

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**THE ACTIVE AND PASSIVE VOTING RIGHTS OF CONVICTED PRISONERS IN
SOUTH AFRICA AND THE UNITED KINGDOM**

**A mini-thesis submitted in partial fulfilment of the requirements for the degree of LL.M
in the Faculty of Law of the University of the Western Cape**



By

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DECLARATION

I, Cindy-Lee Neavera Bekeer, declare that **The active and passive voting rights of convicted prisoners in South Africa and the United Kingdom** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

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DEDICATION

This work is dedicated to an amazing woman, my mother Laetitia Bekeer, who has always been my rock, my pillar of strength and my biggest supporter, and to Professor Wessel le Roux, the person who helped me reach my true academic potential.



KEY WORDS AND PHRASES

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Active voting rights

Passive voting rights

Voter exclusions

Prisoners

Membership of parliament

African Charter on Human and Peoples' Rights

South Africa

European Convention on Human Rights

United Kingdom



LIST OF ABBREVIATIONS AND ACRONYMS

ECHR	European Court of Human Rights
EU	European Union
IEC	Independent Electoral Commission
UK	United Kingdom
SA	South Africa
SACC	South African Constitutional Court

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CHAPTER ONE

INTRODUCTION

1.1 The nature and importance of the right to vote

The right to vote is a pillar of a representative democracy. Section 19 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) translates the constitutional commitment to democracy into an individual right to participate in representative politics.¹ Section 1(d) of the Constitution states that South Africa is a sovereign democratic state founded on certain values, one of which is “[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”² According to Theunis Roux, section 1(d) contains and supports a “deep principle of democracy” that attributes a duty to the government to “ensure accountability, responsiveness and openness.”³ Although democracy means different things for different people, democratic governance entails that the views of those affected by government decisions be valued when such decisions are made.⁴

The Constitutional Court has on various occasions expressed the importance attached to the right to vote. Sachs J expressed the importance of the right in our constitutional democracy:

“Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. *The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.* In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same

¹ De Waal J ‘Political Rights’ in Klaaren J, Marcus G, Spitz D & Woolman S (eds) *Constitutional Law of South Africa* (1999) 24-1&2; Section 19 of the Constitution reads as follow: “(1) Every citizen is free to make political choices, which includes the right- (a) to form a political party; (b) to participate in the activities of, or recruit members for, a political party; and (e) to campaign for a political party or cause. (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution. (3) Every adult citizen has the right- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and (b) to stand for public office and, if elected, to hold office.”

² The Constitution of the Republic of South Africa, 1996.

³ Roux T ‘The Principle of Democracy in South African Constitutional Law’ in Woolman S & Bishop M (eds) *Constitutional Conversations* (2008) 78-79.

⁴ De Waal J ‘Political Rights’ in Klaaren J, Marcus G, Spitz D & Woolman S (eds) *Constitutional Law of South Africa* (1999) 24-1.

democratic South African nation; that our destinies are intertwined in a single interactive polity.”⁵

O’Regan J held, in the *New National Party* case, that the obligation to afford citizens the right to vote is important, not only because of the youth of our constitutional democracy but also because of the ‘emphatic’ denial of democracy in the past.⁶ Because of the past and voter exclusions based on race, South Africans should treasure the power of the franchise, and the importance of its universality.⁷ O’Regan J also made the following statement regarding the link between the right to vote and our constitutional democracy:

“In exercising the right to vote, each citizen affirms and invigorates our constitutional democracy. To build the resilient democracy envisaged by the Constitution, we need to establish a culture of participation in the political process, as well as tolerance of different political views and a recognition that democracy can be a unifying force even where political goals may be diverse.”⁸

More importantly O’Regan J expressed the importance of the right to vote by stating the following:

“The right to vote is more than a symbol of our common citizenship; it is also an instrument for determining who should exercise political power in our society.”⁹

In the *Richter* case, O’Regan J again made the link between the right to vote and our constitutional democracy by expressing the constitutional importance of the right and its exercise:

“The right to vote, and the exercise of it, is a crucial working part of our democracy. [...] The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as

⁵ *August v Electoral Commission* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 at [17].

⁶ *New National Party v Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 at [120] (hereafter *New National Party v Government of the Republic of South Africa* (1999)).

⁷ *New National Party v Government of the Republic of South Africa* (1999) at [120]; according to Cliffs Notes ‘Race and Ethnicity Defined’ available at <http://www.cliffsnotes.com/sciences/sociology/race-and-ethnicity/race-and-ethnicity-defined> (accessed 14 February 2015) the word “race” refers to “groups of people who have differences and similarities in biological traits deemed by society to be socially significant, meaning that people treat other people differently because of them. For instance, while differences and similarities in eye colour have not been treated as socially significant, differences and similarities in skin colour have.”

⁸ *New National Party v Government of the Republic of South Africa* (1999) at [120].

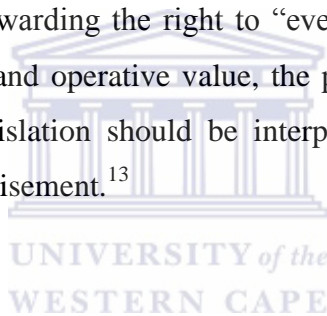
⁹ *New National Party v Government of the Republic of South Africa* (1999) at [120].

well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.”¹⁰

The right to vote (as the essence of representative democracy) is often contrasted with the participatory dimension of democracy.¹¹ In the *Doctors for life* case, Yacoob J underscored the centrality of the right to vote even in a participatory democracy:

“Oppression and exploitation during apartheid was the result of the painful fact that the majority of people had no vote and were not represented in Parliament. Millions of people suffered, tens of thousands of people were tortured and even died and millions of people struggled against the apartheid regime. Any suggestion that the struggle and sacrifice of the past was predominantly aimed at securing public participation in the making of laws represents, in my view, a cynical denial of the phenomenal extent of apartheid devastation and pain. The failure to accord due weight to the actions and decisions of the representatives of the people of South Africa would demean the very struggle for democracy.”¹²

The right to vote is a symbol of our citizenship. Section 19 of our Constitution affirms this symbolic value of the right by awarding the right to “every citizen”. Precisely because the right to vote has both symbolic and operative value, the participation of citizens should be broadened, and all electoral legislation should be interpreted teleologically to encourage enfranchisement over disenfranchisement.¹³



¹⁰ *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* (CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) at [53].

¹¹ *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) at [137]–[139]; Parliament of the Republic of South Africa ‘A People’s Government, the People’s Voice’ available at http://www.parliament.gov.za/live/content.php?Item_ID=296 (accessed 14 February 2015) describes both “representative democracy” and “participatory democracy”. “Representative democracy, that is government by men and women elected in free and fair elections in which each adult citizen’s vote is equally weighted (universal suffrage), [refers to when] [r]epresentatives are elected to office and are charged with the responsibility of making decisions on behalf of the electorate [...] In its narrowest interpretation, representative democracy means that elected representatives must directly represent the views of those who voted them into power.” In as far as participatory democracy is concerned; Parliament refers to it in the following way: “[p]articipatory democracy, it is suggested, is a form of representative democracy in which citizens are actively involved in the decision-making processes of government[...] Participatory democracy is not necessarily a new or different form of democracy, but a strengthening or expansion of formal representative democracy to include greater levels of participation by civil society [and it] aims to empower civil society to drive legislative and policy agendas from the grassroots.”

¹² *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at [294] (hereafter *Doctors for Life International v Speaker of the National Assembly* (2006)).

¹³ *African Christian Democratic Party v Electoral Commission* (003/11 IEC) [2011] ZAEC 2 at [23]: “These foundational values require a court of law, and the Electoral Commission, when interpreting provisions in electoral statutes to seek to promote enfranchisement rather than disenfranchisement and participation rather than exclusion.”

1.2 Limitations on the right to vote

Despite the importance attached to the right to vote and the constitutional value of “universal adult suffrage”, the right is (and has always been) subject to limitations. One of the express limitations on the right, as found in the wording of section 19(2)(a) of the Constitution, is that it is a right which is only available to “adult citizens”, meaning from the start that children and foreigners do not have enjoyment of this right in our country. Other possible limitations include, but are not limited to, residence, mental capacity, and imprisonment.¹⁴ In the past the most common limitation was based on race, when black South Africans were deprived of the right to vote.

The focus of this mini-thesis falls on imprisonment as voter exclusion and as a possible justifiable limitation on the right to vote. Imprisonment was one of the common voter exclusions during the Apartheid era; however, the exclusion of prisoners was not limited to Apartheid South Africa. Many open and democratic societies continue to impose voting disabilities on some categories of prisoners.¹⁵ For some time, the same was the case in Post-Apartheid South Africa as well.

In terms of section 36 of the Constitution, any limitation of any right in the Bill of Rights can only take place if such limitation can be reasonably justified. In order for a limitation of section 19 to be justifiable, the law imposing a limitation on the right must (i) have a legitimate aim, (ii) there must be a rational connection between the limitation and the aim, and (iii) the limitation must be reasonable or proportional.¹⁶ The same applies to voting rights: “[r]ights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement”.¹⁷

1.3 Imprisonment as voter exclusion

As mentioned, in this mini-thesis the focus falls on imprisonment as voter exclusion. With regards to active voting rights, prisoner exclusions have always been provided for in legislation, whereas passive voting rights exclusions have always been provided for in the

¹⁴ For a fuller discussion of these voter exclusions see López-Guerra C *Democracy and Disenfranchisement: The Morality of Electoral Exclusions* (2014).

¹⁵ *August v Electoral Commission* (1999) at [31].

¹⁶ The Constitution of the Republic of South Africa, 1996, section 36.

¹⁷ *August v Electoral Commission* (1999) at [17].

Constitution. As far as passive voting rights are concerned, the Apartheid and Post-Apartheid Constitutions have consistently excluded certain convicted prisoners from membership in the legislature.¹⁸ As far as active voting rights are concerned, the position is less uniform. It is useful to trace the exclusion of prisoners back to Apartheid when all convicted prisoners were disenfranchised. The Electoral Act 45 of 1979 excluded all convicted and sentenced prisoners from voting and distinguished between permanent and temporary disenfranchisement.¹⁹ There was thus a blanket ban on prisoner's voting rights during Apartheid. Initially, Post-Apartheid legislation, as it was amended on three occasions, either excluded certain convicted prisoners,²⁰ or all of them (by implication).²¹ Under the 1993 Electoral Act, certain categories of prisoners were disqualified. Like the 1979 Act, these disqualifications were linked to the type of offence committed and whether or not a particular person was sentenced to imprisonment as a result of having committed such offence and did not get the option of a fine. In the 1998 Electoral Act this prisoner disqualification was removed. This amendment resulted in uncertainty whether prisoners could vote or were still excluded by necessary implication. This uncertainty gave rise to the *August* case, in which the Court held that prisoners could vote and that it was the duty of the Electoral Commission to make sure that all prisoners are enabled to vote.²² Parliament responded to this judgment with the 2003 Electoral Laws Amendment Act, which reinserted an explicit exclusion of certain categories of prisoners, no longer based on the type of offence committed, but the type of sentence imposed (imprisonment without an option of a fine). This amendment gave rise to the *NICRO* case in which the Court found this explicit voter exclusion unconstitutional. Parliament officially aligned the Electoral Act with the *NICRO* judgment by explicitly enfranchising all prisoners by amending the Act in 2013.²³ As the law stands, all prisoners are permitted to vote in South Africa; no voter exclusion applies at present to prisoners under Post-Apartheid law.

The purpose of this mini-thesis is to assess the present position regarding prisoner disenfranchisement in South Africa from a human rights perspective, and to recommend reforms of South African electoral legislation as far as prisoners' voting rights are concerned.

¹⁸ Republic of South Africa Constitution Act 110 of 1983, Constitution of the Republic of South Africa Act 200 of 1993 and Constitution of the Republic of South Africa, 1996 respectively.

¹⁹ Electoral Act 45 of 1979, sections 4(1) (a), 4(1)(b), 4(2) (a), 134(3)(a), and 144(1).

²⁰ Electoral Act 87 of 1993, section 16(d) and Electoral Laws Amendment Act 34 of 2003, section 24B(2).

²¹ Electoral Act 73 of 1998, section 8(2).

²² *August v Electoral Commission* (1999) at [36]

²³ *Minister of Home Affairs v NICRO* (2004) at [65].

1.4 The structure of the argument

In the first chapter, prisoners' voting rights in South Africa and under the African Charter on Human and Peoples' Rights ("African Charter")²⁴ is assessed and discussed in relation to legislation and case law. An assessment of prisoners' active voting rights, as traced from the Electoral Act of 1979 (last Apartheid era Electoral Act) via the *August* and *NICRO* cases till the 2013 Electoral Act, reveals that prisoner disenfranchisement is not as such incompatible with the right to vote under the Bill of Rights or the African Charter, as long as the disenfranchisement does not include all prisoners. The Constitutional Court confirmed that prisoners may in principle be disenfranchised, as long as it is not a blanket disenfranchisement, and as long as it is not the exclusion as found in the 2003 Electoral Act. What the Court did not do, however, was to clarify to the legislature which type of prisoner exclusions would be constitutionally justifiable. It remains an open constitutional question which kind of prisoner exclusion would be justifiable under section 36 of the Constitution. This unresolved question is problematic, because even though Parliament extended the franchise to all prisoners in the 2013 Act, future legislatures might decide to reintroduce the exclusion of some prisoners. Nevertheless, in the *NICRO* case, Chaskalson CJ and Ngcobo J both suggested that an active voting rights exclusion might pass constitutional muster if it mirrored the passive voting rights exclusion contained in the Constitution. The Constitution provides for the exclusion of prisoners from standing for public office; it does so in terms of section 47(1)(e). The section excludes those serving a sentence of imprisonment of more than 12 months and extends this disqualification to five years after the expiration of the prison sentence.

The compatibility between the human right to vote and this constitutionally mandated exclusion (as a model of voter exclusions generally) cannot be tested under South African law. The question remains whether the constitutional position with regards to passive voting rights (and on the suggestions by Chaskalson CJ and Ngcobo J also active voting rights) is compatible with international and regional human rights law (in this case African Human Rights Law). This issue is addressed in the second part of chapter two. The initial conclusion reached here is that the African Charter and the African case law, as heard by the African Court of Human Rights, is unclear. Neither the African Court nor the African Commission

²⁴ (Also referred to as the "*Banjul Charter*") adopted in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986. CAB/LEG/67/3/Rev 5

has dealt with cases relating to prisoners' voting rights (both active and passive). Because of this lack of African jurisprudence, a comparative look beyond the African system is required.

The third chapter investigates the status of prisoner disenfranchisement under the European Convention for the Protection of Human Rights and Fundamental Freedoms, with particular reference to the right of prisoners to vote in the United Kingdom (the "UK"). The purpose of this chapter is to determine which prisoner exclusion the European Court of Human Rights ("European Court") accepts as being compatible with the European Convention. This is done in an attempt to establish whether the South African constitutional provision which deals with the passive voting rights exclusions (also active voting rights exclusions) is compatible with comparative regional international human rights. The conclusion is that the exclusion contained in section 47(1)(e) of the South African Constitution is the type of exclusion which the European Court would accept as being compatible with the Convention.

The mini-thesis concludes, in Chapter four, by arguing that a legislative voter exclusion, modelled on the existing constitutional limitation on the passive voting rights of citizens, would be compatible with section 19(3) of the Bill of Rights, the African Charter, and international human rights law generally. Whether such a voter exclusion should be reintroduced into Post-Apartheid law is thus purely a matter of policy. Given the threat which serious crime poses to the culture of human rights and democracy,²⁵ there are no sound policy reasons why such a voter exclusion should not be reintroduced. To this end, the mini-thesis concludes with a proposal that the Electoral Act be amended as soon as possible to disenfranchise all prisoners serving a sentence of imprisonment of more than 12 months.

²⁵ In *Glenister v President of the Republic of South Africa* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at [57] the Constitutional Court warned that serious crime threatens our young democracy: "Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights. Organised crime and drug syndicates also pose a real threat to our democracy."

CHAPTER TWO

PRISONERS' VOTING RIGHTS IN SOUTH AFRICA AND THE AFRICAN UNION

2.1 Introduction

In this chapter prisoners' voting rights will be discussed in light of section 19(3) of the Constitution and in light of electoral legislation. This discussion will be limited to post-Apartheid developments from the 1994 election onwards, and will include national, provincial and local government elections. The development of prisoners' voting rights will be traced from the 1994 election via *August*²⁶ and *NICRO*²⁷ to the 2013 amendment of the Electoral Act. This discussion and assessment of the development will include both active and passive voting rights. The history of prisoner's voting rights in post-Apartheid South African will be evaluated against the law and jurisprudence of the African Union.

The purpose of this chapter is to illustrate how the South African Constitutional Court failed to finalise the issue of prisoner disenfranchisement, because it acknowledges that certain prisoners may reasonably be disqualified from voting, without prescribing to the legislature which prisoners may be so excluded. The Court has thus left this open by omitting to guide and give Parliament an indication as to which classes of prisoners could be reasonably excluded.²⁸ The other purpose of this chapter is to determine which classes of prisoners can reasonably be excluded, meaning which exclusion will pass constitutional muster.

2.2 The active voting rights of prisoners in South Africa (1994-2014)

Provision is made for active voting rights in section 19(3)(a) of the Constitution. This section states the following:

“Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.”

²⁶ *August v Electoral Commission* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (hereafter *August v Electoral Commission* (1999)).

²⁷ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (hereafter *Minister of Home Affairs v NICRO* (2004)).

²⁸ *August v Electoral Commission* (1999) at [31].

This section should be read with section 19(2) which provides for the right to free, fair and regular elections.²⁹ Section 19(2) gives content to the right to vote and it obliges the government to make proper arrangements for the effective exercise of the right to vote, as contained in section 19(3)(a).³⁰ This right, like all other rights in the Bill of Rights, can be limited in terms of section 36 of the Constitution. The next part of this chapter contains a chronological description of the law of prisoner disenfranchisement during the 20 years between 1994 and 2014. However, the history begins with the Apartheid legislation of 1979.

2.2.1 Electoral Act 45 of 1979

The Electoral Act 45 of 1979 contained a blanket exclusion of all convicted and sentenced prisoners. In addition, the Act distinguished between citizens who were permanently disenfranchised as a result of their prior imprisonment, and citizens who were only temporarily disenfranchised for the duration of their incarceration.

In terms of section 4(1)(a) permanent disenfranchisement was activated if a person had been convicted of treason, or of murder; or of an offence under the Internal Security Act 44 of 1950, or the Terrorism Act 83 of 1967, in respect of which he or she had been sentenced to a period of imprisonment without the option of a fine. These individuals were not allowed to be registered or to remain registered as a voter.

Sections 134(3)(a), 144(1) and section 4(1)(b) of the Act made provision for temporary disenfranchisement. Under the first two of these sections citizens could be declared temporarily incapable of being registered or of voting for up to five years (for corrupt, i.e. bribery) and two years (for illegal, i.e. conducting an opinion poll among voters) election practices, regardless of, and in addition to, any other criminal sentence. Here the court had discretion to suspend the voting rights of convicted criminals for up to five years in addition to their criminal sentence. Section 4(1)(b) of the Act confirmed that no person was allowed to

²⁹ In terms of this provision “[e]very citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.”

³⁰ De Waal J ‘Political Rights’ in Klaaren J, Marcus G, Spitz D & Woolman S (eds) *Constitutional Law of South Africa* (1999) 24-8, in *New National Party v Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 Yacoob J held in para [11] that the right to vote is fundamental to our democracy and without it there can be no democracy. He emphasised the importance of making arrangements for the effective exercise of the right by stating that “[...] the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.”

register or remain registered as a voter, if he or she had been convicted of any corrupt or illegal practice under the Act, and had been declared incapable of being registered or of voting at any election during any period, and the period had not expired.

Section 4(2)(a) of the Act contained a more general exclusion clause. It provided that a citizen who had been convicted of an offence, in respect of which he or she had been sentenced to a period of imprisonment without the option of a fine, was not entitled to be registered as a voter or to vote in any election during the period of his or her detention.

This summation ought to give one an idea as to the Apartheid position regarding prisoner disenfranchisement and will assist in understanding the post-Apartheid Electoral Acts, as will follow.

2.2.2 Electoral Act 202 of 1993

South Africa's transitional process from Apartheid to a democracy commenced on 2 February 1990. Negotiations commenced between the Apartheid government (National Party) and the main opponent (African National Congress) in which other political parties joined at a later stage.³¹ By December 1993 a consensus had been reached with regards to a political transition to majority rule.³² After this agreement was reached South Africa adopted 'a package of interrelated statutes': Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution'), Electoral Act 202 of 1993, and Independent Electoral Commission Act 150 of 1993.³³

The Electoral Act 202 of 1993 was passed to regulate the first, non-racial, National and Provincial democratic elections which were held on 27 April 1994. This Act disqualified certain classes of people from voting. The original version of the Electoral Act 202 of 1993 was adopted in December 1993 and assented to in January 1994. Section 16(d) of the Act, the provision which disenfranchised prisoners, stated the following:

³¹ Independent Electoral Commission 'Report of the Independent Electoral Commission: the South African Elections of April 1994' (1994) Johannesburg: Independent Electoral Commission 7.

³² Independent Electoral Commission 'Report of the Independent Electoral Commission: the South African Elections of April 1994' (1994) 7.

³³ Independent Electoral Commission 'Report of the Independent Electoral Commission: the South African Elections of April 1994' (1994) 8.

“Notwithstanding the provisions of section 15, no person shall be entitled to vote in the election if that person is serving a sentence of imprisonment without the option of a fine in respect of any of the following specified offences involving violence or dishonesty: (i) **Murder**, culpable homicide, **rape**, indecent assault, child stealing, kidnapping, assault with intent to do grievous bodily harm, **robbery**, malicious injury to property and breaking or entering any premises with intent to commit an offence; (ii) fraud, corruption and bribery; or (iii) any attempt to commit any offence referred to in subparagraph (i) or (ii)”

This section was amended immediately before election on 25 April 1994 to extend the number of prisoners who could vote. In order to enfranchise more prisoners the list of offences were reduced from 13 offences to 3. On election day the amended section 16(d) provided as follows:

“Notwithstanding the provisions of section 15, no person shall be entitled to vote in the election if that person is [...] **detained in a prison after being convicted and sentenced without the option of a fine in respect of** any of the following offences irrespective of any other sentence in respect of any offence not mentioned hereunder which is served concurrently with the first mentioned sentence: (i) **Murder, robbery with aggravating circumstances and rape; or (ii) any attempt to commit any offence referred to in subparagraph (i).**”

There are two similarities between this provision and section 4(1)(a) of the 1979 Electoral Act. Both provisions excluded convicted prisoners who were in prison after being convicted of an offence without the option of a fine from voting. The other similarity is that both sections list murder as an offence which would warrant disenfranchisement.

With regards to allowing prisoners to cast special votes section 39 of Act 202 of 1993 made such provision for certain prisoners. Section 39 (7)(a) provided the following:

“Any convicted prisoner or person awaiting trial being detained who is not excluded from voting in terms of section 16(d) may only vote by special vote under this section: Provided that such a vote shall be taken--(i) at the prison or place where he or she is detained; and (ii) on the date determined for the casting of special votes.”

During negotiations and the drafting of the Electoral Act 1993, one of the main issues was deciding whether or not prisoners should be permitted to vote. Some wished to extend the franchise to all prisoners and others were more conservative, because they did not want to extend the franchise to prisoners, thus the negotiation sought to strike a balance between these two competing interests.³⁴ “Such representations culminated in several reformulations,

³⁴ Independent Electoral Commission ‘Report of the Independent Electoral Commission: the South African Elections of April 1994’ (1994) 10.

the last being promulgated the day before the elections.”³⁵ From this quote it is apparent that section 16(d) was promulgated at the last-minute. The reason for the last-minute promulgation was, because of the controversial nature of prisoner voting the negotiating parties could not reach consensus on the issue earlier.

After the 1994 National and Provincial election the Independent Electoral Commission (‘IEC’) recommended that the issue regarding the right of prisoners to participate in elections should be resolved before the 1999 election.³⁶ Parliament responded to this recommendation by enacting the 1998 Electoral Act.

2.2.3 Electoral Act 73 of 1998

The initial disqualification of certain convicted prisoners was removed when the Electoral Act 73 of 1998 was adopted to regulate the second post-apartheid National and Provincial elections of 1999. It is apparent from the provisions below that prisoners were not mentioned in the Act at all. The Electoral Act 73 of 1998 made provision for the registration of all eligible voters in sections 6(1), 7(1), 8(1) and 8(2). Section 6(1) stated the following:

“Any South African citizen in possession of an identity document may apply for registration as a voter.”

In terms of section 7(1)(b):

“A person applying for registration as a voter must do so only for the voting district in which that person is ordinarily resident.”

Section 8(1) and (2) stated the following:

“(1) If satisfied that a person’s application for registration complies with this Act, the chief electoral officer must register that person as a voter by making the requisite entries in the voters’ roll. (2) The chief electoral officer may not register a person as a voter if that person— (a) has applied for registration fraudulently or otherwise than in the prescribed manner; (b) is not a South African citizen; (c) has been declared by the High Court to be of unsound mind or mentally disordered; (d) is detained under the Mental Health Act, 1973 (Act No. 18 of 1973); or

³⁵ Independent Electoral Commission ‘Report of the Independent Electoral Commission: the South African Elections of April 1994’ (1994) 10.

³⁶ Independent Electoral Commission ‘Report of the Independent Electoral Commission: the South African Elections of April 1994’ (1994) 85.

(e) is not ordinarily resident in the voting district for which that person has applied for registration.”

Prisoners were neither permitted nor disqualified from registering and voting as can be seen from these two provisions. Parliament was thus silent on whether the chief electoral officer may or may not register convicted prisoners to enable them to vote. Prisoners were also not regarded as a class for whom the Electoral Commission should make special arrangements to allow them to vote. This was apparent from section 33(1)(a) and (b) which contained the following provision:

“(1) The Commission—(a) must allow a person to apply for a special vote if that person cannot vote at a voting station in the voting district in which the person is registered as a voter, due to that person’s—(i) physical infirmity or disability, or pregnancy; (ii) absence from the Republic on Government service or membership of the household of the person so being absent; or (iii) absence from that voting district while serving as an officer in the election concerned, or while on duty as a member of the security services in connection with the election; (b) may prescribe other categories of persons who may apply for special votes.”

The Electoral Commission thus implicitly excluded prisoners from voting, because it did not prescribe prisoners as “other [category] of persons who may apply for special votes” in terms of section 33(1)(b).

During the drafting process of the Electoral Laws Amendment Act 34 of 2003 the Home Affairs Portfolio Committee held a briefing on the Bill [B54-03] which took place on 2 September 2003. In the explanatory memorandum reference was made to the 1998 Electoral Act. It was stated that prisoners were not made provision for in the 1998 Act “probably because there was *no intention to give prisoners special votes*.”³⁷ Parliament did not give any reasons for the implicit exclusion of prisoners from voting, but it can be inferred that Parliament excluded prisoners, because it did not want to include prisoners as a class who were entitled to a special vote in terms of section 33. Prisoners were absent from their ordinary residence which meant that they could only vote in terms of casting a special vote, but no provision was made for them to cast special votes in terms of section 33. This implicit exclusion of prisoners from voting and the silence of Parliament contained in section 8(2) is what gave rise to the *August* case.

³⁷ Parliamentary Monitoring Group ‘Electoral Laws Amendment Bill: briefing’ 2 September 2003 available at <http://www.pmg.org.za/minutes/20030901-electoral-laws-amendment-bill-briefing> (accessed 26 July 2014).

2.2.4 *August v Electoral Commission (1999)*

In the *August* case, a convicted prisoner argued that the Electoral Act 73 of 1998 did not limit the right of prisoners to vote, and therefore the Electoral Commission was under an obligation to take the necessary steps to enable convicted prisoners to register and vote in prison.³⁸ Parliament was silent on the issue of the right of prisoners to vote, but besides the fact that no provision was made for prisoners in the 1998 Act or in any other legislation or regulations, the Commission did not make any arrangements to enable prisoners to register and to vote.³⁹

The Electoral Commission presented three arguments as to why they did not make arrangements for prisoners to vote. These arguments related to fairness, practicality and the principle of democracy. With regards to fairness, the Commission argued that prisoners were absent from their place of ordinary residence and as a result lost the opportunity to exercise their right to vote through their own misconduct.⁴⁰ The Commission argued that special measures to accommodate absentee voters should be reserved for voters who are unable to vote, because they find themselves in a situation which is not of their own making.⁴¹ The Commission further argued that if special arrangements were made for prisoners, then the resources of the Commission would be strained, because they might have to make similar arrangements for “citizens abroad, pilots, long-distance truck drivers, and poor persons living in remote areas without public transport.”⁴² The argument is thus that it would be unfair to make arrangements for prisoners to vote and in the process straining the resources which might lead to the Commission not being able to make arrangements for the group of people mentioned above. With regards to the practicality argument, the Commission argued that making special arrangements for prisoners to register and vote as absentee voters would create “insurmountable logistical, financial and administrative difficulties”.⁴³ In a nutshell, the Commission argued that making arrangements for prisoners to register and vote would not be practical, because it will result in the state experiencing various difficulties.

³⁸ *August v Electoral Commission* (1999) at [2].

³⁹ *August v Electoral Commission* (1999) at [22].

⁴⁰ *August v Electoral Commission* (1999) at [20].

⁴¹ *August v Electoral Commission* (1999) at [8].

⁴² *August v Electoral Commission* (1999) at [30].

⁴³ *August v Electoral Commission* (1999) at [8].

The Constitutional Court held that it cannot deny ‘actual claims’ which were timeously asserted by determined people (those of the prisoners), because of the ‘possible existence’ of ‘hypothetical claims’ that ‘might’ have been brought by indeterminate groups.⁴⁴ In addition the Court held that Parliament cannot, by its silence, deprive a prisoner of the right to vote and such silence cannot be interpreted to empower or require the Court or the Commission to decide which category of prisoners should be deprived of this right.⁴⁵

With regards to the argument relating to democracy, the issue related to the interpretation of the phrase ‘ordinarily resident’. Counsel for the respondents pointed out that the Commission had difficulty in giving the words ‘ordinarily resident’, as contained in section 7(1)(b) of the 1998 Act, a meaning.⁴⁶ The question that had to be answered was whether ordinary residence is the place where the person was ordinarily resident before he or she was incarcerated, or the location of the prison?⁴⁷ The Chairperson of the Electoral Commission averred that whether ‘ordinarily resident’ meant the place where a person was resident before he was incarcerated or the prison it would present the state and the electoral process with a lot of logistical, financial and administrative difficulties.⁴⁸ The question of a concentrated prison electorate exercising disproportionate local influence was raised by the Commission in order to cast doubt on the interpretation of ‘ordinarily resident’ meaning the ‘prison’.⁴⁹ Treating prisons as a place of ordinary residence will not interfere with the outcome of national and provincial election; however it will gravely impact local government elections.⁵⁰ Democracy means ‘self-government’. The community in which the prison is situated will not be able to govern themselves, because prisoners would do it for them and this was anticipated to become a serious problem for democracy. The court in this case stated that Parliament must consider this issue, thus leaving this issue open and undecided.

The Court held that “[e]ven on the first interpretation of the phrase, no explanation was tendered to show why providing special votes for prisoners was any more difficult than providing special votes for the other categories of voters referred to in section 33 of the 1998

⁴⁴ *August v Electoral Commission* (1999) at [30].

⁴⁵ *August v Electoral Commission* (1999) at [33].

⁴⁶ Section 7(1)(b) states that “[a] person applying for registration as a voter must do so- [...] (b) only for the voting district in which that person is ordinarily resident.”

⁴⁷ *August v Electoral Commission* (1999) at [15].

⁴⁸ *August v Electoral Commission* (1999) at [13].

⁴⁹ *August v Electoral Commission* (1999) at [29].

⁵⁰ *August v Electoral Commission* (1999) at [29].

Electoral Act, such as persons in hospital and diplomats abroad.”⁵¹ In addition the court held that ‘ordinarily resident’ means the prison, as far as prisoners are concerned.⁵² The reason why the Court favoured this interpretation was because “[w]hen people are imprisoned they are forced to leave their homes and to reside in prison. They have no choice.”⁵³

Many open and democratic societies impose voting disabilities on some categories of prisoners.⁵⁴ It is important to understand that the *August* judgement should not be read as suggesting that Parliament may not disenfranchise certain categories of prisoners, however Sachs J said that: “[o]ne should not underestimate the difficulties that would confront the legislature, [...] in determining whether or not certain classes of prisoners may legitimately have their right to vote limited.”⁵⁵ The Court thus made it clear that Parliament may disenfranchise certain classes of prisoners; however it did not give Parliament any guidance as to which prisoners might reasonably be excluded. The Court also admitted that such a consideration might not be an easy one and it acknowledges the fact it would be a difficult task for Parliament to make such a classification.

The Court concluded that the applicants were entitled to the remedy they sought.⁵⁶ In doing so, the Court did not rule on the constitutionality of the exclusion of prisoners, should the exclusion be properly included in the Electoral Act. The Court did not venture into an application of the limitations clause (section 36 of the Constitution), because there was no law limiting the right of prisoners to vote.⁵⁷ The actions of the commission, by not making provision for prisoners to register and vote, limited their right to vote.

⁵¹ *August v Electoral Commission* (1999) at [13].

⁵² *August v Electoral Commission* (1999) at [27].

⁵³ *August v Electoral Commission* (1999) at [27].

⁵⁴ *August v Electoral Commission* (1999) at [31].

⁵⁵ *August v Electoral Commission* (1999) at [31] and [32].

⁵⁶ *August v Electoral Commission* (1999) at [36]; the remedy sought by the applicants were for the electoral commission to take the necessary steps to enable convicted prisoners to vote in prison . The Constitutional Court held “that all persons who were prisoners during each and every period of registration between November 1998 and March 1999, and who are not excluded from voting by the provisions of section 8(2) of the Electoral Act 73 of 1998, are entitled to register as voters on the national common voters' rolls; that all persons who are prisoners on the date of the general election are entitled to vote in that election if they have registered to vote... or otherwise; the respondents are to make all reasonable arrangements necessary to enable the applicants and other prisoners...to register as voters on the national common voters' roll; the respondents are to make all reasonable arrangements necessary to enable the applicants and other prisoners...to vote at the forthcoming general election.”

⁵⁷ *August v Electoral Commission* (1999) at [31].

In response to the *August* case Ntusi Mbodla stated:

“The more complex issue of prisoners' voting rights was examined by looking at the nature of human and democratic rights as well as the extent to which imprisonment is intended to deprive a person of these rights. *No strict conclusion could be drawn from this discussion except to reject a system whereby disenfranchisement occurred as a circumstantial consequence of imprisonment.*”⁵⁸

The *August* case gave rise to further amendments to the electoral legislation. Parliament responded to the *August* judgment by enacting the Local Government: Municipal Electoral Act 27 of 2000 in order to clarify the issue of where prisoners are ‘ordinarily resident’ for purposes of registering and voting in national and provincial elections. In addition, Parliament’s other response to the *August* judgment took the form of the Electoral Laws Amendment Act 34 of 2003, which also addressed the issue of where a prisoner is ‘ordinarily resident’. In addition to this, the Act addressed Parliament’s silence (as per the 1998 Act) regarding enabling prisoners to register and vote.

2.2.5 Local Government: Municipal Electoral Act 27 of 2000

This Act was enacted to regulate the second democratic local government elections. It also provided for some amendments to the Electoral Act of 1998. The Municipal Electoral Act amended the Electoral Act in an attempt to address the issue of where prisoners should register and vote. Section 7(1)(b) of the Electoral Act 1998 stated that a person applies for registration as a voter only for the voting district in which that person is ‘ordinarily resident’, however the Act did not define where a person’s ordinary residence is. As far as prisoners are concerned the court in *August* interpreted ‘ordinarily resident’ to mean the prison where a particular person is detained, because when people are imprisoned they have no choice but to leave their homes and to reside in prison.⁵⁹

The Municipal Electoral Act amended section 7 of Act 73 of 1998 by inserting the following:

“Section 7(3)(a) A person is regarded to be ordinarily resident at the home or place where that person normally lives and to which that person regularly returns after any period of temporary absence. (b) For the *purpose of registration* on the voters’ roll a person is *not* regarded to be

⁵⁸ Mbodla N ‘Should Prisoners Have a Right to Vote?’ (2002) 46 *Journal of African Law* 102.

⁵⁹ *August v Electoral Commission* (1999) at [27].

ordinarily resident at a place where that person is lawfully imprisoned or detained, but at the last home or place where that person normally lived when not imprisoned or detained.”

This provision undid the interpretation provided in *August*. As far as prisoners were concerned the phrase ‘ordinarily resident’ no longer meant the prison where a person is detained but the last home or place where a person normally lived when he or she was not imprisoned or detained.

During the drafting process the Home Affairs Portfolio Committee welcomed submissions, on 23 May 2000, regarding certain provisions in the Municipal Electoral Bill, one of which were section 7. This section dealt with ‘who may vote’ in municipal elections. When the Committee dealt with the question of who may vote, Advocate Lambani stated that those imprisoned lawfully on the voting day may not vote.⁶⁰ The reason for this is, because in a municipal election one has to vote in the municipality of one’s residence and this would be impossible for prisoners to do.⁶¹

At public hearings held on 5 June 2000 by the Home Affairs Portfolio Committee it became apparent that section 7(1)(b) of the Bill excluded prisoners and those awaiting trial from voting in municipal elections.⁶² Mr Butiki Pitikoe presented submissions on behalf of Lawyers for Human Rights. They supported this section, arguing that it would cause an ‘administrative nightmare’ to permit prisoners and those awaiting trial to vote since most prisoners are not incarcerated in the same municipalities in which they reside.⁶³ The South African Local Government Association (SALGA) stated that not allowing prisoners to vote would create the perception that municipal elections were not important.⁶⁴

Mr Pitikoe stated that the Lawyers for Human Rights support voting of prisoners in national and provincial elections, but the reason why it does not support such at a local level is

⁶⁰ Parliamentary Monitoring Group ‘Local Government Municipal Electoral Bill: Submission’ 23 May 2000 available at <http://www.pmg.org.za/minutes/20000522-municipal-electoral-bill-briefing-and-discussion> (accessed 1 November 2014).

⁶¹ Parliamentary Monitoring Group ‘Local Government Municipal Electoral Bill: Submission’ 23 May 2000 available at <http://www.pmg.org.za/minutes/20000522-municipal-electoral-bill-briefing-and-discussion> (accessed 1 November 2014).

⁶² Parliamentary Monitoring Group ‘Municipal Electoral Bill: hearings’ 5 June 2000 available at <http://www.pmg.org.za/minutes/20000604-municipal-electoral-bill-hearings> (accessed 28 October 2014).

⁶³ Parliamentary Monitoring Group ‘Municipal Electoral Bill: hearings’ 5 June 2000 available at <http://www.pmg.org.za/minutes/20000604-municipal-electoral-bill-hearings> (accessed 28 October 2014).

⁶⁴ Parliamentary Monitoring Group ‘Municipal Electoral Bill: hearings’ 5 June 2000 available at <http://www.pmg.org.za/minutes/20000604-municipal-electoral-bill-hearings> (accessed 28 October 2014).

because of the differences between politics at the local level and politics at the National level.⁶⁵ Mr Pitikoe made the following statement:

“We believe that allowing prisoners to vote in the municipal elections will unnecessarily involve the voting rights of prisoners in controversy. It will make our cause for the vote at National Level more difficult to advance in the eyes of the public.”⁶⁶

According to him prisoners have no interest in good governance at local level, because their interest in clean water and reliable electricity is sufficiently taken care of by the custodial duties that the state has in respect of prisoners.⁶⁷ The main reason why Lawyers for Human Rights supported the exclusion of prisoners from voting in municipal elections is apparent from the following statement made by Mr Pitikoe:

“Prison populations also have the potential to Skew the electoral results in a constituency based system. We accept that this would be unreasonable towards the general public who have direct and substantial interests in local government affairs.”⁶⁸

On 6 June 2000 the Home Affairs Portfolio Committee held deliberations where Adv Lambani stated that the Bill was not supposed to give or take away rights, but it was supposed to describe the municipal election process in terms of what should be done.⁶⁹ The State Law Advisors had some concerns about the constitutionality of section 7(1)(b) and as a result they communicated with the IEC regarding the deletion of section 7(1)(b) from the Bill.⁷⁰ The IEC proposed a deletion of the section. The position was that no special arrangements would be made for prisoners to vote in municipal elections. Mr Mokoena responded by saying that the deletion did not take the problem away, because there may still be law suits brought by prisoners.⁷¹ By the time the Bill was presented to government section 7(1)(b) was deleted, because the clause dealt with the right to vote and this right was in the

⁶⁵ Parliamentary Monitoring Group ‘Municipal Electoral Bill: hearings’ 5 June 2000 available at <http://www.pmg.org.za/minutes/20000604-municipal-electoral-bill-hearings> (accessed 28 October 2014).

⁶⁶ Parliamentary Monitoring Group ‘Municipal Electoral Bill: hearings’ 5 June 2000 available at <http://www.pmg.org.za/minutes/20000604-municipal-electoral-bill-hearings> (accessed 28 October 2014).

⁶⁷ Parliamentary Monitoring Group ‘Municipal Electoral Bill: hearings’ 5 June 2000 available at <http://www.pmg.org.za/minutes/20000604-municipal-electoral-bill-hearings> (accessed 28 October 2014).

⁶⁸ Parliamentary Monitoring Group ‘Municipal Electoral Bill: hearings’ 5 June 2000 available at <http://www.pmg.org.za/minutes/20000604-municipal-electoral-bill-hearings> (accessed 28 October 2014).

⁶⁹ Parliamentary Monitoring Group ‘Municipal Electoral Bill: Deliberations’ 6 June 2000 available at <http://www.pmg.org.za/minutes/20000605-municipal-electoral-bill-discussion> (accessed 1 November 2014).

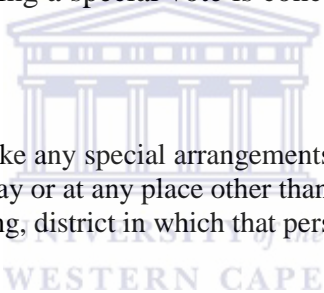
⁷⁰ Parliamentary Monitoring Group ‘Municipal Electoral Bill: Deliberations’ 6 June 2000 available at <http://www.pmg.org.za/minutes/20000605-municipal-electoral-bill-discussion> (accessed 1 November 2014).

⁷¹ Parliamentary Monitoring Group ‘Municipal Electoral Bill: Deliberations’ 6 June 2000 available at <http://www.pmg.org.za/minutes/20000605-municipal-electoral-bill-discussion> (accessed 1 November 2014).

Constitution and there was no intention to deal with it in the Bill.⁷² Mr Mokoena stated that section 7(1)(b) contained a controversial blanket exclusion which included awaiting trial prisoners as well and therefore the IEC did not think that the section would survive constitutional challenge.⁷³

Section 7(1)(b) was deleted from the Bill thus the provision never made it into the Act. The general understanding is that prisoners cannot vote in municipal elections. The Commission has on occasion stated that prisoners can register while in prison to enable them to vote in national and provincial elections only, meaning that they cannot do so for municipal elections.⁷⁴ The position is thus the same as that which gave rise to the *August* case in relation to National and Provincial elections, where Parliament was silent on whether prisoners could vote or not.

As far as the arrangement for casting a special vote is concerned, section 55 of the Act stated the following:



“The Commission may not make any special arrangements whereby a person is allowed to vote on any day other than voting day or at any place other than the voting station or a mobile voting station established for the voting, district in which that person is registered as a voter.”

This section prohibited the commission from making any special arrangements for anyone to cast his or her vote. Parliament realised the harshness of this provision and amended it in 2010 through the enactment of the Local Government: Municipal Electoral Amendment Act 14 of 2010. Act 14 of 2010 amended Act 27 of 2000 by deleting the words as found in section 55 and substituting it with the following:

“Any voter who is unable, on voting day, to cast his or her vote at the voting station in the voting district where he or she is registered, may in the prescribed manner apply and be allowed, prior to voting day, to cast a special vote within that voting district.”

The Act is silent on whether prisoners would be permitted to cast a special vote in municipal elections.

⁷² Parliamentary Monitoring Group ‘Municipal Electoral Bill: Deliberations’ 6 June 2000 available at <http://www.pmg.org.za/minutes/20000605-municipal-electoral-bill-discussion> (accessed 1 November 2014).

⁷³ Parliamentary Monitoring Group ‘Municipal Electoral Bill: Deliberations’ 6 June 2000 available at <http://www.pmg.org.za/minutes/20000605-municipal-electoral-bill-discussion> (accessed 1 November 2014).

⁷⁴ Electoral Commission of South Africa ‘Frequently asked questions: For voters’ available at <http://www.elections.org.za/content/for-voters/FAQ-For-Voters/> (accessed 30 October 2014).

2.2.6 Electoral Laws Amendment Act 34 of 2003

The Electoral Laws Amendment Act 34 of 2003 amended the Electoral Act in various ways, however only some amendments are relevant to prisoners' voting rights. Section 4 of Act 34 of 2003 amended section 8 of Act 73 of 1998 by inserting section 8(2)(f) which provided the following:

“The chief electoral officer may not register a person as a voter if that person is serving a sentence of imprisonment without the option of a fine.”

In addition, Act 34 of 2003 amended Act 73 of 1998 by inserting section 24B which contains the heading “Prisoners”. Section 24B (1) and (2) provides the following:

“(1) In an election for the National Assembly or a provincial legislature, *a person who on election day is in prison and not serving a sentence of imprisonment without the option of a fine* and whose name appears on the voters' roll for another voting district, *is deemed for that election day to have been registered by his or her name having been entered on the voters' roll for the voting district in which he or she is in prison.* (2) A person who is in prison on election day may only vote if he or she is not *serving a sentence of imprisonment without the option of a fine.*”

Section 24B(1) restored the position in *August* regarding the fact that citizens should register and vote where they are ‘ordinarily resident’. In terms of this section prisoners are deemed to have been registered in the district in which they are in prison, provided that they are not serving a prison sentence without the option of a fine. Section 24B(2) on the other hand contains the position of the 1979 Electoral Act and the 1993 Act in as far as the disenfranchisement of those prisoners serving prison sentence without the option of a fine are concerned.

2.2.7 *Minister of Home Affairs v NICRO (2004)*

The amendments by Act 34 of 2003 gave rise to the *NICRO* case. In this case the National Institute for Crime Prevention and the Re-integration of Offenders (Nicro) and two convicted prisoners serving sentences of imprisonment lodged an application for an order declaring sections 8(2)(f), and 24B(1) and (2) of Act 1998, as amended by Act 2003, which deprived

convicted prisoners of the right to participate in elections, to be inconsistent with the Constitution and invalid.⁷⁵

The question was raised as to whether legislation disqualifying prisoners or categories of prisoners from voting could be justified under section 36 of the Constitution. The government tried to justify the exclusion of all convicted prisoners (who did not have the option of paying a fine) on similar grounds as those which surfaced in *August*. The government's arguments, as in *August*, related to practicality, fairness and a new crime prevention and deterrent ground made its appearance.

With regards to the practicality (logistics and cost) argument, the Minister submitted that in making provision for mobile voting stations in prison involves risking the integrity of the voting process, because of the fact that arrangements have to be made for the storage and transport of such votes.⁷⁶ The Minister further argued that special arrangements like this puts strain on the logistical and financial resources which are available to the Electoral Commission for purposes of conducting the elections.⁷⁷ The Court responded to this by stating that no factual basis was provided for the logistical argument, because there was no information before the court that suggested that an undue burden would be placed on the resources of the state.⁷⁸ The court rejected this argument.

With regards to the argument relating to fairness the Minister's submission related to the fact that, according to the state, it would not be fair if prisoners were to be seen as being favoured above others who also have difficulty making it to the polling stations. He argued that special arrangements for voting could be made, but only for certain classes of people, which excluded prisoners and the categories of people for whom special arrangements had to be made had to be limited.⁷⁹ He made the argument that there are other categories of persons who, for good reasons, cannot get to registration and voting stations and that the state's resources should be used to enable law abiding citizens to register and vote and should not be at the disposal of convicted prisoners.⁸⁰ The Court responded to this argument by stating that

⁷⁵ *Minister of Home Affairs v NICRO* (2004) at [3].

⁷⁶ *Minister of Home Affairs v NICRO* (2004) at [40].

⁷⁷ *Minister of Home Affairs v NICRO* (2004) at [40].

⁷⁸ *Minister of Home Affairs v NICRO* (2004) at [49].

⁷⁹ *Minister of Home Affairs v NICRO* (2004) at [41].

⁸⁰ *Minister of Home Affairs v NICRO* (2004) at [44], what the Minister tried to argue was that it would be unfair to make provision for voting by prisoners and not to do the same for law abiding citizens.

it has no substance.⁸¹ The court substantiated in saying that prisoners are prevented from voting by the Electoral Act and the actions of the state therefore their position cannot be compared to people whose freedom has not been curtailed by law and who require special arrangements to be made in order for them to vote.⁸²

On the grounds of crime prevention and deterrence the Minister argued that if our country, where there are strong feelings against the high level of crime, were to allow convicted prisoners to vote it would send an incorrect message to the public that the government is soft on crime.⁸³ The Court rejected this argument stating that “[a] fear that the public may misunderstand the government’s true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration.”⁸⁴ With regards to this argument the Court assumed that the government intended to convey “[t]hat at the level of policy it is important for the government to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens. Such a purpose would be legitimate and consistent with the provisions of section 3 of the Constitution [which deals with the rights and duties of citizenship].”⁸⁵ Pierre De Vos is of the opinion that this was indeed one of the arguments by the Minister even though the court assumed it to be. He is of the opinion that this is an argument by implication.⁸⁶ I am of the opinion that the state failed to argue that a citizen’s rights are related to their duties and should not be implied, thus the question that the Court could not answer was whether government, as a matter of policy, could adopt the stance that the rights of citizens are related to their duties (enhancing respect for the rule of law)?⁸⁷ The reason why the Court could not answer this question was, because the policy issue was not properly argued by the government thus leaving the court with insufficient information to answer this question.

The Court noted that no information was put before it about the sort of offences for which shorter periods of imprisonment are likely to be imposed, the sort of persons who are likely to

⁸¹ *Minister of Home Affairs v NICRO* (2004) at [52].

⁸² *Minister of Home Affairs v NICRO* (2004) at [53]; The court held at [53] that “[t]he mere fact that it may be reasonable not to make special arrangements for particular categories of persons who are unable to reach or attend polling stations on election day does not mean that it is reasonable to disenfranchise prisoners. Whether or not that is reasonable as a matter of policy raises different considerations.”

⁸³ *Minister of Home Affairs v NICRO* (2004) at [46] and [55].

⁸⁴ *Minister of Home Affairs v NICRO* (2004) at [46].

⁸⁵ *Minister of Home Affairs v NICRO* (2004) at [57].

⁸⁶ De Vos P ‘South African Prisoner’s Right to Vote’ (2005) *NICRO and the Community Law Centre* 6.

⁸⁷ This was the stance taken in the case of *Hirst v the United Kingdom* (No.2) [2005] ECHR 681.

be imprisoned for such offences, and the number of persons who might lose their vote because of comparatively minor transgressions.⁸⁸ It thus held the following: “we have wholly inadequate information on which to conduct the limitation analysis that is called for”⁸⁹. It also pointed out the fact that the provisions which appear in the 1998 Act as a result of the 2003 amendment Act appear to disenfranchise prisoners whose convictions and sentences are under appeal.⁹⁰

The Court concluded that the provisions introduced by Act 34 of 2003 were unconstitutional, because it was in violation of the right to vote and the Minister of Home Affairs failed to justify this violation.⁹¹ It should be noted that the court did not decide the matter as to the voting rights of prisoners in general, thus it did not resolve the issue of prisoner disenfranchisement. It just focussed on the justification given by the state for limiting the right to vote of those prisoners who were sentenced to imprisonment without the option of a fine and based on that it found that the violation was unconstitutional. The question still remains; would the exclusion of all prisoners or certain classes of prisoners be unconstitutional? Could there ever be a justifiable reason for the exclusion?

Chaskalson CJ, who wrote the majority judgment, raised the issue relating to the fact that the Electoral Act 73 of 1998 (as amended by Act 34 of 2003) prohibited prisoners sentenced to imprisonment without the option of a fine from voting while our Constitution permits a prisoner serving a sentence of imprisonment of less than 12 months without the option of a fine to stand for public office.⁹² This meant that a person sentenced to prison for less than a year without the option of a fine, could stand for public office, but at the same time could not vote. What the Court did was to suggest section 47(1)(e) as an example of the kind of prisoner exclusion that might pass the test of constitutionality. This means that the majority of the Court has left the question open. This still leaves the constitutionality of a properly crafted exclusion undecided.

Madala J wrote a dissenting judgment. He held that even though there was a lack of evidence before the court to enable it to do a limitation analysis, this lack of evidence does not

⁸⁸ *Minister of Home Affairs v NICRO* (2004) at [67].

⁸⁹ *Minister of Home Affairs v NICRO* (2004) at [67].

⁹⁰ *Minister of Home Affairs v NICRO* (2004) at [67].

⁹¹ *Minister of Home Affairs v NICRO* (2004) at [65].

⁹² *Minister of Home Affairs v NICRO* (2004) at [67].

necessarily result in invalidity of the impugned provision.⁹³ He disagreed with the findings and conclusion which the majority reached, particularly on the lack of justification for the infringement of the right to vote.⁹⁴ According to Madala J the temporary removal of the right to vote of certain categories of prisoners is in line with the government objective of balancing individual rights and the values of our society. He felt strongly about not rewarding a person, who has no respect for the law, the right and responsibility of voting.⁹⁵

Ngcobo J also wrote a dissenting judgment. In his opinion the policy which the government is trying to pursue is one of denouncing crime and sending a message to criminals that the rights citizens have are related to their duties and obligations as citizens.⁹⁶ He was of the opinion that the government had a legitimate purpose in pursuing a policy of denouncing crime and to promote a culture of the observance of civic duties and obligations.⁹⁷ Our Constitution does not take kindly to crime, Ngcobo J pointed out that this is apparent from section 47(1)(e) of the Constitution which disqualifies any person who is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine from membership of the National Assembly.⁹⁸ There is a similar disqualification from membership in the provincial parliament and the local government. He also pointed out an important issue which parliament overlooked. The limitation on prisoners' voting rights makes no distinction between those prisoners who are serving a prison sentence while awaiting the outcome of an appeal and those whose appeals have been finalised. According to him "[t]his distinction is important because the former may still be found not guilty on appeal or have their sentence reduced to a prison sentence with an option of a fine. If an outcome of the appeal comes after

⁹³ *Minister of Home Affairs v NICRO* (2004) at [101].

⁹⁴ *Minister of Home Affairs v NICRO* (2004) at [112].

⁹⁵ *Minister of Home Affairs v NICRO* (2004) at [117].

⁹⁶ *Minister of Home Affairs v NICRO* (2004) at [140]; Ngcobo J held at [144] that "[...]crime undermines the rule of law, a foundational value of our constitutional democracy. What is more, those who commit crimes violate their constitutional duties and responsibilities as citizens of this country."

⁹⁷ *Minister of Home Affairs v NICRO* (2004) at [145], Ngcobo J substantiated his reasoning as found at [145] by saying the following at [157]: "This limited limitation of the right to vote sends an unmistakable message to the prisoner. If you should be released and again commit a crime of a nature that attracts the prison sentence without the option of a fine, you will not vote in the next elections. That message is a necessary effort to fight crime. It is a reminder that the duties and responsibilities of a citizen also include an obligation to respect the rights of others and comply with the law. The convicted prisoners break the law in breach of their constitutional duty not to do so."

⁹⁸ Section 47(1)(e) provides: "Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except – [. . .] (e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed."

the elections, the person would have been wrongly deprived of the right to vote.”⁹⁹ He correctly held that to this extent the limitation goes too far, because it does not make the distinction which the Constitution makes (section 47 (1)(e)).¹⁰⁰ He concluded by saying the following:

“[...] this defect is in my view of the kind that could adequately be cured by reading in the following qualifying phrase: “*but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired*”, after the phrase “*serving a sentence of imprisonment without the option of a fine*”, into the provisions.”¹⁰¹

Ngcobo J suggested that by reading the above phrase into the Electoral Act will solve the problem which the Act created by not stating the position of those prisoners who are awaiting the outcome of their appeals. He merely mentioned that section 47(1)(e) demonstrates that crime will not be tolerated. He thus hinted that a provision similar to section 47(1)(e) of the Constitution could be an example of prisoner disenfranchisement which will pass constitutional muster, however he proposed the reading in of the above phrase instead of the provision contained in section 47(1)(e). The following phrase is thus not what Ngcobo J proposed to be read-in “convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine”. Enacting the provision of section 47(1)(e), which relate to passive voting rights, as the provision which disenfranchises prisoners would have been the ideal remedy for active voting rights, because it would limit the disenfranchisement to some prisoners and not all. It also limits the disenfranchisement to those who committed the more serious offences, because a sentence of imprisonment of more than one year can be presumed to be a serious offence in our law.

After the two judgments, academics expressed the fact that there is still some uncertainty as to the status of prisoner voting rights. In response to *August* and *NICRO*, Brickhill & Babiuch are of the opinion that all that can be said with certainty is that the active voting rights of prisoners cannot be excluded based on logistical or financial considerations. Beyond this minimum, they correctly regard the issue as undecided:

⁹⁹ *Minister of Home Affairs v NICRO* (2004) at [152].

¹⁰⁰ *Minister of Home Affairs v NICRO* (2004) at [153].

¹⁰¹ *Minister of Home Affairs v NICRO* (2004) at [153].

“It remains an open question, however, whether more narrowly tailored ban on prisoner voting rights – such as disenfranchising only those prisoners found guilty of a certain category of more serious crimes – may be constitutionally permissible.”¹⁰²

In both cases the Court does not support or take away from the principle of democracy which is contained in the constitutional text (section 1(d)).¹⁰³ Theunis Roux is of the opinion that:

“At best, [our courts/judges] are agnostic on the question whether that principle can be enforced in cases where the state does not act irrationally.”¹⁰⁴

This means that our courts are uncertain or does not know how to apply the principle of democracy. For Theunis Roux the principle of democracy appears “blush”.¹⁰⁵

As a result of the *NICRO* judgment the electoral commission made provision for all convicted prisoners to register and vote in the 2004 and 2009 national and provincial elections. “No distinction was made between sentenced and awaiting-trial prisoners or between the different categories of sentenced prisoners.”¹⁰⁶ Parliament responded to the Court’s ruling in *NICRO* by passing the Electoral Amendment Act 18 of 2013.

2.2.8 Electoral Amendment Act 18 of 2013

The 2013 Act, like the 1998 version of the Act, did not exclude any classes of prisoners from voting in the National and Provincial election which was held on 7 May 2014. Section 3 of Act 18 of 2013 deleted section 8(2)(f) from Act 73 of 1998, meaning that no provision exists which prohibits the chief electoral officer from registering a person as a voter even if that person is serving a sentence of imprisonment without the option of a fine. Section 5 of Act 18 of 2013 amended section 24B of Act 73 of 1998 by deleting the words “and not serving a sentence of imprisonment without the option of a fine” from section 24B(1) and by deleting

¹⁰² Brickhill J & Babiuch R ‘Political Rights’ in Woolman S (ed) *Constitutional Law of South Africa: Volume 3* (2ed) (2008) 45.51.

¹⁰³ Roux T ‘The Principle of Democracy in South African Constitutional Law’ in Woolman S & Bishop M (eds) *Constitutional Conversations* (2008) 87 (hereafter Roux T ‘The Principle of Democracy in South African Constitutional’ (2008)).

¹⁰⁴ Roux T ‘The Principle of Democracy in South African Constitutional’ (2008) 87.

¹⁰⁵ Roux T ‘The Principle of Democracy in South African Constitutional Law’ (2008) 88.

¹⁰⁶ Independent Electoral Commission ‘Report of the Independent Electoral Commission: National and Provincial Elections 2 April 2009’ 20 and 21 available at <https://www.elections.org.za/content/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=1287> (accessed 1 November 2014).

section 24B(2) in its entirety. After this amendment, section 24B (1) of the Electoral Act 73 of 1998 (as amended by Act 18 of 2013) now reads as follows:

“In an election for the National Assembly or a provincial legislature, a person who on election day is in prison and whose name appears on the voters' roll for another voting district, is deemed for that election day to have been registered by his or her name having been entered on the voters' roll for the voting district in which he or she is in prison.”

When the Electoral Amendment Act, 2013 was still in Bill form the public were given the opportunity to make submissions and the Electoral Commission responded to such submissions on 16 September 2013. The Electoral Commission submitted that there should not be a problem regarding prisoner disenfranchisement because the Constitutional Court expressed itself on the matter.¹⁰⁷ This shows that the Commission does not have any reservations about the approach which the Constitutional Court used in deciding the issue of prisoner enfranchisement. At the Second reading debate on the Electoral Amendment Bill [B 22 –2013] on 19 September 2013 Mr MW Thring spoke on behalf of the African Christian Democratic Party, in saying that the party has its reservations about permitting convicted prisoners to vote, however the party respects the decision of the Constitutional Court in this regard.¹⁰⁸ There was thus a general acceptance of the Court's judgment.

2.2.9 First interim conclusion

In *August* the Constitutional Court already confirmed that it is not taking the position that disenfranchising prisoners would in general be unconstitutional. The Court thus meant that prisoners could be disenfranchised as long as it is not a blanket exclusion. In *NICRO*, on the other hand, the Court found that it was unconstitutional to disenfranchise all prisoners serving a sentence of imprisonment without the option of a fine. The Court's reason for this finding was because this exclusion was too broad to the extent that it included the commission of any crime and a sentence of any length. The question left open is thus which type of prisoner exclusions would be constitutional. Would it be constitutional if the exclusion in terms of active voting right mirrored the exclusion in terms of passive voting rights, as contained in

¹⁰⁷ Parliamentary Monitoring Group 'Electoral Amendment Bill: Electoral Commission response to public submissions' 16 September 2013 available at <http://www.pmg.org.za/report/20130916-electoral-amendment-bill-electoral-commission-response-public-submissions> (accessed 26 July 2014).

¹⁰⁸ Parliamentary Monitoring Group 'Second Reading debate: Electoral Amendment Bill [B 22 –2013]' 19 September 2013 available at <http://www.pmg.org.za/hansard/20130919-second-reading-debate-electoral-amendment-bill-b-22-2013> (accessed 26 July 2014).

section 47(1)(e)? As suggested by Chaskalson J and Ngcobo J an exclusion of prisoners from voting might be constitutional if it mirrored the exclusion contained in section 47(1)(e). For this reason an assessment of the passive voting rights in South Africa is done in the next section of this chapter.

2.3 The passive voting rights of prisoners in South Africa (1994-2014)

Provision is made for passive voting rights in section 19(3)(b), section 47(1)(e), section 61(1) read with section 106(1)(e) and section 158(1)(c) of the Constitution.¹⁰⁹ Section 19(3)(b) states:

“Every adult citizen has the right to stand for public office and, if elected, to hold office.”

Much emphasis will be put on section 47(1)(e), because the majority of political disputes, regarding people who stand for or hold a public office with a criminal record, has been regarding section 47(1)(e). It is, however, important to note that section 47(1)(e), section 61(1) read with section 106(1)(e) and section 158(1)(c) contain the same provision. The Municipal Electoral Act prescribes in section 17(2)(f) that a person who is about to stand as ward councillor is required to submit a prescribed declaration, which is signed by him or herself, stating that he or she is not disqualified from standing for election in terms of the Constitution or any applicable legislation. Section 27(2)(b) of the Electoral Act contains a similar provision which relates to the National and Provincial legislatures.

In order to put the current position regarding passive voting rights into context it will suffice to have a look at the last Apartheid era Constitution and the Interim Constitution. The last apartheid era Constitution, the Republic of South Africa Constitution Act 110 of 1983, in section 54(1)(a), made provision for the exclusion of a person from standing for public office if that person was convicted of an offence and sentenced to prison. Section 54(1)(a) provided the following:

“No person shall be capable of being elected or nominated or of sitting as a member of a House if he has at any time been *convicted of any offence for which he has been sentenced to*

¹⁰⁹ Section 47(1)(e), sec 61(1) read with sec 106(1)(e), sec 106(1)(e) and sec 158(1)(c) each prohibits a person from being elected, to the National Assembly, the National Council of Provinces, the Provincial Legislature and the Municipal Council respectively, if such a person is convicted of an offence and sentenced to more than 12 months' imprisonment without an option of a fine.

imprisonment without the option of a fine for a period of not less than twelve months, unless he has received a grant of amnesty or a free pardon, or unless the period of such imprisonment expired at least five years before the date of his election or nomination”.

The Interim Constitution, the Constitution of the Republic of South Africa Act 200 of 1993, also made provision for the exclusion of person serving a prison sentence of more than 12 month from standing for public office. Section 42(1)(b) provided the following:

“No person shall become or remain a member of the National Assembly if he or she is *convicted of an offence in the Republic for which he or she has been sentenced to imprisonment of more than 12 months without the option of a fine*, unless he or she has received a pardon.”

The current Constitution, section 47(1) disqualifies the following people from being members of the National Assembly:

“(a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than- (i) the President, Deputy President, Ministers and Deputy Ministers; and (ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation; (b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council; (c) un-rehabilitated insolvents; (d) anyone declared to be of unsound mind by a court of the Republic; or (e) *anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.*”¹¹⁰

The relevant disqualification, section 47(1)(e) provides that a citizen is excluded from standing for public office in the National Assembly if such citizen is convicted of an offence and sentenced to more than 12 month’s imprisonment without the option of a fine; such disqualification ends five years after the sentence has been completed.

The 1993 Constitution only excluded a particular individual from standing for public office while he or she is in prison, where as the 1983 Constitution excluded an individual during the period of serving his or her prison sentence up until five years after his or her release. The 1983 provision was thus re-enacted into the 1996 Constitution to the extent that a person’s

¹¹⁰ The Constitution of the Republic of South Africa, 1996.

exclusion from public office ends five years after the completion of his or her prison sentence.

With regards to the position under the current Constitution, there has been much debate about the interpretation of section 47(1)(e). The issue regarding the interpretation of this section was dealt with in a case that came before the Electoral Commission where the political party, Freedom Front Plus, objected to the nomination of Mrs Winnie Mandela as a candidate in the election of 22 November 2009.¹¹¹ The Commission rejected this objection and this rejection led to an appeal being made to the Electoral Court of South Africa. The appellant contended that Mrs Mandela is disqualified from standing for public office, because of “a sentence of imprisonment of more than twelve months imposed on her in July 2004, even though the whole of the sentence was suspended on certain conditions.”¹¹² This sentence was as a result of her fraud and theft conviction. Freedom Front Plus argued that the word ‘imprisonment’ referred to in section 47(1)(e) includes a suspended term of imprisonment.¹¹³ The court held that Mrs Mandela “is not disqualified from standing as a candidate for election on 22 April 2009 as she was not sentenced to an effective term of imprisonment, capable of being ‘completed’ within the meaning of section 47(1)(e).”¹¹⁴ This is so because section 47(1)(e) provides that the disqualification from standing for public office ends five years after the sentence has been ‘completed’ and a suspended sentence cannot be completed, but it ‘expires’.¹¹⁵ The court came to its conclusion by using section 9 of the Constitution. It held that “a person who commits a more serious offence for which he or she serves a prison term of twelve months would be eligible to hold public office much earlier than a person who did not actually serve a prison term, but his or her sentence suspended for a period of five years for example. This could never have been the intention of the Legislature, namely to encourage uneven treatment of its citizens in violation of the equal protection provisions of section 9 of the Constitution.”¹¹⁶

Academics such as Pierre de Vos are of the opinion that if one looks at the plain language of the Constitutional text, the drafters “clearly wanted to make sure that recently convicted

¹¹¹ *Freedom Front Plus v African National Congress* (02/2009) [2009] ZAEC 4 at [1] (hereafter *Freedom Front Plus v African National Congress* (2009)).

¹¹² *Freedom Front Plus v African National Congress* (2009) at [1].

¹¹³ *Freedom Front Plus v African National Congress* (2009) at [5].

¹¹⁴ *Freedom Front Plus v African National Congress* (2009) at [15].

¹¹⁵ *Freedom Front Plus v African National Congress* (2009) at [11].

¹¹⁶ *Freedom Front Plus v African National Congress* (2009) at [13].

crooks are prevented from representing us in Parliament.”¹¹⁷ He is of the opinion that, even if one gets a sentence of imprisonment of more than 12 months without the option of paying a fine and such sentence is suspended, it is still covered by section 47(1)(e) even though no actual prison term were carried out.¹¹⁸ This interpretation by De Vos is as result of the case of Mrs Mandela who became a Member of Parliament despite this provision, thus it shows that in past practice the interpretation of De Vos were rejected. I agree with the interpretation of De Vos, because of the fact that the person who gets the sentence must have committed a crime serious enough to warrant a sentence of imprisonment and should not be allowed to stand for public office and represent the people (citizens). These are the people who will make the laws of the country; do we really want to leave the responsibility of making the laws to criminals? However, all is not lost to these individuals and they are not excluded forever, because their passive voting rights are restored five years after the completion of their sentence.

2.3.1 Second preliminary conclusion

Prisoner disenfranchisement as contained in the Electoral legislation of the country has been found to be unconstitutional by the Constitutional Court without any proclamation as to what type of prisoner disenfranchisement would pass constitutional muster. Chaskalson J and Ngcobo J merely hinted that section 47(1)(e) of the Constitution, containing the passive voting exclusion, might be an example of an exclusion which would pass constitutional muster as far as active voting is concerned. The legislation was thus measured against the Constitution. The determination which has to be made now is whether the Constitutional provision, section 47(1)(e), is in line with Human Rights standards under the African Charter. The question is thus whether the African Court of Human Rights has decided the status of prisoners’ voting rights.

2.4 Prisoners’ voting rights under the African Charter

The South African Constitutional Court has not yet determined the status of prisoners’ voting rights, thus it would be best to look at the position under the African Charter to determine

¹¹⁷ De Vos P ‘Yengeni, Winnie not eligible for Parly?’ *Constitutional Speaking* 30 January 2009 available at <http://constitutionallyspeaking.co.za/yengeni-winnie-not-eligible-for-parly/> (accessed 10 June 2014).

¹¹⁸ De Vos P ‘One law for ANC, another for the rest?’ *Constitutional Speaking* 26 February 2009 available at <http://constitutionallyspeaking.co.za/one-law-for-anc-another-for-the-rest/> (accessed 24 March 2014).

such status. The African Union caters for African countries which are member countries of the union and it has a Commission which ensures the protection of human and peoples' rights as laid down in the Charter.¹¹⁹ South Africa is a member state of the African Union and is party to the African Charter on Human and Peoples Rights,¹²⁰ meaning that the country, through its representatives, signed the charter and thus consented to adhere to the provisions of the charter. South Africa is also bound by the African Charter on Democracy, Elections and Governance.¹²¹

Article 13(1) of the African Charter on Human and Peoples Rights is the relevant article as far as voting rights is concerned. Article 13(1) provided the following:

“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”¹²²

The African Charter on Democracy, Elections and Governance also contains certain provisions relating to political rights of citizens. This Charter is a binding legal instrument which South Africa signed and ratified in 2010. It addresses elements which are necessary for the establishment of liberal democracies.¹²³ Some of the objectives of this charter include promoting adherence, by states, to principles and values of democracy and respect for human rights; promoting regular free and fair elections and promoting the establishment of conditions which are necessary to foster citizen participation.¹²⁴ Under this charter, state parties agree to recognise participation through universal suffrage as the inalienable right of the people.¹²⁵ Member states of the African Union commit themselves to certain rights and obligations under which democratic elections are conducted such as recognising that “every citizen has the right to fully participate in the electoral processes of the country, including the right to vote or be voted for, according to the laws of the country and as guaranteed by the Constitution, without any kind of discrimination.”¹²⁶

¹¹⁹ African Charter on Human and Peoples' Rights, article 24 (2).

¹²⁰ Adopted in Nairobi June 27, 1981 Entered into Force October 21, 1986.

¹²¹ Adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30 January 2007.

¹²² African Charter on Human and Peoples Rights adopted in Nairobi June 27, 1981 Entered into Force October 21, 1986, article 13(1).

¹²³ Elvy S 'Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance' (2013) 27 *Emory International Law Review* 41.

¹²⁴ The African Charter on Democracy, Elections and Governance, articles 2(1), 2(3) and 2(10).

¹²⁵ The African Charter on Democracy, Elections and Governance, article 4(1).

¹²⁶ Guidelines for African Union Electoral Observation and Monitoring Missions, EX.CL/91 (V) Annex II.

In terms of the Declaration on the Principles Governing Democratic Elections in Africa the countries who are members of the African Union reaffirms, in Declaration IV (1) and (2), the following rights and obligations under which democratic elections are conducted:

“(1) Every citizen shall have the right to participate freely in the government of his or her country, either directly or through freely elected representatives in accordance with the provisions of the law. (2) Every citizen has the right to fully participate in the electoral processes of the country, including the right to vote or be voted for, according to the laws of the country and as guaranteed by the Constitution, without any kind of discrimination.”¹²⁷

The African Court of Human Rights have not yet been faced with a case regarding active voting rights of prisoners, thus there is no answer in regional law regarding the status of prisoner disenfranchisement. The closest the Court has come to dealing with a matter regarding voting rights is the case of *Rev Mtikila v Tanzania*.¹²⁸ This case relates to passive voting rights; however it is not a case regarding prisoners’ passive voting rights.

Mtikila instituted proceedings against the Tanzanian government claiming that it had, through certain Constitutional amendments to its Constitution, violated its citizens’ right of freedom of association, the right to participate in public/governmental affairs and the right against discrimination by prohibiting independent candidates to contest Presidential, Parliamentary and Local Government elections.¹²⁹ The Eight Constitutional Amendment Act of Tanzania required that any candidate for Presidential, Parliamentary and Local Government elections had to be a member of, and be sponsored by, a political party.¹³⁰

Mtikila requested the court to declare that the Tanzanian government violated Article 13(1) of the African Charter on Human and Peoples’ Rights.¹³¹ The Court held that the rights guaranteed under the Charter as stated in Article 13(1) are individual rights.¹³² The court noted that what had to be determined was whether or not an individual right has been placed into jeopardy, or otherwise violated, not whether or not groups may enjoy the particular right.¹³³ The Court held the following:

¹²⁷ African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), adopted in Durban, South Africa in 2002.

¹²⁸ *Rev. Christopher R. Mtikila v. The United Republic of Tanzania* (Application No 011/2011) (hereafter *Mtikila v. The United Republic of Tanzania* (2011))

¹²⁹ *Mtikila v. The United Republic of Tanzania* (2011) at [4].

¹³⁰ *Mtikila v. The United Republic of Tanzania* (2011) at [68].

¹³¹ *Mtikila v. The United Republic of Tanzania* (2011) at [76].

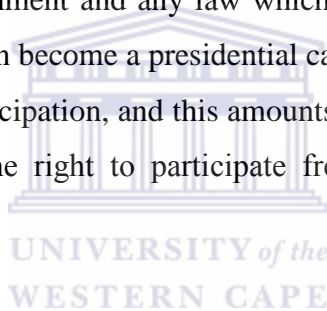
¹³² *Mtikila v. The United Republic of Tanzania* (2011) at [98].

¹³³ *Mtikila v. The United Republic of Tanzania* (2011) at [98].

“[...] a requirement that a candidate must belong to a political party before she is enabled to participate in the governance of Tanzania surely derogates from the rights enshrined in Article 13(1) of the Charter.”¹³⁴

The Court looked at Article 27(2) which provides for the limitation of rights and freedoms. This provision requires a limitation to take the form of a law of general application and this limitation must be proportionate to the legitimate aim pursued.¹³⁵ The Court held that there were no evidence to show that “the restrictions on the exercise of the right to participate freely in the government of the country by prohibiting independent candidates falls within the permissible restrictions set out in Article 27(2) of the Charter [...] the restriction on the exercise of the right through the prohibition on independent candidacy is not proportionate to the alleged aim of fostering national unity and solidarity.”¹³⁶

The Court held that Article 13(1) reserves the right to a citizen to participate directly or through representatives in government and any law which requires a citizen to be part of a political party before he or she can become a presidential candidate is a restraint which denies the citizen the right of direct participation, and this amounts to a violation.¹³⁷ The court found that there was a violation of the right to participate freely in the government of one’s country.¹³⁸



The South African Constitution allows for the exclusion of prisoners in as far as in relates to their passive voting rights (i.e. section 47(1)(e)). In order to determine the validity of these provisions, limiting the passive voting rights of citizens, one has to test these provisions against the African Charter and the decisions handed down by the African Court. There is nothing in the Charter and the *Mtikila* case that suggests that the sections in the South African Constitution, as far as passive voting rights are concerned, are inconsistent with the charter. The question still remains; what is the status of voting rights of convicted prisoners, because the *Mtikila* case has not answered any questions relating to prisoner voting rights?

Because the African Court on Human and Peoples’ Rights and the African Commission on Human and Peoples’ Rights, respectively, has till this day not dealt with a case relating to prisoner disenfranchisement, it means that the issues relating to prisoner disenfranchisement

¹³⁴ *Mtikila v. The United Republic of Tanzania* (2011) at [99].

¹³⁵ *Mtikila v. The United Republic of Tanzania* (2011) at [107.1].

¹³⁶ *Mtikila v. The United Republic of Tanzania* (2011) at [107.2].

¹³⁷ *Mtikila v. The United Republic of Tanzania* (2011) at [109].

¹³⁸ *Mtikila v. The United Republic of Tanzania* (2011) at [111].

have only been dealt with on a national level by the member countries. This issue was addressed by Adem Abebe in an article. He examined the extent to which international human rights law recognises the right of prisoners to vote.¹³⁹ He examined the position which the European Court of Human Rights takes on the issue of prisoner disenfranchisement. He then discussed the two South African cases *August* and *NICRO*. He found that both the South African Constitutional Court and the European Court takes the position that criminal disenfranchisement can be legitimate in certain cases; because it ensures respect of civil duties.¹⁴⁰ In addition the two Courts' position is that an automatic ban is disproportionate.¹⁴¹ Ncgobo J, in the *NICRO* case, proposed that legislation which disenfranchises prisoners should be invalid to the extent that it does not distinguish between 'those prisoners who are serving a prison sentence while awaiting the outcome of an appeal and those whose appeals have been finalised'.¹⁴² Abebe is of the opinion that "it will be interesting to see if Justice Ncgobo's calculations will be relied on in future cases in the European Court and the African Human Rights Committee."¹⁴³

According to Abebe, the desire of countries to inculcate a sense of civic responsibility in prisoners has been the principal justification for continued criminal disenfranchisement.¹⁴⁴ He opposes criminal disenfranchisement as additional punishment, because he is of the view that it does not serve as a deterrent and that criminals will not be deterred by the threat of disenfranchisement.¹⁴⁵ He is of the opinion that disenfranchisement is at the bottom of any 'calculated risk' taken by prospective criminals.¹⁴⁶

He concludes by saying the following:

"There is currently nothing at the African regional level that can help to clarify the uncertainty in relation to the status of the right of prisoners to vote [...] Although the right to vote is an established right in the African human rights system, neither the African Charter, nor other African human rights instruments, provide sufficient guidance on the extent to which the

¹³⁹ Abebe A 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013) 46 *Comparative and International Law Journal of Southern Africa* 413 (hereafter Abebe A 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013)).

¹⁴⁰ Abebe A 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013) 413.

¹⁴¹ Abebe A 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013) 433.

¹⁴² *Minister of Home Affairs v NICRO* (2004) at [152].

¹⁴³ Abebe A 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013) 433.

¹⁴⁴ Abebe A 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013) 441.

¹⁴⁵ Abebe A 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013) 441.

¹⁴⁶ Abebe A 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013) 441.

suffrage should be universal [...] The African Commission has also not addressed the issue in its resolutions and concluding observations.”¹⁴⁷

In addition he recommends that human rights activists and civil society organisations submit complaints to the African Commission and to the Court, challenging criminal disenfranchisement laws based on the right to political participation under article 13 of the African Charter.¹⁴⁸ He proposes that the Commission adopt a resolution on the extent to which criminal disenfranchisement laws are compatible with the Charter and the best way to address this uncertainty is to submit an advisory opinion to the court.¹⁴⁹

2.5 Third preliminary conclusion

Roux is of the opinion that a deep reading of the principle of democracy has not yet been confirmed by a majority of the Constitutional Court in South Africa. He states the following:

“The constitutional text clearly supports a deep reading of [the principle of democracy] that conforms to accounts of democracy in political theory which insist that, for democracy to be meaningful, government must facilitate real public participation in decision-making and genuine deliberation.”¹⁵⁰

The South African Constitutional Court and the African Court of Human Rights have not finalised the issue of prisoner disenfranchisement. It seems as if the constitutional provision, section 47(1)(e), is in line with the African Charter because the African Court have not indicated otherwise. Thus it seems that section 47(1)(e) would pass constitutional muster if enacted as the provision which excludes the affected prisoners from voting.

What the Constitutional Court clarified, in both *August* and *NICRO*, was that it will not accept arguments regarding logistical, financial and administrative difficulties as reasons for the disenfranchisement of prisoners. The government based the disenfranchisement of prisoners on the shortage of logistical and financial resources of the state and the Court rejected these arguments. In *NICRO* the government submitted that the aim of disenfranchising convicted prisoners was to serve as a crime prevention and deterrent

¹⁴⁷ Abebe A ‘In pursuit of universal suffrage: the right of prisoners in Africa to vote’ (2013) 442-443.

¹⁴⁸ Abebe A ‘In pursuit of universal suffrage: the right of prisoners in Africa to vote’ (2013) 443.

¹⁴⁹ Abebe A ‘In pursuit of universal suffrage: the right of prisoners in Africa to vote’ (2013) 444-445.

¹⁵⁰ Roux T ‘The Principle of Democracy in South African Constitutional Law’ in Woolman S & Bishop M (eds) *Constitutional Conversations* (2008) 95.

measure. The Court made it clear that, with regards to the crime prevention and deterrent aims of disenfranchisement, it would accept such a purpose as legitimate.¹⁵¹ With regards to the proportionality factor, the Court found that in disenfranchising all prisoners serving a sentence of imprisonment is not proportional. It based this on three factors, the length of the prison sentence, the type of offence and the consideration of appeals which have not yet been finalised. The Court held that no information was put before it about the sort of offences for which shorter periods of imprisonment are likely to be imposed, the sort of persons who are likely to be imprisoned for such offences, and the number of persons who might lose their vote because of comparatively minor transgressions.¹⁵² It also pointed out the fact that section 24B(2) of the 1998 Act, as amended by the 2003 amendment Act, disenfranchise prisoners whose convictions and sentences are under appeal.¹⁵³

In attempting to determine the status of prisoner disenfranchisement, by having a look at regional law, no answers were produced. Neither the African Charter nor the African Court shed some light on such status and for this reason a comparative look beyond African system is required. In the following chapter, in another attempt to find an answer regarding the status of prisoners' voting rights, an assessment of UK law will take place. The focus will be on prisoners' voting rights in UK, England and the European Convention and voting rights of prisoners under the Convention. In this chapter the tension between UK law and European Human Rights Law will be illustrated. The following chapter contains an assessment of prisoner voting rights cases, as handed down by the European Court of Human Rights, which is an attempt to determine which prisoner disenfranchisement laws, are permitted. This will assist in making a recommendation for the reform of the South African electoral law.

¹⁵¹ *Minister of Home Affairs v NICRO* (2004) at [57], “[A]t the level of policy it is important for the government to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens. Such a purpose would be legitimate and consistent with the provisions of section 3 of the Constitution [which deals with the rights and duties of citizenship].”

¹⁵² *Minister of Home Affairs v NICRO* (2004) at [67].

¹⁵³ *Minister of Home Affairs v NICRO* (2004) at [67] and [152].

CHAPTER THREE

PRISONERS' VOTING RIGHTS IN THE UNITED KINGDOM AND EUROPEAN UNION

3.1 Introduction

In this chapter the voting rights of prisoners in the United Kingdom and in the European Union will be discussed. This discussion will be limited to one of the four United Kingdom countries, England. The discussion will also be limited to and will focus on the development of the law as from 1998 till 2014. The reason for this is, because of the fact that the United Kingdom does not have a written Constitution and it enacted the Human Rights Act, 1998 to codify certain rights and freedoms.

The laws relevant to prisoner voting will be outlined, as this was analysed in the case discussions. The United Kingdom position on voting rights of prisoners will be discussed in light of the case of *Hirst v Attorney General* (2001). After this discussion a discussion of voting rights of prisoners, as it is found under the European Convention and as the issue was addressed by the European Court of Human Rights, will be discussed and assessed. This will be done by analysing some of the major cases regarding prisoner disenfranchisement, including *Hirst v the United Kingdom* (2005). The importance of these cases is the manner in which the European Court interpreted and applied Article 3 of Protocol No. 1 of the European Convention, which contains the right to vote and to be voted for. A discussion of passive voting rights as found in the United Kingdom will follow. The eligibility of candidates who want to stand for public office will be outlined, thus focussing on the passive voting rights.

The purpose of this chapter is to analyse electoral legislation and to determine the status of prisoner voting rights in the United Kingdom and in the European Union. Another purpose of this chapter is to assess the approach which the United Kingdom Courts and European Court took in determining the validity of disenfranchising legislation. This purpose will assist in making a determination as to what aims the Court accepts as legitimate aims which the disenfranchisement of prisoners tries to achieve. In addition, a determination will be made as to the factors which played a role in the application of the proportionality assessment.

3.2 The active voting rights of prisoners in the United Kingdom (1998-2014)

It is important to note that the United Kingdom has an ‘unwritten’ Constitution which is why Douglas Vick refers to the Constitution as an ‘odd’ one.¹⁵⁴ This means that provision is made for particular rights and freedoms in Acts of Parliament. Those relevant to voting rights, in particular that of prisoners will be looked at and discussed below. The legislation as it is found presently will be discussed in order to get a sense as to what is contained in these laws that gave rise to the dispute in the *Hirst* case.

3.2.1 Representation of the People Act 1968, 1969, 1983 and 2000

The Representation of the People Act was enacted after it was recommended at a multi-party Speaker's conference, on Electoral Law, in 1968 that a convicted prisoner who is in custody should not be entitled to vote.¹⁵⁵ This prohibition was initially enacted by section 4 of the Representation of the People Act 1969 where after it was re-enacted by section 3(1) of the 1983 Act.¹⁵⁶ The Representation of the People Act 1983 currently governs elections in the United Kingdom. Section 3(1) of the Act states the following:

“A convicted person during the time that he is detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained is legally incapable of voting at any parliamentary or local government election.”¹⁵⁷

In 1999 the government recommended that “remand prisoners and mental patients (other than those in custody who have been convicted) should be allowed to vote.”¹⁵⁸ This recommendation was enacted in the Representation of the People Act 2000. Act 2000 amended Act 1983 by inserting section 3A into the Act. Section 3A states the following:

“(1) A person to whom this section applies is, during the time that he is— (a) detained at any place in pursuance of the order or direction by virtue of which this section applies to him, or (b) unlawfully at large when he would otherwise be so detained—legally incapable of voting at any parliamentary or local government election.”

¹⁵⁴ Vick D ‘The Human Rights Act and the British Constitution’ (2002) 37 *Texas International Law Journal* 329-333 (hereafter Vick D ‘The Human Rights Act and the British Constitution’ (2002)).

¹⁵⁵ *R v (1) Secretary of State for the Home Department (2) Two Election Registration Officers, Ex Parte (1) Pearson (2) Martinez: Hirst v HM Attorney General* (2001) at [7] (hereafter *Hirst v Attorney General* (2001)).

¹⁵⁶ *Hirst v Attorney General* (2001) at [7].

¹⁵⁷ Section 3(1) of the Act of 1983.

¹⁵⁸ *Hirst v Attorney General* (2001) at [7].

During the time that the 2000 Act was debated in the House of Commons Mr Howarth, for the government, maintained the view that losing rights, one of which is the right to vote, is part of a convicted prisoner's punishment.¹⁵⁹

It would at this point be fitting to have a look at the relevant provisions of the Human Rights Act 1998 and the European Convention on Human Rights and the relation between the two.

3.2.2 The Human Rights Act 1998 and the European Convention on Human Rights

The United Kingdom has an unwritten Constitution and the Human Rights Act, which came into force in 1998, was an attempt by the UK government to codify and give a formal legal status to essential rights and freedoms as contained in the European Convention on Human Rights.¹⁶⁰ Douglas Vick pronounces that “[the] Act represents a culmination of a long-running constitutional debate in the United Kingdom over whether to adopt a Bill of Rights.”¹⁶¹ The relevant provision in the European Convention is Article 3 of Protocol No. 1 which deals with the “Right to Free Elections” and it provides the following:

“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 the Preamble of the Human Rights Act 1998 it is stated that the Act’s purpose is “to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights...” The relevant provisions of the Human Rights Act 1998 are sections 1 and 4. Section 1(1) states the following:

“In this Act “the Convention rights” means the rights and fundamental freedoms set out in—
(a) Articles 2 to 12 and 14 of the Convention, (b) *Articles 1 to 3 of the First Protocol*, and (c) Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the Convention.”

Section 4 on the other hand gives the United Kingdom domestic courts the authority to make a declaration of incompatibility of any law of the United Kingdom to the extent that it is incompatible with the European Convention. Section 4(1) and (2) are the relevant provisions and they state the following:

¹⁵⁹ *Hirst v Attorney General* (2001) at [8].

¹⁶⁰ Adopted in Rome on 4 November 1950.

¹⁶¹ Vick D ‘The Human Rights Act and the British Constitution’ (2002) 329-330.

“(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right. (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.”

The law as outlined above were the ones which the UK High Court and the European Court of Human Rights considered and assessed before delivering their judgments in the different *Hirst* judgments. The debate surrounding this legislation is clearly set out below.

3.2.3 *Hirst v Attorney General* (2001)

Mr Hirst, who is a British national from England, pleaded guilty to manslaughter on the ground of diminished capacity and was sentenced to a term of discretionary life imprisonment.¹⁶² He alleged that, because of the blanket ban on prisoner voting in the United Kingdom, his right to vote was violated by section 3 of the Representation of the People Act 1983.¹⁶³

Lord Justice Kennedy, who wrote the judgment, had to determine whether section 3(1) of the Representation of the People Act 1983 was compatible with Article 3 of Protocol No. 1. Hirst asserted that he was entitled to a declaration of incompatibility in terms of section 4(1) of the Human Rights Act 1998.¹⁶⁴ Kennedy J noted that the wording of Article 3 of Protocol No. 1 does not confer rights on individuals; however it has been interpreted to confer such rights in the past.¹⁶⁵ This is apparent from the case of *Mathieu-Mohin and Clerfayt v Belgium* in which the European Court of Human Rights interpreted Article 3 to include the right to vote and the right to stand for election.¹⁶⁶ Kennedy J quoted a piece from the *Mathieu-Mohin* judgement which contains the requirements which have to be met in order for section 3(1) of the 1983 Act to be in line with Article 3 of Protocol No. 1:

“The rights in question are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide

¹⁶² *Hirst v the United Kingdom* (No.2) (2005) ECHR 681 at [12] (hereafter *Hirst v the United Kingdom* (2005)).

¹⁶³ *Hirst v the United Kingdom* (2005) at [12].

¹⁶⁴ *Hirst v Attorney General* (2001) at [6].

¹⁶⁵ *Hirst v Attorney General* (2001) at [4].

¹⁶⁶ *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 EHRR 1 at [51].

margin of appreciation in this sphere, but it is for *the Court* to determine in the last resort whether the requirements of Protocol No 1 have been complied with; it *has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate*. In particular, such conditions must not thwart the free expression of the opinion of the people in the choice of the legislature.”¹⁶⁷

The Secretary of State for the Home Department argued that convicted prisoners who are in custody “have forfeited their right to have a say in the way the country is governed”, because they have lost the moral authority to vote.¹⁶⁸ He gave his reasons for maintaining the current policy for the disenfranchisement of prisoners. He stated the following:

“By committing offences which by themselves or taken with any aggravating circumstances including the offender's character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have a say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative.”¹⁶⁹

The government did not give a proper account of the aims it tried to achieve through this blanket exclusion of convicted prisoners; however it is apparent that the purpose of the disenfranchisement was to punish the offender.

Kennedy J held that out of respect to the legislature, courts should not easily be persuaded to condemn what the legislature has done, especially where it has been done in primary legislation after careful evaluation and against a background of increasing public concern about crime.¹⁷⁰ He dismissed the application and chose to “defer to the legislator”.¹⁷¹ He thus chose to comply with the decision of the Legislator to limit the right of convicted prisoners to vote. In addition to this conclusion Kennedy J referred to the Canadian case *Sauvé v Canada* (No 2) in which Linden JA wrote the following:

“I would leave to philosophers the determination of the ‘true nature’ of the disenfranchisement. It may be argued that this legislation does different things - it imposes a civil consequence, it fixes a civil disability, it imposes a criminal penalty, it furthers a civic goal, it promotes an

¹⁶⁷ *Mathieu-Mohin and Clerfayt v Belgium* [1987] 10 EHRR 1 at [52].

¹⁶⁸ *Hirst v Attorney General* (2001) at [40].

¹⁶⁹ *Hirst v Attorney General* (2001) at [9].

¹⁷⁰ *Hirst v Attorney General* (2001) at [20].

¹⁷¹ *Hirst v Attorney General* (2001) at [41].

electoral goal, or it is part of the sentencing process. I believe that these arguments, made alone, are of limited assistance.”¹⁷²

Kennedy J agreed with Linden JA and stated that perhaps it would be the best course to let the philosophers determine the true nature of disenfranchisement.¹⁷³ Kennedy J thus respected the legislature’s authority by accepting the exclusion of convicted prisoners, however he was of the opinion that philosophers are in a better position to determine the nature of disenfranchisement.

As a result of the case being dismissed in the High Court, Mr Hirst made an application to appeal this decision; however this application was dismissed by Lord Justice Simon Brown on the ground that the appeal had no real prospect of success.¹⁷⁴ After the application for appeal was dismissed, Mr Hirst instituted proceedings in the European Court of Human Rights and for this reason; the position of prisoner voting rights under the European Convention will follow.



3.3 Active voting rights of prisoners under the European Convention

As pointed out already the relevant provision in the Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention on Human Rights”) is Article 3 of Protocol No. 1 which is the provision dealing with voting rights. The European Court of Human Rights “rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.”¹⁷⁵ The European Court has made the status of prisoner voting rights quite clear, however some States, as will be seen below, has not yet conformed to the European Court’s position on prisoner disenfranchisement. Such States rely on the ‘margin of appreciation’ which is afforded to them.

¹⁷² *Sauvé v Canada* (No 2) (2000) 2CF 117 at [99] and *Hirst v Attorney General* (2001) at [29].

¹⁷³ *Hirst v Attorney General* (2001) at [40].

¹⁷⁴ *Hirst v the United Kingdom* (2005) at [19].

¹⁷⁵ European Court of Human Rights ‘The Court in Brief’ available at http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (accessed 4 October 2014).

3.3.1 *Hirst v the United Kingdom* (2005)

3.3.1.1 Chamber Judgment

The European Court of Human Rights, in the Grand Chamber, first outlined the Chamber Judgment. The court first pointed out that in dealing with this case it had to keep in mind that Mr Hirst's tariff (the part of his sentence relating to retribution and deterrence) expired in June 1994. The tariff refers to the minimum period a prisoner who is serving a life sentence must serve to meet the requirements of retribution and deterrence before being considered for release.¹⁷⁶ After prisoner has served this minimum sentence he or she will only be released if the prisoner is judged to no longer be a risk of harming the public.¹⁷⁷

Mr Hirst submitted that the UK's blanket disenfranchisement of convicted persons was not a result of a reasoned and properly justified decision that was reached after a thorough debate, but it was out of adherence to historical tradition.¹⁷⁸ According to him there was no evidence that the ban pursued the aims that the government was trying to achieve and no link had been shown between the removal of the right to vote and the prevention of crime or respect for the rule of law.¹⁷⁹ According to him the limitation was unrelated to the nature or seriousness of the offence and varied in its effects on prisoners depending on whether their imprisonment coincided with an election.¹⁸⁰

The government submitted that the right to vote, under Article 3 of Protocol No. 1, was not absolute, because a wide margin of appreciation was to be allowed to contracting states to determine under which conditions the right to vote is to be exercised.¹⁸¹ The government was of the view that the court failed to give due weight to this consideration.¹⁸² The government noted that even if it restricted the ban to those who committed the most serious offences the applicant would still be prevented from voting, because he was serving a sentence of life

¹⁷⁶ UK Parliament (Hilary Benn) 'House of Commons Written Answers for 8 July 2002' available at <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020708/text/20708w27.htm> (accessed 13 October 2014).

¹⁷⁷ UK Parliament (Hilary Benn) 'House of Commons Written Answers for 8 July 2002' available at <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020708/text/20708w27.htm> (accessed 13 October 2014).

¹⁷⁸ *Hirst v the United Kingdom* (2005) at [42].

¹⁷⁹ *Hirst v the United Kingdom* (2005) at [44].

¹⁸⁰ *Hirst v the United Kingdom* (2005) at [45].

¹⁸¹ *Hirst v the United Kingdom* (2005) at [47].

¹⁸² *Hirst v the United Kingdom* (2005) at [47].

imprisonment for the offence of homicide.¹⁸³ The government submitted that the reason for the ban was because convicted prisoners had breached the social contract and thus forfeited the right to take part in the government of the country.¹⁸⁴ It submitted that the measures used were proportionate, because it only affected those who committed the serious offences which warranted an immediate custodial sentence and it excluded those subject to fines, suspended sentences, community service or detention for contempt of court as well as fine defaulters and remand prisoners.¹⁸⁵

The Court emphasised that “the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.”¹⁸⁶ Article 3 of Protocol No. 1 requires that a limitation only be imposed as a result of a legitimate aim and the means employed to achieve such aim must not be disproportionate.¹⁸⁷ The Court found that the exclusion from voting of convicted prisoners in detention was disproportionate. The reason for this was because the limitation applied to a large amount of people automatically without considering the length of the sentence or the gravity of the offence.¹⁸⁸ The court also held that insofar as the disqualification was seen to be part of punishment there was no logical justification for the disqualification to continue, because Mr Hirst completed the part of his sentence that related to punishment and deterrence.¹⁸⁹ It further held that there is no place under the Convention system for an automatic disenfranchisement which is based purely on what might offend public opinion.¹⁹⁰ The Court concluded that Article 3 Protocol No. 1 had been breached. As a result of this judgment the UK government decided to seek a hearing at the Grand Chamber of the European Court of Human Rights.¹⁹¹

¹⁸³ *Hirst v the United Kingdom* (2005) at [49].

¹⁸⁴ *Hirst v the United Kingdom* (2005) at [50].

¹⁸⁵ *Hirst v the United Kingdom* (2005) at [51].

¹⁸⁶ *Hirst v the United Kingdom* (2005) at [58].

¹⁸⁷ *Hirst v the United Kingdom* (2005) at [62].

¹⁸⁸ *Hirst v the United Kingdom* (2005) at [41].

¹⁸⁹ *Hirst v the United Kingdom* (2005) at [41].

¹⁹⁰ *Hirst v the United Kingdom* (2005) at [70].

¹⁹¹ Department for Constitutional Affairs ‘Voting Rights of Convicted Prisoners Detained within the United Kingdom: The UK Government’s response to the Grand Chamber of the European Court of Human Rights judgment in the case of *Hirst v The United Kingdom*’ (CP29/06 14/12/2006) 13-14 (hereafter Department for Constitutional Affairs ‘Voting Rights of Convicted Prisoners Detained within the United Kingdom’ (2006)).

3.3.1.2 Grand Chamber Judgment

In the Grand Chamber the court had to determine whether the blanket ban pursued a legitimate aim in a proportionate manner. With regards to the aim of the blanket ban the court submitted that Article 3 of Protocol No. 1 of the Convention does not specifically state or limit the aims which a measure must pursue in order to be compatible with it.¹⁹² The government argued that the aim of the limitation on prisoners' voting rights were to prevent crime and to enhance civic responsibility and respect for the rule of law.¹⁹³ The other aim was to confer an additional punishment on convicted prisoners. The court accepted that section 3 of the Representation of the People's Act may be regarded as pursuing these aims and stated that there were no reasons to exclude the aims as flawed or *per se* incompatible with Article 3 of Protocol No. 1.¹⁹⁴

With regards to the proportionality the court referred to the submissions of the government. The government argued that the ban was proportionate and submitted that it was restricted to prisoners convicted of crimes serious enough to warrant a custodial sentence.¹⁹⁵ The Court held that even though there are categories of detained persons unaffected by the bar, it includes a wide range of offenders and sentences (from one day to life and from minor offences to the most serious offences).¹⁹⁶ The court also observed that even if a person commits a serious offence, the question of whether the person will be deprived of his or her right to vote will depend on whether the judge will impose a custodial sentence or a community sentence.¹⁹⁷

The Court noted that it is evident that the nature of restrictions imposed on the rights of convicted prisoners to vote was in general seen as a matter which Parliament had to decide and not national courts.¹⁹⁸ Although the situation was improved by the Act of 2000, which granted the right to vote to persons detained on remand, section 3 of the 1983 Act remains a "blunt instrument", because it still strips a significant amount of people of their Convention

¹⁹² *Hirst v the United Kingdom* (2005) at [74].

¹⁹³ *Hirst v the United Kingdom* (2005) at [74].

¹⁹⁴ *Hirst v the United Kingdom* (2005) at [75].

¹⁹⁵ *Hirst v the United Kingdom* (2005) at [77]; the government also argued that the limitation did not include prisoners detained on remand, for contempt of court or default in payments of fines.

¹⁹⁶ *Hirst v the United Kingdom* (2005) at [77].

¹⁹⁷ *Hirst v the United Kingdom* (2005) at [77].

¹⁹⁸ *Hirst v the United Kingdom* (2005) at [80].

right to vote.¹⁹⁹ It strips convicted prisoners of their right to vote irrespective of the length of their sentence and irrespective of the nature and gravity of the offence and their individual circumstances.²⁰⁰ The Court found that this restriction is general, automatic and indiscriminate and it must be seen as falling outside any acceptable margin of appreciation and as being incompatible with Article 3 Protocol No. 1 of the Convention.²⁰¹

The government submitted that it was concerned that the Court, in its Chamber judgement, had failed to give any explanation as to what steps the United Kingdom would have to take to render its policy compatible with Article 3 of Protocol No. 1 and urged in the interests of legal certainty that Contracting States received detailed guidance from the court.²⁰² The Court said that its function is to rule on the compatibility of legislation with the Convention and it is for the state concerned to choose the means to be used in its domestic legal order in order to discharge of its obligation under Article 46 of the Convention.²⁰³ It is left to the legislature to decide on the choice of the means for securing the rights guaranteed by Article 3 Protocol No. 1.²⁰⁴ The Court concluded by stating that there has been a violation of Article 3 of Protocol No. 1.²⁰⁵

Judge Caflisch wrote a concurring opinion to that of the majority opinion above. Caflisch held that even though some democratic states have a presumption of universal suffrage, it does not mean that the state is unable to restrict the right to vote, elect and stand for election.²⁰⁶ There must, however, be limits on such restrictions.²⁰⁷ In response to the argument by the government, that the disenfranchisement was in line with the objectives of preventing crime and punishing offenders and thus enhancing civic responsibility, he said that he disagrees with this and believes that participating in the democratic process may serve as a first step towards re-socialisation.²⁰⁸ He went on to state that “[i]t might have been useful

¹⁹⁹ *Hirst v the United Kingdom* (2005) at [82].

²⁰⁰ *Hirst v the United Kingdom* (2005) at [82]; Easton S ‘Electing the Electorate: The Problem of Prisoner Disenfranchisement’ (2006) 69 *The Modern Law Review Limited* 449.

²⁰¹ *Hirst v the United Kingdom* (2005) at [82].

²⁰² *Hirst v the United Kingdom* (2005) at [52].

²⁰³ *Hirst v the United Kingdom* (2005) at [83]; Article 46(1) of the Convention states the following: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”

²⁰⁴ *Hirst v the United Kingdom* (2005) at [84].

²⁰⁵ *Hirst v the United Kingdom* (2005) at [85].

²⁰⁶ *Hirst v the United Kingdom* (2005) at [2].

²⁰⁷ *Hirst v the United Kingdom* (2005) at [2].

²⁰⁸ *Hirst v the United Kingdom* (2005) at [5].

if the Court [...] had indicated some of the parameters to be respected by democratic States when limiting the right to participate in votes or elections.”²⁰⁹

He made some suggestions as to what, in his opinion, should have been some of the elements contained in these parameters. First, he suggested that the measures of disenfranchisement must be prescribed by law, secondly, the law authorising the disenfranchisement cannot be a blanket law, meaning the disenfranchisement must be restricted to major crimes.²¹⁰ He also made a third suggestion which is followed by a fourth one. He suggests that the legislation authorising the disenfranchisement as additional punishment should be a matter to be decided by the judge and not the executive.²¹¹ He finally suggests that “in those Contracting States where the sentence may comprise a punitive part (retribution and deterrence) and a period of detention based on the risk inherent in the prisoner’s release [the period after the tariff], the disenfranchisement must remain confined to the punitive part and not be extended to the remainder of the sentence.”²¹²

Judges Tulkens and Zagrebelsky also wrote a joint concurring opinion. They stated that convicted prisoners were banned from voting, irrespective of the gravity or nature of the offence and this shows that the reason for the disqualification is the fact that they are serving a prison sentence.²¹³ There are no practical reasons for denying prisoners the right to vote. There is no room in the convention for the old notion of ‘civil death’ that lies behind the ban on convicted prisoners’ voting.²¹⁴ A convicted person’s imprisonment is the ground for disenfranchisement, however the lack of a rational basis for this is a good enough reason for finding that there is a violation of the Convention.²¹⁵

The court was divided 12 to 5. Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, who disagreed with the majority of the Court, wrote the minority judgement. In their joint dissenting opinion judges Wildhaber, Costa, Lorenzen, Kovler and Jebens held that they do not agree with the majority and are of the opinion that there was not a violation of Article 3

²⁰⁹ *Hirst v the United Kingdom* (2005) at [7].

²¹⁰ *Hirst v the United Kingdom* (2005) at [7].

²¹¹ *Hirst v the United Kingdom* (2005) at [7].

²¹² *Hirst v the United Kingdom* (2005) at [7].

²¹³ *Hirst v the United Kingdom* (2005) at [3].

²¹⁴ *Hirst v the United Kingdom* (2005) at [5].

²¹⁵ *Hirst v the United Kingdom* (2005) at [6].

Protocol No.1.²¹⁶ They looked at the wording of Article 3 of Protocol No.1 and came to the conclusion that it does not directly grant individual rights and contains no conditions for the elections other than the requirement that the ‘free expression of the opinion of the people’ must be ensured.²¹⁷ “This indicates that the guarantee of a proper functioning of the democratic process was considered to be of primary importance.”²¹⁸ The Article does not prescribe any aims which might justify restrictions of the protected rights.²¹⁹ They accepted that the restriction on the voting rights of prisoners was legitimate for purposes of preventing crime, punishing offenders and enhancing civic responsibility, and respect for the rule of law.²²⁰

It is an important task for the Court to ensure that the rights granted by the Convention system comply with ‘present-day conditions’ however it is important to bear in mind that the Court is not the legislator and should be careful not to assume legislative functions.²²¹ The judges pointed out that that some European countries also have restrictions on prisoners’ right to vote and that the legislation in Europe shows that there is little consensus about whether or not prisoners should have the right to vote.²²² They stated that it is a fact that the majority of the member states knows about the restrictions imposed although some have blanket and some limited restrictions and because of this the legislation in the United Kingdom cannot be said to be in disharmony with a common European standard.²²³

What follows are some of the prisoner voting rights judgments, post- *Hirst*, as handed down by the UK Supreme Court and the European Court. These cases will be discussed in order to illustrate which government aims the European Court accepts as legitimate and to determine which factors the Court takes into account when doing the proportionality analysis. With regards to the cases which follow, all the applicants in the cases alleged that their country’s electoral legislation prevented them from voting as a result of their imprisonment and thus violated their right to vote as contained in Article 3 of Protocol No. 1.

²¹⁶ *Hirst v the United Kingdom* (2005) at [1].

²¹⁷ *Hirst v the United Kingdom* (2005) at [2].

²¹⁸ *Hirst v the United Kingdom* (2005) at [2].

²¹⁹ *Hirst v the United Kingdom* (2005) at [3].

²²⁰ *Hirst v the United Kingdom* (2005) at [3], “[...] since... the majority accept that the restriction in question served legitimate aims, there is no need for us to pursue this question any further.”

²²¹ *Hirst v the United Kingdom* (2005) at [6].

²²² *Hirst v the United Kingdom* (2005) at [6].

²²³ *Hirst v the United Kingdom* (2005) at [6].

3.3.2 Post-*Hirst* case law

3.3.2.1 *Frodl v Austria* (2010)

The applicant, Mr Frodl, was serving a life imprisonment of more than one year for murder and as a result was disenfranchised.²²⁴ As a result of his imprisonment his name was not entered in the electoral register.²²⁵ The relevant legislation which disenfranchised the applicant was Article 26(5) of the Federal Constitutional Act which states the following:

“Forfeiture of the right to vote and to stand for election can only ensue from a court sentence.”

Section 22 of the National Assembly Election Act, on the other hand, reads as follows:

“(1) *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[...]* (2) If the legal consequences [of a conviction] are suspended under other legal provisions or have lapsed or if all legal consequences or the forfeiture of the right to vote have been pardoned, the convicted person shall not forfeit the right to vote; nor shall he or she forfeit the right to vote if the court has imposed a conditional sentence. If the condition is revoked, disenfranchisement shall take effect from the day that decision becomes operative.”

Frodl alleged that his exclusion under section 22 of the National Assembly Election Act was unlawful as this provision was unconstitutional and not compatible with Article 3 of Protocol No. 1 of the Convention.²²⁶ The government submitted that the legal situation in Austria differed from that at issue in the *Hirst* case, because under Austrian law there was no indiscriminate disenfranchisement of all detainees.²²⁷ In Austria, in order for a limitation on the voting rights of prisoners to take effect there has to be a final conviction for one or several intentionally committed criminal acts carrying a prison sentence of more than one year.²²⁸ The government also argued that section 44(2) of the Criminal Code gave the judge an opportunity to conditionally suspend the legal consequences of the conviction

²²⁴ *Frodl v Austria* [2010] ECHR at [7] (hereafter *Frodl v Austria* (2010)).

²²⁵ *Frodl v Austria* (2010) at [8].

²²⁶ *Frodl v Austria* (2010) at [8].

²²⁷ *Frodl v Austria* (2010) at [21].

²²⁸ *Frodl v Austria* (2010) at [21].

(disenfranchisement).²²⁹ In this way the individual circumstances of the affected person is taken into account.²³⁰

Frodl submitted that the government did not explicitly list specific aims pursued by the disenfranchisement of prisoners in Austrian law and therefore the disenfranchisement must be regarded as not being in accordance with Article 3 of Protocol No. 1.²³¹ In determining whether the measure of disenfranchisement pursued a legitimate aim in a proportionate manner the Court noted that this case has certain similarities to that of *Hirst*.²³² The Court responded to Frodl's submission regarding the aim of the disenfranchisement by stating that "[i]t is true that the Government did not structure their submissions by explicitly setting out first the legitimate aims pursued by the measure at issue and then demonstrating the proportionality of the manner in which those aims were pursued. However, given the less formal structure of the necessity test under Article 3 of Protocol No. 1, the Court nevertheless considers that it transpires from the arguments relied on by the Government and the specific references to those relied on in the *Hirst* case, that they consider that the provisions on disenfranchisement of prisoners under Austrian law pursued the legitimate aims of preventing crime by punishing the conduct of convicted prisoners and also of enhancing civic responsibility and respect for the rule of law."²³³ The Court found no reason to regard these aims as "untenable or incompatible" with Article 3 Protocol No.1.²³⁴

With regards to the conditions for disenfranchisement set out in section 22 of the National Assembly Election Act, the Court found that this provision is more detailed than the one in *Hirst* and there is no automatic disenfranchisement of all prisoners because it applies only in the case of a prison sentence exceeding one year and only to convictions for offences committed with intent.²³⁵ The Court agreed with the applicant that section 22 of the National Assembly Election Act does not meet all the criteria established in *Hirst*. Under the *Hirst* test it is also an essential element that the decision on disenfranchisement should be taken by a

²²⁹ *Frodl v Austria* (2010) at [21], [31]-[32] Section 44(2) of the Criminal Code grants the sentencing judge discretion in deciding whether or not disenfranchisement should be imposed as an additional sanction on the accused according to the government this discretion is too wide, however the Court found that this provision entered into force only on 1 March 1997 and was therefore not applicable in the applicant's case so the Court had no need to decide this matter.

²³⁰ *Frodl v Austria* (2010) at [21].

²³¹ *Frodl v Austria* (2010) at [28].

²³² *Frodl v Austria* (2010) at [28].

²³³ *Frodl v Austria* (2010) at [30].

²³⁴ *Frodl v Austria* (2010) at [30].

²³⁵ *Frodl v Austria* (2010) at [33].

judge who will take into account the particular circumstances but besides this, there must be a link between the offence committed and issues relating to elections and democratic institutions.²³⁶ The Court thus found that the government had an aim; however there was no link between the sanction of life imprisonment and the conduct (murder) and circumstances of the individual concerned which led to the applicant's disenfranchisement.²³⁷ For this reason the Court found that there has been a breach of Article 3 of Protocol No. 1 in the present case.²³⁸

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

This case is similar to that of *Hirst*, it concerned an application against the United Kingdom of Great Britain and Northern Ireland by two British nationals.²³⁹ They were both serving a determinate sentence of imprisonment.²⁴⁰ They alleged that Article 3 of Protocol No.1 of the European Convention was violated as a result of the refusal to enrol them on the electoral register for domestic elections and for elections to the European Parliament.²⁴¹ This prohibition is contained in sections 3 of the Representation of the People Act 1983.

The applicants complained about the fact that they had been subject to a blanket ban on voting in elections and, as a result, were unable to vote in the European Parliamentary Elections which were held in June 2009 and in the General Elections in May 2010.²⁴² The court criticised the UK government's delay in implementing this Court's judgment in *Hirst* and in amending section 3 of the Act.²⁴³ The Court revisited the case of *Hirst* and concluded that there has been a violation of Article 3 of Protocol No. 1 to the Convention.²⁴⁴

²³⁶ *Frodl v Austria* (2010) at [34].

²³⁷ *Frodl v Austria* (2010) at [35].

²³⁸ *Frodl v Austria* (2010) at [36].

²³⁹ *Greens and M.T. v United Kingdom* [2010] ECHR at [1] (hereafter *Greens and M.T. v United Kingdom* (2010)).

²⁴⁰ *Greens and M.T. v United Kingdom* (2010) at [7].

²⁴¹ *Greens and M.T. v United Kingdom* (2010) at [3].

²⁴² *Greens and M.T. v United Kingdom* (2010) at [73].

²⁴³ *Greens and M.T. v United Kingdom* (2010) at [75].

²⁴⁴ *Greens and M.T. v United Kingdom* (2010) at [79].

3.3.2.3 *Scoppola v Italy* (No.3) (2012)

This case concerns the exclusion of the applicant, an Italian national from voting. He was found guilty of the murder of his wife and attempted murder of his son and was sentenced to thirty years' imprisonment and a lifetime ban from public office within the meaning of Article 29 of the Criminal Code.²⁴⁵ His name was deleted from the electoral roll which meant that he could not vote.²⁴⁶

In terms of the Italian legal system a ban from public office is an ancillary penalty which entails the forfeiture of the right to vote.²⁴⁷ The Italian Criminal Code makes express provision for the forfeiture of the right to vote if such forfeiture is as a result of any of a series of specific offences, irrespective of the duration of the sentence imposed.²⁴⁸ Besides the specific offences which results in the forfeiture of voting rights, a conviction for any offence punishable by imprisonment will also result in the offender being banned from public office. Such a ban can be temporary (where the sentence is three years or more) or it can be permanent (for sentences of five years or more and life imprisonment).²⁴⁹

The Criminal Code, Article 28, provides the following with regards to the ban from public office:

“The ban from public office may be for life or temporary. In the event of a lifetime ban from public office, unless the law provides otherwise, the convicted person shall be deprived of: (1) the right to vote or stand for election in any electoral body (*comizio elettorale*) and all other political rights.”

The Criminal Code, Article 29, provides the following, with regards to the sentences which entail a ban from public office:

²⁴⁵ *Scoppola v Italy* (No.3) [2012] ECHR at [14] (hereafter *Scoppola v Italy* (2012)).

²⁴⁶ *Scoppola v Italy* (2012) at [24].

²⁴⁷ *Scoppola v Italy* (2012) at [33].

²⁴⁸ *Scoppola v Italy* (2012) at [33], “...embezzlement of public funds, by a public official (*peculato*) or otherwise, extortion, and market abuse (punishable, respectively, under Articles 314, 316 *bis*, 317 and 501 of the Criminal Code); certain offences against the judicial system, such as perjury by a party, fraudulent expertise or interpretation, obstructing the course of justice and “disloyal counsel” (*consulenza infedele*) (punishable, respectively, under Articles 371, 373, 377 and 380 of the Criminal Code); and offences involving abuse and misuse of the powers inherent in public office (Article 31 of the Criminal Code).”

²⁴⁹ *Scoppola v Italy* (2012) at [34].

“A sentence to life imprisonment or to imprisonment for no less than five years shall entail a lifetime ban from public office for the convicted person; sentencing to imprisonment for not less than three years shall entail a five-year ban from public office ...”

It would at this point be important to note that “in Italian law, under Article 29 of the Criminal Code, only those offenders sentenced to at least three years’ imprisonment were deprived of the right to vote. Where the offence attracted a sentence of less than five years, the disenfranchisement lasted only five years, a lifelong ban on voting being reserved for offenders sentenced to between five years and life.”²⁵⁰

The Italian Government made similar submissions to those made by the United Kingdom Government in the *Hirst* case. It pointed out that, where the right to vote is concerned, Contracting States have a wide margin of appreciation and that the denial of the applicant’s right to vote pursued the legitimate aims of preventing crime and upholding the rule of law.²⁵¹ It also argued that it met the proportionality requirement.²⁵² In addition the Government pointed out that in Italian law, unlike the UK law; the loss of the right to vote did not depend on the detention of an individual, but on judgments in criminal cases becoming final.²⁵³ The disenfranchisement of Mr Scoppola was based on a penalty as prescribed by law and such disenfranchisement is not a measure that is applied automatically.²⁵⁴ The Government concluded its submissions by stating that “the Italian legal system was designed, according to the Government, to avoid the discrimination that could arise if courts were free to make decisions on a case-by-case basis in such a sensitive area as that of political rights.”²⁵⁵

The Court submitted that it must determine “whether there was interference with the applicant’s rights under that provision. The Court noted that it must determine whether the measures used by the government to disenfranchise prisoners exceeded any acceptable margin of appreciation.²⁵⁶ It held that there was an interference with the applicant’s right to vote (Article 3 of Protocol No. 1), because of the ancillary penalty imposed on him.²⁵⁷ It stated that “the applicant’s disenfranchisement pursued the legitimate aims of enhancing civic responsibility and respect for the rule of law and ensuring the proper functioning and

²⁵⁰ *Scoppola v Italy* (2012) at [28].

²⁵¹ *Scoppola v Italy* (2012) at [64].

²⁵² *Scoppola v Italy* (2012) at [65].

²⁵³ *Scoppola v Italy* (2012) at [66].

²⁵⁴ *Scoppola v Italy* (2012) at [67] and [68].

²⁵⁵ *Scoppola v Italy* (2012) at [70].

²⁵⁶ *Scoppola v Italy* (2012) at [85].

²⁵⁷ *Scoppola v Italy* (2012) at [89].

preservation of the democratic regime.”²⁵⁸ The Court found that it cannot conclude that the Italian system has the general, automatic and indiscriminate character that led it, in the *Hirst* case, to find a violation of Article 3 of Protocol No. 1.²⁵⁹ It held that in Italy, disenfranchisement is only in relation to serious offences and not minor ones or those which, although more serious in principle, do not attract sentences of three years’ imprisonment or more.²⁶⁰ The court thus concluded with the following remarks:

“[T]he restrictions imposed on the applicant’s right to vote did not “thwart the free expression of the people in the choice of the legislature”, and maintained “the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage”. The margin of appreciation afforded to the respondent Government in this sphere has therefore not been overstepped. Accordingly [the court held, by sixteen votes to one that], there has been no violation of Article 3 of Protocol No. 1.”²⁶¹

In Italian law the impugned measure was applied only where the offence was punishable with a particularly heavy sentence, including life imprisonment which meant that the measure was proportional.²⁶²

According to Javier Jaramillo the *Scoppola* judgment is regarded by some as a setback for prisoner rights, because the continued disenfranchisement permits the continued stigmatisation of prisoners.²⁶³ It seems that Jaramillo and others who see the *Scoppola* judgment as a setback for prisoner rights have a misunderstanding of the judgment. I can draw no other conclusion, because why else would they consider *Scoppola* as a setback, if anything the judgment improves the position of prisoners in the electoral process. Jaramillo is also of the view that the Court missed an opportunity in *Scoppola* to provide clarity and direction on the question of prisoner disenfranchisement.²⁶⁴ Again this has no merit, because

²⁵⁸ *Scoppola v Italy* (2012) at [92], The Court also held that in Italian law the disenfranchisement of a person barred from public office as an ancillary penalty pursued the legitimate aim of the proper functioning and preservation of the democratic regime.

²⁵⁹ *Scoppola v Italy* (2012) at [108].

²⁶⁰ *Scoppola v Italy* (2012) at [108].

²⁶¹ *Scoppola v Italy* (2012) at [110].

²⁶² *Scoppola v Italy* (2012) at [26].

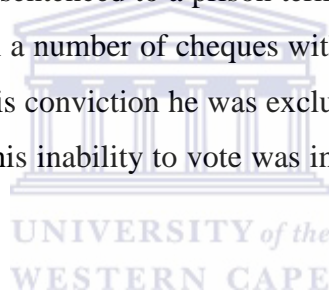
²⁶³ Jaramillo J ‘*Scoppola v Italy (No.3)*: The Uncertain Progress of Prisoner Voting Rights in Europe’ (2013) 36 *Boston College International and Comparative Law Review* 33 (hereafter Jaramillo J ‘*Scoppola v Italy (No.3)*’ (2013)).

²⁶⁴ Jaramillo J ‘*Scoppola v Italy (No.3)*’ (2013) 46; “While [the European Court of Human Rights’] prior decision in *Hirst (No. 2)* stands for the proposition that a blanket ban on prisoner suffrage violates Article 3 of Protocol 1 of the [Convention], it remains unclear after *Scoppola (No. 3)* what other forms of prisoner disenfranchisement are impermissible. Given the seemingly political nature of the *Scoppola (No. 3)* decision, the [court] did nothing to advance either the progress of prisoner voting rights or its own credibility as the judicial body tasked with giving life to the [Convention].”

the *Scoppola* judgement is an example of the type of disenfranchisement which the Court will permit as opposed to a blanket ban, as in *Hirst*. Some observers viewed the *Scoppola* decision as proof that the United Kingdom's refusal to comply with *Hirst* had worked.²⁶⁵ According to Jaramillo, the *Scoppola* case might have been a response by the European Court to the pressure from the United Kingdom.²⁶⁶ This view, again, has no merit because the two cases, *Hirst* and *Scoppola*, are based on completely different facts and disenfranchising legislation. According to Jaramillo the European Court missed an opportunity in *Scoppola* to provide clarity and direction on the question of prisoner disenfranchisement; because after the *Scoppola* judgement it remains unclear as to what other forms of prisoner disenfranchisement are impermissible.²⁶⁷

3.3.2.4 *Soyler v Turkey* (2013)

The applicant was convicted and sentenced to a prison term of four years, eleven months and twenty-six days for having drawn a number of cheques without having sufficient funds in his bank account.²⁶⁸ As a result of this conviction he was excluded from voting while serving his prison sentence. He alleged that his inability to vote was in violation of Article 3 of Protocol No. 1 to the Convention.²⁶⁹



Section 7(3) of the Law on Basic Provisions Concerning Elections and on Registers of Voters (Law No. 298 of 1961) provides that convicts in penitentiary establishments cannot vote. Section 53(1)(b) of the Criminal Code (Law no. 5237 of 2004) on the other hand provides that as the statutory consequence of imposition of a prison sentence for an offence committed intentionally, a person shall be deprived of the right to vote, the right to stand for election and the enjoyment of all other political rights. This excludes a convicted person whose prison sentence is suspended or who is conditionally released from the prison.²⁷⁰

The rationale behind section 53 is that society has lost trust in the offender and therefore the offender (convicted person) is prevented from exercising certain rights which necessitate a

²⁶⁵ Jaramillo J '*Scoppola v Italy (No.3)*' (2013) 43.

²⁶⁶ Jaramillo J '*Scoppola v Italy (No.3)*' (2013) 44.

²⁶⁷ Jaramillo J '*Scoppola v Italy (No.3)*' (2013) 46.

²⁶⁸ *Soyler v Turkey* [2013] ECHR at [6] (hereafter *Soyler v Turkey* (2013)).

²⁶⁹ *Soyler v Turkey* (2013) at [3].

²⁷⁰ Criminal Code (Law no. 5237 of 2004), section 53(3).

relationship of trust.²⁷¹ The rationale behind this punishment is to ensure that the criminal regrets having committed the offence and in the process is rehabilitated.²⁷² This was the aim which the government relied on.

The applicant submitted that the offence did not mean that he was so morally or mentally untrustworthy as to be prevented from exercising his civic duties.²⁷³ He also submitted that the disenfranchising legislation did not take into account the nature of the offence or the severity of the punishment and for this reason the application of the legislation was wholly disproportionate.²⁷⁴ “The only criterion taken into account when imposing the ban was the element of “intention” in the commission of the offence.”²⁷⁵

The Court held that persons convicted of having intentionally committed an offence are unable to vote and their disenfranchisement does not come to an end on release from prison on probation, but continues until the end of their original sentence period.²⁷⁶ The Court held that the government’s aim in encouraging citizen-like conduct is not per se incompatible with Article 3 of Protocol No. 1.²⁷⁷ The Court held that “the restrictions placed on convicted prisoners’ voting rights in Turkey are harsher and more far-reaching than those applicable in the United Kingdom, Austria and Italy, which have been the subject matter of examination by the Court in its judgments.”²⁷⁸

With regards to the proportionality analysis the Court held that the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners’ voting rights, however “in Turkey, disenfranchisement is an automatic consequence derived from the statute, and is therefore not left to the discretion or supervision of the judge.”²⁷⁹ It also held that the measure restricting the right to vote is indiscriminate in its application because it “does not take into account the nature or gravity of the offence, the length of the prison sentence – leaving aside the suspended sentences shorter than one year – or the individual circumstances of the convicted persons. The Turkish legislation contains no express

²⁷¹ *Soyler v Turkey* (2013) at [17].

²⁷² *Soyler v Turkey* (2013) at [17].

²⁷³ *Soyler v Turkey* (2013) at [25].

²⁷⁴ *Soyler v Turkey* (2013) at [26].

²⁷⁵ *Soyler v Turkey* (2013) at [26].

²⁷⁶ *Soyler v Turkey* (2013) at [36].

²⁷⁷ *Soyler v Turkey* (2013) at [37].

²⁷⁸ *Soyler v Turkey* (2013) at [38].

²⁷⁹ *Soyler v Turkey* (2013) at [39].

provisions categorising or specifying any offences for which disenfranchisement is foreseen.”²⁸⁰

The Court concluded by stating that it is unable to see any rational connection between the sanction and the conduct and circumstances of the applicant.²⁸¹ It further concluded that “the automatic and indiscriminate application of the harsh measure in Turkey on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, and that there has been a breach of Article 3 of Protocol No. 1 in the present case.”²⁸²

3.3.2.5 *R (on the application of Chester v Secretary of State for Justice) and McGeoch v The Lord President of the Council (2013)*

Unlike the cases above, which were heard in the European Court, this was a case heard by the UK Supreme Court. This case is similar to that of *Hirst* to the extent that it is based on the same disenfranchising law. The case concerned appeals of two prisoners convicted of murder and sentenced to life imprisonment and who, as a result, was excluded from voting.²⁸³

The Attorney General submitted that the Supreme Court should refuse to follow the European Court’s authority as per *Hirst* and *Scoppola*.²⁸⁴ He based this argument on the wide margin of appreciation which states have in this area and on section 4 of the Human Rights Act which authorises a domestic court to make a declaration of invalidity where legislation is incompatible with a Convention Right.²⁸⁵ His argument is thus that the UK courts may deviate from the European Court’s judgments; because the Human rights Act contemplates that domestic legislation may not be compatible with the country’s international obligations as established by case-law of the European Court of Human Rights.²⁸⁶ According to the Attorney General the European Court of Human Rights acknowledged the margin of appreciation which States have, but failed to respect it.²⁸⁷ The Attorney General pointed out

²⁸⁰ *Soyler v Turkey* (2013) at [41].

²⁸¹ *Soyler v Turkey* (2013) at [45].

²⁸² *Soyler v Turkey* (2013) at [47].

²⁸³ *R (on the application of Chester v Secretary of State for Justice) and McGeoch v The Lord President of the Council* [2013] UKSC 63 at [1] (hereafter *R and McGeoch v The Lord President of the Council* (2013)).

²⁸⁴ *R and McGeoch v The Lord President of the Council* (2013) at [27]-[29].

²⁸⁵ *R and McGeoch v The Lord President of the Council* (2013) at [30].

²⁸⁶ *R and McGeoch v The Lord President of the Council* (2013) at [28].

²⁸⁷ *R and McGeoch v The Lord President of the Council* (2013) at [30].

that the European Court has accepted as a legitimate aim of disenfranchisement “enhancing civic responsibility and respect for the rule of law” and his argument is thus that because of this the UK is entitled to withhold the vote from those serving sentences for offences sufficiently serious to justify such a sentence.²⁸⁸

The Court held that it would not be right for it to refuse to apply the principles established by the Grand Chamber decisions in *Hirst* and *Scoppola* consistently with the way in which they were understood and applied in those decisions.²⁸⁹ The Court expressed that it cannot disregard (“dis-apply”) the legislative prohibition on prisoner voting by making all prisoners eligible to vote.²⁹⁰ It is clear from *Hirst* and *Scoppola* that a ban on eligibility will be justified in respect of a very significant number of convicted prisoners.²⁹¹

3.3.2.6 *Firth and others v United Kingdom* (2014)

Ten British nationals lodged an application against the UK and Northern Ireland. They were all incarcerated, however their case-file does not disclose either the offences of which they were convicted or the lengths of the sentences of imprisonment imposed on them.²⁹² They were automatically prevented from voting. The Court held that “[g]iven that the impugned legislation remains un-amended, the Court cannot but conclude that, as in *Hirst* (no. 2) and *Greens and M.T.* and for the same reasons, there has been a violation of Article 3 of Protocol No. 1 in the applicants’ case.”²⁹³

3.3.2.7 *Murat Vural v Turkey* (2014)

The applicant poured paint on various statues, at various locations, of Atatürk, the founder and the first President of the Republic of Turkey.²⁹⁴ This meant that he had committed the offence on five separate occasions. He was charged with and found guilty of the offence of contravening the Law on Offences Committed Against Atatürk (Law no. 5816) and as a

²⁸⁸ *Scoppola v Italy* (2012) at [60]; *R and McGeoch v The Lord President of the Council* (2013) at [30].

²⁸⁹ *R and McGeoch v The Lord President of the Council* (2013) at [34].

²⁹⁰ *R and McGeoch v The Lord President of the Council* (2013) at [73].

²⁹¹ *R and McGeoch v The Lord President of the Council* (2013) at [73].

²⁹² *Firth and others v United Kingdom* (2014) ECHR 47784/09 at [6] (hereafter *Firth and others v United Kingdom* (2014)).

²⁹³ *Firth and others v United Kingdom* (2014) at [15].

²⁹⁴ *Murat Vural v Turkey* [2014] ECHR 306 at [7]-[10] (hereafter *Murat Vural v Turkey* (2014)).

result was sentenced to three years' imprisonment.²⁹⁵ The trial court increased the sentence by half, because of the fact that the offence was committed in a public place. He was thus sentenced to a prison term of twenty-two years and six months.²⁹⁶

The Law on Offences Committed Against Atatürk (Law no. 5816) provides as follows:

“Section 1: [...]Anyone who demolishes, breaks, ruins or dirties a sculpture, statue, monument or the mausoleum of Atatürk, shall be liable to imprisonment for a term of between one and five years...”

Section 53 of the Criminal Code (Law no. 5237 of 2004) is also applicable here, as in the *Soyler* case. The relevant provision is section 53(1)(b) which provides that a person who gets a prison sentence as a result of having intentionally committed an offence shall be deprived of the right to vote, the right to stand for election and the enjoyment of all other political rights.

The Court held that it “has already found it established that in Turkey disenfranchisement is an automatic consequence derived from the statute and that it is indiscriminate in its application in that it does not take into account the nature or gravity of the offence, the length of the prison sentence – leaving aside suspended sentences shorter than one year – or the individual circumstances of those convicted.”²⁹⁷ The Court concluded by stating that there is nothing in the case which allows it to reach a different conclusion than that in *Soyler* and therefore held that there has been a violation of Article 3 of Protocol No. 1 to the Convention on account of the applicant's disenfranchisement.²⁹⁸

Based on the Court's judgement in *Hirst* and the judgments which followed, the UK government had four occasions at which proposals and recommendations for the reform of section 3 of the Representation of the People's Act were made. One of these recommendations took the form of the Draft Voting Eligibility (Prisoners) Bill. The relevant consultation processes at which proposals for reform were made are outlined in the following part section of this chapter.

²⁹⁵ *Murat Vural v Turkey* (2014) at [2] and [3].

²⁹⁶ *Murat Vural v Turkey* (2014) at [3].

²⁹⁷ *Murat Vural v Turkey* (2014) at [79].

²⁹⁸ *Murat Vural v Turkey* (2014) at [80].

3.4 Recommendations for legislative reform in UK

The United Kingdom Government responded in 2006 to the European Court's judgement, as laid down in the *Hirst* case in 2005, through drafting consultation papers. Several proposals were made as to possible ways in which the government can address the issue of the blanket ban of prisoners from voting. The first proposal was to *retain the current ban on voting rights of convicted prisoners*. This proposal would be in line with the view of many people, that prisoners should remain disenfranchised.²⁹⁹ The second proposal was to *enfranchise prisoners sentenced to less than a specified term*. This proposal focusses on the duration of the prison term. It is the policy of many of the member states within the European Council to disenfranchise those prisoners with a long prison sentence and to enfranchise those with a shorter term.³⁰⁰

The third proposal was to *allow the sentencing judge to decide on whether or not to withdraw the franchise*. The government pointed out that there are two alternatives linked to the third proposal.³⁰¹ The first is to have legislation which empowers courts to enfranchise a convicted person, despite a general statutory disenfranchisement and the second is to have legislation which empowers courts to disenfranchise a convicted person despite a general statutory provision which extends the franchise to prisoners.³⁰² The government has its reservations about this proposal to the extent that it questions whether judges are best placed to exercise control over a person's right to vote.³⁰³

The fourth proposal was to *disenfranchise all tariff-expired life sentence prisoners*. These are prisoners who are kept in prison beyond the original length of their sentence, for whatever reason. The government considers that to enfranchise such prisoners would not be desirable, because these prisoners were detained further beyond their original term, reason being that

²⁹⁹ Department for Constitutional Affairs 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2006) 23.

³⁰⁰ Department for Constitutional Affairs 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2006) 24.

³⁰¹ Department for Constitutional Affairs 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2006) 24.

³⁰² Department for Constitutional Affairs 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2006) 24.

³⁰³ Foster S 'Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote' (2009) 9 *Human Rights Law Review* 501 (hereafter Foster S 'Reluctantly Restoring Rights' (2009)).

they still pose a danger to society.³⁰⁴ The government also made certain proposals relating to *prisoners who were found guilty of electoral offences*. The government states that such persons automatically lose their right to vote.³⁰⁵

The second stage of the consultation process took place in 2009. The government believed that tying the vote to the length of the sentence would establish a clear relationship to the seriousness of the offence and the suspension of the vote.³⁰⁶ It thus found that it would be appropriate to undertake a limited enfranchisement with eligibility determined on the basis of the length of a sentence, which was the second proposal of the first consultation.³⁰⁷ The first proposal, the one which the government favours, is that *prisoners sentenced to less than one year's imprisonment* would be automatically entitled to vote, this is subject to certain exceptions linked to the type of offence.³⁰⁸ The second and third proposals apply the same rules as the first, however they relate to a *two year* and *four year length of imprisonment*. The fourth proposal relates to the provision that a person who received a *sentence of between two and four years* could apply to a judge to vote.³⁰⁹ The government expressed its stance that it will not enfranchise those prisoners serving a life or other indeterminate sentence and this will include cases where they are post-tariff prisoners.³¹⁰

Even though the two stage consultation process took place to change the policy regarding prisoner voting, no change in the law took place before the general election on 6 May 2010.³¹¹ The government announced on 20 December 2010 that it will enact legislation to allow those offenders sentenced to a custodial sentence of less than four years the right to

³⁰⁴ Department for Constitutional Affairs 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2006) 25.

³⁰⁵ Department for Constitutional Affairs 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2006) 26.

³⁰⁶ Foster S 'Reluctantly Restoring Rights' (2009) 506.

³⁰⁷ Ministry of Justice 'Voting Rights of Convicted Prisoners Detained within the United Kingdom: Second stage consultation' (CP6/09 08/04/2009) 23 (hereafter Ministry of Justice 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2009)).

³⁰⁸ Ministry of Justice 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2009) 24.

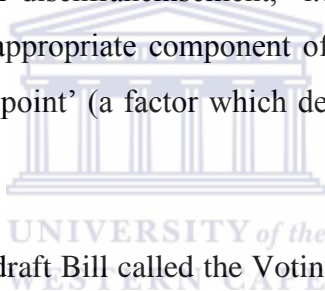
³⁰⁹ Ministry of Justice 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2009) 24.

³¹⁰ Ministry of Justice 'Voting Rights of Convicted Prisoners Detained within the United Kingdom' (2009) 22.

³¹¹ White I 'Prisoner's voting rights' *Parliament and Constitution Centre House of Commons Library* 7 September 2011 available at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01764.pdf> (accessed 1 September 2014) 1.

vote in UK Parliamentary and European Parliament elections, however it stated that this will only occur if a sentencing judge considers the enfranchisement appropriate.³¹²

Steve Foster and Nicholas Munn made certain recommendations in their work. Steve Foster is of the opinion that citizenship and democratic rights should only be limited for reasons such as to prevent disorder or crime or to protect the rights of others.³¹³ He recommends that if the government's aim is to punish offenders through disenfranchisement then such aim should be clearly articulated in sentencing law and policy which distinguish certain offences and offenders.³¹⁴ Nicholas Munn, on the other hand, is of the opinion that in order for a system of criminal disenfranchisement to be legitimate it must; apply only to those offenders who committed the most serious offence.³¹⁵ Criminal disenfranchisement is a serious punishment and to apply indiscriminately to all imprisoned leads to the proportionality of its application being lost.³¹⁶ In order to avoid this Munn proposes that it is important to establish, what he calls a 'trigger point' for disenfranchisement, "i.e. a degree of seriousness beyond which disenfranchisement is an appropriate component of punishment."³¹⁷ This means that each state should have a 'trigger point' (a factor which determines which prisoners can and cannot vote).



The UK government compiled a draft Bill called the Voting Eligibility (Prisoners) Bill 2012. This Bill was drafted in response to *Greens and M.T.* and *Scoppola* and contains three options for reform of prisoners' disenfranchisement. The three options, as found in the Bill, are to ban prisoners sentenced to 4 or more years imprisonment³¹⁸, to ban prisoners sentenced to more than 6 month's imprisonment³¹⁹ or to ban all prisoners.³²⁰

³¹² White I 'Prisoner's voting rights' *Parliament and Constitution Centre House of Commons Library* 7 September 2011 available at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01764.pdf> (accessed on 1 September 2014) 1.

³¹³ Foster S 'Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote' (2009) 489.

³¹⁴ Foster S 'Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote' (2009) 493.

³¹⁵ Munn N 'The Limits of Criminal Disenfranchisement' (2011) 30 *Criminal Justice Ethics* 223 (hereafter Munn N 'The Limits of Criminal Disenfranchisement' (2011)).

³¹⁶ Munn N 'The Limits of Criminal Disenfranchisement' (2011) 226.

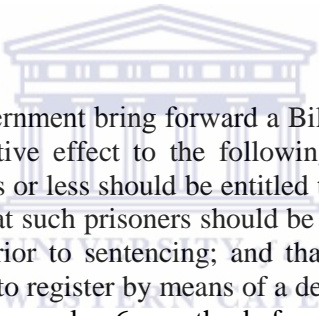
³¹⁷ Munn N 'The Limits of Criminal Disenfranchisement' (2011) 226.

³¹⁸ The Voting Eligibility (Prisoners) Bill 2012, Schedule 1 states that prisoners serving a custodial sentence for a term of 4 years or more and those serving a life sentence are disqualified from voting at a parliamentary or local government election.

³¹⁹ The Voting Eligibility (Prisoners) Bill 2012, Schedule 2 states that prisoners serving a custodial sentence for more than 6 months and those serving a life sentence are disqualified from voting at a parliamentary or local government election.

³²⁰ The Voting Eligibility (Prisoners) Bill 2012, Schedule 3 states that prisoners who are serving a custodial sentence are disqualified from voting at a parliamentary or local government election.

In 2013 the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill released a report in which it assessed the position on prisoner voting rights under the Convention and the judgments as handed down by the European Court. The Committee recommended that the UK Parliament should comply with the Court's judgment in *Hirst* by enacting legislation that would confer voting rights on *some* convicted prisoners.³²¹ The committee recommended that those sentenced to a term of imprisonment of 12 months or less should retain the right to vote. The reason for this term is because 12 months is the maximum period of imprisonment that a magistrates' court can impose for multiple offences and because it corresponds with the position that pertained at the time the UK ratified the Convention and the First Protocol.³²² The committee also recommended that prisoners should be enfranchised in the period leading up to release thus they should be entitled to apply, six months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released.³²³ In addition it proposed a statutory framework which it believes to be proportionate:



“We recommend that the Government bring forward a Bill, at the start of the 2014 –15 session of Parliament, to give legislative effect to the following conclusions: 1) That all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections; 2) That such prisoners should be registered to vote in the constituency where they were registered prior to sentencing; and that, where there is no identified prior residence, they should be able to register by means of a declaration of local connection; 3) That prisoners should be entitled to apply, 6 months before their scheduled release date, to be registered to vote in the constituency into which they are due to be released.”³²⁴

Even though the UK government considered all these proposals and recommendations on four occasions the matter is still undecided as the government has failed to commit itself to any of them up until November 2014. Hopefully by 2015 the UK Parliament would have enacted the Committee's recommendations.

This concludes the discussion on active voting rights, which will be followed by a discussion of the position in the United Kingdom in respect of passive voting rights.

³²¹ House of Lords House of Commons Joint Committee on the Draft Voting Eligibility (Prisoners) Bill 'Draft Voting Eligibility (Prisoners) Bill Report' (2013) 64.

³²² House of Lords House of Commons Joint Committee on the Draft Voting Eligibility (Prisoners) Bill 'Draft Voting Eligibility (Prisoners) Bill Report' (2013) 64.

³²³ House of Lords House of Commons Joint Committee on the Draft Voting Eligibility (Prisoners) Bill 'Draft Voting Eligibility (Prisoners) Bill Report' (2013) 64.

³²⁴ House of Lords House of Commons Joint Committee on the Draft Voting Eligibility (Prisoners) Bill 'Draft Voting Eligibility (Prisoners) Bill Report' (2013) 64-68.

3.5 The passive voting rights of prisoners in the United Kingdom (1998-2014)

Unlike the active voting rights in the United Kingdom, England, its disputes relating to passive voting rights are non-existent, in as far as people with a criminal record is concerned. Out of the four United Kingdom countries, the focus will be on England. It has been mentioned that Article 3 of Protocol No.1 includes the right to stand for election and to sit as a member of Parliament, once elected. Even though people can stand for public office, democratic countries disqualify certain citizens, more importantly prisoners, from standing for election.

Member states of the Council of Europe enjoy the liberty of establishing the criteria of eligibility to stand for election; this criterion varies from state to state and does so in accordance with the historical and political factors of each state.³²⁵ O'Boyle says that because of this liberty which the member states have, when applying Article 3 "any electoral legislation must be assessed in the light of the political evolution of the country concerned."³²⁶ Like any election in any country, in order for an individual to stand for election he or she has to be eligible to stand for election and to hold public office. The United Kingdom has various elections. There are United Kingdom Parliamentary Elections, European Parliament Elections (because the UK is a member state of the European Union) and the England Local Government Election.

In the Local Government Elections of England residents vote for councillors to represent a particular ward on the local council.³²⁷ In the General United Kingdom Parliamentary Elections, citizens vote for a Member of Parliament to sit in the UK Parliament in Westminster.³²⁸ In order to stand for election to the UK Parliament one must meet some qualifications. The candidate must be at least 18 years old and be either a British citizen, a citizen of the Republic of Ireland, or a citizen of a Commonwealth country who does not

³²⁵ O'Boyle M 'Electoral Disputes and the ECHR: An Overview' (2008) 30 *Human Rights Law Journal* 5 (hereafter O'Boyle M 'Electoral Disputes and the ECHR: An Overview' (2008)).

³²⁶ O'Boyle M 'Electoral Disputes and the ECHR: An Overview' (2008) 5.

³²⁷ The Electoral Commission 'Local Government Elections in England' available at http://www.aboutmyvote.co.uk/how_do_i_vote/voting_systems/local_government_elections_in.aspx (accessed 17 September 2014)

³²⁸ The Electoral Commission 'General (UK Parliamentary) Elections' available at http://www.aboutmyvote.co.uk/how_do_i_vote/voting_systems/general_uk_parliamentary_ele.aspx (accessed 17 September 2014).

require leave to enter or remain in the UK, or who has indefinite leave to remain in the UK.³²⁹
A person standing for election is not required to be a registered elector (voter).

In the United Kingdom a number of people are disqualified from becoming a Member of Parliament, in particular, convicted prisoners who are serving a prison sentence of more than a year. The Representation of the People Act 1981, section 1, provides that a person is disqualified from membership of the House of Commons if they meet all of the following criteria:

“They have been found guilty of one or more offences, they have been sentenced to be imprisoned or detained for more than one year, they are detained in the UK, the Republic of Ireland, the Channel Islands or the Isle of Man, or are unlawfully at large at a time when they would otherwise be detained.”³³⁰

The European Parliament elections are held in each of the four UK states, one of which is England. Here citizens vote for members of the European Parliament to represent their region.³³¹ Each of the four regions are allocated a number of members to stand for election, this number is determined by the number of people in the country.³³² This summation of passive voting rights in the UK is just to illustrate that convicted prisoners are not eligible to stand for public office just like they are not eligible to vote.

³²⁹ The Electoral Commission ‘Guidance for Candidates and Agents: UK Parliamentary by-election in Great Britain’ May 2014 available at http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0015/14154/UKPE-CA-by-election-guidance.pdf (accessed 17 September 2014) 10.

³³⁰ The Electoral Commission ‘Guidance for Candidates and Agents: UK Parliamentary by-election in Great Britain’ May 2014 available at http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0015/14154/UKPE-CA-by-election-guidance.pdf (accessed 17 September 2014) 31; The Representation of the People Act 1981, section 1 states the following: “A person found guilty of one or more offences (whether before or after the passing of this Act and whether in the United Kingdom or elsewhere), and sentenced or ordered to be imprisoned or detained indefinitely or for more than one year, shall be disqualified for membership of the House of Commons while detained anywhere in the British Islands or the Republic of Ireland in pursuance of the sentence or order or while unlawfully at large at a time when he would otherwise be so detained.”

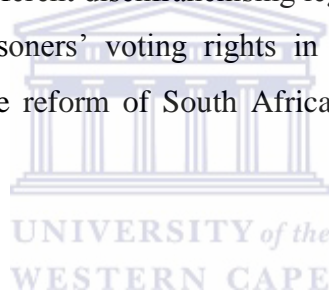
³³¹ The Electoral Commission ‘European Parliament elections in England, Scotland and Wales’ available at http://www.aboutmyvote.co.uk/how_do_i_vote/voting_systems/european_parliament_elections.aspx (accessed 17 September 2014).

³³² The Electoral Commission ‘European Parliament elections in England, Scotland and Wales’ available at http://www.aboutmyvote.co.uk/how_do_i_vote/voting_systems/european_parliament_elections.aspx (accessed 17 September 2014).

3.6 Conclusion

As can be deduced from the above case law, the different States administer criminal disenfranchisement differently. The disenfranchisement in these cases is based on factors such as: the type of offence, the nature of the offence (whether it was committed with intent or negligence), the length of the prison sentence, the circumstances of the offender, and the discretion of the sentencing judge. The aim which the States are trying to achieve through the disenfranchisement is the same in each of the cases being; enhancing civic responsibility and respect for the rule of law, ensuring the proper functioning and preservation of the democratic regime, crime prevention, and punishment. The European Court has accepted all these aims as legitimate, however the issue in each case was the proportionality analysis relating to the before mentioned factors.

The Court's assessment of the different disenfranchising legislation has assisted in reaching a conclusion on the status of prisoners' voting rights in South Africa. For this reason a recommendation is made, for the reform of South African Electoral law, in the following chapter.



CHAPTER FOUR

COMPARATIVE CONCLUSION

4.1 Introduction

This mini-thesis started out by looking at the nature and importance of the right to vote. The right to vote is a fundamental participatory element of our democracy. The right to vote has been described as a symbol of our citizenship and as ‘a badge of dignity and personhood’.³³³ Even so, the right to vote has always been subject to a series of voter exclusions and limitations. The limitation on which this mini-thesis focused is that of imprisonment. The main aim of this mini-thesis was to determine the constitutionality of prisoner disenfranchisement under Post-Apartheid law. In chapter two, with regards to active voting rights, the first preliminary conclusion reached was that the manner in which the Legislature has up to now tried to disenfranchise prisoners was unconstitutional. However, with regards to passive voting rights, it was found that the constitutional provision (section 47(1)(e)) which excludes prisoners from standing for public office, is an example of an active voting exclusion which might pass constitutional muster. This constitutional provision was measured against regional human rights law, in terms of the African Charter, to determine its compatibility with the right to vote. The second interim conclusion reached was that the compatibility of section 47(1)(e) with the African Charter was unclear. Because of this lack of clarity, the status of prisoners’ voting rights in the UK was investigated in light of the European Court’s judgments relating to prisoner disenfranchisement. This comparative investigation gave some clarity, in that it became apparent which types of exclusions are compatible with the European Convention and the human right to vote in general.

Where does all of this leave the exclusion of convicted prisoners from exercising their right to vote in South Africa during, or immediately after, their imprisonment? This chapter draws on the preceding chapters to arrive at a comparative assessment of the status of prisoner disenfranchisement under South African and regional human rights law. The purpose of this chapter is to make certain recommendations to the South African legislature as to how it can

³³³ *African Christian Democratic Party v Electoral Commission* (003/11 IEC) [2011] ZAEC 2 at [23] and *August v Electoral Commission* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 at [17] (hereafter *August v Electoral Commission* (1999)).

properly exclude certain categories of prisoners from voting. This chapter contains a proposed exclusion of prisoners which will pass constitutional muster.

4.2 South African Constitutional Court vs European Court of Human Rights

Both the SACC and the ECHR have set clear principles which must be followed when disenfranchising prisoners. The SACC has confirmed that prisoners may be disenfranchised and that Parliament is not prohibited from excluding prisoners from voting.³³⁴ However, what the Court made clear is that a blanket exclusion would not be constitutional. The Court rejected the exclusion of all prisoners serving a prison sentence without the option of a fine and found that this too was an exclusion which is not constitutional.³³⁵ This exclusion included a large amount of prisoners and the Court found that the exclusion was too broad in that the exclusion included all offences and both shorter and longer periods of imprisonment.³³⁶ In addition this exclusion affected both those prisoners who are serving a prison sentence while awaiting the outcome of an appeal and those whose appeals have been finalised.³³⁷

The ECHR, like the SACC, held that even though some democratic states have a presumption of universal suffrage, it does not mean that the state is unable to restrict the right to vote, elect and stand for election.³³⁸ These restrictions must however be limited, which is why the ECHR has rejected the blanket exclusion of prisoners from voting and found that it is not compatible with the European Convention.³³⁹ The reason for this finding was the same as that of the SACC in that the exclusion includes a wide range of offenders and sentences (from one day to life and from minor offences to the most serious offences).³⁴⁰

³³⁴ *August v Electoral Commission* (1999) at [31] and [32].

³³⁵ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at [65] (hereafter *Minister of Home Affairs v NICRO* (2004)); Electoral Act 34 of 2003, section 24B(2): “A person who is in prison on election day may only vote if he or she is not *servicing a sentence of imprisonment without the option of a fine.*”

³³⁶ *Minister of Home Affairs v NICRO* (2004) at [67].

³³⁷ *Minister of Home Affairs v NICRO* (2004) at [152].

³³⁸ *Hirst v the United Kingdom (No.2)* [2005] ECHR 681 at [2] (hereafter *Hirst v the United Kingdom* (2005)).

³³⁹ *Hirst v the United Kingdom* (2005) at [82].

³⁴⁰ *Hirst v the United Kingdom (No.2)* [2005] ECHR 681 at [77]; *Soyler v Turkey* (2013) ECHR at [41] (hereafter *Soyler v Turkey* (2013)), *Murat Vural v Turkey* [2014] ECHR 306 at [79]-[78] (hereafter *Murat Vural v Turkey* (2014)).

The Court has accepted law, which disenfranchises those prisoners who committed an offence with intent and as a result are serving a sentence of more than one year, as not automatic and which might have been compatible with the Convention.³⁴¹ However, the Court has confirmed that there must be a link between the offence committed and issues relating to elections and democratic institutions.³⁴² Thus a law disenfranchising prisoners who committed an offence with intent and as a result are serving a sentence of more than one year would be compatible with the Convention if the offence for which such person is sentenced is linked to issues relating to elections and democratic institutions. Another exclusion which the Court has accepted as being compatible with the Convention is a disenfranchisement which is only in relation to serious offences and not minor ones or those which, although more serious in principle, do not attract sentences of three years' imprisonment or more, are compatible with the Convention.³⁴³

The ECHR laid more emphasis on the fact that the exclusion must bear a connection with the type of offence committed and the length of the sentence in order for it to be in line with the Convention. The SACC did the same however such position was not emphasised and seemed to have been abandoned when Chaskalson J and Ncgobo J suggested the exclusion contained in section 47(1)(e) of the Constitution (which does not make reference to any type of offence only the length of the prison sentence) as an exclusion which will pass constitutional muster.

It is a principle that if a right is limited, such limitation must be justified. In order to justify a limitation on a right the party limiting the right must put forward the objectives which such limitation serves to achieve. Even though the particular party can identify legitimate objectives, the means used to achieve these objectives must not be disproportionate, meaning such objectives must pass a proportionality test.³⁴⁴ In the judgments of both Courts, certain objectives, which the respective governments were trying to achieve through the exclusion of prisoners from voting, were identified.

In the Constitutional Court the policy objectives identified were based on the avoidance of logistical, financial and administrative difficulties,³⁴⁵ and the prevention and deterrence of

³⁴¹ *Frodl v Austria* [2010] ECHR at [33] (hereafter *Frodl v Austria* (2010)).

³⁴² *Frodl v Austria* (2010) at [34].

³⁴³ *Scoppola v Italy* (No. 3) [2012] ECHR 868 at [108] (hereafter *Scoppola v Italy* (2012)).

³⁴⁴ *Mathieu-Mohin and Clerfayt v Belgium* [1987] 10 EHRR 1 at [52].

³⁴⁵ *August v Electoral Commission* (1999) at [8]; *Minister of Home Affairs v NICRO* (2004) at [40].

crime.³⁴⁶ With regards to the first objective, the Court found that it was not a legitimate objective and thus rejected it.³⁴⁷ With regards to the crime prevention and deterrence objective, the Court rejected the way in which the argument relating to such objective was presented, however the court accepted that “at the level of policy it is important for the government to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens.”³⁴⁸ In as far as the proportionality assessment was concerned, the Court found that the proportionality of the exclusion of prisoners had to be determined after taking into consideration the following factors: the length of the prison sentence; the type of offence; and the consideration of appeals which have not yet been finalised.³⁴⁹

In the European Court the legitimate objectives identified were enhancing civic responsibility and respect for the rule of law,³⁵⁰ ensuring the proper functioning and preservation of the democratic regime,³⁵¹ crime prevention,³⁵² and punishment.³⁵³ These were the objectives identified in each of the cases relating to prisoner disenfranchisement and the court accepted one or more of these policy objectives as legitimate in each case.³⁵⁴ With regards to proportionality, the Court considered the following factors: the fact that the limitation can be imposed by a Court (the sentencing judge) or by the legislature through a blanket legislative rule; the type of offence (and whether there must be a relation between the offence committed and issues relating to elections and democratic institutions); and the length of the sentence.

With regard to the first proportionality issue, the Court held that the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners’ voting rights, however the Court accepts that a well-tailored legislative rule might suffice as in Turkey, where “disenfranchisement is an automatic consequence derived from the statute, and is therefore not left to the discretion or supervision of the judge.”³⁵⁵ With regards to the length of the sentence and the type of offence, the Court held that even though in some cases there

³⁴⁶ *Minister of Home Affairs v NICRO* (2004) at [46] and [55].

³⁴⁷ *August v Electoral Commission* (1999) at [30]-[33]; *Minister of Home Affairs v NICRO* (2004) at [49].

³⁴⁸ *Minister of Home Affairs v NICRO* (2004) at [83] and [57].

³⁴⁹ *Minister of Home Affairs v NICRO* (2004) at [67].

³⁵⁰ *Hirst v the United Kingdom* (2005) at [74], *Frodl v Austria* (2010) at [30], *Scoppola v Italy* (2012) at [64].

³⁵¹ *Scoppola v Italy* (2012) at [92].

³⁵² *Hirst v the United Kingdom* (2005) at [74]; *Frodl v Austria* (2010) at [30], *Scoppola v Italy* (2012) at [64].

³⁵³ *Hirst v the United Kingdom* (2005) Caflisch J judgment at [5], *Frodl v Austria* (2010) at [30], *Soyler v Turkey* (2013) at [17].

³⁵⁴ *Hirst v the United Kingdom* (2005) at [75].

³⁵⁵ *Soyler v Turkey* (2013) at [39].

were categories of detained persons unaffected by the exclusion, some exclusions include a wide range of offenders and sentences (from one day to life and from minor offences to the most serious offences).³⁵⁶ With regards to the fact that there must be a relation between the offence committed and issues relating to elections and democratic institutions, the Court held that if there is a link the exclusion would definitely pass the proportionality test.³⁵⁷ This does not mean that the opposite applies, and that exclusions will only be proportional in cases of electoral offences.

After having considered all the principles developed and factors identified by the Courts, a conclusion is reached in the following part of this chapter as to how the South African Legislature can reform the country's electoral law. The suggestion is that South Africa revisit its current policy which allows all prisoners to vote, and to re-enact a provision which disenfranchises a section of the prisoner population, as a means to combat crime and inculcate greater civic responsibility among citizens.

4.3 Suggestions for electoral reform

After having considered South African Law, African Law, United Kingdom Law, and European Law, the conclusion reached is that not all prisoners should be permitted to vote. They should not be permitted to participate in making the very laws which they violated.

The suggestion is that the South African government adopt the policy objectives which the European Court accepted as legitimate. The aim of disenfranchising prisoners should be to punish them, to prevent and deter crime, to enhance civic responsibility and respect for the rule of law, and ensuring the proper functioning and preservation of the democratic regime. In addition, in order for the disenfranchisement to be in line with the Constitution it should be limited to those offenders who have committed the more serious offences. With regards to the proportionality element, the argument is thus that the disenfranchisement does not have to be linked to the type of offence in order to determine how serious the offence is, because the length of a sentence imposed by a Court should give one an indication as to the seriousness of the offence. In addition, the limitation must not be left to the discretion of a sentencing judge but to the Legislature, and there need not be a relation between the offence committed and

³⁵⁶ *Hirst v the United Kingdom* (2005) at [77].

³⁵⁷ *Soyler v Turkey* (2013) at [41].

issues relating to elections and democratic institutions, because the exclusion should be based on the length of the sentence received.

A legislative voter exclusion, modelled on the existing constitutional limitation on the passive voting rights of citizens, would be compatible with section 19(3) of the Bill of Rights, the African Charter, and international human rights law generally. Whether such a voter exclusion should be reintroduced into Post-Apartheid law is thus purely a matter of policy. Given the threat which serious crime poses to the culture of human rights and democracy, there are no sound policy reasons why such a voter exclusion should not be reintroduced.

It would therefore be appropriate to reconsider the comments by Chaskalson CJ and Ngcobo J and to enact their suggestions regarding section 47(1)(e) into law. Both of them hinted that the exclusion contained in section 47(1)(e) of the Constitution might be an exclusion which could be applied to prisoners' voting rights and it might pass the test of constitutionality.³⁵⁸ Justice Ngcobo also raised the issue regarding the fact that the exclusion of prisoners as contained in the Electoral Act 1998 included both those prisoners who are serving a prison sentence while awaiting the outcome of an appeal and those whose appeals have been finalised. He saw this as a defect in the Act and suggested that it could be cured by reading the following phrase into the existing section 8(2)(f) after the phrase "*serving a sentence of imprisonment without the option of a fine*":

*"but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired"*³⁵⁹

If Ngcobo's suggestion had to be read into section 8(2)(f) the section would thus read as follows:

"The chief electoral officer may not register a person as a voter if that person is serving a sentence of imprisonment without the option of a fine, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired."

As the position regarding prisoner voting rights stands today, all prisoners are permitted to vote in national and provincial elections. This has been the position since the *NICRO* case

³⁵⁸ *Minister of Home Affairs v NICRO* [2004] at [67] and [153].

³⁵⁹ *Minister of Home Affairs v NICRO* [2004] at [153].

and the enactment of the Electoral Amendment Act of 2013. The proposal is that Parliament limits the rights of prisoners to take part in elections by enacting the following provision:

“Anyone who is convicted of any offence in terms of South African Criminal Law and *sentenced to more than 12 months imprisonment without the option of a fine* may not vote in the National or Provincial elections, but *no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined*, or until the time for an *appeal has expired*. This *exclusion does not include a suspended sentence*.”

As mentioned, I propose that this provision be enacted even though it does not specify types of offences, because if a court sees it fit to impose a prison sentence of more than 12 months, it would be safe to assume that the offence is not a minor one. Also, one should be careful to not convey a message to society that it is acceptable to commit certain offences, but not others. Society must know that no criminal activity will be tolerated. Offenders should know that they will not be rewarded with the right and responsibility of voting.³⁶⁰



Word count: 31 723

³⁶⁰ *Minister of Home Affairs v NICRO* [2004] at [117].

BIBLIOGRAPHY

BOOKS

López-Guerra C *Democracy and Disenfranchisement: The Morality of Electoral Exclusions* (2014) Oxford University Press: Oxford.

CHAPTERS IN BOOKS

Brickhill J & Babiuch R 'Political Rights' in Woolman S (ed) *Constitutional Law of South Africa: Volume 3* (2ed) (2008) Juta & Co Ltd 45-51.

De Waal J 'Political Rights' in Klaaren J, Marcus G, Spitz D & Woolman S (eds) *Constitutional Law of South Africa* (1999) Juta: Kenwyn [23-1]-[23-22]

Roux T 'The Principle of Democracy in South African Constitutional Law' in Woolman S & Bishop M (eds) *Constitutional Conversations* (2008) Pretoria University Law Press: Pretoria 79-96



JOURNAL ARTICLES

Abebe A 'In pursuit of universal suffrage: the right of prisoners in Africa to vote' (2013) 46 *Comparative and International Law Journal of Southern Africa* 410-446

De Vos P 'South African Prisoner's Right to Vote' (2005) *NICRO and the Community Law Centre* 1-10

Easton S 'Electing the Electorate: The Problem of Prisoner Disenfranchisement' (2006) 69 *The Modern Law Review Limited* 443-461

Elvy S 'Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance' (2013) 27 *Emory International Law Review* 41-116

Foster S 'Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote' (2009) 9 *Human Rights Law Review* 489-507

Jaramillo J ‘*Scoppola v Italy (No.3)*: The Uncertain Progress of Prisoner Voting Rights in Europe’ (2013) 36 *Boston College International and Comparative Law Review* 31-46

Mbodla N ‘Should Prisoners Have a Right to Vote?’ (2002) 46 *Journal of African Law* 92-102.

Munn N ‘The Limits of Criminal Disenfranchisement’ (2011) 30 *Criminal Justice Ethics* 223-239

O’Boyle M ‘Electoral Disputes and the ECHR: An Overview’ (2008) 30 *Human Rights Law Journal* 1-8

Vick D ‘The Human Rights Act and the British Constitution’ (2002) 37 *Texas International Law Journal* 329-372

CASE LAW

African Court of Human Rights

Rev. Christopher R. Mtikila v. The United Republic of Tanzania (Application No 011/2011)

Canada

Sauvé v. Canada (Attorney General), [2002] 3 S.C.R. 519

European Court of Human Rights

Firth and others v United Kingdom [2014] ECHR

Frodl v Austria [2010] ECHR

Greens and M.T. v United Kingdom [2010] ECHR

Hirst v the United Kingdom (No.2) [2005] ECHR 681

Mathieu-Mohin and Clerfayt v Belgium [1987] 10 EHRR 1

Murat Vural v Turkey [2014] ECHR 306

Scoppola v Italy (No. 3) [2012] ECHR 868

Soyler v Turkey [2013] ECHR



South Africa

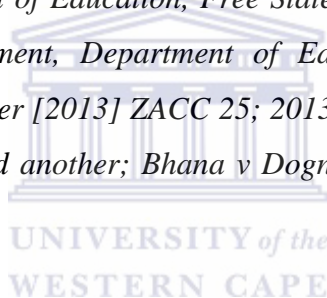
African Christian Democratic Party v Electoral Commission (003/11 IEC) [2011] ZAEC 2 August and Another v Electoral Commission and Others (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363

Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)

Freedom Front Plus v African National Congress (02/2009) [2009] ZAEC 4 (31 March 2009)

Glenister v President of the Republic of South Africa (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)

Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) Jaga v Donges, NO and another; Bhana v Dognes, NO and another 1950 (4) SA 653 (A)



Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others (CCT 03/04) [2004] ZACC; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC)

New National Party v Government of the Republic of South Africa and Others (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489

Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae) (CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC)

United Kingdom

R (on the application of Chester v Secretary of State for Justice) and McGeoch v The Lord President of the Council (2013) UKSC 63

R v (1) Secretary of State for the Home Department (2) Two Election Registration Officers, Ex Parte (1) Pearson (2) Martinez: Hirst v HM Attorney General (2001) [2001] EWHC Admin 239

LEGISLATION

Austria

Austrian Federal Constitutional Act

Austrian National Assembly Election Act

Austrian Criminal Code

Italy

Italian Criminal Code

Turkey

Turkish Criminal Code (Law no. 5237 of 2004)

Law on Basic Provisions Concerning Elections and on Registers of Voters (Law No. 298 of 1961)

Law on Offences Committed Against Atatürk (Law no. 5816)

South Africa

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of South Africa Act 200 of 1993

Electoral Act 45 of 1979

Electoral Act 87 of 1993

Electoral Act 73 of 1998

Electoral Amendment Act 18 of 2013

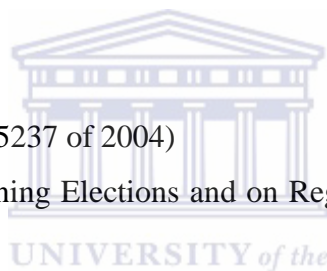
Electoral Laws Amendment Act 34 of 2003

Local Government: Municipal Electoral Act 27 of 2000

Republic of South Africa Constitution Act 110 of 1983

United Kingdom

Human Rights Act 1998



Representation of the People Act 1968
Representation of the People Act 1969
Representation of the People Act 1981
Representation of the People Act 1983
Representation of the People Act 1985
Representation of the People Act 2000

BILLS

Electoral Amendment Bill [B 22 –2013]
Electoral Laws Amendment Bill [B54-03]
Voting Eligibility (Prisoners) Bill 2012

IEC REPORTS

Independent Electoral Commission ‘Report of the Independent Electoral Commission: National and Provincial Elections 2 April 2009’ available at <https://www.elections.org.za/content/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=1287> (accessed 1 November 2014)

Independent Electoral Commission ‘Report of the Independent Electoral Commission: the South African Elections of April 1994’ (1994) Johannesburg: Independent Electoral Commission

CONVENTIONS

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14

INTERNET REFERENCES

Cliffs Notes ‘Race and Ethnicity Defined’ available at <http://www.cliffsnotes.com/sciences/sociology/race-and-ethnicity/race-and-ethnicity-defined> (accessed 14 February 2015)

De Vos P ‘One law for ANC, another for the rest?’ *Constitutional Speaking* 26 February 2009 available at <http://constitutionallyspeaking.co.za/one-law-for-anc-another-for-the-rest/> (accessed 24 March 2014)

De Vos P ‘Yengeni, Winnie not eligible for Parly?’ *Constitutional Speaking* 30 January 2009 available at <http://constitutionallyspeaking.co.za/yengeni-winnie-not-eligible-for-parly/> (accessed 10 June 2014)

Electoral Commission of South Africa ‘Frequently asked questions: For voters’ available at <http://www.elections.org.za/content/for-voters/FAQ-For-Voters/> (accessed 30 October 2014).

European Court of Human Rights ‘The Court in Brief’ available at http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (accessed 4 October 2014)

Parliamentary Monitoring Group ‘Electoral Amendment Bill: Electoral Commission response to public submissions’ available at <http://www.pmg.org.za/report/20130916-electoral-amendment-bill-electoral-commission-response-public-submissions> (accessed 26 July 2014).

Parliamentary Monitoring Group ‘Electoral Laws Amendment Bill: briefing’ 2 September 2003 available at <http://www.pmg.org.za/minutes/20030901-electoral-laws-amendment-bill-briefing> (accessed 26 July 2014)

Parliamentary Monitoring Group ‘Local Government Municipal Electoral Bill: Submission’ 23 May 2000 available at <http://www.pmg.org.za/minutes/20000522-municipal-electoral-bill-briefing-and-discussion> (accessed 1 November 2014)

Parliamentary Monitoring Group ‘Municipal Electoral Bill: Deliberations’ 6 June 2000 available at <http://www.pmg.org.za/minutes/20000605-municipal-electoral-bill-discussion> (accessed 1 November 2014)

Parliamentary Monitoring Group ‘Municipal Electoral Bill: hearings’ 5 June 2000 available at <http://www.pmg.org.za/minutes/20000604-municipal-electoral-bill-hearings> (accessed 28 October 2014)

Parliamentary Monitoring Group ‘Second Reading debate: Electoral Amendment Bill [B 22 – 2013]’ available at <http://www.pmg.org.za/hansard/20130919-second-reading-debate-electoral-amendment-bill-b-22-2013> (accessed 26 July 2014)

Parliament of the Republic of South Africa ‘A People’s Government, the People’s Voice’ available at http://www.parliament.gov.za/live/content.php?Item_ID=296 (accessed 14 February 2015)

The Electoral Commission ‘European Parliament elections in England, Scotland and Wales’ available at http://www.aboutmyvote.co.uk/how_do_i_vote/voting_systems/european_parliament_elections.aspx (accessed 17 September 2014)

The Electoral Commission ‘General (UK Parliamentary) Elections’ available at http://www.aboutmyvote.co.uk/how_do_i_vote/voting_systems/general_uk_parliamentary_elections.aspx (accessed 17 September 2014)

The Electoral Commission ‘Guidance for Candidates and Agents: UK Parliamentary by-election in Great Britain’ May 2014 available at http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0015/14154/UKPE-CA-by-election-guidance.pdf (accessed 17 September 2014)

The Electoral Commission ‘Local Government Elections in England’ available at http://www.aboutmyvote.co.uk/how_do_i_vote/voting_systems/local_government_elections_in_english.aspx (accessed 17 September 2014)

UK Parliament (Hilary Benn) ‘House of Commons Written Answers for 8 July 2002’ available at <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020708/text/20708w27.htm> (accessed 13 October 2014)

White I ‘Prisoner’s voting rights’ *Parliament and Constitution Centre House of Commons Library* 7 September 2011 available at <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01764.pdf> (accessed 1 September 2014)

AFRICAN LAW

African Charter on Democracy, Elections and Governance *Adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30 January 2007*

African Charter on Human and Peoples' Rights (Also referred to as the "*Banjul Charter*")
adopted in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986.
CAB/LEG/67/3/Rev 5

African Union Declaration on the Principles Governing Democratic Elections in Africa,
AHG/Decl.1 (XXXVIII), *adopted in Durban, South Africa in 2002.*

Guidelines for African Union Electoral Observation and Monitoring Missions, *EX.CL/91 (V)*
Annex II.

UK GOVERNMENT PAPERS

Department for Constitutional Affairs 'Voting Rights of Convicted Prisoners Detained within
the United Kingdom: The UK Government's response to the Grand Chamber of the European
Court of Human Rights judgment in the case of *Hirst v The United Kingdom*' (CP29/06
14/12/2006)

House of Lords House of Commons Joint Committee on the Draft Voting Eligibility
(Prisoners) Bill 'Draft Voting Eligibility (Prisoners) Bill Report' (2013)

Ministry of Justice 'Voting Rights of Convicted Prisoners Detained within the United
Kingdom: Second stage consultation' (CP6/09 08/04/2009)