as has indeed been done, for instance in the second paragraph of Article 11.¹¹²

They continue:

[O]ne should not start from the concept of inherent limitation, but from the view that everyone, detained persons included, is entitled to these rights... Since special regulations for the voting of prisoners can be made without difficulty, a general exclusion would amount to an exclusion of a group of the population which is insufficiently justified by their special status.¹¹³

The worry of the influence of a doctrine of implied limitations, is that it opens the door for discrimination of certain groups of people or individuals because their “special status” may justify treating them differently.

If a mentally disabled adult was refused the right to vote, despite being able, perhaps with help, to consciously process his own preferences, as well as the different options open to him, such a restriction would arguably be justified on Lord Justice Kennedy’s reading of Art3Prot1, and a reading informed by the idea of implied limitations, given that such a restriction still ensures the free expression of the people in the choice of the legislature. The free expression of the people must be secured, but so should the free expression of individuals, without which the collective expression of the electorate is undermined.

It seems that “implied limitations” thinking is unfortunately still influencing the way many consider this issue. A doctrine of implied limitations, appears to skip dangerously over any real consideration of the right, as it applies to the person concerned, and fails to take seriously the proportionality stage of the analysis.

Let us turn to the more recent line of prisoner voting cases, beginning with the landmark case which inspired this paper: *Hirst (No 2) v UK*.¹¹⁴

¹¹² *ibidem*, p. 764.

¹¹³ *ibidem*.

¹¹⁴ *Hirst, supra*, n. 1.

2.5. Prisoner Voting Case Law: Hirst and Beyond

2.5.1. *Hirst v United Kingdom (No 2)*

The Applicant John Hirst, a British national who was convicted of manslaughter, was given a life sentence in prison for his crime in 1980. Subject to the UK Representation of the People Act 1983, he was therefore banned from voting in parliamentary or local elections during the term of his imprisonment.

Section Three of Part One of the said Act, states that: “[a] convicted person during the time that he is detained in a penal institution in pursuance of his sentence...is legally incapable of voting at any parliamentary or local government election.”¹¹⁵

The Chamber of the ECtHR held in 2004, that despite the wide margin of appreciation which they felt ought to apply in this case, such a restriction on voting, was disproportionate, given that it applied “automatically, irrespective of the length of the sentence or the gravity of the offence” and found that “the results were arbitrary and anomalous, depending on the timing of elections.”¹¹⁶ Given that the primary reason submitted by the UK Government for the ban, was punitive, the Chamber also held that there was no logical justification for the continuation of the restriction, given that the punitive part of Hirst’s sentence was over.¹¹⁷

The Chamber, finally, was not convinced that the UK had ever “sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners.”¹¹⁸ The Case came to the Grand Chamber in late 2005 and by 12 votes to 5, Grand Chamber agreed with the previous judgment, dismissing the UK Government’s appeal.

¹¹⁵ Representation of the People Act 1983, accessible at <http://www.legislation.gov.uk/ukpga/1983/2>.

¹¹⁶ *Hirst, supra*, n. 1, at 41.

¹¹⁷ *ibidem*. Judge Caflisch at 4(d).

¹¹⁸ *ibidem*. at 41.

2.6. The UK Government's arguments for disenfranchisement

2.6.1. Disenfranchisement in pursuit of the legitimate aims

The UK government's arguments, as to the legitimate aims for the restriction on prisoners voting rights related to the prevention of crime, and the punishment of offenders, as well as enhancing civil responsibility and respect for the rule of law.¹¹⁹ It is argued, and hopefully will be shown through the course of this chapter, and in conjunction with the framework laid out in the previous chapter, that these aims are not sufficient and proportionate in nature to outweigh the right to vote, given (inter alia) that the nature of the link between the restriction of voting rights and the prevention of crime is extremely questionable.

It is argued that removing the right to vote from prisoners is less likely to contribute to their reformation and social rehabilitation than if they were to possess it. As Easton has stated:

The UK Government...argued that denial of voting rights enhances civil responsibility but disenfranchisement perpetuates isolation and social exclusion. Conversely, restoring the vote and participation in the political process would assist in rehabilitation by reminding prisoners of the obligations and duties of citizenship and encourage a sense of responsibility.¹²⁰

The above view, seems to have been agreed with by the Canadian Supreme Court in the case of *Sauvé v. Canada*¹²¹ who took the view that:

“[T]here was *no rational connection* between the denial of the right to vote and that objective. Instead of promoting civic responsibility, it undermined respect for the law and democracy, given that the law's legitimacy is ultimately derived from the right of every citizen to vote. It went against the principles of inclusiveness, equality and citizen participation which are essential to a democracy.”¹²²

Easton claims that “it is reasonable to assume that voting rights would have an indirect positive effect on crime rates, as they encourage participation in public life, increase a

¹¹⁹ *Hirst, supra*, n. 1, at 50.

¹²⁰ Easton, 2011, p. 224.

¹²¹ *Sauvé v. Canada (Attorney General)* Canadian Supreme Court [2002] 3 S.C.R. 519.

¹²² Easton, 2011, pp. 224-225 (emphasis added).

sense of being a stakeholder in society and may encourage law-abiding behaviour.”¹²³

Furthermore, removing voting rights of prisoners:

[I]ncreases their social exclusion and marginalisation...But re-enfranchisement would arguably have the opposite effect, strengthening their citizen status, giving them a voice and would also affirm the democratic values of equality and inclusion. Moreover, it would also further their rehabilitation by promoting the reintegration of offenders, and thereby enhance the protection of the public. So enfranchisement may promote social inclusion and benefit society.¹²⁴

Whether or not this argument is valid, and it is difficult to prove, given the lack of widespread studies,¹²⁵ what is clear is that there is certainly not a discernible and sufficient link between the means employed (disenfranchisement) and the aim pursued (prevention of crime). If one formulates the two in terms of harms to be compared, the harm of removing the voting right would outweigh the unclear and remote vulnerability to harm through future crime committed because of the removal of the right to vote. This is not to say that the prevention of crime is not important, but that the prevention of crime necessitated by convicted prisoners voting will be minimal or non-existent.

2.6.2. The “right” to vote as a privilege

In the *Hirst* judgment of the UK Divisional Court in 2001, the then Secretary of State for the Home Department stated:

By committing offences which by themselves or taken with any aggravating circumstances including the offender’s character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have their say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote.”¹²⁶

What is interesting here, as we noted earlier, is an equation of rights and privileges, as well as an explicit reference to a forfeit of rights. We have both references to rights as

¹²³ *ibidem*. p. 228.

¹²⁴ *ibidem*.

¹²⁵ Easton notes that “there have been no large-scale research studies on the link between voting and offending”, but observes that there is enough evidence to suggest that voting may be a factor, and that the link is “worth exploring”, *ibidem*. p. 228.

¹²⁶ As cited in *Hirst, supra*, n. 1. at 16.

something less than rights, and rights as something which can be forfeited. Essentially these boil down to one and the same thing; a conception of rights that holds the right to vote, not as justifiably limited, but undeserved.

The problem with this view is that it clouds the disproportionality of the restriction with moral judgment. A restriction on a right must be proportionate in the sense of being for the legitimate and necessary protection of a public good and prevention of harms to others, whereas the removal of a right based on the character, deservingness, or moral authority of the person and risks unjustified and harsh treatment.

Several passages from the District Court judgment of *Hirst* were cited in the Grand Chamber. (The case did not go to the UK Court of Appeal or then, House of Lords (now Supreme Court), as the applicant was considered to have no chance of success.)

Lord Justice Kennedy stated:

The European Court ... requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this Court to defer to the legislature. It is easy to be critical of a law which operates against a wide spectrum.¹²⁷

On the one hand, it would have been extremely surprising to have the District Court decide in any other way, on an extremely sensitive and complex topic going to the heart of parliamentary sovereignty, especially given the weakness of Art3Prot1. On the other hand, this appears to be deference bordering on neglect. It still ought to be for the court to at least conduct a proportionality assessment of its own, considering the areas of its expertise, instead of just deferring the entire thing to parliament.

Finally Lord Justice Kennedy stated:

If section 3(1) of the 1983 Act can meet the challenge of Article 3 [of the First Protocol] then Article 14 has nothing to offer, any more than Article 10.¹²⁸

¹²⁷ *ibidem*.

¹²⁸ *ibidem*.

The latter statement refers to the fact that the applicant claimed violations of his Article 14 right to be free from discrimination, taken together with Article 10, freedom of expression. This argument was not considered. What is interesting is that this statement betrays another conception of Art3Prot1 as presenting a challenge to states, and not an individual right to the applicant. Once again, the formulation undermines its strength.

2.6.3. Disenfranchisement as part of a prisoner's punishment

At paragraph 23, the Grand Chamber judgment in *Hirst*, citing the relevant domestic law and practice in the UK, states the following:

During the passage through Parliament of the Representation of the People Act 2000, which allowed remand prisoners and unconvicted mental patients to vote, Mr Howarth MP, speaking for the government, maintained the view that “it should be part of a convicted prisoner’s punishment that he loses rights and one of them is the right to vote”.¹²⁹

This would again appear to undermine the value of rights, but further than this, it may even be a dangerous view. If we cannot ensure that there is a proportionate link between the loss of voting rights, and the aim pursued by the government (cited as the prevention of crime) and yet the right can still be “lost”, then which other rights could prisoners lose? The idea of prisoners losing rights could be used to underpin a whole series of draconian measures, treating prisoners in harmfully or with contempt. For this reason, and a host of others, the “European Prison Rules” state on the matter that:

Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this.¹³⁰

The UK’s position, would also seem to be incompatible with Article 25(b) of the ICCPR cited above, as well as potentially with Article 10(1) of the same Covenant which states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”, and 10(3) which

¹²⁹ *ibidem*. at 24.

¹³⁰ Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, 11 January ,Part VIII, 102.2, accessible at <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

stipulates that, “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

2.6.4. “Prisoners have broken the social contract”

The final argument that we shall consider here is the one that “[c]onvicted prisoners breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country.”¹³¹ Social Contract theory is rich, complex and lengthy, and a detailed exposition is far beyond the scope of this thesis. However a simplified, and brief account will be given.

The idea of the social contract has strong links with the idea of “the state of nature”, as discussed in Chapter One. Often social contract theories take this state as the starting point and use the social contract to explain how we move from this state of nature into an organised system of legitimate government, whose rules the people must obey, and who must themselves respect the rights of the people. The term “The Social Contract” is often associated with Jean-Jacques Rousseau’s work on the subject, in which he states that, “[s]ince no man has a natural authority over his fellow...we must conclude that conventions form the basis of all legitimate authority among men.”¹³² The social contract (or compact), as stated by Rousseau claims that, [e]ach of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.”¹³³

Furthermore, “on the violation of the social contract, each regains his natural rights and assumes his natural liberty, whilst losing the conventional liberty in favour of which he renounced it.”¹³⁴ This is a wonderfully elegant way of explaining the legitimacy of governmental authority. The idea being that one gives up certain natural rights and freedoms, in return, or as consideration for the protection of civil liberties, or those rights that the state is able to protect. This then forms a “contract” with the state that if breached by either side, legitimises action by the other.

¹³¹ *ibidem.* at 50.

¹³² Rousseau, 2010, p.4.

¹³³ *ibidem.* p. 10

¹³⁴ *ibidem.* p. 9.

The argument stands then, that prisoners have breached the social contract, by using their liberty to pursue malicious goals, and must therefore forfeit their civil liberties which the state has thus far, secured for them. Of course any contract requires consent and consideration. The latter is in theory, present but is the former? Rousseau admits that, “[a]lthough [the clauses] have perhaps never been formally set forth, they are everywhere the same and everywhere tacitly admitted and recognised.”¹³⁵ Is it reasonable to say that one’s civil liberties may be lost because of tacit consent of the social contract? There would seem to be numerous different responses to this question. One is to dispute that tacit consent is present at all. Another is to concede that tacit acceptance is present, but that this is not sufficient and that to justify losing something with such importance, express consent only would be considered appropriate. The latter would perhaps be the more reasonable. Within the first response, it will need to be considered ways in which, through living in a political society, we may tacitly consent to the social contract,¹³⁶ and reject all of these as evidence of such consent. Considering all of these is a task beyond the remit of this paper, but it may suffice to say that this is doubtful, given as Hume has stated:

[W]ere you to ask the far greatest part of the nation, whether they had ever consented to the authority of their rulers, or promised to obey them, they would be inclined to think very strangely of you: and would certainly reply, that the affair depended not on their consent, but that they were born to such an obedience.¹³⁷

Even if such tacit consent is deemed to exist, it is argued that this cannot be enough, in the case of prisoners, to justify their disenfranchisement. Could one argue then that the idea of the social contract has therefore been put to work in the “disenfranchising” legislation – The Representation of the People Act? It is certainly a valid argument. But also a slightly strange one, given the lack of reference to a social contract in modern

¹³⁵ *ibidem*.

¹³⁶ “Every man, that hath any possession, or enjoyment, of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as anyone under it. . .” Locke, 1764, at 119.

¹³⁷ Hume, 2010, *Book III: Of Morals*, Part II, Section VIII.

society.¹³⁸ It would seem to be at best an argument of convenience from the government, rolling it out because it could make a valid point for their purposes. It is difficult to argue that Britain's modern political society is premised upon the social contract.

Furthermore, as pointed out by Brenner and Caste, the social contract justification for prisoner disenfranchisement would seem to fail to explain why it is only prisoners that should lose the right to vote. If this argument was accepted, "any commission of a crime, whether a felony or a misdemeanour, should be grounds for denial of the franchise."¹³⁹

2.6.5. A wide margin of appreciation - The dissenting judgment in Hirst

The Grand Chamber's judgment in *Hirst* had a significant dissenting minority, who disagreed with the majority verdict that the margin of appreciation did not justify the disproportionate and arbitrary nature of the blanket ban. They stated:

Our own opinion whether persons serving a prison sentence should be allowed to vote in general or other elections matters little. Taking into account the sensitive political character of this issue, the diversity of the legal systems within the Contracting States and the lack of a sufficiently clear basis for such a right in Article 3 of Protocol No. 1, we are not able to accept that it is for the Court to impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent.¹⁴⁰

This is perhaps the most damning indictment of Art3Prot1 that we have yet seen. Despite the fact that in the *Mathieu-Mohin* case, it was interpreted as conferring an individual right, the dissenting minority in *Hirst*, were still not persuaded that this ought to be the focus. It is this sort of view which leads to the opinion that the right to vote does not exist in the European human rights system.

¹³⁸ Debates concerning the social contract were revived with John Rawls' famous work "A Theory of Justice" in which he presented his "Original Position", holding that "justice as fairness" entailed those conditions that would have been hypothetically agreed to by people who were behind a "veil of ignorance", lacking knowledge of what positions they would occupy in society.

¹³⁹ Brenner & Caste, 2003, p. 238.

¹⁴⁰ *Hirst, supra*, n. 1, joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, annex (c), at 4.

2.7. Penological arguments for prisoner disenfranchisement

It will be pertinent now to turn our focus to the common arguments for prisoner disenfranchisement from a penological perspective. There will be broadly speaking, four attempted justifications; disenfranchisement as retribution, as deterrence, as rehabilitation and as incapacitation. I shall consider them all in turn. It is likely that disenfranchisement as retribution and as deterrence will be particularly challenging to reconcile with the idea of the right to vote.

2.7.1. Disenfranchisement as retribution

Retributive justice considers that justice is done when the punishment is proportionate to the gravity of the crime. At first glance disenfranchisement would not seem to be an appropriate punishment, given that it will always apply in addition to imprisonment itself. As Susan Easton argues, “it [disenfranchisement] is a particularly degrading punishment in so far as it reduces the prisoners to a state of social or civil death.”¹⁴¹ There would not seem to be a clear link between an imprisonable offence and the loss of voting rights. Certainly in the context of the UK’s blanket ban, it is very difficult to see a link between the harm caused, the gravity of the offence and the loss of voting rights. However, Brenner and Caste note the general difficulty in assessing the proportionality of punishments in stating that, “no one has been able to calculate this correspondence between crime and penalty...retributivists tend to rely on rough calculations”,¹⁴² and that even if it were possible to calculate, “it cannot be claimed that disenfranchisement matches all felonies. Thus depriving *all* felons of the right to vote cannot be justified on retributivist grounds”.¹⁴³ This position is also contrary to a great deal of human rights theory. When rights are restricted, it should not be for reasons of punishment.

2.7.2. Disenfranchisement as deterrence

Deterrent reasons for disenfranchisement would reflect the idea that removing the right to vote would act as a strongly discouraging factor to commit crimes, both in the future,

¹⁴¹ Easton, 2011, p. 224.

¹⁴² Brenner & Caste, 2003, p. 235.

¹⁴³ *ibidem*.

for the specific offender, and for the rest of society. In fact this links directly to the UK governments stated aim of preventing crime, and encouraging respect for the rule of law. As the renowned French philosopher Michel Foucault explained, “[t]hings must be so arranged that the malefactor can have neither any desire to repeat his offence, nor any possibility of having imitators.”¹⁴⁴ It is extremely questionable, the extent to which the removal of the right to vote would have the desired deterrent effect, given that any removal of the right would, in most systems that practice such a removal, coincide with a prison sentence, likely to be a much stronger deterrent of crime. The restriction of a right for the purpose of deterring others from committing a crime, would also seem to be contrary to a rights-based approach, and somewhat counter-intuitive, given that, by definition, a suitable deterrent ought to outweigh gain in committing the crime. As Easton states, “it is hard to imagine that the prospective offender would be deterred from criminal behaviour by the prospect of losing voting rights compared to the threat of incarceration itself.”¹⁴⁵ This links directly to the idea of justifying disenfranchisement through prevention of crime and again calls this into question.

2.7.3. Disenfranchisement as rehabilitation

Disenfranchisement for rehabilitative reasons is an odd conception. It was in fact, argued by the UK Government in *Hirst* in the sense that removing the vote from convicted prisoners would increase their sense of civic responsibility. This in fact seems closer to an argument from deterrence, and in actual fact, it is argued that such removal is more likely to have the opposite effect, as considered earlier, in the sense of encouraging expression and self-development. Easton has stated that:

[I]t is reasonable to assume that voting rights would have an indirect positive effect on crime rates, as they encourage participation in public life, increase a sense of being a stakeholder in society and may encouraging law abiding behaviour. So enfranchisement may promote social inclusion and benefit society.¹⁴⁶

¹⁴⁴ Foucault, 1979, p.93.

¹⁴⁵ Easton, 2011, p. 224.

¹⁴⁶ *ibidem.* p. 228.

Put in even stronger terms by Tims, “[p]erpetual disenfranchisement does not serve a rehabilitative function; rather it stifles the rehabilitative process and stigmatizes the individual for life.”¹⁴⁷ Brenner and Caste even consider that there may even be a *duty* to vote for prisoners in this regard.¹⁴⁸

2.7.4. Disenfranchisement as incapacitation

This view is likely to be the most reconcilable with the view of rights expressed above. Rights can justifiably be restricted in order to prevent certain harm to others and to the rights of others. In the case of prisoners, their detention and incapacitation ensures that others are safe from the potential harms that they could be liable to cause, but does disenfranchisement incapacitate them in a similar sense, preventing the free exercise of this right causing harm to others? As we saw earlier, this seems unlikely. The only instances where this might be a plausible and proportionate argument, would seem to be where offenders had committed electoral fraud and thus there would exist a logical and proportionate link, perhaps from retributive, deterrent and incapacitative reasons, given that the free exercise of an electoral fraudster’s right to vote, could (making assumptions about the likelihood of re-offense) endanger others’ rights to free and fair elections. As Brenner and Caste have considered disenfranchisement for electoral offences and noted the intuitive appeal, perhaps inspired by a Kantian conception of “*ius talionis*” (an eye for an eye) – noting that the disenfranchisement here at least would seem more proportionate. However, they note that even here prisoner disenfranchisement is problematic, given that (among other problems) imprisonment is likely to be deemed disproportionate for electoral offenders.¹⁴⁹

These attempted justifications, taken separately, do not seem strong enough to justify disenfranchisement. Even considering all of them together, would seem insufficient for the removal of the right to vote especially given that some of the justifications are predicated on grounds that misunderstand or are incompatible with, rights theory. Rights, at least on the model considered above, cannot be restricted because of weak

¹⁴⁷ Tims, 1975, 124, 156.

¹⁴⁸ Brenner & Caste, 2003, p. 233.

¹⁴⁹ *ibidem.* pp. 240-241.

policy considerations, or for reasons that do not prevent any sort of individual or social harm, such is their strength and importance.

Contrary to much of the disenfranchisement argumentation here, it is argued that:

If prisoners are without a vote...they are effectively non persons, which legitimate the view that prisoners should be forgotten and marginalises them in the minds of governments and the public. ...Restoring the right to vote can be seen as a key element of rehabilitation in giving people another chance to build a better life. Civic reintegration is arguably a key step towards citizenship and away from law breaking.¹⁵⁰

The arguments of the UK above, can therefore be seen as predominantly retributivist (imposing disenfranchisement as a punishment), rehabilitative (encouraging respect for the rule of law and promoting civil responsibility) and deterrent/incapacitative (preventing crime).

The UK's justifications seem to fail from a retributive perspective, given the arguably disproportionately and the assertion that rights restrictions should not be imposed for punitive reasons. They would seem to fail from rehabilitative perspective, in terms of encouraging respect for the rule of law and civil responsibility, given that, as we have seen, the opposite effect may be just as likely. And they would seem to fail from a deterrent and incapacitative perspective (of preventing crime) because, as Brenner and Caste state, deterrence fails as a justification for the disenfranchisement of inmates because "if the severity of prison life cannot deter one from committing a crime, it is unlikely that adding disenfranchisement will achieve this goal."¹⁵¹

2.8. Post-Hirst Case Law

Despite the seeming lack of compelling reasons to restrict prisoners voting (except on the basis of moral judgements), the UK government, as we have seen, still failed to make changes. Following *Hirst*, the ECtHR received 2500 new applications claiming violations of Art3Prot1, given the government's failure to act. In *Greens and MT v*

¹⁵⁰ Easton, 2011, p. 230.

¹⁵¹ Brenner & Caste, 2003, p. 236.

United Kingdom,¹⁵² the ECtHR had reason to use its new pilot judgment procedure, giving the UK six months from the date on which the judgment became final (11 April 2011) to remedy the situation. The UK was granted a new six month deadline following the Grand Chamber's judgment in the 2012 case of *Scoppola*.¹⁵³

There are two main cases which merit discussion and analysis following *Hirst*. The first was *Frodl v Austria*, heard by the First Section of the ECtHR in 2010.

2.8.1. *Frodl v Austria*¹⁵⁴

The case concerned a prisoner facing a life sentence who had also been banned from voting under Austrian legislation which imposed such penalties on all prisoners serving sentences of more than one year.

The Austrian Government argued that such a prohibition could be distinguished from that in *Hirst*, given that it allowed room for a category of prisoners to vote and was therefore not drawn in such disproportionate and arbitrary terms. The applicant argued that the government had not submitted legitimate aims that were proportionate to the restriction and had not proved the necessity of the restriction. Further the applicant claimed that the government had “merely relied on the gravity of the crime of which the applicant had been convicted in order to justify his disenfranchisement and pointed to differences between the Austrian provision and the one at issue in the *Hirst* case.”¹⁵⁵

Indeed, pointing to the gravity of the offence to justify the disenfranchisement does not establish or explain why there is a sufficient and discernible link between the “punishment” (disenfranchisement) and the aims (explanation of which in the *Frodl* case were somewhat lacking.¹⁵⁶) All it does it to assert a position that argues that the offender, because of the serious nature of his wrongdoing, can justifiably be deprived of a right. This is contrary to a proper understanding of the way that human rights should

¹⁵² ECtHR, *Greens and M.T v. United Kingdom*, Applications Nos. 60041/08 and 60054/08, 23 November 2010 (became final on 11 April 2011).

¹⁵³ *Scoppola*, *supra*, n. 96.

¹⁵⁴ ECtHR, *Frodl v. Austria*, (Application no. 20201/04), 8 April 2010.

¹⁵⁵ *ibidem*, at 17.

¹⁵⁶ *ibidem*, at 30.

work. It is the position of this paper that a sufficient and discernible link may only exist in cases whereby the harm caused by the prisoner, undermines the idea of democracy, of free and fair elections, or the right to vote itself. These cannot be construed in a broad sense, so as to claim that any crime committed is contrary to democratic ideals. As the Court in *Hirst* held:

Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the legislature, does not therefore exclude the possibility of restrictions on electoral rights being imposed on an individual who has, for example, seriously abused a public position or whose conduct has threatened to undermine the rule of law or democratic foundations (see, for example, *X v. the Netherlands*).¹⁵⁷

It is argued that only in those such situations can a proportionate link exist between the crime on the one hand, and the restriction on the other hand. This is because the right restricted in the offender, is in the interests of protections against harms to that same right, or similar harms to others.

Similarly the *Frodl* Court stated, “that there must be a link between the offence committed and issues relating to elections and democratic institutions.”¹⁵⁸ As well as stressing the importance that the decision should be taken only by a judge, taking into account the particular circumstances, all of which aims to ensure that disenfranchisement is the exception. The Court therefore found these elements wanting in the Austrian government’s restriction and found a violation of Art3Prot1. The Court stressed the need for a “discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned” as required by the principle of proportionality.¹⁵⁹ It is promising that the Court focuses on a slightly more objective side to the proportionality test here, as it is less likely to be obscured by political considerations. However, the fact that the Court requires the link between sanction (disenfranchisement) and the conduct of the individual still implies that disenfranchisement (the removal of a right) is conceived as a punishment. Not only is this contrary to rights theory, as we have already seen, the European Prison Rules state

¹⁵⁷ *Hirst supra*. n. 1, at 71.

¹⁵⁸ *Frodl, supra*, n. 154, at 34.

¹⁵⁹ *ibidem*, at 35.

that “imprisonment is by the deprivation of liberty a punishment in itself”,¹⁶⁰ and should not be aggravated. The Court should ask therefore, whether there is a discernible and sufficient link between the sanction (disenfranchisement) and the aim to be achieved by the sanction (proportionality between means and ends). If a discernible link exists, and the aim to be achieved is, on fair balance, in prevention of a harm that might outweigh that caused by the removal of a voting right,¹⁶¹ then it may be justified,

The result of the judgment however, seems to be telling the Austrian government that it ought to provide for prisoner voting in the vast majority of cases. This is a very promising position and corresponds largely with the rights theory-inspired approach above, that to justify the balancing act, there must be a link between the harm protected against and the harm imposed. However, the Court seemed to retreat from this position markedly in the 2012 case of *Scoppola*.

2.8.2. *Scoppola V Italy (No 3)*

Franco Scoppola was convicted in 2002 of murder and attempted murder, and was sentenced to thirty years imprisonment, as well as banned for life from holding public office under the Italian Criminal Code, which subsequently necessitated his being disenfranchised. The Grand Chamber of the ECtHR, apparently fearing that the *Frodl* Court had gone too far, seemed to backtrack on certain issues, including the need for all decisions to be made by a judge, arguably undermining the “disenfranchisement as exceptional” position.¹⁶²

The Grand Chamber found that the ban was more tailored to individual circumstances and gravity of offence, and therefore that It lacked the “general, automatic and indiscriminate character that led it, in *Hirst*, to find a violation of Article 3 of Protocol No. 1”¹⁶³. The Grand Chamber essentially took the view that it was for the state to regulate the voting ban amongst prisoners. It focused on the lack of consensus between the states of the Council of Europe as to the extent of the disenfranchisement (or lack

¹⁶⁰ European Prison Rules, *supra*. n. 130.

¹⁶¹ In the view of this thesis, such a harm will very rarely exist.

¹⁶² *Scoppola*, *supra*, n. 96, at 97-99

¹⁶³ *ibidem*. at 108.

thereof)¹⁶⁴ and cited *Hirst* that it was “for each Contracting state to mould [legislation] into their own democratic vision.”¹⁶⁵

This conclusion is strongly disputed. It is unfortunate, although not unsurprising that the Grand Chamber moved away from the Court’s judgment in *Frodl*. There is a feeling that the Grand Chamber were not willing to reaffirm the principles of the *Frodl* case, and live with the political consequences, and so they went too far the other way, rendering *Hirst* a judgment with now very limited applicability. Taking all the case law together, it seems to be the principle, that the ECtHR, will find a ban on prisoner voting, to be within the state’s MOA, if it is not blanket, arbitrary and undebated, and there has been some evidence of tailoring the “punishment” to fit the crime. It seems that other than these factors, the Court has resigned its role, leaving it to the state to decide. One then begins to question what has actually been gained from this line of case law? The only dissenting opinion in *Scoppola* came from Judge Björgvinsson who stated, “[r]egrettably the judgment in the present case has now stripped the *Hirst* judgment of all its bite as a landmark precedent for the protection of prisoners’ voting rights in Europe.”¹⁶⁶

The Grand Chamber in *Scoppola* seem to forget that such a wide restriction on prisoner voting (and even an individual disenfranchisement) harms the essence of the right which is supposed to be at the heart of Art3Prot1. This does not mean an instant finding against the state, but the need for a strong and proportionate justification. The Grand Chamber in *Scoppola* stated:

Taking the above considerations into account, the Court finds that, in the circumstances of the present case, the restrictions on the applicants right to vote, did not “thwart the free expression of the people in the choice of the legislature” and maintained “the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage”....the margin of appreciation afforded to the respondent Government in this sphere has therefore not been overstepped.¹⁶⁷

¹⁶⁴ *ibidem*. at 101.

¹⁶⁵ *ibidem*. at 83, citing *Hirst*, *supra*, n. 1, at 61

¹⁶⁶ *Ibidem*, Dissenting Opinion of Judge David Thór Björgvinsson.

¹⁶⁷ *ibidem* at 110.

It is disputed here that the Grand Chamber is once again asking the wrong question. The collective nature of Art3Prot1 is seemingly compatible with widespread disenfranchisement, the right to vote, is not. As the Grand Chamber itself stated “the Convention is first and foremost a system for the protection of human rights”,¹⁶⁸ it ought to heed its own advice.

It is clear that the case law has become unclear and contradictory and the *Frodl* judgment had left the ECtHR again, afraid of its position, struggling with its intuitive wish to grant wide deference to the state in regulating the ban in *Scoppola*. Perhaps the Court was afraid of extending the *Frodl* judgment and leaving a clear precedent that would involve a number of states needing to alter their legislation permitting prisoner disenfranchisement. The inherent political considerations are likely to have played a huge role here, the Court perhaps worried that it would surely have faced accusations of overstepping its mark or being excessively activist.

In the next chapter, the ways in which the margin of appreciation and proportionality tests have been functioning in the cases, will be considered and a slight refocusing of these tests will be presented, attempting to bring greater individual rights protection whilst avoiding accusations of activism

¹⁶⁸ *ibidem*, at 94.

CHAPTER III

FROM A PRIVILEGE TO A RIGHT. BALANCING, MARGINS AND PROPORTIONALITY: PUTTING THE 'CURE', TO THE TEST.

3.1. Introduction

The human rights theory, as well as the (unconvincing) reasons for disenfranchisement that we have seen thus far, will be used in this chapter, in an attempt to consider the place of rights in the tests which operate at the ECtHR level, and ultimately try to provide a greater structure to those tests. As Letsas has argued, failure to perform such tasks and to distinguish the role of rights, may lead to “moral confusion and political mistakes”.¹⁶⁹ This seems a rather pertinent observation given that most prisoners are arguably disenfranchised because of disguised political and moral judgments, which the European Court defers to, rather than logical restrictions on rights. It has been noted so far, and will be shown to a greater extent that rights are currently not afforded sufficient protection against political considerations in the MoA and proportionality tests.

As we have seen, one of the main foci of the prisoner voting cases was that, given the vast array of methods that can be used to organise electoral systems; influenced by history, culture and politics, the MoA afforded to the state, should be broad.¹⁷⁰ The Court is certainly right to permit a diverse range of approaches, given the array of such factors in different states. But that does not mean, (despite the nature of this issue, going to the heart of state sovereignty and democracy)¹⁷¹ that it should allow any of these approaches to disproportionately undermine the right to vote. It is argued here that most of the systems which ban a large number of prisoners from voting, will do just this. In this section, the MoA will be studied in further detail in order to show how it could to

¹⁶⁹ Letsas, 2007, p. 17.

¹⁷⁰ *Hirst*, supra, n. 1, at 61.

¹⁷¹ Binder has noted the difficult resultant balance, given political rights’ “double character as human rights and elements of national constitutional legal orders”, Binder, 2012, p. 510.

be used, in conjunction with a more structured proportionality analysis, to protect the right to vote.

3.2. Margin of Appreciation (MoA)

3.2.1. Origins of the MoA

The MoA is something of an enigma. Given that it has been described at times as a “doctrine”¹⁷², at others a “power”¹⁷³, has been consistently referred to as a form of deference,¹⁷⁴ or termed the State’s “elbow room”,¹⁷⁵ it is unsurprising that Lester has referred to the margin as “slippery and elusive as an eel.”¹⁷⁶ The MoA has developed through the jurisprudence of the ECtHR and has no textual basis in the Convention.¹⁷⁷

The MoA, or something similar, exists in many of the different regional human rights systems, but it was the European Court who first developed and introduced the concept into its working.¹⁷⁸ Similar tools had, however, previously existed at the state level. The UK has always had a traditionally strong executive, which tends to have majority control over the legislature, and a relatively weak “separation of powers”. It is therefore no surprise that in UK cases, the judiciary have been known to pay deference to the executive in certain circumstances, a tradition which developed from the idea of *Wednesbury* unreasonableness,¹⁷⁹ whereby the Court would intervene if the decision of the executive branch of Government was manifestly unreasonable, to the point of being irrational, but would otherwise afford deference. The underlying premise was often that because its actions stemmed from sovereign Acts of Parliament, or because it was better

¹⁷² E.g. O’Donnell, 1982, 474; Legg, 2012, p. 15 et seq.

¹⁷³ E.g. Yourow, 1996, p 34; ECtHR, *Handyside v. the United Kingdom*, Application no. 5493/72, 7 December, 1976, at 49.

¹⁷⁴ Legg, 2012, pp. 22-26.

¹⁷⁵ Yourow, 1996, p. 13.

¹⁷⁶ Lester, 1998, 73, 75.

¹⁷⁷ The concepts of subsidiarity and the margin of appreciation will soon be given explicit mention in the text of the ECHR however, through Protocol 15 to the Convention, which will enter into force when states have signed and ratified it. Available at http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.

¹⁷⁸ For one of the most useful accounts of the initial development of the margin of appreciation, c.f. Spielmann 2012 (online). Yourow also offers an excellent overview of the development through the main, relevant case law, in Yourow, 1996, pp. 12-198.

¹⁷⁹ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

placed or had greater expertise in a specific matter, the decisions of the executive branch of government should not otherwise be interfered with.

If this form of deference is justified,¹⁸⁰ then one could argue that the same, or perhaps an even greater level of deference ought to be afforded to States in the context of the European system, given that each State is sovereign, and should be, generally speaking, in a much better position to determine the best action to be taken in a specific situation, because, as the Court once stated, of their “direct and continuous contact with the vital forces of their country.”¹⁸¹ Indeed, the idea of subsidiarity¹⁸² plays a large role in the justification of the MoA. The MoA is significantly more complex than this however, defying simple definition. “Wide” margins of appreciation are consistently referred to in certain areas, illustrating that the scope of the margin changes according to the nature of the right involved, and the values surrounding it, as well as the context of the situation.¹⁸³

3.2.2. Role of the MoA

One of the great problems, as alluded to, is that the Court has never sought explicitly to clarify the method of application of the MoA or to lay out a concrete theory of factors influencing its scope and use. It has become clear, through its use, and establishment as an important concept upon decisions of the Court can turn, that there are a number of factors influencing its scope. These have included, but are not limited to; the expertise of the State on the matter, the democratic legitimacy of the state, the position of the state as “better-placed” to judge the presence or lack of a European Consensus on the subject of a right or a relevant value.¹⁸⁴ In fact the latter concept has taken on such importance in some cases, that Yourow has stated that ‘the law of the Convention sometimes seems

¹⁸⁰ It is argued here that it is not, as it turns the Court to mere supervisor.

¹⁸¹ *Handyside, supra, n. 173.*

¹⁸² A full examination of this principle is unfortunately beyond the scope of this thesis. For more information c.f. Christoffersen, 2009 pp. 227-358.

¹⁸³ States are often given wide margins, in cases relating to issues such as national security (ECtHR, *Klass and Others v. Germany, Application no. 5029/71*, 6 September 1978; or the protection of morals (*Handyside, supra, n. 173.*).

¹⁸⁴ Legg gives a comprehensive exposition of the nature of these margin-affecting factors. Legg, 2012, pp. 116-174.

neither greater nor less than the consensus or lack thereof in the law and practice of the States Parties.”¹⁸⁵ If this is the case then it would seem to indicate that the Court sees its role as secondary to the human rights interpretation of the contracting parties; which would of course be deeply unsatisfactory.

The MoA seems to have become something of a perceived entitlement for States, and as mentioned, will soon be enshrined in the text of the Convention itself. Is it a positive development that the MoA has become so ingrained in the working of the Court? In order to answer this question, it will be useful to examine some key debates and criticism of the MoA in a general sense as well as its influence in the more specific case of concrete judgments of the Court.

3.2.3. Development of the MoA

It will now be appropriate to consider the ways in which, and the cases through which the MoA has developed in practice, beginning with *Greece v UK*.¹⁸⁶

Greece v UK, like all other cases in which the MoA was first used, was in the context of a derogation by a State, in a time of public emergency under Article 15 of the Convention. This allows States to derogate from their obligations under the Convention, when it is deemed that a “public emergency...threatens the life of the nation.”¹⁸⁷ In this case of 1958, regarding certain alleged breaches of the Convention by the UK in its administration of the island of Cyprus, the Commission decided that the UK ought to enjoy a margin of discretion in its assessment of whether the measures taken in this context were “strictly required by the exigencies of the situation”.¹⁸⁸

It was not long, however, before the Court, which was established in 1959, began to use the MoA as a tool in “non-emergency” cases outside of the context of Article 15 derogations. This was seen, firstly through cases whereby the State invoked a defence of public safety or security, but without the corresponding derogation; not an unimaginable

¹⁸⁵ Yourow, 1996, p. 195.

¹⁸⁶ European Commission of Human Rights, *Greece v. the United Kingdom*, application no. 176/56, 1958. (the Cyprus Case).

¹⁸⁷ *ibidem*, at 113.

¹⁸⁸ *ibidem*, at 143.

jump, once it is considered that the state ought to have some discretion as to whether there exists a need for measures in the interests of security.¹⁸⁹ Subsequently, it was the so-called “personal freedoms”, primarily articles 8-11 of the Convention, which formed a large proportion of cases in which the MoA began to play a significant role. Some have noted this subsequent expansion of the doctrine as an unfortunate and excessive inflation of the concept.¹⁹⁰

3.2.4. Is the MoA just human rights “relativism”?

In *Z v. Finland*, Judge Demire stated, “I believe that it is high time for the court to banish that [margin of appreciation] concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies”.¹⁹¹ Some of the most prominent and powerful criticisms of the MoA doctrine focus on the perceived danger that it presents to the universality of human rights, amidst claims that allowing deference to states on the question of rights will lead to different standards of rights protection and varying content and scope of rights themselves.

If such relativism undermines the strength of rights then the opposite extreme would be to secure strict universality. In his partly dissenting judgment in the *Belgian Linguistics Case*, Judge Wold stated that, “[e]very human right granted by the Convention must be the same in all the contracting member states. The right to education must have exactly the same content in Belgium as in Norway or in Turkey and all the other states which have ratified the Convention.”¹⁹² Indeed Yourow believes Judge Wold’s view implies that “the Belgian Linguistic majority’s tacit acknowledgment of the national authorities’ power of appreciation leads in the direction of an interpretive methodology harmful both to the substantive aims of the Convention and to the evolution of its

¹⁸⁹ This was the case in *Klass, supra*, n. 183.

¹⁹⁰ Kratochvíl, 2011, 324.

¹⁹¹ ECtHR, *Z v. Finland*, Application no. 22009/93, 25 February 1997, Partly Dissenting Opinion of Judge de Meyer, at III.

¹⁹² ECtHR, *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium (Merits)*, Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, Partly Dissenting Opinion of Judge Wold.

jurisprudence”¹⁹³ Is this the case? This position would appear to allow very little room for a state’s MoA. However, Legg has stated that “this argument relies on an overly narrow understanding of universality, one that is both unattractive as a matter of theory and likely to have been far from the minds of the framers of the treaties”¹⁹⁴ and therefore that “the MoA properly employed may produce different approaches to the implementation of human rights from place to place, which are nevertheless consistent with the universality of human rights.”¹⁹⁵ In reality, it seems that ultimately, prisoner voting aside, “the Court must seek to reconcile universality and diversity” in its use of the MoA.¹⁹⁶

3.2.5. The MoA as a danger to proportionality

As Van Dijk and Van Hoof state, “given the object and purpose of the Convention as an instrument for the protection of human rights, the Court’s very use of the MOA requires close scrutiny...the margin of appreciation should not lead to a dilution of the proportionality requirement under various provisions of the Convention.”¹⁹⁷

As this thesis has already indicated, the MoA, as employed in the *Scoppola* case in particular, and as it threatens to be employed in any future “non-blanket ban” prisoner voting cases, operates as a gap into which the proportionality test may fall. Given the debunking of the reasons for disenfranchisement laid out above, it would seem that future cases in which prisoner disenfranchisement is held to fall under the MoA of the state, can only be decided as a result of the “margin” operating as a chasm which engulfs a thorough use of the proportionality test. Much of this problem may be attributable to the difficulties in separating and understanding the proportionality analysis as separate from the MoA. Christoffersen has noted the “partial mystery” of the

¹⁹³ Yourow, 1996, p. 34.

¹⁹⁴ Legg, 2012, p. 39.

¹⁹⁵ *ibidem*. p40.

¹⁹⁶ ECtHR, *Leyla Şahin v. Turkey*, Application no. 44774/98, 10 November 2005, dissenting opinion on this point agreeing with the majority.

¹⁹⁷ Van Dijk & Van Hoof, 1998, p. 94.

interaction between the proportionality test and the MoA,¹⁹⁸ and the potentially “impossible task of trying to untangle” the two.¹⁹⁹

3.2.6. The MoA’s direct influence upon the standard of review

It is claimed here that the way in which the MoA has influenced the ECtHR’s standards of review singles it out, as the most important principle in the functioning of the Court, and therefore the most critical to understand.

In the *Handyside* case, it was stated that the MoA should go “hand-in-hand with a European supervision”.²⁰⁰ Rather than construing this as a safeguard against excessive deference, it has sometimes been interpreted as implying a “hands-off” approach. The MoA has directly influenced some judges to call for a test, not dissimilar to a *Wednesbury* assessment, which merely ensures the “reasonableness” of national court decisions before deeming them compatible with the Convention. The dissenting opinion of Judges Thór Vilhjálmsson and Bindschedler-Robert in the *Barthold v Germany*²⁰¹ case stated:

According to the well-established case-law of our Court, it is for the national authorities to make the initial assessment of the necessity. In this respect, the Contracting States enjoy a margin of appreciation. The assessment has to be made in good faith, with due care and in a reasonable manner...As to the supervisory role of our Court, the main question for determination is whether the decisions of the German courts were proportionate to the legitimate aim pursued.²⁰²

The fact that the Court has been “very sparse in substantiating its approach”²⁰³ to the MoA has certainly lead to confusion as to the appropriate margin to afford and thus the appropriate standard of review. Would it be better then, to abandon the MoA, given that it may lead to rights relativism, and potentially compromises rights protection as well as legal certainty? This would appear to be a conceptually crude and naïve solution to these issues. Whatever problems the MoA may conceivably cause, it serves several

¹⁹⁸ Christoffersen, 2009, p. 1.

¹⁹⁹ *ibidem*, p. 3.

²⁰⁰ *Handyside, supra*, n. 173, at 49.

²⁰¹ ECtHR, *Barthold v. Germany, Application no. 8734/79*, 25 March 1985.

²⁰² *ibidem*. Dissenting Opinion of Judges Thór Vilhjálmsson and Bindschedler-Robert

²⁰³ Van Dijk & Van Hoof, 1998, p. 93

important and possibly essential functions. As mentioned earlier, Roberts and Merills have stated, “[t]he difficulty...is that...limitations are often permitted for reasons which on the face of it only the state can properly assess.”²⁰⁴ In what Letsas terms the “structural” element of the doctrine²⁰⁵, the MoA allows the ECtHR to follow the principles of subsidiarity and afford deference to the state, on the basis of the institutional relationship between the two, and the fact that the latter is better placed to take decisions closer to the people (in terms of legitimacy and in terms of expertise). Whilst it is important not to overstate this structural element, it remains important to acknowledge the ideas of subsidiarity and state expertise through this branch of the MoA. It is inherently linked to the fact that international and regional human rights systems are essentially predicated upon the initial consent of sovereign states who must be allowed to take legitimate decisions in the name of their citizens, insofar as they do not violate fundamental rights. Furthermore, in reality we are not moving towards a system without the MoA but in fact towards a system where the MoA is enshrined in the text of the Convention with the forthcoming Protocol 15. Despite worries that this may formalise judicial ambiguity, we must then find a way to demystify the concept and turn it from ambiguous concept to structured principle.

Suggesting that the MoA ought to be removed, would give rise to conflict and difficulty in a system where political considerations are far from insubstantial. As Merills has stated, “the margin of appreciation is a way of recognising that the international protection of human rights and sovereign freedom of action are not contradictory but complementary. Where one ends, the other begins.”²⁰⁷

The substantive face of the margin doctrine refers to the fact that the state ought to be allowed a say on the interpretational questions surrounding the rights and restrictions and the “balance” to be struck between them. This is perhaps the more controversial concept, and indeed the most dangerous to the proportionality analysis. Depending upon

²⁰⁴ Robertson, & Merrills, 1992, p.204.

²⁰⁵ Letsas contends (correctly in my view) that one of the reasons for confusion concerning the doctrine is the failure of the Court to draw a distinction between the ‘structural’ and the ‘substantial’ concepts of the margin of appreciation, Letsas, 2007, pp. 80-98.

²⁰⁷ Merills, 1993, pp. 174-5.

whether the Court conceives of such an analysis in the form of explicit “balancing”, this face of the MoA seems to risk deferring the entire proportionality analysis to the state. This is something which perhaps implicitly occurred in the *Scoppola* case.

This side of the MoA is not without justification however. When a the Court asks if a restriction was “necessary in a democratic society”, the state will want to have its say as to whether its own interpretation of the rights and the public good at stake strike the correct balance within its own system of democracy, bearing in mind its cultural, historical and political particularities. But we should be very careful not to overstate this point. To concede that the above is a job for the state, is to banish the European Court to a role of supervision and ultimately, submission. It must be borne in mind that the state has an important perspective, and the Court must attempt to understand its position, but ultimately, there must be more than mere supervision of the reasonableness of the state action. The proportionality test in particular, must be more concretely structured than this and carried out by the Court.

3.2.7. The European Consensus

As already noted, one of the most important factors, influencing the degree to which a state will be afforded a MoA by the Court, is the existence of a “common European consensus” or lack thereof, on the definition or scope of a certain value or interest under assessment.²⁰⁸ The idea is that the lack of any consensus on a relevant issue would legitimise the state’s interpretation of that issue, as one which could justifiably fall under the range of acceptable interpretations.

This factor also strongly influenced the Court’s findings in the landmark case of *Handyside v UK*,²⁰⁹ which concerned the publication and dissemination of a “Little Red Schoolbook” encouraging young teenagers to question societal norms and to explore their curiosities about drugs and sex. The UK attempted to ban the book under the Obscene Publications Act 1959 (as amended by the Obscene Publications Act 1964). At

²⁰⁸ Legg also offers a comprehensive overview of other factors which may influence the MoA. Legg, 2012, pp. 67-174.

²⁰⁹ *Handyside*, supra, n. 173.

Strasbourg, the applicants claimed a violation of their Article 10 right to freedom of expression, which the Court held to be one of the “essential foundations”²¹⁰ of a democratic society and that restrictions should be narrowly construed. The Court however, also afforded the UK a wide MoA on the basis that there exists no “uniform conception of morals” and therefore no common European consensus.

Is the lack of a common European consensus a valid reason for affording the State a wide MOA? That depends upon a number of different factors. The argument seems strong when it comes to morals. It would appear to be for the State to decide when it ought to restrict a right for reasons of the protection of public morals, given that the ECtHR’s job is not to bring to bear on the conception of morality that is acceptable in a particular society. It *is* for the Court to decide whether the restriction, on the basis of such a conception of morals is “necessary in a democratic society”²¹¹ and it may allow a state a wide MoA in deciding this. Generally speaking, this would seem to be a good reason for affording the State at least an element of deference. That being said, the Court should also not merely shy away from its responsibilities on the basis that morality is not uniform.

What about when the lack of consensus argument is invoked, not in relation to morality, but in relation to some other factor? It is argued here that, depending on the factor involved, there is a much weaker case for a wide MOA to be afforded. It was argued in *Hirst*, that the lack of a common consensus upon political and electoral systems in Europe and more specifically on the prisoner disenfranchisement issue, justified a wide MoA to the point of finding no violation.²¹²

This can be distinguished from the lack of consensus on morals, which have a direct but complex connection with the definitional and foundational questions of rights and their

²¹⁰ *ibidem*, at 49.

²¹¹ The words “necessary in a democratic society” are included in the text of the Convention in articles 8(2), 9(2) and 10(2), sometimes considered as the “personal freedoms”. This test has expanded beyond these three provisions and has come to be integral to the Convention in a great many of other rights however.

²¹² Lord Justice Kennedy, in the Divisional Court, spoke of a “wide spectrum”, in which the United Kingdom fell into the middle, *Hirst, supra, n. 1* at 15; Also asserted by the Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, at 6.

scope. Morality is a fundamental, but amorphous concept which underpins beliefs, influences actions, and may inspire certain legislation. In what can be considered an element of “substantive” deference, in Letsas’s terms, on an interpretational question or a question of a proportionate balance, it is for the European Court to decide whether an interpretation on the basis of morality is compatible with the Convention, affording the state a certain amount of leeway. This leeway may result in a slightly lighter-touch test, but this does on any account mean that Court should abandon its consideration of the factors involved or an effective assessment.

In *Hirst*, the lack of consensus was also asserted in relation to the legitimate aim for the restriction.²¹³ The UK Government argued that the restriction was in the interest of preventing crime, and punishing offenders, and designed to enhance civil responsibility and respect for the rule of law. Given that Art3Prot1 contains no explicit limitation clauses, it appeared to be open to the UK to make such an argument. However, the justification would arguably be disproportionate.

Indeed, there is no European-wide consensus on the best way to prevent crime, nor on the best ways to ensure public safety, but this can be distinguished from the lack of consensus on morality, on the basis of its greater objectivity. The Court is able to consider this submission on its merits, including its prima facie feasibility. Rather than affording a wide margin, the Court ought to scrutinise it carefully, given its questionable nature. This is not to say that the UK should have been afforded no margin, given that it is certainly best placed to decide the optimum methods for preventing crime and ensuring public safety in its own domain, but the action taken in the pursuit of this aim must be shown to be proportionate.

The danger of the MoA operating as such, or merely following a “lack of European consensus” approach was noted in the *Müller*²¹⁴ case, where Judge Spielmann warned that following such an approach might mean that “many of the guarantees laid down in

²¹³ *ibidem*, at 74.

²¹⁴ ECtHR, *Müller and Others v. Switzerland*, Application no. 10737/84, 24 May 1988.

the Convention could be in danger of remaining a dead letter”.²¹⁵ In a similar vein, it has been noted by Yourow, that “without limits being placed upon it, the margin doctrine could in fact become a detriment to the practical efficacy of the Convention.”²¹⁶

Lord Lester states that, “the problem with the Court’s invocation of the margin of appreciation is that it removes the need for the Court to discern and explain the criteria appropriate to particular problems. What is needed is a careful and skilful application of the principle of proportionality.”²¹⁷ This is an extremely pertinent point and one which ties into the criticisms in this thesis, concerning the lack of proportionality analysis in the prisoner voting cases. It is timely then, to consider that principle now.

3.3. The Proportionality Test

An important principle, which, though nowhere in the European Convention on Human Rights mentioned in express terms, permeates the whole of its fabric is that of proportionality. Essentially this is but another facet of the concept of balance, and balance is very much at the centre of the whole subject of the protection of human rights, there being a sort of inbuilt balancing mechanism in the whole of the structure of the Convention.²¹⁸

A restriction on any of the rights laid down in the Convention must be prescribed by law, in pursuit of a legitimate aim, and “necessary in a democratic society”. One of the means of determining and strengthening this necessity is through the test of proportionality. This test is quite context specific however, and is sometimes conceived of in different ways. A restriction may be held to be disproportionate if less stringent measures could have been taken to achieve the legitimate aim;²¹⁹ this is to consider the proportionality between the ends (to be achieved) and the means (employed). Proportionality is also sometimes considered as striking the “necessary balance between

²¹⁵ Dissenting Opinion of Judge Spielmann, at 10(b).

²¹⁶ Yourow, 1996, p.129.

²¹⁷ Lester, 1998, p. 78.

²¹⁸ Cremona, 1995, p.323.

²¹⁹ This was the case in *Müller and Others v. Switzerland*, *supra*, n. 214, in which it was held that destruction of offensive painting would have been disproportionate when it was open to the Court to take the “minimum action necessary”, in confiscating them, at 40.

the collective interest of society and the individual rights”, as held in the *Belgian Linguistics Case* of 1968.²²⁰

This conception of balancing different interests, accords, broadly speaking, with the interest theory of rights presented in the previous chapter. Indeed, the Court states that, “[t]he Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.”²²¹ This idea of striking a balance is strongly linked to the idea of proportionality, in fact it seems to be implied in certain cases that the balance *is* proportionality. However, the Court also stated in *Belgian Linguistics* on the question of discrimination under Article 14, that violation occurs, “when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.”²²² So what is proportionality? Is it the identification of the least stringent, effective measure, is it pinpointing a reasonable relationship between means and ends, is it striking a “just balance” between individual and collective goals, or are these in fact one and the same test masquerading under different descriptions? This question will be considered throughout this section.

3.3.1. Political Rights – Essence or Balance?

Christina Binder has considered the issue of proportionality within the field of political rights and noted the delicacy of the necessary balance between sovereignty and rights protection, stating, that “political rights situate themselves in the heart of national sovereignty since they relate to issues central for state functioning, such as the right to vote and stand for elections as well as the features of specific electoral systems”.²²³ This certainly helps to explain some of the Court’s reliance on the MoA and reluctance to take a strong position on prisoners’ voting rights, essentially deeming it a matter for the state to decide in *Scoppola*. Furthermore, as well as going to the heart of parliamentary

²²⁰*Belgian Linguistics supra*, n. 192, at 13.

²²¹ *ibidem*, Interpretation of the Court, at 5.

²²² *ibidem*, at 10.

²²³ Binder, 2012, p. 507.

legitimacy and sovereignty, Binder further notes that political rights, especially as they relate to electoral systems “are a very direct expression of the specific historical, cultural legal and political conditions of a state”.²²⁴ This places them in a position which may sometimes be difficult to reconcile with the universality of rights. The challenge to the Court here will clearly be not to concede that the differences in political regimes justify differences in rights protection but to balance such protection whilst also respecting differences between states.

Diversity in political systems is certainly desirable and necessary, however, it is argued that diversity in electoral systems can still exist and does still exist after human rights are ensured. A state that ensures the right to vote is fully implemented does not lose its diversity. It must be ensured that diverse systems are compatible with human rights protection. Once that is the case they can be as diverse as possible. If we care about human rights at all, we cannot put them behind diversity of political systems.

In the difficult task of balancing respect for diversity with respect for rights, the standard of review which emerges from the Court’s use of the proportionality analysis and the MoA, is key. On the question of this standard, Binder notes a perceived shift between what she terms a “black and white” to a “shades of grey” approach, implying a move from the Court’s early jurisprudence, where it considered whether the essence of a right had been infringed by the restriction, to a more nuanced consideration of a more diverse range of factors in the balance of a proportionality analysis.²²⁵ The benefit of this approach is clearly that the Court is more open to the diversity of different political systems, which helps to strike a balance between rights protection, diversity and sovereignty. However, as Binder does also note, and has been argued by those who claim that proportionality is a danger to rights, such a balance may run the risk of “balancing away”²²⁶ the right itself. Although the “essence of rights” doctrine may be premised on a higher burden to show a rights violation and is more deferential, the “shades of grey” approach could end up being more deferential in a de facto sense. It is

²²⁴ *ibidem*.

²²⁵ *ibidem*, pp. 512-517.

²²⁶ *ibidem*. p 518.

argued that the Court has, in the prisoner voting line of cases, lost sight of the black and the white, and moved too far from the “essence of rights” doctrine. The essence of the right to vote, has clearly been violated, as admitted by Lord Justice Kennedy in the Divisional court judgment in *Hirst*, but a move away from a “black and white” approach has allowed a greater role for the MoA, in a balancing assessment that has nullified and objective assessment for the ECtHR which is desperately needed. For similar reasons, Binder notes the need for the “essence of rights” approach to be retained and borne in mind rather than discarded entirely, citing the case of *Yumak and Sadak*²²⁷ as one in which the essence of the right to vote seemed to have been violated and yet the proportionality analysis “balanced this away” rather than focusing on the right and finding a violation.²²⁸ The very same has occurred in the prisoner voting cases. Whilst there are a plethora of factors to consider, and a “shades of grey” approach is needed, the ECtHR has unfortunately lost sight of the black and white.

3.3.2. “Necessary in a democratic society”

The “necessary in a democratic society” test is one way of considering, on balance, whether a restriction is proportionate to the aim pursued, in the wider sense of considering context specific circumstances and multiple factors. It is here then, that a substantive version of the MoA most logically arises as the state will wish to offer its own interpretation as to the necessity of the rights restriction and the interpretational and balancing questions inherent in its democratic society.

The *Handyside* case was notable for the fact that the Court gave considered explanation of the phrase “necessary in a democratic society” when considering the need for a restriction upon the right relied upon by the applicant. It held that “necessary” was not a flexible term and:

[N]ot synonymous with "indispensable" ...neither has it the flexibility of such expressions as "admissible", "ordinary"... "useful", "reasonable" or "desirable". Nevertheless, it is for the national

²²⁷ ECtHR, *Yumak and Sadak v. Turkey*, Application no. 10226/03, 8 July 2008.

²²⁸ Binder, 2012, 518.

authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.²²⁹

In the *Barthold* case, the Court explained further that:

The contracting states enjoy a power of appreciation in this respect, [that] goes hand in hand with a European supervision which is more or less extensive depending upon the circumstances; it is for the Court to make the final determination as to whether the interference in issue corresponds to such a need, whether it is "proportionate to the legitimate aim pursued" and whether the reasons given by the national authorities to justify it are "relevant and sufficient".²³⁰

The idea of a restriction needing to be "necessary in a democratic society" as well as the corresponding "pressing social need" perhaps implies its necessity to prevent some form of harm, which fits well with the theory discussed throughout this paper.

A state is of course, better placed to judge the existence of a "pressing social need" within its borders, by reason, as the Court held in *Handyside*, of its "direct and continuous contact with the vital forces of the country."²³¹ It is argued that the existence of a "pressing social need" is highly questionable in the case of prisoner voting restrictions. There, quite frankly, would appear to be little harm to protect against worthy of making a restriction "necessary in a democratic society", at least if we are to take such a test seriously and not to use it as a mere substitute for declaring a state consistently better-placed to judge the necessity of a restriction. Whilst, it is argued here, the Court ought to ask whether it is necessary in the *specific* democratic society in question, and not just *any* democratic society, it still seems counterintuitive to hold that restricting voting rights of any person – a foundational principle of democracy – is necessary in a democratic society. The only time that this could be the case, is if such a restriction was considered necessary, in order to protect democracy itself.²³² Whether the restriction of prisoners' voting rights is needed for this purpose will be considered in the final chapter.

²²⁹ *Handyside*, supra, n. 173, at 48.

²³⁰ ECtHR, *Barthold v. Germany*, Application no. 8734/79, 25 March 1985, at 55.

²³¹ *Handyside*, supra, n. 173, at 48.

²³² Ramsay has put forward an argument that democracy is more complex than often represented that that it does indeed need protection from prisoner voting. Ramsay, Peter, 'Faking Democracy with Prisoners' Voting Rights, pp. 1-13 in *LSE, Law, Society and Economy Working Papers*, no.7, 2013

The problem of the *necessary in a democratic society* test then, is that it seems to be the point at which the MoA and the proportionality analysis intertwine, as can be inferred from the above statement in the *Barthold* case. At this point, the two become quite difficult to separate. As Cremona notes:

In practice the principle of proportionality goes hand in hand with ... a margin of appreciation....In fact...that margin of appreciation is commonly the starting point in its assessment of proportionality and also figures in the conclusion in the sense either that, having regard to the margin of appreciation, the impugned measure is found to be proportionate...or that, even having regard to the margin of appreciation, it is found to be disproportionate.²³³

The danger with this approach is that it risks the assessment of whether a measure was proportionate, also being deferred to the state. It would seem that in certain cases, the MoA and the proportionality test are liable to collapse into the same analysis. As this thesis believes a certain element of balancing to be unavoidable and necessary (in the sense that balancing is synonymous with analysing and does not need to imply a cost-benefit analysis) the best solution is to have safeguards in the form of insulating certain parts of the proportionality assessment from the balancing exercise, where it is more liable to be subject to deference. This part of the proportionality analysis will therefore be protected from the excessive use of the substantive element of the MoA.

3.3.3. Means and ends vs. striking a balance: The inevitability of balancing

Some commentators have argued that the balancing analogy is dangerous to rights protection, or that proportionality itself is an “assault on human rights.”²³⁴ Some, including Luteran, have argued that we would be better to use the idea of proportionality between means and ends.²³⁵ In the *Dudgeon* case the Court stated:

Notwithstanding the MoA left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the

²³³ Cremona, 1995, p. 328.

²³⁴ Tsakyrakis, 2009, 468

²³⁵ Luteran, 2009, pp. 296; 305, cited by Legg, 2012, p. 187.

circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it.²³⁶

The Court here seems to imply that the test to be used is of proportionality between ends and means. Both Legg and Luteran seem to feel positively about such a test, over the idea of proportionality as balancing. Legg construes Luteran's opinion as follows:

“Luteran argues that the language of balancing should be abandoned, since it gives rise to a prevalent and unhelpful understanding of proportionality as a cost-benefit analysis when instead the courts are assessing the proportion between the ends and means of state action; It is wrong to think that the limitation clauses of the ECHR open the door to an abstract balancing exercise between the various conflicting interests that are involved”.²³⁷

This is an interesting view because it seems to assume that there is a difference between, on the one hand, a fair balance between the collective and the individual interest, and on the other hand proportionality between ends and means, without actually explaining what proportionality between ends and means constitutes. “Balancing” as conceived in this thesis, is merely synonymous with a form of analysis, which is impossible to avoid when assessing whether state action was proportionate. One can certainly attempt to avoid the *language* of balancing but it is more than likely that any form of analysis that goes beyond a mere verification of the existence of a link between ends and means, will necessarily involve weighing of factors. As the Court stated in *Lonnroth v Sweden*, “the search for a fair balance is inherent in the whole of the Convention”²³⁸

Legg states that, “assessing proportionality between ends and means involves judgment on the rectitude of state action by assessing all of the relevant reasons for and against that action...this is not some rational weighing process but an exercise of choice about the importance of the relevant considerations taken together.”²³⁹ In a “choice about the importance of the relevant considerations taken together” – how does one arrive at the said choice? One does so through analysis of the relevant considerations. And how does

²³⁶ ECtHR, *Dudgeon v United Kingdom*, (Application no. 7525/76) 22 October 1981, at 59.

²³⁷ Legg, 2012, p. 186.

²³⁸ ECtHR, *Sporrong and Lönnroth v. Sweden*, Application no. 7151/75; 7152/75, 23 September 1982, at 69.

²³⁹ Legg, 2012, p. 185.

one analyse the considerations? By comparing and contrasting them with other principles and considerations. Legg's point seems to try and distinguish between "balancing" as analysing and comparing state actions and state aims (means and ends) to assess the proportionality, and assessing the relevant reasons and principles to decide whether they justify state action. Legg agrees with Luteran that "[b]alancing gives rise to an unhelpful idea of a cost benefit analysis, when instead the courts are assessing the proportionality between ends and means of state action."²⁴⁰ But how is the Court to assess the proportionality? These assessments cannot be carried out in a vacuum. A consideration means nothing when it stands alone, uncomparing. The analyses would seem to reduce themselves to more similar exercises than Legg claims.

Whilst Legg and Luteran appear to take exception to the *rhetoric* of balancing, there does seem to be a tendency to assume that balancing is easy to avoid. Letsas states:

It is wrong to think that the limitation clauses of the ECHR open the door to an abstract balancing exercise between the various conflicting interests that are involved, The point of the limitation clauses is to invite the court to identify what principle justifies the right in question and to examine whether that principle applies in the applicant's case.²⁴¹

One cannot simply claim that we must look to the values behind rights²⁴² and compare them, or consider the most important principles in the case and analyse them²⁴³, for whether directly or indirectly, we are performing the same exercise as we pretend that we are trying to avoid, albeit in a more confusing fashion. Either rights can be balanced, or they cannot. And if they cannot, then the concept of proportionality ceases to have a function at all.

3.3.4. Complementary not contradictory standards

To respond to the earlier question of whether the different formulations of proportionality are distinct, or effectively variations of the same test, I would argue that to a greater or lesser extent, they are all constituent elements of the overall idea of a fair

²⁴⁰ Luteran, 2009, p. 260, cited by Legg, 2012, p. 185.

²⁴¹ Letsas, 2007, p. 14.

²⁴² As Letsas appears to above.

²⁴³ Legg, 2012, p. 185.

balance to be struck between means and ends. Some elements of this test would appear more objective than others, and some, a times will appear more relevant than others (for example, the “less onerous means principle” if an artist’s paintings are burned to prevent an exhibition). Such principles come together, however, to allow the Court to interpret whether a fair balance has indeed been struck.

Legg is right to claim that the idea of balancing can be dangerous. But the reason for this, it is argued here, is that it is difficult to control everything that enters the balance. The margin of appreciation may sneak in, in the substantive sense, to swing the balance. This is why it is best to consider the idea of proportionality as necessarily composed of all the different principles and tests as complementary rather than contradictory. The existence of a sufficient and discernible link, proportionality between ends and means, and the existence of a less onerous alternative, will all come together to indicate whether a fair balance has been struck between the means employed and the aim pursued. Insofar as the narrower, and more objective elements (the discernible link in particular) can be insulated from the broader considerations of fair balance, they can protect the proportionality test from being overtaken by the MoA.

3.3.5. Two-stage proportionality and balancing harms

It is suggested then, that we separate the more objective principles in the proportionality analysis away from the “necessary in a democratic society” test, in order to avoid the reach of the substantive MoA; namely the existence of a discernible and sufficient link between ends and means, as noted in *Hirst* and the existence of a less onerous effective measure. This separation is important because the “necessary in a democratic society” test has become a varying mesh of different factors which may become blurred and overlooked when a wide MoA is granted. It is argued then, that before the “necessity” can be considered and before any form of balancing can be entered in to, a proportionality test should first seek to establish the existence of an objective and discernible link, as well as the suitability of the action, in the sense that there was no less stringent or onerous measure that could have been taken. The State will have little

room for margin of appreciation in this first part of the test, but will have in the second part assessing whether the action was “necessary in a democratic society”.

If this rational and discernible link between means and ends does not, in the courts view, reasonably exist – it should not pass on to the second stage of the proportionality test, to consider the necessity, because if there was no rational basis for the court’s action then it cannot have been proportionate and it cannot have been necessary. A violation should then be found.

3.3.6. The two-stage approach employed in prisoner voting cases

It is argued here that, given the questionable and arguably illogical nature of the link between the means employed and aim pursued, the prisoner voting cases, should prima facie not pass the first stage and therefore be declared disproportionate, falling outside of the acceptable margin of appreciation.

If such a case involved electoral fraud, or crimes undermining the very democratic system, the discernible and logical link could, in principle, be present – aiming to protect harms to others’ rights to vote in free and fair elections. Whether or not this is realistic in practice is difficult to say, but the link is present, which would make it prima facie acceptable to consider all other reasons on balance, in the second part of the analysis.

3.3.7. The strength of the approach

Despite the wide MoA in such cases, Yourow has noted that the Court changed approach in cases such as *Dudgeon*²⁴⁴ and *Sunday Times*²⁴⁵ because allowing a wide MoA here would have produced results “contrary to the Convention’s basic values.”²⁴⁶ In the *Dudgeon* case, the Court found that there was no pressing social need for a restriction on the applicant’s Article 8 right to private life caused by legislation prohibiting homosexual acts between consenting male adults. The Government’s aim

²⁴⁴ *Dudgeon, supra*, n. 236.

²⁴⁵ ECtHR, *Sunday Times v. United Kingdom*, Application no. 6538/74, 26 April 1979.

²⁴⁶ Yourow, 1996, p.12.

appeared to be protection against harm to vulnerable people in society.²⁴⁷ Such an argument would not stand up to the first stage requirement of constituting a discernible and logical link to the rights restriction and should therefore constitute an indication against a wide MoA and towards a violation.

In the case of *Silver v UK*,²⁴⁸ a prisoner's private correspondence, and letters were intercepted before being sent and read. The justification for this was inter alia, prison security and the prevention of crime. Clearly in this case there exists a discernible and logical link between the means and the ends of state action but this is a good example of the insufficiency of this test alone. We cannot know if the measure was proportionate in the sense of being necessary, without other information. In order to know if the ends justify the means we need to know the content of the letters, the frequency, the recipients, and so on.

In the case of *Müller*,²⁴⁹ the lack of consensus on morality appeared to justify the confiscation of paintings deemed offensive. This is arguably a classic case of a wide MoA obscuring key parts of the proportionality test. The Court could have asked itself whether a more proportionate response existed, in the sense of being less onerous, such as subjecting the paintings to restricted showings. Such a decision does not seem to uphold, as the Court said in *Handyside*, the values of "tolerance and broadmindedness without which there is no "democratic society."²⁵⁰

With a two-stage approach to proportionality, the Court could have asked itself the objective questions relating to proportionality, namely; "is there a discernible and logical link between the means and the ends of the restriction?" and "was there a less onerous measure and suitable measure that could have been taken?" These questions, although the state possesses some expertise in their regard, should be open to a much lesser influence by the MoA. In this case, the link exists, but there was a less intrusive course of action open to the state. The presumption should therefore be in favour of a

²⁴⁷ *Dudgeon, supra*, n. 236, at 47.

²⁴⁸ ECtHR, *Silver and Others v. United Kingdom*, (Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75), 25 March 1983.

²⁴⁹ *Müller, supra*, n. 214.

²⁵⁰ *Handyside, supra*, n. 173, at 49.

violation. In *Hirst*, it is argued that there was no discernible and logical link between banning prisoners from voting and preventing crime, bearing in mind that the burden of proof needs to be on the state, accused of violating rights. And if this is the case less onerous action could have been taken for the achievement of the state aim (perversely the very opposite of what the state, in fact, did. In the Dissenting Opinion of Judge Costa in *Hirst*, he noted questionable logic of this link, stating:

I confess to having doubts about the legitimacy – or rationality – of that aim. It is perfectly conceivable, for example, that a person who has been convicted of electoral fraud, of exceeding the maximum permitted amount of electoral expenditure or even of corruption should be deprived for a time of his or her rights to vote and to stand for election. The reason for this is that there exists a logical and perhaps even a natural connection between the impugned act and the aim of the penalty.²⁵¹

Whilst it is accepted that there is no proof that enfranchising prisoners would improve crime rates, this misses the point that there is also no proof that it does not. This would be a useless argument, except for the fact that priority must be to explicit and individual rights²⁵² unless there is clear justification for their restriction.

The examples offered here are intended to help illustrate the potential flexibility of this approach and to phase out cases where the “essence of the right” would appear to be breached, as well as to be considerate of a wider range of factors that a state is best placed to assess (a “shades of grey” proportionality analysis).

3.4. Incommensurability revisited

As we have already mentioned, the Court’s conception of a “pressing social need” for a restriction fits well with the protection against harms approach, and helps to explain the search for a fair balance inherent in the Convention, which was mentioned in *Sporrong and Lönnroth*²⁵³

²⁵¹ *Hirst, supra*, n. 1, Dissenting Opinion of Judge Costa, at 3.

²⁵² Greer, 2006, pp. 203-213.

²⁵³ *Sporrong and Lönnroth, supra*, n. 238, at 69.

Letsas however, seems to reject balancing entirely and argues that in their decisions, the Court should reject “hostile external preferences”²⁵⁴ By the theory presented throughout this thesis, we can certainly agree to reject any considerations that do not protect against harm, but this does not mean that we should reject all balancing.²⁵⁵

Alexy has argued that balancing is not “all or nothing” but is a “requirement to optimise”.²⁵⁶ His theory works by noting the “intensity of nonsatisfaction of...one principle versus the importance of satisfying the other.”²⁵⁷ Given the inability to measure concepts like dignity, any balancing exercise as conceived above can operate merely as a guide, but it can be a useful guide, especially if we utilise more objective concepts like the effect of the harm or potential harm on a person’s autonomy, capabilities and development. These are all mutually reinforcing factors which can contribute to a person’s dignity and we can thus build an analysis which gives an indication of the strength of the arguments involved.

3.5. Conclusions: decency and democracy

Throughout this thesis we have seen that far from justifying feeling sick about prisoners voting, the reasons shown, and those debunked, lead to the view that much more could be gained by enfranchising prisoners than could be lost, certainly in the sense that more harm is done by disenfranchising, and no harm (in the sense conceived in this thesis, is done by affording prisoners the vote. It is certainly not acceptable for one to tell another how to feel, and it is clear that there will be a wide range of strong opinions on the matter. But if we believe in the importance of human rights, then we cannot be entitled to let those feelings govern our judgments about such rights. Human rights, centred around protecting the dignity of human beings is wholly undermined if we are governed by considerations of how we feel toward people, independently of the harm that they present.

²⁵⁴ Letsas, 2007, p. 14.

²⁵⁵ For a strong interest theory of balancing, see Alexy, 2009.

²⁵⁶ *ibidem*, p. 107 .

²⁵⁷ *ibidem*, p. 105.

In chapter two, we saw how the arguments for prisoner disenfranchisement, and the approach of the European Court, turned what should be a right to vote, into a privilege. The third chapter tried to show how this trend could be reversed, by taking the considerations from chapter one, concerning the values at the basis of rights, and by showing that rights should not be outweighed by political considerations that do not protect against any harm but merely reinforce moral judgements. Furthermore, the third chapter attempted to show how the narrower, more objective part of the proportionality analysis could be insulated from the widening scope of the MoA; a particularly important step in the case of political rights, where a fair balance is difficult to strike and the ECtHR is clearly tempted to use the MoA as an increasing justification for deference. As Easton states, [t]he view that prisoners do not deserve rights, that prisoners are second class citizens and that civic rights may be earned through good behaviour and forfeited through wrongful acts, remains very strong.²⁵⁸ Indeed, it will be difficult to overcome these feelings with logical arguments because they seem to be based upon an intuitive moral feelings and reflexes. It may be very important to consider Margalit's concept of the "decent society" as one whose institutions do not humiliate its subjects.²⁵⁹ Humiliation seems the antithesis of dignity, and thus a decent society ought to respect the rights of its members, especially its most vulnerable. In this regard, feeling of sickness towards prisoners may do more harm when expressed externally as it has the capacity to humiliate.

It seems to be common to claim that, in this day and age "universal suffrage" exists, without stopping to consider whether this is true. Beckmann has noted the tendency to hide behind the idea that "who should vote in a democracy", is impossible to answer.²⁶⁰ It seems to me logical that all those affected by the laws, should have a say in their creation,²⁶¹ but perhaps this is too simple. It seems to me *illogical*, that it would be "necessary in a democratic society" to undermine the principles of democracy. As Beckmann states, "the fact of democratic exclusion leads us to ask how denying people

²⁵⁸ Easton, 2011, 251.

²⁵⁹ Margalit, Avishai, *The Decent Society*, Harvard: Harvard University Press, 1998, p. 1.

²⁶⁰ Beckmann, 2009, p. 10.

²⁶¹ Näsström, 2011, 116.

the right to vote could ever be justified in a democracy”.²⁶² Ultimately, as the Court, and the United Kingdom would do well to remember, “the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion.”²⁶³

²⁶² Beckmann, 2009, p. 10.

²⁶³ *Hirst, supra, n. 1*, at 59.

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