


Prisoner voting in the United Kingdom: an empirical study of a contested prisoner right

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Do prisoners' rights matter? This paper examines this question through a social-legal study of one of the most controversial prisoners' rights issues of recent decades: prisoner voting. Thousands of prisoners are legally eligible to vote in the United Kingdom. Drawing on a survey of 134 electoral administrators, we explore whether they are exercising that right and the potential barriers to electoral participation which they face. We find that participation among eligible prisoners is extremely low. Further, we identify problems in the administration of prisoner voting rights which may prevent eligible prisoners from voting. In light of these findings, we argue that the scale of prisoner disenfranchisement is likely to be graver than previously thought and open to future legal challenge. The prisoner voting example provides a cautionary tale of the limitations of prisoner rights, both as a measure of existing prison conditions and as tools for transforming them.

INTRODUCTION

Do prisoners' rights matter? Since the 1970s, when they were 'unknown to English law',¹ prisoner rights in the United Kingdom (UK) have proliferated. Alongside an increasingly detailed body of international human rights law on the treatment of prisoners,² the principle of legality,³ the European Convention on Human Rights (ECHR) and the Human Rights Act (HRA) 1998 have been central to this development.⁴ Today, rights are the 'dominant

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1 Stephen Livingstone, 'Prisoners Have Rights, but What Rights?' (1988) 51 *MLR* 525.

2 For example United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (17 December 2015) A/RES/70/175; United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (21 December 2010) A/RES/65/229; Kresimir Kamber, 'Remedies for Breaches of Prisoners' Rights in the European Prison Rules' (2020) 11 *New Journal of European Criminal Law* 467.

3 David Scott, 'The Politics of Prisoner Legal Rights' (2013) 52 *Howard Journal of Criminal Justice* 233, 239–41.

4 Elaine Genders and Elaine Player, 'Rehabilitation, Risk Management and Prisoners' Rights' (2014) 14 *Criminology & Criminal Justice* 434, 437.

framework for regulating prisons'.⁵ How and why these rights matter, however, is the subject of trenchant debate among researchers, prison reformers and campaigners. For some, they offer the only realistic guarantee of minimum standards for a vulnerable population at the mercy of the state.⁶ They are conducive to better prison conditions, more effective re-integration, and present an opportunity to challenge 'punitive penal policies in a regressive penal culture'.⁷ For others, however, prisoners' rights matter, but for altogether different reasons. In an environment where control, deprivation, and suffering are routinised features of daily life,⁸ prisoner rights act 'as a smokescreen that prevents a radical questioning of the prison's existence and dominance'.⁹ They provide a 'cloak of legitimacy for existing penal practices'¹⁰ and perpetuate the idea that imprisonment is, or could ever be, humane.¹¹

In this article, we address the question empirically. Specifically, we examine whether prisoners' rights matter through a socio-legal investigation into voting by prisoners who are legally entitled to vote in UK elections. The question of prisoner enfranchisement in the UK was the subject of a fractious and long-running legal dispute. In 2005, the European Court of Human Rights (ECtHR) held that the state's disenfranchisement of convicted prisoners violated the right to free and fair elections under Article 3 of the First Protocol (A3P1) to the ECHR.¹² Thereafter, prisoner voting became a focal point for growing conservative anxieties over human rights legislation and the role of supranational European institutions.¹³ Successive administrations refused to implement the ruling, but in 2017 the UK Government announced a set of administrative changes which included allowing prisoners on temporary release to vote. The 'Lidington compromise'¹⁴ – named after then Secretary of State for Justice, David Lidington MP – was formally accepted by the Council of Europe's Committee of Ministers the following year, bringing the matter to a close.¹⁵

5 Sarah Armstrong, 'At Risk of Rights: Rehabilitation, Sentence Management and the Structural Violence of Prison' (2020) 28 *Critical Criminology* 85.

6 Susan Easton, *Prisoners' Rights: Principles and Practice* (London: Routledge, 2011).

7 Scott, n 3 above, 237.

8 Nils Christie, *Limits to Pain* (Oxford: Martin Robertson, 1981); Gresham Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton, NJ: Princeton University Press, 1958); David Scott and Helen Codd, *Controversial Issues in Prisons* (Maidenhead: Open University Press, 2010). Joe Sim, 'An Inconvenient Criminological Truth: Pain, Punishment and Prison Officers' in Jamie Bennett, Ben Crewe and Azrini Wahidin, *Understanding Prison Staff* (London: Routledge, 2007).

9 Isobel Renzulli, 'Prison Abolition: International Human Rights Law Perspectives' (2022) 26 *International Journal of Human Rights* 100, 101.

10 Scott, n 3 above, 238.

11 Thomas Mathiesen, *The Politics of Abolition Revisited* (Oxford: Routledge, 2015)

12 *Hirst v United Kingdom (no 2)* (2006) 42 EHRR 41 (*Hirst*).

13 C.R.G. Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2013) 66 *Parliamentary Affairs* 511.

14 C.R.G. Murray, 'Prisoner Voting and Devolution: New Dimensions to an Old Dispute' (2021) 25 *Edinburgh Law Review* 291.

15 Committee of Ministers, 'Resolution CM/ResDH(2018)467' Council of Europe, 2018 at <https://hudoc.exec.coe.int/ENG#%7B%22EXECIdentifier%22:%5B%22001-188692%22%5D%7D> (last accessed 27 June 2022).

As a result of this dispute, prisoner voting has received extensive parliamentary consideration,¹⁶ the merits (or otherwise) of extending the franchise have been debated at length,¹⁷ and the UK's response to the various judgments of the ECtHR have been examined in detail.¹⁸ What has been largely overlooked, however, is the fact that tens of thousands of prisoners are already entitled to vote in the UK. Unconvicted, unsentenced and civil prisoners: all retain the right to vote by post or proxy under electoral law.¹⁹ Prisoners on temporary release or home detention curfew can vote when outside of prison,²⁰ while those serving up to one year sentences in Scotland are now permitted to vote in devolved and local elections.²¹ So far, however, there has been no concerted attempt to ascertain whether these prisoners are able to *exercise* their right to vote.

This article provides the first in-depth empirical investigation of this issue. Offering new insights into electoral participation at the margins, it presents the findings from a survey of 134 electoral administrators across the UK, supplemented by information gathered through Freedom of Information requests. In covering all parts of the UK, the article takes account of the 'new dimensions'²² to prisoner voting after the Scottish parliament and the Senedd (Welsh parliament) acquired control over their respective devolved and local electoral

16 House of Commons and House of Lords Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* HL 103 HC 924 (2013); Equalities and Human Rights Committee, *Prison Voting in Scotland* SP 315 (2018); Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (Cardiff: National Assembly for Wales, 2019).

17 Mandeep K. Dhami, 'Prisoner Disenfranchisement Policy: A Threat to Democracy?' (2005) 5 *Analyses of Social Issues and Public Policy* 235; Deborah Cheney, 'Prisoners as Citizens in a Democracy' (2008) 47 *Howard Journal of Criminal Justice* 134; Susan Easton, Tim Black and Mandeep K. Dhami, 'Should Prisoners be Allowed to Vote?' (2012) 90 *Criminal Justice Matters* 43; Claudio López-Guerra, *Democracy and Disenfranchisement: The Morality of Electoral Exclusions* (New York, NY: OUP, 2014); Peter Ramsay, 'Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy' (2013) 16 *Critical Review of International Social and Political Philosophy* 421; Peter Ramsay, 'Faking Democracy with Prisoners' Voting Rights' LSE Law, Society and Economy Working Papers 7/2013; Pablo Marshall, 'Voting from Prison: Against the Democratic Case for Disenfranchisement' (2018) 11 *Ethics and Global Politics* 1.

18 For example Sophie Briant, 'Dialogue, Diplomacy and Defiance: Prisoners' Voting Rights at Home and in Strasbourg' (2011) 3 *EHRLR* 243; Danny Nicol, 'Legitimacy of the Commons Debate on Prisoner Voting' [2011] *PL* 681; C.R.G. Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after *Hirst v United Kingdom*' (2011) 22 *King's Law Journal* 309; Murray, n 13 above; Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *HRLR* 503; Kanstantsin Dzehtsiarou, 'Prisoner Voting Saga: Reasons for Challenges' in Helen Hardman and Brice Dickson (eds), *Electoral Rights in Europe: Advances and Challenges* (London: Routledge, 1st ed, 2017). Elizabeth Adams, 'Prisoners' voting rights: case closed?' *UK Constitutional Law Association* 30 January 2019 at <https://ukconstitutionallaw.org/2019/01/30/elizabeth-adams-prisoners-voting-rights-case-closed/> (last accessed 27 June 2022); Murray, n 14 above; Ergul Celiksoy, 'Execution of the Judgments of the European Court of Human Rights in Prisoners' Right to Vote Cases' (2020) 20 *HRLR* 555.

19 Representation of the People Act 1983, as amended by the Representation of the People Act 2000. UK Ministry of Justice, *Restrictions on Prisoner Voting Policy Framework* (2020).

20 *ibid.*

21 Scottish Elections (Franchise and Representation) Act 2020, s 5.

22 Murray, n 14 above.

arrangements.²³ This approach contributes toward a more constitutionally literate debate on prisoner rights in the UK.²⁴

We find that participation among eligible prisoners is extremely low. Further, we identify two broad sets of issues in the administration of prisoners' electoral rights which may prevent prisoners from voting. The first are *logistical* and include poor communication and an absence of information-sharing between electoral and prison services across England and Wales, the dispersal of prisoners across prison estates, and a prevalence of incomplete or erroneous applications, potentially indicative of a lack of support within prisons for the registration process. The second are *interpretive* and relate to electoral administrators' concerns that aspects of the guidance on remand and temporary licence prisoners are insufficient to be applied consistently.

Based on these findings, we argue that the extent of prisoner disenfranchisement in the UK is likely to be graver than previously thought. Eligible prisoners who wish to vote face a system defined by administrative complexity and uncertainty, in which the right to vote can be obstructed by circumstances beyond prisoners' control, without scrutiny or consequence. While the Lidington compromise appears to have drawn a line under this issue, we contend that the state's rules and procedures on prisoner voting require a fundamental reappraisal. Returning to the question posed at the outset, the prisoner voting example demonstrates that prisoners' legal rights are a poor measure of the existing conditions facing prisoners. In practice, their rights will count for little while the administrative infrastructure and enforcement mechanisms which allow them to be realised are absent.

The remainder of the article proceeds as follows. First, we situate our empirical study within wider debates on prisoner rights and provide the legal and political context of prisoner voting in the UK. Next, we set out the methodology for our research and justify our survey-based approach. In the absence of publicly available data, we contend that electoral administrators are uniquely well-placed to provide insight into the workings of this remote section of UK electoral systems. In the remaining parts of the paper, we set out the quantitative and qualitative findings from our survey before going on to consider their significance for wider debates on prisoner disenfranchisement and prisoner rights.

PRISONER VOTING: TESTING THE LIMITS OF PRISONER RIGHTS

The influence, extent and value of prisoner rights has attracted considerable debate in recent years.²⁵ Advocates for prisoner rights emphasise the role that rights play in providing a bulwark against 'harsh and degrading punishments

23 Scotland Act 2016, ss 3-11; Wales Act 2017, ss 5-10.

24 On the lack of constitutional literacy within debates on criminal justice in the UK, see David Garland, 'Preface' in Peter Duff and Neil Hutton, *Criminal Justice in Scotland* (Aldershot: Ashgate, 1999) xiv. Hazel Croall, Gerry Mooney and Mary Munro, *Criminal Justice in Scotland* (Abingdon: Willan Publishing, 2010).

25 Scott, n 3 above, 234.

and from populist punitiveness'.²⁶ Rights, they also argue, facilitate scrutiny, offering 'standards against which to evaluate prison rules and practices'.²⁷ By giving prisoners recourse to the courts, they 'provide another way of opening up the closed world of the prison to public scrutiny'.²⁸ Prisoner rights can thus promote 'humane and constructive regimes'.²⁹ In this regard, many point to the positive impact of the ECHR and the HRA 1998 on prison conditions in the UK.³⁰

Advocates of a rights-based approach to imprisonment also stress the benefits for both prisoners and society. Rights give recognition to prisoners' 'essential humanity'³¹ and 'equal status and value',³² offering tools with which to challenge their 'social exclusion and invisibility'.³³ They can create a sense of fair treatment, helping to ensure stability within prisons, and promote a sense of civic responsibility, thereby facilitating re-integration into society.³⁴ Accordingly, a culture of respect for rights can enhance the legitimacy of prison as an instrument of criminal justice.³⁵ At the same time, the enhanced scrutiny which rights provide can be used to challenge the existence of the prison itself in favour of alternative approaches to criminal justice.³⁶

These claims, however, are fiercely contested, and even advocates of a rights-based approach recognise its limitations. Sceptics argue that prisoner rights are routinely outweighed by the competing institutional considerations of the prison, such as safety, order and security.³⁷ In practice, despite the enactment of the HRA 1998, prison governance continues to be characterised by 'a deep-seated resistance to the concept of prisoners' rights'.³⁸ A further problem is that prisoners are often unaware of their rights.³⁹ Pursuing rights claims through the courts also requires time, money, literacy and support; many prisoners will lack one or all of these.⁴⁰ Judicial review proceedings, in particular, carry prohibitive financial risks – what Hickman has called 'public law's disgrace'⁴¹ – which are especially severe for those held in the prison estate, many of whom are drawn

26 Easton, n 6 above, 7.

27 Stephen Livingston, 'Prisoners' Rights in the Context of the European Convention on Human Rights' (2000) 2 *Punishment and Society* 309, 311.

28 *ibid.*

29 Easton, n 6 above, 7.

30 *ibid.*, 9. Anastasia Karamalidou, *Embedding Human Rights in Prison* (London: Palgrave Macmillan, 2017).

31 Livingston, n 27 above, 311.

32 Easton, n 6 above, 8.

33 *ibid.*

34 *ibid.*, 7–8.

35 *ibid.*, 7. Livingston, n 27 above, 311.

36 Renzulli, n 9 above.

37 Genders and Player, n 4 above, 438.

38 *ibid.*, 451.

39 Karamalidou, n 30 above, 116–117.

40 Easton, n 6 above, 9–10.

41 Tom Hickman, 'Public law's disgrace' *UK Constitutional Law Association* 9 February 2017 at <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/> (last accessed 25 October 2022).

from the lowest socio-economic backgrounds and earn next to nothing for prison work.⁴²

In practice, this means that rights tend to be ‘enforced on a case-by-case basis’,⁴³ as and when potential violations are brought to the attention of the courts. Even then, judges will often defer to the views of the prison authorities.⁴⁴ Where rights claims do succeed in the courts, their implementation will depend on the ‘jaded attention’⁴⁵ of the same institutions which resisted them. As Easton notes, ‘without adequate mechanisms of implementation and enforcement ... rights are clearly of little value to prisoners’.⁴⁶

Despite being conceived as a limit on punitiveness, rights also remain vulnerable to the prevailing political attitudes towards prisoners.⁴⁷ In the UK, this has manifested in the introduction of restrictions on prisoners’ access to legal aid⁴⁸ over the last decade and the ever-looming threat of the HRA’s repeal.⁴⁹ Far from carrying an emancipatory potential, some argue that the vindication of rights can also be used to justify further expansion of the prison estate.⁵⁰ Perhaps the most potent criticism, however, is that violations of prisoners’ rights remain systematic, with prison conditions around the world routinely falling foul of the standards which rights imply.⁵¹ Armstrong therefore asks, ‘... given the widespread acceptance among liberal democratic states of human rights frameworks for the regulation of prisons ... why do we still find evidence of the kinds of conditions that gave rise to rights standards in the first place?’⁵² Prisoner rights are thus imbued with great hope and deep suspicion.

The issue of prisoner voting in the UK allows us to explore these competing perspectives. As one of the most highly politicised human rights issues of the last

42 Loïc Wacquant, *Prisons of Poverty* (Minneapolis, MN: University of Minnesota Press, 2009). Virginia Mantouvalou, ‘Structural Injustice and the Human Rights of Workers’ (2020) 73 *CLP* 59.

43 Marc Gevers and Gustav Muller, ‘Unwholesome Prison Blues: A Call to Protect International Prisoners’ Rights and Standardise Conditions of Detention’ (2019) 52 *Comparative and International Law Journal of South Africa* 75, 79.

44 Scott, n 3 above, 234.

45 Gevers and Muller, n 43 above, 79.

46 Easton, n 6 above, 7–8.

47 *ibid.*, 10. C.R.G. Murray, ‘Monsterring Strasbourg over Prisoner Voting Rights’ in Michelle Farrell, Eleanor Drywood and Edel Hughes (eds), *Human Rights in the Media: Fear and Fetish* (Oxford: Routledge, 2019).

48 Legal Aid, Sentencing and Punishment of Offenders Act 2012; Criminal Legal Aid (General) Regulations 2013, SI 2013/9; Criminal Legal Aid (General) (Amendment) Regulations 2013, SI 2013/2790. The latter were successfully challenged in *R (Howard League for Penal Reform) v Lord Chancellor* [2017] 4 *WLR* 92.

49 Bill of Rights HC Bill (2022–23) [117]; Helen Fenwick and Roger Masterman, ‘The Conservative Project to ‘Break the Link between British Courts and Strasbourg’: Rhetoric or Reality?’ (2017) 80 *MLR* 1111.

50 Sarah Armstrong, ‘Securing Prison through Human Rights: Unanticipated Implications of Rights-Based Penal Governance’ (2018) 57 *Howard Journal of Crime and Justice* 401, 414–415.

51 For example Rick Lines, ‘The Right to Health of Prisoners in International Human Rights Law’ (2008) 4 *International Journal of Prisoner Health* 3, 36; Genders and Player, n 4 above; Barry Goldson and Ursula Kilkelly, ‘International Human Rights Standards and Child Imprisonment: Potentialities and Limitations’ (2013) 21 *International Journal of Children’s Rights* 345; User Voice and Queen’s University Belfast, *Coping with Covid in Prison: The Impact of Prisoner Lockdown* (User Voice, 2022).

52 Armstrong, n 5 above, 402.

two decades, it is an ideal subject to test the resilience of prisoner rights. Prisoner voting rights are also located in different sources – not only a supranational human rights treaty (namely ECHR, A3P1) but in domestic electoral laws⁵³ – thereby enabling us to examine the vitality of prisoner rights–protection at different institutional levels. Further, as will be explored in the remainder of this part of the paper, prisoners’ voting rights have proven to be extremely fragile. In contrast to the gradual extension of the franchise to the general population over the last two centuries, prisoners have seen their voting rights expand and contract. Further, successful litigation on voting rights has failed to yield reform, and even while some prisoners retain the right to vote, existing evidence points to various ways in which they continue to be excluded from the electoral process.

Fluctuations in the franchise

Although prisoner rights were largely unknown in the UK until the 1970s, the lineage of prisoner voting rights can be traced back much further. Indeed, the extent of prisoner disenfranchisement has varied dramatically since the nineteenth century.⁵⁴ Between 1949–67, for example, prisoners serving under one year sentences in England and Wales could vote by post, along with all prisoners in Scotland, so as long as they remained on the electoral register.⁵⁵ From 1967–69, no category of prisoner was explicitly excluded from the franchise.⁵⁶ Moreover, there is evidence that prisoners were able to exercise their right to vote during this period of liberalisation: a *Times* article ahead of the 1950 general election reported that postal votes had been returned ‘from prisons in Cardiff, Lincoln, Preston and Manchester’.⁵⁷ As Murray thus observes, ‘[p]risoners participated in the electoral process without the system collapsing under the weight of their moral turpitude’.⁵⁸

It was only with the enactment of the Representation of the People Act 1969 that all convicted prisoners were prevented from voting by statute. This was maintained with the enactment of current law, section 3 of the Representation of the People Act 1983 (RPA 1983), which provides that those serving custodial sentences are ‘legally incapable’ of voting while held in custody. Remand prisoners (ie those awaiting trial or sentencing) therefore remained eligible, but until 2000 were restricted in terms of where they could declare their place of residence for the purposes of electoral registration. The Representation of the

53 Representation of the People Act 1983, as amended by the Representation of the People Act 2000 and the Scottish Elections (Franchise and Representation) Act 2020.

54 Murray, n 13 above, 513–518; House of Commons and House of Lords Joint Committee on Draft Voting Eligibility (Prisoners) Bill, n 16 above, 7–11.

55 Forfeiture Act 1870, s 2; Criminal Justice (Scotland) Act 1949, s 15; Representation of the People Act 1948, s 8; *ibid.*

56 Criminal Law Act 1967, s 1 and Sched 1; Criminal Law Act (Northern Ireland) 1967, Sched 3; *ibid.*

57 House of Commons and House of Lords Joint Committee on Draft Voting Eligibility (Prisoners) Bill, n 16 above, 8.

58 Murray, n 13 above, 520.

People Act 2000 rectified this situation, amending the 1983 Act to allow remand prisoners without a fixed address to register using a ‘declaration of local connection’ (using either a previous address or an address where they would be resident if they were not in prison), or with the address of the prison in which they are held. The fact that the ban under the 1983 Act extended to *convicted* prisoners *detained in pursuance of a sentence* meant that civil prisoners (those held in contempt of court or for defaulting on fines) and those released on home detention curfew were also legally eligible to vote.

The *Hirst* case and the Lidington compromise

More recent alterations to UK prisoner voting rules have emerged in direct response to human rights litigation. In 2005, John Hirst, a prisoner serving a discretionary life sentence for manslaughter, successfully challenged the 1983 Act at the ECtHR. In a landmark ruling, the Grand Chamber of the Court held that section 3 amounted to a ‘general, automatic and indiscriminate restriction’⁵⁹ which violated the right to free and fair elections under A3P1 ECHR. For over a decade, successive UK administrations refused to implement the ruling, despite their unsuccessful attempts to convince the ECtHR to reconsider and thousands of subsequent legal challenges by UK prisoners.⁶⁰

On 2 November 2017, however, the Lidington compromise was announced. First, convicted prisoners granted temporary release would be permitted to vote while outside of prison. According to the UK Government, this would ‘affect up to one hundred offenders at any one time’.⁶¹ Second, the loss of the vote would be made clear to prisoners at or close to the time of their sentencing, thereby addressing a minor point in the *Hirst* judgment that disenfranchisement was being imposed upon prisoners without informing them.⁶² Third, the UK Government would request the relevant bodies in Scotland and Northern Ireland to introduce parallel changes in their respective criminal justice systems. On 6 December 2018, the Council of Europe’s Committee of Ministers, responsible for supervising the implementation of ECtHR judgments, noted these changes ‘with satisfaction’⁶³ and formally brought the matter to a close.

The Lidington compromise, however, has been subject to widespread criticism. The UK’s response, according to von Staden, was an act of ‘minimalist compliance’.⁶⁴ an extreme example of a state seeking to minimise the financial

59 *Hirst* n 12 above at [82].

60 *Greens and MT v United Kingdom* [2010] ECHR 1826; *Scoppola v Italy (no 3)* (2013) 56 EHRR 19. In the former case, the ECtHR stated that it had received around 2,500 applications with a similar complaint.

61 UK Ministry of Justice, ‘Secretary of State’s Oral Statement on Sentencing’ 2 November 2017 at <https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing> (last accessed 27 June 2022).

62 *Hirst* n 12 above at [77].

63 Committee of Ministers, n 15 above.

64 Andreas von Staden, ‘Minimalist compliance in the UK prisoner voting rights cases’ *ECHR Blog* 16 November 2018 at <https://www.echrblog.com/2018/11/guest-blog-minimalist-compliance-in-uk.html> (last accessed 27 June 2022).

and political costs associated with an adverse human rights ruling. An alternative viewpoint is that this was a case of concerted *non-compliance* by the UK, notwithstanding the Committee of Ministers' response. The offending legislation remains in force and convicted prisoners remain overwhelmingly disenfranchised, including the same categories of prisoner who successfully brought legal challenges to the ECtHR. Even those enfranchised by the changes face additional restrictions compared with other eligible categories. Temporary release prisoners are only permitted to register and vote while physically outside of prison and 'become ineligible again upon return to prison'.⁶⁵ Furthermore, they cannot be released for the purpose of voting, nor can they register to vote using the address of the prison. Their ability to vote is therefore entirely coincidental to their release for other permitted purposes, such as employment, childcare, or compassionate leave, and may also depend on having a regular address outside of prison for the purpose of registration.⁶⁶ In many cases, these individuals will also be on temporary release from a prison outside of their normal constituency, further complicating voter registration. As if to confirm the limited impact of the changes, the UK Ministry of Justice also stipulated that the measures 'should not result in any additional resource implications'⁶⁷ for prisons across the UK.

The shortcomings in the resolution of the *Hirst* case appear extensive. However, the outcome arguably betrayed an even more deeply flawed assumption: namely, that prisoners who are *legally eligible* to vote can *exercise* that right. In reality, whether those prisoners can use their vote is not only unclear but difficult to ascertain empirically. There is limited evidence regarding the administrative context in which eligible prisoners vote and almost no official data on voter registration and participation among the UK prison population.

Existing evidence on voting by eligible prisoners

The categories of prisoner eligible to vote in UK elections account for a substantial minority of the prison population. If we take the remand population by itself, on average there were 13,463 remand prisoners across the UK in 2020–21.⁶⁸ This number accounted for more than a third (38 per cent) of the prison population in Northern Ireland, a fifth (22 per cent) of the Scottish prison population, and 15 per cent of prisoners in England and Wales.

However, the limited evidence available suggests that very few prisoners are registering to vote. In 2019, Peter Stanyon, the Chief Executive of the

65 UK Ministry of Justice, n 19 above.

66 UK electoral law requires individuals to be 'resident' at an address within a given constituency for the purposes of electoral registration.

67 UK Ministry of Justice, n 19 above.

68 Department of Justice, *Northern Ireland Prison Population Statistics 2020/21* (2021); Scottish Prison Service, *Scottish Prison Population Statistics 2020-21* (2022); UK Ministry of Justice, 'Offender management statistics quarterly: October to December 2020' (2021) at <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2021> (last accessed 26 June 2022).

Association of Electoral Administrators, told the National Assembly for Wales⁶⁹ Equality, Local Government and Communities Committee: ‘... in terms of the feedback that we’ve got UK wide, the numbers are very, very small. If I was to do a poll of colleagues across the whole of the UK, there would be one or two individuals registered as a result of the current system’.⁷⁰ A low uptake among eligible prisoners was also confirmed in the Electoral Commission’s report on the 2021 Scottish Parliament election, which revealed that just 38 prisoners had registered to vote in that election – despite the Scottish Government’s estimation that an additional 1,000 prisoners had acquired the vote in 2020.⁷¹

There are likely to be a range of reasons for the lack of participation. The Electoral Commission’s report on the Scottish election suggested that Covid-19 may have influenced the low uptake, with registration numbers affected by a high turnover of short-term prisoners over the previous two years.⁷² Other plausible reasons include the fact that prisoners, particularly those on remand, are likely to have more immediate concerns: their pending trial, their financial circumstances or those of their families, or their adjustment to their new surroundings.⁷³ Like a significant section of the general population, many prisoners will have neither faith nor interest in electoral politics, or feel that politicians display little interest in them.⁷⁴ However, even where prisoners seek to vote, existing evidence points to serious problems in the administration of their voting rights. For instance, although remand prisoners are eligible to vote, a 2012 review by HM Inspectorate of Prisons (HMIP) found that two out of five prisons visited had ‘*no arrangements to facilitate this entitlement*’.⁷⁵

There is also sustained evidence that prisoners are unaware of their voting rights. HMIP found that the ‘majority of remand prisoners’⁷⁶ that had spoken with inspectors did not know that they were entitled to vote. The same problem was subsequently observed by two parliamentary committee inquiries on prisoner voting.⁷⁷ Mirroring this trend, a study by Dhami and Cruise found that a

69 The National Assembly for Wales was renamed Senedd Cymru / Welsh Parliament in May 2020.

70 Equality, Local Government and Communities Committee, Inquiry into Voting Rights for Prisoners: Evidence Session 5, 7 March 2019 at [25].

71 Electoral Commission, *Report on the Scottish Parliament Election on 6 May 2021* (2021); Scottish Government, *Consultation on Prisoner Voting* (2018).

72 *ibid.*

73 Denise Downie and James Carnie, *Remand Prisoners 2017. 16th Survey Bulletin* (Edinburgh: Scottish Prison Service, 2018); HM Inspectorate of Prisons (HMIP), *Remand Prisoners: A Thematic Review* (2012).

74 R.S. Foa, A. Klassen, M. Slade, A. Rand and R. Collins, *The Global Satisfaction with Democracy Report 2020*. (Cambridge: Centre for the Future of Democracy, 2020); Cormac Behan, ‘“Still Entitled to Our Say”: Prisoners’ Perspectives on Politics’ (2012) 51 *Howard Journal of Criminal Justice* 16. Martine Herzog-Evans and Jérôme Thomas, ‘French Prisoners Cast Their Vote in the 2019 European Elections: An Ad Hoc Analysis of Their Electoral Choices and Political Attitudes’ (2020) 59 *Howard Journal of Crime and Justice* 505.

75 HMIP, n 73 above, 63 (emphasis added).

76 *ibid.*

77 House of Commons and House of Lords Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, n 16 above, 75, 77. Equality, Local Government and Communities Committee, n 16 above, 45.

third of *ineligible* prisoners across the UK (those convicted and sentenced) were unaware that they had lost their right to vote.⁷⁸

An inquiry into prisoner voting by the Fifth Senedd's Equality, Local Government and Communities Committee received evidence of further issues from electoral administrators and prison officials. Prisoners often lacked the necessary information and documentation for the registration process, such as their date of birth, national insurance number, a passport or driver's licence, and a fixed or regular address.⁷⁹ A further barrier to registration was the unstable nature of the prison population, marked by the 'constant admission, movement, and release of prisoners'.⁸⁰

The available evidence thus points towards low rates of participation among eligible prisoners and a range of potential obstacles to voter registration. Together, these hint at the possibility of administrative disenfranchisement beneath the veneer of legal rights. The true extent of disenfranchisement, however, remains unknown. Under the current arrangements, if not a single UK prisoner was exercising their right, the absence of empirical data would serve to conceal this fact. Without transparency regarding the scale of prisoner participation, there is little room for effective scrutiny or revision of current government policy. Instead, human rights institutions and policy-makers are left to infer the extent of disenfranchisement from legal rules alone, taking the government at its word that the law does what it says it does. To compound this problem, whether eligible prisoners have attempted or been able to vote has not been subject to systematic, UK-wide empirical examination. It is to this lacuna and our own efforts to explore this problem to which we now turn.

METHODOLOGY

In search of data: who knows what?

Unlike in neighbouring jurisdictions such as Ireland⁸¹ and France,⁸² there is generally no official information on the number of prisoners who are registered to vote in UK elections, let alone the number that take part. We know that many prisoners are in categories eligible to vote in elections across the UK, but with the very recent exception of Scotland,⁸³ there is no systematic data collection on prisoner participation. The paucity of official data is compounded by the rules of 'residence' under UK electoral law which mean that most prisoners who *are* registered will be indistinguishable from other electors on the electoral register. Eligible prisoners may be able to register as ordinary electors, using their permanent address (if they have one), or alternatively via a 'declaration of

78 Mandeep K. Dhimi, and Paula A. Cruise, 'Prisoner Disenfranchisement: Prisoner and Public Views of an Invisible Punishment' (2013) 13 *Analysis of Social Issues and Public Policy* 211.

79 Equality, Local Government and Communities Committee, n 70 above.

80 Equality, Local Government and Communities Committee, n 16 above, 46.

81 Behan, n 74 above.

82 Herzog-Evans and Thomas, n 74 above.

83 Electoral Commission, n 71 above.

local connection', using either their previous address or an address where they would be resident if they were not in prison. In the last resort, they may be able to use the address of the prison in which they are held.⁸⁴ Most prisoners who register to vote are therefore unlikely to be registered at the address of a prison.

With limited official information and no direct academic precedent to draw upon, mixed methods were employed to study prisoner voting empirically. First, data were obtained using requests under the Freedom of Information Act 2000 and Freedom of Information (Scotland) Act 2002. Freedom of Information legislation provides researchers with a 'powerful tool'⁸⁵ for carrying out social research in areas where data are largely inaccessible. Requests for data on the number of prisoners registered to vote were sent to all local authorities in England (81), Northern Ireland (3), Scotland (15), and Wales (5) with a prison located within their boundary, as well as Valuation Joint Boards (9) in Scotland. Between October 2020 and November 2021, further requests for information on prisoner voting policy and the number of prisoners eligible to vote were sent to the UK Ministry of Justice, the Judicial Office for England and Wales, HM Inspectorate of Prisons, the Scottish Government, the Scottish Prison Service, the Scottish Courts and Tribunals Service, HM Inspectorate of Prisons Scotland, the Northern Ireland Prison Service, the Northern Ireland Department of Justice, the UK Government's Northern Ireland Office, the Electoral Office for Northern Ireland and the Electoral Commission.

The responses we received put beyond doubt that the public bodies which might be assumed to hold information about prisoner voting in the UK do not possess it. The requests to the three justice departments and all local authorities failed to yield evidence that a single prisoner was registered to vote. The responses also revealed widespread confusion and misunderstanding about who holds (or should hold) this information and about which prisoners are disenfranchised. Some local authorities believed that they held the information (all of these confirming that no prisoners were registered to vote), others believed that the prisons had it, while some believed that no prisoner whatsoever could vote, and that the information therefore did not exist.

Alongside these requests, we also consulted a small sample of electoral registers, either directly or with the support of electoral and archival staff, with a view to identifying whether any prisoners were registered at prison addresses. We conducted this exercise in Cardiff, Liverpool, Durham, Salford, and Northern Ireland. Durham and Salford have among the largest populations of remand prisoners in the UK (HMP Durham and HMP Forest Bank, respectively),⁸⁶ Northern Ireland has one electoral register for the entire jurisdiction, covering multiple prisons; Liverpool and Cardiff both contain at least one prison and

84 Electoral Commission, 'Can prisoners register to vote?' 14 October 2020 at <https://www.electoralcommission.org.uk/running-electoral-registration-wales/eligibility-register-vote/what-are-residency-requirements-registration-purposes/can-prisoners-register-vote> (last accessed 27 June 2022).

85 Ashley Savage and Richard Hyde, 'Using Freedom of Information Requests to Facilitate Research' (2014) 17 *International Journal of Social Research Methodology* 303, 315.

86 UK Ministry of Justice, 'Offender management statistics quarterly: October to December 2019' (2019) at <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2019> (last accessed 27 June 2022). See 'Prison population tool'.

were chosen for convenience. In each location, we enquired about the current and the 2019 registers to ascertain whether any prisoners were registered to vote at the addresses of the local prisons. In all but one case, we found no registered prisoners. The unique exception was in Northern Ireland: the Electoral Office for Northern Ireland confirmed to us that a single prisoner held in HMP Maghaberry was registered to vote as of November 2021. While this method enabled us to locate the proverbial needle in the haystack, and may have some merit for future studies, it also reinforces the fact that official data on prisoner voting in the UK is extremely limited. In order to obtain a greater depth of insight, a different approach is required.

A survey of electoral administrators

Between June and November 2021, questionnaires were distributed to electoral administrators across the UK. The survey consisted of closed and open questions and gathered both quantitative and qualitative information. Participants were asked about their experiences (or lack of) of handling voter registration applications from prisoners and for their views on the guidance provided to administrators by the Electoral Commission to help prisoners register.

Our questionnaire was purposively targeted at electoral officials in the UK based on their unique expertise and experience in handling voter applications from those in the prison estate. These officials assess whether a prisoner is eligible to vote, seek out further information, liaise with other services where necessary, and determine where and how an incarcerated individual should register their place of residence for the purpose of voting. Experienced electoral administrators can also provide longer-term insights about whether prisoners have been applying to vote and offer accounts of any difficulties involved. While some comparative studies have conducted surveys with prisoners directly, typically this has been used in contexts where all prisoners are entitled to vote.⁸⁷ Given that eligible prisoners in the UK tend to be short-term and geographically dispersed, electoral administrators offered a more reliable sample and longer-term perspectives.

A gatekeeper from the Association of Electoral Administrators (AEA) helped to facilitate our research by advertising our study amongst electoral administrations in each region across England, Scotland, and Wales. A contact at each regional branch of the AEA further helped to advertise our research and ensure that our sample gathered data from all areas of the UK. In Northern Ireland, the Electoral Office for Northern Ireland is responsible for elections and was contacted to take part in our survey. The survey was conducted anonymously but participants were asked to indicate their job title and the nation / region in which they worked.

In total, we received 134 responses from electoral officials across the UK. The majority were from England (109), followed by Wales (16), Scotland (eight) and

87 Anette Storgaard, 'The Right to Vote in Danish Prisons' in Alec C. Ewald and Brandon Rottinghaus (eds), *Criminal Disenfranchisement in an International Perspective* (Cambridge: Cambridge University Press, 2006).

Northern Ireland (one). We analysed the data thematically to identify emerging patterns, codes, and themes. The aim was to ‘create an overall story’⁸⁸ about prisoner voting and to understand what each of the different themes identified ‘reveal about the topic’.⁸⁹ Even though this is a small sample, the data provide the most detailed empirical insights into the administration of prisoner voting in the UK to date. Our findings are presented in the following sections and are used to inform our discussion and conclusions.

ARE PRISONERS APPLYING TO VOTE?

The rarity of prisoner participation: ‘In nearly twenty years I have never had a request’

Our survey of electoral administrators shows that voter registration applications from eligible prisoners are extremely uncommon. Two thirds of respondents (66 per cent) indicated that they had never received an application from a prisoner, while roughly a quarter (28 per cent) reported that they had. The overwhelming majority (96 per cent) of those who had experience of handling prisoner applications had received just one to five applications during their careers as electoral administrators. In the open-ended parts of the survey, a number of respondents emphasised how uncommon such applications were within their local authority areas:

I and my colleague (of twelve years in elections) have never processed a remand application. (*Democratic Services and Elections Lead Specialist, South East*)

Applications are very rare in our area. We [have] had one in the years I have been doing the job. (*Electoral Services Manager, North West*)

From experience we have received no interest from prisoners regarding voting rights. (*Electoral Services Officer, Wales*)

These data are particularly striking given our respondents’ experience in their profession. The overwhelming majority (82 per cent) had been electoral administrators for at least six years. Many (60 per cent) had at least 11 years’ experience, while just under a third (30 per cent) had at least 20 years’ experience. The vast majority therefore would have been in post during multiple UK, devolved and local government electoral cycles. Many would have been in place when the registration rules for remand prisoners were relaxed in 2000. Given that potentially hundreds of thousands of prisoners have been eligible to register during this period, these figures suggest that the scale of prisoner participation in elections in the UK has been negligible.

88 Lorelli S. Nowell, Jill M. Norris, Deborah E. White and Nancy J. Moules, ‘Thematic Analysis: Striving to Meet the Trustworthiness Criteria’ (2017) 16 *International Journal of Qualitative Methods* 1, 11.

89 *ibid.*

The picture differs somewhat when we disaggregate the data by legal and political jurisdiction and consider the types of prisoner that administrators had engaged with. In terms of legal jurisdiction, less than a quarter (23 per cent) of the combined respondents across England and Wales had received an application from a prisoner. Except for one respondent, who had dealt with six to 10 applications, all of those (97 per cent) had only dealt with one to five applications during their time as electoral administrators. Around two thirds (65 per cent) had dealt with remand prisoners, while a large minority (41 per cent) did not know the category of at least one of the prisoners who had applied. If we consider the 109 English responses separately, the results are broadly the same: a large majority (71 per cent) had never dealt with an application from a prisoner and virtually all (97 per cent) of those who did have experience with prisoners had only ever received between one and five applications. Most of those (61 per cent) had dealt with remand prisoners but many (46 per cent) did not know the prisoner category. Among the 16 Welsh responses, the trends are again similar: only a quarter (25 per cent) of the respondents had experience with applications from prisoners and all of those had dealt with just one to five applications, exclusively from remand prisoners.

With just eight Scottish respondents, the picture in Scotland is more limited, yet the responses showed notable differences. All but one of the Scottish respondents (86 per cent) had experience with applications from prisoners. In contrast to the data overall, the majority (75 per cent) had received applications from prisoners serving under one-year sentences, following the legislative change introduced in Scotland in 2020, while three respondents (38 per cent) had dealt with applications from remand prisoners. In line with the rest of the data, however, each of the seven respondents with experience of prisoner applications had only received between one and five applications during their career. This data is therefore consistent with the Electoral Commission's report on the 2021 Holyrood election.⁹⁰ While we should be careful not to draw too many inferences from a small sample, there is little here to suggest that the extent of prisoner participation in elections differs in Wales, England, or Scotland.

In Northern Ireland, we obtained just one survey response. Since electoral registration and returning officer functions are vested in one organisation within the jurisdiction, this was to be expected. Uniquely, this administrator had dealt with 20+ applications from prisoners – the highest category offered within the survey and more than any other individual respondent. Given the absence of higher value categories, it may be that the number of applications handled by this administrator was even higher. Further, the applications received included not only remand prisoners but unsentenced prisoners and prisoners on temporary release. This makes Northern Ireland the only part of the UK where a respondent indicated that they had received an application from a temporary release prisoner following the implementation of the Lidington compromise. This complements existing evidence that voting carries a particular significance for prisoners in Northern Ireland.⁹¹ However, while there appears to be a

⁹⁰ Electoral Commission, n 71 above.

⁹¹ Behan, n 74 above, 19.

possibility of greater participation in the jurisdiction, the overall picture from the survey is that very few UK prisoners are seeking to exercise their electoral rights.

Reasons for low participation

Previous evidence on prisoner voting in the UK and other jurisdictions suggests that low participation is due to a lack of knowledge among eligible prisoners about their voting rights.⁹² However, the survey responses demonstrate that even where eligible prisoners *are* aware of their voting rights, incarceration imposes various logistical and administrative complications for voter registration which can effectively disenfranchise prisoners.

Poor communication

In the open-ended parts of the survey, several respondents emphasised the importance of effective communication and coordination between electoral and prison services. Without information-sharing and channels of communication, administrators are unlikely to know where eligible prisoners are held and may be unable to identify whether an applicant is eligible to vote. Voter registration processes also require certain data, documentary evidence and paperwork. Effective communication between prisoners and electoral administrators is therefore essential to allow administrators to establish which documents and information prisoners can provide, and also to ensure that electoral correspondence is directed to the correct prison.

Survey responses suggest that existing arrangements in some parts of the UK are deeply inadequate, with many administrators reporting poor information-sharing and communication between services. This problem seems to be particularly prevalent within the England and Wales legal jurisdiction. The responses indicate that electoral administrators in England and Wales are not automatically informed when and where someone is placed in custody, nor are they updated if a person is convicted or moved to another prison where they can be contacted. Administrators therefore depend on that information being communicated voluntarily either by prisoners or by their families.

We aren't notified if someone has been convicted and therefore it is up to the person/family to let us know so they can be removed from the electoral register at their address. (*Electoral Services Officer, South West*)

I feel that we are reliant on the family members of those that are in remand to update us on the whereabouts of these people. (*Democratic Services and Elections Lead Specialist, South East*)

As previously discussed, a significant minority (41 per cent) of those respondents based in England and Wales with experience of applications from

92 HMIP, n 73 above; Nicole D. Porter, *Voting in Jails* (Washington, DC: The Sentencing Project, 2020).

prisoners did not know what type of prisoner had applied to register. While this could reflect the time that had passed since these administrators had processed the applications, or a lack of familiarity with different categories of eligible prisoner, the survey evidence demonstrates that some administrators were simply unable to establish the circumstances of the prisoners who had applied. Some indicated that they were able to process applications using informal channels of communication: as one respondent put it, ‘after checking applications with [the] governor’ (*Electoral Services Manager, South East*). Many, however, reported that they were unable to communicate with the prison in which the individual was held.

[I] found it impossible to contact the prison to find out which category of prisoner the applicant was. (*Elections Officer, North East and Yorkshire*)

It is very difficult to obtain the information from the prison service as to the status of the prisoner (i.e. long-term on remand or otherwise) and to establish the address at which the person should register. (*Electoral Services Manager, South East*)

It is unclear whether, and to what extent, this is also a problem in Northern Ireland. In Scotland, however, there appears to be more effective communication between electoral administrators and the prison service, with an information-sharing agreement having been established following the enactment of the Scottish Elections (Franchise and Representation) Act 2020. One respondent explained: ‘Fortunately, in Scotland we have [an] SLA [Service Level Agreement] in place where the Scottish Prison Service provides monthly lists to EROs of all prisoners either on remand or sentenced to less than 12 months in prison who provided a connection address and this information is used to send registration forms to the elector at their place of detention’ (*Administration Manager, Scotland*).

The data thus suggests that a lack of information-sharing between services is posing a risk of administrative disenfranchisement to prisoners in the UK. The extent of this risk, however, differs between legal jurisdictions. Unlike in England and Wales, administrators in Scotland are given information on the location and status of eligible Scottish prisoners, meaning that they are better equipped to correspond with those prisoners and make determinations about eligibility. These arrangements may explain why among those respondents with experience of applications from prisoners only one (13 per cent) of the Scottish respondents reported not knowing the prisoner category, compared to 41 per cent in England and Wales.

Incomplete or erroneous applications

A common problem across the jurisdictions is that applications may not be filled in correctly or returned on time. In total, around a third (36 per cent) of the respondents with experience of handling applications from prisoners had rejected applications. When broken down by nation / jurisdiction, this encompassed roughly a third (36 per cent) of English respondents, a quarter

(20 per cent) of Welsh respondents and half (50 per cent) of Scottish respondents with experience of prisoner applications (no rejections were reported by the Northern Ireland respondent). In the qualitative parts of the survey, several administrators cited incomplete forms, errors, or delays among the reasons for the applications failing.

The forms took a great deal of time to be returned via the prison service and many forms went astray, most importantly the postal vote application. (*Electoral Services Manager, South East*)

Some did not complete a postal vote so had to be contacted to advise of option[s] but most did not reply. (*Principal Administration Officer for Electoral Registration, Scotland*)

Essential information was omitted from the application and the information required was not provided upon follow up enquiries. (*Electoral Registration Data Manager, Scotland*)

This suggests that even where prisoners have intended to vote, many are failing to make it beyond the registration process. It may be that absent voter (proxy / postal) forms are not being consistently supplied by prisons, or that the forms are inappropriate to prisoners' circumstances. The prevalence of incomplete and incorrect applications also suggests a lack of support within prisons with the registration process, which in turn is leading to delays and failed applications. One respondent suggested that this was a particular concern given the prevalence of low literacy rates among prisoners:⁹³ 'Many prisoners may often have low literacy levels and require additional support at the point at which they are completing the applications which may not always be readily available' (*Electoral Services Manager, Wales*).

Official government documents across the UK acknowledge the need to support prisoners with the voting process. The UK government's *Restrictions on Prisoner Voting Policy Framework*, for example, states that '[w]here eligible prisoners wish to vote in elections, local processes must be in place to support them with applications'.⁹⁴ It also provides that '[e]ligible prisoners with disabilities or language, reading, or writing difficulties must be assisted with applying to register to vote, and assisted with voting, if they request help'.⁹⁵ The Scottish Prison Service has similarly stated its 'responsibility to ensure that all those in our care who are entitled to vote, and wish to do so, have the opportunity to

93 'The most recent data published by the Ministry of Justice shows that 57% of adult prisoners taking initial assessments had literacy levels below those expected of an 11-year-old'. HMIP and Ofsted, 'Prison education: a review of reading education in prisons' 22 March 2022 at <https://www.gov.uk/government/publications/prison-education-a-review-of-reading-education-in-prisons/prison-education-a-review-of-reading-education-in-prisons> (last accessed 26 October 2022).

94 UK Ministry of Justice, n 19 above.

95 *ibid.*

do so'.⁹⁶ The data presented above, however, indicate that insufficient support is being made available.

Transfers and dispersal

A further logistical problem identified in the survey is the transfer and dispersal of prisoners across local authority areas. In 2019, a total of 85,833 prison transfers took place across England and Wales: an average of 235 transfers a day.⁹⁷ The decision on where to place prisoners is determined by a range of factors, including security category, the availability of educational and training places, and the stage of a prisoner's sentence. Prison places are also determined based on capacity rather than any link between the individual sentenced to imprisonment and the place where they live.⁹⁸ Prisoners are therefore often cast far and wide across the prison estate.⁹⁹ Moreover, this practice is by no means confined to sentenced prisoners. Because not all prisons receive those who are awaiting trial or sentencing, remand prisoners (even those with a prison in their local authority boundary) are often likely to be held in establishments outside of their local authority area. In England and Wales, data from 2019 show that a large proportion of prisoners from Cardiff (27 per cent), Birmingham (38 per cent), Islington (58 per cent), Liverpool (26 per cent) and Manchester (82 per cent), to name a few, were being held in prisons outside of their local authority area.¹⁰⁰

Dispersal poses various complications for the administration of prisoner voting. First, since electoral administrators in England and Wales are not informed when or where a person is remanded in custody, they have no way of knowing where individuals normally resident within a local authority area can be contacted for the purposes of encouraging voter registration. As one survey respondent put it, 'How do we engage with prisons all around the country?' (*Electoral Services Officer, Wales*). While information-sharing arrangements between the prison service and electoral administrators in Scotland means that the problem of dispersal is less acute, one respondent explained that it can still complicate registration: 'The main issue is that prisoners are sentenced all over the country and ... may require contacting other EROs to check for information to process certain applications' (*Administration Manager, Scotland*).

96 Letter from the Scottish Prison Service to Howard League Scotland, 21 June 2021 at https://www.whatdotheyknow.com/request/756414/response/1816018/attach/4/FOI%20HQ21040.pdf?cookie_passthrough=1 (last accessed 27 June 2022).

97 UK Ministry of Justice, n 86 above. See 'Prison releases: October to December 2019'.

98 House of Commons Justice Committee, Oral Evidence, The Budget and Structure of the Ministry of Justice HC 1679-ii, 24 January 2012, Q121.

99 Robert Jones, 'Imprisonment in Wales: a breakdown by local authority' Cardiff University, Wales Governance Centre, 2018 at https://www.cardiff.ac.uk/__data/assets/pdf_file/0010/1286992/Imprisonment-in-Wales-A-Local-Authority-Breakdown-.pdf (last accessed 25 June 2022); James Carnie and Róisín Broderick, *Prison Survey 2019* (Edinburgh: Scottish Prison Service, 2020).

100 UK Ministry of Justice, 'Prisoners on remand by establishment and local authority area'. Data obtained via the Freedom of Information Act 2000 (2021). These data were unavailable for Northern Ireland and Scotland.

A second dispersal problem identified by respondents is that the determination of where a prisoner is 'resident' for the purposes of electoral registration becomes more complex:

Where a prisoner is detained is not necessarily in the country in which they are from. How do we connect prisoners to a particular area for voting rights? Where do they qualify from? (*Electoral Services Officer, Wales*)

A person on remand may be located elsewhere in the country..., so should they register in the new area (which they are only temporarily living in) or in their home area, where they are likely to return to afterwards? (*Senior Electoral Officer, Eastern*)

Respondents suggested that this is particularly important because the address used by a prisoner to register to vote can determine whether their application proceeds, stalls, or even fails. As the responses below indicate, applications have been rejected on the basis that prisoners attempted to register in the wrong local authority area.

The prisoner needed to register at their home address which was out of our area. (*Electoral Services Manager, North West*)

Prison was outside of our area (home address was within our area) (*Electoral Services Manager, Southern*)

The person's home town (here) is where they applied to register, but they were currently living in another electoral area ... so should have applied there, not here. (*Senior Electoral Officer, Eastern*)

Dispersal thus introduces significant uncertainty: administrators may face a lack of clarity as to where a prisoner should register, while prisoners face the risk of having their applications rejected if they attempt to register using the wrong address.

A further problem associated with dispersal, one well-documented within research on prisoner / family relationships, is that it can disrupt correspondence with the outside world, thereby hindering the registration and voting processes.¹⁰¹

How are postals going to get into and out from prisons? How can we ensure this method is secure while also ensuring the integrity and secrecy of the ballot? (*Electoral Services Officer, Wales*)

Where will [we] be sending their postal votes and how will [we] be sure they will get them when they arrive where they are being held on remand? (*Electoral Services Officer, South East*)

101 Roy Light and Bryony Campbell, 'Prisoners' Families: Still Forgotten Victims?' (2007) 28 *Journal of Social Welfare and Family Law* 297.

Even accounting for better information-sharing in Scotland, these responses suggest that dispersal can present a major impediment to the realisation of prisoners' voting rights across the UK.

REMAND AND TEMPORARY RELEASE: INTERPRETING THE GUIDANCE

Remand prisoners and those on temporary release are arguably the two most legally significant categories of prisoner in the present context. While remand prisoners account for the largest proportion of prisoners who are eligible to vote, the enfranchisement of temporary release prisoners was the key reform which brought the *Hirst* dispute to a close. The guidance on voter registration for these prisoners is therefore particularly important, and our survey asked respondents for their views on it. A common theme among the responses received was a concern that electoral administrators are being granted significant discretion over prisoners' voting rights while being offered only limited instructions on how to exercise it.

Remand prisoners

Prisoners on remand have three options when registering to vote: they can use their home address, the prison address, or a declaration of local connection (based on either their address prior to imprisonment or the address where they would normally be resident). Meanwhile, prisoners who are already registered to vote at their previous address (prior to custody) are still considered to be resident at that address so long as they have not been at the prison for a period 'sufficient' for them to be regarded as resident there. As discussed in the previous section, several respondents voiced some uncertainty over which route should be followed in the context of prisoner dispersal.

Section 5 of the RPA 1983 sets out a presumption that prisoners held on remand should not be considered resident at the prison where they are held. Section 7A(2) of the Act then states that a prisoner may be regarded as resident at the prison 'if the length of the period which he is likely to spend at that place is sufficient for him to be regarded as being resident there for the purposes of electoral registration'. Echoing the legislation, the Electoral Commission guidance states that remand prisoners are 'deemed to be resident there if the period of detention is sufficient to enable them to be regarded as being resident there'.¹⁰² If a prisoner can be considered resident at a prison, however, this does not preclude them from using another address or making a declaration of local connection.¹⁰³

What constitutes a 'sufficient' period of detention is not specified but instead left to the judgement of electoral administrators. In response to a request for

¹⁰² Electoral Commission, n 84 above.

¹⁰³ RPA 1983, s 7A(5)

further information, the Electoral Commission indicated that the determination of a 'sufficient' period of detention is 'a matter for the Electoral Registration Officer (ERO) at each individual local authority to determine, based on the circumstances of the applicant'.¹⁰⁴ As one respondent observed, the guidance therefore 'leaves it to the administrator to decide if they qualify' (*Electoral Administrator, North East and Yorkshire*).

Survey respondents held different views about the clarity of the Electoral Commission's guidance on remand prisoners. Around half (49 per cent) said that it was clear, compared with a small minority (13 per cent) who felt it was unclear and around a third (37 per cent) who did not know. A majority of respondents indicated that they would feel 'quite confident' (52 per cent) or 'very confident' (13 per cent) applying the guidance to a case. In their written responses, several administrators also suggested that the networks of support provided by more experienced colleagues, neighbouring local authorities and the Electoral Commission would enable them to navigate any uncertainties.

Nevertheless, almost a third (31 per cent) admitted that they would feel 'not very confident' if asked to apply the guidance. Given that most respondents had, to their knowledge, never received an application from any category of prisoner, this is perhaps unsurprising. Even so, our survey responses identified several concerns. For example, one respondent criticised the lack of clarity from the Electoral Commission's guidance, suggesting that it had become 'much more woolly and open to interpretation', despite administrators needing 'clear and concise guidance' (*Governance Manager, Scotland*).

More specifically, several administrators noted the lack of explicit guidance as to what constitutes a 'sufficient' period of detention for the purposes of establishing a prisoner's place of residence, along with the difficulty in trying to predict how long a period on remand might last:

Guidance needs to clarify how long a period of detention is sufficient to be regarded as being resident to register at the institution they are detained at. (*Electoral Administrator, North East and Yorkshire*)

Very vague with how long they need to be on remand and held in prison for before they can be deemed resident at the prison. (*Administration Officer, Scotland*)

Without knowing how long the applicant will be on remand for prior to any sentencing can make determining the application complicated. (*Electoral Services Officer, London*)

These responses highlight the potential for inconsistency in how the voting eligibility rules for remand prisoners are administered. Electoral registration officers, it seems, are not only left to determine prisoners' qualifying address with ambiguous guidance but must also make predictions about prisoners' likely remand periods and potential transfer before elections. As we discuss further below, this is particularly problematic in a context in which both remand populations and the length of average remand periods are in flux.

104 Email from the Electoral Commission to the authors (21 October 2021).

Prisoners on temporary release

The UK Government in 2018 revised the administrative guidance on prisoner voting in England and Wales to enable prisoners released on temporary licence to vote; the same changes were also put into effect in Scotland and Northern Ireland. This was the key concession of the Lidington compromise which led to the resolution of the *Hirst* judgment. The Electoral Commission's guidance now states that 'it is possible that in some limited circumstances, convicted prisoners who have been released on temporary licence may meet the criteria to register to vote'.¹⁰⁵

In the survey, less than a quarter (22 per cent) of administrators felt that this guidance was clear, roughly a fifth (21 per cent) viewed it as unclear and the majority (57 per cent) did not know. Importantly, a majority indicated that they would be 'not very confident' (49 per cent) or 'not confident at all' (eight per cent) if ever required to apply the guidance. Many criticised the lack of detail regarding the 'limited circumstances' in which prisoners on temporary release become eligible:

The guidance does not give in depth information about who is eligible and under which circumstances. (*Electoral Services Manager, West Midlands*)

It is too vague stating 'in some limited circumstances' they can vote, but no guidance as to which circumstances. (*Electoral Services Manager, East Midlands*)

Information is rather vague and the references do not appear to offer any further information. (*Administration Manager, Scotland*)

Administrators also expressed concern about how these rules could be enforced. As discussed earlier, temporary release prisoners cannot register while inside the prison, nor can they register using the prison address or by using a declaration of local connection. They must therefore register as ordinary electors. As part of the registration process, they would still be required to provide their current and previous addresses. In theory, this should enable an electoral administrator to identify whether a person is being held in prison. However, several respondents observed that administrators would have no sure way of knowing whether someone is on temporary release.

[I] am not sure what information you would be provided with to show that a prisoner is only on a temporary licence and, therefore, eligible to register to vote. (*Electoral Services Officer, South West*)

Difficult to obtain this information unless offered by the elector themselves. (*Electoral Services Manager, South East*)

How are we to know when the licence has ended? (*Electoral Services Manager, South East*)

¹⁰⁵ Electoral Commission, n 84 above.

In light of these issues, several survey respondents raised concerns about the discretion being conferred upon electoral administrators.

The definition of whether they are able to register seems to be based on the interpretation of the legislation which could differ when applied by different authorities. (*Election Manager, North West*)

A lot is being left to the administrator to determine. (*Electoral Support Officer, Eastern*)

The responses underline the potential for inconsistency in the application of the relevant rules. For a number of administrators, they lack comprehensiveness and raise basic questions around enforceability. As a result, it seems that the application of these rules in practice, though extremely rare, is likely to be arbitrary and unpredictable. Given that the guidance is framed by the legislative provisions, however, the Electoral Commission may be locked into this position, unable to clarify the guidance for fear of going beyond what was intended by the rules.

DISCUSSION AND CONCLUSIONS

Administrative disenfranchisement

The data collected reveal that the scale of disenfranchisement in the UK is likely to be more severe than the legal rules on voting eligibility suggest. While eligible prisoners may choose not to vote, some will be precluded from doing so by the institutional and administrative systems which they depend upon to participate in the electoral process. The administrative complexity is felt unevenly across the UK's jurisdictions, but it pervades each of them. An absence of systematic information-sharing between electoral and prison services in England and Wales makes for a particularly chaotic system in which administrators do not know where eligible voters are held and requests for information from prisons can end up stonewalled. With prisons across the UK apparently lacking the necessary systems of support and guidance with the registration process, incomplete or erroneous applications are being sent off only to be returned.

Prisoner dispersal complicates electoral registration further, yet prisoners are expected to intuitively navigate those complications if they are to avoid delayed or rejected applications. Even if the issue of residence is overcome, dispersal may still disrupt or delay the registration process when correspondence is misdirected to prisons where individuals are no longer held. Exacerbating these logistical problems are the challenges of interpreting the relevant rules and guidance. Clearly, the legislative silence as to what constitutes a sufficient period of detention to qualify a prisoner as being 'resident' at their place of detention for the purposes of electoral registration is a source of consternation among some electoral administrators; so too is the vagueness of the 'limited circumstances' in which temporary release prisoners can apparently vote.

The UK government has long sought to justify the ban on prisoner voting on the grounds that it provides an additional punishment for offences serious enough to warrant a custodial sentence, one which promotes civic responsibility and respect for the rule of law.¹⁰⁶ The research findings, however, reveal that this justification is flawed. In practice, eligible prisoners who have not been convicted of any criminal offence may also lose the right to vote. In the end, the realisation of the right depends not only on the prisoner: it is contingent upon the responsiveness of prisons to electoral administrators' requests for information; adequate support within the prisons; successful mitigation of the disruptive potential of dispersal; and a consistent interpretation of vague rules with which few electoral administrators have direct experience. Where any one of these is lacking, it is likely that a prisoner will be unable to vote. To the extent that the resolution of the *Hirst* case rested upon the notion that prisoners are no longer disenfranchised on an arbitrary basis, clearly it requires re-examination.

A cardinal principle of the ECHR is that rights should not be 'theoretical or illusory ... but practical and effective'.¹⁰⁷ In light of this study, however, it is difficult to see how A3P1 ECHR, despite being described by the ECtHR as 'a vitally important Convention right',¹⁰⁸ provides anything other than illusory protection for UK prisoners. As with illusory rights observed on other issues falling within the Convention's scope, the state has been given carte blanche and recourse to the ECtHR has 'little to offer by means of a resolution'.¹⁰⁹ Given that we are also dealing with rights found in domestic public law, however, clearly the problems run deeper than the ECHR. The right to vote under UK electoral laws, it seems, is also an illusory right for many eligible prisoners, particularly those in England and Wales.

Returning to the question posed at the outset, the UK prisoner voting example suggests that prisoner rights currently count for little. Rather than demonstrating the protective power of such rights, their potential to enhance public scrutiny, promote inclusion or re-integration, or raise standards within prisons, it aligns with the wider disjuncture which has been observed between the rhetoric and reality of prisoner rights. Lidington's compromise, predicated on wilful ignorance of the true scale of prisoner disenfranchisement, offers another stark reminder that bestowing rights on prisoners does not 'lead automatically to the realization of rights-respecting practices'.¹¹⁰

Future developments, debates, and research

The findings of this study have several implications for future policy, debates, and research. First, they bring into question the legal resolution of the *Hirst* case. Not only has there been no progress on prisoners' voting rights in the UK

106 *Hirst* n 12 above at [50].

107 *Airey v Ireland* (1980) 2 EHRR 305 at [24].

108 *Hirst* n 12 above at [82].

109 Fiona de Londras, 'Fatal Foetal Abnormality, Irish Constitutional Law, and *Mellet v Ireland*' (2016) 24 *Medical Law Review* 591, 597.

110 Armstrong, n 5 above, 88.

(Scotland's cautious reforms aside); the possibility of *administrative* (as opposed to *statutory*) disenfranchisement was entirely neglected from political and judicial consideration.¹¹¹ Recent developments add further weight to the case for a full reappraisal of current policy. During the Covid-19 pandemic, the number of individuals released on a temporary basis in England and Wales decreased by 44 per cent, largely undoing the minor changes made to the franchise in 2018.¹¹² Meanwhile, the number of remand prisoners – already the largest category of prisoner eligible to vote – has increased dramatically across the UK.¹¹³ In England and Wales, this has been aided by the decision to extend the time limit on remand from six to eight months.¹¹⁴ A growing number of people are therefore at risk of administrative disenfranchisement.

Notwithstanding the fact that voting rights have been rendered illusory for many prisoners, any identifiable instances of administrative disenfranchisement should be subject to legal challenge. Given that the exclusion of convicted prisoners was previously held to violate the ECHR, it follows that the exclusion of remand prisoners in particular should also constitute a violation. Even if ongoing political hostility to prisoner enfranchisement is likely to deter judicial intervention on human rights grounds, a case might still be fashioned using principles of administrative law. For example, it could be argued that the UK Ministry of Justice's clear and unambiguous policy that prisons must have arrangements in place to facilitate voting for eligible prisoners gives rise to a legitimate expectation for such prisoners which has been unlawfully frustrated by the inadequacies of the current setup.¹¹⁵

Nevertheless, the history of UK prisoner voting litigation powerfully demonstrates the limits and potential futility to that route. As Scott argues, 'any optimism and zeal for penal transformations through the courts must be qualified'.¹¹⁶ Even if litigation proves successful, it may not yield the necessary statutory or administrative changes from an unwilling UK government. The case for practical and effective voting rights for prisoners will therefore need to be made not only legally but politically, drawing upon the growing body of evidence available.¹¹⁷ Given that the UK government recently shrugged off

111 See Equality, Local Government and Communities Committee, n 16 above, for a notable exception.

112 UK Ministry of Justice, 'Release on temporary licence by establishment'. Data obtained via the Freedom of Information Act 2000 (2022).

113 Department of Justice, n 68 above; Scottish Prison Service, n 68 above; UK Ministry of Justice, *Offender Management Statistics Bulletin, England and Wales. Quarterly: October to December 2021, and Annual: Calendar Year 2021* (2022); Howard League Scotland, *The Scandal of Remand in Scotland: A Report by Howard League Scotland* (2021).

114 Fair Trials, 'UK: Thousands held in prison for longer than legal time limit while awaiting trial' *Fair Trials* 17 March 2021 at <https://www.fairtrials.org/articles/news/uk-thousands-held-prison-longer-legal-time-limit-while-awaiting-trial/> (last accessed 27 June 2022).

115 *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545.

116 Scott, n 3 above, 238.

117 For example Erika Wood and Rachel Bloom, *De Facto Disenfranchisement* (New York, NY: American Civil Liberties Union and Brennan Center for Justice at New York University School of Law, 2008); Electoral Commission, 'Response to inquiry into voting rights for prisoners' 2019 at <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-responses-consultations/response-inquiry-voting-rights-prisoners> (last ac-

concerns over the potential disenfranchisement of millions of voters with legislation requiring photographic identification, that will be a significant task.¹¹⁸

Next, systematic collection and publication of data related to prisoner voting should be introduced across the UK. In the absence of such data, electoral administrators, policy-makers and the public will remain in the dark regarding the location of eligible voters held in the prison estate and the extent of their participation. In that context, the voting rights of those prisoners are likely to remain illusory, even in the event of future devolved or UK-wide legislation extending the franchise to convicted prisoners.

Finally, the findings have ramifications for future research in this area. They demonstrate, first, that surveys with electoral administrators can provide important insights, both for UK studies and in similar comparative contexts in which prisoners are eligible to vote, yet the state refuses to collect and publish relevant data. What is also clear, however, is that the barriers faced by eligible prisoners now differ in important respects across the UK's legal and political jurisdictions. In responding to this challenge, future research in this area may contribute to the development of a comparative socio-legal literature on penal policy, electoral law and human rights *within* the UK. Most importantly, the findings underline the need to interrogate the legal rights of prisoners empirically, if we are to avoid judgements of prison conditions grounded in legal fictions. This is a fundamental prerequisite for an informed debate on the future of imprisonment and penal policy.

cessed 10 October 2022); Porter, n 92 above; Durrell Douglas, *Voting in Jails: Advocacy Strategies to #unlockthevote* (Washington, DC: Sentencing Project, 2022).

118 Elections Act 2022, Sched 1. Aubrey Allegretti, 'Millions in UK face disenfranchisement under voter ID plans' *The Guardian* 4 July 2021 at <https://www.theguardian.com/politics/2021/jul/04/millions-in-uk-face-disenfranchisement-under-voter-id-plans> (last accessed 5 July 2022).