

In pursuit of universal suffrage: the right of prisoners in Africa to vote

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Abstract

This article assesses decisions of domestic courts in Africa on the right of prisoners to vote. Although there is an increasing recognition of this right to vote at national level, it is difficult to talk of such a 'right' at the international, or African level. Nevertheless, it appears from the decisions of international and regional tribunals that international human rights law is not in favour of automatic and indiscriminate criminal disenfranchisement laws. Some courts in Africa have played an active role in enfranchising prisoners. Yet, the overwhelming majority of African countries continue to exclude prisoners from elections. A decision at the African level, either by the African Commission on Human and Peoples' Rights, or by the African Court on Human and Peoples' Rights, can contribute to clarifying the status of the right of prisoners to vote in the African human rights system. Human rights NGOs should, therefore, identify and submit a suitable test case to the commission, and if possible to the court. This article recommends that the African Commission should submit an application requesting the advisory opinion of the African Court on the issue of criminal disenfranchisement with its diverse manifestations.

INTRODUCTION

International, regional, and domestic human rights systems, recognise the right to political participation in the democratic governance of one's country. Two of the most important elements of the right to political participation, are the right to vote and to be voted for. The right to vote is a fundamental political right as it creates continuous opportunities to select those governing a nation.¹ Indeed, elections have become the hallmark of democratic governance. A cursory look at the practice of states reveals that elections may be conducted in diverse ways. While some countries adopt majoritarian or plurality electoral systems, others opt for electoral systems that ensure

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¹ Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* (2005) 547.

proportional representation for contending political groups. The age limit and other conditions governing the right to vote and the right to stand for election, may vary across borders. International law does not prescribe a universal model, and therefore recognises a margin of discretion for states in determining the mechanisms to give effect to the right to political participation. This discretion is not absolute. The choices made by states to give effect to the right to political participation are subject to constitutional standards at the domestic level, and, where applicable, international and or regional supervision based on requirements set out in relevant human rights instruments.

One area exhibiting diverse state practice, relates to the granting of the franchise to prisoners.² Despite the fact that the right to vote has steadily been extended to all adult citizens of sound mind, the imposition of restrictions on the right of individuals in legal custody to vote (criminal disenfranchisement) is an accepted and common practice. Criminal disenfranchisement is the principal relic of the old notion of ‘civil death’, where convicts were deprived of their legal, political and civil rights.³ In many countries, including the overwhelming majority of states in Africa, there is a general, and often automatic, restriction on the franchise in relation to persons under lawful custody. For instance, in Tanzania individuals who have been sentenced to death, and all persons under sentence of imprisonment for more than six months, are disqualified from voting.⁴ In Ethiopia individuals who are serving a sentence of imprisonment are excluded from registering to vote during the period of their incarceration.⁵

² For the purpose of this article, a prisoner refers to a person who is in detention for committing a crime. It also includes remand prisoners who are in pre-trial detention awaiting the final decision of a court on whether they have committed the alleged crime. It does not include those who are detained against their will for reasons other than the commission of crimes such as mental health.

³ Ewald “‘Civil death’: the ideological paradox of criminal disenfranchisement law in the United States” 2002 *Wisconsin Law Review* 1045, 1049 observing that criminal disenfranchisement ‘imposes on criminal offenders something akin to the medieval condition of “civil death”’.

⁴ The National Elections Act, Cat 343, s 11(1)(c). However, individuals who are serving a sentence of imprisonment as an alternative to or in default of payment of a fine are not excluded from voting.

⁵ Electoral Law of Ethiopia Amendment Proclamation 532/2007, ar 33(3)(b). This provision does not expressly exclude remand prisoners – those who are in prison awaiting their conviction and sentencing. However, in practice, no arrangements are made to ensure that pre-trial detainees exercise their right to vote.

In addition, courts may, on a case by case basis impose limits on the convicted criminals to vote and to be elected.⁶

The scope of the limitations on the right of prisoners to vote, varies across borders. In some countries the ban on the right to vote ends upon the release of a prisoner. In such cases, criminal disenfranchisement is temporary. In others, particularly in the United States, criminal disenfranchisement is sometimes permanent and continues even after the sentence of imprisonment has been served.⁷ In some countries criminal disenfranchisement depends on the nature of the offence, regardless of the length of the prison sentence. Conviction for serious offences, such as violent crimes, treason, electoral offences, and other felonies, may entail denial of the right to vote. In other countries it depends on the severity of the sentence regardless of the nature of the offence. Despite the diversity in approach, the dominant practice, in particular in Africa, continues to support restrictions on the right of prisoners to vote.

The lack of political incentives and the reluctance of the political organs to expand the franchise to all adult citizens of sound mind have led to the transfer of the battle on the right of prisoners to vote to judicial organs. In recent years, this right has become the subject of litigation at the international, regional and national levels. The European Court of Human Rights has ruled on a number of cases involving the right of prisoners to vote.⁸ The United Nations Human Rights Committee has also decided on a communication regarding an automatic ban on the right of those in legal custody to vote.⁹ The right of prisoners to vote has not yet been the subject of litigation at the African regional level. Neither the African Commission

⁶ The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation no 414/2004, art 123(a).

⁷ For instance, in some states in the United States, individuals convicted of felonies are permanently disenfranchised, unless the government approves rights restoration on an individual basis – ‘Felony disenfranchisement laws in the United States’ *The Sentencing Project, Research and Advocacy for Reform* available at: http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Nov2012.pdf (last accessed 27 May 2013); ‘Criminal disenfranchisement laws across the United States’ available at: http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48642.pdf (last accessed 27 May 2013).

⁸ For instance, *Hirst v The United Kingdom* (No 2) application no 74025/01 (30 March 2004). See the discussions in section II below.

⁹ *Denis Yevdokimov and Artiom Rezanov v the Russian Federation*, communication No 1410/2005 (21 March 2011). See the discussions in section II below.

on Human and Peoples' Rights, nor the African Court on Human and Peoples' Rights has had the opportunity to rule on the validity of criminal disenfranchisement. However, courts in some African countries have addressed the extent to which their respective constitutions protect the right of prisoners to vote.

The purpose of this article is to explore decisions of domestic courts in four African countries, namely South Africa, Ghana, Kenya, and Botswana, on criminal disenfranchisement. With a view to providing a background, section two assesses the right to political participation in the international and African human rights systems. In particular, it investigates the extent to which international human rights law recognises the right of prisoners to vote, as reflected in decisions of supranational human rights tribunals. Section three analyses the decisions of domestic courts in selected African countries on the constitutional right of prisoners to vote. The countries are chosen based on the fact that their courts have had the opportunity to pronounce on this right. The last part concludes the article. It observes that, although there is an increasing recognition of prisoners' right to vote, it is problematic to talk of such a 'right' at the international level. It appears that international human rights law does not favour automatic and indiscriminate criminal disenfranchisement laws. Most importantly, courts in some African countries have been active in enfranchising prisoners, yet many countries in Africa continue to exclude prisoners from voting. A decision at the African level, either by the African Commission or the African Court – the two principal organs in charge of the protection and promotion of human rights – could contribute to clarifying the status of the right to vote of prisoners under the African human rights system.

Although there is considerable literature on criminal disenfranchisement, it is mostly in the context of the United States. There is no existing scholarship that adequately explores the status of the right of prisoners to vote in Africa. In particular, no academic study addresses the jurisprudence of domestic courts in Africa on criminal disenfranchisement from a comparative perspective. The leading work dealing with the rights of prisoners does not address the right to vote.¹⁰ This article is, therefore, a significant addition to comparative legal studies. Though the discussion of the decisions will look at how the domestic courts have responded to purported justification for

¹⁰ Sarkin (ed) *Human rights in African prisons* (2008).

laws that disenfranchise prisoners, this article does not assess theoretical justifications and criticisms of criminal disenfranchisement.¹¹

THE RIGHT OF PRISONERS TO VOTE IN THE INTERNATIONAL HUMAN RIGHTS SYSTEM

The right to political participation is one of the most widely recognised rights in international and regional human rights systems.¹² The founding instrument that recognises this right, is the 1948 Universal Declaration of Human Rights. Article 21 of the Universal Declaration provides that ‘everyone’ has the right to take part in the governance of his or her country.¹³ The power of governments to exercise legitimate authority must rest on ‘the will of the people’.¹⁴ The Declaration particularly singles out periodic and

¹¹ Traditionally, two theories have provided justifications to criminal disenfranchisement. Lockean social-contract theories have been relied on to assert that criminals should lose their say in the political process because they have broken the social-contract. According to some interpretations, republican theories imply that criminals are less virtuous than law-abiding citizens. As such, their involvement in elections undermines the ‘purity of the ballot box’. The idea is that only ‘good’ citizens should be allowed to vote. For the theoretical defence of the practice of criminal disenfranchisement, see Clegg ‘Who should vote?’ (2001) 6 *Texas Review of Law and Politics* 159, 178 arguing that criminal disenfranchisement laws ‘ensure that those casting ballots pass a minimum threshold of trustworthiness and common civic commitment and demonstrate a willingness to abide by the laws they would require others to follow’; Manfredi ‘Judicial review and criminal disenfranchisement in the United States and Canada’ (1998) 60 *The Review of Politics* 277 arguing that ‘there is a principled defence of criminal disenfranchisement that is grounded in the relationship among citizenship, civic virtue and punishment’. For theoretical criticisms of criminal disenfranchisement, see Ewald n 3 above, contending that ‘while liberal and republican ideas about self-government have long provided solid foundations for criminal disenfranchisement in American political thought, the goals and principles of both ideologies also undergird powerful challenges to the practice’; Schall ‘The consistency of felon disenfranchisement with citizenship theory (2006) 22 *Harvard Black Letter Law Journal* 53 arguing that criminal disenfranchisement is incompatible with liberal conceptions of citizenship and democracy; Ewald *Punishing at the polls: the case against disenfranchising citizens with felony convictions* (2003); Manza & Uggen *Locked out: felon disenfranchisement and American democracy* (2006) 12 discussing the ‘underlying logics of felon disenfranchisement’; Furman ‘Political illiberalism: the paradox of felon disenfranchisement and the ambivalences of Rawlsian justice’ (1997) 106 *Yale Law Journal* 1197; Reiman ‘Liberal and republican arguments against disenfranchisement of felons’ 2005 *Criminal Justice Ethics* 3 arguing that disenfranchisement of offenders who have completed their sentences is morally wrong, and that enfranchising all offenders – even those in prison would – be good social policy’.

¹² For a detailed discussion of the right to political participation in international and regional instruments, see Fox ‘The right to political participation in international law’ in Fox & Roth (eds) *Democratic governance and international law* (2000) 52–69.

¹³ Article 21(1) Universal Declaration of Human Rights, adopted and proclaimed by United Nations General Assembly resolution 217 A (III) of 10 December 1948.

¹⁴ Universal Declaration of Human Rights, art 21(3).

genuine elections as the principal tool for the realisation of the right to political participation.

Following the foundation laid down by the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR) reaffirmed the right to political participation.¹⁵ More specifically, the ICCPR guarantees the right to vote and to be elected in regular and genuine elections in a manner that guarantees the ‘free expression of the will of the electors’.¹⁶ Unlike the Universal Declaration which guarantees the right to political participation to ‘everyone’, the ICCPR limits the right to ‘citizens’ of the state concerned. The right to political participation is also guaranteed in the Convention on the Elimination of All Forms Discrimination against Women,¹⁷ the United Nations Declaration on the Rights of Indigenous Peoples,¹⁸ the United Nations Convention on the Rights of Persons with Disabilities,¹⁹ the European Convention on Human Rights and Fundamental Freedoms,²⁰ and the American Convention on Human Rights.²¹

In the African context, the African Charter on Human and Peoples’ Rights recognises the right to participate freely in the government of one’s country, either directly or indirectly.²² Similar to the ICCPR, and in contrast to the Universal Declaration, the African Charter limits the applicability of the right to participation to ‘citizens’ of a country. The guarantee of the right to

¹⁵ Article 25, The International Covenant on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976.

¹⁶ ICCPR, art 25(3).

¹⁷ Article 7 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted by the United Nations General Assembly resolution 34/180 of 17 December 1979, entered into force on 3 September 1981.

¹⁸ Articles 5 and 18, United Nations Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly on 13 September 2007.

¹⁹ Article 29, United Nations Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly Resolution A/RES/61/106 of 24 January 2007, entered into force on 3 May 2008. Under art 5(6) criminal punishment must only serve the goal of reform and social adjustment of prisoners.

²⁰ Article 3, First Protocol to the European Convention on Human Rights and Fundamental Freedoms, adopted by members of the Council of Europe on 20 March 1952. This provision does not expressly guarantee the right to vote and to stand for elections. It simply imposes a positive duty on member states to hold regular and free and fair election which are based on universal suffrage and held in secret ballot.

²¹ Article 23 The American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights on 22 November 1969.

²² Article 13, African Charter on Human and Peoples’ Rights, adopted by the Organisation of Africa Unity on 27 June 1981, entered into force on 21 October 1986.

participation in the African Charter is more concise than both the Universal Declaration and the ICCPR. The Charter does not single out periodic multi-party elections as the principal tool of political participation.²³ There is very little doubt that article 13 encompasses the right to vote and to be elected in regular elections. It is also clear that the right to political participation is not absolute. Article 13 provides that the right should be exercised ‘in accordance with the provisions of the law’. According to the African Commission, the right to participation, including the right to vote, extends to ‘every citizen’ and ‘its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular State’.²⁴ Article 9 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women similarly guarantees the right of African women to participate in political and decision-making processes and imposes a duty on states to promote the participation of women, through measures, inclusive of affirmative action.²⁵

Another important instrument that specifically outlines the right to participate in elections is the African Charter on Democracy, Elections and Governance which came into force in February 2012.²⁶ The Preamble of this Charter clearly implies that popular participation should form the bedrock of democracy and good governance. In fact, the establishment of the necessary conditions to foster citizen participation is one of the basic objectives and principles of the Charter.²⁷ Article 4 recognises the inalienable right to popular participation through universal suffrage.²⁸ For this purpose, states should organise regular, transparent, free and fair elections.²⁹ This Charter, just like the African Charter on Human and

²³ Moreover, Fox observed that art 13 of the African Charter ‘fails to stipulate that an electoral choice must reflect the free expression of the electors’ will or the opinion of the people. ... The absence of such a provision suggests that art 13 may permit one-party elections’ – Fox ‘The right to political participation in international law’ (1992) 17 *Yale Journal of International Law* (1992) 539, 568.

²⁴ *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) par 75.

²⁵ Article 9, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the African Union Assembly on 11 July 2003, entered into force on 25 November 2005.

²⁶ African Charter on Democracy, Elections and Governance, adopted during the 8th Ordinary Session of the African Union General Assembly on 30 January 2007, entered into force in February 2012.

²⁷ *Id* at art 2(10) and art 3(7).

²⁸ *Id* at art 4(2).

²⁹ *Id* at arts 3(4), 17 and 32(7).

Peoples' Rights, does not explicitly recognise the right to vote and to stand for elections as essential components of the right to political participation.

There are also several resolutions and declarations that emphasise the importance of an inclusive approach towards criminal justice. The Standard Minimum Rules for the Treatment of Prisoners affirm that the period of imprisonment should be used to reform, rehabilitate and reintegrate prisoners to ensure that they are 'not only willing but able to lead a law-abiding and self-supporting life'.³⁰ Prisoners should be treated in a way that emphasises their continuing part in the community.³¹ The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa similarly calls on states to promote the integration of prisoners into society.³² The Minimum Rules call on states to safeguard the 'civil interests' of prisoners, as well as their social security interests.³³ The Basic Principles for the Treatment of Prisoners provide that 'all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights'.³⁴ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment calls on states to respect the inherent dignity of prisoners.³⁵ The combined reading of these soft laws leads to the conclusion that prisoners should continue to participate in socio-political activities and should retain all their rights other than those that are intimately linked to their incarceration.

The above discussion reveals that international and regional human rights instruments guarantee the right to vote to all citizens. Although none of these

³⁰ Rule 58, Standard Minimum Rules for the Treatment of Prisoners, adopted by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955 and approved by the Economic and Social Council resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

³¹ Standard Minimum Rules, Rule 61.

³² Principle 3, The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, adopted by the African Commission on Human and Peoples' Rights meeting at its 34th Ordinary Session held in Banjul, The Gambia from 6–20 November 2003.

³³ Standard Minimum Rules, Rule 61.

³⁴ Principle 5, Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

³⁵ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly Resolution A/RES/43/17, 76th plenary meeting of 9 December 1988.

instruments expressly addresses the right of prisoners to vote, given that prisoners are citizens, a literal interpretation of the relevant instruments can lead to the conclusion that states must make arrangements to enable prisoners to vote. The right to participation in general, and the right to vote in particular, is not absolute and may be limited under conditions outlined by each of the instruments. For instance, under article 13 of the African Charter, the right to participation must be exercised ‘in accordance with the provisions of the law’. The most important question then, is whether the restriction on the right of prisoners to vote constitutes a legitimate, necessary and proportional limitation of the right to participation.

The first international tribunal that had the opportunity to address the right of prisoners to vote in a contentious proceeding was the European Court of Human Rights.³⁶ The United Nations Human Rights Committee, the organ in charge of monitoring compliance with the ICCPR, has also expressed its views on the issue of criminal disenfranchisement on several occasions.³⁷ The decisions of these tribunals help to clarify the status of the right of prisoners to vote which is not apparent from the provisions of the human rights instruments.

Article 3 of the First Protocol to the European Convention on Human Rights guarantees the right to regular, free, and fair elections. Although this provision is formulated in the form of state-duties, and not individual rights, the European Court ruled that the two rights constitute essential components of the duty to hold free and regular elections.³⁸ The exact content of this provision has been the subject of litigation in a number of cases. One of the most controversial and politically divisive issues that has had to be addressed has been the status of prisoners’ right to vote in the European human rights system.

³⁶ For a list of the cases on the right to vote of prisoners, see ‘Factsheet – prisoners’ right to vote’ available at: http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf (last accessed 27 May 2013).

³⁷ For instance, *Denis Yevdokimov and Artiom Rezanov v the Russian Federation*, communication No 1410/2005 (21 March 2011).

³⁸ The European Court on Human Rights has interpreted this provision to also include ‘the subjective rights to vote and to stand for election’ – see, for instance, *Ahmed and others v The United Kingdom*, application 22954/93 (Judgment of 2 September 1998) par 75. The unique phrasing in terms of state obligation was intended to give greater solemnity to the Contracting States’ commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference.

In the case of *Hirst v the United Kingdom*³⁹ the complainants submitted that the law and practice in the UK where individuals sentenced to prison terms are automatically disenfranchised for the duration of their detention, violated the right to vote. The court observed that the right to vote must be ‘acknowledged as being the indispensable foundation of a democratic system. Any devaluation or weakening of that right threatens to undermine that system and it should not be lightly or casually removed’.⁴⁰ Any limitation of the right to vote is therefore suspect. The court emphasised that any limitation to a right recognised in the European Convention, should be based on law; should not curtail the right in question to such an extent as to impair the very essence of the right; should pursue a legitimate aim; and the means employed should be proportionate to the aim.⁴¹ Despite observing that there was no clear evidence that disenfranchisement deterred crime, and that there was no clear, logical link between the automatic loss of voting rights and the imposition of custodial sentences, the court nevertheless refrained from scrutinising the legitimacy of the objectives of disenfranchisement rules.⁴² It rather focused on whether the means used to achieve the stated objectives were proportionate. It held that blanket bans were indiscriminate and absolutely disregarded the personal circumstances of the prisoner and the gravity of the crimes he or she committed (paragraph 51). As a result, the court concluded, automatic disenfranchisement leads to arbitrary and disproportionate outcomes.

The court recognised that there were some exceptions to the UK Law that limited the right of prisoners to vote. The ban only affected those sentenced to prison terms and it did not apply to prisoners on remand, to those who are in custody for failure to pay fines and to those detained for contempt of court. Furthermore, disenfranchisement is temporary – it falls away upon release. Nevertheless, these exceptions did not adequately appease the indiscriminate and sometimes arbitrary outcomes of the ban. While reaffirming the wide margin of appreciation states enjoy, owing to the lack of consensus on the issue, and the wide range of approaches adopted by

³⁹ *Hirst v The United Kingdom* (No 2) application no 74025/01 (30 March 2004).

⁴⁰ *Id* at par 41.

⁴¹ *Id* at par 36.

⁴² The Grand Chamber detached itself from this conclusion of the court. It held that it is difficult to hold that these aims are untenable. The court observed ‘whatever doubt there may be as to the efficacy of achieving these aims through a bar on voting, the Court finds no reason in the circumstances of this application to exclude these aims as untenable or *per se* incompatible with the right guaranteed under Article 3 of Protocol No 1’ – *Case of Hirst v The United Kingdom* (No 2) application No 74025/01 (6 October 2005) par 75.

member states of the European Council, the Chamber concluded that it could not accept that ‘... an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation’.⁴³ The automatic exclusion of all convicted prisoners from voting, regardless of the gravity of their offence, the sentence and the personal circumstances of the offender was therefore found to be disproportionate to any purpose it was intended to achieve.

The case was referred to the Grand Chamber at the request of the UK.⁴⁴ The Grand Chamber observed that the historical trajectory has been towards voter inclusion and that ‘universal suffrage has become a basic principle’.⁴⁵ Nevertheless, the duty of states to organise free elections is not absolute and is subject to implied limitations. The court reiterated the severity of automatic criminal disenfranchisement and observed that ‘the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned’.⁴⁶ It also emphasised the role of courts in ensuring that deprivations of political rights are not arbitrary. The Grand Chamber agreed with the first Chamber that, despite the existence of some exceptions, the ban included such ‘a wide range of offenders and sentences, that it amounted to a ‘blunt’ exclusion’.⁴⁷ The ban was so extensive as to be disproportionate. The court noted that there was indeed a variation in the practice of states. Although it is important, state practice is not itself determinative of substantive issues.⁴⁸

In a similar case⁴⁹ the European Court had to decide whether the ban on convicts sentenced with final effect to imprisonment of more than one year, violated article 3 of the First Protocol. The court observed that criminal disenfranchisement must be proportionate to the end pursued, and ‘must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the

⁴³ *Hirst v The United Kingdom* (No 2) par 51.

⁴⁴ Case of *Hirst v The United Kingdom* (No 2) Grand Chamber, application no 74025/01 (6 October 2005).

⁴⁵ *Id* at par 59.

⁴⁶ *Id* at par 71.

⁴⁷ *Id* at par 82.

⁴⁸ *Id* at par 81. The court found a violation of art 3 in a subsequent case due to the failure of the UK to comply with the decision of the Grand Chamber in the *Hirst* case – see *Case of Greens and MTV The United Kingdom*, applications nos. 60041/08 and 60054/08 (23 November 2010).

⁴⁹ Case of *Frodl v Austria*, application no 20201/04 (8 April 2010). The disenfranchisement ends six months after the term of imprisonment has been served.

people through universal suffrage'.⁵⁰ Although the Austrian Law was less exclusionary than the Law in the UK which was challenged in *Hirst*, it was still found to be incompatible with article 3. The court concluded that

Disenfranchisement may only be envisaged for a rather narrowly defined group of offenders serving a lengthy term of imprisonment; there should be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and such a measure should *preferably* be imposed not by operation of a law but by the decision of a judge following judicial proceedings. ... [A]nd that there must be a link between the offence committed and issues relating to elections and democratic institutions.⁵¹
(Emphasis added.)

The court further noted that it was essential that any decision on disenfranchisement should generally be taken by a judge, taking into account the individual circumstances of the case. This decision subtly expanded the right to vote guarantee by requiring that the decision to bar prisoners from voting should 'preferably' be made by judicial organs on a case-by-case basis. Austria's request to refer the case to the Grand Chamber was rejected.

In yet another case⁵² the complainant challenged a law in Italy which barred criminals sentenced to at least three years of imprisonment from voting. The ban is temporary where the sentence is between three and five years, and permanent when the prison sentence is longer than five years. A temporary ban entails loss of the right to vote for five years. In addition, conviction on certain offences results in an automatically loss of the right to vote, regardless of the sentence.⁵³ The right to vote may be rehabilitated by a court of law when 'the offender has displayed consistent and genuine good conduct' three years after the date on which the principal sentence had been served. The first Chamber reiterated that the disenfranchisement was indiscriminate as it automatically depended on the sentence. Hence, the Law was in violation of article 3 of Protocol 1.

⁵⁰ *Id* at pars 24 and 28.

⁵¹ *Id* at par 34.

⁵² *Scoppola v Italy* (No 3) application no 126/05 (18 January 2011).

⁵³ These offences include embezzlement of public funds, extortion, market abuse, certain offences against the judicial system, such as perjury by a party, fraudulent expertise or interpretation, obstructing the course of justice and disloyal counsel and offences involving abuse and misuse of the powers inherent in public office.

The case was referred to the Grand Chamber.⁵⁴ The Grand Chamber first reiterated the main standard established in *Hirst*, which is that laws that generally, automatically and indiscriminately bar all imprisoned criminals from voting, are incompatible with article 3. In contrast to the views of the first Chamber in *Frodl*, the Grand Chamber observed that, although desirable, the involvement of courts was not a necessary precondition that determines the justifiability and proportionality of all restrictions on the right to vote.⁵⁵ Limitations may also be imposed based on laws enacted by the legislature. The Grand Chamber observed that, given the specific circumstances of the applicant, the Italian Law did not lead to automatic, general and indiscriminate disenfranchisement as it was only those sentenced to at least three years' imprisonment who were denied their right to vote and that the duration of the denial also depended on the duration of the sentence.⁵⁶ In all cases, a person has the possibility of regaining his or her right to vote through judicial rehabilitation. This, and other possibilities, ensured that 'the Italian system is not excessively rigid'.⁵⁷ The Grand Chamber concluded that 'the legal provisions in Italy defining the circumstances in which individuals may be deprived of the right to vote show the legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand'.⁵⁸ The restrictions on the right to vote of prisoners did not 'thwart the free expression of the people in the choice of the legislature' guaranteed under article 3.⁵⁹ The court concluded that there was no violation of the right to vote.

The UN Human Rights Committee has also had the opportunity to determine the status of the right of prisoners to vote in the ICCPR. As indicated above, article 25 guarantees the right of citizens to vote and outlaws any 'unreasonable restrictions' to this right. In relation to prisoners, article 10 in addition provides that the purpose of punishment shall be 'reformation and social rehabilitation'. Any ban on the rights of prisoners to vote should

⁵⁴ *Scoppola v Italy* (No 3) application No 126/05, Grand Chamber (22 May 2012).

⁵⁵ Case of *Frodl v Austria*, par 99 observing that 'restrictions will not necessarily be automatic, general and indiscriminate simply because they were not ordered by a judge. ... [T]he circumstances in which the right to vote is forfeited may be detailed in the law, making its application conditional on such factors as the nature or the gravity of the offence committed'.

⁵⁶ *Scoppola v Italy* (No 3) par 106.

⁵⁷ *Id* at par 109.

⁵⁸ *Id* at par 108.

⁵⁹ *Id* at par 110.

comply with these two provisions. In General Comment 25⁶⁰ the Committee observes that any limitation on the right to vote should be ‘objective and reasonable’. In relation to criminal disenfranchisement, the Committee observes that ‘[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.’⁶¹ Any limitation on the right of prisoners to vote should be assessed based on its proportionality with the nature of the offence and the severity of the sentence. Those who have not been finally convicted of a criminal offence, should be allowed to vote, even if they are in prison awaiting trial.

The Committee has on occasion disapproved the practice of criminal disenfranchisement.⁶² In 1993, the Committee expressed serious concern about a Law in Luxembourg which imposed temporary restrictions on the right to vote of individuals convicted of a serious crime, such as murder or rape.⁶³ The Law allowed individuals convicted of minor offences to vote. Similarly, in a Concluding Observation on the human rights situation in Hong Kong, the Committee noted its concern that ‘depriving convicted persons of their voting rights for periods of up to 10 years may be a disproportionate restriction of the rights protected by article 25’.⁶⁴ Again in 2001 the Committee recommended that the United Kingdom should reconsider its criminal disenfranchisement laws, as there was no discernible ‘justification for such a practice in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoner’s reformation and social rehabilitation, contrary to Article 10’.⁶⁵ In 2003, as well, the Committee expressed its continued concern at the

⁶⁰ Paragraph 14, UN Human Rights Committee (HRC), *CCPR General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7.

⁶¹ General Comment no 25, par 14.

⁶² For a discussion on the compatibility of criminal disenfranchisement laws with arts 10 and 25 of the ICCPR, see Macdonald ‘Disproportionate punishment: the legality of criminal disenfranchisement under the International Covenant on Civil and Political Rights’ (2009) 40 *The George Washington International Law Review* 1375.

⁶³ *Report of the Human Rights Committee*, UN Doc A/48/40 (Part I) (7 October 1993) par 132.

⁶⁴ Concluding observations of the Human Rights Committee (Hong Kong): United Kingdom of Great Britain and Northern Ireland, CCPR/C/79/Add 57 (9 November 1995) par 19.

⁶⁵ *Id* at par 10.

systematic deprivation of the right to vote of convicted prisoners in Luxembourg, as the deprivation constituted ‘an additional penalty’ in criminal cases.⁶⁶ In 2006 the Committee noted that criminal disenfranchisement in relation to felony offences in the United States, was incompatible with the ICCPR.⁶⁷ It expressed particular concern at the continuation of the disenfranchisement even after the completion of the sentence, and recommended that the United States should ‘restore voting to citizens who have fully served their sentences and those who have been released on parole’.⁶⁸ The Committee also recommended that the US should ‘review regulations relating to deprivation of the vote for felony convictions to ensure that they always meet the reasonableness test of article 25’.⁶⁹

In a contentious case which challenged a constitutional ban on the right to vote of all persons deprived of their liberty in Russia,⁷⁰ the Human Rights Committee observed that ‘the right to vote and to be elected is not an absolute right, and that restrictions may be imposed on it provided they are not discriminatory or unreasonable’.⁷¹ It concluded that the automatic and blanket deprivation of the right to vote for anyone sentenced to a term of imprisonment did not meet the requirements of reasonableness and necessity.⁷² Concurring with the decisions of the majority, two members nevertheless emphasised that ‘[t]he Committee does not say that all convicted prisoners must be permitted to vote, or that a particular category of convicted prisoners must be permitted to vote. Article 25 is consistent with a wide range of reasonable approaches to this question.’⁷³ The Committee was not of the view that all prisoners have the right to vote regardless of the offences they have committed or of the sentences they are serving.

⁶⁶ Concluding observations of the Human Rights Committee: Luxembourg, CCPR/CO/77/LUX (15 April 2003) par 8.

⁶⁷ Concluding observations of the Human Rights Committee: United States of America, CCPR/C/USA/CO/3/Rev1 (18 December 2006) par 35.

⁶⁸ *Id* at par 35.

⁶⁹ As above, par 35. The Committee also noted that criminal disenfranchisement may disproportionately affect minority groups as people of colour were over-represented in prisons.

⁷⁰ *Denis Yevdokimov and Artiom Rezanov v the Russian Federation*, communication No 1410/2005 (21 March 2011).

⁷¹ *Denis Yevdokimov and Artiom Rezanov v the Russian Federation*, par 7.4.

⁷² *Id* at par 7.5.

⁷³ *Id*, individual opinion of Committee members Gerald L Neuman and Iulia Antoanella Motoc, at 10.

A look at paragraph 14 of General Comment 25 and the views in the concluding observations noted above may imply that the Committee considers that disenfranchisement should be ordered on a case-by-case basis, taking into account the severity of the offence, the length of the sentence and the individual circumstances of the offender. A blanket ban on the right of prisoners to vote is contrary to article 25 of the ICCPR, and the rehabilitative and inclusionary objectives of criminal law articulated in article 10. It also appears that the Committee will be reluctant to invalidate laws that deny the right of persons who have committed certain offences to vote, particularly those related to the political process, such as electoral offences. Although it disapproves of criminal disenfranchisement, the Human Rights Committee has made it clear that states may still exclude a certain category of criminals from voting, as long as it is reasonable and necessary in the circumstances.

Both the European Court and the Human Rights Committee have not affirmed that all prisoners should be allowed to vote. The jurisprudence on the limitation of the right of prisoners to vote is inconclusive. However, it is clear that a general, automatic and indiscriminate ban on the right of all prisoners to vote is disproportionate and violates the right to vote. It further appears that the continued ban on the right to vote after sentence has been served, is also incompatible with the right to vote. According to the jurisprudence of the European Court, suspending the right to vote of those who are sentenced to imprisonment of not less than three years is acceptable. Suspending the right to vote of those sentenced to at least one year is not proportional. It is not clear whether a law that suspends the right to vote of prisoners sentenced to, say, two years, is compatible with article 3 of the First Protocol. It is not possible at this juncture to outline a general rule based on the decisions of the court. It appears from the comments of the Human Rights Committee that the standards that apply before limiting the rights of prisoners will be acceptable, are higher in the ICCPR than in the European Convention. The Human Rights Committee would likely find the Italian Electoral Law to be incompatible with the ICCPR. The progressiveness of the Committee reflected in its concluding observations may partly be ascribed to the fact that it has a promotional mandate, in addition to its protective mandate. Unlike the European Convention, the ICCPR clearly provides that the purpose of punishment should be reform and social rehabilitation and reintegration. This determination of the purpose of crime and punishment appears to have provided additional legal leverage to the relatively expansive interpretations by the Human Rights Committee.

THE RIGHT OF PRISONERS TO VOTE IN DOMESTIC COURTS IN AFRICA

Although there has not been a case on the right of prisoners to vote at the African level, domestic courts in some African countries have had to decide whether limitations to this right are in line with constitutional standards. The first court to grapple with the question of the right of prisoners to vote, was the South African Constitutional Court. Courts in Ghana, Botswana and Kenya have also confronted similar constitutional issues. This section presents and analyses the decisions of these courts. The Constitutions of South Africa and Ghana specifically recognise the right to political participation – including the rights to vote and to stand for election. In contrast, the Constitution of Botswana does not explicitly entrench a constitutional right to participation. While the courts in South Africa, Kenya and Ghana have upheld the right to vote of prisoners in their respective countries, the High Court of Botswana has rejected challenges to the ban on the right of prisoners to vote. The difference in the judgments is mainly a result of the variation in the constitutional text guaranteeing the right to vote.

The South African Constitutional Court

One of the underlying values of the South African Constitution is ‘universal adult suffrage’.⁷⁴ The Constitution expressly guarantees the right to vote to every adult citizen of sound mind.⁷⁵ This provision does not outline any substantive conditions based on which the right to vote may be limited. Nor does it specifically allow the legislature to enact legislation to determine the circumstances under which the right to vote may be limited. However, section 36 of the Constitution contains a general limitation clause, on the basis of which any right in the Bill of Rights may be justifiably restricted. Accordingly, constitutional rights, including the right to vote, may only be limited ‘in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.⁷⁶

⁷⁴ Constitution of the Republic of South Africa, 1996 s 1(d).

⁷⁵ *Id* at s 19(3).

⁷⁶ *Id* at s 36(1). In determining whether a limitation is justifiable and reasonable, several factors should be taken into account including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation and the relation between the limitation and its purpose. In addition, courts should consider whether there exists a less restrictive means to achieve the purpose of the limitation.

The South African Constitutional Court has decided two cases on the right of prisoners to vote.⁷⁷ In the first case⁷⁸ the court had to determine whether the Independent Electoral Commission of South Africa had the duty to make arrangements to ensure that prisoners are registered and able to vote. At the time the case was initiated, the Electoral Law did not specifically include prisoners in the list of persons or groups of persons who were disqualified from voting. The main question was whether the Independent Electoral Commission had an obligation to take positive measures to facilitate the registration of prisoners, and to enable them to vote. When two prisoners, one serving a long sentence for fraud and another awaiting trial on fraud charges, acting on their own behalf and on behalf of all prisoners, approached it, the Independent Electoral Commission refused to guarantee that all prisoners would be registered to vote. The commission rather indicated that it would make all the necessary arrangements to register prisoners, if a court affirms the commission's constitutional duty to do so. The respondents argued that they did not have the duty to seek out qualified voters and register them.⁷⁹ It is rather for enfranchised people to seek registration, and to avoid situations that may entail loss of the opportunity to register, such as being in prison. Since prisoners are 'authors of their own misfortune',⁸⁰ the respondents argued, the government should not be required to make special arrangements to register or otherwise ensure their participation in elections. The government also argued that allowing prisoners to register and to vote would create logistical nightmares.

The views of the court on the value of universal suffrage were unequivocal:⁸¹

... 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.

⁷⁷ For a discussion of the right to vote of prisoners in South Africa, see Muntingh & Sloth-Nielsen 'The ballot as bulwark: prisoners' right to vote in South Africa' in Ewald & Rottinghaus *Criminal disenfranchisement in an international perspective* (2009) 221–243.

⁷⁸ *August and Another v Electoral Commission and Others*, 1999 3 SA 1 (CC); 1999 4 BCLR 363 (CC).

⁷⁹ *Id* at par 24.

⁸⁰ The Transvaal High Court (Judgment of 20 February 1999) had rejected the application of the prisoners on this ground (*per* Els J). The Constitutional Court case was an appeal from the decision of the High Court.

⁸¹ *August and Another v Electoral Commission and Others*, par 16.

Given that the right to vote is indispensable to any democracy, any ‘legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement’.⁸² The court also observed that there are a substantial number of basic rights that prisoners are entitled to enjoy and that individuals do not lose all their rights upon being sentenced to jail.⁸³ It held that, since prisoners are prevented from registering and voting due to their incarceration, and since there is no law that disqualifies them from voting, the commission has the duty to take reasonable steps to register them.⁸⁴ The right to vote by its very nature requires positive measures on the part of the state.⁸⁵ In the absence of a law of general application allowing the limitation of a right, the conditions outlined under the general limitation clause in section 36 had not been satisfied. As such, the limitation of the right of prisoners to vote was unconstitutional.

It should be noted that the court did not rule that the government cannot limit the right of prisoners to vote. Indeed, legislation may be enacted to exclude a particular group of prisoner from voting, so long as such exclusion is reasonable and justifiable.⁸⁶ The court specifically pointed out that the judgment should not be read as entailing that ‘Parliament is prevented from disenfranchising certain categories of prisoners’.⁸⁷ Prisoners have a constitutional right to vote, and in the absence of legislation allowing their disqualification ‘neither the Commission nor this Court has the power to disenfranchise them’.⁸⁸ The court unanimously concluded that the commission has the duty to register prisoners, and to make reasonable arrangements to ensure that they vote on the election date.

Following the outcome of this decision, parliament amended the Electoral Law. Under the amended Law only those prisoners serving a sentence of imprisonment without the option of a fine, were excluded from voting. The exclusion did not include un-sentenced prisoners, and prisoners incarcerated for failure to pay fines. In addition, the ban was temporary and lapsed upon the release of the prisoner.⁸⁹ The second case involved the compatibility of

⁸² *Id* at par 17.

⁸³ *Id* at par 18.

⁸⁴ *Id* at par 38,

⁸⁵ *Id* at par 16.

⁸⁶ *Id* at par 31.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ However, ‘if they had not registered before being imprisoned and are released from prison after the voters’ roll has closed but before the day of the elections, they will not

this amendment with the constitutional right to vote.⁹⁰ Given that the limitation was imposed by a law of general application, the constitutional question differed from that in *August*. The issue in this case was whether the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, as required by section 36. The burden of proving the justifiability and reasonableness of limitations rests with the entity invoking the limitation, in this case the state.

Several reasons were advanced by the government to justify the restriction. First, it was averred that the establishment of mobile polling stations to enable prisoners to vote may potentially undermine the integrity of the electoral system. Arranging mobile polling stations also allegedly required serious resource allocation.⁹¹ According to the government,

[r]ather than putting the scarce resources of the state at the disposal of convicted prisoners, such resources should ... be used for the provision of facilities to enable law abiding citizens [other categories of persons who for good reasons have difficulty in getting to registration and voting stations, such as people unable to travel to polling stations because of physical infirmities, disabilities or pregnancy] to register and vote.⁹²

It was also argued that resource limitations necessitated limiting the categories of people for whom special arrangements should be made.⁹³ It was submitted that it 'would not be fair ... to devote resources to criminals who are responsible for their own inability to vote'.⁹⁴ The court rejected the resource justification 'at the first hurdle', because there was no evidence indicating that making arrangements to enable excluded prisoners to vote, would create substantial resource problems, especially given that similar arrangements were to be made to ensure that prisoners who have not been sentenced, and those who were sentenced to imprisonment with the option of fine would be able to vote.⁹⁵

be able to vote even though they are no longer in prison' – *August and Another v Electoral Commission and Others*, par 31.

⁹⁰ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*, case CCT 03/04 (decided 3 March 2004).

⁹¹ *Id* at par 40.

⁹² *Id* at par 44.

⁹³ *Ibid.*

⁹⁴ *Id* at par 46.

⁹⁵ *Id* at pars 50 & 51.

The main justification related to policy reasons advanced by the state. Criminal disenfranchisement was presented as a means of sending a strong message to the public that the government is tough on crime and criminals. The court held that the mere ‘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’.⁹⁶ The government cannot limit constitutional rights merely to ‘enhance its image’ or to correct a public misconception as to its true attitude to crime and criminals.⁹⁷ Nevertheless, the desire to send a message that the rights that individuals enjoy should be seen in relation to their duties as citizens was considered a legitimate aim in a democratic society.⁹⁸ It was necessary to explore whether the means used to achieve this legitimate objective were proportional and reasonably linked the limitations on the right of prisoners to vote. The court held that the ban on the right of prisoners to vote was blanket and generally applicable to virtually all prisoners sentenced to imprisonment. Such a blanket and indiscriminate ban was found to be arbitrary and disproportionate. The court also pointed to the fact that section 47(1)(e) of the Constitution allows individuals who are sentenced to not more than twelve months in prison, to stand for election. The court found it illogical to exclude from voting, even those prisoners who are eligible to stand for election as candidates.⁹⁹ The exclusion of all prisoners sentenced to imprisonment without the option of fine, was not reasonable and justifiable. The consequence of this judgment was that all prisoners were allowed to be registered and to vote in the elections.

Dissenting from the majority, Madala J argued that the reasons advanced by the government were legitimate, as criminal disenfranchisement serves symbolic as well as concrete purposes. The suspension of the right to vote and its restoration upon the release of the prisoner ‘is salutary to the development and inculcation of a caring and responsible society’.¹⁰⁰ Madala J found the limitation justifiable and in line with the government objective of balancing individual rights and social values, particularly in the context

⁹⁶ *Id* at par 56.

⁹⁷ *Ibid.*

⁹⁸ *Id* at par 57. This is essentially the same as the arguments raised in the cases that were decided by the European Court (discussed above). The exclusion of prisoners from voting is justified based on the desire to enhance civic responsibility and respect for the rule of law; and to provide additional punishment, *ie* the loss of voting rights is an additional punishment to the loss of liberty.

⁹⁹ *Minister of Home Affairs v NICRO and Others*, par 67.

¹⁰⁰ *Id* at par 116.

of a country 'which is notoriously plagued by the scourge of crime'.¹⁰¹ Affording a person who has no respect for the law the right and responsibility of voting amounts to rewarding 'irresponsibility and criminal conduct'.¹⁰² Granting prisoners the right to vote amounts to treating them more favorably than 'others who, for some legitimate reason, are unable to exercise the right to vote by registering and voting as prescribed by the applicable statutory provisions'.¹⁰³ He also ruled that the imposition of limitations on the right of prisoners to vote 'engender public confidence in the democratic process and the criminal justice system'.¹⁰⁴ The limitation was justifiable and reasonable in terms of section 36.

Ngcobo J similarly observed that the limitation of the right of prisoners to vote pursued a legitimate policy of 'denouncing crime and sending a message to criminals that the rights that citizens have are related to their duties and obligations as citizens'.¹⁰⁵ This is particularly so when seen in light of the high rate of crime in South Africa and the fact that crime 'strikes at the very core of the fabric of our society'.¹⁰⁶ The ban advanced essential civil responsibilities. He also noted that the loss of the right to vote is temporary and only lasts as long as the person is incarcerated.¹⁰⁷ The limitation is limited. The temporary nature of the limitation ensures that those who are sentenced to long prison terms, miss more elections than those who are sentenced to short-term custodial sentences. To this extent, the ban takes into account the severity of the offence, and the limitation was therefore justifiable and reasonable. However, Ngcobo J held that the legislation should be invalid to the extent it did not distinguish between 'those prisoners who are serving a prison sentence while awaiting the outcome of an appeal and those whose appeals have been finalized'.¹⁰⁸ The distinction is important because convictions and sentences may be reversed on appeal, in which case a prisoner would have lost his or her right to vote without having committed a crime under the law.

The *August* case was not ultimately decided on the substance of the case. It was rather decided on the absence of legislation limiting the right of

¹⁰¹ *Id* at par 117.

¹⁰² *Id* at par 117.

¹⁰³ *Id* at par 124.

¹⁰⁴ *Id* at par 126.

¹⁰⁵ *Id* at par 140.

¹⁰⁶ *Id* at pars 144, 147 and 148.

¹⁰⁷ *Id* at par 146.

¹⁰⁸ *Id* at par 152.

prisoners to vote. As a result, the Independent Electoral Commission was required to make reasonable arrangements to enable prisoners to vote. The substantive issues relating to the circumstances under which the right of prisoners to vote may be limited, were addressed in the second case. The decision of the majority in the second case, relied mainly on the wide nature of the exclusion, and the fact that the Electoral Law did not consider the circumstances of each crime and each prisoner. It is clear that the court did not find that the right of prisoners to vote cannot be limited. It will be interesting to see if the Constitutional Court will invalidate a law similar to the Italian Law which disenfranchised persons sentenced to imprisonment for three years or more, and was upheld by the European Court. The judgment did not imply that the right to vote may only be limited on an individual basis, by a court of law, depending on the nature of the crime and the circumstances of the prisoner. The court also did not imply that the ban should only affect those prisoners who have been convicted of crimes relating to the right to vote, such as violations of laws governing the electoral process. Any future classifications based on the nature of crime and the severity of the sentence, may still be upheld by the court.

A very important argument was raised by Ngcobo J in the *NICRO* case. He observed that the temporary nature of the ban means that the number of elections a prisoner will miss generally depends on the length of the sentence which he or she must serve. This may imply that even an automatic ban on the right to vote, is proportional to the severity of the sentence, as long as the ban is temporary.¹⁰⁹ It also entails that the ban affects each criminal in a different and individualised way. This argument was not raised in the cases that were decided by the European Court and the Human Rights Committee. Unless one is convinced that the number of times that a person will not exercise his right to vote does not matter, the temporary nature of criminal disenfranchisement ensures that the ban affects different criminals differently. Since the court found that there was indeed a legitimate and justifiable reason for limiting the right of prisoners to vote, the temporary nature of the disenfranchisement ensures its proportionality and individuality. This is an elegant point which was not expressly addressed by the majority in the South African Constitutional Court or by the European

¹⁰⁹ However, this analysis does not necessarily take the *nature* of the crime into account. It only takes in to account the length of the prison *sentence*. A person who has been convicted of an electoral offence and sentenced to a shorter year term will suffer less than another person who has committed an offence unrelated to elections and sentenced to a long prison sentence.

Court and the Human Rights Committee. In fact, in both the Constitutional Court and the European Court criminal disenfranchisement was found to be legitimate in ensuring respect of civil duties. The automatic ban was found to be disproportionate. It will be interesting to see if Justice Ngcobo's calculations will be relied on in future cases in the European Court and the Human Rights Committee.

The Supreme Court of Ghana

The second African court which had the opportunity to rule on the right of prisoners to vote was the Supreme Court of Ghana. The Supreme Court joined two cases as they involved the same issue – whether prisoners have the right to vote in public elections and referenda.¹¹⁰ One of the cases was submitted by an NGO, the Centre for Human Rights and Civil Liberties (CHURCIL) and challenged the refusal of the Electoral Commission of Ghana to enable remand prisoners (pre-trial detainees) – those individuals who are in custody awaiting the completion of their trial – to vote in elections. The ban particularly affected those who have been remanded for more than six months. Individuals must be registered to vote in their place of residence. A person who has been absent for more than six months, loses his former residence. Since prisoners remanded for more than six months no longer have a residence, they may not be registered to vote. The second case was instituted by a private practitioner, Mr Ocansey, and was broader in scope. It challenged the exclusion from voting of all prisoners, not just remand prisoners.

Section 42 of the 1992 Constitution of Ghana guarantees the right of all Ghanaian citizens to vote, except those below the age of eighteen years, and persons of unsound mind. The practice of refusing prisoners the right to vote is based on section 7(5) of the Electoral Law,¹¹¹ which provides that persons who are detained in legal custody shall not be treated as residents for purposes of voter registration and voting. Consequently, prisons did not qualify as polling divisions for registration and voting purposes.

CHURCIL argued that no 'legitimate or constitutionally permissible state or governmental interest is served by the non-recognition of prisons as places

¹¹⁰ *Ahumah Ocansey v The Electoral Commission*, Writ No JI/4/2008, and *Centre for Human Rights and Civil Liberties (CHURCIL) v Attorney General and the Electoral Commission*, Writ No JI/5/2008, Supreme Court of Ghana (23 March 2010).

¹¹¹ The Representation of the People Law, 1992, PNDCL 284.

of residence for voter qualification and registration purposes'.¹¹² The restriction on the right of prisoners to vote, therefore violated article 42 of the Constitution. Mr Ocansey argued broadly that voting and citizenship are inextricably linked. Denying any prisoner the right to vote constituted an indirect denial of his or her Ghanaian citizenship.

The respondents argued that prisons did not constitute residences as required by the Electoral Law. They argued that criminal disenfranchisement is necessary as it is in the interest of public safety and security, that prisoners who have deliberately violated the laws of the land and the rights of other citizens should lose their right to vote.

In outlining the basic rule of interpretation, the Supreme Court observed that fundamental rights 'must be broadly, liberally, generously or expansively construed, in line with the spirit of the constitution, history, our aspirations, core values, principles, and with a view to promoting and enhancing human rights rather than derogating from it'.¹¹³ In contrast, limitations on fundamental rights must be strictly or narrowly construed and should be expressly provided for. There is very little room for implied limitations. Based on a 'purposive-literalist' interpretative approach, the court found that section 42 guarantees the right to vote to all Ghanaians aged eighteen or more, save those persons of unsound mind. It also ruled that the Constitution did not cede 'any of its authority to either the EC [Electoral Commission] or some other authority to add further to the list of who shall not have the right to vote'.¹¹⁴ The court concluded that the right to vote was guaranteed to all citizens, including prisoners, and that the drafters of the Constitution would have been explicit if they intended to debar those in legal custody from voting. The fact that the Constitution was clear in excluding those who have been convicted of a crime from eligibility to stand for election to the office of the President and as a member of parliament implied, according to the court, that the drafters of the Constitution did not intend to exclude prisoners from voting.

The court rejected the argument of the respondents that, in view of the suffering they caused to society, prisoners should be excluded from participating through voting in the governance of their country. The court

¹¹² *Ahumah Ocansey v The Electoral Commission*, page 9.

¹¹³ *Id* at 16.

¹¹⁴ *Id* at 18.

held that rights may only be limited if the infringement of the right achieves a constitutionally valid purpose, and the means chosen are reasonably and demonstrably justifiable. It observed that the respondents had not provided any legitimate justification for the exclusion of prisoners from voting. Indeed, it was extremely difficult 'to understand what constitutionally legitimate interest is served by the non-recognition of prisons as places of residence for the purposes of voter registration'.¹¹⁵

The court further observed that the denial of the right of prisoners to vote is not justifiable 'even for those who have been convicted of high crime against the State, such as subversion or high treason. Even for those who attempt to derail the democratic process, voting remains an important means of teaching them democratic values.'¹¹⁶ The ban on the right of prisoners to vote was found to be inconsistent with article 42 of the Constitution.

The lack of any indication in article 42 authorising the possible extension of the list of circumstances that may justify the limitation of the right to vote provided the basis for the decision by the Supreme Court. The court also found that there was no pressing public interest that would justify the total removal of the right of all prisoners to vote. Although the court relied on decisions by the Canadian Supreme Court and the Constitutional Court of South Africa, it appears that the Ghanaian Supreme Court will not tolerate any significant limitations on the right of prisoners to vote. Even limitations on the right to vote of those who have committed serious crimes, such as treason and electoral crimes, may be found to be unconstitutional. In other words, the Ghanaian Supreme Court will likely invalidate any form of limitation on this right based on the nature of the offence, or the severity of the sentence. This near total ban on the limitation of the right of prisoners to vote is broader than decisions on this issue by any other court in the world.

The right to vote of prisoners in Kenya

The current Constitution of Kenya was adopted in 2010 after the outcome of a referendum overwhelmingly supported its adoption. It replaced the 1963 Independence Constitution. Before the 2010 Constitution was subjected to

¹¹⁵ *Id* at 31. It should be noted that, unlike the Supreme Court of Ghana, the Constitutional Court of South Africa accepted as legitimate the limitation of the rights of prisoners because they have violated their civic duties. However, the Constitutional Court rejected the argument that the limitation was necessary and justifiable.

¹¹⁶ *Ahumah Ocansey v The Electoral Commission* at 31.

a referendum, there was a controversy on whether the Independence Constitution excluded prisoners from voting in referenda. The High Court had to decide whether the Interim Independent Electoral Commission, which was responsible for organising the referendum, had a duty to register prisoners and make the necessary arrangements for them to vote in the referendum.¹¹⁷

The 1963 Constitution did not specifically entrench a broad right to political participation. Nevertheless, as amended in 1992, section 32(2) guarantees the right to vote to ‘everyone’. However, the Constitution provided that registered voters detained in lawful custody or who had been convicted of an offence connected with elections, did not have the right to vote in ‘elections of elected members’. Similarly, section 43(2)(c) of the Constitution, as amended in 1974, explicitly precluded prison inmates from voting in parliamentary and presidential elections. Both section 32(2) and section 43(2)(c), applied to ‘elections of elected members’. These provisions did not specifically refer to referenda. The court had to decide whether a referendum was distinct from an election for selecting members of the National Assembly, and Presidential elections.

After considering the role of a referendum in the Kenyan constitutional system – which was to constitute and reconstitute the Constitution itself – the court held that a referendum was indeed distinct from elections for members of representative bodies. Section 43 did not exclude prisoners from voting. Nevertheless, any right may be limited in the public interest to the extent necessary and proportional. The court had to determine whether there was a legitimate justification to limit the right of prisoners to vote. Despite identifying two main theoretical explanations for the disenfranchisement of prisoners in the literature, namely enhancing civic responsibility and respect for the law and the need to maintain the ‘purity of the ballot box’, the court held that ‘there is no legitimate governmental objective or purpose that would be served by denying the inmates the right to vote in a referendum’.¹¹⁸ The failure of the Interim Independent Electoral Commission to make all the necessary arrangements to enable those in detention to vote in the referendum did not, therefore, have any constitutional basis. Other limits on

¹¹⁷ *Ms Priscilla Nyokabi Kanyua v Attorney General and Interim Independent Electoral Commission*, Constitutional Petition 1 of 2010, High Court of Kenya (23 June 2010).

¹¹⁸ *Ms Priscilla Nyokabi Kanyua v Attorney General and Interim Independent Electoral Commission* at 22.

the right to vote, such as age and mental incapacity, were acceptable. The court also implied that those who have committed an electoral offence may be legitimately excluded from voting.

It should be noted that the High Court only affirmed the right of prisoners to vote in relation to the 2010 referendum. Moreover, the issue was not whether prisoners had the right to vote in elections in general. Since the ban on the right of prisoners to vote in parliamentary and presidential elections was found in the 1963 Constitution itself, the court did not extend its ruling beyond the referendum. It did not have the power to invalidate constitutional provisions. Consequently, the court's ruling was directly relevant to the referendum only. This case is different from the cases decided in South Africa and Ghana, where the issue was the compatibility of laws that ban prisoners from voting, with the constitutional right to vote. The question before the Kenyan court was whether the constitutional ban on the right of prisoners to vote in parliamentary and presidential elections also covered referenda. The court did not determine whether the right to political participation included the right of prisoners to vote and whether the government can legitimately exclude prisoners from voting. The court appears to have held that the right to vote is guaranteed to everyone, including citizens, unless the Constitution specifically excludes them. Looking at the reasoning of the court, if the disenfranchisement had not been in the Constitution, the court would probably have invalidated any legislative exclusion of prisoners from voting.

Fortunately the 2010 Constitution has done away with the complete ban on the right of prisoners to vote in any elections, including presidential and parliamentary elections.¹¹⁹ Section 38(3)(a) guarantees every adult citizen the right to be registered as a voter and to vote. Similarly, section 83(1), which sets out the qualifications for a voter, only excludes from voting those persons convicted of electoral offences in the five years preceding the election. Section 51 clearly reaffirms that prisoners continue to enjoy all the rights in the Constitution, 'except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned'.¹²⁰ Since the right to vote is not inherently incompatible with the fact that the person is in detention,

¹¹⁹ The Constitution of Kenya, 2010.

¹²⁰ *Id* at s 51(1).

prisoners enjoy the right to vote.¹²¹ This interpretation was confirmed by the High Court in January 2013 in an order which required the Independent Electoral and Boundaries Commission to take immediate affirmative steps to ensure the registration of prisoners so that they could vote in the March 2013 elections.¹²² The court held that the Constitution imposed a positive responsibility to ensure that all the people of Kenya, and particularly those who are marginalised or vulnerable, including prisoners, are able to exercise their fundamental rights, in particular the right to vote. The Constitution imposed an immediate duty to ensure that prisoners are able to vote, and mere inconveniences such as logistical hurdles cannot justify overriding constitutional imperatives. The IEBC was ordered to make necessary administrative arrangements to ensure the registration of prisoners like all other citizens. The court also ordered the IEBC to ensure that those prisoners who were registered were able to vote.

The IEBC did not appeal this decision. The Supreme Court of Kenya has not finally ruled on the matter. It is likely that the IEBC will continue to make arrangements to register all prisoners. As a result, the decision of the High Court is unlikely to be reversed. If the Kenyan parliament moves to restrict the right to vote of some prisoners, depending either on the nature of the offence or on the severity of the sentence, the Supreme Court would have to finally consider the justifiability and proportionality of the limitation.

The right to vote of prisoners in Botswana

The right of prisoners to vote has also been the subject of constitutional litigation in Botswana. The High Court of Botswana had to decide whether section 6(1)(b) and 6(2) of the Electoral Act which disqualify persons serving a prison sentence of more than six months from voting in parliamentary elections, is incompatible with any provision of the Constitution.¹²³ The Constitution of Botswana does not explicitly recognise a general right to political participation. It recognises the right to vote in section 67. The main challenge to the applicant's case was the fact that

¹²¹ Similarly, s 5(3) of the Elections Act no 24 of 2011 grants the right to be registered to vote to 'any citizen of Kenya who has attained the age of eighteen years'.

¹²² *Kituo Cha Sheria v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR.

¹²³ *Thomas Sibanda v The Attorney General of Botswana & Secretary of the Independent Electoral Commission*, case no MAHLB-000347-09, High Court of Botswana (7 September 2009) (unreported).

section 67(5) of the Constitution expressly disqualifies those who are in lawful custody on the date of the election from voting.

In the presence of a sweeping constitutional ban on the right of prisoners to vote, the applicants relied on sections 3, 12, 13 and 15 of the Constitution, guaranteeing the right to equal protection of the law, right to freedom of expression, assembly and association, and the prohibition against discrimination, and requested the court to harmonise these provisions with section 67(5). The applicants impliedly argued that the human rights provisions supersede other provisions of the Constitution.¹²⁴ Given the absence of a general right to political participation, or an unqualified right to vote, in the Botswana Bill of the Rights, the court held that there was no disharmony between any of the human rights provisions and the ban on prisoners' right to vote. The court ruled that it was difficult to read the right to vote as part of the right to freedom of expression, the right to freedom of assembly and association and protection against discrimination.¹²⁵ Even if it were possible to read the right to vote into these provisions, the court held that these provisions could not have been intended to prohibit criminal disenfranchisement in view of the presence of section 67.¹²⁶ The right to vote was actually recognised only in section 67, which at the same time explicitly disqualified prisoners from voting.

From the reasoning of the High Court, it appears that, had it not been for the explicit constitutional ban on prisoners' right to voters, it would have ruled in favour of the applicants. The court referred to the decision of the South Africa Constitutional Court in the *August* case. It noted that the South African Constitution guaranteed an unqualified right to vote to all adult citizens of sound mind and that it did not contain any provision explicitly disenfranchising prisoners. The constitutional texts in South Africa are different from that which obtains in Botswana.¹²⁷ Had the constitutional texts

¹²⁴ *Id* at pars 46–51. Interestingly, the court observed that there may be possibilities where some sections of a constitution may be declared unconstitutional based on an old decision of the *High Court of Tanzania – Rev. Christopher Mitikila v Attorney General*, Civ Case No 5 of 1993 – which has now been effectively overruled by the Court of Appeal of Tanzania. The Court of Appeal held that a court cannot invalidate a constitutional amendment on substantive grounds – see *The Honorable Attorney General v Reverend Christopher Mtikila*, Misc Civil Case No 10 of 2005, Court of Appeal (June 2010).

¹²⁵ *Thomas Sibanda v The Attorney General of Botswana & Secretary of the Independent Electoral Commission*, pars 52 and 53.

¹²⁶ *Id* at par 59.

¹²⁷ *Id* at pars 62–66.

been similar or comparable, the High Court would likely have upheld the right of prisoners to vote.

The decision of the High Court is textually defensible. The constitutional ban on the right of prisoners to vote is more sweeping than that in the Electoral Act. First, the Constitution allows the disqualification of those who are in lawful custody. This includes not only those who have been convicted and sentenced, but also those who are in custody awaiting trial, and those who have appealed against a conviction and/or sentence. The Electoral Act disenfranchises only those individuals who have been convicted and sentenced to imprisonment for six months or longer. The Act does not disqualify those prisoners who have not been convicted, or those who have been convicted and sentenced to less than six months' imprisonment. The applicant in the instant case was serving a prison term of ten years for the offence of house breaking. The court did not consider whether the Independent Electoral Commission should make arrangements to ensure the right to vote of those who are not excluded by the Electoral Act. Prisoners who have not been convicted and those who have been sentenced to less than six months imprisonment may still bring a case to the High Court to require the Independent Electoral Commission to make arrangements to ensure that they are registered and able to vote in future elections.

CONCLUSION

Universal suffrage is an essential constituent of representative democracy. However, the suffrage has not really been universal. Despite the historical expansion of the franchise to include blacks (specifically in the US),¹²⁸ the poor, the illiterate, women, and other marginalised groups, convicts serving custodial sentences continue to stand on the margins of elections. The main problem that groups other than prisoners face in the exercise of their right to vote is often practical rather than legal. There is often no group other than prisoners that is officially and legally excluded from voting. Due to the practice of criminal disenfranchisement, the fate of individuals serving custodial sentences is determined by individuals and political institutions that do not represent them. It is hard to say that those who are disenfranchised for committing a crime 'enjoy equal protection of the laws'.¹²⁹

¹²⁸ Valelly *The two reconstructions: the struggle for black enfranchisement* (2004).

¹²⁹ Fletcher *Our secret Constitution: how Lincoln redefined American democracy* (2001)151.

The desire to inculcate a sense of civic responsibility in prisoners (republican theories of citizenship) has provided the principal justification for continued criminal disenfranchisement laws. Criminal disenfranchisement can be counterproductive, and can lead to further social alienation and frustration.¹³⁰ Because it is inherently exclusionary, criminal disenfranchisement may also undermine the reintegrative, rehabilitative, and reformist ideals that underlie contemporary criminal justice systems.¹³¹ Criminal disenfranchisement as an additional punishment has been criticised. Since disenfranchisement laws have ‘low visibility’, it is unclear whether disenfranchisement can actually play any role in deterring crime, on top of the deterrent effect of the sentence of imprisonment itself.¹³² Ordinary citizens are often unaware of criminal disenfranchisement laws. Disenfranchisement is, at most, at the bottom of any ‘calculated risk’ taken by prospective criminals. This defeats arguments premised on deterrence. Inherent bias towards prisoners, rather than genuine theories, explains disenfranchisement laws. The existing theories merely give effect to the prevalent bias.

The failure of the democratic process to do away with or limit the application of criminal disenfranchisement laws, perhaps because prisoners have no practical means of influencing the views of politicians, has forced human rights advocates increasingly to resort to courts to ensure the realisation of the right of prisoners to vote.

At the international level, there is a general disapproval of criminal disenfranchisement. The status of the right of prisoners to vote is far from clear. It is hard even to talk of a ‘right’ of prisoners to vote. There has been a gradual progression towards the expansion of the franchise to prisoners. Both the European Court of Human Rights and the UN Human Rights Committee, have held that automatic and general restrictions on the right of

¹³⁰ Austin “‘The shame of it all’: stigma and the political disenfranchisement of formerly convicted and incarcerated persons” (2004) 36 *Columbia Human Rights Law Review* 173 arguing that ‘voting rights should be extended to ex-offenders in order to allow them to rehabilitate themselves and to transcend the shame of incarceration’.

¹³¹ Schall n 11 above at 75 observing that ‘[n]ot only does felon disenfranchisement not aid rehabilitation, it may in fact impede it. Voting is thought by many to be a virtue-inducing exercise, drawing citizens’ attention to the common good. By blocking the formation of virtue, disenfranchisement may actually serve to make recidivism more likely’.

¹³² Johnson-Parris ‘Felon disenfranchisement: the unconscionable social contract breached’ (2003) 89 *Virginia Law Review* 109, 131–32 questioning the deterrence effect of disenfranchisement laws.

prisoners to vote, violate the right to vote. The Human Rights Committee has, in addition, noted that the continued application of the restriction after the prisoner has been released, violates the right to political participation. Although the Human Rights Committee has been more critical of criminal disenfranchisement laws than the European Court, it has not unequivocally ruled that criminal disenfranchisement of any form is incompatible with the ICCPR. Neither of them has suggested that the ban on the right to vote should be made by a court of law on a case-by-case basis. This could have facilitated the individual determination of each case on its own facts and circumstances.

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. The decisions of domestic courts in Africa reflect the same uncertainty at the international and regional levels. Courts in Ghana and South Africa have found the automatic ban on the right of prisoners to vote unconstitutional. These courts seem to be more sympathetic towards prisoners, and less sympathetic towards criminal disenfranchisement laws. While the South African Constitutional Court has not disapproved all forms of limitation on the right to vote of prisoners, the decision of the Ghanaian Supreme Court appears to imply that it will not tolerate any significant limitation of the right of prisoners to vote. Although the South African Constitutional Court found the limitations on the right to vote of prisoners unjustifiable and disproportionate, it accepted the reasons advanced by the government as legitimate. As a result, it may endorse some levels of limitation on prisoners' right to vote. On the other hand, because the Ghanaian Supreme Court rejected the legitimacy of the reasons behind criminal disenfranchisement, it is unlikely to uphold criminal disenfranchisement laws. The Kenyan High Court has also affirmed that the 2010 Constitution protects the right of prisoners to vote. In contrast, the High Court of Botswana upheld criminal disenfranchisement laws. This is mainly because criminal disenfranchisement is sanctioned by the Botswana Constitution itself, which makes it difficult for the courts to invalidate it. The court did not have the same or comparable constitutional leverage as the courts in South Africa, Ghana and Kenya in determining the right of prisoners to vote. The difference in the decisions of these courts reveals that the extent to which courts can protect and promote human rights is limited by the textual formulation of constitutional provisions. The constitutional text significantly checks levels of judicial activism.

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 suffrage should be universal. The African Charter does not specifically guarantee the principle of universal and equal suffrage. There is no hard or soft law addressing whether or not prisoners have the right to vote. Neither the African Court, nor the African Commission has expressed itself on criminal disenfranchisement in a contentious case. The African Commission has also not addressed the issue in its resolutions and concluding observations. It is recommended that the Special Rapporteur on Prisons and Conditions of Detention, should raise the issue of criminal disenfranchisement in her reports and during promotional visits.¹³³ NGOs should also flag criminal disenfranchisement laws in their shadow reports and in the NGO Forum that is held prior to the ordinary sessions of the African Commission. It is further recommended that human rights activists and civil society organisations submit complaints to the commission, and if possible to the court, challenging criminal disenfranchisement laws based on the right to political participation under article 13 of the African Charter. In addition to the right to political participation in article 13, provisions that will be relevant to the assessment of the compatibility of criminal disenfranchisement laws with the African Charter, include the right to dignity and legal recognition (article 5) and the right to equal protection of the law (article 3).¹³⁴

The court and the commission have a role to play in enfranchising prisoners and clarifying the validity of criminal disenfranchisement in Africa.¹³⁵ If a communication is brought against any African state, either in the court or the commission, a blanket ban on voting rights of prisoners will almost certainly be found to be contrary to the African Charter. The decisions of the Human

¹³³ On the role of the African Commission in general and the Special Rapporteur in particular in promoting the rights of prisoners, see Murray 'The African Commission's approach to prisons' in Sarkin (ed) *Human rights in African prisons* (2008) 204–223.

¹³⁴ Article 2 of the Charter can also be relevant as it prohibits discrimination based on distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or *other status* (emphasis added). 'Other status' may be argued to include distinctions based on imprisonment.

¹³⁵ In addition, judicial tribunals of Sub-Regional Economic Communities such as the Court of Justice of the Economic Community of West Africa States (ECOWAS) and the East African Court of Justice of the East African Economic Community and possibly the South African Development Community Tribunal may be used to promote the right to vote of prisoners. For the role of these Sub-Regional Tribunals in promoting human rights, see Ebobrah 'Application of the African Charter by African Sub-Regional organisations: gains, pains and the future' (2012) 16 *Law, Democracy and Development* 49.

Rights Committee, the European Court on Human Rights and the domestic courts in Africa will provide a strong background on the basis of which the African Commission and the court may build.¹³⁶ The commission has held that the limitation of the right of citizens to vote may only be justified on grounds of ‘legal incapacity’.¹³⁷ Since prisoners do not generally lose their legal capacity, the commission is likely to reject any significant limits on the right of prisoners to vote. If the commission follows the approach of the Ghanaian Supreme Court and finds that the policy and practical reasons behind criminal disenfranchisement are not legitimate, it is unlikely to endorse any significant limitations on the right of prisoners to vote. If, on the other hand, it follows the approach of the South African Constitutional Court, and holds that the theoretical and or practical reasons are legitimate, it is likely to leave the determination of the scope of justifiable and proportional limitations to the ‘margin of appreciation’ of the state concerned.¹³⁸ These observations similarly apply to the African Court, which is not bound by the decisions of the commission. It may arrive at a different conclusion. Obviously, given the fact that the commission has promotional as well as protective mandates, it is likely to be more progressive than the court which only has protective mandates. As a judicial organ, the court is likely to be more cautious than the commission. As a quasi-judicial organ with promotional functions, the commission is less likely to be constrained by textual limits.¹³⁹

The African Commission should adopt a resolution on the extent to which the African Charter is compatible with criminal disenfranchisement laws. Given the wide practice of criminal disenfranchisement in Africa, the best

¹³⁶ Under art 60 of the African Charter, the Commission is authorised to draw inspiration from international law on human and peoples’ rights.

¹³⁷ *Purohit and Another v The Gambia* (2003) AHRLR 96(ACHPR2003) par 75.

¹³⁸ The African Commission has endorsed the principle of margin of appreciation. Accordingly, states enjoy some level of discretion in determining the proportionality of limitations – *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) pars 50–53.

¹³⁹ In this regard, the commission has, for instance, developed the theory of ‘implied rights’ whereby it implies rights that have not been expressly guaranteed in the African Charter. For instance, the commission has recognised the right to food, housing and privacy – *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR (ACHPR 2001) pars 59–63. The commission has similarly allayed the fear associated with the so-called ‘claw-back’ clauses which threatened to subordinate Charter rights to domestic laws – see Naldi ‘Limitation of rights in the African Charter on Human and Peoples’ Rights: the contribution of the African Commission on Human and Peoples’ Rights’ (2001) 17 *South African Journal of Human Rights* 117 observing that ‘it is encouraging to observe that the Commission has through its case law to date confounded the pessimistic predictions of many commentators [concerning the potentially disastrous impact of ‘claw-back’ clauses]’.

way to address the uncertainty, is to submit a request for an advisory opinion to the court. Although advisory opinions do not bind any specific country, they do provide an important guideline to all countries on whether their laws and practices are compatible with their obligations. An advisory opinion will also enable the court to address the different country-specific approaches in relation to criminal disenfranchisement, and its application to presidential, parliamentary and local elections. Advisory opinions will also allow the court broadly to determine the implications of the ban on the right of prisoners to vote in countries with different electoral systems. In short, unlike contentious cases where the court will determine allegations of violations in the context of specific facts and parties, the advisory procedure will enable the court to investigate the right of prisoners to vote in varied circumstances and contexts. It is, therefore, strongly recommended that the commission request an advisory opinion from the court.¹⁴⁰ An advisory opinion will address all manifestations and forms of criminal disenfranchisement, and will, it is hoped, avoid the submission of a chain of cases to the commission and the court. This is, for instance, the case in the European Court of Human Rights where hundreds of cases relating to the right to vote of prisoners have been submitted against a few countries. An advisory opinion can forestall the submission of countless applications against each individual state. The advisory procedure does not, and should not, exclude the possibility of contentious cases. Individual prisoners may still submit cases to challenge their exclusion from voting.

In conclusion, despite the fact that most of the underlying justifications for criminal disenfranchisement have been discredited, the majority of states around the world continue to impose restrictions on the right of some or all prisoners to vote. As long as recognising the right of prisoners to vote does not negatively affect the right of others to vote, there is no reason why they should be denied the right. Criminal disenfranchisement may negatively

¹⁴⁰ Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights allows any African organisation recognised by the African Union, such as the African Commission, to submit a request for an advisory opinion of the African Court. Whether or not African NGOs can submit a request for an advisory opinion is not clear. That depends on the interpretation of 'African organizations' in art 4 of the Protocol. There is currently a case before the African Court on this exact issue. If the court holds that NGOs can indeed submit such a request, the issue of criminal disenfranchisement can be submitted to the court by any African NGO. For a discussion of the advisory jurisdiction of the African Court, see Van der Mei 'The advisory jurisdiction of the African Court on Human and Peoples' Rights' (2005) 5 *African Human Rights Law Journal* 27.

affect the rights of, and punish those who are not, prisoners.¹⁴¹ Enfranchising prisoners may actually have practical benefits. Guaranteeing the right to vote to prisoners will definitely set the foundation for improving the horrendous prison conditions in Africa. The vote will give prisoners an important leverage to influence politics and politicians, as politicians will have an incentive to canvass for their votes in exchange for improved prison conditions. The vote will also ensure that politicians genuinely focus on and put in place, appropriate measures and adequate resources for the rehabilitation and social reintegration of prisoners. The recognition of the right to vote of prisoners will facilitate the realisation of other important rights.

¹⁴¹ Jackson-Gleich 'The broad impact of felony disenfranchisement: how political exclusion affects felons, non-felons, and the Nation' available at: <http://www.thepresidency.org/storage/documents/Calkins/Jackson-Gleich.pdf> (last accessed 27 May 2013) observing that there are 'the multiple ways in which felony disenfranchisement policies affect and seem to punish those who are not themselves felons' – at 9.