Symposium Paper

Prisoners' Voting Rights

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The Equal Justice Project is pleased to present this issues paper for our Symposium on Prisoners' Voting Rights. Our interest has been spurred in the issue by the recent changes to such rights, and the lack of discussion or debate surrounding these changes. We hope you find the following discussion illuminating and thought-provoking. We begin with an introduction to the arguments surrounding prisoners' right to vote, continue with a jurisdictional overview including discussion of important cases, and finish with the question of a regional human rights mechanism.

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Justifications for Prisoner Disenfranchisement

It is not necessary to construct an argument advocating that specifically prisoners should have voting rights. Any positive argument for why anyone gets voting rights applies equally to prisoners. So the question “why should prisoners be allowed to vote?” merits the same response as the question “why should anyone get the vote?” The issue, then, is not why prisoners should have the vote, but whether the fact that someone is a prisoner is a sufficient reason to deny them the vote. Before assessing the arguments, two points should be noted.

First, it is worth mentioning what these arguments must show. They must first demonstrate that prisoners deserve additional punishment, as disenfranchisement is not a necessary consequence of imprisonment[1] but a ‘supplementary’ punishment. [2] Assuming this can be shown, it must then be demonstrated why the particular form this punishment takes should be the loss of the vote. Merely showing that prisoners have broken our rules ‘does not establish which of those rules they ought to lose the protections of.’[3]

Second, there are many reasons that have been advanced to exclude prisoners: forfeiture,[4] the burden on the state,[5] electoral requirements,[6] deterrence,[7] rehabilitation,[8] and more. This paper focuses on only two justifications: the social contract and the requirement of democratic preconditions. The narrow focus is because the preceding justifications are considerably outdated in a liberal human rights era; what is fascinating about the two considered here is that not only are they more intuitively plausible but they seek to win the argument on liberal terms.

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1 J Fitzgerald and G Zdenkowski, “Voting Rights of Convicted Persons,” (1987) 1 *Criminal Law Journal* 11 at 36.

2 Heather Lardy, “Prisoner Disenfranchisement: Constitutional Rights and Wrongs,” *Public Law* (2002) at 527.

3 Richard L. Lippke, “The Disenfranchisement of Felons,” (2001) 20 *Law and Philosophy* at 561.

4 Lardy, above n 2, 530.

5 See *August v Electoral Commission* 1999 (3) SA1 (CC) at [28], where the Constitutional Court held that administrative and procedural arrangements can easily be made to enable prisoners to vote.

6 This was argued by National in 1977. See Greg Robins, “The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand,” (2006) 4 *NZJPIL* at 169.

7 Britain argued this in *Hirst v United Kingdom (No 2)* (2005) ECHR 74025/01 (Grand Chamber, ECHR) (*Hirst*) claiming the legislation was legitimate because it served the purpose of “preventing crime” (at [50]).

8 See Paul Quinn, “Submission to the Law and Order Committee on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill 2010″ at [6.2].

(a) Social Contract

Philosophers have traditionally used the concept of a social contract to explain obedience to the rule of law. It is an heuristic, hypothetical solution to the problem of how we as free beings can move from a state of nature to a society under rule, yet still retain our freedom. Rousseau's famous answer was that if each individual retains a say in how he is to be ruled, his will is not subordinated to the will of others because 'in giving himself to all, gives himself to nobody'.[9]

Prisoner disenfranchisement advocates use the theory to advocate two similar arguments. The first holds that rights have correlative duties, and with respect to the right to vote, the relevant duty is the upholding of the social contract, or obeying the law. There are several problems with this. First, presumably minor crimes do not warrant disenfranchisement (arguably, they do not even breach the contract).[10] Yet absent in social contract theory is guidance as to where the threshold ought to lie. Also, the focus is exclusively on the lawbreaker's obligation to society, while wholly neglecting the correlative question of whether society has fulfilled its obligations to the lawbreaker.[11] But perhaps most importantly, this argument does not overcome the second of the two hurdles mentioned above: namely, why the punishment must be specifically the loss of the vote.

The second variation attempts to bridge this gap by connecting crime to a lack of respect for the law. It proposes that, by violating laws one has participated in creating, one is reneging on the agreement to respect the law and thereby forfeits the right to further assist in creating it.[12] In contrast to the viewpoint above, which justifies disenfranchisement based on the *fact* of one's breaking the law, this position holds that society can disenfranchise based on an inference about one's *attitude* towards the law. The argument fails because it makes the dubious assumption that breaking the law is tantamount to denying its legitimacy.[13] Analogising, it is like saying that one cannot break a promise and at the same time acknowledge the promise was binding. But this is perfectly consistent. The failure of both of the above accounts lies in the absence of a premise explaining the connection between crime

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9 Jean-Jacques Rousseau, Judith R. Masters, and Roger D. Masters, *On the social contract, with Geneva manuscript and Political economy* (New York: St. Martin's Press, 1978).

10 As per the concurring judgment of Caflisch J in *Hirst* above n 7 at [7]: "It cannot simply be assumed that whoever serves a sentence has breached the social contract."

11 Jeffrey Reiman, "Liberal and Republican Arguments Against the Disenfranchisement of Felons," (2005) *Criminal Justice Ethics* at.11.

12 Reiman, above n 11, considers this argument at 10.

13 Reiman, above n 11, 10. See also Andrew Geddis, "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed," (2011) 2 *New Zealand Law Review* at 456.

and the loss of the vote. Yet this is precisely what the hypothetical contract was supposed to provide.

(b) Democratic Requirements

Many have argued that the absence of "civic virtue" warrants a denial of voting rights. Presently, this is the position of the United States and British governments,[14] and was advanced by the Canadian,[15] South African[16] and Australian[17] governments in their respective domestic litigation. To succeed this argument must not only show that it is necessary for democratic participants to possess civic virtue, but equally that prisoners lack it. Neither premise is convincing.

Civic virtue is a conception of characteristics considered instrumental to the proper functioning of a democracy. The first step in the argument is to show that democracy requires these characteristics of its citizens. A recent formulation of this argument by Manfredi seeks to justify prisoner disenfranchisement on liberal grounds.[18] Manfredi uncontroversially contends that liberal communities must define their membership base by some measure. He accepts that access to citizenship cannot depend on proof of certain characteristics. But while we cannot require something like an IQ threshold for voters, we can infer with reasonable accuracy that the worst offenders in society lack civic virtue, and justifiably exclude them from our community.[19]

In response, while Manfredi has shown that it is *desirable* that members of our community are reasonable, intelligent and empathetic, he has failed to show that democracy *requires* these traits of its citizens, which is necessary for the argument to succeed.[20] Manfredi states

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14 See Nora Demleitner, "Disenfranchisement in Comparative Perspective: Legal and Political Approaches: 3. U.S. felon disenfranchisement: parting ways with Western Europe," in *Criminal Disenfranchisement in an International Perspective* (Cambridge: Cambridge University Press, 2009). See also *Hirst* above n 7 at [50] and *Scoppola v Italy (No 3)* (126/05) Section II, ECHR 18 January 2011 at [76].

15 *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68, [2002] 3 SCR 519 at [21].

16 *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) at [59].

17 *Roach v Electoral Commissioner* [2007] HCA 43, (2007) 233 CLR 162 at [12].

18 While I have chosen to focus on Manfredi's arguments, many of his points are also made by other critics.

19 Christopher P. Manfredi, "In defense of prisoner disenfranchisement," in *Criminal Disenfranchisement* (above n 14) at 273. See also Roger Clegg, "Who Should Vote?" (2001) 6 *Texas Review of Law and Politics* at 161.

20 Reiman, above n 11, 8.

that 'the justification for prisoner disenfranchisement lies in its promotion of a substantively richer notion of liberal citizenship.'[21] But nothing in democracy requires this conception of citizenship, even if it would somehow be beneficial. Manfredi thus makes a fallacious inference from the premise that liberal regimes *operate better* if citizens possess certain characteristics to the conclusion that liberal regimes *can only operate* if they possess these characteristics.

Even if Manfredi can overcome this hurdle, his job is incomplete. He must show that prisoners do in fact lack civic virtue and therefore deserve to be stripped of the franchise. But if the relevant criterion is the absence of civic virtue, then confining the scope of disenfranchisement to prisoners is both under- and over-inclusive: the former because many citizens outside prison exhibit gross immorality, the latter because there is no necessary connection between a lack of civic virtue and receipt of a custodial sentence.[22] The reality is that "criminals and noncriminals are morally mixed."[23]

The right to vote is the quintessential right in a democracy. In closing, that which was noted at the outset bears repetition. The onus is not on those who would give prisoners the vote: political scholarship holds this as the default position. The onus is squarely on those seeking to deny an otherwise eligible group from voting. It is hence not necessary to justify voting rights for prisoners. It is only necessary to explain why no argument seeking to remove the vote succeeds. While space prevents an analysis of every argument to this effect, the above has shown why two of the most common arguments fail.

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21 Manfredi, above n 19, 277.

22 Reiman, above n 11, 7.

23 Reiman, above n 11, 7.

Jurisdictional overviews:

New Zealand, Canada, and Australia

New Zealand

I The current position

Prisoner's voting rights in NZ are governed by s 80 (1) (d) of the Electoral Act 1993:

> "The following persons are disqualified for registration as electors...a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.[24]"

A prison means "a prison established or deemed to be established under the Corrections Act 2004."[25] The Corrections Act 2004 permits the Minister of Corrections to declare any land or building to be either a corrections prison or a police jail.[26] Persons either sentenced to imprisonment,[27] or detained in custody or on remand[28] will be in either a corrections prison or a police jail, and thus are disqualified from registration as electors per s 80 (1) (d).

In order to vote, a person must be both qualified to register, and registered on the electoral roll.[29] Thus, if a prisoner is disqualified from registration, they may not vote, even if they are currently registered on the Electoral Roll, as signified by the 'and' in s 60 (1) Electoral Act 1993.[30] The Registrar of Electors must remove the prisoner's name when their disqualification is either certified by the Registrar, or notified per s 81.[31]

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24 The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 came into force on the 16 December 2010, per s 2.

25 Per the Interpretation s 3 Electoral Act 1993.

26 Corrections Act 2004, s 32 (1).

27 Corrections Act 2004, ss 34 (1), 34 (2).

28 Corrections Act 2004, s 34 (3).

29 Electoral Act 1993, s 60.

30 The Electoral Roll will be changed in due course in response to imprisonment due to the requirement in s81 Electoral Act 1993, requiring notice of a person's imprisonment to be forwarded to the Electoral Commission (and thus the Registrar of Electors) within seven days of the imprisonment.

31 Electoral Act 1993, s 98.

II The previous position

The Electoral Act 1993 was amended by the Electoral (Disqualification of Sentenced Prisoners) Act 2010, introduced by Paul Quinn. Prior to the 2010 Amendment Act, the s 80 (1) (d) disqualification reads:

> "a person who, under- i) sentence of imprisonment for life; or ii) a sentence of preventive detention; or iii) a sentence of imprisonment for a term of 3 years or more,- is being detained in prison."[32]

The effect of the amendment has been to widen the catchment for the disqualification to any person imprisoned, which includes detention on remand or being in custody of the police, at the time of the election. A prisoner given a disqualified or qualified status under the old unamended Act remains in that position.[33]

The 2010 amendment marks a return to prisoner disenfranchisement after several government flip-flops. In 1975 most prisoners[34] were re-enfranchised by the Labour Government[35], although this decision was only briefly explained by Parliament, leaving academics to conclude that the move relied on "the minimal restriction of civil rights and an increasing awareness of prisoners' positions within society to justify giving prisoners the right to vote."[36] In 1977, prisoners were again all disenfranchised, and remained so until the Electoral Act 1993 which maintained the policy in general with an important exception for prisoners with sentences less than three years.[37] Rationale behind the 1993 policy was again left somewhat unclear, with little public Parliamentary debate on the issue.[38]

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32 Electoral Act 1993, s 80 (1) (d), version as at 7 July 2010.

33 Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, s 6.

34 Prisoners who had perpetrated 'corrupt' offences against the franchise (per ss215-218 Electoral Act 1993 at 2006 these are personation, bribery, treating or undue influence) were still deprived of certain civil liberties including the right to vote.

35 Electoral Act 1975, s 18 (2).

36 Greg Robins 'The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand' (2006) 4 NZJPIL at165, 168.

37 Electoral Act 1993, s80 (1) (d), until amended in 2010.

38 Robins, above n 13, at 171.

III Academic Comment

Academia has raised both substantive and procedural concerns about the current state of the law in this area.

A Substantive Concerns

The right to vote is enshrined in NZ by the New Zealand Bill of Rights Act 1991, guaranteeing "the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and secret ballot"[39] and only permitting restriction where "demonstrably justified in a free and democratic society."[40] Due to this high threshold, the blanket disenfranchisement imposed by the current s 80 (1) (d) raises substantive concerns about the rationale behind the provision. [41]

Disenfranchisement has been seen as a part of the loss of liberty which society sees as appropriate retribution for crime. Indeed, imprisonment inherently removes certain rights and freedoms in response to a misdemeanour of the criminal- the right to freedom of movement primarily, and secondarily rights to freedom of association and expression. However, it is arguably one step further to withdraw rights not linked necessarily to physical imprisonment. Academics have likened disenfranchisement to restricting freedom of religion or the right to speak one's native language while incarcerated.[42]

Additionally, withdrawing the right to vote pursuant to imprisonment may result in arbitrary divisions between those able to vote and those prevented. Arbitrary outcomes may ensue where, for instance, a person is in custody on the day of the election for a minor allegation and thus is deprived of the right to vote where on any other day the custody would not have caused that outcome. It is possible that "pure luck" determines whether imprisonment follows any one act, and thus the bare link between being in prison and disenfranchisement, rather than conviction or seriousness of offence, is arbitrary.[43]

Substantive concerns also include the difficulty of re-enrolling prisoners once they are released from incarceration. The s 80 (1) (d) disenfranchisement is a disqualification from registration, but if the prisoner is currently on the Electoral Roll, the disqualification manifests as a mandatory removal from the roll.[44] Thus, in order to re-enfranchise the

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39 s 12(a).

40 s 5.

41 Electoral (Disqualification of Convicted Prisoners) Amendment Bill, as reported from the Law and Order Committee, Commentary, 5; Andrew Geddis 'Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed' 3 *NZLR* 2011 at 453.

42 Geddis, above n 41, at 455.

43 Geddis, above n 41, 456.

44 Electoral Act 1993, s 98.

prisoner as an active member of society post-release, the prisoner must re-enrol. Linking statistics of incarceration and statistics of voting behaviour, first-time electoral enrolment is rare enough for the groups which make up the bulk of the prison population, let alone re-enrolment.[45]

Current global trends show a shift away from this type of blanket disenfranchisement.[46] This is supported by General Comments on the International Covenant on Civil and Political Rights (ICCPR), and the United Nations Human Rights Committee (UNHRC) which requires reasonable and objective grounds for disenfranchisement.[47] New Zealand has ratified the ICCPR with no relevant reservations, and is party to the UNHRC, however these instruments are not incorporated into domestic law. The NZBORA is protected by the Attorney-General's mandatory supervision in s 7, but due to Parliament's supremacy, the amended s80 (1) (d) is legally valid.[48]

B Procedural Concerns

Procedural concerns have been expressed regarding the passing of the Bill. Recorded debate on the issue was limited, and reasons provided by the Bill's opponents were not responded to by supporters.[49] Submissions were substantially against the Bill, and the Attorney-General's report recommended that the Bill not be passed due to inconsistency with the New Zealand Bill of Rights Act 1991.[50] Parliament, as the sovereign lawmaker, is permitted to pass law in the face of factors such as these. However, commentators claim that to do so without providing reasons, and in regards to a basic human right, demonstrates a serious, damaging failure to engage meaningfully with the issue at hand.[51]

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45 Geddis, above n 41, 443-474, 448.

46 Geddis, above n 41, 450. Blanket disenfranchisement has been abandoned in Canada, South Africa, Hong Kong, and Ireland, and distaste for the policy has been expressed in the High Court of Australia and the European Court for Human Rights, although the UK maintains blanket disenfranchisement.

47 Art 25(b) International Covenant on Civil and Political Rights; Human Rights Committee *General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art 25)* (CCPR/C/21/Rev1/Add7, General Comment No 25 (General Comments) Office of the High Commissioner for Human Rights 1996) at [14].

48 Geddis, above n 41, 452.

49 Electoral (Disqualification of Convicted Prisoners) Amendment Bill, Comment, 2; Geddis, above n 18, 464.

50 s 7.

51 Geddis, above n 41, 467.

Australia

I Legislation

A Right to vote in federal elections

There have been several changes to the prisoners' entitlement to vote in federal elections over the past decade. The original statute outlining the entitlement to vote as part of the commonwealth election is the Commonwealth Electoral Act 1918.[52] There has been a number of legislative amendments which restricted the prisoners' voting rights. In 2004, section 93 (8) of the 1918 Act was amended in 2004 by inserting section 93 (8) (b)[53]. This completely abolished the right of any prisoner to vote in federal elections. Anyone serving a "sentence of imprisonment", defined as being in "full-time detention" which is "attributable to the sentence", is prohibited from enrolling and voting.[54]

Furthermore, the Act was further amended in 2006 to clarify the legislative intent to abolish prisoners' voting rights. Subsection 8AA was inserted, stating that "a person who is serving a sentence of imprisonment for an offence … is not entitled to vote at any Senate election or House of Representatives election". [55] This section clearly prohibits anyone imprisoned for an offence against any federal or state law from voting in the national elections. It is important to note that the disqualification from voting does not necessarily end when prisoners finish serving their sentence. Once their names are struck off the electorate rolls, it may be difficult to re-enrol even after they are released, for example due to difficulties with establishing a stable address for the minimum requirement of one month.[56]

In 2007, the High Court of Australia held that the complete prohibition of prisoners from voting is a violation of the Constitution[57]. Following this famous decision, subsection 8AA of the Commonwealth Electoral Act 1918 was amended in 2011.[58] The amendment meant that the legislation only prohibited those who are serving a sentence of three years or longer from

52 Commonwealth Electoral Act 1918 (Cth).

53 Electoral and Referendum Amendment Act 2004 (Cth), sch 1.

54 Schedule 1.

55 Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth), sch 1.

56 Sandey Fitzgerald "Ending felon disenfranchisement" (paper published by the Democratic Audit of Australia, July 2005)

57 *Roach v Electoral Commissioner* (2007) 233 CLR 162 (HCA).

58 Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011 (Cth).

voting in federal elections, rather than abolishing voting rights of every prisoner.[59] This remains the status quo of the voting rights of prisoners in federal elections.

B Right to vote in state elections

Each state has different statutory restrictions on the prisoners' rights to vote in state elections. Queensland follows the most restrictive approach, where any prisoner serving a sentence of any length may not vote in the state or district elections.[60]

Both New South Wales and Western Australia prohibit prisoners from voting if they are serving a sentence of more than one year.[61] In Tasmania, the restrictions towards entitlement to vote are the same as those at the federal level. Any prisoner serving a sentence of three years or more is not entitled to vote.[62]

In South Australia and Australian Capital Territory, there are no restrictions on the prisoners' right to vote in state elections, provided that the prisoner's address is within the electorate.[63] Nothing in these two statutes prohibits anyone serving a sentence of imprisonment from participating in state elections.

II Roach v Electoral Commissioner

In 2007, the Australian High Court was faced with determining whether s 93 (8AA) of the Commonwealth Electoral Act 1918 (Cth) was constitutionally valid in the case of *Roach v Electoral Commissioner.*[64] The applicant, Vicki Roach, was a prisoner serving a sentence of six years. She argued that both the 2004 and 2006 amendments to the Commonwealth Electoral Act 1918 were unconstitutional and invalid, on the basis that such laws violate ss 7 and 24 of the Australian Constitution. The court held by a majority (4-2), that the 2006 amendment which barred all prisoners from voting was unconstitutional, but upheld the validity of the 2004 amendment, which established the disenfranchisement of prisoners sentenced to prison for three years.

A Majority

59 Schedule 2.

60 Electoral Act 1992 (Qld), s 106.

61 Parliamentary Electorates and Elections Act 1912 (NSW), subs 25 (a); Electoral Act 1907 (WA), para 18 (1) (c).

62 Electoral Act 2004 (Tas), subs 31 (2).

63 Electoral Act 1985 (SA), s 29; Electoral Act 1992 (ACT), subs 72 (2).

64 *Roach v Electoral Commissioner* [2007] HCA 43.

The majority (Chief Justice Gleeson and Justices Gummow, Kirby and Crennan) recognised that universal suffrage has now become an established fact in Australia, due to the historical development of the Constitution, but acknowledged this is subject to exceptions.[65]

Gleeson CJ in a separate judgment noted that in determining the validity of such exceptions there must be found to be a rational connection between purpose and the disenfranchisement.[66]

He found the rationale for excluding prisoners from voting;

> 'must be that serious offending represents such a form of civic irresponsibility that it is appropriate for parliament to mark such behaviour as anti-social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental political right'.[67]

With regards to the 2006 amendment, Gleeson CJ found the use of a sentence of imprisonment to identify those who have engaged in serious criminal conduct in order to satisfy the rationale to be arbitrary; it does not sufficiently take into account the seriousness of the offence. In particular he noted that many prisoners may be serving short-term sentences and the failure to differentiate between those serving short term and long-term sentences breaks the rational connection between the disenfranchisement of those sentenced to imprisonment and the purpose for doing so.

Gleeson CJ however found that the disenfranchisement of prisoners sentenced for three years or more as per for the 2004 amendment was valid. Such an exception takes into account the seriousness of the offence, focusing on those with long-term sentences.[68]

Gummow, Kirby and Crennan JJ, in a judgment given by Justice Gummow, note that the test of validity asks whether the exception is;

> 'reasonably appropriate and adapted [or 'proportionate'] to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.[69]

They noted the end served by the 2006 Act was to further stigmatise those serving a sentence of imprisonment. The new amendment has no regard to a number of significant factors; the nature of the offence committed, length of term of imprisonment, and personal circumstances

65 *Roach v Electoral Commissioner* [2007] HCA 43.

66 At [8] per Gleeson CJ.

67 At [12] per Gleeson CJ.

68 At [19].

69 At [85] per Gummow J.

of the offender.[70] The end served by the 2006 amendment was found to go well 'beyond what is reasonable, appropriate and adapted (or 'proportionate') to the maintenance of representative government'.[71]

With regards to the validity of the 2004 Act, Gummow, Kirby and Crennan JJ found that the 2004 Act is appropriate and adapted to serve an end consistent with maintenance of the Australian representative government, as it takes into account the 'seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process'.[72]

B Dissent

In dissent, Haynes and Heydon JJ found that both the Acts were valid, arguing that the majority essentially drew an arbitrary line between serious and shorter-term imprisonment.[73] Heydon J argued that under s 7 of the constitution the phrase 'chosen by the people' did amount to universal suffrage.

70 At [90] per Gummow J.

71 At [95] per Gummow J.

72 At [98] per Gummow J.

73 Graeme Orr and George Williams "The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia" (2009) 8 Election Law Journal 123 at 133.

Canada

I Section 3 of the Canadian Charter of Rights and Freedoms

Similar to the status of New Zealand's constitution as a body of important statutes rather than a single statute, the Canadian Constitution consists of codified acts as well as uncodified conventions and traditions. The Constitution Act 1982 is a vital part of the Canadian constitution. This Act includes a number of previous Acts referred to in its schedule, determining the status of these pieces of legislation as constitutional. It also incorporates the Canadian Charter of Rights and Freedoms, a bill of rights espousing fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights and language rights. Section 52 (1) of the Constitution Act provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Unlike any of New Zealand's constitutional documents, and notably unlike our Bill of Rights, this supremacy clause allows for courts to strike down laws outside of the constitution on the basis that they are inconsistent with the rights espoused within the constitution. Furthermore, the Constitution Act is entrenched. It may only be amended pursuant to entrenching procedures contained within the Act. In most circumstances, the procedure to be followed is that under s 38 (1), requiring assent from both the House of Commons and the Senate, as well as the approval of two-thirds of the provincial legislatures (at least seven provinces) representing at least 50% of the population.

Part 1 of the Constitution Act sets out the Canadian Charter of Rights and Freedoms. Section 3 states that a democratic right is that "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." Section 1 of the Charter states that "*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

II Canada Elections Act 2000, c. 9

The Canada Elections Act relates to the elections of Members of Parliament to the Canadian House of Commons. Section 4 (c) of this Act states that "every person who is imprisoned in a correctional institution serving a sentence of two years or more" is not entitled to vote at an election. Section 5 makes it an offence to vote or attempt to vote if one knows they are not allowed to under s 4, or to induce another to vote, knowing that person is not entitled to vote under s 4.

III Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68

This case began in 1988 when a prisoner serving a life sentence challenged the constitutionality of statutory provisions barring his right to vote, under s 3 of the Canadian Charter. Judge Van Camp in the Ontario High Court of Justice held that these provisions contravened s 3 of the Charter, but were a reasonable limitation of the right to vote under s 1 of the Charter. This decision was made on the basis that the limitation of the right had a reasonable objective: excluding those whose conduct society disapproved of from voting in that society's elections. The limitation was also reasonable, not abrogating voting rights more than necessary and restoring voting rights on prisoners once they were released. Judge Van Camp, however, rejected the argument that there were inherent limitations on the right to vote (meaning that the application of s 1 was unnecessary). The judge noted the clear and unambiguous nature of the wording of s 3, as opposed to sections concerning other rights that used wording such as "unreasonable" as qualifiers.

However, in 1991, the case of *Belczowski v The Queen*[74] was decided by the Federal Court. Another prisoner serving a life sentence argued the same issue, concerning voting rights before the federal court and was successful. The court held that prisoner disenfranchisement was not a reasonable limitation under s 1 of the Charter and that the statutory provisions concerning prisoner's voting rights were invalid. This was upheld by the Federal Court of Appeal. In this case, the Federal Court discussed the application of three purported objectives in favour of prisoner disenfranchisement. It rejected the argument that prisoner disenfranchisement was required to "affirm and maintain the sanctity of the franchise" in Canadian democracy, on the basis that legislators should not impose tests of decency and responsibility on prisoners. Besides, indecent and irresponsible people could just as well be found outside of prison. The court then rejected the objective of "preserving the integrity of the voting process" because there was no reason to assume all prisoners were ignorant about elections, just as there was no reason to assume all non-prisoners were well informed. The third objective, to punish offenders, was the only one the Federal Court and the Federal Court found plausible, as the courts saw it as akin to taking away rights such as freedom of assembly and association as means of punishment. Nonetheless, the disenfranchisement of prisoners was still deemed an unreasonable limitation of the right to vote.

Soon after, the Ontario Court of Appeal overturned the finding in *Sauvé*, which was upheld by the Supreme Court of Canada. In the Supreme Court decision, the government contention that denying voting rights would promote civic responsibility and respect for the law was rejected. The Court held that it was likely to do just the opposite. Prisoner disenfranchisement only prevented prisoners from learning about democratic values and social responsibility – hindering objectives of rehabilitation and reintegration - and flew in the face of the inclusiveness and equality principles of Canadian democracy. Furthermore, the objective that prisoner disenfranchisement was another means of punishing law-breakers was met with some criticism by the court as Parliament had supplied no reason for why they

74 *Belczowski v The Queen* [1991] 5 C.R. (4th) 218.

felt that prisoners should be additionally punished by this measure. The Court also viewed voting rights as a fundamental right and, as such, any restriction of it could not be arbitrary. Since prisoner disenfranchisement provisions were a blanket ban on voting rights regardless of a prisoner's individual circumstances, they were arbitrary and could not be sustained.

The Supreme Court in *Sauvé* held that s 3 of the Canadian Charter of Rights and Freedoms guaranteed prisoners the right to vote and that denying this right was not a "reasonable limit" that could " be demonstrably justified in a free and democratic society", under s 1 of the Charter. The case had been brought under s 51 (e) of the electoral legislation of the time, which prohibited prisoners from voting. By the time of the decision s 51 (e) had been repealed, but s 4 (c) of the new Electoral Act had much the same effect. The Court held that s 51 (e) had been unconstitutional, and that the new s 4 (c) was likewise to be void. As a result, there is no longer any restriction on prisoners voting rights in Canada. Section 4 (c) remains in the Electoral Act but it no longer has any force or effect.

Dissent

It should be noted that the Supreme Court holding in *Sauve* was not a unanimous decision. The dissenting judgments saw the prisoner disenfranchisement provisions as a proportional and reasonable limit on the right to vote, and supported parliament's objective of using disenfranchisement as a means of punishment against serious criminal offenders. The minority did not view these provisions as discriminatory as it stressed the past criminal behavior of those excluded from voting.

Cases from the European Court of Human Rights

The European Court of Human Rights has covered the issue of prisoners' right to vote in a variety of cases, with some controversy as to implementation of judgments in the defendant states. A selection of cases will be explored below.

***Hirst v The United Kingdom (No.2)* (2006) 42 EHRR 849**

I Material Facts

The applicant was serving a sentence of discretionary life imprisonment for manslaughter, but importantly, had completed the tariff portion of his sentence. His claim was based on Article 3 of Protocol 1 of the Convention on Human Rights, and that his ban on voting in United Kingdom elections, effected by s 3 of the Representation of the People Act 1983 (RPA), breached that Convention right. He was unsuccessful in the High Court of England and Wales.

In respect of Article 3, the European Court of Human Rights found in the applicant's favour by a majority of 12-5.

II The Majority Judgment

The Court followed its decision in *Mathieu-Mohin and Clerfayt v Belgium*, in holding that, whilst the drafting of Article 3 appeared to be concerned with state party obligations, it nevertheless involved a guarantee of an individual right to vote. [75]

The Court considered that the right to vote is not a privilege, but rather a function of the presumption in democratic states. That said, Article 3 does not guarantee an absolute right, and it impliedly gives contracting state parties a margin of appreciation.[76] However, notwithstanding that "a wide margin of appreciation should be granted to the national legislature",[77] an absolute bar, to which the section amounted, could not fall within an acceptable margin of appreciation.[78]

Drawing on *Mathieu-Mohin*, the Court outlined three areas of inquiry necessary to consider in determining whether the s 3 voting conditions were in breach of Article 3: non-interference with the 'very essence' of the right, legitimacy of the aim pursued in limiting the right, and the proportionality of the means used to secure that aim.[79]

The Court emphasised that the mere fact of a prisoner's detention does not mean that he has forfeited his rights afforded to him under the Convention. This means that a blanket exclusion or disenfranchisement cannot be justified solely on the basis that they are in prison. Neither can it be based on public opinion.[80]

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75 *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1 (Grand Chamber, ECHR).

76 *Hirst v The United Kingdom (No.2)* (2006) 42 EHRR 849 (Grand Chamber, ECHR) at [41].

77 At [41].

78 At [59].

79 At [62].

80 At [70].

The Court acknowledged that limiting the right in circumstances where a person has acted inconsistently with the objects of the right (eg abuse of the election process), is justified. This is because in that type of case, the requirements of the proportionality inquiry are met: there is a “discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned”.[81]

Whether the purpose behind s 3 of the RPA is as a further punishment or to encourage civic responsibility, and whether or or not they are served by the limitation, the Court was prepared to defer to the State on the purposes behind the limitation, in holding that they are legitimate aims for the limiting of the right.[82]

The Court found that the impact of s 3, whilst in pursuit of a legitimate aim, was disproportionate in its application. In considering UK sentencing practice, the Court notes that, in relation to imposing a sentence of imprisonment, there was an absence of any nexus or “direct link between the facts of any individual case and the removal of the right to vote”.[83] It further concluded that there had been little in the way of substantive parliamentary or public debate on the issue.

In referring to the margin of appreciation afforded to nation states, the Court concluded that it was not so wide as to allow a ban of this kind, one which was “general, automatic, and indiscriminate” in its application. As such, the provision was in breach of Article 3.

In cases such as this, it is the Court's function to rule on the conformity to the Convention rights of current measures, and not to suggest ways in which that conformity might be achieved. However, in his concurring judgment, Judge Caflisch elaborated on what might be acceptable parameters on limiting the right to vote: the disenfranchisement measures must be prescribed by law; that law must not be a ‘blanket law’ in its application; the disenfranchisement should be judicially imposed (i.e. not an automatic Executive function); and the disenfranchisement should only attach to the punitive part of the sentence.[84]

In the case, no separate cause of action was found under Articles 10 and 14, which concern general rights to non-discrimination and freedom of speech, because the right to vote enshrined in Article 3 was a specialist subset of the two.

III The Dissent

The dissent accepted that the relevant inquiries were of legitimate aim and proportionality; however, they considered that restrictions on the right to vote could be of a general character and not breach Article 3, providing that they were not arbitrary.[85]

81 At [71].

82 At [75].

83 At [77].

84 At [O-I7].

85 At [O-III4].

In terms of proportionality and the ‘wide margin of appreciation’, they considered it was the place of the legislature to decide on voting restrictions,[86] and that incompatibility with Article 3 should only be found where the measure was clearly arbitrary or “impaired the very essence of the right to vote”.[87]

The dissent were critical of the majority’s ‘dynamic’ and ‘evolutive’ approach to the interpretation of Article 3 in the present case, again emphasising the primacy of the national legislature in setting the restriction, and the danger of the Court assuming a legislative function.[88] The majority was also mistaken in finding that the legislature had enacted the provision without ‘substantial debate’: “It is not for the Court to prescribe the way in which national legislatures carry out their legislative functions”.[89]

Finally, the dissent considered that the Court should have analysed the existence of a breach in the present circumstances of the case before it, and not in the way it did, *in abstracto*. In this case the applicant had been sentenced to life imprisonment for a very serious crime, and it was precisely the kind of situation in which a restriction on voting might be justified.[90]

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86 At [O-III4].

87 At [O-III5].

88 At [O III6].

89 At [O-III7].

90 At [O-III8].

***Frodl v Austria* (2011) 2 EHRR 5**

I Material Facts

The applicant was an Austrian citizen who had been convicted of murder and sentenced to life imprisonment. Under s 22 of the National Assembly Election Act, he was barred from the electoral roll on the basis that 'anyone who has been convicted by a domestic court of one or more criminal offences committed with intent and sentenced with final effect to a term of imprisonment of more than one year shall forfeit the right to vote.' He argued in the ECHR that this was a breach of the Article 3 of Protocol No. 1 of the Convention of Human Rights, which states that 'the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

In 2005 in *Hirst,* the ECHR had made a finding that a blanket prohibition on prisoner's disenfranchisement was unenforceable. In finding a breach of Article 3 of Protocol No. 1 above, they had noted that this was a 'blunt instrument' that was indiscriminate to all prisoners, irrespective of the length of their sentence and the nature or gravity of their offence and individual circumstances.

II Decision

In this case, the Court reiterated that states have a margin of appreciation as to how to implement Conventional Articles in terms of state policy. However, although the Austrian Government's provisions were more narrowly defined than those in *Hirst,* they failed to meet the criteria established in that case. Aside from ruling out blanket restrictions, disenfranchisement could only be envisaged for a narrowly defined group of offenders serving a lengthy term of imprisonment; that there had to be direct link between the facts on which a conviction was based and the sanction of disenfranchisement and that such a measure should be imposed not by operation of a law but by the decision of a judge following judicial proceedings.'[91]

This was to ensure that disenfranchisement was an exception even in the case of convicted prisoners, as it was not in the best interests of a democratic and tolerant society for automatic disenfranchisement 'based purely on what might offend public opinion'.[92] Ultimately it was noted that the severe measure of disenfranchisement was not to be resorted to lightly and the principle of proportionality required a 'discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.'

Therefore, since Article 22 of the National Assembly Election Act did not meet all of these requirements, the Court found that there had been a breach of Article 3 of Protocol No. 1 in the present case.

91 *Frodl v Austria* (2011) 2 E.H.R.R. 5

92 *Hirst v The United Kingdom (No.2)* (2006) 42 EHRR 849 (Grand Chamber, ECHR)

III Implications

The jurisprudence set by *Hirst* and *Frodl* means that although member states still have a wide discretion in regards to their policy-making, blanket bans on prisoners' disenfranchisement will not be allowed. Furthermore, it would appear that the criteria defined in *Hirst* and reiterated in *Frodl* are quite narrowly set out, posing the question of how much leeway states would actually have in regards to their policy-making in a pragmatic sense.

***Greens and M.T. v the United Kingdom* (2010)**

(nos. 60041/08 & 60054/08)

I Material Facts

The two applicants were serving determinate prison sentences. They sought registration on the electoral register, using the address of their prison. They were refused registration, since they were convicted prisoners. The applicants then appealed the decision.

II Decision

The Court unanimously held that the United Kingdom was required to implement the judgment of the court in *Hirst (no 2)*,[93] and gave the state six months in which to propose legislation that would amend the Representation of the People Act 1983 and the European Parliamentary Elections Act 2002, if appropriate.[94] The Committee of Ministers was left to determine an appropriate period in which this legislation had to be enacted. The applicants were also granted 5000 euros for costs, although the Court declined to award damages.

III Arguments

A Admissibility

The UK government claimed that the applicants had not exhausted domestic remedies, and needed to do this before the case could be considered by an external court. The Court held that the government needed to prove that the domestic remedies proposed were accessible and could provide redress for the applicants. The remedy proposed was for the applicants to bring a 'claim under s 3 of the Human Rights Act, which would seek the "reading down" of s 8 of the 2002 Act'.[95] The Court found that such a claim would not have a reasonable chance of succeeding, and therefore did not require the applicants to exhaust it.

B Alleged Violation of Article 3 of Protocol No. 1 to the European Convention on Human Rights

This Article states that states must undertake to hold free elections 'under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.[96]

The applicants had claimed that their ineligibility to vote in the European and general elections contravened this article.The Court followed their decision in *Hirst (no 2)* and stated

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93 *Hirst v The United Kingdom (No.2)* (2006) 42 EHRR 849 (Grand Chamber, ECHR)

94 *Greens and M.T. v the United Kingdom* (nos. 60041/08 & 60054/08); Representation of the People Act 1983, s 3; European Parliamentary Elections Act 2002, s 8.

95 At [67].

96 Article 3, Protocol 1, European Convention on Human Rights.

that the UK government was violating this Article by preventing the applicants from voting through s 3 of the 1983 Act.

C Alleged Violation of Article 13 of the Convention

The Article provides that 'Everyone whose rights and freedoms as set forth in [the] Convention shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. [97]

D Application of Article 41 of the Convention

Article 41 of the Convention states that 'If the Court finds that there has been a violation of the Convention or Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation t be made, the Court shall, if necessary, afford just satisfaction to the injured party'.[98]

The applicants claimed non-pecuniary damages. The Court rejected this claim and followed their decision in *Hirst*, in which the Court had refused to award non-pecuniary damages on the basis that it was for the government to implement such measures.[99]

E Application of Article 46 of the Convention

Article 46 states that:

> '1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall exercise its execution.'[100]

The Court reiterated that in *Hirst*, it had left the decision of how to implement the judgment up to the United Kingdom's discretion, and since then little had been done. In view of that, the Court felt that it was necessary to impose a time frame on the United Kingdom in which to come up to standard. As such, the Court ordered that within 6 months the government needed to introduce legislative proposals that would amend s 3 of the 1983, as well as s 8 of the 2002 Act, if appropriate. The Committee of Ministers was also given the power to determine a time frame within which the legislation had to be passed.

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97 Article 13, European Convention on Human Rights.

98 Article 41, European Convention on Human Rights.

99 *Greens and M.T. v the United Kingdom* [At 97].

100 Article 46, European Convention on Human Rights.

Scoppola v Italy (No 3) **(no. 126/05)**

I Material Facts

The applicant was convcted of murder and sentenced to 30 years' imprisonment. He was also given a lifetime ban from public office, under Article 29 of the Criminal Code. This Article states that any person given a sentence of more than 5 years imprisonment will receive a lifetime ban on voting or standing for election.[101] The applicant then complained to the electoral committee. When this complaint was rejected, he appealed to the courts, claiming that Article 28 violated Article 3 of Protocol No 1.

II Decision

The Court found that Italy had not violated Article 3 of Protocol 1. The Court reiterated that the right to vote is not a privilege, although there was room for states to put some limitations in this right. The Court then considered whether the applicant's rights under Article 3 had been interfered with by the legislation, and if so, whether 'that interference pursued one or more legitimate aims and whether the means employed to achieve them were proportionate'.[102]

1. The Court found that there were no dispute that the legislation interfered with the applicant's rights under Article 3.
2. The Court found that the disenfranchisement served to 'pursue the aims of preventing crime and enhancing civi responsibility and respect for the rule of law', which constituted legitimate aims.
3. The Court found that the means employed were proportionate, as not all prisoners were automatically disenfranchised, and prisoners had the opportunity to regain their rights after finishing their sentence, if they could show consistent good conduct. The Court felt that these factors showed that the Italian legislation was not 'excessively rigid'.[103]

III Dissent

Judge David Thór Björgvinsson was the only dissenting judge. He agreed with the earlier Chamber judgment that Article 28 of the Criminal Code did violate Article 3 of Protocol 1. Judge Björgvinsson argued that he found the majority position to be incompatible with the Court's decision in *Hirst*. He found the 'concrete situation' in both cases to be very similar and did not believe that the arguments for differentiating the two were strong enough.[104] He argued that the applicant was not disenfranchised for any reason specific to his situation, but

101 *Scoppola v Italy* (no. 126/05) at [36].

102 At [88].

103 At [109].

104 Per Björgvinsson J.

rather because of the general nature of the legislation. There was no evidence, therefore, that there was 'any direct link between the facts of his case and the removal of his right to vote.'[105] Judge Björgvinsson also claimed that the two pieces of legislation, the Criminal Code and the Representation of the People Act 1983, both indiscriminately removed the right to vote given under the Convention without consideration of the circumstances of the person involved. He did not believe that this 'automatic forfeiture' was justified in either case, as the courts had not made any assessment of propotionality with regards to whether prisoners should be deprived of a fundamental right.[106]

IV Third Party Intervener

The government of the United Kingdom acted as a third-party intervener in this case. It claimed that 'each State should be free to adopt its own legal system in keeping with its social policy, and to choose which arm of the State (legislatire, executive or judiciary) should have the power to take decision concerning prisoners' voting rights.'[107] The government tried to claim that depriving all prisoners of the right to vote was legitimate, because it encouraged respect for the law and good conduct.[108] It also argued that the Court should overturn its decision in *Hirst*.

The Court refused to depart from its previous judgment, stating that no good reason had arisen since the decision in *Hirst* that could warrant re-examination.

V Implications

The six month period imposed on the UK government in *Greens and M.T.*was suspended while it acted as a third party intervener in this case. However, after the Grand Chamber delivered its judgment, the UK was given 6 months, until 22 November 2012, to implement the rulings in *Greens and M.T.* So far, the UK has not done so. It is unclear what will happen if they continue to refuse to do so.[109]

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105 Per Björgvinsson J.

106 Per Björgvinsson J.

107 At [75].

108 At [76].

109 Eirik Bjorge 'Prisoners' Voting Rights: The Gift That Keeps on Giving' (9 November 2012) Oxford Human Rights Hub <http://ohrh.law.ox.ac.uk/?tag=scoppola-v-italy>.

<u>Possibility of an Australasian/</u>
<u>Pacific Human Rights Mechanism</u>

I. Existing Regional Human Rights Mechanisms.

Regional human rights charters already exist in the major regions of Europe, Africa and the Americas, each with their own court or commission to give these rights effect.[110] The European Court of Human Rights is widely considered to be the most effective transnational judicial process for complaints brought by both individuals and states.[111] Thus, Europe should be looked to as a positive example in considering the development of a human rights mechanism in the Pacific.

The European Convention on Human Rights and Fundamental Freedoms was developed in the wake of World War II, as a regional implementation of the Universal Declaration of Human Rights. The European Court of Human Rights was set up in 1959 to rule on alleged violations of the Convention bought by States and from 1998, individual claimants.[112] Member States must ensure that domestic law protects the human rights enshrined by the convention and provide domestic remedies for such violations. National legal mechanisms remain the primary protectors of human rights with the Court providing a system of 'outer protection' as a last resort after all domestic remedies have been exhausted.[113]

A Achievements of the Court

The court's jurisdiction has grown to include 47 States with more than 800 million inhabitants.[114] Accordingly, the court has provided justice for tens of thousands of Europeans and assisted in moving national laws and practices towards improved human rights standards, bringing the continent together over shared democratic values.[115]

The court has become a 'symbol of hope' for those people who believe their domestic judicial institutions have not offered them adequate protection of their human rights.[116] While New Zealand has a generally outstanding human rights record, it remains without a written

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110 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; African Charter on Human and Peoples' Rights (27 June 1981) 1520 UNTS 217; American Convention on Human Rights (22 November 1969) 1144 UNTS 123.

111 Steven Greer *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, Cambridge, 2006) at 1.

112 Kevin Boyle "Council of Europe, OSCE, and European Union" in Hurst Hannum (ed) *Guide to International Human Rights Practice* (4th ed, Transnational Publishers, Ardsley (NY) 2004) at 146.

113 At 147.

114 Christian Tomuschat "The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions" in Rudiger Wolfrum and Ulrike Deutsch (eds) *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Springer, New York, 2009) at 1.

115 Jean-Claude Mignon "European Court of Human Rights is Not Perfect but Still Precious" *The Guardian* (online ed, London, 19 April 2012).

116 Tomuschat, above n 5, at 12.

constitution or document to entrench human rights. As a result, a regional court to act as a form of outer protection and a symbol of hope for wronged people is not without value.

B Issues to Be Taken Into Account

The court has been overloaded with applications, largely from a small number of violating states. In 2011, 151,600 applications were pending with more than half of these applications being brought against just four countries: Russia, Turkey, Italy and Romania.[117] The court delivers an impressive amount of judgments per year. In 2011 the Court delivered 1,157 judgments concerning 1,511 applications, deciding a total of 52,188 applications before January 1st, 2012.[118] However, it takes around five years from initial application to receive a delivery of judgment from the court.[119]

II. Potential for a Pacific or Australasian Regional Human Rights Mechanism?

While regions such as Europe have had an active human rights mechanism for upwards of fifty years, the Asia-Pacific region (as defined by the UN) is the only major region lacking an equivalent system to adjudicate over the protection of human rights.[120] In spite of this, UN calls for an Asia-Pacific regional human rights mechanism have not gained significant favour. This is largely due to concerns over the feasibility and practicality of creating one in a region encompassing 41 countries from Afghanistan to Fiji with vast cultural, political and religious differences. Thus the development of separate sub-regional mechanisms for Asia and the Pacific appear more workable.[121]

In light of this how would a regional human rights mechanism work in the Asia-Pacific region and what countries would it include?

A Pacific Human Rights Mechanism

A primary point may be that it is unclear where the boundaries of such a court would lie – would it include solely Australia and New Zealand, or would it include Pacific nations? This boundary problem is relevant when we consider the explanations for having regional human rights mechanisms:

‘The importance of a regional mechanism lies in the fact that it is designed to articulate a common approach to a complex problem, an approach that will assist states, from a position

117 European Court of Human Rights “The European Court of Human Rights: In Facts and Figures 2011” (Media Release, January 2012) at 5.

118 At 8.

119 Greer, above n 2, at 38.

120 Report of the Asia Pacific Human Rights Network “Establishing a regional human rights mechanism for the Asia-pacific region” (2003) 2 Asia-Pacific Journal on Human Rights and the Law 82 at 82.

121 Kathryn Hay “A Pacific Human Rights Mechanism: Specific Challenges and Requirements” (2009) 40 VUWLR 195 at 207.

of shared regional values, to address shortcomings in their national frameworks so as to allow individuals the means to enjoy their rights in full, and to obtain effective redress when those rights are denied'.[122]

Accordingly, in order to assess which countries should be included in this regional body would require assessment as to which countries share values. As Durbach et al state, 'There is a significant degree of political, economic and cultural commonality across Pacific countries and territories'.[123] However, when we combine Australia and New Zealand with Pacific Island territories, we can come up against some important divergence of culture and policy – something recognised by the Asia Pacific Forum's submission on an Australian government inquiry into Human Rights Mechanisms and the Pacific.[124] Such issues may limit the willingness of countries to come together to form such a court.

Such disparities between values may also affect the likelihood of the ability of states to agree on what should be included in a human rights charter for the region. As all states would have to agree to the substance of the charter for them to agree to be bound by its standards, it seems likely that those states whose policies are not particularly congruent with human rights would prefer a human rights charter with a lesser degree of protection than some other charters.[125]

A potentially dramatic and harmful consequence of New Zealand's participation in such a regional instrument could be the reading down of its obligations under the ICCPR and other international treaties in favour of the regional instrument, if this regional instrument should offer a lesser protection to human rights than those international treaties.

Furthermore, a Pacific regional court would almost certainly have the same issues as the ECHR with high application volumes, case backlogs and certain states producing the majority of complaints. Resource wise, Australia and New Zealand would likely have to bear the brunt of the cost of wading through an extensive list of cases coming from Pacific Nations, many of whom are already reliant on aid.

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122 Louise Arbour, UN High Commissioner for Human Rights (13th UN Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region, Beijing, 29 August – 2 September 2005, Beijing).

123 Andrea Durbach, Catherine Renshaw, and Andrew Byrnes "“A tongue but no teeth”? The emergence of a regional human rights mechanism in the Asia-Pacific" (Working Paper 30, University of New South Wales Faculty of Law Research Series 2009, August 2009) at 8.

124 New Zealand Human Rights Commission “Inquiry examines human rights mechanisms in the Asia Pacific // New Zealand Human Rights Commission” New Zealand Human Rights Commission <http://www.hrc.co.nz/international-human-rights-new/human-rights-in-the-pacific-and-asia/inquiry-examines-human-rights-mechanisms-in-the-asia-pacific>.

125 Kelly Dawn Askin “Issues Surrounding the Creation of a Regional Human Rights System for the Asia-Pacific” (1997) 4 ILSA J Int'l & Comp L 599 at 600.

On the other hand, the mere fact of having a regional mechanism could 'educate citizens, states, corporations, and organizations on the importance of respecting human dignity, and… serve as a deterrent.'[126] Furthermore, the existence of a regional mechanism could provide more heft towards sanctioning those states that are permitting or perpetrating the abuse of human rights. [127]

A regional court could act as an oversight for countries, such as New Zealand, where human rights are not entrenched; this is especially important for countries that do not have a national human rights institution overseeing their adherence to such standards (and to any international human rights instruments to which they may be a party). In the Pacific only New Zealand, Australia and Fiji have national human rights institutions[128] – and though Fiji has had a human rights commission since 1997, this has been far from effective.[129] A regional human rights court could be important for forcing states such as Fiji to adequately protect human rights. This is particularly important when we note that the Pacific has the lowest worldwide level of ratification of the seven core international human rights instruments (largely due to concerns over perceived conflicts with customary practice, restricted financial and human resources and a lack of technical capacity to fulfil obligations).[130]

Consideration on the possibility of a sub-regional mechanism has increased over the years through avenues such as the Pacific Plan. However, Pacific leaders have yet to establish a sub-regional human rights institution. Previous propositions, such as the LAWASIA 1989 Pacific Charter of Human Rights, failed to get significant support. It was perceived to have been developed solely by New Zealand and Australia, promoting Western values that would not improve Pacific people's lives.[131] Currently a sub-division of the Asia Pacific Forum of National Human Rights Institutions, the Advisory Council of Jurists, conducts a human rights overview process considering specific human rights situations or questions. These reports and recommendations are considered and sometimes implemented by APF member national human rights institutions.[132] Though these reports 'seek to contribute to the development of regional jurisprudence on international human rights law,'[133] such jurisprudence would seem

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126 At 600.

127 Burns H Weston, Robin Ann Lukes, Kelly M Hnatt "Regional Human Rights Regimes: A Comparison and Appraisal" (1987) 20 Vand J Transnat'l L 585 at 590.

128 Michael Kirby "Robin Cooke, Human Rights and the Pacific Dimension" (2008) 39 VUWLR 119 at 140.

129 Vanessa Spencer "Sri Lanka and Fiji: Ghost Human Righs Commissions" (September 20, 2011) *The Sri Lanka Guardian* (online ed, New Delhi, 24 June 2011).

130 At [172]-[173].

131 Hay, above n 13, at 173.

132 Durbach, Renshaw and Byrnes, above n 14, at 16.

133 At 16.

to be fairly useless without any trial process by which to use it. As the Honourable Justice asserts, the Pacific's lack of a human rights court or commission leaves a significant void in the protection of human rights that cannot be justified when one considers such avenues have been readily available to the people of Europe, Africa and the Americas for decades.[134] Accordingly, he considers a human rights mechanism to be a regional necessity.

Imrana Jalal, Human Rights Advisor to the Pacific Regional Rights Resource Team (RRRT) has developed suggestions on what a Pacific Human Rights Charter should include and strategies for implementing a Pacific Human Rights Mechanism. Jalal recommends the charter should reinforce established universal human rights with the addition of rights and duties that are particular to Pacific Island nations, such as the right to fish as an essential component of food security, as long as these do not conflict with or 'whittle down' universal rights.[135] She argues a regional mechanism will bring the idea of universal standards of human rights closer to home while taking into account regional conditions and peculiarities - thus promoting state commitment by giving pacific people a sense of ownership over the charter.[136] A regional commission is preferable, as it will provide redress where national systems fail and provide an increased level of independence from undue influences. The largest obstacle facing the implementation of a Pacific is funding, however planning and outreach to aid services can overcome this. Overall a Pacific Regional Commission or Court will be able to facilitate the realisation of the fifteen Objectives of the Pacific Plan, promote human rights protection in the area and enable countries to pool together financial and academic resources.[137]

III. How a Regional Human Rights Mechanism Could Impact on New Zealand Prisoners' Right to Vote

We have seen in a broad sense how a regional human rights mechanism could affect the protection of human rights in the Pacific generally. However, how would such a mechanism affect disenfranchisement of New Zealand prisoners?

On an individual level, the existence of a regional human rights court could allow prisoners to bring individual petitions to the court on the basis of their disenfranchisement being a breach of their human rights. This could provide them with an effective right to be heard (something unlikely in any domestic challenges to the legislation due to the lack of an arguable case on the basis of Parliamentary sovereignty and due to the rule that the New Zealand Bill of Rights Act does not override any inconsistent statutes).

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134 Kirby, above n 15, at 139.

135 Imrana Jalal "Why Do We Need a Pacific Regional Human Rights Commission" (2009) 40 VUWLR 177 at 184.

136 At 185.

137 At 192-193.

Furthermore, a regional court could, by adjudicating the disenfranchisement of prisoners as an abuse of their human rights, issue a recommendation that New Zealand repeal the law. This could force change at a political level - on the basis of its lowering of New Zealand in the eyes of the regional and international community by tarnishing it with the image of being a human rights abuser.

However, as we have seen from the United Kingdom's approach to ECHR decisions condemning its deprivation of prisoners' rights to vote, this is certainly not a determinative solution. We could hope however that New Zealand would be sufficiently respectful of any suggestions made by such a Court (to which it would obviously be a party), so as to implement its judgments.

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