



# **Prisoner voting rights on a European perspective: the cases of McHugh & others v. The United Kingdom and Thierry Delvigne v. Commune de Lesparre Médoc**

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**Prisoner voting rights on a European perspective: the cases of McHugh & others v. The United Kingdom and Thierry Delvigne v. Commune de Lesparre Médoc**

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This paper will study the issue of felon disenfranchisement across Europe, focusing on the need for a change in the legislation of those Member States of the Council of Europe, preventing all offenders from voting while serving their time in prison. These laws, equally condemned by both the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ), are nowadays considered as contributing to the dehumanization of prisoners through the deprivation of that fundamental right, the right to vote, which should be a guarantee of democracy. Following the rationale of two recent cases on the issue, brought before the above-mentioned Courts, the paper will then analyse on what grounds a Member State can restrict the right to vote of detainees. To do so, the paper will consider two different systems adopted by several Member States namely: a system disenfranchising prisoners on a sentence length basis and a system depriving of the right to vote only prisoners having committed select offences, i.e. those targeting the democratic structure of the State.

*Keywords:* Prisoners' right to vote, Criminal justice, Human rights, European Court of Justice, European Court of Human Rights.

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**Il diritto di voto dei detenuti, una prospettiva europea: i casi di McHugh e altri c. Il Regno Unito e Thierry Delvigne c. Comune di Lesparre Médoc**

Viola Scordia\*

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Questo documento verte sull'analisi, a livello Europeo, del fenomeno di privazione del diritto di voto dei detenuti. Dallo studio emerge l'urgenza di una riforma delle legislazioni degli stati membri del Consiglio d'Europa, che pongono un divieto generale all'esercizio del voto da parte dei detenuti. Queste disposizioni, condannate sia dalla Corte Europea dei Diritti dell'Uomo (CEDU) sia dalla Corte Europea di Giustizia (CEG), sono attualmente considerate fattori di disumanizzazione del detenuto in quanto lo privano di quel diritto fondamentale, il diritto di voto, che dovrebbe essere considerato una imprescindibile garanzia democratica. Seguendo la logica applicata dalle corti precitate in due sentenze recenti, questo documento analizza le basi su cui uno stato membro può limitare il diritto di voto dei detenuti. Per fare ciò si considerano due diversi approcci alla questione: un primo approccio prevede la privazione del diritto di voto basata sulla lunghezza della pena scontata; un secondo approccio prevede la privazione del diritto di voto solo ai detenuti che scontano pene legate a determinati tipi di reato.

*Parole chiave:* Diritto di voto dei detenuti, Giustizia penale, Diritti umani, Corte di Giustizia Europea, Corte Europea dei Diritti dell'Uomo.

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## Introduction

Democracy was once established through the idea of universal suffrage. Our forefathers accepted the principle that not only male persons, nobles, and those who owned property or paid taxes should have the right to vote, but everyone – irrespective of their status in society. We may now feel that some of these right-holders do not deserve this possibility, but to exclude them is to undermine a crucial dimension of the very concept of democracy – and thereby human rights<sup>1</sup>.

*(Thomas Hammarberg, Council of Europe Commissioner for Human Rights)*

Throughout history the right to vote has been one of the most coveted rights, one need look no further than the abolition of the franchise or the battle for the enfranchisement of women and it will be clear how long and challenging was the path towards universal suffrage. We may think that today the right to vote is indefinitely achieved, yet this is not the case, still some part of the population of many modern democracies cannot vote. This part of the population is the prison population.

In various European countries prisoners cannot cast their vote. Some countries apply a complete ban on the right to vote of inmates, others apply selective restrictions based either on the length of the sentence or on the type of offence committed, these restrictions on voting rights may apply during the conviction and, in few countries only, even post release.

Indeed, the question of prisoners' right to vote is a complex one as it aims straight at the heart of one's moral sphere. One may think that prisoners lose their rights, including the right to vote, as soon as they are convicted of breaching the law and violating the social contract that ties society together. Yet, this is not the case. Inmates retain all of the fundamental rights that law-abiding citizens have but, of course, the right to liberty. It is not clear why prisoners who do not lose their fundamental rights should lose the right to vote.

All issues revolving around detainees are per se thorny issues due to the stigma ex-offenders constantly face. A stigma, as defined by Erving Goffman<sup>2</sup>, is a deeply discrediting attribute that takes shape within the eyes of others and through the active process of interaction between the “normals” and the “stigmatized”. In the case of ex-offenders, the past participation in criminal activities corresponds to what Goffman defines as a blemish of individual character<sup>3</sup>. Blemishes of individual character are the most powerful form of stigma as they suggest a constant potential threat. The stigma attached to ex-offenders is even stronger because of the attributor: the State.<sup>4</sup> This attribution allows the maintenance of social hierarchy and ultimately provides for a justification of the pre-existing forms of social discrimination<sup>5</sup>. This, by making the target one-dimensional. Ex-offenders are therefore perceived as simply being such, and not as individuals having committed a crime in the past. Thus, a stigma becomes the “frame through which the perceivers will understand the target”<sup>6</sup>. To conclude, the stigma, which remains unreduced at the

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<sup>1</sup> Thomas Hammarberg, Council of Europe Commissioner for Human Rights, “Prisoners should have the right to vote”, the commissioner's human rights comments, 2011.

<sup>2</sup> E. Goffman, *Stigma: Notes on the Management of Spoiled Identity*, 1963.

<sup>3</sup> *Ivi.* 2, p. 4.

<sup>4</sup> T. M. Callais, *Ex-Offenders, Stigma Management, and Social Movements: An Organizational Case Study of Identity Work and the Reentry Process*, Ohio State University, 2009. p. 23.

<sup>5</sup> *Ivi.* 4, p. 20.

<sup>6</sup> *Ivi.* 4, p. 18.

moment of re-entry, entails the ex-offender's loss of control over his own identity, which is predetermined by society. Ex-offenders therefore find themselves caught in a vicious circle destined to relegate them to second-class-citizenship.

Due to its controversial and sensitive nature, the question of prisoner's voting rights is rarely at the centre of political debate in most European countries. The lack of interest is also a result of the predicament of prisoners being the part of the population that is most often forgotten even in democratic societies. Nevertheless, many cases on the issue of felon disenfranchisement have been brought before the European courts and a judicial answer was given to the philosophical question.

This paper examines the status of prisoner voting rights in Europe, focusing exclusively on the right to active voting, for obvious reasons. I take as my subject the legal practices of the Member States of the Council of Europe, as this organization encompasses more countries of the European continent than the European Union. I begin by, laying out the European and National legislations as well as the European case law regarding the practice of felon disenfranchisement. I aim to highlight the main arguments the ECHR and the ECJ have developed in their approach to the question of prisoner's voting rights. Then, I present two case studies on the issue of prisoner voting rights. The first, *McHugh & others v. The United Kingdom*, brought in front of the ECHR, is the last of a long series of cases against the United Kingdom's harsh ban on prisoner voting. The second, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* of 2015 was the first case referred to the ECJ on the issue. By the two cases I aim to show how, despite different outcomes, the two courts apply the same, well-established jurisprudence and rationale. After that, I consider two main questions that the issue of felon disenfranchisement revolves around, namely the rationale for prisoner enfranchisement, i.e. the pros and cons of granting prisoners the right to vote, and the issue of determining the basis for prisoners' disenfranchisement, viz. on what grounds the right to vote of prisoners should be limited. Finally I conclude by a number of recommendations.

## I. European legislation and case law

### 1. European legislation

European legislation on the issue of felon disenfranchisement may be described as disharmonious. In fact, there is no specific provision of European law that organises the right to vote of prisoners. On the one hand, the Charter of Fundamental Rights of the European Union clearly states that every citizen of the Union has the right to vote in and to stand for elections<sup>7</sup>. Contrarily, the European Convention on Human Rights is much less unambiguous on the issue. In Article 3, Protocol 1 to the Convention it is the right to free elections that is protected. Yet, the ECHR has interpreted the provision as guaranteeing the individual right to vote<sup>8</sup>.

Despite the fact that the European Union and the Council of Europe are two distinct institutions operating on different fields, their work overlaps especially as concerns the

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<sup>7</sup> Charter of Fundamental Rights of the European Union, Art. 39 and 40.

<sup>8</sup> *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX.

protection of Human Rights. Both institutions uphold such rights, however the mechanisms set out to enforce them are frail. If on one hand the ECJ has the power to force decisions and impose sanctions upon unyielding Member States, the right to individual petition to the Court is highly qualified. On the other hand, the ECHR, though widely accepting individual appeals, has a fairly nonexistent power to sanction.

Though the European Union was unable to enter the European Convention on Human Rights<sup>9</sup>, the Union does uphold the rights inscribed in such Convention. The provisions of the ECHR were incorporated into the law of the European Union as soon as 1992. Article F of the Treaty of Maastricht placed on the European institutions and the High Contracting Parties an obligation to respect fundamental rights as inscribed in the ECHR<sup>10</sup>. This provision was upheld and reinforced by subsequent treaties. The treaty of Amsterdam, amending the Treaty on European Union, granted jurisdiction to the European Court of justice to rule on the application of the article and therefore to sanction breaches of the Convention by both Member States and the Institutions of the European Union. Thus, though unable to join the ECHR, the European Union does guarantee a satisfactory degree of protection through what is now Article 6 of the Treaty on the European Union<sup>11</sup>.

For those Member States of both the European Union and the Council of Europe, protection of fundamental rights is thoroughly guaranteed. This, because the European Union's primary legislation, most of its secondary legislation and the rulings of the Courts, which must comply with the ECHR, have a direct effect. The general principle of direct effect, established by the ECJ<sup>12</sup>, allows for individuals to directly invoke the law of the Union before national and European Courts. The issue here stands in the strict conditions that an individual must comply with in order to bring a case before the European Courts.

As regards the European Court of Human Rights the problem does not stand in the conditions to bring an individual action, au contraire, in the lack of power to impose effective sanctions. The compliance with the rulings of the Strasbourg Court mainly rests on the good faith of its Members given that the Court's rulings have no direct effect either. The sole incentive for compliance is the intervention of the Committee of Ministers of the Council of Europe, whose role is to oversee the execution of the sentences and the payment of damages to the injured party. The Committee of Ministers can, as the *extrema ratio*, suspend the representation of an unyielding Member or invite it to withdraw from the Institution.

The paradox here lies in the fact that the European Court of Justice does guarantee a more effective protection of the rights listed in the European Convention on Human rights than the ECHR itself, because of the principle of the direct effect and the power of sanction granted to the ECJ and the other Institutions. However there are two main qualifications: the effectiveness is limited to the provisions listed in the European Convention of Human Rights and not their interpretation by the ECHR, and individual access to the Court is rarely granted. This is not the case for the ECHR that does guarantee individual appeals but does not have the power to

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<sup>9</sup> ECJ, 13 June 2014, opinion 2/13.

<sup>10</sup> Article F, Title I "Common provisions", Treaty on European Union, 1992.

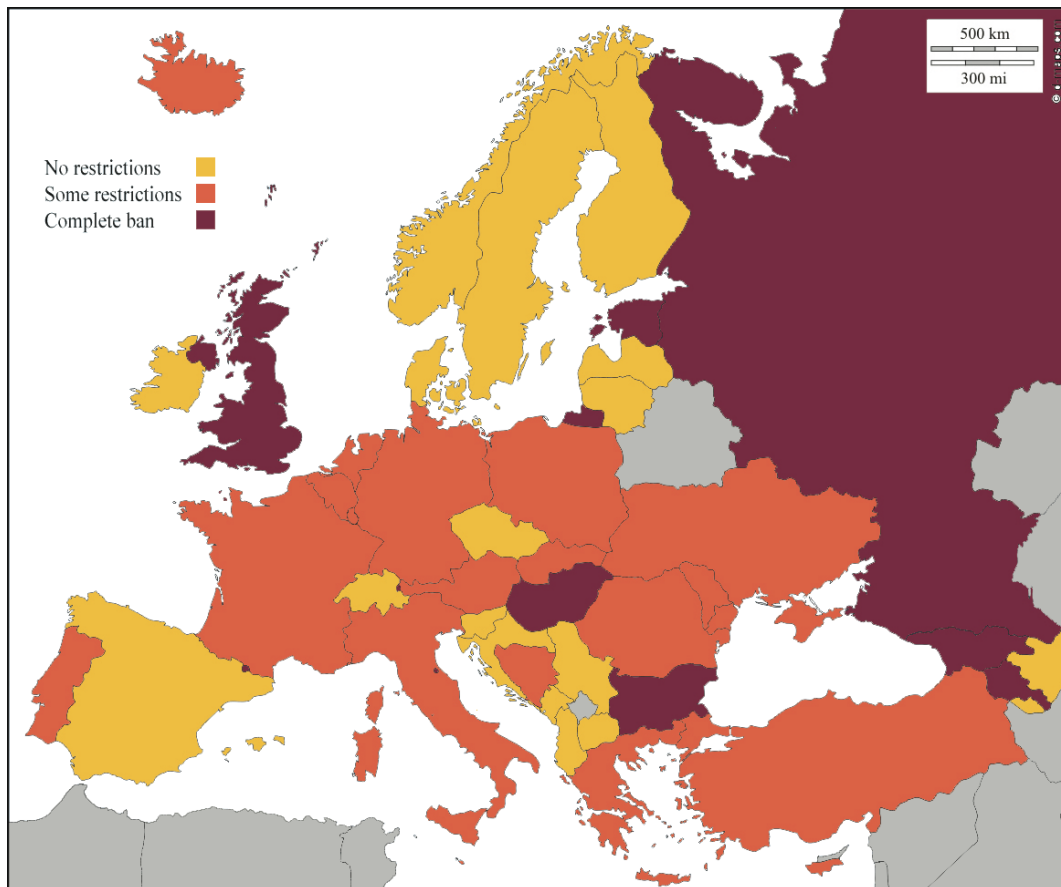
<sup>11</sup> Article 6, Title I "Common provisions", Consolidated version of the Treaty on European Union, 2007.

<sup>12</sup> NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, ECJ, 1963.

impose effective sanctions.

As regards national legislation on prisoners' right to vote, three separate groups may be identified among the 47 countries of the Council of Europe. 17 countries allow all prisoners to vote without any restriction, among them many Eastern European countries such as Albania, Macedonia and Serbia as well as the four Nordic countries. 20 countries including France, Italy, Germany and the Netherlands apply some restrictions on prisoners' right to vote. Finally, all condemned prisoners are disenfranchised in 10 of the Council's Member States such as the United Kingdom, Russia and Bulgaria, to name a few.

Map: The right to vote of prisoners in the Member States of the Council of Europe



Source: author's own elaboration.

## 2. Relevant European case law

Both the ECHR and the ECJ have had the opportunity to rule on the question of felon disenfranchisement. However, it is the ECHR that has developed a substantial case law on the subject.

The first case the aforesaid Court examined was that of *Hirst (n°2) v. The United Kingdom (2005)*. The case concerned a detainee condemned to life imprisonment, then released on licence, who challenged the United Kingdom's ban on prisoner voting. The Court held that the automatic disenfranchisement of prisoners conflicted with the Convention rights and urged the



United Kingdom to reform its legislation. Firstly, the Court admitted the possibility for Member States to limit this fundamental right if in pursuit of a legitimate aim and in regard of the principle of proportionality. The ECHR went on considering that, while in prison, detainees enjoy all Convention Rights except for the right to Liberty, in accordance with Article 5(1)(a)<sup>13</sup> of the Convention. Secondly, the Court considered whether the legislation fulfilled the criteria formerly stated as regards the legitimate aim. It accepted the Government's suggestion that the ban was intended as a means to prevent crime and enhance civic responsibility. However, the Court also held that the criterion of proportionality was unfulfilled as the law resulted in a general, automatic and indiscriminate disenfranchisement and because there was no link between the crime committed and the punishment.

Following the *Hirst* case the United Kingdom was condemned in three other instances in 2010, 2014 and 2015<sup>14</sup>. Nevertheless, the government firmly refused to amend the legislative ban on prisoner voting. The precedent set forth in *Hirst (n°2) v. The UK* was subsequently confirmed in various rulings involving other Member States of the Council of Europe. Among the many cases studied by the Court on the same issue, was that of *Frodl v. Austria* of 2010. The Austrian law, which prevents all prisoners condemned to more than one-year imprisonment for a deliberate crime from voting, was found to be incompatible with the Convention. The Court therefore confirmed the precedent and established three criteria to be fulfilled for the limitation to be conventional; first, the limitation must be pronounced by a judge and not be the result of the application of a legislative norm; second, when limiting a prisoner's right to vote the court must take into account the circumstances of the case; and third, "there must be a link between the offence committed and issues relating to elections and democratic institutions"<sup>15</sup>. In *Scoppola v. Italy* (2012), the ECHR endorsed the observations submitted by the British government as a third party, stating that Member States have a wide margin of appreciation in determining the crime categories causing disenfranchisement and whether the ban should result from a court decision or a legislative provision. In accordance with its well-established jurisprudence the Court struck down the laws of various Member States resulting in a blank ban on prisoner voting. The Turkish law depriving all prisoners, including those on parole and on conditional sentence, was quashed twice in 2013 and 2014<sup>16</sup> under the principles established in the *Hirst* and *Frodl* cases. Similarly, in *Anchugov and Gladkov v. Russia* (2013) the Court held that the nature of the norm, resulting in an automatic ban on prisoners right to vote, had no influence on its lawfulness<sup>17</sup>.

As to the European Court of Justice, the Luxembourg Court recently issued the ruling of *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde*, on the question of

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<sup>13</sup> European Convention on Human Rights, Art. 5, Right to Liberty and Security: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court"

<sup>14</sup> *Hirst v. the United Kingdom (no. 2)*, ECHR 2005; *Greens and M.T. v. the United Kingdom*, ECHR 2010; *Firth and Others v. the United Kingdom*, 2014 and *McHugh & others v. The United Kingdom*, ECHR, 2015.

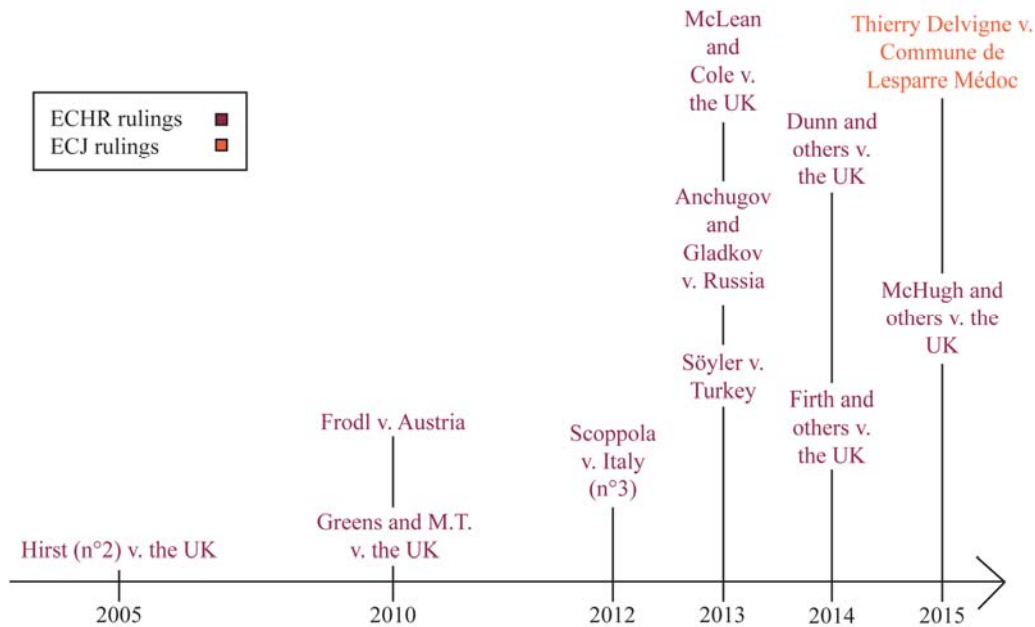
<sup>15</sup> *Frodl v. Austria*, ECHR 2010, §34.

<sup>16</sup> *Söyler v. Turkey*, ECHR 2013; *Murat Vural v. Turkey*, ECHR 2014.

<sup>17</sup> The Russian government argued that the provision prohibiting detainees from voting was enacted in the Constitution, *Anchugov and Gladkov v. Russia*, ECHR 2013, §85.

the right to vote of prisoners and heavily relied on the Strasbourg Court's case law in its rationale due to the lack of ECJ precedents.

Table 1: Timeline of the European Case law on felon disenfranchisement



Source: author's own elaboration.

## II. Case studies

*McHugh & others v. The United Kingdom* and *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* are two cases of 2015 in British and a French detainees, challenge the legislative limitations on their right to vote in two different European Courts, i.e. the ECHR and the ECJ respectively. With two different outcomes, the two Courts apply the same, well-established jurisprudence and rationale.

The case of *McHugh & others v. The United Kingdom* was brought by over one thousand British claimants to the ECHR. Given the well-established jurisprudence on the issue, the case at stake was treated following the pilot-judgement procedure that was applied in the *Greens and MT* decision<sup>18</sup>. The pilot-judgement procedure, inscribed in article 61 of the Rules of the Court, allows for the recognition of systemic dysfunctions and violations of Convention Rights at the national level. Through the implementation of such procedure, the ECHR identifies the structural defect and addresses clear indications to the Member State for reform, all in granting priority of examination to cases arising under such issue.

Here, the claimants challenged the British provision banning all detainees from voting<sup>19</sup> alleging it violated Article 3 of Protocol 1 to the Convention. A provision imposing on Member States the obligation to hold free elections allowing the free expression of citizens and their participation to the democratic process.

<sup>18</sup> *Greens and M.T. v. the United Kingdom*, ECHR 2010.

<sup>19</sup> Representation of the People Act 1983 §3(1).

In accordance with its well-established case law the court ruled the ban to be incompatible with the Convention because of its characters of generality, automaticity and indiscriminatio<sup>20</sup>. The blank ban, which was never amended following the court's numerous sentences of incompatibility<sup>21</sup>, was again considered as unduly burdening a vitally important Convention right.

The case of *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* concerns two questions on the interpretation of the Charter of Fundamental Rights of the European Union (the Charter) and was brought to the ECJ by the Tribunal d'Instance<sup>22</sup> of Bordeaux. The original claimant, Mr. Delvigne was convicted of murder and lost his right to vote as required by a provision of the Old Criminal Code<sup>23</sup>. However, though the right was reinstated after a reform of the French Criminal Code, the permanent ban to which he was subject was not removed. The claimant argued that the non-retroactivity of the more lenient punishment violated first, the principle of universal suffrage and second, the principle of non-retroactivity of the more lenient penal law. All in creating inequality between prisoners convicted before and after the reform.

Having declared itself incompetent to rule on the first question<sup>24</sup>, the Court upheld the French provision, arguing that it constituted a proportionate limitation in accordance with article 52(1)<sup>25</sup> of the Charter. To reach this conclusion the Court performed a comparative analysis of the case at stake and the relevant ECHR case law.

These two cases clearly illustrate that the idea that prisoners should acquire the right to vote is gaining momentum. Even though both Courts have allowed for Member States to limit this right to a certain extent, they equally stand firmly against laws resulting in a blanket ban on prisoners' voting as they breach the principle of proportionality that must tie the sentence to the offence committed. This recognition of prisoners' voting rights reflects the idea that inmates are citizens in all respects and therefore deserve to enjoy all fundamental rights.

This paper will now study the implications that such considerations may have, particularly the rationale behind the idea of felon enfranchisement and subsequently the basis for a proportionate limitation of the right to vote of prisoners.

### III. The implications

The issue of felon disenfranchisement revolves around two main questions, which require closer attention. In this Section, I take them respectively. First, I analyze the rationale for prisoners' enfranchisement, in other words, the arguments advanced in favour and against the

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<sup>20</sup> Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, ECHR 2005-IX, § 82.

<sup>21</sup> Ibid 14.

<sup>22</sup> A Tribunal d'Instance is a first instance jurisdiction comparable to a District Court.

<sup>23</sup> Code Pénal (ancien), Livre I, Chapitre I, art. 28.

<sup>24</sup> Under article 51(1) of the Charter, the Court has jurisdiction over all those cases arising under national legislation adopted in order to implement European law. Contrariwise, Mr. Delvigne's case arose under a disposition of French criminal procedure, completely unrelated to European law.

<sup>25</sup> Charter of Fundamental Rights of the European Union, 2000, Chapter VII, art. 52(1) "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

enfranchisement. Second, following the European Courts' decisions advising Member States that apply complete bans on prisoner voting to reform their current legislation, I consider the basis for such a limitation of the right to vote of inmates through an analysis of the legal landscape across Member States. This section will heavily rely on material concerning the United Kingdom because of the lengthy debate held on the issue at stake.

### 1. The rationale for felon enfranchisement

To scrutinize the arguments for and against felon enfranchisement the paper will rely heavily on the United Kingdom's Draft on Voting Eligibility (Prisoners) Bill 2013. Facing numerous sentences of incompatibility handed down by the ECHR, the two Houses of the British parliament discussed the possibility of reforming their current legislation on the right to vote of prisoners and formed a Joint Committee to conduct pre-legislative scrutiny. The report of the commission, issued in 2013, brought up the relevant arguments for reform. Nevertheless, the project was firmly dismissed by the Government as it was facing steadfast opposition by both the public<sup>26</sup> and the major political parties. Accordingly, British Prime Minister David Cameron announced in the Commons: “No one should be in any doubt. Prisoners are not getting the vote under this government”<sup>27</sup>.

In the United Kingdom, the doctrine of automatic, general and indiscriminate disenfranchisement of detainees may be traced back to the middle ages and to the idea of civic death. Those condemned of treason or felony used to lose their right to own or transfer property and, as a consequence, their right to vote, for the entitlement to vote was long a property-based qualification. This provision remained more or less unchanged throughout the centuries and even resisted the abolition of the franchise, becoming today section 3 of the Representation of the People Act 1983.

Keystone is the idea that the deprivation of voting rights is an integral part of the punishment symbolizing the breach of the social contract. To justify the idea that the loss of the right to vote is part of the punitive aspect of the purposes of sentencing, the British government argues that the right to vote is part of one's liberty, which is lifted as soon as an offence is committed. This interpretation of the right to vote was corroborated by the written evidence presented by the Archbishops' Council of the Church of England to the Joint Committee on the draft Voting Eligibility (Prisoners) Bill which explains how:

“Imprisonment constitutes a loss of liberty and, as a corollary of that, a range of opportunities to participate in civil society, as well as in normal social patterns of activity, are forfeited, including the right to vote”<sup>28</sup>.

The philosophy underlying the United Kingdom's blanket ban on prisoner voting may be retraced to Locke's idea that a citizen, when breaking the law, also breaches the terms of the

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<sup>26</sup> YouGov UK conducted a poll on a sample of 1812 adults on the right to vote of prisoners in the UK, 63% of the respondents said that “no prisoners should be allowed to vote at elections”, YouGov / Sunday Times Survey Results, 22nd - 23rd November 2012. At: [http://d25d2506sfb94.s.cloudfront.net/cumulus\\_uploads/document/lmlmhdqllh/YG-Archives-Pol-ST-results%20-%2023-251112.pdf](http://d25d2506sfb94.s.cloudfront.net/cumulus_uploads/document/lmlmhdqllh/YG-Archives-Pol-ST-results%20-%2023-251112.pdf).

<sup>27</sup> I Won't Give Prisoners The Vote, says David Cameron, *The Guardian*, 24 October 2012.

<sup>28</sup> The Archbishops' Council, Church of England—Written evidence (VEP 0018), *Joint Committee on the draft Voting Eligibility (Prisoners) Bill Oral and Written Evidence*.

social contract, thus becoming an outlaw who “may be destroyed as a lion or a tyger, one of those wild savage beasts, with whom men can have no society nor security”<sup>29</sup>.

It is clear that such a substantial deprivation of rights cannot rely merely on the medieval theory of outlawry and civic death for its outdated nature. Today both prisoners and prisons are perceived in a different and more humanized way. Moreover, the enfranchisement of prisoners can be considered valuable in improving democracy, preventing discriminatory practices and contributing in the rehabilitative process of detainees.

As regards the democratic value of enfranchising detainees, we must bear in mind the ECHR’s statement, in the Hirst (n° 2) decision, that prisoners do not forfeit their convention rights as soon as they lose their right to liberty. Contrary to the argument of the British government, the court emphasizes that the right to vote is not a privilege that can be considered as a corollary to the right to liberty but an individual right, crucial to the establishment of an effective democracy. The justification for a ban on prisoner’s voting rights should be distinct from a loss of the right to liberty. In addition, it should out weight the benefits of enhancing democracy. The medieval sentiments that underlie the blanket ban cannot provide such a justification.

Furthermore, felon disenfranchisement laws may lead to reproducing discriminatory practices already prevalent in society. Detainees generally come from underprivileged backgrounds or racial and ethnic groups. An automatic and indiscriminate ban on prisoners' right to vote may thus result in the persistent exclusion of such groups from the political sphere. Such a practice may be detrimental in furthering democracy. In addition, it may relegate the excluded class or group, relegated into second-class citizenship, which has far reaching consequences than the aims of a ban.

Indeed, complete enfranchisement of felons would not have a substantial impact on political representation. As a matter of fact, in all of the Council of Europe's Member States, the prison population does not even reach the 1% of the overall population<sup>30</sup>. Thus, albeit all enfranchised prisoners voted, they would not influence the political landscape of a State.

Concerning rehabilitative potential of felon enfranchisement it is important to state, first and foremost, that contrary to what is advanced by most advocates of disenfranchisement there is no evidence indicating that the deprivation of the right to vote furthers any aim of punishment, such as retribution, deterrence, public protection and rehabilitation<sup>31</sup>. On the contrary, disenfranchisement contributes to the alienation of inmates, therefore increasing the possibility of recidivism<sup>32</sup>. The importance of rehabilitating prisoners towards getting back to society was clearly exposed by one Member of the Irish Parliament, who affirmed that:

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<sup>29</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, 5 Is there a rational basis for disenfranchisement?

<sup>30</sup> Table in appendix.

<sup>31</sup> Caritas Social Action Network (CSAN), the domestic social action agency of the Bishops’ Conference and Catholic Bishops’ Conference of England and Wales Department for Christian Responsibility and Citizenship—Written evidence (VEP 0003), *Joint Committee on the draft Voting Eligibility (Prisoners) Bill Oral and Written Evidence*.

<sup>32</sup> “Denying prisoners the right to vote will only serve to alienate prisoners further, thus increasing the chances of reoffending”, Dr Bharat Malkani, Written evidence (VEP 0008), *Joint Committee on the draft Voting Eligibility (Prisoners) Bill Oral and Written Evidence*.

The aim of modern criminal law is to rehabilitate offenders and orientate them positively towards a society when they are released. That is the kernel of what we are trying to do here. Our legal system deals with the prisoner's body, but we do not deal with the mind. Having properly served due process and due time, we try, if possible, to help prisoners get back into society when they have fully discharged their duty to it<sup>33</sup>.

In line with this approach, the Irish Parliament reformed its de facto disenfranchisement of felons in 2006. Although granting prisoners the right to vote, provisions of Irish law did not provide any means for detainees to cast their vote. The lack of appropriate legislation therefore resulted in de facto disenfranchisement. The provisions in question were amended in 2006 by the Electoral (Amendment) Act, and a mechanism for postal voting was set up, conforming Ireland to the ECHR jurisprudence.

An incentive to settle the debate in favour of enfranchisement would be its impact on recidivism. If it were proven that disenfranchisement was tightly linked to increased rates of recidivism, it certainly would encourage policy-makers to seriously consider felon enfranchisement. Regrettably, there is no comprehensive study of the link between enfranchisement and recidivism on a European scale. However, some studies on the question have been conducted in the United States<sup>34</sup>. In the criminal justice system set up in the United States, disenfranchisement is the rule and enfranchisement is the exception thus, the implications are clearly more relevant than those observed in the analysis of the European system. However, in the former system, the link between disenfranchisement and recidivism rates is more easily observable. Despite the lack of a comprehensive study, some scholars have been able to observe such phenomenon. An article published by Guy Padraic Hamilton-Smith and Matt Vogel<sup>35</sup> shows that “individuals released in states that permanently disenfranchise are roughly ten percent more likely to reoffend than those released in states that restore the franchise post-release”. To sum up, felon disenfranchisement laws may be considered as being linked to recidivism.

The rehabilitative value of prisoner enfranchisement is emphasized by many associations and charities working in contact with detainees. User Voice is an ex-offender-led charity that “use[s] the democratic process of engagement as a form of rehabilitative tool for prisoners and people on criminal justice orders.”<sup>36</sup>. Through the organisation of prison councils, composed of elected representatives of each living unit or wing of the prison and through which prisoners are able to

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<sup>33</sup> Fergus O'Dowd, Irish Member of Parliament for the Louth Constituency, Electoral (Amendment) Bill 2006: Second Stage, Dáil Éireann Debate, *Vol. 624 No. 5*, p. 7.

<sup>34</sup> In comparison to the European system, the structure of the United States' felon disenfranchisement laws, is extremely complex. Unlike Europe, the United States present five different legislative options, ranging from complete enfranchisement, implemented in two States only, to permanent and indefinite disenfranchisement, applied even post-release in 11 States. These provisions, together with higher incarceration rates, cause the exclusion from the ballot of 6million citizens. Uggen C., Shannon S., Manza J., *State-Level Estimates of Felon Disenfranchisement in the United States, 2010; 2012*, The Sentencing Project. At <http://www.sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf>

<sup>35</sup> Hamilton-Smith GP., Vogel M., *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, Berkley La Raza Law Journal, Vol.22, Article 3, 2012.

<sup>36</sup> Mark Johnson, CEO of User Voice, Q5, Prison Reform Trust, User Voice and Women in Prison - Oral evidence (QQ 1-22), *Joint Committee on the draft Voting Eligibility (Prisoners) Bill Oral and Written Evidence*.

participate the prison's management. Mark Johnson, ex-offender and CEO of User Voice relied on his personal experience to explain the rehabilitative process that detainees undergo:

As a child [...] I was taught how to resolve conflicts with my fists or weapons. It was not until I entered that process of rehabilitation that I could get sat down and taught the benefits of compromise and of being resilient to witnessing decisions that I am uncomfortable with but having the stability to be able to cope with that non-violently.

Such evidence confirms the thesis that voting would enable prisoners to “confront their own role in society and make a contribution by way of fulfilling a civic duty - that is, the duty to vote”<sup>37</sup>.

If the introduction of a simple democratic practice, such as the organization of prison councils, has shown to improve the rehabilitative process undergone by detainees, enfranchising detainees would undoubtedly have a stronger and more positive rehabilitative impact.

Disenfranchisement may be considered as damaging democracy when depriving a select and underprivileged group of citizens of the right to representation. Moreover, it prevents detainees from undergoing what many estimate to be a valuable process of rehabilitation. However, given the size of the group affected by these measures, and the sensitiveness of the issue, policy-makers may be reluctant to reform their current disenfranchisement provisions. To this, it should be added that the consequences provided by European treaties for those Member States violating the ECHR jurisprudence, against blanket bans, are extremely lenient, and are often reduced to mere fines, which may not provide adequate incentives for Member States to reform their legislation.

To conclude, the dilemma we face when considering the enfranchisement of detainees is caused by the clash of two opposite and irreconcilable ideologies. On one hand, we have the popular view of detention as simply pursuing the aim of punishment, according to which detainees are unworthy of benefitting from the participation in a civil society. On the other hand, there is the idea of detention as a means to rehabilitate the offender and prepare him for the reinsertion into society he had repudiated by breaching its laws. While the former theory is heavily influenced by the social stigma attached to offenders, the proponents of the latter theory tend to underline the numerous valuable effects linked to rehabilitation through enfranchisement: democratization and reduction of recidivism rates.

## 2. The basis for the disenfranchisement of prisoners

Following the rulings of the two major European Courts, the ECJ and the ECHR, it is clear that many countries of the Council of Europe, including the United Kingdom, need to reform their Criminal laws that provide for an automatic, general and indiscriminate disenfranchisement of detainees. Yet, the content of the reform remains a matter of debate. Although the Courts clearly established that a Member State can limit the right to vote of prisoners as far as it respects the criterion of proportionality, little guidance was provided regarding what would be an appropriate limitation. Criticism was leveled against the rulings especially by the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill of the British

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<sup>37</sup> Ibid 33.

Parliament, which abandoned its draft of reform partly for this reason.

The question of determining the basis for the limitation of the right to vote of prisoners is difficult to answer as it involves deciding which detainees deserve to be granted this fundamental right and which do not. Both the ECHR and the ECJ refused to answer this question and refrained from establishing a precedent for the willing Member States to follow, leaving to the discretion of each of them to decide what to consider a proportionate limitation. Among the Member States of the Council of Europe, 10 Member States prevent the whole prison population from voting, 17 Member States allow all prisoners to vote with no restrictions and 20 Member States apply limitations. The most interesting for our purposes are the practices of those that apply limitations and their rationale for disenfranchisement.

There are two main approaches to adopt when limiting the right to vote of prisoners. First, the limitation may be based on the length of the sentence, therefore on the gravity of the offence. Second, it may be based on the type of the offence committed. Most of the countries limiting the right to vote of prisoners mix both approaches, creating hybrid systems. In the following discussion of the two approaches I consider both the different practices of Member States that apply restrictions and the case law of the two European Courts.

The sentence-based approach is the most widespread one among those Member States that apply limitations on prisoner's voting rights. Among the Member States that apply the sentence-based approach, however, there are major differences in both the length of the sentence that leads to deprivation of voting rights and the period of deprivation. The sentence-based limitation was also taken into account by the Joint Committee on the Draft Eligibility (prisoners) Bill, where the Committee had envisaged 3 options regarding the current provisions: refraining from reform, opening the possibility of voting to all detainees serving a custodial sentence of less than 4 years or 6 months, respectively. Although the Courts do not provide substantial guidance in this respect, the case law can give us an idea. In the case of *Frodl v. Austria* brought to the ECHR, the ban imposed on all detainees serving more than one year in prison was struck down as being disproportionate. Whereas, in the *Thierry Delvigne* decision by the ECJ, the French criminal provision depriving detainees of their civic rights for 10 years if sentenced for serious crimes and for 5 years for minor offences, was not put into question. There are also a number Member State that apply limitations of the right to vote based on the length of the sentence but were never challenged in the Courts such as Belgium, where the Electoral Code provides that all detainees condemned to a custodial sentence between 4 months and 3 years are disenfranchised for a period of 6 years and those convicted for 3 years or more lose their right to vote during 12 years<sup>38</sup>.

Whilst this sentence-based limitation may seem as an acceptable compromise, its social utility is open to question. The idea of the social utility of a punishment was theorized by the celebrated Italian jurist and philosopher Cesare Beccaria, in *On Crimes and Punishments* (1764). The theory states that the punishment of a criminal, in order to serve as a deterrent, ought to be conceived as to have both the greatest effect on society and the least pain to the

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<sup>38</sup> Marilia Crespo Allen, National provisions concerning ineligibility and incompatibility with regard to the European Parliament, European Parliament, June 1997 at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI\\_ET\(1997\)220623](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(1997)220623).



offender, who should never be deprived of his fundamental rights. The social utility of a limitation of the right to vote based on the length of the detention may be questioned, as it constitutes a punishment completely unrelated to the offence committed. Depriving the detainee of the fundamental right to vote does not serve the interests of the society, rather it corresponds to a desire for revenge. Although the ECHR, in line with the idea of social utility, underlined that the sentence must fit the crime committed, the European courts seem to accept this system of selective disenfranchisement of prisoners as a proportionate limitation.

The second, offence-based approach to selective disenfranchisement of detainees consists of depriving of the right to vote of those offenders having committed specific categories of crimes. Generally, the offences entailing the loss of the right to vote are those targeting the state or the democratic order. Most States implementing such policies combine it with a minimum term of imprisonment to be served. In Germany for example, all detainees are allowed to vote and disenfranchisement is provided for as an ancillary penalty applicable only to certain categories of offences such as treasonous forgery, treason, attack against organs and representatives of foreign governments and electoral fraud with sentences over one year imprisonment<sup>39</sup>. The system logically deprives of the right to vote of merely those offenders having harmed the democratic structure of the State. Thus, in the present case, the deprivation of this fundamental right is justified as it fits the crime committed, clearly serving as a deterrent, consistently with Beccaria's vision of utility.

As concerns the relevant case law on the issue, there is no record of cases brought against States adopting this selective system of disenfranchisement, which may suggest that this practice is more acceptable even for detainees. Linked to this is the fact that this method entails fewer rulings of disenfranchisement as it is linked to very specific offences and not among the most committed. For example in Germany only 1,4 sentences per year involve the withdrawal of the right to vote<sup>40</sup>.

To conclude this system, depriving of the right to vote on a offence-type basis, may be regarded as being more efficient especially as it respects the principles of proportionality and utility of the punishment. However, it also constitutes a less attractive option for those countries that do not demonstrate great flexibility, as its implementation leads to fewer rulings of disenfranchisement.

## Conclusion

The legal landscape across Member States, on the question of felon disenfranchisement is extremely disparate. On one hand, at the national level the 47 Member States of the Council of Europe use three different approaches: 10 automatically disenfranchise all detainees, 17 allow all prisoners to vote with no restrictions and again 20 apply some restrictions to the right to vote of convicted offenders. On the other hand, on the European level the European Courts refuse to provide for precise guidance on the issue, it restrains itself to manage the issue on a case-to-case basis. Accordingly, the cases of *McHugh and others v. the UK* and *Thierry Delvigne v.*

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<sup>39</sup> German Criminal Code, S. 45; 100a; 94; 102; 107a.

<sup>40</sup> Heribert Prantl, *Wahlbürger hinter Gittern*, 16. August 2012, Süddeutsche Zeitung at <http://www.sueddeutsche.de/politik/deutsches-strafrecht-wahlbuenger-hinter-gittern-1.1442183>.

*Commune de Lesparre Médoc*, illustrate how the question is dealt with by both the ECHR and the ECJ, merely upholding or striking down national provisions.

At all events, one thing appears to be clear: the impossibility to maintain blanket bans on the right to vote of prisoners inasmuch as they violate the fundamental rights guaranteed to all citizens indistinctly, they do not pursue any aim of punishment and they contribute to the alienation of a category which is per se disaffected.

The need for reform is becoming increasingly evident, however the question remains open of how this reform needs to be implemented. Considering the lack of flexibility of those Member States automatically disenfranchising all convicted offenders, they are unlikely to suddenly repeal their legislation and allow all convicts to vote. Therefore, the sole plausible solution is that of reforming the current legislation in such way as to simply limit the prisoners' access to vote.

As concerns the basis for limiting the right to vote of prisoners, two are the alternatives. First, a system providing for selective disenfranchisement on a sentence-length basis, second, a method that allows to deprive of the right to vote solely detainees convicted of select offences such as those targeting the democratic apparatus of the society. Even though, the former has been considered as a proportionate limitation by both European Courts, it may be questioned on the grounds of utility since there is no link between the punishment and the crime. On the other hand, the latter, though never disputed before the Courts, may be regarded as already complying with the criterion of proportionality as the punishment does fit the crime committed in accordance with the concept of social utility. Notwithstanding the considerations above, it is unlikely that those states disenfranchising all detainees will adopt this system as the number of prisoners allowed to vote would by far exceed the number of those disenfranchised.

In conclusion, we must bear in mind that the contract tying the European Courts and the Member States provides that, on one hand, the aforesaid institutions will receive appeals from Member States on questions of compliance of national provisions with the European treaties and legislation. On the other hand, the Member States accept to comply with the interpretation rendered by the Courts, and to reform their national legislation when required. Such has been the case in many instances, we may cite as an example the 2013 ECHR case of *Torreggiani v. Italy*.

In this instance, the Court condemned the Member State first, for its persistent prison overcrowding resulting in inhumane and degrading conditions of detention, second for the inadequacy of appeals. The Strasbourg Court urged the Member State to update its legislation on the issue in order to avoid further appeals. In response to the ruling, Italy conformed its legislation to the ruling, promulgating the Decree Law<sup>41</sup> on the monitored reduction of the prison population in December 2013.

In conclusion in the current political context, where States firmly assert their National Sovereignty to the detriment of a coherent European policy, the Courts' rulings that aim at modifying national law, are easily seen as interfering with the sovereignty of the Member States. In fact, whatever the issue at stake may be, States with a nationalistic tendency, tend to reject the intervention of outer institutions, a priori. Fearing that partially opening the law-making

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<sup>41</sup> Decree Law no. 146, 23 December 2013.

process, to a supranational legislative body, will ultimately lead to the complete erosion of National Sovereignty.

Nevertheless, when it comes to basic human rights, Member States should swallow their national pride and promote even the interests of that part of the population that is most easily forgotten.

## Appendix

Table 2: percentage of the prison population per Member State of the Council of Europe.

Country	Prison Population	% Prison Population
Albania	5455	0,19%
Andorra	55	0,07%
Armenia	3880	0,13%
Austria	8188	0,10%
Azerbaijan	22526	0,24%
Belgium	11769	0,10%
Bosnia and Herzegovina	2662	0,07%
Bulgaria	9028	0,13%
Croatia	3763	0,09%
Cyprus	811	0,09%
Czech Republic	20628	0,20%
Denmark	3492	0,06%
Estonia	2830	0,22%
Finland	3105	0,06%
France	60896	0,09%
Georgia	10236	0,27%
Germany	63628	0,08%
Greece	11798	0,11%
Hungary	18424	0,19%
Iceland	147	0,05%
Ireland	3733	0,08%
Italy	52434	0,09%
Latvia	4745	0,24%
Liechtenstein	8	0,02%
Lithuania	7810	0,27%
Luxembourg	631	0,11%
Malta	582	0,14%
Monaco	28	0,07%
Montenegro	1083	0,17%
Netherlands	11603	0,07%
Norway	3710	0,07%
Poland	72609	0,19%
Portugal	14238	0,14%
Republic of Moldova	7643	0,22%
Romania	28383	0,14%
Russian Federation	642470	0,44%
San Marino	2	0,01%
Serbia	10500	0,15%
Slovak Republic	9991	0,18%
Slovenia	1511	0,07%
Spain	63025	0,14%
Sweden	5400	0,06%
Switzerland	6923	0,08%
Macedonia	3034	0,15%
Turkey	172562	0,22%
Ukraine	71046	0,19%
United Kingdom	95507	0,15%

Source: Author's own elaboration based on data found in World Prison Population List<sup>42</sup>.

<sup>42</sup> Roy Walmsley, World Prison Population List (eleventh edition), 2016, World Prison Brief. At [http://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition.pdf)

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