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Authors	Morgan-Williams, Samantha
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University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

CHAPTER XVII
JUSTIFYING ACTS OF DENIALISM
The Case of Prisoner Disenfranchisement in the UK

Samantha Morgan-Williams*

1. INTRODUCTION

This paper will explore the case of prisoner disenfranchisement in the United Kingdom[1] (hereinafter UK) as a concrete example of political denialism and human rights. It will explore the basis of denialism and human rights, from two approaches, asking both *how* and *why* denialism is perpetrated and justified in the UK. Initially seeking to challenge *how* the blanket ban on prisoner voting is justified at a domestic level. The paper will then identify *why* political denialism is contentious within the concrete example that prisoner disenfranchisement provides, determining the conceptual and legal basis and subsequent political support for the prisoner voting ban.

In examining how political actors, such as the UK Government,[2] justify continued denial of rights at the expense of their obligations under the ECHR, this paper highlights the prisoner voting rights case as concrete example of political or functional denialism in practice. It therefore affords an excellent example within which to address why denialism is committed and consequently how a state can justify continued human rights violations. In looking beyond the act of denialism and addressing the justifications themselves, this paper contributes to deepening understanding of situations where the State power is the main perpetrator of denialism.

* PhD Candidate, Centre for Criminal Justice and Human Rights, University College Cork, Ireland.

1 For the purpose of this paper the 'United Kingdom' is used in direct reference to the executive, judiciary and legislative (Parliament) unless indicated otherwise.

2 For the purposes of this chapter, Government refers exclusively to Her Majesty's Government, commonly referred to as the UK Government, which is currently formed of Members of Parliament from the Conservative Party, led by Prime Minister David Cameron.

2. DENIALISM AND HUMAN RIGHTS: POLITICAL DENIALISM

Scholars working within this field have largely drawn upon the works of Stanley Cohen in identifying the forms of denial.[3] At the Conference associated with this collection of papers entitled *Denialism and Human Rights*,[4] a number of forms of denialism where thus identified. The most notable of these was given by Prof. Eric Heinze[5] who outlined the forms which denial has been recognised to take within the field of human rights.[6] These were identified as factual, normative, justifiable and political denialism.[7]

The first of these, factual denial, occurs where a series of events or conduct is questioned as to ever having existed. A key example of such would be Holocaust or more generally genocide denial. Secondly, denialism within human rights can be normative in form, where it is disputed whether a norm can be considered as a human right. An example of this would be the denial of rights to certain groups of minority or even unfavourable groups. Normative denialism is therefore normally characterised as the refusal to grant certain classes of citizens their human rights.[8] Thirdly, justifiable or defensible denialism is a form of denialism present within human rights when the perpetrator seeks to justify a derogation or denial of human rights. A core example is found within the European Convention on Human Rights system (hereinafter ECHR or Convention) where certain rights are 'derogable' in times of emergency or state crisis for the protection of state security.[9] The

3 For more on this see; S, COHEN, *States of Denial: Knowing about Atrocities and Suffering*, 2nd ed., Polity Press, Stafford BC 2010.

4 Denialism and Human Rights, Faculty of Law, Maastricht University 22nd & 23rd January 2015.

5 Prof. Eric Heinze, Professor of Law and Humanities, Queen Mary University of London.

6 E. Heinze, presentation entitled 'Functional Denial and the Politics of Human Rights,' given at 'Denialism and Human Rights,' Faculty of Law Maastricht University 22nd & 23rd January 2015. Heinze's presentation and his identification of four forms of human rights denial are representative of existing research into this area, for more on Heinze's own work in the area of politics and human rights see; E. Heinze, 'Even-handedness and the Politics of Human Rights' (2008) 21 *Harvard Human Rights Journal* pp. 7 – 46 and E. Heinze and R. Freedman, 'Public Awareness of Human Rights: Distortions in the Mass Media', (2009) 12 *International Journal of Human Rights*.

7 In his recent publication, *After Sustainability, Denial, Hope, Retrieval,* John Foster, draws exclusively upon the work of Stanley Cohen in identifying the forms of denialism prevalent within climate change denialism. He notes that these are literal, interpretative and implicative denial. For more on this see; J. Froster, *After Sustainability: Denial, Hope, Retrieval,* Routledge, London 2015.

8 The debate surrounding the legitimacy of the right to development, or even the validity of human rights for animals could serve as an example of normative human rights.

9 Article 15 ECHR allows states to derogate from certain rights guaranteed by the Convention in time of 'war or other public emergency threatening the life of the nation'. Permissible derogations under Article 15 must meet three substantive conditions: there must be a public emergency threatening the life of the nation; any measures taken in response must be 'strictly

fourth and final example of denialism often present within human rights is political or functional denialism. Political denialism occurs where an act which results in a denial of rights is seen by a political power as necessary or intrinsic to values.[10]

The latter form 'political or functional denialism,' is that which this paper concerns itself with, and is arguably the rarest in practice within the field of human rights. This is owing to a number of factors. These draw extensively from the general and driving principles behind human rights, which recognise that basic rights and fundamental freedoms are inherent to all human beings, inalienable, applicable to all regardless of gender, sex or race, and that everyone be treated equally in dignity and rights. Within Europe in particular, there is a clear consensus that upholding human rights and honouring human rights standards is key to a State's standing and this is represented by the reputation of the Council of Europe's Convention on Human Rights and the associated European Court of Human Rights.[11] Thus, states are often unwilling to be seen as complicity or knowingly committing acts of denial of human rights

A central theme when addressing denialism is often that the nature of the denial itself remains either fully or partly unacknowledged.[12] However, in instances of political or functional denialism, the denial of human rights is not only acknowledged by the offending political power, but even widely supported and its continuation justified, as is the case within the prisoner disenfranchisement debate. In the case of political denialism of human rights, it is rare for a state to openly and consistently flout or 'deny' its human

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required by the exigencies of the situation', and the measures taken in response to it, must be in compliance with a state's other obligations under international law.

10 However, a point to consider here is the nature of human rights itself. Is it more a matter of us not previously regarding political denialism as a form of denialism? Given a number of factors such as human rights systems allowed (to some extent) for derogations and excuses for denying in limited circumstances and given that states rarely directly admit to denying but may only comply in very limited or superficial ways. Could it be said that political denialism is in fact present within all human rights enforcement regimes? Given that considering more controversial issues such as implementation of socio-economic rights as opposed to civil and political rights are seen to be more aspirational rather than intrinsic?

11 Although it must be noted here, that as the case study of this paper shows that this does not mean that in a system where the is largely, strong respect for human rights that human rights abuses and derogations from human rights standards do not occur. Rather, that where a strong system exists, within which there is a functioning consensus that human rights be respected and upheld, that this acts as a sort of 'peer-pressure' mentality, acting as a deterrent. No state therefore wishes to be thought of as a state which does not respect human rights.

12 For more on this see C.A.R Moerland, Conference presentation entitled 'The killing of death – The BBC documentary Rwanda's untold story and the denial of the genocide against the Tutsi', given at 'Denialism and Human Rights', Maastricht University Faculty of Law, 22nd and 23rd January 2015; and also 'Meaning In Motion And Merging Discourses: How Scholars And Journalists Recycle The Ideological Denial Of The Genocide Against The Tutsi.' Siena, Italy, 10th Biennial Conference of the International Association of Genocide Scholars.

rights duties and obligations. However, in the UK the denial of voting rights for prisoners is a widely supported stance within both political, public and media spheres, which it is argued by proponents is 'enshrined in British democratic tradition.'[13] The legal and conceptually basis for this blanket ban will now be addressed before the justifications for the ban itself are examined.

2.1. PRISONER DISENFRANCHISEMENT IN THE UK

Under domestic law, Section 3 of the *Representation of the People Act* 1983[14] indiscriminately disenfranchises all prisoners. This act creates a blanket ban under which prisoners serving a custodial sentence do not have the right to vote during their incarceration, and only those on remand may partake in elections:

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

Under this legal provision, prisoners are barred from exercising the right to vote, which is a well-documented basic civil liberty and widely recognised in international law. Protection for this right is expressly provided under in a variety of international and regional systems including Article 21 of the Universal Declaration of Human Rights, as well as Article 25 of the International Covenant on Civil and Political Rights, the ECHR Article 3 Protocol 1.[15] Article 3 Protocol 1 of the ECHR dictates that states belonging to the Council of Europe, must guarantee 'free elections…under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'[16]

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13 See both D. Grieve, MP (2011) 523 *HC Deb*. 511 and D. Cameron, MP, (2010) 517 *HC Deb*. 921.

14 Section 3 of the *Representation of the People Act* 1983 as amended by the *Representation of the People Act* 1985 and 2000.

15 Other International Legal Instruments which protect the right to vote include but are not limited to: the Charter of the Organization of American States, the African (Banjul) Charter on Human and Peoples' Rights and many other international human rights documents Organisation For Security and Cooperation In Europe (OSCE) International Standards Of Elections (1990), European Union (EU) Council Regulations 975/99 And 976/99 (1999), Organization Of American States (OAS) American Convention on Human Rights (entered into force 1978) see <www.oas.org/> for all OAS documents. Inter-American Convention on the Granting of Political Rights to Women (entered into force 1954) Article 23 of the American Convention on Human Rights and Article 20 of the American Declaration of the Rights and Duties of Man guarantee the right of citizens to vote and be elected in genuine periodic elections. African Union (Formerly Organisation of African Unity), African Charter on Human and Peoples' Rights (1981), Article 13(1) of the African (Banjul) Charter on Human and Peoples' Rights provides that every citizen shall have the right to participate freely in their government.

16 Full text of the Convention and Protocols available at: <www.echr.coe.int/Documents/Convention_ENG.pdf>.

The current blanket ban on prisoner disenfranchisement in the UK under domestic legislation has been found contrary to the ECHR as Section 3 of the *Representation of the People Act* conflicts with Article 3 of Protocol 1 of the Convention's provisions. As a result, the UK has been found to be in violation of its treaty obligations and is obliged to align domestic legislation with the relevant ECHR provisions (preamble ECHR, and Article 46).[17] This resulted in a number of cases coming before the ECtHR (*Hirst*,[18] *Greens & M.T.*,[19] *Scoppola*,[20] *Firth*,[21] *and McHugh*)[22] where the Court found the blanket ban to constitute a direct violation of the UK's human rights obligations.

Yet, the UK has failed to apply these judgments and amend the current legislation. This refusal to follow the ECtHR clearly demonstrates tensions in the UK between politics and human rights protections, as the UK is purposefully failing in its obligations to uphold minimum human rights standards, denying not only prisoners the rights owed to them under the Convention's provisions, but also denying the supremacy of the Court itself in matters of human rights.

2.2. PRISONER DISENFRANCHISEMENT CASE LAW BEFORE THE ECtHR

On 30 March 2004, the ECtHR gave its judgment in the case of *Hirst v The UK*.[23] Seven judges at the ECtHR ruled that the UK's ban on prisoners' voting

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17 Article 46 Binding force and execution of judgments: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation.'

18 *Hirst v. the United Kingdom,* no. 74025/01, ECHR 2005-II.

19 *Greens and M.T. v. The United Kingdom,* no. 60041/08, ECHR 2010.

20 *Scoppola v. Italy,* no.126/05, ECHR 2012-III.

21 *Firth and Others v. the United Kingdom,* no. 47784/09, ECHR 2014.

22 *McHugh and Others v. the United Kingdom,* no. 51987/08, ECHR 2015.

23 *Hirst v. the United Kingdom*, no. 74025/01, ECHR 2005-II. In the case John Hirst, a prisoner serving a life sentence for manslaughter had challenged the ban on prisoners' votes after previously losing the case in the High Court. Although this was the first time the issue of prisoner disenfranchisement was brought before the ECtHR in a British context, there had been challenges to the validity of the RPA under the ECHR at a domestic level. *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. Hirst

breached the ECHR. The Government subsequently appealed the decision.[24] Upon appeal, the Grand Chamber of the Court held, by a majority of 12 to 5 that a blanket ban preventing all convicted prisoners from voting, irrespective of the nature or gravity of their offences, constituted a violation of Article 3 of Protocol No. 1 ECHR.[25]

> 'There was, therefore, no question that prisoners forfeit their Convention rights merely because of their status as detainees following conviction. Nor was there any place under the Convention system, where tolerance and broadmindedness were the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.'[26]

The Court accepted the UK's argument that Member States should have a wide discretion as to how they regulate a ban on prisoners voting. '[B]oth as regards the types of offence that should result in the loss of the vote and as to whether disenfranchisement should be ordered by a judge in an individual case or should result from general application of a law.'[27]

It recognised, however, that due to a violation of the above Protocol, that reform was necessitated in this instance. Although it advocated legislative change, the court did not give any detailed guidance as to the steps that the UK should take to make its law compatible with Article 3 of Protocol No. 1. Stating that it was for each Member State of the Council of Europe to decide on its own rules under the margin of appreciation, as is the norm under the Convention rules of interpretation.[28, 29]

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had first challenged the ban in the High Court, but lost in 2001 when the court ruled that it was compatible with the European Convention for prisoners to lose the right to a say in how the country was governed.

24 Under Article 43 the Case may be referred to the Grand Chamber, however, the parties have a three-month deadline following the delivery of a Chamber judgment to request referral of the case to the Grand Chamber for fresh consideration. Requests for referral to the Grand Chamber are examined by a panel of judges which decides whether referral is appropriate.

25 *Hirst v. the United Kingdom*, no. 74025/01, ECHR 2005-II.

26 Ibid.

27 Ibid.

28 This position was reiterated in *Frodl v. Austria,* no. 20201/04, ECHR 2010 reference where a breach of Article 3 Protocol No. 1 was found against Austria as his objective disenfranchisement denied him the rights afforded to him under this Article. The applicant, who was convicted of murder and sentenced to life imprisonment in 1993 in Austria, alleged that his disenfranchisement constituted a breach of his rights under Article 3 of Protocol No. 1 because he was serving a term of imprisonment of more than one year. The fact that there was no subjective decision on the matter and that the matter was not decided on a case to case basis but instead amounted to a blanket ban meant that the judgment of the European Court of Human Rights, which became final on 4 October 2010, held that there had been a breach of Article 3 of Protocol No. 1.

29 This was again reiterated post-Scoppola in a press release by Registrar of the Court of ECHR 222 (2012) 22.05.2012. For more see: http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003–3953519–4581929#{'itemid':['003–3953519–4581929']}.

> 'The Court accepts that this is an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners' right to vote can still be justified in modern times and if so how a fair balance is to be struck. In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored…It cannot accept however that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation.'[30]

The breach of Protocol No. 1 was again brought before the court in *Greens & M.T*[31] after the UK failed to implement the *Hirst* judgment. The applicants in this instance complained that the refusal to enrol them on the Electoral Register for domestic and European elections was in violation of Article 3 of Protocol No. 1. In its Chamber judgment of 23 November 2010, the European Court again found a violation of the right to free elections against the UK. Finding that the Government of the UK had failed to amend the blanket ban legislation, or even attempted any means of legislative reform, bringing domestic law in line with the ECHR as required under previous judgment *Hirst*.[32] The Court held that the Government should immediately bring forward legislative proposals to amend the law and to enact the legislation within a period decided by the Committee of Ministers.[33]

> 'Applying its pilot judgment procedure, the Court has given the UK Government six months from the date when Greens and M.T. becomes final to introduce legislative proposals to bring the disputed law/s in line with the Convention.'[34]

Initially the UK was given a six-month time frame by the Committee of Ministers within which to bring forward proposals.[35] This was extended, however, by *Scoppola v Italy (No 3)*[36] when the UK intervened as a third party.[37] In this instance the Court held that there had been a breach of Article 3

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30 *Hirst v. the United Kingdom*, no. 74025/01, §41, ECHR 2005-II.

31 *Greens and M.T. v. The United Kingdom,* no. 60041/08, ECHR 2010.

32 *Hirst v. the United Kingdom*, no. 74025/01, ECHR 2005-II.

33 The Committee of Ministers (CM) is the executive arm of the Council of Europe which supervises the implementation of the Court's judgments. Once a judgment becomes final, it is transmitted to the CM for supervision of its implementation. Further information about the implementation process can be found here: <www.coe.int/t/dghl/monitoring/execution>.

34 ECHR press notice 23 November 2010.

35 See 1157th meeting notes, *Hirst* No. 2 Group, decision 6 at <https://wcd.coe.int/ViewDoc.jsp?id=2013315>.

36 The applicant, Franco Scoppola was sentenced in 2002 to life incarceration for a multitude of serious crimes. Under Italian law, his life sentence entailed a lifetime ban from public office, amounting to permanent rescinding of his right to vote. Scoppola subsequently complained that the ban on public office imposed as a result of his sentencing had amounted to a permanent forfeiture of his entitlement to vote which constituted a violation of Article 3 Protocol 1.

37 The extension gave the United Kingdom 6 months from the judgment date within which the implement either proposals or affect legislative change, making the deadline 22 November 2012.

Protocol No. 1 in the form of the disenfranchisement of Mr. Scoppola and reiterated that the position of the UK (as observer State under) was contrary to the ECHR:

> 'The Court reiterated that a blanket ban on the right of prisoners to vote during their detention constituted an 'automatic and indiscriminate restriction on a vitally important Convention right… falling outside any acceptable margin of appreciation, however wide that margin may be.'[38]

This belligerent refusal has brought the focus of the Committee of Ministers into play; as is standard following an ECtHR ruling, as the case(s) were referred to the Committee as the task of supervising judgment executions is vested with the body under Article 46(2) of the ECHR.[39] In the UK, little has been done in the case of prisoner voting rights to implement the *Hirst* and *Greens & M.T* judgments, and the Government has made clear that the topic and the possibility of enforced change is a deeply unpopular one with both itself and the public.[40] It appears here that much of the delay in reform has been premised on the understanding that the disenfranchisement of prisoners has been a consistent feature of the UK's history as a parliamentary democracy, a point tabloids have seized upon.[41]

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38 *Scoppola v. Italy,* no. 126/05, ECHR 2012-II.

39 The article provides that 'the final judgment of the Court shall be transmitted to the Council of Europe, which shall supervise its execution.' Pursuant to this, Rule 3(a) outlines that respondent states are under a duty in the case of a violation to inform the Committee of measures taken to resolve the circumstances under which the violation occurred. Adversely under Rule 4 of the Committee Rules until the state fully complies with the judgment that the issue will continue to refer back to the Committee's agenda every 6 months until the above measures and proceedings are satisfied.

40 YouGov survey undertaken by Dr Joel Faulkner Rogers at the Cambridge POLIS Department entitled 'Prisoner voting: viva the 'civic death' penalty?' The finding of said survey available at <https://yougov.co.uk/news/2015/02/06/update-attitudes-prison-voting-viva-civic-death-pe/> show a continued strong public support for the continuation of disenfranchisement of those incarcerated. The survey finds that this is in line with previous findings in 2010, 2011 and 2012. Fieldwork was conducted online between 25–26 January 2015, with a total sample of 1656 British adults, and the survey was developed in collaboration with William Warr, currently a student on the Masters in Public Policy at the Cambridge POLIS Department, and his supervisor, David Howarth, who is also Director of the course.
The survey began with a split-sample experiment to compare the effect of describing the ECtHR ruling as coming from either a 'European' or an 'international' court when asking about UK law on prisoner voting. The sample was randomly divided and each sub-sample answered variants of the same question.

41 Specifically over prisoner votes: D. Davis and J. Straw, 'We must defy Strasbourg on prisoner votes', 2012 *The Telegraph* <www.telegraph.co.uk/news/uknews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html> accessed 13.04.2015.

2.3. DEVELOPMENTS 2014–2015

Recent cases before the Court both *Firth and Others v. the UK*[42] and *McHugh & Others v UK,*[43] held that the blanket ban on prisoner voting was contrary to the Convention.[44] Despite finding yet again that the UK continues to violate prisoners' rights to participate in elections, the Strasbourg court declined to order that any of claimants be awarded payment in form of redress finding the ruling to be in itself just satisfaction.

In *McHugh,* the Court held:

> 'there had been a violation of article 3 of protocol No 1 because the case was identical to other prisoner voting cases in which a breach of the right to vote had been found and the relevant legislation had not yet been amended … the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants …' It dismissed 'the remainder of the applicants' claim for just satisfaction.'[45]

The Court once again held that States have a broad discretion under the margin of appreciation as to how they could implement Article 3 Protocol No. 1 regarding the rights of those in prison, ultimately holding as it did in previous judgments that there is no means by which a blanket ban can be reconciled with the provisions of Protocol No. 1:

> 'The rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere. … There are numerous ways of organising and running electoral systems…which it is for each Contracting State to mould into their own democratic vision. … [P]risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention [guaranteeing the right to liberty and security]. … Any restrictions on these other rights must be justified … There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction.'[46]

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42 *Firth and Others v. the United Kingdom,* no. 47784/09, ECHR 2014.

43 *McHugh and Others v. the United Kingdom,* no. 51987/08, ECHR 2015.

44 These were so-called 'legacy cases' that gathered all outstanding prisoner voting cases against the UK pending before the Court.

45 *Supra* n. 39 at §§12–17. The Court also rejected the applicants' claim for legal costs. It did not consider that legal assistance was required to lodge an application, for the reasons given in Firth and Others. The Court's approach to follow-up cases was made clear in that judgment, which was both concise and unambiguous. No legal assistance was required to consider its implications.

46 *Hirst v. the United Kingdom*, no. 74025/01, ECHR 2005-II, §§58–61 and 69–7.1.

The UK Government, however, has clearly held firm to its position on a continuation of prisoner disenfranchisement. A Ministry for Justice Spokesman reiterated the Government's stance post ruling that: 'The government has always been clear that it believes prisoner voting is an issue that should ultimately be decided in the UK. However, we welcome the court's decision to refuse convicted prisoners costs or damages.'[47]

Commenting on the above and the UK's refusal to amend the *RPA* the Equality and Human Rights Commission stated:

> 'It is for parliament to decide how our laws reflect judgments from the European court of human rights, and today's ruling does not change that. The European court cannot change the UK's laws. It would be for parliament to decide which of the possible convention-compliant approaches is introduced. It is important that the UK complies with the convention not least to reinforce our position when we ask other countries to respect human rights.'[48]

It is clear that the situation in the UK regarding prisoner disenfranchisement and the involvement of the ECtHR is not aided by the current political situation. Where tensions with the Court and perceived interference in what is seen as a central policy decision to disenfranchise incarcerated offenders is particularly provoking for the electorate. Notably the UK Government perceive the ECtHR as overstepping its ambit, infringing upon domestic matters:

> 'In recent years the Court seems to have forgotten that its job is to apply the principles of the Convention as originally intended by those who signed it… As a result, we now find ourselves in a situation where the Court is trying to impose judgments on Britain which would have astonished those who signed the Convention.'[49]

In refusing to implement the current jurisprudence from the ECtHR, the UK is actively engaging in denialism, by not recognising the supremacy of the ECHR system on human rights issues and by denying the incarcerated their right to vote as recognised by jurisprudence from the Strasbourg Court. Speaking on this issue, Sean Humber, legal counsel for some of 554 plaintiffs in *McHugh* stated that:

> 'Despite the European court of human rights having first ruled that the UK government's blanket ban on allowing prisoner voting was unlawful a decade ago, and confirming the unlawfulness of this blanket ban in a succession of further

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47 Quote taken from O. Bowcott 'UK prisoners banned from voting not entitled to compensation' 2015 *The Guardian* www.theguardian.com/society/2015/feb/10/uk-prisoner-voting-ban-breached-human-rights-european-court-rules accessed on 16.04.2015.

48 Ibid.

49 D. Davis and J. Straw, 'We must defy Strasbourg on prisoner votes' 2012 *The Telegraph* <www.telegraph.co.uk/news/uknews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html> accessed 13.04.2015.

> judgments ever since, the government stubbornly refuses to act…We are in a position where the government appears to take a perverse pleasure in unlawfully breaching the human rights of thousands of its citizens. It should be extremely worrying to all of us that the government seems to have so little regard for its international human rights obligations or the rule of law.'[50]

The next part of this paper will address and highlight the weakness of the UK's justifications for the on-going disenfranchisement of the incarcerated, evidencing the lack of contextual basis and easily rebuttable nature of this current denialist position.

3. JUSTIFICATIONS FOR THE BAN ON PRISONER VOTING RIGHTS

As is often the case when engaging with denialists and cases of denialism, the basis for the UK's current position and resulting blanket ban is an easily refuted one. Speaking on the usage of denialist tactics Justice of the South African Supreme Court, Edwin Cameron notes that denialists will usually cling to and draw extensively upon easily disproved arguments, employing 'distortions and half-truths.'[51] The current vilification by the UK Government of the 'interfering Court' is clearly a prejudiced view of the Strasbourg body. Cameron notes that such 'misrepresentations of their opposition's position'[52] are often key to denialist tactics, where the perpetrator seeks to establish themselves in an 'us and them' type scenario, where the inference is that the opposition is out of touch or misguided about the principles the denialist advocates.[53] This is certainly the case in the prisoner disenfranchisement debate, as this section will evidence.

The disenfranchisement of prisoners in the UK dates back to the *Forfeiture Act 1870* and was linked to the notion of 'civic death', whereby through the crime committed the right to partake in elections is removed through lack of a civic responsibility. The 1870 Act denied offenders their rights of citizenship and any person convicted of treason or a felony sentenced to a term of imprisonment exceeding 12 months lost the right to vote until they had served their sentence and then regained their civic duties. The *Representation of the People Act 1969* (hereinafter the RPA) codified the legislation further, permanently introducing a specific provision into electoral law, that convicted persons were legally incapable of voting during the time that they were detained.

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50 *Supra* n. 43.

51 E. Cameron, 'The Dead Hand of Denialism,' edited version of his Edward A Smith Annual Lecture at Harvard Law School's Human Rights Programme on April 8. 2003 *Mail & Guardian (Johannesburg)* <http://ww2.aegis.org/news/dmg/2003/MG030410.html> accessed 16.04.2015.

52 Ibid.

53 Ibid.

The UK has cited many different reasons for the continuation of prisoner disenfranchisement, there are three main points, which provide a basis for the continuation of a blanket ban; the notion of civic death or civic virtue; the Social Contract Theory; and the assumption that denying prisoners the right to vote enhances sentencing aims.

The justifications and reasoning behind these will be examined, alongside the contrary evidence, which will challenge the validity of each of these and their usage as part of the prisoner voting ban.

3.1. CIVIC DEATH ARGUMENT AND HISTORICAL JUSTIFICATIONS

Regarding the notion of 'civic death,' Juliet Lyon, Director of the Prison Reform Trust, has said:

> 'People are sent to prison to lose their liberty not their identity. The UK's outdated ban on sentenced prisoners voting, based on the 19th century concept of civic death, has no place in a modern democracy and is legally and morally unsustainable. Experienced prison governors and officials… believe people in prison should be able to exercise their civic responsibility.'[54]

Although this is the most used justification used to justify the continuation of a blanket ban on voting for those imprisoned, it is undoubtedly the weakest, stemming from the fact that those who utilise the argument have yet to explain its usage. Further, a brief overview of the history of this particular justification serves well to undermine its very practise. The claim of civic death suggests that through the act of their crimes, that prisoners lose their civic virtue, are no longer worthy of being afforded civic duties and as a result befall 'civic death.' It is apparent therefore that the relationship between the individual and the state changes radically when one is found guilty of an offence and incarcerated. The use of civic death as a justification was discredited by Lord Sumption during a recent Supreme Court consideration of the prisoner voting debate, when the judge outlined that depriving prisoners of the vote:

> '[I]s not and never has been a form of outlawry, or 'civil death' (the phrase sometimes used to describe the current state of the law on prisoners' voting rights).

[54] Juliet Lyon, Director of the Prison Reform Trust, quote sourced at: Government Has Six Months To Overturn Prisoners' Voting Ban: <www.prisonreformtrust.org. United Kingdom/ProjectsResearch/Citizenship/BarredfromVoting>.

> On the contrary, until the 1960s, it was mainly the incidental consequence of other rules of law.'[55]

The very term 'civic death' conjures forth draconian ideas of having damaged the democratic process and as a result losing all rights. In the past, this was known as outlawry or attainder, terms which fed into the *Forfeiture Act 1870*. Defining either of these is not an easy task, however, to summarise Blackstone *outlawry* and *attainder* were clearly related:

> 'When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is attainder. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society… He is then called attaint, stained, or blackened. He is no longer of any credit or reputation; he is dead in law.'[56]

The *Forfeiture Act 1870* is regularly cited as the source of prisoner disenfranchisement in English law.[57] However ironically, the 1870 Act was enacted to liberalise the ancient system of the *attainder*, intended 'to give a simple remedy for an oppressive injustice.'[58] The Act retained several restrictions on the civic participation of convicted felons serving more than 12 months' imprisonment, including preventing them from voting or standing as candidates in any election for the duration of their imprisonment. It is important to note here, that due to the temporal clause (sentences over 12 months) that although the Act is commonly cited by Parliament as justification of a continued ban, that if the Act itself were to be enacted in present day that it would pass the requirements of the ECtHR in abolishing a blanket ban allowing some class of prisoners to vote.

Notwithstanding the intentions of the Act, the realities were very different, as in practise even those who qualified to vote under the limited statutory restrictions meant that all classes of convicted prisoner, including those held on remand, continued to suffer 'administrative disenfranchisement' where prisoners were often prevented from attending the polls by way of their incarceration. However, the fact that the act was not followed in practise does

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55 Sumption L at para. 164. *R (on the application of Chester) (Appellant) v Secretary of State for Justice (Respondent) McGeoch (AP) (Appellant) v. The Lord President of the Council and another (Respondents) (Scotland)* [2013] UKSC 63 On appeal from: [2010] EWCA Civ 1439; [2011] CSIH 67.

56 Quote from Blackstone's Commentaries on the Laws of England (1765–1769).

57 See C.R.G, Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after *Hirst v. United Kingdom*' (2012) 22 *Kings Law Journal* 309–334, and C.R.G. Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2012) *Parliamentary Affairs* 1–29, pp. 4–12.

58 C. Forster, MP (1980) 30 *HC Deb* 200, 932.

not take away from the fact that in theory the Act is much more accommodating to prisoners than the current RPA.

The idea of the blanket ban being intrinsic to British democratic process becomes more illogical when one considers the upheaval of voting rules surrounding World War II, particularly those pertaining to prisoners, whereby all prisoners were allowed to vote.[59] The first important alteration of the UK's electoral arrangements occurred when the post-war Labour Government introduced postal ballots under the RPA 1948, making them available even to individuals 'no longer resident at their qualifying addresses.' This simple amendment meant that that, 'prisoners confined in prisons outside their constituencies would be accepted by Returning Officers as eligible to vote by post.'[60] Following the enactment of the *Criminal Law Act 1967*, prisoners across the UK, regardless of the length of their sentence, could participate by postal ballot in the parliamentary by-elections and local government elections held between January 1968 and April 1969. However, progress in this area was turned on its head with little debate in Parliament,[61] in a remarkable move when all convicted prisoners throughout the UK were again disenfranchised under the *RPA 1969*.[62]

What is clear from a brief overview of the idea of civic death, and the attached history of the term, is that it clearly cannot be said that the blanket ban has long been a strong and steadfast part of British history. Even this perfunctory account has proved that the law has been subject to toing and froing on the subject and that the current blanket ban is still only a relatively recent phenomenon.

In terms of progression, it is also noteworthy here that as the remainder of the penal system has evolved, the blanket ban is a key provision that has not, holding on steadfastly to a tradition inherent more to Victorian than modern times. Executions, and the widespread tortuous acts which formed a part of the penological system in place when the civic death argument was created, are long forgotten, deemed archaic, unnecessary and not in keeping with modern penological change. Why, therefore, should the blanket ban be the only exception allowed to continue in use?

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59 RPA 1948, s. 8(1)(e) and see RPA 1948, s. 8(4)(b) for the requirement that a new address must be outside the constituency if a postal vote was sought on the basis of not being resident at a qualifying address.

60 In the years following this amendment no serious objection was raised in relation to the enfranchisement of prisoners in Britain, on the contrary the success of those in Scottish prisons being afforded the vote with no negligible effect felt on the democratic process served as justification for this to continue.

61 Ibid.

62 *RPA* 1969, s. 4.

3.2. THE CIVIC VIRTUE ARGUMENT

The civic virtue and civic death arguments, although predominantly intertwined and spawned from the same ideology, differ on the actual reason or main aim of their use. The civic virtue argument on the contrary stems from the actual abstract and objective committing of a crime as a member of a democratic process. This strand of this argument asserts that when one violates the laws one participated in creating, that one defaults on the agreement to respect the law and hence forfeits any right to assist further in creating it.[63]

However in order to say that prisoners lack civic virtue, certain generalisations must be inferred about their character and although it is true that people who break the law seemingly do not respect the law, the justification on this premise for taking away their vote appears to create or infer a second punishment. Traditionally in most jurisdictions, most sentences for crimes appear in the form of incarceration, thereby invoking the issue that if there has already been a punishment given, then what is the second crime then that prisoners are being punished for by forfeiting their vote?[64] Under the Criminal Justice Act 2003 five different rationales for sentencing offenders are set out, the first being punishment that is proportionate to the seriousness of the crime committed.[65] It is clear here then that the blanket ban could affect this section of the criminal justice act. John Hirst, for instance, the prisoner who brought the issue to the European Court of Human Rights in 2005, was given a 14-year sentence but was detained longer by the parole board because he was considered to be of potential danger to the public. By this point, he had served the supposedly punitive part of his sentence, but continued to be punished by not being allowed to vote.

Clearly, Hirst unnecessarily received greater punishment than his trial judge felt was proportionate because of this. Essentially disenfranchisement is fundamentally an additional punishment and as such requires an additional justification, particularly when one takes this provision of the Criminal Justice Act into account, yet none has as far as this author can gage, ever been supplied. Consequentially this idea of civic death or a second punishment appears jurisprudentially to be morally unjustifiable. Thomas Hammarberg, former

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63 In other words, if you refuse to follow the law, you clearly do not respect it and should lose the ability to partake in its development.

64 Incarceration as a punishment is particularly noteworthy, as recent developments have indicated alternatives to imprisonment, what would occur in these situations, if say, someone is under house arrest or serving an alternative means of sentencing can they still vote if they are remaining at their own address? It is evident that disenfranchisement only operates when you are imprisoned. Why is that? Because it is seen that only the most serious offences result in imprisonment, but that is clearly not always the case. In addition, how does this work re remand prisoners who have not been convicted?

65 *Criminal Justice Act 2005* Part 12 Chapter 1 Section 142 General Provisions About Sentencing: <www.legislation.gov.United Kingdom/United Kingdompga/2003/44/contents>.

Commissioner for Human Rights at the Council of Europe, has articulated his opinion on this matter stating that:

> 'Prisoners though deprived of physical liberty, have human rights… Measures should be taken to ensure that imprisonment does not undermine rights, which are unconnected to the intention of the punishment.'[66]

It is clear therefore the civic virtue argument is decidedly weak and standing as it does on feeble and unpersuasive evidence. The term civic virtue is used as haphazardly as civic death in support of prisoner disenfranchisement, with little evidence that its proponents can even define the essential term of the premise nor explain how it justifies the ban.

3.3. THE SOCIAL CONTRACT

The idea of a social contract as advocated for by Jacques Rousseau and Thomas Hobbes can be simply summarised in this context as the following: that people who misbehave have broken a social contract, and must be punished by the stripping of the rights supplied by the said contract. The Social Contract presents two main forms of argument; the first is that rights have corresponding duties, and secondly with respect to the right to vote, the duty of the citizen is to uphold the social contract (in practice, not to break the law). Therefore, by respecting the law and acting upon the duties prescribed by the Social Contract the citizen receives certain benefits.

The Social Contract theory has been used to justify the current stance taken in Australasia by the Australian and New Zealand Legislators respectively. In Australia, prisoners serving sentences of more than three years are denied the right to vote, and the Australian Human Rights Commission recognised that this is in breach of the State's obligations under Article 25 ICCPR. In New Zealand, the position is much more severe, mirroring the UK's stance with the effect that no person incarcerated after the amendment could register on the electoral roll.[67] Sam Bookman, writing for the New Zealand Human Rights Blog discusses the basis and consequences of this amendment:

> 'To the untrained eye this flies in the face of section 12(a) of our Bill of Rights Act 1990 and section 25 of the International Covenant on Civil and Political Rights 1966 (ICCPR). But to the apparently learned eye of politicians, we can justify any measure

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66 Quote by Thomas Hammarberg taken from, T. Whitehead, 'Denying prisoners the vote makes them 'non people' says human rights chief.', 2011 *Home Affairs* <www.telegraph.co.United Kingdom/news/United Kingdomnews/law-and-order/8419767/Denying-prisoners-the-vote-makes-them-non-people-says-human-rights-chief.html>.

67 In late 2010, New Zealand amended section 80(1) (d) of the Electoral Act 1993 to reflect this ban.

> that causes prisoners ill on the basis that they have already committed a wrong, and hence deserve to suffer the consequences of that wrong.'[68]

The use of the Social Contract argument places a great deal of trust and onus onto the effectiveness of the criminal justice system in the UK, as in order for the Social Contract theory to stick as a justification, we would need to ensure that all criminals are incarcerated or there would need to be an insured and complete consistency in sentencing process and a clear delineation of such. Pursuant to this, the Social Contract Theory gives no guidance as to how we should do this or how we should create this degree of seriousness and minimal threshold. Furthermore, this argument neglects the comparative and complementary question of whether society has upheld its duties to the criminal, the person given obligations under the Social Contract. In short, we must not forget that the contract is bilateral. A further issue with this argument is how or why exactly the punishment for breaking or forsaking obligations under the Contract is disenfranchisement. On this point, it is evident that merely showing criminals have clearly disregarded criminal law, does not make clear which of those rules they should lose the protection of:

> 'The Government have submitted that the measure pursues the aim of preventing crime by sanctioning the conduct of convicted prisoners and also the aim of enhancing civic responsibility and respect for the rule of law … the Government stated that the aim of the bar on convicted prisoners was to confer an additional punishment … it may nevertheless be considered as implied in the references to the forfeiting of rights that the measure is meant to give an incentive to citizen-like conduct.'[69]

The second strand of the Social Contract argument can perhaps be offered as an indicator of why the punishment manifests itself in such a way. The Social Contract theory asserts that when one violates the laws one participated in creating that the criminal defaults on the agreement to respect the law and

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68 Currently in Australia, people who have been sentenced for more than 3 years in prison do not have the right to vote in federal elections while they are serving their sentence. Some argue that it may be reasonable to punish prisoners who have committed serious crimes by depriving them of the right to vote. However, the United Nations Human Rights Committee considers that depriving persons who have been convicted of a felony of the right to vote does not meet the obligations in article 25 of the ICCPR nor does it serve the rehabilitation goals of article 10(3) of the Covenant. (Human Rights Committee 18 December 2006) The Australian Human Rights Commission does not support the view that prisoners should have their right to vote suspended during their period of imprisonment. For an excellent analysis of this see: Sam Bookman Denying voting rights to prisoners in New Zealand: What was Parliament thinking? March 14th, 2013 <http://nzhumanrightsblog.com/newzealand/denying-voting-rights-to-prisoners-in-new-zealand-what-was-parliament-thinking/>.

69 *Hirst v. the United Kingdom,* no. 74025/01, §74, ECHR 2005-II.

hence abdicates any right to assist further in creating it.[70] In short, while the first argument is based on the fact of the law breaking, the latter part of the argument claims that society can deny the vote to citizens based on an inference about their attitude to the law, given their law-breaking. In summary both the civic death and Social Contract argument appear to follow, the rather arbitrary approach that if you refuse to follow the law you clearly do not respect it and should lose the ability to partake in its development.

3.4. ACHIEVING SENTENCING AIMS

A further justification often presented in favour of a continuing ban on prisoner enfranchisement is the premise that the blanket ban serves certain sentencing aims. During a recent statement providing evidence before the Joint Committee on the Draft Voting Eligibility (Prisoner) Bill, the Right Honourable Jack Straw MP (former Home Secretary and Justice Secretary) and David Davies MP (former Shadow Home Secretary and Minister for Europe) both advocated this approach.[71] Notwithstanding this opinion, the use of sentencing aims as a justification for denying the vote is in the author's opinion the weakest of the three. This weakness stems exclusively from the fact that whenever this point is given, that no actual evidence or reasoning is provided, it is merely stated that a blanket ban aids sentencing aims and the prisoner's rehabilitation.

Consequently, despite the over-generalisation of politicians contrary to this, research proves that maintaining a life as close to normality as possible will make re-integration an easier process, aide rehabilitation and diminish recidivism rates upon the prisoner's release.[72] This point was recognised by Judge Caflisch in *Hirst* (No2) at para. 5 of his concurring judgment where he stated that:

> 'The UK Government further contended that disenfranchisement in the present case was in harmony with the objectives of preventing crime and punishing offenders,

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70 For more on this point or for a contrasting view of democracy as an exclusionary system see P. Ramsay, Faking Democracy with Prisoners' Voting Rights, *LSE Law Society and Economy Working Papers* 7/2013 London School of Economics and Political Science & Law Department.

71 The Right Honourable Jack Straw MP & David Davies MP appearing as witnesses before the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill on: Wednesday 17 July at 9.36am. Ended at 10.41am.

72 For more on prisoner disenfranchisement and rehabilitation see: S. Easton, 'Electing the Electorate: The Problem of Prisoner Disenfranchisement' (2006) 69 *The Modern Law Review* 3, pp. 443–452. For the value of education on rehabilitating prisoners see: J.S. Vacca, 'Educated Prisoners Are Less Likely to Return to Prison' (2004) 55 *Journal of Correctional Education* 4, pp. 297–305; for more general writings on the merits of rehabilitation see: M. Monash and E.A. Anderson, 'Liberal Thinking on Rehabilitation: A Work-Able Solution to Crime' (1978) 25 *Social Problems* 5, pp. 556–563; P. Lutz, *Probation and Rehabilitation. Journal of Criminal Law and Criminology* (1931–1951) Vol. 25, No. 6 (Mar. – Apr., 1935) pp. 914–917; C.R. Tittle,

> thereby enhancing civic responsibility (judgment, §50). I doubt that very much. I believe, on the contrary, that participation in the democratic process may serve as a first step toward re-socialisation.'[73]

Also reiterating this point was Dr. Peter Selby, former Bishop to Her Majesty's Prisons and now President of the National Council for Independent Monitoring Boards for Prisons who has stated that:

> 'Denying convicted prisoners the right to vote serves no purpose of deterrence or reform. What it does is to state in the clearest terms society's belief that once convicted you are a non-person, one who should have no say in how our society is to develop … It is making someone an 'outlaw' … it has no place in expressing a civilised attitude towards those in prison.'[74]

The justification itself however follows several trains of thought, the first of those being denunciation. The supporting claim here is that the loss of the vote sends a clear message to the wrongdoer about the evil of their conduct: are we telling them that because they are a bad person they will not only be incarcerated but also further excluded as they committed a crime and their opinion is no longer valued? The second aim offered under the title of sentencing aims, is deterrence. Much like its predecessor, this is also deeply flawed yet is unfortunately frequently offered by governments such as the UK and Australia as a reason for denying the vote.[75] The government defended deterrence as the main purpose behind the blanket ban in *Hirst*:

> 'The Government argued that the disqualification in this case pursued the intertwined legitimate aims of punishing offenders, enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country.'[76]

'Institutional Living and Rehabilitation' (1972) 13 *Journal of Health and Social Behaviour* 3, pp. 263–275; C.A. Visher and J.TRAVIS, 'Transitions from Prison to Community: Understanding Individual Pathways' (2003) 29 *Annual Review of Sociology* pp. 89–113.

73 *Hirst v. The United Kingdom,* no. 74025/01, Concurring Opinion of Judge Caflisch, §5, ECHR 2005-II.

74 'People in prison are citizens, says Archbishop ahead of prisoners voting debate' 2011 *Prison Reform Trust* <www.prisonreformtrust.org.United Kingdom/PressPolicy/News/vw/1/ItemID/114> accessed 11.08.2011.

75 The Australasian governments have been particularly adamant about the merits of prisoner disenfranchisement and sentencing aims. For a more detailed and subjective, account of this see S. Bookmann, 'Denying voting rights to prisoners in New Zealand: What was Parliament thinking? 2013 *NZ Human Rights Blog* <http://nzhumanrightsblog.com/newzealand/denying-voting-rights-to-prisoners-in-new-zealand-what-was-parliament-thinking/>.

76 *Hirst v. the United Kingdom, no.* 74025/01, §51, ECHR 2005-II.

However, there is little evidence to support this stance and therefore this justification fails for two reasons. Firstly, policy makers are assuming that people know about disenfranchisement laws. However, upon commencing research on prisoner disenfranchisement, it became quickly apparent that not many people actually know about prison disenfranchisement. While this may be a generalisation, it is one supported by many working and writing on this topic.[77] As evidence suggests however the majority of those incarcerated are more concerned with maintaining their personal and familial relationships and losing their freedom than with their suffrage.[78] Thus, the deterrence value of the deprivation of a right to vote is slim to none. Acknowledging that there are of course exceptions to each rule it appears that if a person has chosen to forsake their civil liberties that deprivation of their electoral rights may not provide effective deterrence. On the contrary, greater civic involvement actually contributes to an easier transition into life post-incarceration.

4. POLITICS, POLITICAL DENIALISM AND THE PRISONER DISENFRANCHISEMENT DEBATE: A MORAL PANIC?

This section of the paper will address the '*why*' element, namely why the UK has chosen to deny prisoners their voting rights and to deny its international obligations and in doing so, the Court's legitimacy to enforce both Convention norms. The drive behind the UK's act of political denialism is clearly framed against the backdrop of the changing attitudes to the ECtHR within the UK. This section will highlight that within acts of political denialism, there is often an element on which the perpetrator can fasten their argument. In the case of the UK, this would initially be the aforementioned justifications based on 'democratic traditions,' but also those based upon the creation of a 'moral panic,' with two parallel and interconnected aims. The meaning of this in the context of the prisoner voting debate will be discussed shortly.

As a founder of the ECHR, one could be forgiven for thinking that the UK would be a staunch supporter of the Convention system and associated Court. More recently however, the UK's relationship to the ECtHR has become tinged with controversy. Leading politicians advocate an enhanced approach to

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77 S. Bookmann, 'Denying voting rights to prisoners in New Zealand: What was Parliament thinking? 2013 *NZ Human Rights Blog* http://nzhumanrightsblog.com/newzealand/denying-voting-rights-to-prisoners-in-new-zealand-what-was-parliament-thinking/>. See also Murray and Wagner *supra* n. 53 and 59.

78 The Right Honourable Jack Straw MP & David Davies MP appearing as witnesses before the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill on: Wednesday 17 July at 9.36am. Ended at 10.41am and see: S.EASTON, 'Electing the Electorate: The Problem of Prisoner Disenfranchisement' (2006) 69 *The Modern Law Review* 3, pp. 443–452.

domestic protection of ECHR rights, as evidenced during the UK's chairmanship of the Council or Europe and there is renewed interest in the age of subsidiarity present at the Brighton Conference.[79] As these issues fall beyond the constraints and remit of this paper, they will not be considered, however what is important here is the general attitude present within the current UK government towards the ECtHR and prisoner voting rights.

> 'It is frustrating and disappointing to see that, largely because of a single judgment concerning the right to vote of some categories of convicted prisoners, the court has become a sort of *hate figure*, not just in the popular press, but also in the soundbites of politicians.'[80]

As articulated in the opening part of this paper, the UK is a knowing and complicit perpetrator of political denialism. In denying prisoners the vote for political motivations, the UK is blatantly disregarding the judgments of the ECtHR on prisoner disenfranchisement. It is suggested, that in exploring why the UK is denying to recognise and fulfil its Convention obligations, that there is an element of moral panic at play. That the prisoner voting debate is not only an example of political denialism but also of an 'overreaction', or creation of a moral panic.[81]

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79 Steering Committee for Human Rights (CDDH), Final Report on measures requiring amendment of the European Convention on Human Rights (CDDH/2012/R74 Addendum I), 15 February 2012, www.coe.int/t/dgi/brightonconference/Documents/CDDH-amendment-measures-report_en.pdf. The PM, speaking at the Parliamentary Assembly of the Council of Europe, lamented the current interventionist approach of the Court and touted enhanced subsidiarity as key to building a more understanding relationship between states and the Court. In doing so he referenced both terrorism and prisoner disenfranchisement as prime examples of the Court's flaws. He went on to propose that where a state had democratically debated the issue and once the judgment had passed the scrutiny of the domestic judiciary that the Court should not be able to intervene in the matter. The members of the assembly, which Cameron addressed, agreed and voted in a total majority that the Court should become subsidiary to national courts and bodies, acting in an enhanced advisory role.

80 N. Bratza quoted in E. Bjorge, 'Prisoners' Voting Rights: The Gift That Keeps on Giving,' 2012 *Oxford Human Rights Hub* <http://ohrh.law.ox.ac.uk/prisoners-voting-rights-the-gift-that-keeps-on-giving/> accessed 16.04.2015.

81 It is interesting to note here the work of those such as A. Von Hirsch, and M. Wasik, ['Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework' (1997) 56 *Cambridge Law Journal*, 599.] supported by C.R.G. Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2012) *Parliamentary Affairs* 1–29], who maintain that the fact that prisoners were invited and urged to vote during and post WWII in order to maintain a proper electorate completely undermines the main justification for the blanket ban; that it is a traditional and historic feature of the United Kingdom's electoral tradition;
'Universal disenfranchisement of prisoners has not been an ever-present feature of the United Kingdom's electoral system over the last century. Indeed, the restrictions on the franchise have often rested on very limited legal authority and, by the middle of the twentieth century, were subject to extensive exceptions. Nonetheless, in an attempt to persuade the electorate that prisoner disenfranchisement is hardwired into the United Kingdom's system of representative democracy, the opponents of prisoner enfranchisement continue to insist that it was 'never an issue in the British prison system until the lawyers got hold of it through the European Convention on Human Rights.' [B. Jenkin, MP (2011) 523 *HC Deb.* 494].

Cohen suggested in his book *Folk Devils and Moral Panics*, that a moral panic occurs when a 'condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests.'[82] Cohen saw moral panic and denialism as connected ideas, and this is certainly true within political acts of denialism.[83] 'Cohen's understanding of the overreaction to putative social problems, most evident in moral panic, is balanced by his keen observation on the underreaction in which knowledge of human rights violations is concealed and denied.'[84]

If moral panic is the 'overreaction', the denialism is representative of an underreaction, the turning of 'a blind eye to human rights abuses perpetuated by the state.'[85] Indeed prisoner disenfranchisement fulfils many of the characteristics that Goode and Ben-Yehuda developed from Cohen's principles, characteristics which determine whether an event is a moral panic, they list these as concern, hostility, consensus and disproportionality.

Firstly, there is clearly concern that enfranchising prisoners will have a negative effect on society.[86] Secondly, there is hostility towards prisoners due to their having committed a crime to become incarcerated; this is supported by a consensus among both the public and polity that the incarcerated provide a risk to society. Finally, it can be argued that the support behind a continued ban on prisoner enfranchisement is rooted in disproportionality especially as evidenced above, that enfranchising prisoners is linked to better rehabilitation post-incarceration and the majority of European countries have no means of restrictions on the voting rights of those incarcerated.

It is thus suggested, that where the act of denying prisoners their voting rights is an act of political denialism, that the reasoning behind this denial rests upon the creation of two elements of 'moral panic' and that intrinsically for a political power to rely upon denialism that an element of moral panic is key.[87] The first of

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82 S. Cohen, *Folk Devils And Moral Panics*, MacGibbon & Kee, London 1972.

83 S. Cohen, 'Human rights and crimes of the state: the culture of denial' (1993) 26 *Australian and New Zealand Journal of Criminology 2*, 97–115.

84 M. Welsh, 'Moral panic, denial, and human rights: scanning the spectrum from overreaction to underreaction' in D. Downes, P. Rock, C. Chinkin and C. Gearty, *Crime Social Control and Human Rights From Moral Panics to States of Denial: Essays in Honour of Stanley Cohen*, Willen Publishing, London 2007.

85 M. Welsh, 'Moral panic, denial, and human rights: scanning the spectrum from overreaction to underreaction' in D. Downes, P. Rock, C. Chinkin and C. Gearty,, *Crime Social Control and Human Rights From Moral Panics to States of Denial: Essays in Honour of Stanley Cohen*, Willen Publishing, London 2007.

86 This is clearly represented by the traction which the current prisoner voting debate has created in the UK, as articulated in this section it is due to the moral panic created by the idea that 'criminals, rapists and paedophiles' be allowed to vote which has created the impetus for the Government to challenge the Court's decision on this matter.

87 Clearly in order to garner the public support necessary to be elected or to create popular and lasting political legacy, politicians need to draw their manifests based on what will encourage the electorate to support them and vote for them. In appealing to issues of morality and

these is based upon the public's views on criminals, whereby the majority view the enfranchisement of prisoners to be distasteful or morally reprehensible:

> 'When a person commits a crime which is sufficiently serious to put him in prison, he sacrifices his liberty, his freedom of association, and his vote. When we vote in a government, we choose a group of men and women to make laws on our behalf. Convicted prisoners should have no say in this; those who break the law cannot make the law.'[88]

Speaking on this issue David Cameron, Prime Minister, stated that allowing those incarcerated to partake in the democratic process made him 'physically ill.' This position is strongly represented within public opinion on the matter[89] and excluding criminals from the democratic process has therefore garnered easy support for politicians.

The other element to the moral panic surrounding prisoner disenfranchisement rests upon the Court's role. Criticism of the ECHR and the Court is constant both among politicians and the public, and the constant vilifying of the Court has gained much traction both in politics and through the media:[90]

> 'The media, then – in a sense – can create social problems, they can present them dramatically and overwhelmingly, and, most important, they can do it suddenly. The media can very quickly and effectively fan public indignation and engineer what one might call "a moral panic".'[91]

Opposition to human rights has become an apparent favoured policy for politicians across the political spectrum especially regarding prisoner voting rights. It is clear from the refusal of consecutive governments, since the *Hirst* judgment in 2005, to implement the ECtHR judgments and amending the RPA 1998, that prisoner voting rights is not an issue behind which the public can align themselves. Rather, it is clear that upholding the ban and connecting this to British traditions and values, as many politicians have, is the more popular position:

> 'In attempting to overrule British law on prisoner voting rights, Strasbourg judges have exceeded the limits of their proper authority. If the Court does not reflect the

particularly on the issue of prisoner disenfranchisement, clearly a reason why the debate is so fraught and contentious is that it appeals to people's morality and incites a reaction.

88 Talk given to University College London By the Rt Hon Dominic Grieve QC MP Why Human Rights should matter to Conservatives, 3rd December 2014.

89 *Supra* n. 26.

90 One of the reasons politicians find it so easy to criticise human rights is that the popular press have laid the groundwork for them to do so. For some of the myths perpetuated by the British Press regarding human rights see the excellent rightsinfo.org 'The 14 Worst Human Rights Myths,' <http://rightsinfo.org/infographics/the-14-worst-human-rights-myths/>.

91 J. Young in S. Cohen, *Images of Deviance*, MacGibbon & Kee, London 1971, p. 71.

> views of member states of the Council of Europe, there will be conflict. Where the court infringes our constitutional rights, we will not back down.'[92]

It also appears that prisoner voting rights was the ideal issue behind which politicians could drive public support, as Professor Helen Fenwick details, the prisoner voting rights debate has 'proved convenient' for the UK in challenging the ECtHR system.

However, it is not just prisoner voting rights that is causing tension between Strasbourg and the UK. While the prisoner voting debate highlights most of the issues considered to be at stake by the UK Government, there are deeper issues at play in how the UK views and interacts with the ECtHR and Convention system. It now appears that anti-ECtHR sentiment is so prevalent within politics that the Conservative Party has promised to repeal the HRA 1998 if it obtains a majority at the 2015 election. Further, the Party has even threatened withdrawal from the ECHR and Council of Europe system.[93] Speaking on his Party's plan's to create a British Bill of Rights, Former Attorney General, Dominic Grieve, has summed up the current issue between the Government and Strasbourg rather succinctly:

> '[T]he real problem for [the Conservatives] is not so much the interpretation of the Convention by the Strasbourg Court or indeed our own domestic courts but the frustration that an international legal obligation prevents the UK Government from being able to ignore judgments when it considers that they are adverse to its view of what is in the public interest.'[94]

Clearly, the second element of moral panic is tied to this representation of the Strasbourg Court as an 'interfering' or 'meddling' Court. A Court which oversteps its' ambit in seeking to enforce 'un-British values' upon the UK,[95] 'the Strasbourg Court has taken upon itself an extraordinary and unnecessary power to micromanage the legal systems of the Member States of the Council of Europe (or at any rate, those who pay attention to its decisions.'[96]

This position is proliferated all too willingly by the British press, who regularly misrepresent the Strasbourg Court and its judgments, representing

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92 D. Davis And J. Straw, 'We must defy Strasbourg on prisoner votes', 2012 *The Telegraph* <www.telegraph.co.uk/news/uknews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html accessed 13.04.2015.

93 'A Great Day for British Justice: Theresa May Vows UK to leave ECtHR' *Daily Mail* <www.dailymail.co.uk/news/article-2287183/A-great-day-British-justice-Theresa-May-vows-UKEuropean- Court-Human-Rights.html> accessed 13.04.2015. Specifically over prisoner votes: D. Davis and J. Straw, 'We must defy Strasbourg on prisoner votes'.

94 Talk to University College London By the Rt. Hon. Dominic Grieve QC MP, Why Human Rights should matter to Conservatives, 3rd December 2014.

95 Rt. H.D. Davies, 'We Must Defy Strasbourg on Prisoner Votes' *The Telegraph* <www.telegraph.co.UnitedKingdom/news/UnitedKingdomnews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html>.

96 L. Hoffmann, *Forward to Policy Exchange,* Pamphlet 2011.

the Court as a body in which criminals, terrorists etc. use human rights to surpass and trample the rights of UK citizens. Most notable for doing so are the Daily Mail, the Daily Express and the Sun, who consistently refer to the HRA as the 'Hated Human Rights Act.'[97] The Daily Mail is renowned for calling the ECHR a 'charter for criminals and parasites.' It is easy to see consequently, where the support for a ban on prisoner disenfranchisement comes from when one considers media portrayals of human rights and the political manifesto on human rights issues. In what becomes a vicious circle, the misrepresentations peddled by both politicians and media are enthusiastically deployed by further politicians and other media outlets, resulting in the situation currently unfolding in the UK, where regard for human rights under the Convention system is at an all-time low.[98]

Therefore, it can be argued that in answering 'why' the UK has chosen to deny both its obligations under the ECHR system and to deny prisoners the vote that the answer clearly lies in the proliferation of the negative attitude towards the Court and prisoner enfranchisement. Adam Wagner, QC credits this as 'monstering of human rights…where the Human Rights Act and the European

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97 'May: Scrap the Human Rights Act. Home Secretary Calls for hated laws to be axed' *The Sun* <www.thesun.co.uk/sol/homepage/news/3848868/May-Scrap-the-Human-Rights-Act.html>; 'Tories pledge to scrap 'dangerous' Human Rights Act' *Express* <www.express.co.uk/news/uk/381630/Tories-pledge-to-scrap-dangerous-Human-Rights-Act>; 'Human rights is a charter for criminals and parasites our anger is no longer enough' Mail on Sunday, 15 July 2012; 'Human rights laws are a charter for criminals, say 75% of Britons' 2012 *Daily Mail* <www.dailymail.co.uk/news/article-2130224/Human-rights-laws-charter-criminals-say-75 Britons.html> accessed 13.03.2015; 'Migrant facing deportation wins right to stay in Britain… because he's got a cat' 2009 *Daily Mail* <www.dailymail.co.uk/news/article-1221353/Youve-got-cat-OK-stay-Britain-officials-tell-Bolivianimmigrant.html> accessed 13.04.2015; 'Immigrant allowed to stay because of pet' 2009 *Daily Telegraph* <www.telegraph.co.uk/news/newstopics/howaboutthat/6360116/Immigrant-allowed-to-stay-becauseof-pet-cat.html> accessed 13.04.2015; D. Barrett, '102 foreign criminals and illegal immigrants we can't deport' 2011 *Sunday Telegraph* <www.telegraph.co.uk/news/uknews/law-and-order/8570639/102-foreign-criminals-and-illegalimmigrants-we-cant-deport.html> accessed 13.04.2015.

98 Arguably leaving the ECHR and CoE system will not resolve all issues that the UK has with human rights and external influence. Devolution must be considered. The Conservative Party's the Bill of Rights Commission eventually figured out that devolution is an integral part of plans to withdraw from the ECHR system. As a result, Parliament's options may be limited whilst issues surrounding Scotland, Northern Ireland and Wales and their say in the matter remain under-appraised.

Consequently, the UK would be sending a significant signal to other states also not implementing ECtHR judgments. Any justification for leaving must be balanced against the very significant signal which the UK would be sending that it has lost confidence in the European Convention on Human Rights. Moreover, the British Bill of Rights would have to mitigate all the factors that leaving Strasbourg would arguably create. If the British Bill of Rights is not up to par with Convention protections, this would leave individuals in the UK in a weaker position against the state if their rights are breached.

The key question is therefore whether the current plans to withdraw from the European Court of Human Rights will solve the problems which the Conservative party and press are so found of highlighting.

Court of Human Rights have become monsters in the eyes of the public, and those who claim using human rights law have themselves been monstered.'[99] In short, it appears that this monstering or increasingly poor public and political attitude towards the ECtHR has been utilised by the Government to drive public support. Consequently, the monstering of human rights is key to the prisoner enfranchisement debate, as it is the impetus or driving force behind support for the UK's committing such a blatant act of denialism.[100]

5. CONCLUSION

In conclusion, the aim of this paper has been to examine the reasoning and justifications behind support for the continued blanket ban on prisoner disenfranchisement in the UK. The example of denialism represented by prisoner disenfranchisement in the UK has been addressed from two angles. Firstly the '*how*' was explored – how the UK can justify such a blatant denial of both the rights of prisoners to vote and as a result deny both the legitimacy of the ECtHR and its human rights obligations. The main justifications – civic death, civic virtue, the social contract and the ambiguous achieving of sentencing aims – were all explored as valid justifications for continuation of the ban. It is apparent from an exploration of these that each of the justifications is easily refuted, undermining any value to the argument proposed in support of the ban.

Secondly, the *'why'* element was explored, namely why the UK has chosen to deny prisoners their voting rights and to acknowledge its international

99 A. Wagner, 'the Monstering of Human Rights,' conference paper delivered at Human Rights in the UK Media: Representation and Reality, University of Liverpool, 19 September 2014. Paper accessed at <http://ukhumanrightsblog.com/2014/09/22/the-monstering-of-human-rights> accessed 16.04.2015.

100 On this point, academics have suggested many reasons why the Conservative Coalition Government has chosen to challenge the Court's authority. It is argued that this is predominantly rooted, as Grieve (referenced in main text) articulates it appears that ultimately the ECHR system is viewed as an inconvenient as it gets in the government's way, or hampers certain societal policies. On this point see, A. Hirsch, 'The MPs voting against prisoners, and 21st century civic death' 2011 *The Guardian*. M. Elliott, 'Repealing the Human Rights Act, withdrawing from the ECHR: be careful what you wish for' 2013 *Public Law For Everyone* <http://publiclawforeveryone.wordpress.com/2013/03/04/repealing-the-human-rights-act-withdrawing-from-the-echr-be-careful-what-you-wish-for/>; C. Murray 'Prisoner Voting: The Human Rights Issue that Keeps on Giving' 2013 *Bloglovin* <www.bloglovin.com/frame?post=1278443997&group=0&frame_type=a&blog=6976793&link=aHR0cDovL2ZlZWRwcm94eS5nb29nbGUuY29tL35yL2h1bWFucmlnaHRzL2t4THUvfjMvNE9oUXpEZnU0SHMv&frame=1&click=0&user=0>; J. Duffy, 'Apocalypse soon? The UK without the European Convention on Human Rights' 2013 *UK Human Rights Blog* <http://ukhumanrightsblog.com/2013/05/17/apocalypse-soon-the-uk-without-the-european-convention-on-human-rights/>; H. Fenwick 'An appeasement approach in the European Court of Human Rights?' 2012 *UK Constitutional Law Association* <http://ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/>.

obligations, consequently denying the Court's legitimacy to enforce the Convention. The main reason why this concrete case of denialism is playing out was addressed against the backdrop of the changing attitudes to the ECtHR within the UK. It was highlighted that within acts of political denialism, there is often an element on which the perpetrator can fasten their argument. In the case of the UK, this was held to be the aforementioned justifications based on 'democratic traditions,' but also those based upon the creation of a 'moral panic,' with two parallel and interconnected aims. One side of which is fuelled by public distaste for those incarcerated and the other driven by an undermining of the ECtHR system through vilifying of the Court.

Thus, while it is clear that being devoid of strong justifications will not cause the UK to depart suddenly from its current position, it does amount to a certain lack of credibility regarding its adopted position on the rights of prisoners to vote in the face of clear decisions to the contrary by the ECtHR. This lack of credibility when coupled with the continuing threat of not only being still in breach of treaty obligations holds to seriously undermine the UK's stance as a key figure within European human rights, especially as the UK continues to flout the Court's rulings in refusing to implement the judgments, lifting the blanket ban.

The validity of these justifications is evidently not of concern to the UK as proponents of this concrete case of denialism. Rather, this is grounds within which to utilise public policy arguments to justify a political stance against an international legal body (the ECtHR). This paper has addressed these public policy insights and justifications to gain insight into concrete situations where a human rights abuse is supported by and committed by a State itself. In highlighting both how the UK has attempted to justify its current position and why it is committing such a blatant denial of human rights and its' international obligations, this paper seeks to contribute to research within political motivated instances of denialism against human rights provisions. The prisoner voting rights debate thus provides an excellent example within which to address why and how denialism is committed, and consequently how a leading state within the European human rights system can justify continued human rights violations.