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## **Prisoner voting in Wales: devolved autonomy and human rights at the jagged edge**

### **ABSTRACT**

In light of recent contestation between the UK Government and devolved institutions over legal human rights protections, this paper examines the acute challenges that arise in the Welsh context for the implementation of Article 3 of Protocol 1 (A3P1) to the European Convention on Human Rights (ECHR), namely the right to free and fair elections. The European Court of Human Rights (ECtHR) has held repeatedly that a blanket prohibition on convicted prisoner voting is a violation of the ECHR. Following the devolution of competences over devolved and local elections, the fundamental question for Wales is not merely whether prisoners *should* get the vote, but *how* a more progressive policy can be delivered within the current structures of Welsh devolution. We argue that the Welsh Government's proposals for reform – partial enfranchisement based on sentence length – will be conditioned and undermined by criminal law and sentencing policy for which it has no control. Meanwhile, other options are either beyond devolved competence or entirely contingent upon the cooperation of a UK Government which opposes prisoner enfranchisement. In tackling these issues, we aim to demonstrate the profoundly limited nature of 'devolved autonomy' in an area ostensibly within the competence of Welsh institutions. The case study of prisoner voting thus brings into focus the unique and significant limitations on Welsh devolution and the considerable scope for complexity at the intersection of devolved governance and international human rights obligations.

**Key words:** prisoner voting, Wales, human rights, Welsh devolution, devolved autonomy

## INTRODUCTION

In recent years, the United Kingdom's (UK) territorial politics have been marked by intense contestation between Westminster and the devolved institutions.<sup>1</sup> The legal protection of human rights has become a focal point of this conflict, with devolved governments and political parties opposing UK Government plans for a 'Bill of Rights' to replace the Human Rights Act 1998 and developing their own human rights frameworks.<sup>2</sup> In this context, the scope for devolved institutions to implement international human rights standards is under increasing academic scrutiny.<sup>3</sup> In this article, we contribute to these debates using a case study of prisoner voting in the Welsh devolution context.

Over the last two decades, prisoner voting has been one of the most controversial human rights issues in the UK. Between 2004 and 2017, the European Court of Human Rights held repeatedly that the disenfranchisement of convicted prisoners for the duration of their sentences under UK electoral law was incompatible with the right to free and fair elections under Article

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<sup>1</sup> R. Masterman, 'Brexit and the United Kingdom's devolutionary constitution' (2022) 13(S2) Global Policy 58.

<sup>2</sup> E. Sheerin, 'British Government must not threaten our rights or our peace' (Sinn Féin, 22 June 2022) <<https://www.sinnfein.ie/contents/63864>> accessed 6 July 2022. Welsh Government, 'The Welsh Government's response to the UK Government consultation on replacing the Human Rights Act 1998' (Welsh Government, 2022) <[https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights\\_0.pdf](https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights_0.pdf)> accessed 6 July 2022; Scottish Government, 'The Human Rights Act and the British Bill of Rights' (Scottish Government, 2022) <<https://www.gov.scot/policies/human-rights/human-rights-act/#:~:text=The%20Scottish%20Government%20regards%20the,most%20vulnerable%20people%20in%20society.>>> accessed 6 July 2022. UK Ministry of Justice, 'Consultation outcome. Human Rights Act Reform: A Modern Bill of Rights – consultation' (UK Government, 2022). <<https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>> accessed 6 July 2022.

<sup>3</sup> K. Boyle and N. Busby, 'Human Rights and Devolution: Devolution as a Vehicle for Human Rights Protection and Progress'. (Human Rights Consortium Scotland, 2021) <<https://hrscotland.org/wp-content/uploads/2021/09/Final-Devolution-and-Human-Rights-Dev-as-a-vehicle-for-HR-protection-and-progress-Sept-2021.pdf>> accessed 6 July 2022. S. Hoffman, S. Nason, R. Beacock and E. Hicks (with contribution by R. Croke), *Strengthening and advancing equality and human rights in Wales*. (Welsh Government, 2021). <<https://gov.wales/strengthening-and-advancing-equality-and-human-rights-wales>> accessed 6 July 2022; K. McCall-Smith, 'Making rights real through human rights incorporation' (2022) 26(1) Edinburgh Law Review 87.

3 of the First Protocol of the European Convention on Human Rights ('A3P1 ECHR').<sup>4</sup> Successive UK governments refused to implement the ruling, but the matter was formally resolved in 2018 after the UK Government made several administrative changes which included granting prisoners on temporary release the right to vote while outside of prison.<sup>5</sup> Just as the matter was reaching a resolution, however, prisoner voting became a *devolved* issue, creating 'new dimensions to an old dispute'.<sup>6</sup>

With the enactment of the Scotland Act 2016 and the Wales Act 2017, the Scottish Parliament and the Senedd (Welsh Parliament) acquired control over their respective devolved and local electoral arrangements.<sup>7</sup> Public consultations and parliamentary inquiries on prisoner voting swiftly ensued in both countries.<sup>8</sup> In 2020, the Scottish Parliament legislated to enfranchise prisoners serving up to one year sentences.<sup>9</sup> In Wales, by contrast, matters have proven more complicated.

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<sup>4</sup> *Hirst v United Kingdom (no 2)* (2006) 42 EHRR 41; *Greens and MT v United Kingdom* (2011) 53 EHRR 21; *McLean and Cole v United Kingdom* (2013) 57 EHRR SE8; *Firth and others v United Kingdom* (2016) 63 EHRR 25; *McHugh and others v United Kingdom* [2015] ECHR 155; *Millbank and others v United Kingdom* [2016] ECHR 595.

<sup>5</sup> UK Government, 'Secretary of State's oral statement on sentencing' (Ministry of Justice, 2017); <<https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing>> accessed 27 June 2022. Committee of Ministers, 'Resolution CM/ResDH(2018)467' (Council of Europe, 2018) <[https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:\[%22001-188692%22\]}>](https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22001-188692%22]}>) accessed 27 June 2022.

<sup>6</sup> C.R.G. Murray, 'Prisoner voting and devolution: new dimensions to an old dispute' (2011) 25(3) *Edinburgh Law Review* 291.

<sup>7</sup> Scotland Act 2016, ss 3-11; Wales Act 2017, ss 5-10. Murray, *ibid*, 300.

<sup>8</sup> Welsh Government, 'Electoral Reform in Local Government in Wales' (Welsh Government, 2017) <[https://gov.wales/sites/default/files/consultations/2018-01/consultation\\_document-en\\_0.pdf](https://gov.wales/sites/default/files/consultations/2018-01/consultation_document-en_0.pdf)> accessed 6 July 2022; Scottish Government, 'Consultation on prisoner voting' (Scottish Government, 2018) <<https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2018/12/consultation-prisoner-voting/documents/consultation-prisoner-voting/consultation-prisoner-voting/govscot%3Adocument/00544221.pdf>> accessed 6 July 2022; Equalities and Human Rights Committee, *Prisoner Voting in Scotland* (Scottish Parliament, 2018). Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (National Assembly for Wales, 2019).

<sup>9</sup> Representation of the People Act 1983, s 3, as amended by Scottish Elections (Franchise and Representation) Act 2020, s 5.

Following recommendations from the Senedd’s Equality, Local Government and Communities Committee, in March 2020 the Welsh Government announced plans to grant Welsh prisoners serving sentences under four years the right to vote in devolved and local elections.<sup>10</sup> Using ‘home address’ to establish a Welsh ‘connection’, the plans would extend to all eligible prisoners irrespective of where they are being held across the England and Wales prison estate. By the Welsh Government’s estimation, 1,900 prisoners – more than a third of the Welsh prison population – would acquire the right to vote under these proposals.<sup>11</sup> If enacted, this would be the most significant reform of electoral rights within UK prisons in more than five decades.<sup>12</sup>

Bringing Welsh prisoners within the franchise, however, is far more complicated than the decision to enact legislation. Beyond the challenges presented by Covid-19 and the hostility of most London-based newspapers,<sup>13</sup> the Welsh devolution dispensation contains significant legal and constitutional barriers to the enfranchisement of Welsh prisoners. Unlike in Scotland and Northern Ireland, Welsh devolved institutions inhabit a single, ‘England and Wales’ justice system and legal jurisdiction which continues to be the principal responsibility of the UK Government and Westminster Parliament. Absent a justice system and jurisdiction of its own,

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<sup>10</sup> Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (n 8); Welsh Government, ‘Prisoner voting plans unveiled’ (Welsh Government, 8 March 2020) <<https://gov.wales/prisoner-voting-plans-unveiled>> accessed 27 June 2022.

<sup>11</sup> Ibid.

<sup>12</sup> Between 1967-69, no category of prisoner in the UK was explicitly excluded from the franchise. All convicted prisoners became subject to a statutory ban on voting with the enactment of the Representation of the People Act 1969. C.R.G. Murray, ‘A perfect storm: parliament and prisoner disenfranchisement’ (2013) 66(3) *Parliamentary Affairs* 511, 519-20.

<sup>13</sup> D. McNulty, N. Watson and G. Philo ‘Human Rights and Prisoners’ Rights: The British Press and the Shaping of Public Debate’ (2014) 53(4) *Howard Journal of Crime and Justice* 360; C.R.G. Murray, ‘Monsterring Strasbourg over prisoner voting rights’, in M. Farrell, E. Drywood and E. Hughes (eds), *Human Rights in the Media: Fear and Fetish* (Routledge, 2019).

the Welsh context is highly anomalous. As the Welsh Government has argued, ‘every ‘devolved’ legislature in the common law world has an accompanying legal jurisdiction’.<sup>14</sup>

Operating within a system with some but not all of the necessary levers over prisoner voting, Welsh devolved institutions are caught in the grip of legal obligations which they do not have the powers to fulfil. On the one hand, they are required to respect the electoral rights of prisoners under A3P1 ECHR.<sup>15</sup> However, they must do so without control of the criminal law, sentencing, the courts or prisons.<sup>16</sup> For Wales, therefore, the fundamental question is not whether prisoners *should* get the vote, but *how* a more progressive policy can be delivered within these structures.

To date, a considerable body of legal scholarship has addressed the UK’s response to the ECtHR’s rulings on prisoner voting.<sup>17</sup> Recent work has also examined the implications of devolution, focusing in particular on the prohibitive effects of the ‘super-majority’ requirement for devolved electoral reforms.<sup>18</sup> In this article, we add to this literature by focusing on the far-reaching implications of the ‘jagged edge’ for prisoner enfranchisement in the Welsh context,

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<sup>14</sup> Welsh Government, ‘Commission on Justice in Wales: Supplementary evidence of the Welsh Government to the Commission on Justice in Wales’ (Welsh Government, 2018).

<sup>15</sup> Government of Wales Act 2006 ss 81-82, 108A(e); Human Rights Act 1998, s 6.

<sup>16</sup> Government of Wales Act 2006, sch 7A, pt 1, para 8(1) and pt 2, para 175.

<sup>17</sup> E.g. S. Briant, ‘Dialogue, diplomacy and defiance: prisoners’ voting rights at home and in Strasbourg’ (2011) 3 European Human Rights Law Review 243; D. Nicol, ‘Legitimacy of the Commons debate on prisoner voting’ [2011] Public Law 681; C.R.G. Murray, ‘Playing for time: prisoner disenfranchisement under the ECHR after *Hirst v United Kingdom*’ (2011) 22(3) King’s Law Journal 309; Murray, ‘A perfect storm’ (n 12); E. Bates, ‘Analysing the prisoner voting saga and the British challenge to Strasbourg’ (2014) 14(3) Human Rights Law Review 503; K. Dzehtsiarou, ‘Prisoner voting saga: reasons for challenges’, in H. Hardman and B. Dickson (eds) *Electoral Rights in Europe: Advances and Challenges* (Routledge, 2017). E. Adams, ‘Prisoners’ voting rights: case closed?’ (UK Constitutional Law Blog, 30 January 2019) <<https://ukconstitutionallaw.org/2019/01/30/elizabeth-adams-prisoners-voting-rights-case-closed/>> accessed 27 June 2022; E. Celiksoy, ‘Execution of the Judgments of the European Court of Human Rights in Prisoners’ Right to Vote Cases’ (2020) 20(3) Human Rights Law Review 555.

<sup>18</sup> Murray (n 6 above).

drawing attention to the considerable scope for complexity at the intersection of devolved governance and international obligations.

The article proceeds as follows. First, we situate our discussion of prisoner voting within existing literatures on Welsh devolution and ‘devolved autonomy’. Even while there is considerable scope for strengthening rights-protection in Wales, we suggest that the concept of ‘autonomy’ is inappropriate given the significant constraints on Welsh devolved institutions’ powers, particularly in matters that straddle the jagged edge of criminal justice in Wales. The remainder of the article develops this argument through an examination of legal complexities involved in the implementation of voting rights for Welsh prisoners. Here we argue that current arrangements in Wales are incompatible with A3P1 ECHR and that Welsh devolved institutions are required to take steps to remedy this situation. We then consider different measures which the Welsh Government might consider to ensure that Welsh electoral law is compatible with the ECHR. Here it will be argued that the Welsh Government’s preferred option – partial enfranchisement based on sentence length – will be conditioned and undermined by criminal law and sentencing policy for which it has no control. Meanwhile, other reform options are either beyond devolved competence or entirely contingent upon the cooperation of a UK government which opposes prisoner enfranchisement. Welsh devolution, as presently constituted, provides only limited, contingent scope to observe and enhance the protection of prisoners’ rights under A3P1 ECHR. We conclude our discussion by considering the potential implications for the future of devolution in Wales.

## DEVOLVED ‘AUTONOMY’: A CRITIQUE

### The scope for home-grown human rights policy

Prisoner voting in Wales is tied to fundamental questions about the nature of devolved power within the UK’s constitutional structures. In public law and multi-level governance literature, the concept of ‘devolved autonomy’ is invoked habitually to describe the devolved institutions’ powers and decision-making. The term implies the primacy, control and self-direction of these institutions over devolved policy areas. In an influential account of the concept, Elliott argues:

...the devolution schemes both acknowledge and conjure into life a constitutional principle—that of devolved autonomy—whose fundamentality is increasingly difficult to dispute. This demands, among other things, that the authority of devolved institutions be respected, and implies the general impropriety of UK legislation impinging upon self-government within the devolved nations.<sup>19</sup>

From this perspective, the concept of devolved autonomy has both normative and descriptive dimensions. Normatively, it refers to a principle, counterposed to the legislative supremacy of the Westminster Parliament, which conditions and restrains UK level interference with decision-making at the devolved level. In this respect, the Sewel Convention, whereby the UK Parliament does not ‘normally’ legislate with respect to devolved competences or policy areas without the consent of the devolved institution(s) concerned, played an important role, historically.<sup>20</sup>

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<sup>19</sup> M. Elliott, ‘The Principle of Parliamentary Sovereignty in Legal, Constitutional and Political Perspective’ in J. Jowell, D. Oliver and C. O’Cinneide (eds), *The Changing Constitution* (8<sup>th</sup> edn, OUP 2015) 42-43.

<sup>20</sup> A. McHarg, ‘Constitutional Change and Territorial Consent: The *Miller* Case and the Sewel Convention’ in M. Elliott, J. Williams and A.L. Young, *The UK Constitution After Miller: Brexit and Beyond*. (Oxford: Hart, 2018).



To the extent that the devolution schemes ‘acknowledge’ devolved autonomy, however, it appears that the term also purports to describe devolved institutions’ powers empirically. Here, researchers generally recognise that the autonomy concerned is not absolute: instead, devolved competences need to be understood within the context of not only the legal but also the political, financial and practical constraints to which they are subject. Trench, for example, observes that ‘it is easy to misread the formal division of powers to assume that devolved autonomy is greater than it actually is’.<sup>21</sup>

In both its normative and empirical dimensions, the concept of devolved autonomy is under increasing strain following a range of unilateral, centralising reforms undertaken by the UK Government in the context of the UK’s withdrawal from the European Union.<sup>22</sup> Greene argues that ‘Brexit ... has demonstrated the fragility of this “fundamental” constitutional Principle’.<sup>23</sup> As an empirical description, however, the concept of devolved autonomy has always downplayed and obscured the various ways in which the devolved institutions’ powers are contingent and constrained, particularly in the Welsh context.

As a matter of constitutional theory, the term ‘devolved autonomy’ is paradoxical. The legal doctrine of parliamentary sovereignty provides that the UK Parliament may legislate on any matter, devolved or reserved – a power also guaranteed under the devolution statutes<sup>24</sup> – and

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<sup>21</sup> A. Trench, ‘Un-joined-up government: intergovernmental relations and citizenship rights’ in S.L. Greer (ed), *Devolution and social citizenship in the UK* (Bristol University Press, 2009) 119.

<sup>22</sup> In particular, the United Kingdom Internal Market Act 2020. T. Horsley, ‘Constitutional reform by legal transplantation: the United Kingdom Internal Market Act 2020’ (2022) 42(4) OJLS 1143.

<sup>23</sup> A. Greene, ‘Parliamentary sovereignty and the locus of constituent power in the United Kingdom’ (2020) 18(4) ICON 1166, 1172. Similarly, the Institute for Government concludes that Brexit has ‘exposed the limitations of the consent process as a guarantor of devolved autonomy’. A. Paun and K. Shuttleworth, *Legislating by consent: How to revive the Sewel convention* (Institute for Government, 2023).

<sup>24</sup> Scotland Act 1998 s 28(7); Northern Ireland Act 1998 s 5(6); Government of Wales Act 2006 s 107(5).

that Acts of the UK Parliament take precedence over all other laws. The UK Supreme Court has described this as ‘the essence of devolution’,<sup>25</sup> in contrast to a federal system based on the formal division of powers between the central and sub-state legislatures. From this perspective, devolved powers and decision-making are defined not by their autonomous character, but rather the legal omnipotence of the Westminster Parliament to set them aside at will. Even at a theoretical level, therefore, the ‘devolved’ prefix is not only a qualification of ‘autonomy’, but its latent negation.

The governance of legal human rights at the devolved level demonstrate the limitations on devolved power more concretely. Devolved legislatures are required to abide by the ECHR: unlike Acts of the UK Parliament, devolved legislation which violates the Convention rights can be declared ‘not law’ by the courts.<sup>26</sup> This has already proven to be a significant limitation on devolved powers.<sup>27</sup> However, the devolved institutions do not have a general competence to determine the minimum human rights standards within their respective territories (i.e. for reserved, as well as devolved, matters), nor do they have any formal influence on the content of those standards.<sup>28</sup> They are entitled to build upon UK-wide human rights obligations within areas of devolved competence, but here they face significant constraints.

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<sup>25</sup> *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland* [2019] AC 1022, [41]

<sup>26</sup> Scotland Act 1998 ss 29(1) and 29(2)(d); Northern Ireland Act 1998 ss 6(1) and 6(2)(c); Government of Wales Act 2006 ss 108A(1) and 108A(2)(e).

<sup>27</sup> E.g. *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] AC 1016.

<sup>28</sup> Despite the long-standing opposition of the devolved governments to the repeal of the Human Rights Act 1998, the UK Government seeks to replace the legislation with a ‘Bill of Rights’ which weakens or removes several of the Act’s protections. Both governments also favoured the retention of the EU Charter of Fundamental Rights in UK law, but this was rejected by the UK Government.

For instance, devolved institutions can only subject *themselves* to additional human rights obligations; they cannot place the same obligations on either the UK Parliament or UK ministers, even in respect of devolved matters, nor can they create schemes which could subject UK-level institutions to judicial scrutiny and non-binding declarations on human rights grounds.<sup>29</sup> According to the UK Supreme Court, even non-binding schemes would ‘impose pressure’<sup>30</sup> on the UK Parliament and thereby undermine its freedom to legislate on devolved matters, as guaranteed by the devolution statutes. Since the UK Parliament retains the legal authority to alter devolved competences and intervene in any devolved matter, devolved human rights policy is also contingent upon Westminster’s self-restraint. In general, devolved legislation perceived as an impediment to UK Government policy aims can be simply legislated away.<sup>31</sup>

The UK Government also has a power to veto devolved legislation, even when its provisions are within the competence of the devolved legislatures. Overlaps between cross-cutting devolved and non-devolved competences thus provide further scope for the UK Government to frustrate devolved policies which it disagrees with. In the Welsh case, s 114 of the Government of Wales Act 2006 gives the UK Government a power to prevent a Senedd Bill from receiving royal assent if it ‘has reasonable grounds to believe’ that the legislation would have an ‘adverse effect’ on reserved matters, on ‘the operation of the law as it applies in England’ or if it would conflict with international obligations or the interests of defence or national security. The UK Government recently exercised the equivalent power for the first

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<sup>29</sup> *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42.

<sup>30</sup> *Ibid*, [52].

<sup>31</sup> Note, for example, the UK Government’s recent plans to repeal provisions of the Trade Union (Wales) Act 2017. BBC News, ‘Rail strike: UK ministers to scrap Senedd ban on agency staff’ (BBC News, 27 June 2022) <<https://www.bbc.co.uk/news/uk-wales-61957466>> accessed 5 July 2022.

time under the Scotland Act 1998, s 35, in order to block the Scottish Government's Gender Recognition Reform Bill.<sup>32</sup> The power under s 114 of the 2006 Act, however, is not only broader but subject to more permissive statutory conditions. It is broader to the extent that, unlike Scottish bills, Senedd legislation can be blocked where the UK Government has reasonable grounds to believe that it would adversely affect the operation of the law as it applies in England.

The statutory threshold is lower because, unlike s 35 of the Scotland Act 1998, there is no requirement that Senedd legislation modifies the law on reserved matters. All that is required is that the UK Government has 'reasonable grounds to believe' the legislation would have the adverse effects specified. The role of the courts here appears to be confined to an assessment of whether the UK Government's judgement is reasonable in the *Wednesbury*<sup>33</sup> sense. If this is the case, judges would be unlikely to intervene to uphold devolved legislation in all but the most extreme cases. While the s 114 order may be annulled by either the House of Commons or the House of Lords, it remains an expansive veto power over Senedd legislation, with significant consequences for the exercise of devolved competences. As Trench notes, 'the practical exercise of devolved autonomy depends on the ability to reach an accommodation with the UK Government – which, given the inequality of bargaining power of each level, means at least ensuring that the UK Government does not obstruct devolved proposals'.<sup>34</sup> Given that successive UK governments have vehemently opposed the enfranchisement of convicted prisoners, this is particularly significant in the present context.

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<sup>32</sup> D Torrance and D Pyper, *The Secretary of State's veto and the Gender Recognition Reform (Scotland) Bill* (House of Commons Library, 2022).

<sup>33</sup> i.e. '...so unreasonable that no reasonable authority could ever have come to it'. *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 K.B. 223, 230 (Lord Greene MR).

<sup>34</sup> Trench (n 21 above) 122.

Devolved institutions must also find the resources for additional human rights protections in the absence of any specific funding for such measures in the block grant allocated by the UK Government. With limited powers to generate their own funds through borrowing and taxation, their dependency on the block grant means that devolved human rights policy can be affected by variations in UK Government spending in England. Major spending reductions in England can precipitate the same policy shifts by the devolved governments, irrespective of their own policy agendas.<sup>35</sup> The effects of this arrangement are particularly severe in Wales, where ‘UK government fiscal policy remains an overwhelmingly important determinant of the size of the Welsh budget’.<sup>36</sup>

In addition to these general limitations, Welsh devolved institutions have always been subject to a unique set of constraints. The National Assembly for Wales did not acquire full legislative powers over matters devolved to it until 2011.<sup>37</sup> Further, for almost two decades, the guiding principle of Welsh devolution was that all powers would remain with Westminster unless and until ‘conferred’. The Wales Act 2017 introduced a reserved powers ‘model’ of sorts, whereby all powers would be devolved unless subject to an explicit reservation. Superficially, this reform brought Wales in line with Scotland and Northern Ireland, but is unprecedented in the breadth and extent of powers which are reserved to Westminster. To the extent that a reserved powers model emphasises autonomy ‘by specifying *only* those powers to be retained by the central (Westminster) legislature’,<sup>38</sup> the Welsh example is a poor fit. Less an exercise in

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<sup>35</sup> For example, the UK Government’s decision to discontinue funding for Covid-19 testing in England in early 2022. R. Mosalski, ‘Welsh Government issues statement on future of free Covid testing in Wales’ (*WalesOnline*, 22 Feb 2022). <<https://www.walesonline.co.uk/news/wales-news/welsh-government-issues-statement-future-23179910>> accessed 6 July 2022.

<sup>36</sup> G. Ifan, C. Siôn and D. Wincott, ‘Devolution, independence and Wales’ fiscal deficit’ (2022) 261(1) *National Economic Review* 16, 19.

<sup>37</sup> Following a referendum on primary law-making powers on 3 March 2011, held in accordance with the Government of Wales Act 2006, pt 4.

<sup>38</sup> Masterman (n 1) 61.

autonomy-enhancement, the latest iteration of Welsh devolution is but ‘another constitutional scheme of bits and pieces’.<sup>39</sup>

In the context of the present discussion, by far the most significant constraint is the single ‘England and Wales’ justice system and legal jurisdiction, which dates back to the Laws in Wales Act 1536-42 (sometimes referred to, euphemistically, as the ‘Acts of Union’). Five centuries on, despite legislative devolution to Wales and the increasing differentiation of Welsh and English laws, it remains the steadfast view in Westminster and Whitehall that this arrangement should persist.<sup>40</sup> Indeed, the only discernible logic of the most recent iteration of Welsh devolution is the Whitehall imperative that Welsh devolved institutions should not have control over the justice system. The 2017 Act not only reserves justice and jurisdiction to Westminster, it even introduces a requirement on Welsh ministers to conduct ‘justice impact assessments’ for new Senedd bills,<sup>41</sup> stipulating how new Welsh policies will affect the workings of the England and Wales legal system. Despite the regular and profound changes, Welsh devolution has been consistently characterised not by notions of self-rule and autonomy but restriction and control.

### **The ‘jagged edge’ of justice in Wales**

The area of criminal justice in Wales provides one of the clearest examples of the paradox between autonomy and restriction. While the responsibility for criminal justice remains

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<sup>39</sup> R. Rawlings, ‘The strange reconstitution of Wales’ [2018] PL 62, 68.

<sup>40</sup> HC Deb 22 January 2020, vol 670, col 156WH; D. Wolfson, ‘Lord Wolfson speech: Legal Wales Conference’ (London: Ministry of Justice, 2021) <<https://www.gov.uk/government/speeches/lord-wolfson-speech-legal-wales-conference>> accessed 19 January 2022. The UK Government reiterated this standpoint in a Westminster Hall debate on 29 November 2022. The Parliamentary Under-Secretary of State for Justice, Mike Freer MP, said: ‘We disagree with Lord Thomas and with the Welsh Government, and do not think that justice should be devolved’. HC Deb 29 November 2022, vol 723, col 274WH.

<sup>41</sup> Government of Wales Act 2006, s 110A

formally reserved to the UK level, policy decisions taken by successive Westminster governments have, rather inadvertently, provided the devolved government with a considerable role to play in delivering justice services.<sup>42</sup> In areas such as health, education, housing, social services, and tackling substance misuse, for example, the Welsh Government has responsibility for developing and implementing its own strategies aimed at reducing crime and supporting those in conflict with the law. Even if there remains a nominally singular England and Wales jurisdiction, the criminal justice system in post-devolution Wales is not the same as that which operates in England.

Arguably the clearest illustration of the ‘different Welsh perspective’ to criminal justice in post-devolution Wales is the creation of distinct Welsh-only strategies and initiatives that form part of the Welsh Government’s own policy agenda.<sup>43</sup> In the area of youth justice, for example, the devolved government has led on a rights-based approach to the treatment of children in conflict with the law. Its *Children First, Offender Second* strategy has been widely heralded for its inclusive and progressive approach to children’s rights.<sup>44</sup> In response to the outbreak of Covid-19 in 2020, the Welsh Government used its powers over healthcare to require Welsh police forces to enforce different public health regulations in Wales to those in England.<sup>45</sup> The devolved government has also devised alternative approaches to supporting homeless prison

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<sup>42</sup> R. Jones and R. Wyn Jones, *Criminal Justice in Wales: On the Jagged Edge* (University of Wales Press, 2022).

<sup>43</sup> NOMS Cymru, Welsh Government and Youth Justice Board, *Joining Together in Wales: An Adult and Young People’s Strategy to Reduce Reoffending* (National Offender Management Service Cymru, 2006), iii.

<sup>44</sup> M. Drakeford, ‘Devolution and youth justice in Wales’ (2010) 10(2) *Criminology and Criminal Justice* 137.

<sup>45</sup> R. Jones, M. Harrison and T. Jones, ‘Policing and Devolution in the UK: The ‘Special’ Case of Wales’ (2022) 0(0) *Policing: A Journal of Policy and Practice* 1-13.

leavers,<sup>46</sup> tackling substance misuse,<sup>47</sup> improving domestic abuse services,<sup>48</sup> and legislating to remove the defense of ‘reasonable chastisement’.<sup>49</sup>

Despite the ‘considerable autonomy’<sup>50</sup> that the devolved government enjoys over key policy areas in Wales, however, the nature of the Welsh devolution dispensation presents several obstacles and challenges to policy implementation.<sup>51</sup> In post-devolution Wales, absent a separate criminal justice system, those charged with the responsibility for conceiving and operationalising justice policy and wider areas of social policy are working across a *jagged edge* between devolved and reserved responsibilities. The UK Government’s criminal justice policies intersect with and indeed are reliant upon the Welsh Government’s responsibilities for many areas of social policy. Likewise, devolved policy-making is fundamentally impacted by criminal justice policies being pursued by the UK Government, over which devolved institutions have little or no formal influence. Despite having a progressive vision for youth justice, for example, it is the UK Government which is responsible for setting the age of criminal responsibility. Likewise, while the the Welsh Government has set out its own vision for a future Welsh criminal justice system, including its intention to ‘reduce the size of the

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<sup>46</sup> HM Inspectorate of Prisons, ‘Report on a full unannounced Inspection of HMP Altcourse’ (London: HM Inspectorate of Prisons, 2014).

<sup>47</sup> D. Brewster and R. Jones, ‘Distinctly Divergent or Hanging onto English Coat Tails? Drug Policy in Post-Devolution Wales’ (2019) 19(3) *Criminology and Criminal Justice* 364–381.

<sup>48</sup> Jones and Wyn Jones, *Criminal Justice in Wales: On the Jagged Edge* (n 42 above).

<sup>49</sup> Welsh Government, ‘Ending physical punishment in Wales’ (Cardiff: Welsh Government, 2022). <<https://gov.wales/ending-physical-punishment-children>> accessed 29 June 2022.

<sup>50</sup> NOMS Cymru, Welsh Government and Youth Justice Board (2006), *Joining Together in Wales: An Adult and Young People’s Strategy to Reduce Reoffending* (National Offender Management Service Cymru, 2006), 8.

<sup>51</sup> D. Brewster and R. Jones, ‘Distinctly Divergent or Hanging onto English Coat Tails? Drug Policy in Post-Devolution Wales’ (2019) 19(3) *Criminology and Criminal Justice* 364.



prison population’,<sup>52</sup> this ambition will ultimately be contingent on the UK Government’s control over criminal law and sentencing policy.

Following a two-year investigation into the state of the justice system in Wales, the Commission on Justice in Wales, chaired by the former Lord Chief Justice, Lord Thomas of Cwmgiedd, concluded that the arrangements for criminal justice in Wales are not only highly unorthodox but ‘overly complex’.<sup>53</sup> A research report commissioned by the Welsh Government also noted that this setup is ‘bound to have an impact on the Welsh Government’s capacity to strengthen and advance equality and human rights’, and that some rights-enhancing measures ‘may require cooperation from UK Government’.<sup>54</sup>

Prisoner voting in devolved elections falls squarely within this complex set of arrangements. The current rule excluding convicted prisoners from voting is found in electoral law, but its effects are determined by criminal law and sentencing policy. While the 2017 Act transferred powers over Welsh electoral arrangements to Wales, thereby providing space for home-grown democratic reform,<sup>55</sup> criminal law, sentencing, prisons and the courts remain reserved to the UK level.<sup>56</sup> It seems that the UK Government simply did not consider the full implications of devolving competences over the electoral franchise. Indeed, when Secretary of State for

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<sup>52</sup> Welsh Government, *Delivering Justice for Wales* (Cardiff: Welsh Government, 2022) <<https://gov.wales/sites/default/files/publications/2022-06/delivering-justice-for-wales-may-2022-v2.pdf>> accessed 6 July 2022, 9.

<sup>53</sup> Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Commission on Justice in Wales, 2019) <[https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL\\_2.pdf](https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL_2.pdf)> accessed 22 June 2022, 10.

<sup>54</sup> Hoffman et al (n 3 above) 77.

<sup>55</sup> Wales Act 2017, ss 5-10.

<sup>56</sup> Government of Wales Act 2006, sch 7A, pt 1, para 8(1) and pt 2, para 175.

Justice, David Lidington MP, first announced the changes to prisoner voting rules in 2017, he remarked:

... we will of course work with the three devolved administrations on this issue, in particular to reflect the differences in law and practice in Scotland and Northern Ireland, and we have informed them of our plans to resolve this for the whole of the UK.<sup>57</sup>

The statement underscored, first, the UK Government's preference for a state-wide approach to prisoner voting. Second, it showed obliviousness to the fact that the devolution of competences over Scottish devolved elections had already taken place, and that the same changes were also imminent in the Welsh context. Third, the statement suggests that the single England and Wales legal jurisdiction was responsible for a particular neglect of the Welsh dispensation.

The Senedd has thus inadvertently acquired control over a significant criminal justice policy, but it does not exercise 'autonomy' over this issue. Instead, Welsh devolved institutions find themselves in a legal bind: obliged to uphold the ECHR, yet lacking the powers necessary to protect and enhance prisoners' A3P1 rights independently of Whitehall's supervision; required to act lawfully, even while the routes to legality are either cluttered or shut off entirely by reservations.

## **THE CONTINUING DISENFRANCHISEMENT OF WELSH PRISONERS, POST- *HIRST***

### **The limitations of the 'Lidington compromise'**

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<sup>57</sup> UK Government, 'Secretary of State's oral statement on sentencing' (n 5 above).

So far, we have questioned the merits of the concept of ‘devolved autonomy’ in light of the various constraints on Welsh devolved institutions. We turn now to examine the interaction between those constraints and the matter of prisoner voting. Our aim here is to demonstrate how, on the one hand, there are powerful legal incentives for the Welsh Government to introduce legislation to enfranchise the Welsh prison population. In the subsequent part of the paper, we will demonstrate how these incentives are stifled by the existing dispensation.

The legal dimensions of the prisoner voting dispute between the UK and the ECtHR are well known. Section 3 of the Representation of the People Act 1983 provides that all convicted prisoners are ‘legally incapable’ of voting for the duration of their sentences. When this was challenged in Strasbourg in *Hirst v UK*, the ECtHR held that this ‘general, automatic and indiscriminate’<sup>58</sup> rule was a disproportionate restriction on the right to vote which violated A3P1 ECHR. While it refrained from specifying how UK electoral law could be brought in line with the Convention, it called repeatedly on the UK to introduce a *legislative* change.<sup>59</sup> In 2018, however, the Council of Europe’s Committee of Ministers, responsible for the supervision of the Strasbourg court’s judgments, closed the matter after the UK Government introduced a set of minor administrative reforms: the ‘Lidington compromise’<sup>60</sup> – named after then Secretary of State for Justice, David Lidington MP.<sup>61</sup> Convicted prisoners would be informed at or close to the time of sentencing that they would lose their right to vote, thereby addressing a minor point in the *Hirst* judgment that disenfranchisement was being imposed

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<sup>58</sup> *Hirst* (n 4 above) para 82.

<sup>59</sup> *Greens and MT* (n 4 above) para 115; *Firth* (n 4 above) para 14; *McHugh* (n 4 above) para 10; *Millbank* (n 4 above) para 9. Celiksoy (n 17 above) 573.

<sup>60</sup> Murray (n 6 above) 299.

<sup>61</sup> UK Government, ‘Secretary of State’s oral statement on sentencing’ (n 5 above).

upon prisoners without informing them.<sup>62</sup> Second, prisoners on temporary release would be entitled to vote while physically outside of prison. This added to the list of categories who were already able to vote under UK electoral law, including unconvicted, unsentenced and civil prisoners.<sup>63</sup> Third, the administrative guidance would be clarified to make clear that prisoners released on home detention curfew – who were already eligible – were also allowed to vote.

Lidington's compromise has been described as 'minimalist compliance',<sup>64</sup> and the Committee of Minister's decision to accept it 'hard to comprehend'.<sup>65</sup> Despite the ECtHR's insistence on legislative change, s 3 of the 1983 Act is still in force and convicted prisoners remain overwhelmingly disenfranchised. Even those enfranchised by the UK Government's changes face additional restrictions compared with other eligible categories. Temporary release prisoners cannot vote while inside prison<sup>66</sup> They cannot be released for the purpose of voting, nor can they register to vote using the address of the prison. They can only register and vote if released for other permitted purposes, such as employment, childcare, or compassionate leave.<sup>67</sup> In many cases, these individuals will be on temporary release from a prison outside of their normal constituency, further complicating voter registration. Murray suggests that this

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<sup>62</sup> '...it may be noted that, when sentencing, the criminal courts in England and Wales make no reference to disenfranchisement'. *Hirst* (n 4 above) para 77.

<sup>63</sup> UK Ministry of Justice, 'Restrictions on prisoner voting policy framework' (London: Ministry of Justice, 2020)  
<<https://www.gov.uk/government/publications/restrictions-on-prisoner-voting-policy-framework>> accessed 27 June 2022.

<sup>64</sup> A. von Staden, 'Minimalist compliance in the UK prisoner voting rights cases'(ECHR Blog, 16 November 2018)  
<<https://www.echrblog.com/2018/11/guest-blog-minimalist-compliance-in-uk.html>> accessed 27 June 2022.

<sup>65</sup> Celiksoy (n 17 above) 575.

<sup>66</sup> UK Ministry of Justice, 'Restrictions on prisoner voting policy framework' (n 63 above).

<sup>67</sup> UK electoral law requires individuals to be 'resident' at an address within a given constituency for the purposes of electoral registration. Representation of the People Act 1983, s 4.

particular change ‘if anything increases the level of arbitrariness in the process’.<sup>68</sup> All in all, it is difficult to see what has changed since the *Hirst* ruling.

Further to the limitations of the Lidington reforms, prisoners who have a legal right to vote face a risk of *administrative* disenfranchisement – an issue which has not been subject to adequate political and judicial scrutiny. The limited evidence available suggests that very few prisoners are registering to vote. The Electoral Commission’s report on the 2021 Scottish Parliament election revealed that just 38 prisoners had registered to vote in that election – despite the Scottish Government’s estimation that an additional 1,000 prisoners had acquired the vote in 2020.<sup>69</sup> In a recent empirical study of prisoner voting rights in the UK, we found that applications from eligible prisoners are extremely rare across the UK: less than a third (28%) of electoral administrators surveyed for our study indicated that they had ever received an application from a prisoner.<sup>70</sup> Almost all of those (96%) had received just one to five applications during the course of their careers.<sup>71</sup>

Even where prisoners seek to vote, there are serious problems in the administration of their voting rights. For instance, although remand prisoners are eligible to vote, a 2012 review by HM Inspectorate of Prisons found that two out of five prisons visited had ‘no arrangements to facilitate this entitlement’.<sup>72</sup> Further, prisoners are often unaware of their voting rights and

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<sup>68</sup> Murray (n 6 above) 311.

<sup>69</sup> Electoral Commission, *Report on the Scottish Parliament election on 6 May 2021* (London: Electoral Commission, 2021). Scottish Government, *Consultation on Prisoner Voting* (n 8 above).

<sup>70</sup> R Jones and G Davies, ‘Prisoner voting in the United Kingdom: an empirical study of a contested prisoner right’ (2022) 0(0) MLR 1 <<https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12778>> accessed 26 March 2023.

<sup>71</sup> *Ibid.*

<sup>72</sup> HM Inspectorate of Prisons, *Remand Prisoners: A Thematic Review* (HMIP, 2012). <<https://www.justiceinspectrates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2012/08/remand-thematic.pdf>> accessed 6 July 2022.

may also lack the necessary information and documentation for the registration process, such as their date of birth, national insurance number, a passport or driver's licence, and a fixed or regular address.<sup>73</sup> These difficulties are compounded by the pressures that electoral administrators have faced in recent years: budget cuts to local authorities, loss of experienced staff, and high workloads, resulting in staff in UK electoral services having 'amongst the highest stress rates in the world'.<sup>74</sup> In these conditions, encouraging eligible prisoners to register to vote is unlikely to be a priority.

We identified further problems in the administration of prisoner voting rights in our empirical study with electoral administrators, including poor information-sharing and communication between prison and electoral services, the potential for prisoner transfers and dispersal to disrupt electoral correspondence and registration, and a prevalence of incomplete or erroneous registration applications, potentially indicative of a lack of support within prisons.<sup>75</sup> Electoral administrators' responses to the survey also suggested that the electoral guidance on prisoner voting lacks sufficient clarity to be applied consistently, particularly regarding the registration criteria for remand and temporary release prisoners.<sup>76</sup> In light of these problems, we concluded

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<sup>73</sup> Ibid; House of Commons and House of Lords Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* (HL 103 2013-14) 75, 77; Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (n 8 above) 45; Equality, Local Government and Communities Committee, 'Inquiry into Voting Rights for Prisoners: Evidence Session 5' (National Assembly for Wales, 2019) <<https://record.assembly.wales/Committee/5302>> accessed 27 June 2022, para 59; M. Dhami, and P. Cruise, 'Prisoner disenfranchisement: prisoner and public view of an invisible punishment' (2013) 13(1) *Analysis of Social Issues and Public Policy* 211.

<sup>74</sup> T.S. James, 'Written evidence submission to the House of Lords Select Committee Inquiry on the Electoral Registration and Administration Act 2013' (House of Lords, 2019) 138 <<https://www.parliament.uk/globalassets/documents/lords-committees/electoral-registration-act/evidence-volume-written-evidence.pdf>> accessed 8 January 2022.

<sup>75</sup> Jones and Davies (n 70 above).

<sup>76</sup> Ibid.

that the scale of prisoner disenfranchisement in the UK is likely to be far more severe than the rules on voting eligibility suggest.<sup>77</sup>

In summary, the Lidington compromise not only deviated from the requirements of A3P1 ECHR, as interpreted in *Hirst* and subsequent cases. By focusing exclusively on the question of legal eligibility, at the expense of the administration of voting rights, neither the UK Government nor the Strasbourg institutions fully appreciated the precarious position of prisoners who already have voting rights. Despite all the litigation and political wrangling, therefore, there is yet to be a full legal evaluation of the A3P1 ECHR rights of UK prisoners based on a comprehensive treatment of the relevant facts.

### **The severity of prisoner disenfranchisement in Wales**

If current electoral law and administration continues to infringe the A3P1 rights of UK prisoners, the effects of this are arguably felt most acutely in the Welsh context. While England and Wales combined boast one of the highest imprisonment rates in Western Europe, Wales has consistently recorded a higher rate for the best part of a decade.<sup>78</sup> As the Fifth Senedd's Equality, Local Government and Communities Committee observed, 'people in Wales are more likely to be imprisoned than people in England'.<sup>79</sup> What is more, Wales' imprisonment rate eclipses all other countries in Western Europe listed in the most recent *World Prison Population Brief*.<sup>80</sup> At the same time, convicted – as opposed to unconvicted / remand – prisoners make up a much larger proportion of the prison population in England and Wales

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<sup>77</sup> Ibid.

<sup>78</sup> Jones and Wyn Jones, *Criminal Justice in Wales: On the Jagged Edge* (n 42 above).

<sup>79</sup> Equality, Local Government and Communities Committee (n 8 above), 37.

<sup>80</sup> H. Fair and R. Walmsley, *World Prison Population List* (15<sup>th</sup> edn, Institute for Crime and Justice Policy Research, 2021)

compared to Scotland and Northern Ireland.<sup>81</sup> The result is that Welsh people, particularly those from the most deprived areas<sup>82</sup> and Black, Asian and Minority Ethnic (BAME) backgrounds,<sup>83</sup> are more likely to be disenfranchised by RPA 1983 s 3. Moreover, given the differences in the number of remand prisoners, a higher proportion of the Welsh prison population is subject to the statutory ban, compared with Scotland and Northern Ireland.

From a Welsh perspective, however, Lidington's reforms were inconsequential. The UK Government estimated that 'up to 100 prisoners on any given day'<sup>84</sup> would benefit from the

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<sup>81</sup> Remand prisoners comprise a much larger proportion of the prison population in Northern Ireland (37%), while more than a quarter of prisoners in Scotland (28%) are on remand, compared to 16% of the prison population in England and Wales.

Northern Ireland Prison Service, *Northern Ireland Prison Population 2021-22* (Belfast: Northern Ireland Prison Service, 2022).

< <https://www.justice-ni.gov.uk/publications/northern-ireland-prison-population-2021-22>> accessed 27 March 2023; Scottish Prison Service, *Scottish prison population: statistics 2021 to 2022* (Edinburgh: Scottish Prison Service, 2022)

< <https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>> accessed 27 March 2023. UK Ministry of Justice, *Prison Population: 31 March 2022. Offender management statistics quarterly: October to December 2021* (London: Ministry of Justice, 2022).

< <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-october-to-december-2021>> accessed 27 March 2023.

<sup>82</sup> A wide body of research demonstrates the 'clear positive relationship' between income inequality and higher levels of imprisonment. D. Caddle and D. Crisp, 'Imprisoned women and mothers' (Home Office Research Study 162. Home Office, 1997); T. Newburn, *Social disadvantage, crime, and punishment* in D. Hartley and L. Platt (eds), *Social Advantage and Disadvantage* (Oxford: Oxford University Press, 2016) 329; J. Reiman and P. Leighton, *The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice* (9<sup>th</sup> edn, Routledge, 2010); Social Exclusion Unit, *Reducing Re-offending by Ex-prisoners* (Office of the Deputy Prime Minister, 2002); L. Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, 2009); K. Williams., J. Poyser and K. Hopkins, *Accommodation, homelessness and reoffending of prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) survey* (Ministry of Justice, 2013).

Analysis of Welsh imprisonment data alongside the Welsh Index of Multiple Deprivation show that the rate of imprisonment is around three times greater in the five most deprived local authorities in Wales than the rate recorded for the five least deprived. Although less than a third (28%) of Wales' population live in the five most deprived areas, almost half (49%) of all Welsh prisoners recorded a 'home address' in these places in 2017. G. Davies and R. Jones, 'Deprivation and Imprisonment in Wales by Local Authority Area' (Wales Governance Centre at Cardiff University, 2019).

<sup>83</sup> In 2020, for every 10,000 White people living in Wales 14 were in prison. This compared to 79 people from a Black ethnic background, 44 people from a Mixed background, and 21 per 10,000 from an Asian background. These data were obtained from the UK Ministry of Justice under the Freedom of Information Act 2000.

<sup>84</sup> UK Government, 'Secretary of State's oral statement on sentencing' (n 5 above).



administrative changes. As a proportion of the UK prison population, this would equate to around 6 Welsh prisoners on any given day, in an average Welsh prison population of 4,682.<sup>85</sup> Alternatively, around 0.1% of the Welsh prison population. Developments since the reforms were introduced have also meant that the minor changes made to the franchise in 2018 have largely been undone. In the wake of the COVID-19 pandemic, the temporary release of prisoners in England and Wales was suspended in 2020 for all prisoners except those deemed to be ‘key workers’ and those released on compassionate grounds. With a 44% decrease in temporary releases between 2019 and 2021,<sup>86</sup> the number of additional prisoners entitled to vote in the Senedd election on 6 May 2021 is likely to have been negligible. On this basis, it could be argued that the election failed to meet the requirements of A3P1 ECHR, as set out in *Hirst* and subsequent cases.

To what extent, then, are Welsh devolved institutions required to act to address this situation? Murray observes that although the devolved legislatures can ‘legislate to rectify human rights breaches resultant from Westminster legislation ... within their areas of competence, ... questions remain over the extent to which they are *compelled* to do so’.<sup>87</sup> In an analysis of relevant case law,<sup>88</sup> however, he argues that it is ‘incumbent’<sup>89</sup> upon them to address breaches falling within the scope of their powers.<sup>90</sup> Although not obliged to legislate, if they do, they

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<sup>85</sup> These data were obtained from the UK Ministry of Justice under the Freedom of Information Act 2000.

<sup>86</sup> *Ibid.*

<sup>87</sup> Murray (n 6 above) 296 (emphasis added).

<sup>88</sup> *Ibid* 296-7. *In re G (Adoption: Unmarried Couple)* [2009] AC 173; *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2019] 1 All ER 173.

<sup>89</sup> Murray, *ibid*, 297.

<sup>90</sup> *In re G (Adoption: Unmarried Couple)* [2009] AC 173, [46] (Lord Hope).

must do it in a way which is compatible with the Convention rights.<sup>91</sup> On this basis, Murray concludes that the Welsh Government's recent electoral reforms are problematic: 'In legislating to reform the franchise without addressing the issue of the ongoing breach of prisoners' voting rights, ... the Welsh Government risks having its competence to enact these measures challenged on human rights grounds'.<sup>92</sup>

In summary, there remains a compelling case for the Senedd to legislate in order to meet its human rights obligations. The UK Government's reforms have done nothing to address prisoner disenfranchisement in the UK; indeed, the situation is likely to be worse than previously thought. The effects of current UK Government policy are most acute in Wales, yet the Lidington reforms had no discernible impact on Welsh prisoners. Despite the formal resolution of the *Hirst* cases, it could therefore be argued that recent electoral reforms in Wales and the 2021 Senedd election fell short of A3P1 ECHR's requirements.

## **BARRIERS TO PRISONER ENFRANCHISEMENT IN WALES**

Having acquired competences over devolved electoral arrangements, the Welsh Government and Senedd can now initiate a process of prisoner enfranchisement. As the preceding discussion made clear, there are compelling legal reasons for them to do so. If and when that happens, however, they will face a considerable set of constitutional, political and practical obstacles. After setting out these obstacles, we consider their likely impact on four different reform options and the implications for the Senedd's legislative competence in this space.

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<sup>91</sup> Murray (n 6 above) 297.

<sup>92</sup> Ibid 308. Murray also notes that the Senedd legislated to enable 16 and 17 year olds held in the secure estate to register to vote for devolved and local elections (Senedd and Elections (Wales) Act 2020, s 19). However, FOI requests to all 22 local authorities in Wales suggest that no one in this category had registered for the 2021 Senedd election.

Constitutionally, the Welsh Government lacks the powers to facilitate prisoner voting by itself. Under the devolution statutes, changes to electoral and institutional arrangements are subject to a ‘super-majority’ requirement: they require the approval of two thirds of the Senedd membership, or 40 out of 60 members.<sup>93</sup> In practice, this means that the Welsh Government will need the support of other political parties to extend the franchise. The UK Government considered the threshold necessary to prevent electoral changes being implemented for party-political advantage.<sup>94</sup> However, the super-majority requirement has arguably hampered reform in this area. The Welsh Government had initially included provisions in the Local Government and Elections (Wales) Bill to grant prisoners serving up to four year sentences the right to vote in local elections. However, it chose to abandon these amid the outbreak of the Covid-19 pandemic and criticism from opposition parties over the timing of the changes.<sup>95</sup> Murray therefore argues that the super-majority requirement exerted ‘a telling effect’: ‘the Welsh Government was not confident it could meet the 40 votes that would be required to get these proposals passed’.<sup>96</sup>

A bigger constitutional obstacle, however, is the jagged edge of criminal justice in Wales. Since the UK Government retains control over the prison estate, enfranchisement will require the cooperation of the Ministry of Justice and His Majesty’s Prison and Probation Service

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<sup>93</sup> Under the Government of Wales Act 2006 s 111A the regulation of ‘persons entitled to vote as electors at an election for membership of the Senedd’ is a protected subject matter to which the super-majority requirement applies.

<sup>94</sup> Murray (n 6 above) 301, citing Constitution Committee, *Proposals for the Devolution of Further Powers to Scotland* (2015) HL 145, para 92.

<sup>95</sup> BBC News, ‘Coronavirus: Prisoner votes in Welsh local elections plan shelved’ (*BBC*, 8 April 2020) <<https://www.bbc.co.uk/news/uk-wales-politics-52221041>> accessed 27 June 2022.

<sup>96</sup> Murray (n 6 above) 307.

(HMPPS). As an official for the Electoral Commission told the Senedd committee inquiry on prisoner voting, ‘this can only be done through the co-operation and engagement of the prison service itself’.<sup>97</sup> Further, because the UK Government is still responsible for the criminal law, sentencing and the courts, it will continue to have a profound influence over the number of prisoners which benefit from any Welsh Government changes to the franchise.

This constitutional setup gives rise to a major political obstacle: the long-standing opposition of UK governments to prisoner enfranchisement.<sup>98</sup> With the legal dispute over prisoner voting with the Council of Europe formally resolved, there is little incentive for it to revisit the issue, particularly given the fervent opposition of most of the English media to enfranchising convicted prisoners.<sup>99</sup> Indeed, it seems likely that the more far-reaching the Welsh Government’s proposals, the less likely it is that the UK Government will facilitate the desired change. In other words, an attempt to use devolved competences to their full extent will render UK Government obstruction all the more probable. ‘Devolved autonomy’, however qualified, is not an appropriate description for this arrangement.

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<sup>97</sup> Equality, Local Government and Communities Committee, ‘Inquiry into Voting Rights for Prisoners: Evidence Session 5’ (n 73 above) para 154. Similarly, powers given to the Welsh Language Commissioner under the Welsh Language (Wales) Measure 2011 to ensure compliance with standards of conduct on the Welsh language are limited with respect to the criminal justice system in Wales. Under s 43 of the Measure, the Commissioner is only able to impose duties on Crown bodies, or ministers of the crown, with the consent of the Secretary of State. In 2018 the Welsh Language Commissioner told Westminster MPs that it is likely that ‘most UK Government institutions’ will continue to operate schemes set up outside of the Welsh Language Measure ‘for some time to come’. Welsh Language Commissioner, ‘Written evidence submitted to the House of Commons Welsh Affairs Committee on Prison Provision in Wales’ (Cardiff: Welsh Language Commissioner, 2018) 3.

<sup>98</sup> Former Secretary of State for Justice, David Lidington MP, described the disenfranchisement of convicted prisoners as an expression of ‘British values’. UK Government, ‘Secretary of State’s oral statement on sentencing’ (n 5 above).

<sup>99</sup> McNulty, Watson and Philo (n 13 above); Murray (n 13 above).

The single ‘England and Wales’ justice system also gives rise to a significant practical complication, namely the dispersal of Welsh and English prisoners across the prison estate. In 2021, more than a quarter (27%) of Welsh prisoners were held in England, in over 100 English prisons, while English prisoners made up almost a third (32%) of the prison population in Wales.<sup>100</sup> This situation creates a further incentive for the UK Government not to use its powers to facilitate a more progressive Welsh policy. Whether the Welsh Government seeks to enfranchise prisoners on the basis of the location of the prison in which they are held or their home address, it will be asking the UK Government to make significant concessions on its policy of disenfranchisement for convicted prisoners. Given the nature of the prison population, any Welsh policy of prisoner enfranchisement for devolved elections inevitably involves either convicted Welsh prisoners casting votes inside English prisons or convicted English prisoners casting votes inside Welsh prisons – neither of which a UK government is likely to greet with much enthusiasm.

No matter how the Welsh Government proceeds, these constraints are likely to have decisive implications for the realisation of its chosen policy. One option is to tie disenfranchisement to sentence length. This is the Welsh Government’s preferred approach, having proposed to enfranchise prisoners sentenced to less than four years. This, it argued, ‘strikes the right balance between sending strong and positive messages to prisoners that they continue to have a stake in society and acknowledging the nature, gravity and circumstances of the offending’.<sup>101</sup>

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<sup>100</sup> Welsh prisoners could be found within 104 different prisons in England in 2021. These data were obtained from the UK Ministry of Justice under the Freedom of Information Act 2000.

<sup>101</sup> Welsh Government, ‘Prisoner voting plans unveiled’ (n 10 above).

On the one hand, this step might be enough to discharge its human rights obligations. A number of institutions in recent years have concluded that the enfranchisement of prisoners serving up to one year sentences would satisfy the ECtHR.<sup>102</sup> However, without the corresponding powers over criminal justice policy, and thus the size of the Welsh prison population, any threshold based on sentence length is likely to be devoid of principle and coherence. In effect, this aspect of Welsh electoral policy will be conditioned by the changing currents of criminal justice policy in Westminster. In this respect, it is worth noting that significant changes have already taken place. Since the Welsh Government first consulted on prisoner voting in 2017, for example, the number of Welsh prisoners serving up to four year sentences has fallen by almost a third (31%).<sup>103</sup> Following the 2019 general election, the UK Government also acted upon its commitment to increase the use of longer sentences.<sup>104</sup> As a result, the number of prisoners who would be able to vote in Welsh elections under the Welsh Government's proposals has already shrunk and is likely to reduce further in future.<sup>105</sup>

Another issue with the Welsh Government's preferred approach is that it will require the UK Government, more specifically HMPPS, to permit and facilitate prisoner voting across the prison estate, including potentially in over 100 English prisons. Additionally, it will create differentiated rights inside of prisons, thereby potentially sharpening a division between those prisoners with rights and those without them. This is not without consequence. When the Welsh

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<sup>102</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (n 73 above); Scottish Elections (Franchise and Representation) Act 2020, s 5.

<sup>103</sup> The number of Welsh prisoners serving sentences up to 4 years fell by 31% between 2017 (1,803) and 2022 (1,238). While 38% of the Welsh prison population had been sentenced to less than 4 years in 2017, this number had fallen to 26% in 2022.

<sup>104</sup> Police, Crime, Sentencing and Courts Act 2022.

<sup>105</sup> Conversely, if the UK Government were to do the opposite, and increase the use of shorter sentences, the proportion of prisoners with voting rights would accordingly *increase*, yet without needing any sanction from Welsh devolved institutions.

Government legislated to include unintentionally homeless prison leavers amongst the list of those given automatic priority need status for accommodation in 2001, the policy was cited as a cause of friction between English and Welsh prisoners in English prisons.<sup>106</sup> Similarly, in this instance, prisoners serving comparable sentences, within the same legal jurisdiction, officially the same criminal justice system, even within the same prisons, would hold different rights of democratic participation. In a prison cell in HMP Berwyn in north Wales, for example, it would be possible to have two prisoners – one from Caernarfon, the other from Coventry – sentenced for the same criminal offence and serving the same sentence length. The former would have the right to vote in a local election, the latter would not. In this way, we see how the jagged edge in constitutional arrangements expresses itself in territorial fault lines and policy differentiation even at the scale of the prison cell.

Alternatively, the Senedd could attempt to enfranchise all prisoners held within Welsh prisons, using the prison as their address and the surrounding area as their voting constituency. It might do so on the grounds that these prisoners receive essential devolved services such as healthcare for which the Welsh Government is responsible and ought to be electorally accountable. This, however, would exclude imprisoned Welsh women from the franchise, since they are currently held exclusively in English prisons.<sup>107</sup> Concerns over constituency inflation are also likely to make this approach unpalatable to politicians at both the devolved and UK levels. On the one

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<sup>106</sup> Specifically, HMP Altcourse in Liverpool, which then operated as the ‘local prison’ to north Wales. R. Jones, ‘The Hybrid System: Imprisonment and Devolution in Wales’ (PhD Thesis, Cardiff: Cardiff University, 2017).

<sup>107</sup> The UK Ministry of Justice announced in May 2022 that a 12-bed Women’s Residential Centre will be built at a site in Swansea. Once operational, the Centre will work with around 50 women a year. Ministry of Justice, ‘Location of first-ground breaking Residential Women’s Centre revealed’ (Ministry of Justice, 2022) <<https://www.gov.uk/government/news/location-of-first-ground-breaking-residential-women-s-centre-revealed>> accessed 8 June 2022. In addition to women, the plan would also exclude all Category A Welsh prisoners. Due to the fact that there are no Category A places in Wales, all sentenced Category A Welsh prisoners are held in one of five high security prisons in England. On average, there were 35 Welsh prisoners being held as Category A in 2021.

hand, it would enfranchise up to 1,500 English prisoners held inside Welsh prisons.<sup>108</sup> Given that it took thirteen years and multiple adverse ECtHR judgments before the UK Government conceded to grant ‘up to one hundred prisoners’ the vote, such a dramatic change in policy does not appear likely. Welsh politicians are also uneasy with this approach. The Fifth Senedd’s Equality, Local Government and Communities Committee expressed concern that the use of the prison as a registration address could have ‘a disproportionate effect on a small number of wards and constituencies where prisoners would make up a significant proportion of the electorate’.<sup>109</sup>

A third option would be to grant judges the discretion to disenfranchise individuals sentenced to prison on a case-by-case basis, depending on the nature and seriousness of the offence. Previous case law of the ECtHR indicated that this approach would satisfy the requirements of A3P1:

... 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 law but by the decision of a judge following judicial proceedings.<sup>110</sup>

Subsequent case law has made clear that this is not a requirement under the ECHR.<sup>111</sup> Nonetheless, it highlights one such measure which could help to ensure compatibility with

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<sup>108</sup> These data were obtained from the UK Ministry of Justice under the Freedom of Information Act 2000.

<sup>109</sup> Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (n 8 above) 41. In 2021, there were, on average, 1,783 prisoners being held at HMP Berwyn in Wrexham and 1,625 prisoners at HMP Parc in Bridgend. Ministry of Justice, ‘Prison population figures: 2021’ (London: Ministry of Justice, 2022) <<https://www.gov.uk/government/statistics/prison-population-figures-2021>> accessed 22 June 2022.

<sup>110</sup> *Frodl v Austria* (2011) 52 EHRR 5, para 28.

<sup>111</sup> *Scoppola v Italy (no 3)* (2013) 56 EHRR 19, para 99.



A3P1.<sup>112</sup> Since the Welsh Government and Senedd do not control sentencing policy, however, this policy choice is not available to it. It would therefore need to ask the UK Government to legislate on its behalf or grant the Senedd the competence<sup>113</sup> to give judges the discretion to disenfranchise. Such a request would almost certainly be rejected by a UK government, for three reasons. First, a case-by-case approach would present an inversion of the current position: it would replace automatic legislative disenfranchisement, favoured by the UK Government, with a presumption of continuing enfranchisement. Second, given the UK Government's staunch commitment to retaining a common criminal justice system for England and Wales, it is unlikely it would contemplate such a significant divergence in sentencing policy. Third, English and Welsh prisoners are sentenced at courts across the England and Wales border, meaning that judges in both countries would need to have the discretion to disenfranchise with respect to Welsh devolved elections.<sup>114</sup> Again, it seems highly unlikely that a UK government would facilitate such a significant change in England for the sake of a policy with which it profoundly disagrees.

A fourth, non-legislative option would be to enhance coordination between electoral and prison services. Given the risk of administrative disenfranchisement facing prisoners with voting rights, discussed above, such an intervention could have a similar practical effect to the formal expansion of the franchise. This has been adopted successfully in other contexts.<sup>115</sup> Once again,

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<sup>112</sup> '...the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights'. Ibid.

<sup>113</sup> Government of Wales Act 2006 s 109.

<sup>114</sup> F. Thompson, 'Courts backlog: MPs raise concerns over government plan' (*The National*, 9 March 2022). <<https://www.thenational.wales/news/19978807.courts-backlog-mps-raise-concerns-government-plan/>> accessed 9 June 2022.

<sup>115</sup> The Sentencing Project, *Voting in Jails* (The Sentencing Project, 2020) <<https://www.sentencingproject.org/wp-content/uploads/2020/05/Voting-in-Jails.pdf>> accessed 6 July 2022.

however, UK Government acquiescence would be needed. This was recognised explicitly by the Equality, Local Government and Communities Committee in 2019, which called for a memorandum of understanding between the Welsh and UK Governments to facilitate better coordination between services.<sup>116</sup>

Having considered the implications of these reform options, it is necessary to return to the question of legislative competence. It cannot be taken for granted that Welsh legislation on prisoner voting rights would survive a referral to the UK Supreme Court. An Act of the Senedd is ‘not law’ so far as its provisions ‘relate to’ reserved matters.<sup>117</sup> Whether a provision of devolved legislation relates to a reserved matter is ‘determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances’.<sup>118</sup> The UK Supreme Court has stipulated that there needs to be ‘more than a loose or consequential connection’.<sup>119</sup> Crucially, this assessment is not confined to a provision’s *legal* effects. As the Court’s President, Lord Reed, has said: ‘a provision does not have to modify the law applicable to a reserved matter in order to relate to that matter’.<sup>120</sup> Rather, a provision also needs to be considered in light of its ‘practical effects’<sup>121</sup> and ‘political consequences’.<sup>122</sup> The question therefore would be whether Senedd legislation purporting to allow prisoners to vote in

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<sup>116</sup> Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (n 8 above) 47.

<sup>117</sup> Government of Wales Act 2006, ss 108A(1) and (2)(c).

<sup>118</sup> Government of Wales Act 2006, s 108A(6).

<sup>119</sup> *Martin v Most* [2010] UKSC 10, [49] (Lord Walker).

<sup>120</sup> *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31, [74], citing *Christian Institute v Lord Advocate* [2016] UKSC 51, [33] and [63] (Lady Hale, Lord Reed and Lord Hodge).

<sup>121</sup> *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] 1 WLR 2622, [53] (Lord Reed and Lord Thomas CJ).

<sup>122</sup> *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* (n 120 above), [81] (Lord Reed).

devolved and local elections would have more than a loose or consequential connection to criminal proceedings, sentencing, the courts, prisons or offender management, having regard to its legal, practical and political effects. Given the extensive, cross-cutting implications of prisoner enfranchisement in Wales, discussed above, it is conceivable that the UK Supreme Court would find that such legislation fell outside of the Senedd's legislative competence, even if the legislation did not purport to modify the law on the relevant reserved matters.

Of course, this would produce an absurd outcome. In effect, there would be a two-tiered system for Welsh devolved and local elections, in which the Westminster Parliament retained a regulatory role, but only with respect to prisoners. Given the Supreme Court's expansive approach to 'purpose and effect', however, this possibility cannot be discounted. Even if the UK Government refrained from making a referral to the Supreme Court, it would still be free to prevent the legislation from becoming law using the power available to it under GOWA 2006, s 114. It would merely need to demonstrate that it had 'reasonable grounds to believe' that the legislation would adversely affect either reserved matters or the law as it applies in England. Again, given the cross-cutting effects of prisoner enfranchisement for Welsh elections, this would not be difficult to justify.

We thus see how the devolved level is 'responsible without power':<sup>123</sup> responsible for fulfilling the human rights obligations which arise from control over electoral arrangements, yet lacking the necessary powers over the justice system to discharge them. This lack of constitutional autonomy, compared to Scotland, has very real implications for the implementation of prisoners' human rights. The Scottish Government has been able to use the Scottish Parliament's powers over devolved elections to enfranchise around 1,000 Scottish prisoners,

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<sup>123</sup> Jones and Wyn Jones, *Criminal Justice in Wales: On the Jagged Edge* (n 42 above).

and it remains free to go much further. Many Scottish prisoners have therefore seen their rights enhanced, if only very modestly. By contrast, Wales' devolved institutions enjoy the same powers over devolved elections but are unable to use those powers to enhance prisoner rights in the same way, at least not without UK Government approval. In practice, and to a greater extent than prisoners elsewhere in the UK, Welsh prisoners' A3P1 ECHR rights are conditioned by conflicting political imperatives.

## CONCLUSION

The issue of prisoner voting highlights basic flaws in the design of Welsh devolution, confronting the devolved institutions with human rights obligations which they cannot fulfil without UK Government facilitation. Under these constitutional conditions, the devolved institutions face a stark choice: do nothing, and risk legal challenges to their recent and ongoing electoral reforms, or act, and still face legal challenges (albeit on different grounds), or the potential frustration of their chosen policy by Whitehall.

In these circumstances, what should be done will depend on the priorities of the Welsh Government. If its aim is to engage in box-ticking, 'minimalist compliance' purely to shield itself from legal action, it need only legislate to enfranchise some convicted prisoners and request the UK Government to implement the necessary changes. Clearly, it cannot bear legal responsibility for any attempt by the UK Government to frustrate its policy. The incoherence presented by the criminal justice system in Wales, however, cannot be ignored if a durable policy is to be constructed within current arrangements. As we have seen, granting voting rights based on sentence length will effectively outsource this area of devolved electoral policy to the UK Ministry of Justice. The only policy choices which would not be the full enfranchisement

of all prisoners with a Welsh address, the enfranchisement of all prisoners held in the Welsh prison estate, or a combination of these options. Whichever approach it adopts, the possibility of the UK Government either referring the legislation to the UK Supreme Court or exercising its s 114 veto power cannot be discounted.

Wyn Jones and Scully argue that the idea of a devolution ‘settlement’ is ‘wholly inappropriate’<sup>124</sup> in the Welsh context, given the constant changes which have characterised it.<sup>125</sup> Similarly, we contend that ‘devolved autonomy’ is a flawed empirical description for Welsh devolved competences, particularly where those competences sit at the jagged edge. This is not to downplay the scope which exists for the Welsh Government to strengthen human rights protection within the devolved system.<sup>126</sup> However, the case study of prisoner voting offers a powerful illustration of the difficulties of doing so in the context of an unorthodox and unusually complex Welsh justice system. The problems explored here are not confined to voting rights; other prisoner rights falling at the jagged edge of devolved and reserved competences – whether relating to health, housing or Welsh language provision – are also likely to be adversely affected by current arrangements. The involvement of two different governments within the Welsh criminal justice policy space, each with their own mandate, policy vision and agenda, will therefore continue to raise significant questions over the sustainability of the Welsh dispensation. Unless and until this anomalous situation is resolved, devolved institutions will face considerable challenges to the enhancement of legal human rights protections. Even modest progressive aspirations are likely to be thwarted.

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<sup>124</sup> R. Wyn Jones and R. Scully, *Wales Says Yes: Devolution and the 2011 Welsh Referendum* (University of Wales Press, 2012) 170.

<sup>125</sup> Between the two Government of Wales Acts (1998 and 2006) and two Wales Acts (2014 and 2017), the basic structures of Welsh devolution have changed three times since 1999.

<sup>126</sup> Boyle and Busby (n 3 above); Hoffman et al (n 3 above).