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# Criminal disenfranchisement: Developments in, and lessons from, Scotland

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## Abstract

This article explores both the reasons for, and the potential impact of, the current level of disenfranchisement in Scotland. First, we scrutinise Scottish legal provisions for their compatibility with the European Court of Human Rights (ECtHR)'s jurisprudence, which require disenfranchisement's aims to be clarified and delimited. Second, we examine where disenfranchisement sits within the wider context of Scottish penal values, and what principles underlie its imposition. Finally, we turn to a discussion of whether and how dis/enfranchisement aligns with the Scottish Government's commitments to the rehabilitation and reintegration of people who have been in prison, and to related empirical evidence about desistance from crime. The limited enfranchisement of prisoners established by the Scottish Government in 2020 avoided these core questions and this article aims to help address this neglect and to open up dialogue on these issues.

KEYWORDS
disenfranchisement, penality, prisoner enfranchisement, rehabilitation, reintegration, Scotland

## 1 | INTRODUCTION

Criminal disenfranchisement is the practice of denying electoral rights due to conviction for a criminal offence. Until the Scottish Elections (Franchise and Representation) Act became law in 2020, sentenced prisoners in Scotland and across the UK were under a blanket electoral ban for the duration of their imprisonment. In 2020, access to voting rights was expanded, but only those serving up to one year of imprisonment in Scotland became eligible to vote.

The devolution of electoral powers in the Scotland Act 2016 had also devolved the responsibility to make legal provisions compatible with the European Convention on Human Rights (ECHR). This provided the opportunity – and an *obligation* – for Scotland to depart from the UK's 'blanket-ban' – a position that had previously been struck down by the European Court of Human Rights (ECtHR) in *Hirst* v. *The United Kingdom (No.2)* (2005).

Prior to the 2020 Act, the question of disenfranchisement had been explored by the Scottish Parliament's Equalities and Human Rights Committee in 2019. In its conclusions, the Committee noted that: 'Scotland has to grapple with this issue in a positive, grown-up manner. This report airs the, at times, diametrically opposed arguments and it is down to us to find a just and proportionate balance in a modern society' (Equalities and Human Rights Committee, 2019, para. 125). In their conclusion, they argued that:

> … there is a strong argument that Scotland should aim for a higher standard than recently established at UK level and should therefore legislate to remove the ban on prisoner voting in its entirety. This would be a way for Scotland to show leadership on human rights issues as well as following international standards set out in the International Covenant on Civil and Political Rights. (Equalities and Human Rights Committee, 2019, para. 144)

Despite the recent change introduced in the 2020 Act, long-standing resistance to enfranchising those in prison has been apparent in Scotland. In 2013, soon-to-be First Minister Nicola Sturgeon deemed disenfranchisement 'fundamental' to the 'prison process' (Sturgeon, 2013). Although the Scottish Government subsequently committed to an open debate on enfranchisement (informed by the report of the Standards, Procedures and Public Appointments Committee (SPPAC)), the debate's scope seemed firmly demarcated from the outset.

The initial government proposal submitted to SPPAC stated: 'it is neither appropriate, nor necessary to ensure compliance with the ECHR, to enfranchise all prisoners … the correct balance is … extending voting rights to those prisoners serving shorter sentences' (Standards, Procedures and Public Appointments Committee, 2019, p.22). An assumed harm to victims in enfranchising prisoners was highlighted, and a pledge was made to maintain the disenfranchisement of those serving sentences for 'the most serious and heinous crimes' (Sturgeon, 2018). Although responses in a government consultation were evenly split between those who thought that *all* prisoners should be enfranchised and those who thought that only short-term prisoners should be, only the latter approach seems to have been considered (Standards, Procedures and Public Appointments Committee, 2019, p.21).

Notwithstanding the question of the legality of this approach (discussed in section 2 below), the limited scope of the debate poses important questions about Scottish penality. The SPPAC report stated that it: 'would like to see the Scottish Government's policy on prisoner voting driven by principle and evidence', arguing that they had not yet addressed 'the central question of *what*

*disenfranchisement seeks to achieve*' (Standards, Procedures and Public Appointments Committee, 2019, p.2, italics added).

Within this context, this article explores the reasons for, and potential impact of, the current level of disenfranchisement in Scotland. First, we scrutinise Scottish legal provisions for their compatibility with the ECtHR's jurisprudence. Second, we examine where disenfranchisement sits within the wider context of Scottish 'penal values'. Finally, we turn to a discussion of whether, and how, dis/enfranchisement aligns with the Scottish Government's stated commitments to the rehabilitation and reintegration of people who have been imprisoned. The very limited enfranchisement of prisoners in Scotland avoided these core questions and it is the aim of this article to help address this neglect and to open up dialogue on these issues. Given the complexity of the question and the desire to approach it from various angles, the article combines legal, sociological and criminological approaches, rather than addressing the issue purely from a legal-philosophical perspective, though we fully acknowledge the possibility and need to expand on these perspectives in future work.

In March 2022, we used an earlier version of this article as the stimulus for a 'Chatham House Rules' discussion (in which participants consented to their contributions being shared without attribution in future work). We invited a range of politicians and policymakers, criminal justice sector leaders, academics and activists. Since this was not intended as data collection, it cannot be analysed and discussed below as such. Nonetheless, in our concluding discussion, we share some of their unattributed responses, as well as offering our own reflections on the possible ways forward.

Beyond our focus on Scotland, we hope that by situating the discussion of disenfranchisement within a specific social and penal context, this article can offer something useful to scholars and activists in other jurisdictions; perhaps the framework we employ could be developed and applied elsewhere.

## 2 | ECtHR, PENAL VALUES, AND THE SCOPE OF ACCEPTABLE RESTRICTIONS

In 2005, the ECtHR reached a final decision in *Hirst* v. *The United Kingdom (No. 2)*, confirming that the UK's disenfranchisement policy contravened the ECHR. It was in response to this judgment that, 15 years later, Scotland expanded the franchise to those serving up to twelve months of imprisonment.

This section of the article examines the scope that *Hirst* and other relevant judgments leave for Scotland to adopt a regime consistent with its aspired penal values (discussed in section 3). We do so by recognising that the new Scottish policy is still, as we argue below, insufficiently tailored and would likely be struck down by the Court. Nevertheless, we seek to demonstrate that characterisations of the Court as excessively intrusive in determining the substance of domestic legislation are largely unwarranted, despite, for example, (then) Prime Minister David Cameron stating that he would 'clip the [ECtHR's] wings' over the issue of voting rights (Swinford, 2013).

In what follows, we expose the boundaries of the state's power to restrict electoral rights of convicted citizens, as interpreted from ECtHR jurisprudence. We first establish that the Court's most important – yet frequently ignored – message is that voting restrictions must result from a comprehensive and reflective debate that determines their role and effects in modern democracies. We then go on to account for diverse objectives and regimes of electoral limitations that countries can legitimately pursue, demonstrating that they leave sufficient room to implement a regime of

restrictions fit for Scotland. Finally, we propose a coherent approach that Scotland should adopt, acknowledging the enduring citizenship status of prisoners. This approach recognises the need to reduce obstacles to prisoners' rehabilitation and reintegration, an issue we discuss in section 4 below.

## 2.1 | The problem of 'blanket' and unreflective restrictions

The right to vote constitutes a fundamental democratic precept and as such is guaranteed by Article 3 of Protocol No.1 to the ECHR. However, the right is not absolute, and the Court has previously recognised that countries enjoy a wide 'margin of appreciation' in designing their electoral regimes, acknowledging the importance of diverse democratic contexts (*Hirst*, paras. 60–61). This allows accommodating restrictions to distinctive penal frameworks.

To give effect to this, the Court has demanded that legislators approach electoral restrictions with thoughtful reflection. In *Hirst*, the ECtHR strongly emphasised the fact that the UK's regime of electoral restrictions had not been reconsidered since at least the 1870s (*Hirst*, paras. 22, 41, 79; though the UK government contested this claim). The regime was allegedly in place without due consideration of its coherence with the developed democracy within which it operated and had thus presumably retained inhumane tendencies of bygone forms of punishment. The problem with criminal disenfranchisement – a problem not limited to the UK – was that it had never undergone the serious scrutiny to which other 'traditional' punishments, like the death penalty or corporal punishment, had been exposed. Rather than assuming that imprisonment entails or implies disenfranchisement, the reflective process of policymakers should acknowledge the incoherence between criminal disenfranchisement and the commitment to universal suffrage, an argument which the UK government had largely ignored.

## 2.2 | The breadth of the margin of appreciation

Analysis of ECtHR judgments reveals two key issues for the regulation of electoral rights of prisoners. On the one hand, the ECtHR accepts that electoral restrictions can seek to achieve a variety of both penal and non-penal aims, thus providing legitimacy to different legal objectives. On the other hand, the Court acknowledges that, where various types of electoral restrictions are broadly appropriate to achieve the stated objective, they must be considered proportionate.

First, the ECHR does not stipulate legitimate aims that countries might pursue through disenfranchisement. This means that Scotland could put forward various reasons why it uses electoral restrictions, such as retribution, prevention of crime, rehabilitation, or upholding civic responsibility and the democratic regime (see *Hirst*; *Frödl* v. *Austria*; *Scoppola* v. *Italy (No. 3)*; *Anchugov and Gladkov* v. *Russia*; *Kulinski and Sabev* v. *Bulgaria*; *Söyler* v. *Turkey*). Although the Court has found that countries are within their right to impose electoral restrictions to achieve such aims, academic commentators have nevertheless expressed serious concern about whether this is feasible. For example, important principles of retribution such as proportionality are difficult to achieve through electoral restrictions (Brenner & Caste, 2003; Lippke, 2001; Pettus, 2005) and the lack of a link between the perpetrated crime and disenfranchisement is present in most cases (Itzkowitz & Oldak, 1973). Furthermore, the threat of disenfranchisement is unlikely to deter potential offenders (Cholbi, 2002; Easton, 2006) and, as we will see in section 4 below, such restrictions may impinge negatively on their rehabilitation (Ewald, 2003; Lippke, 2001; Mauer, 2011).

That said, the Court finds that various regimes *might* be considered proportionate: it merely requires 'a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned' (*Hirst*, para. 71). This statement encapsulates the reasons for which the UK's disenfranchisement regime was struck down – it showed no capacity to account for individual cases, and concerned 'a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity' (*Hirst*, para. 77). The Court thus required a more tailored ban which makes disenfranchisement an 'exception' (see *Frödl*, para. 10): the exception could flow either from a legislative stipulation (*Scoppola*, para. 102) or a judicial decision (*Frödl*, para. 35).

More concretely, the ECtHR has shown its acceptance of restrictions based both on the imposed sentence and on conviction for a particular crime. In the first case (basing disenfranchisement on the sentence), the Court accepts that countries may link disenfranchisement to a particular sentence of imprisonment. The sentence of imprisonment cannot be too short: it can neither include all cases of imprisonment (*Hirst*; *Anchugov & Gladkov*; *Söyler*; *Kulinski and Sabev*; *Ramishvili*), nor can it be one year of imprisonment either (*Frödl*), which is what makes the current Scottish regime very likely to be unlawful. The Court, on the other hand, upheld Italy's cut-off point of three years of imprisonment (*Scoppola*). The Court was never prompted to decide on restrictions between one and three years, so its position in this regard is uncertain.

In the second case (of applying disenfranchisement to particular crimes), the Court is not prescriptive in terms of crimes that might warrant disenfranchisement, but it has so far stipulated that a variety of crimes might justify electoral restrictions, including crimes that consist in the abuse of public position or have anti-democratic features, those that relate to elections and democratic institutions, as well as crimes of embezzlement and those against the judicial system (*Hirst*; *Frödl*; *Scoppola*).

## 2.3 | Prisoners as citizens

In seeking to develop a principled and coherent approach then, the Court has consistently emphasised the need for serious scrutiny of the role and aims of criminal disenfranchisement. Such scrutiny need not result in an overly inclusive regime which the critics of the ECtHR fear, and the case of *Scoppola* v. *Italy* is instructive in this regard. Italy uses two parallel disenfranchisement regimes: voting rights are lost in the case of imprisonment over three years or in the case of conviction for specific crimes (such as embezzlement, market abuse, extortion, offences against judicial system, abuse of public office (see *Scoppola*, para. 33)).

Despite the breadth of Italy's restrictions, the ECtHR nevertheless upheld its policy, finding that the legislator showed 'concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender' (*Scoppola*, para. 106). The ban was tailored in various ways, such as: voting restrictions are part of a wider ban from public office that pertains only to those convicted to at least three years of imprisonment; the ban's duration mirrors the length of the sanction; the loss of rights reflects the seriousness of conduct; the judge is involved in the process of deciding on disenfranchisement; the sentenced person can apply for rehabilitation three years after the sentence has passed (see *Scoppola*, para. 38).

In deciding on the purpose and scope of restrictions in Scotland, the ECtHR's firm position on the *enduring citizenship status of prisoners* ought to be the guiding notion. The Court has emphasised that 'prisoners in general continue to enjoy all the fundamental rights and freedoms

guaranteed under the Convention save for the right to liberty' (*Hirst*, para. 69). The preservation of the right to vote additionally serves important social goals as the franchise is 'crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law' (*Hirst*, para. 58).

To move forward therefore, Scotland should begin by deciding which acts are sufficiently serious to warrant electoral restrictions *in addition to* the imposed prison sanction. The question becomes: in which cases (if any) is imprisonment alone insufficient to express censure, such that it must also be accompanied by another form of condemnation that so seriously undermines one's citizenship? Regardless of its current regime, a strong indication that sentenced people remain citizens is visible in Scotland's decision to leave the rights of *non-imprisoned* persons who have offended (even seriously) intact. It therefore seems that Scotland should engage in a more serious debate about the merits of particular legislative solutions. As this part of the article has shown, the ECtHR openly accepts a range of approaches: to move forward in this discussion, the following part of the article analyses disenfranchisement against the backdrop of 'Scottish penal values'.

## 3 | SCOTTISH PENAL VALUES & DIS/ENFRANCHISEMENT

The extent to which 'penal values' shape modern penal practices has been subject to serious academic debate, especially in the context of the tendency towards 'managerialism' and technical or 'what works' discourses in many penal contexts (Feeley & Simon, 1992; Garland, 1990). Even so, penal action is always in part a meaning-making and expressive activity, whether explicitly or implicitly (Garland, 1990, p.186). Indeed, public debate about punishment in Scotland often involves allusions to a *supposedly* distinctive set of 'Scottish' values. Accordingly, the purpose of this section is to identify the nature of these 'Scottish' penal values, and to consider how dis/enfranchisement relates to them.[1]

### 3.1 | Penal welfarism

Scottish penal values are commonly described as 'penal welfarist', centring on the rehabilitation and reintegration of those who have offended (Garland, 2002; McAra, 1999). This also tends to be contextualised within descriptions of an inclusive 'civic culture' in Scotland, enabling a commitment to penal 'programmes aimed at social change', rather than the treatment of those who offend as 'other' (McAra, 1999, p.361). These supposedly inclusive cultural formations are often linked to the legacy of the 1964 Kilbrandon report (see Kilbrandon, 1995), described as 'the quintessential penal welfare document' (Brangan, 2021, p.108). Kilbrandon's impact is said to have extended beyond its focus on juvenile justice and child welfare, shaping the 'ideology and organization of adult criminal justice in Scotland' (McNeill, 2005, p.33), including those who offend within a 'so-called "solidarity project"' (McAra, 1999, p.355).

While in other jurisdictions (most notably the USA and England), commentators describe the rise of 'punitiveness' in the 1970s and beyond,[2] Scotland is said to have sustained a commitment to civic inclusion, preserving a welfarist penality based on care and reintegration (McAra, 1999, p.355). Under these conditions, one might reasonably anticipate more openness to the enfranchisement of those imprisoned. However, while Scotland has often been described as 'exceptional' in its discursive commitment to penal welfarism, recent comparative work has highlighted how the discourse of 'exceptionalism' often obscures the complexity of penal politics and practice

(Brangan, 2019, 2020; Reiter, Sexton & Sumner, 2017; Todd-Kvam, 2019). As we argue below, too sweeping an account of what 'penal welfarism' *means* in Scotland (or, indeed, in any place) obscures its limits, and its complex relationship with imprisonment.

The prison has long been a site of unease over the nature and extent of Scotland's 'solidarity project', reflecting tension between political pride in demonstrating welfarism and its converse: political embarrassment at being perceived as 'soft' on those who breach the social contract (Sparks, 2002, p.563). As Louise Brangan (2021) recently argued, major prison expansion in the political heyday of the 'social welfare' model can be understood by appreciating a concern around the management of those whose offending placed them 'beyond the pale'. The failure to punish, contain, and exclude *them*, it was felt, would undermine a 'positive perception of the welfare system' (Brangan, 2021, p.126). In this context, the 'Kilbrandon ethos' was never extended to those who, it was assumed, 'simply could not learn'; for them, imprisonment operated as 'the coercive arm of social welfare' (Brangan, 2021, p.127).

Additionally, ideas about what actually constitutes a 'penally welfarist' model of imprisonment have fluctuated in Scotland, as elsewhere (Garland, 2017). There is enduring conflict between the idea of prison as a desirable site for rehabilitation and treatment, and recognition of it as a fundamentally disruptive and disintegrative mode of containment (McAra, 1999, p.369). At least since the report of the Scottish Prisons Commission (2008), there has been a level of consensus over the need for 'decarceration' in Scotland, and an acknowledgement that Scotland's high imprisonment is at odds with many of its expressed penal values (Buchan, 2020, p.85; Buchan & McNeill, 2023).

Collaborations across academia, government, and the Scottish Prison Service (SPS) have broadly envisaged: a reductionism that would limit imprisonment to those whose offending is the most serious; and a model of imprisonment premised not on exile, but on community links and facilitating reintegration. Thus, there have been various legislative and policy changes aimed at reducing the number of people in prison (in large part through moving away from short custodial sentences towards community justice, such as the Cabinet Secretary's 'National Strategy for Community Justice', 2016), and a restatement of imprisonment's aims as promoting 'reintegration' and 'citizenship' (Scottish Prison Service, 2013). Why then, despite this long-standing aspiration for a less exclusionary model of imprisonment, have such high levels of disenfranchisement persisted?

## 3.2 | Ambivalent 'welfarism'?

Certainly, in practical terms, this aspiration remains unfulfilled, and the observed 'decarceration' drive has not reduced Scotland's high use of imprisonment. Penal reforms focusing on short sentences and community disposals have failed to achieve significant or stable reductions in the overall prison population.[3] Although the use of custodial sentences under six months has declined since 2011, custodial sentences *over* six months have remained fairly stable (Safer Communities Directorate, 2022, Section 9, Chart 9), and the remand population has steadily increased since 2000, reaching an all-time high in 2021–2022 (Scottish Prison Service, 2023). Both Scotland's prison population and rate of admissions per 100,000 inhabitants scored in the highest category ('very high', meaning more than 25% higher than Europe's median rate), in the Council of Europe's latest annual penal statistics (Aebi et al., 2022, p.4).

Beyond *reducing* imprisonment, contradictions also persist within Scotland's ambitions for a more caring and 'reintegrative' model for those imprisoned. SPS's most recent articulation of imprisonment's ethos (2013) moved away from a pathologising focus on the 'correction' of 'offenders', towards encouraging 'citizenship' and 'reintegration' (Maycock & Morrison, 2018, p.47). The

responsibility for this shift, however, remains in the hands of those imprisoned, as 'responsible agents', without Scotland having addressed the 'social and structural barriers to enjoying citizenship rights' that many of those imprisoned have already faced, and which imprisonment exacerbates (McNeill, 2015, p.210). There also remains a tendency for calls for care of those imprisoned to be met with accusations of 'soft-touch' justice (Scottish Prison Service, 2013, p.3), or notions of 'less eligibility' (McConnell, 2017, p.4), reflecting the enduring ambivalence towards imprisonment's place in Scottish discourse of care and inclusion.

Despite this ambivalence, penal welfarism remains an important 'rhetorical resource' which has long lent a sense of coherence and meaning to Scotland's penal policy (Garland, 1990, p.6). The political coding of 'Scottish' penal values, and of 'welfarism', may form an implicit framework for the policies that can be progressed at different junctures (Morrison & Sparks, 2015). Accordingly, we should locate the dis/enfranchisement debate within contemporaneous political context; here, a post-devolution, 'nation building' Scotland. The dis/enfranchisement debate, we argue below, sits at a boundary between conflicting value-commitments ('inclusion'/'exclusion', 'progressiveness'/ 'toughness') which are linked to arguments about Scotland's national character, political formations and potential constitutional futures (see also Buchan & McNeill, 2023).

### 3.3 | Dis/enfranchisement as a 'boundary' issue

We can contextualise contradictions within Scottish *penal* welfarism by considering the wider 'exclusionary dynamics of Scottish welfarism' (Brangan, 2021, p.125), wherein access to welfare is conditional upon compliance with the strict 'social contract' built into the welfare state. This manifests in 'surveillance' that can result in 'benefit sanctions' and exclusion from support (Watts & Fitzpatrick, 2018). The support of the welfare state has long been 'contingent on meeting certain criteria and on compliance with certain requirements' (McNeill, 2020, p.6), and this 'welfare conditionality' mostly affects those living in poverty; disproportionately impacting those who have been criminalised, ethnic minorities, asylum seekers and refugees.

For prisoners, disenfranchisement adds a form of 'penal conditionality'. As others have argued, imprisonment triggers a form of 'carceral' citizenship (McNeill, 2020; Miller & Stuart, 2017; Vaughan, 2000), and with it a degraded civic status applied disproportionately to already marginalised populations (Wacquant, 2001). Just as welfare conditionality means that those who fail to meet strict standards of citizenship can be deprived of much needed welfare support, those imprisoned for more than twelve months are deprived of a voice in shaping the system by which, as imprisoned subjects, they are completely governed (Tripkovic, 2019, p.6). The construction of breaching the social contract in both penal and welfare conditionality is premised primarily on the assumed responsibilities of these individual citizens – to conform, integrate or assimilate – rather than addressing obstacles to citizenship and participation (McNeill, 2015, p.210).

The dis/enfranchisement debate highlights dissonance within another central claim mentioned above – that Scotland's political formation as a 'social democratic nation' based on civic inclusion has made it less susceptible to 'othering' and the punitive 'us and them' narratives seen elsewhere (Law, 2017, p.51). Quite the reverse: the dis/enfranchisment debate has evoked an 'us' and 'them' divide and a 'zero sum fallacy' between 'offenders' and 'victims' (Zimring, 2001), justifying disenfranchisement by the harm to victims that would, somehow, be done by enfranchising those imprisoned (e.g., Sturgeon, 2018). Disenfranchisement deepens imprisonment's expression of 'othering' and, given their over-representation in Scottish prisons, has a direct effect on the representation of marginalised and disadvantaged groups in the democratic process (Tripkovic,

2019, p.6). This raises serious questions about the impact of this loss of representation for a democratic nation and *everyone* within it (Whitt, 2017). In other contexts, the impact of disenfranchising those imprisoned or formerly imprisoned on electoral outcomes has been explored, with particular focus on what this means for the representation of marginalised groups (see Behrens, Uggen & Manza, 2003; Burmila, 2017; Uggen & Manza, 2002). Work of this kind in the Scottish context could further illuminate the question of disenfranchisement's impact on Scottish democracy.

The question of enfranchising prisoners tests long-standing boundaries of Scotland's model of welfarism and inclusion in its civic community and highlights the role of the prison in entrenching these (Brangan, 2021; Law, 2017). In the context of the Scottish National Party's (SNP) project of 'democratic renewal', and a prison service publicly committed to promoting citizenship for *all* prisoners (Scottish Prison Service, 2013), we might ask why these 'boundaries' have not been pushed further. Accounts of policy evolutions since 2007 have suggested a degree of government avoidance of 'controversial' criminal justice moves because of the value placed on nurturing the widest possible support for independence, and an associated 'capacity building' project (Annison, 2015, p.49; Buchan & McNeill, 2023; McAra, 2008).

Within its articulation of a distinctly 'Scottish path' for justice, the SNP has often appealed to a constructed version of public values (McCulloch & Smith, 2017, p.242), including enduring constraints on who is deserving of citizenship and welfare. Additionally, there may have been (and may still be) fears of undermining the perceived credibility of a referendum result by extending the franchise to a group deemed 'unworthy'. Certain policies (like a commitment to *dis*enfranchisement) can become 'attached to [the] identity' of a political party, drawing in some part on culture, and then being 'forged or tightened significantly' by political contingencies (Dagan & Teles, 2015, p.132). In a capacity- (and nation-) building project, the SNP may articulate, *within* its 'socially progressive' vision, appeals to a longstanding and restrictive model of the 'social contract'.

Nonetheless, there have been examples of potentially 'controversial' evolutions in imprisonment, which push these boundaries. For example, the Scottish Government recently reversed its position that mobile phones could not and *should not* be provided for Scottish prisoners, despite arguments that they would help maintain community bonds and encourage re/integration (e.g., Justice Committee, 2013). This resistance held for years, even after mobiles were introduced in England and Wales – a frequent touchstone of comparison (Howard League Scotland, 2018). After long-term resistance rooted in risk and 'less eligibility' discourse, mobile phones were introduced into prisons as a necessity during Covid-19, and are now described as a marker of a more progressive imprisonment model (e.g., @ScotGovJustice, 2020).

In another example, campaigning against the construction of a 300-place prison to replace Cornton Vale (the national facility for women) resulted in the government scrapping the plan and committing to smaller, community-based units, on the basis that the larger prison would have expanded the women's estate and kept women far away from their communities (McCulloch & Smith, 2017, p.236). Both the initial decision *to* build HMP Inverclyde, and the subsequent decision *not to*, were expressed in terms of progressive Scottish values (Justice Committee, 2014, p.15; SCCJR, 2015). It seems clear that the concept of distinctively 'Scottish' penal values can be mobilised for quite varied outcomes, and that the boundaries to what is possible for Scottish imprisonment can shift through political contingency, circumstance and effective opposition and resistance.

In its decision to extend the franchise only to those prisoners serving under twelve months, the Scottish Government has failed to address whether, and how, this change fits within their

aspirations of care, inclusion and citizenship. In this section, we have argued that the decision to maintain the disenfranchisement of most Scottish prisoners highlights some of the core value-tensions in Scottish articulations of 'penal welfarism' and represents something of a political 'boundary' issue in the expression of these competing values.

With this in mind, we now turn to asking what the implications are for either maintaining or pushing that boundary. What are the potential consequences of depriving most imprisoned people of one of the core features of citizenship? How do these relate to Scotland's political and policy commitment to desistance, rehabilitation and reintegration?

## 4 | DISENFRANCHISEMENT, DESISTANCE, REHABILITATION AND REINTEGRATION

In this section, given the importance of both rehabilitation and reintegration in Scottish policy and law, and the ECtHR's apparent acceptance of rehabilitation as a legitimating aim of disenfranchisement (as noted above), we explore evidence about the relationships between disenfranchisement, offending and desistance, rehabilitation and reintegration.

### 4.1 | Desistance and disenfranchisement

Desistance research – which explores how, and why, people stop offending – has grown in prominence within criminology, and has significantly influenced debates about criminal justice reform, not least in Scotland (McNeill, 2015). In brief, desistance from offending seems to be associated with the interrelationships between personal maturation, the acquisition or development of social bonds (of the type which provide a compelling reason to conform to social and legal norms), shifts in narrative identity (linked to personal and social de-labelling as an 'offender'), and associated changes in routine activities. Useful distinctions have been made between primary, secondary and tertiary desistance: primary desistance relates to the absence of offending behaviour (which may or may not signal longer-term change), secondary desistance relates to changes in identity (Maruna & Farrall, 2004), and tertiary desistance relates to the development of a sense of belonging and acceptance within a moral and political community (McNeill, 2015). Although these forms of desistance have sometimes been construed as sequential stages, the relationships between them may be less linear than that (Nugent & Schinkel, 2016).

Although disenfranchisement has been addressed only rarely within desistance studies, some scholars have paid attention to the civic and political engagement of criminalised people. In the USA, where 'felon disenfranchisement' often extends far beyond release, studies have revealed its profoundly adverse effects on civic and political participation and integration (e.g., Bowers & Preuhs, 2009; Manza & Uggen, 2006). In the UK, Farrall & Calverley (2006) explored civic and political engagement comparing 'persisters' and 'desisters' in their sample; they reported that, on average, desisters scored significantly more highly on a scale of 'liberal citizenship'. They suggested that this might reflect desisters becoming less self-centred; or that they may have adopted group goals in response to help they had received; or that they may have been coerced or socialised into new value structures; and/or that they may have been exposed to 'political' information and engagement (e.g., through the social bonds they have acquired). Rather than choosing between these hypotheses, Farrall & Calverley (2006) conclude that these different influences may interact and reinforce one another.

**TABLE 1** Prison arrivals vs. voter turnout in the independence referendum

| Prison arrivals per 1,000 population, 2019–2020; the top ten local authorities[a] | Lowest voter turnout in the 2014 Scottish independence referendum; the ten lowest local authorities[b] |
|---|---|
| **Dundee City: 4.4** | **Glasgow City: 75.0%** |
| **East Ayrshire: 3.9** | **Dundee City: 78.8 %** |
| Inverclyde: 3.9 | Aberdeen City: 81.7% |
| **North Ayrshire: 3.7** | Orkney Islands: 83.7% |
| Clackmannanshire: 3.6 | Fife: 84.1% |
| **Glasgow City: 3.6** | City of Edinburgh: 84.4% |
| West Dunbartonshire: 3.4 | **North Ayrshire: 84.4%** |
| Falkirk: 3.0 | **North Lanarkshire: 84.4%** |
| Renfrewshire: 2.7 | Shetland Islands: 84.4% |
| **North Lanarkshire: 2.6** | **East Ayrshire: 84.5%** |
| Scotland average: 2.3 | Scotland average: 84.5 |

*Notes*: [a]Justice Directorate (2020), Table C2; [b]McInnes, Ayres & Hawkins (2014), p.14, Table 5.

There is compelling evidence that crime, criminalisation and penalisation are concentrated in the most socially disadvantaged and politically disengaged communities in Scotland (Matthews, 2019), as elsewhere (e.g., Western, 2006). The *Scottish Social Attitudes 2019* survey (Constitution Directorate, 2020) revealed that whereas 86% of those in the *least* deprived quintile of the Scottish population thought it very important to vote in Scottish Parliament elections, that proportion dropped to 70% in the *most* deprived quintile. Trust in local, Scottish and UK governments also tended to decline consistently from the least to the most deprived quintiles.

One crude illustration of the association between imprisonment and political disengagement can be found in Table 1, where we compare the 'top ten' (of 32) Scottish authorities, ranked by the number of prison arrivals per 1,000 population in 2019–2020 and by lower turnout rates in the Scottish independence referendum in 2014. We picked the independence referendum because of the unusually high turnout (84.5%) in what was then assumed to be a 'once-in-a-generation' vote about the country's constitutional future. Five of the ten local authorities with the lowest turnout in the referendum were also among the top ten in rates of imprisonment (shown in bold in the table). A more fine-grained comparative analysis (e.g., at postcode or ward level, and comparing UK, Scottish and local election turnout) might well reveal even stronger evidence of the co-location of imprisonment, deprivation and political disengagement.

In sum, there is strong evidence that the most deprived, criminalised and penalised communities in Scotland are also likely to be the least politically engaged (as in the USA, see McLeod, White & Gavin (2004)). Conversely, some studies suggest that desistance is associated with increased participation in civic, political and social life (e.g., Farrall & Calverley, 2006). Thus, for those who have had crime and justice involvement, increasing political engagement may be seen not only as a constitutive good of a well-functioning modern democracy, but also as an instrumental good in supporting and sustaining desistance.

## 4.2 | Rehabilitation and disenfranchisement

Desistance research has also challenged understandings and changed models of rehabilitation, for example, influencing McNeill's (2012, 2014; see also Burke, Collett & McNeill, 2018)

conceptualisation of four interrelated and interdependent forms of rehabilitation. *Personal rehabilitation* refers to any activity that focuses on personal development which might enable desistance from offending. This might include, for example, not just 'offending behaviour programmes' but also vocational training, education and so on. *Judicial or legal rehabilitation* concerns when, how and to what extent, a person is formally restored to full and free citizenship. *Moral and political rehabilitation* concerns the remediation of the person's civic relationships with the victim of their offence and with their wider moral and political community. But equally importantly, given the arguments in the last section, moral and political rehabilitation also relates to obligations of the state and of society: if a society is unjust and social inequalities are implicated in the genesis of both crime and criminalisation, then that society may also have debts that it must settle in, and through, the support for reintegration that it makes available. Finally, even where personal development or transformation has been achieved, where legal requalification is confirmed and where moral obligations around redress and reparation are settled, the question of *social rehabilitation* remains. Like tertiary desistance, this relates to informal social recognition and acceptance of the returning citizen.

The issue of disenfranchisement potentially interacts with all four of these forms of rehabilitation. For example, one form of personal development that, it seems, we should desire for people in prison is their civic and political development. By way of illustration, Szifris (2021) has recently shown how, even though not intended to be rehabilitative, engagement in 'communities of philosophical enquiry' in prisons can prompt and contribute to personal development precisely through engagement in moral and political dialogue. This stands in stark contrast to more didactic modes of 'correction'. Indeed, recent empirical studies of how people experience risk-focused, correctional programmes and regimes suggests that, as well as imposing significant psychological pains, such approaches are more likely to promote cynicism, to invite resistance or to encourage superficial and insincere compliance than to enable development (see, e.g., Cox, 2017; Crewe, 2009; McNeill, 2019; Warr, 2019).

The kind of dialogical approach that Szifris (2021) explores seems closer to what Rotman (1994) described as (and argued for) anthropocentric or humanistic rehabilitation: 'client centred and basically voluntary, such rehabilitation is conceived more as a right of the citizen than as a privilege of the state' (p.292). Crucially, for present purposes, prisoner disenfranchisement creates formal conditions under which prison-based activities aimed at personal rehabilitation seem likely to be more didactic and authoritarian than dialogical and anthropocentric (in Rotman's terms). If a prisoner cannot express a political opinion via the ballot box, then their engagement in the civic and political dialogue that rehabilitation requires is both highly constrained and formally devalued. 'Rehabilitation' is reduced to a monologue, and delegitimated in the process.

Setting personal development aside, with respect to legal, moral and political rehabilitation, disenfranchisement places prisoners outside of the polity at exactly the time when there is a pressing need for them to be engaged in dialogue about their place within it. In an important sense, it silences them when the rest of polity needs them not just to listen but also to speak. As McNeill & Velasquez (2017, n.p.) put it, disenfranchisement administers a kind of 'civic [and political] anaesthesia', putting prisoners to sleep at precisely the same time that the state and society, through punishment, are asking them to 'wake up' to their civic responsibilities. Indeed, the Equalities and Human Rights Committee (2019), in their conclusions, quoted one of us on this point, approvingly:

> [Many prisoners] … are also wounded in a civic sense, in that they have already been substantively disenfranchised before their formal disenfranchisement by

> punishment. They come from communities where their life opportunities are severely restricted, where health inequalities are profound and where levels of political participation are already minimal and deeply troubling. They are therefore civically wounded, and then as part of their punishment – or as an accidental consequence of it – we apply civic death in the form of full and formal disenfranchisement during their punishment. To make matters more absurd – in my view – we insist that they resurrect themselves civically at the moment of their release and enter back into society, fully prepared to make a robust and rounded contribution as politically and civically engaged citizens. That is completely paradoxical.

Certainly, despite the ECtHR's ruling that a country may impose disenfranchisement to pursue the aim of rehabilitation by 'encouraging citizen-like conduct' (*Söyler* v. *Turkey*, para. 37), it seems hard to see *how* exactly disenfranchisement might provide that encouragement. Indeed, the available criminological evidence tends to suggest that disenfranchisement is more likely to impede rehabilitative efforts than to support them.

## 4.3 | Reintegration and disenfranchisement

Antje du Bois-Pedain (2017) has argued that the pursuit of reintegration is a defining feature of punishment; but one that is commonly neglected. She argues that:

> *there is reintegrative momentum inherent in punishment* that gives the offender himself an interest in being punished. Far from threatening or challenging an offender's membership in the community, punishment reasserts or reinforces it. (p.203, italics added)

This reasoning seems consistent with the re/integrative *aspirations* discussed above in our exploration of Scottish penal values and for that matter with ECtHR jurisprudence around the importance of 'social rehabilitation'.

The pursuit of post-prison reintegration in Scotland's largest city, Glasgow, was recently explored by Alejandro Rubio Arnal (2021) via a dialogical enquiry group comprised of people with varied forms of knowledge derived from lived experience, practice experience in a variety of roles and academic study. Rubio Arnal's (2021) subsequent conceptualisation of reintegration is summarised as a:'multilevel and multilateral phenomenon … [in which] releasees undergo a dynamic and often painful process which involves movement towards different intertwined forms of inclusion and/or exclusion, and is shaped by pre-, intra- and post-prison elements' (p.211).

By 'multilateral', he means that reintegration requires action and commitment from multiple parties; it cannot be pursued or achieved through unilateral action by prisoners.

One of the six forms of reintegration that Rubio Arnal elaborates is 'civic-political integration', which refers to:

> … civic knowledge and attitudes and engagement of both formal and informal kinds; in relation to elections, political parties or community or neighbourhood councils; in relation to participating in online forums on politics, debates on social networks about politics or communities; and even in relation to volunteering. (p.190)

Rubio Arnal illustrates how civic-political disintegration is intertwined with material disadvantage. His participants suggest that debt (and the fear of being pursued for debt) prevents many people caught up in the justice system from registering to vote. People in prison accumulate debt, for example, when they are disqualified from housing benefit (typically after 13 weeks in prison) and go into rent arrears. On release, they typically wait five or six weeks for their benefits claims to be assessed, which can lead to further debt.

More generally, Rubio Arnal's (2021) prison-experienced participants reported how, prior to involvement with the dialogue group, they had felt excluded from public conversations and reluctant to engage with 'authority figures'. Repeated experiences of stigmatisation had undermined their sense of civic self-worth. High levels of digital poverty and exclusion from digital life (both during and after imprisonment) also contributed to their enduring civic-political *dis*integration.

Drawing on Nancy Fraser's (1996) work, Rubio Arnal's (2021) analysis suggests that people in, and after, prison fare particularly badly in terms of social recognition, political representation and material redistribution. Even before they were imprisoned, most were impoverished, stigmatised and civically degraded, as well as being effectively denied political representation. Criminal disenfranchisement thus formalises and entrenches *pre-existing* social and political exclusion. Putting this another way, it pushes them further away from the civic and political position which penal welfarism suggests we would wish them to move towards.

It seems a cruel irony then that one of the most common arguments in favour of disenfranchisement relates to the social contract: those who break the laws, it is said, forfeit their right to be represented in the making of laws. The evidence suggests that we might ask whether, and to what extent, that contract was being honoured by the state even before it was broken by the 'offender'. If the answer is 'no', then perhaps the state should approach the question of disenfranchisement with more humility and seriousness than has been evident to date.

## 5 | REFLECTIONS AND FUTURE DIRECTIONS

In the 'Chatham House Rules' discussion of criminal disenfranchisement in Scotland that we mentioned in the Introduction, participants responded to an earlier version of the analysis above. Several points of clarification were offered. For example, it was noted that the supermajority (a two-thirds majority) required to pass the Bill may have limited the potential to expand prisoner enfranchisement further and may have marked the beginning of an incremental change, rather than a final position. The choice of twelve months as the cut-off point reflected the fact that this is the maximum sentence in 'summary proceedings' in Scotland.

On the other hand, some observed a lack of engagement with the evidence presented to parliamentary committees and found closing arguments to be based on moral assertions rather than the evidence presented. In this, the progress of the Bill was influenced by perceived boundaries to 'public feeling' on prisoner voting, echoing our discussion of dis/enfranchisement as a 'boundary' issue in section 3, above.

The discussion also emphasised that disenfranchisement is not only not integrative, but that it is actively *disintegrative*. Beyond deprivation of liberty, it is an (additional) expression of moral censure and exclusion from civic community. This exclusion is tied to imprisonment, rather than any procedural distinction between summary and solemn cases; some solemn proceedings result in community sentences, meaning that the subject remains enfranchised.

It was also noted that voting rights are only one part of a much wider issue of enfranchisement. As we argued in section 4, many people arrive at prison 'substantively' disenfranchised from political participation, having experienced marginalisation and disadvantage. Substantive enfranchisement means offering those imprisoned a stake in, and a means of, political participation and empowering them within their institutions and the organisation of their daily lives. Scotland's *current* model of imprisonment does not encourage this engagement, and the legacy of prison riots in the 1980s may include a culture of discouraging political action in prisons (cf. O'Carroll, 2022).

The debate has been framed in a way that puts the onus on proving enfranchisement's link to desistance or rehabilitation, rather than asking whether, and why, any disenfranchisement is legitimate. This framing both feeds and draws from a cultural appetite for degradation and disqualification, and often taps into a false victim-offender binary in Scottish culture, as discussed in section 3.

If there is merit in this interpretation of how Scotland has arrived at its current position, then it begs the question of whether, and how, we can change Scotland's 'cultural toolkit' as evoked by participants and in section 3, above; meaning the cultural resources that we draw upon (and which interact with structural and institutional dynamics) in shaping and re-shaping punishment (Savelsberg, 2008). Consideration of that question perhaps directs us towards social justice movements around civil rights, Black Lives Matter, Transformative Justice and Abolitionism in the USA (see Brown, 2019) that have highlighted the racialised dynamics of both mass incarceration in general and disenfranchisement in particular. In Scotland, we might explore how those interested in enfranchisement can develop similar coalitions with related social movements in Scotland.

The Chatham House dialogue also noted that processes of 'civic repair' most often emerge from the ground up through spaces that encourage a feeling of belonging and having a voice. As long as prisons exist, the questions of whether, and how, those imprisoned can create civic communities (e.g., through artistic expression, protest, debate, etc.), and how that can be supported, will endure. At the time of writing, the Scottish Government is pursuing a project of 'democratic renewal', including explorations of deliberative democracy (e.g., via Citizens' Assemblies). Perhaps connecting to this project may open up possibilities of innovation in both substantive and formal enfranchisement in prisons.

Participants at our Chatham House event noted that there is a duty for Scottish Ministers to review the current enfranchisement cut-off by 2023. This review period offers time and space for further dialogue about increased enfranchisement. We hope that this article is a useful contribution to that dialogue. Certainly, as both our analysis and the group discussion highlighted, the issue of prisoner enfranchisement is far from settled in Scotland.

As we write, the UK government has recently announced plans to introduce a Bill of Rights Bill, and to limit the impact of ECtHR rulings. In our view, this only adds urgency to the dialogue to which we aim to contribute here. In any democracy committed to the rule of law, clarity about the rationale for, and justification of, disenfranchisement is important. While that remains absent, the legitimacy of disenfranchisement (and thereby of any and all governments elected under a restricted franchise) remains in doubt.

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## ENDNOTES

[1]This is a somewhat different question from the question of how it relates to the formal purposes of sentencing, in respect of which the Scottish position allows for retribution, crime reduction (including through deterrence), rehabilitation, incapacitation and reparation. For more detail, see https://www.scottishsentencingcouncil.org.uk/media/1510/principles-and-purposes-of-sentencing-in-scotland-and-other-jurisdictions-a-brief-overview.pdf [Accessed 25 May 2023].

[2]These accounts are problematised elsewhere, in terms of the binary notion of 'punitive' versus 'rehabilitative' penal systems (e.g., Goodman, Page & Phelps, 2017), and for their Anglocentrism (e.g., Brangan, 2020).

[3]Due to temporary Covid-19 related measures, the prison population reduced from its highest recorded annual population of 8,198 in 2019–2020 (Scottish Prison Service, 2023) to a fluctuation between 7,300 and 7,600 in subsequent years, though the remand population continued to rise (Justice Analytical Services, 2022). The long-term impact these temporary measures and the resulting sentencing backlog may have on the prison population is uncertain.

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