

Towards a Just and Inclusive Penal System: A Comparative Analysis of Prisoners' Right to Vote in Zimbabwe, South Africa and Sweden

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Abstract

This paper is an examination of prisoners' right to vote in Zimbabwe. The 2013 Constitution of Zimbabwe provides for everyone's right to vote in all the elections and referendums. Prisoners' right to vote though not explicitly provided can be inferred from section 67(3) of the 2013 Constitution which provides for the right to vote for everyone. The reality however is that prisoners have been disenfranchised and failed to exercise their right to vote in all the previously held elections. This paper interrogates whether the state's failure to afford prisoners' right to vote by operation of section 23(3) of the Electoral Act Chapter 2:13, which provides that a voter's name cannot be retained on the voters roll if he or she has ceased to reside in the constituency for a continuous period of 18 months is a justifiable limitation permissible under the Constitution and the international human rights standards on limitations of rights. This paper therefore argues that the denial of prisoners' right to vote on the requirement of residence status is not a justifiable limitation to the right to vote. It concludes that the South African and Swedish approach which allows prisoners to vote in national elections can be adopted since these are not constituency based.

Keywords: prisoners; right to vote; elections; constitution disenfranchisement

1 Introduction

The right to vote is very critical since it grants an equal opportunity to citizens to affect the future direction of the society.¹ The process of voting allows citizens to determine their rights, obligations and elect the people that oversee the administration of the state.² The disenfranchisement of other members of the society from voting clearly deny such citizens the right to decide their future. As such, the right to vote cannot be limited unless there are justifiable reasons for such limitation.

The right to vote is exercised mostly by every person who is of the age of 18 or above. However, the right can be limited in certain circumstances subject to reasonable limitations provided by the law.³ The right can be limited for persons convicted of electoral fraud,⁴ mental incapacity,⁵ minors, non-citizens and citizens who are not on the national voters roll.⁶ The international

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¹ *The Constitution of Sweden, the Fundamental Laws and the Riksdag Act*, Sveriges Riksdag, Stockholm, Sweden, 2016, p. 1.

² *Ibid.*

³ Article 13 of the African Charter on Human and Peoples' Rights provides for the right to vote subject to provisions of national law.

⁴ Schedule 4 of the 2013 Constitution of Zimbabwe.

⁵ UN Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12/07/1996, CCPR/C/21/Rev.1/Add.7, Article 4

⁶ L. Beckman, 'Jailhouse Vote?: Felon Disenfranchisement and Democratic Inclusion', in L. Beckman, *The Frontiers of Democracy. The Right to Vote and its Limits*, (Palgrave, Macmillan (2009), paras. 120-145, at p. 125. R. Clegg, 'Who Should Vote?', 6 *Texas Law Review* (2001) pp.159-178. B. Kaur, 'Prisoners' Right to Vote: Citizen Without a Vote in a Democracy Has No Existence, Economic and Politically', 54:30 *EPW Engage* (2019) p. 27.

human rights framework allows for limitation of the rights to vote on the basis that such limitation is justifiable, proportionate and is pursuing a legitimate aim in a democratic society.⁷ The African regional human rights system limits the right to vote subject to the national laws.⁸ Similarly, the European regional human rights system provides a limitation of the right to vote through a proportionality test.⁹

In Zimbabwe, the Constitution provides for the right to vote for everyone. This can be interpreted to include prisoners regardless of the duration of incarceration. Despite the constitutional provisions on the right to vote, prisoners were not able to vote in all the elections that were held post the 2013 Constitution. The paper asks the following question:

- Is the denial of the right to vote on the basis of non-residency in a constituency a justifiable limitation in terms of section 86 of the Constitution and the international human rights framework?

To answer this question the paper adopts a human rights based approach through examining whether the implementation of the right to vote by Zimbabwe is in compliance with international human rights standards. The paper further adopts a comparative element of the implementation of prisoners' right to vote by Zimbabwe, Sweden and South Africa with the aim of drawing lessons for Zimbabwe. South Africa has been selected because it is bound by the same regional human rights framework as Zimbabwe and as such its model of implementation of prisoners' right to vote can be adopted in Zimbabwe because of contextual proximity and similarities. Sweden has been selected on the basis of its advanced jurisprudence on voting rights. It is part of European human rights system which has a strong legal framework for the protection of prisoners' voting rights. While the European human rights system may not be binding on Zimbabwe, it certainly brings in key lessons which can improve the implementation of prisoners' right to vote in Zimbabwe. The paper is mainly a desk research supplemented by interviews with correction services from Sweden.

The article is structured as follows: the first part of the paper engages in the discourse on the justification for inclusion and exclusions of prisoners from voting as posited by various scholars. This part discusses why it is important for prisoners to vote. The second part discusses the right to vote as recognised by the international and regional human rights framework and the possible limitation of the right to vote. The part also discuss the national legal framework and the provisions of the Electoral Act with the aim to measure Zimbabwe's compliance with the international human rights framework in implementing prisoners' right to vote. Finally, the paper draws a comparative analysis of the implementation of the right to vote by Sweden and South Africa and recommends that Zimbabwe should take a leaf from the approach adopted by these countries to in order to afford prisoners' right to vote.

2 Discourse on Disenfranchisement of Prisoners

This part is a discussion of the theoretical debates on whether or not prisoners should vote. There have been different justifications by scholars on whether or not the right to vote should be extended to prisoners. One of the most raised argument for disallowing prisoners from voting is that the ban on voting is a form of punishment. If one commits a crime, they should suffer

⁷ General Comment No. 5, *supra* note 5, Article 4.

⁸ Article 13 of the African Charter on Human and Peoples' Rights.

⁹ *Frodil v. Austria* (application no. 20201/04); *Scoppola v. Italy* (No #) App 126/05 Grand Chamber judgement of 22 May 2012; *Hirst v. United Kingdom* (No. 2) (2006) 42 E.H.R.R.

the consequences and cannot expect the same treatment as non-convicts. Firstly, a prison term automatically results in the limitation of rights as a form of punishment. Prisoners by virtue of their status lose their rights to liberty, self-determination, marry and found a family and as such the right to vote could be one of the rights that they may lose.

However, disenfranchisement of prisoners is implemented differently depending on the seriousness of the crime and length of the prison term. States generally enjoy a wide margin of appreciation in the manner in which they implement the right to vote subject to reasonable permissible limitations in the national laws. In Kuwait the right to vote is not limited based on the period of incarceration but on the nature of crime committed.¹⁰ Those convicted of crimes involving moral turpitude or breach of trust are not allowed to vote until they are rehabilitated.¹¹ Deprivation of voting rights can therefore continue after the prisoner's release. In some states in the United States of America prisoners are disenfranchised for the rest of their lives.¹² In the United States of America voting bans are applied even to minor offences or to those that have already served their terms and on probation or parole.¹³ Whitt states that in the US 35 out of 50 states practice some form of post-release felon disenfranchisement suspending the right to vote to all that have served their term until the suspension is lifted.¹⁴ He further argued that even after suspension, restoration of the right to vote is problematic and hindered by arbitrary procedures.¹⁵

In some countries like Czech Republic, Ukraine and Latvia prisoners are restricted from voting in local elections on the grounds that they are not affected by local issues.¹⁶ Similarly, in South Africa prisoners are only allowed to vote in provincial and national elections.¹⁷ Prisoners are not deemed to be part of a local community during their imprisonment.¹⁸ Prisoners are therefore allowed to vote in national elections on the basis that despite incarceration, they remain citizens of their country.¹⁹

Some of the justifications advanced for disenfranchising prisoners are that it is an exercise of self- democracy, it is a punitive measure, it preserves the purity of the ballot, it limits voter coercion and lastly that prisoners have no interest in what happens outside prison. These justifications will be discussed in a bid to highlight that such arguments for disenfranchisement are no longer relevant in the modern democracies.

2.1 Disenfranchisement and the Principle of Democracy

It has been argued that democratic values of self-determination justify disenfranchisement.²⁰ As part of exercising self- determination, society has the right to determine the inclusion and

¹⁰ Penal International Reform, *The Right of Prisoners to Vote: A Global Overview*, 2016, p. 3.

¹¹ *Ibid.*

¹² M. Whitt, 'Felon Disenfranchisement and Democratic Legitimacy', 43:2 *Social Theory and Practice* (2017) p. 283-311.

¹³ S. Easton, 'Electing the Electorate: The Problem of Prisoner Disenfranchisement', 69:3 *The Modern Law Review Limited* (2006) p. 448.

¹⁴ Whitt, *supra* note 12, p. 283.

¹⁵ *Ibid.*

¹⁶ Penal Reform International, *supra* note 10.

¹⁷ A.K. Abebe, 'In Pursuit of Universal Suffrage: The Right of Prisoners in Africa to Vote', 46:3 *The Comparative and International Law Journal of Southern Africa* (2013) p. 410.

¹⁸ Penal Reform International, *supra* note 10.

¹⁹ *Ibid.*

²⁰ Whitt, *supra* note 12.

exclusion of members in the electoral process. This approach does not view disenfranchisement as a form of punishment, or mode “of regulating citizenship, but a tool for collective political self-determination”.²¹ The banning of prisoners voting in this case has nothing to do with the inflicting of punishment, rehabilitation or citizenship, but it is all based on the democratic right to self-determination.

Ramsay argues that the denial of prisoners from voting is necessary so as to protect “the integrity of the democratic process”.²² The integrity argument by Ramsay is based on the fact that prisoners have no liberty to decide what they want so their vote does not uphold democracy since they are likely to be coerced into voting for the government.²³ Ramsay further argues that allowing prisoners to vote would provide an avenue for the government to unduly influence elections.²⁴

However, it can also be argued that democracy demands that anyone with legal capacity should participate in public life. In the case of *Sauvé v. Canada*, the Supreme Court of Canada held that “denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values”.²⁵ The Court that held the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a result, denying prisoners the right to vote “is to lose an important means of teaching them democratic values and social responsibility”.²⁶ Behan argues that a robust and healthy democracy is built on participation among all sections of society, and consequently disenfranchisement not only affects the prisoner but is a “societal failing”.²⁷ Prisoners should feel that they are part of the society, and voting is a constant reminder of that. Disenfranchisement makes prisoners feel less allegiance to the country, and this may lead to a higher rate of repeat offences.²⁸ In the case of *Sauvé v. Canada*, the Court held that the practice of disenfranchising voters has no place in a democracy built upon principles of inclusiveness, equality and citizen participation.²⁹

2.2 Moral Unworthiness?

In general, prisoners’ right to vote is curtailed on the basis that those who have committed crimes against the public should not be allowed to determine or participate in political processes.³⁰ Proponents of disenfranchisement have argued that prisoners simply lose the moral authority to vote as a consequence of the serious nature of the crime for which they have been sentenced.³¹ The rationale for disenfranchising prisoners comes from the social contract theory which supposes that when one willingly chooses to disobey the law he/ she should be denied the

²¹ *Ibid.*, p. 287.

²² P. Ramsay, ‘Voters Should Not Be in Prison: The Rights of Prisoners in a Democracy’, 16:3 *Critical Review of International Social and Political Philosophy* (2013) p. 422.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519.

²⁶ *Ibid.*

²⁷ C. Behan, *Citizen Convicts: Prisoners, Politics and the Vote* (Manchester University Press, 2014) p.149.

²⁸ N. Mbodla, ‘Should Prisoners Have a Right to Vote’, 46:1 *Journal of African Law* (2002) pp. 92-102.

²⁹ *Sauvé case*, *supra* note 25.

³⁰ Penal Reform International, *supra* note 10.

³¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.un.org/en/universal-declaration-human-right>. See <http://indicators.ohchr.org>.

³¹ Beckman, *supra* note 6, p. 124.

privileges that is normally open to law abiding citizens. The Italian Constitution is one such legislation that limits the right to vote in cases of moral unworthiness.³²

Reiman states that “those who have broken the law and trust are corrupt and a process in a democracy as important as of voting, it should not be allowed to get impure or contaminated by their involvement”.³³ Sigler also argued that in order to regulate electoral eligibility, prisoners should not vote. The basis for denial of such right is that by committing serious crimes, prisoners would have breached the trust, and consequently they should sit out the vote until they re-establish the presumption of trust.³⁴ The rationale for banning prisoners from voting on the basis of moral unworthiness was dismissed in the case of *Sauvé v. Canada*.³⁵ The Court held that “denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person”.³⁶ Further, the denial of voting rights to prisoners on the basis of moral unworthiness also violates the right to equality. It constitutes discrimination on the basis of status which has been outlawed in numerous international human rights conventions.

According to Bennet, the view that voting is reserved for the trustworthy can be challenged on the basis that firstly “the right to vote is presumptive in the sense that one need not earn it: no qualification – even a very minimal one such as, for instance, passing a literacy test – is necessary”.³⁷ If voting is based on worthiness, it follows then that there would be a need to introduce restrictions on voting such as a basic competence tests for voters.³⁸ Because there is no competency for voting it follows that disenfranchisement on the basis of unworthiness following a conviction is not justifiable.

2.3 Voter Coercion

The other reason advanced for denying prisoners the right to vote is that they are likely to be coerced into voting and their votes will affect the outcome of the election yet they are less likely to be affected by their decisions in the same way as those that are outside.³⁹ This justification is mainly applicable to local elections where prisoners’ vote due to their population disproportionately affect election results. At the end, those outside are affected by the decisions of the incarcerated which might not be in their best interests. It has been argued that prisoners generally do not have control over the administration process such that voter intimidation and coercion is high. Consequently, it has been argued that disenfranchising can be a solution to coerced voting.⁴⁰

It has been argued that in some cases voter coercion of prisoners has resulted in election results that were skewed in favour of the ruling parties. Elwald argues that voter turnout for the leader of Pakistan, General Musharraf, was inflated due to pressures exerted by authorities on the

³² Article 48 of the Italian Constitution of 1948.

³³ J. Reiman, ‘Liberal and Republican Arguments Against the Disenfranchisement of Felons’, 24:1 *Criminal Justice Ethics* (2005) p. 8.

³⁴ M. Sigler, ‘Defensible Disenfranchisement’, 99:1 *Iowa Law Review* (2014) p. 1728.

³⁵ *Sauvé v. Canada* (Chief Electoral Officer), 2002 3 SCR 519.

³⁶ *Ibid.*

³⁷ C. Bennett, ‘Penal Disfranchisement’, 10 *Crim Law and Philos* (2016) p. 413, paras. 411-425.

³⁸ *Ibid.*

³⁹ Ramsay, *supra* note 22, p. 8

⁴⁰ *Ibid.*

electoral behaviour of prisoners.⁴¹ It has also been argued that former US President George Bush won because of disenfranchisement of some voters who had been banned from voting in a particular state as a result of previous convictions. As a result, disenfranchisement negatively affected the election outcome against Bush's opponent.

However, disenfranchisement on the basis of preventing voter coercion can be dismissed by the fact that voter intimidation can take place at any other voting centres which are not prisons. Intimidation of rural voters to vote for the ruling parties is a recurring feature of elections in Africa.⁴² The solution would be to ensure safeguards against voter intimidation and coercion. Freedom to vote for one's political party and candidate is a prerequisite for any election conducted in a democratic country. Measures to curb voter coercion should be "directed against the people engaged in electoral fraud rather than its victims".⁴³

There is also a preconceived notion by governments that prisoners are likely to vote against the regime responsible for their incarceration.⁴⁴ Consequently, "by denying them the vote, the legislature is in fact removing a bloc of opposition support".⁴⁵ However, there is no guarantee that prisoners are likely to vote for the opposition. If anything, the ruling party has the upper hand to manipulate their votes so that the outcome is in favour of the ruling government since they control the prison system.

2.4 Disfranchisement as a Form of Punishment

It has been argued that the prisoners are condemned such that they do not deserve to participate in an electoral process.⁴⁶ Those who have broken the law are punished with denial of rights including the right to vote, apart from being confined in a prison.⁴⁷ It has been stated that "technically, disenfranchisement is not considered part of an offender's sentence but only a 'collateral consequence' of conviction".⁴⁸ Disenfranchisement is therefore perceived as a necessary limitation of the right of the basis of discouraging crime and promoting civic responsibility.⁴⁹ The ban is therefore aimed at promoting the respect for the law.⁵⁰ According to Reiman, "the standard classical liberal argument for disenfranchisement of convicted felons is that criminals violate the social contract, and thereby forfeit the political rights to which the contract entitles them".⁵¹

It is trite that law changes with political, economic and social development such that "a crime today, might be legal tomorrow".⁵² Hence, it has been argued that "a right as fundamental as

⁴¹ A. C. Elwald, 'Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States', *Wisconsin Law Review* (2002) pp. 1045-1137.

⁴² P. Collier and P. C. Vicente, 'Violence, Bribery, and Fraud: the Political Economy of Elections in Sub-Saharan Africa', 153:1 *Public Choice* (2012) pp. 117-147.

⁴³ Beckman, *supra* note 6, p. 129.

⁴⁴ Mbodla, *supra* note 28; Kaur, *supra* note 6, p. 5.

⁴⁵ Mbodla, *supra* note 28.

⁴⁶ Reiman, *supra* note 33.

⁴⁷ Kaur, *supra* note 6, p. 5.

⁴⁸ Reiman, *supra* note 33.

⁴⁹ *Ibid.*

⁵⁰ S. Easton, 'The Prisoner's Right to Vote and Civic Responsibility: Reaffirming the Social Contract', 56:3 *Brunel Law School The Journal of Community and Criminal Justice* (2009) p. 226, paras. 224-237.

⁵¹ Reiman, *supra* note 33.

⁵² Kaur, *supra* note 6.

the right to vote, should not be dependent on the status of imprisonment or conviction".⁵³ Reiman argues that when making arguments against disfranchisement the contextual analysis is very important. A broad perception of prisoners' criminal unworthiness and blameworthiness cannot be made on the basis of a conviction because what is considered a crime in one area might not be the same in another context. Disenfranchisement should therefore not be used as punishment. This argument is particularly relevant when it comes to political crimes such as treason which can easily be used to thwart any government critics.

Reiman argues that:

The criminal justice system tends to label as crimes the ways in which lower-class people harm others, while the ways in which the members of the upper-classes harm others are generally treated as regulatory matters, or if as crimes, not as grave ones. For example, preventable occupational diseases kill far more Americans each year than ordinary homicide. Nonetheless, the intentional acts that leave workers prey to deadly occupational diseases are rarely treated as crimes, and, even when they are, those responsible are almost never treated as murderers. The group that we label "felons" is shaped by all these unjust biases plus, of course, the various injustices that keep many of them at the bottom of society where crime is most tempting and most likely. It is important to keep this in mind when considering policy proposals aimed at "felons" as a group.⁵⁴

Reiman's argument is mainly based on the fact that serious crimes are committed by the elite and clothed in legal technicalities but are not severely punished in the similar manner with the lower class citizens who find themselves incarcerated.

Karlan has argued that disenfranchisement is not only a violation of the right to vote but amounts to cruel inhuman and degrading punishment.⁵⁵ The argument is based on the fact that there is no link between the ban from voting and the offence committed. There is no proof that disenfranchisement can serve the purpose of punishment. She argues that the denial of the right to vote cannot serve the goals of deterrence, incapacitation, rehabilitation or retribution."⁵⁶ Disenfranchisement only emphasises prisoners' exclusion rather than integration in society. Disenfranchisement as a punitive measure can only work if the crime is related to election such as election fraud.⁵⁷ Any other punishment on any offence is not proportionate and cannot even serve the purpose of retribution. Neither can it serve rehabilitation since it is not proportionate to the offence.⁵⁸

2.5 Prisoners Are Not Directly Affected by Policies

There is a presumption that prisoners in particular those serving lengthy prison terms or life imprisonment are not affected by what is happening outside. They are mainly affected by the criminal justice rules. As such they should not exercise their right to vote. Their vote should be specifically on issues that affect prison rules. It has been argued that:

Policy decisions taken by legislatures are predominantly concerned with social and economic aspects of life outside the walls of prisons. Why, then, should individuals with no part in society be able to influence the decisions shaping it? The argument would be that since prisoners do not have a 'stake in our common

⁵³ *Ibid*

⁵⁴ Reiman, *supra* note 33, p. 4.

⁵⁵ P. S. Karlan, 'Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement', *Stanford Public Law and Legal Theory Working Paper Series*, available online at <http://papers.ssrn.com/abstract=484543>, pp. 21-26.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

enterprise' they are not affected by it and, therefore, should not be included in the process deciding which policies to pursue.⁵⁹

However, it is not entirely true that prisoners are not affected by what is taking place outside the prison walls. Such an approach is a narrow understanding of the manner in which prisoners are affected by voting. The prison conditions are actually determined by the policies that are made by people voted into power. The loss of self-determination as a result of incarceration should not be confused with the right to participate in decisions that affect their future lives. While it is true that prisoners do not have control over the way they live in prison, they definitely have a right to participate in political decisions which certainly determines how they are going to live after imprisonment. Even those committed to life imprisonment have a right to input their voice to policies though they may be confined to prison for life. As a result anyone subjected to the legal authority of the state is equally affected by that authority because of the duty to obey the law.⁶⁰

3 International Human Rights Framework on Prisoners' Right to Vote

This section of the paper unpacks the relevant international human rights instrument that provides for the right to vote. These conventions may assist the Zimbabwean courts in deciding on conflicting legislation regarding the right to vote or the interpretation and limitation thereof. Section 327(6) of the Zimbabwean Constitution particularly compels the courts and other judicial forums to interpret legislation in a manner that is consistent with international law and this includes the interpretation of rights in the Bill of Rights.⁶¹ The implementation of national laws should be interpreted in light of the standards set in the international human rights framework.

The Universal Declaration of Human Rights (UDHR) provides that everyone has the right to take part in the government of their country, directly or through freely chosen representatives.⁶² Article 25 of the United Nations International Covenant on Civil and Political Rights (ICCPR) provides for the right to participate in public affairs, voting rights and the right of equal access to public service.⁶³ The UDHR does not qualify the beneficiaries of the right to vote unlike the ICCPR which limits voting to citizens. According to the General Comment No. 25 of the ICCPR on the right to vote, states should be ensured that every individual eligible to vote is included in the voting processes, for instance voter education and voter registration.⁶⁴ The General Comment further stresses that no distinction should be given based on any other ground or status and that conditions set for one to exercise this right should be reasonable and objective. The commentary further imposes the burden on the state to indicate and explain the restrictions on the right.

Article 10(3) of the ICCPR state that "the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". It can then be argued from this assertion that the desired objectives of rehabilitation will not be

⁵⁹ Beckman, *supra* note 6.

⁶⁰ *Ibid.*

⁶¹ Section 327(6) of the 2013 Constitution of Zimbabwe.

⁶² Article 21 of the UDHR.

⁶³ Article 25 of the United Nations International Covenant on Civil and Political Rights. UN General Assembly, 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

⁶⁴ General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 1996.

achieved by denying the prisoners the responsibility they have as citizens to elect those who will run their society. Rather, affording them the social responsibility may go a long way in assuring them that they are still part of the society which expects them to make responsible decisions for themselves and the society at large.

The Convention on the Elimination of All Forms of Discrimination Against Women also guarantees women's right to participation through standing for an election or as voting for their representatives.⁶⁵ Female prisoners therefore should not be discriminated from exercising their right to vote.

However, international conventions do not provide a universal model for the implementation of prisoners' right to vote.⁶⁶ International law recognises a margin of discretion for states in determining the mechanisms to give effect to the right to vote.⁶⁷ The discretion is however subject to constitutional standards at the domestic level, and these need to comply with the minimum requirements outlined in the international human rights instrument.⁶⁸

The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) provide that prisons should not mainly focus on the exclusion of prisoners but their continued participating in the community.⁶⁹ Therefore voting is also a way of allowing prisoners to be part of the community since they determine the policies and leadership in their community. This guideline places emphasis on the fact that punishment should be rehabilitative and not punitive. Punishment should mould a person to fit in the society once more without being treated like an outcast.

Article 60 of the Rules states that "(1) the regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings."

Article 61 further also states that "the treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it ... Steps should be taken to safeguard, the rights relating to civil interests, social security rights and other social benefits of prisoners."

The above discussion reveals that international and regional human rights instruments guarantee the right to vote to all citizens. Although none of these instruments expressly addresses the right of prisoners to vote, given that prisoners are citizens, a literal interpretation of the relevant instruments can lead to the conclusion that states must make arrangements to enable prisoners to vote subject to international standards.⁷⁰

⁶⁵ Article 7 Convention on the Elimination of All Forms of Discrimination against Women. (CEDAW), adopted by the United Nations General Assembly resolution 34/180 of 17 December 1979, entered into force on 3 September 1981.

⁶⁶ Abebe, *supra* note 17, p. 411.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Rule 88(1) of the UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), resolution adopted by the General Assembly, 8 January 2016, A/RES/70/175, available at: <https://www.penalreform.org/resource/standard-minimumrules-treatment-prisoners-smr>.

⁷⁰ Abebe, *supra* note 17, p. 418.

3.1 Limitations of the Right to Vote under the International Human Rights Framework

The ICCPR Committee in the communication of *Denis Yevdokimov and Artiom Rezanov v. Russia* stated that a state that relies on a limitation of the right to vote should justify the reasonableness of the decision to blanket ban the right to vote.⁷¹ In this case the Committee held that the decision by Russia to ban all prisoners from voting was unreasonable and consequently Russia should amend its national laws. In the *Yevdokimov and Artiom Rezanov v. Russia* case the prisoners convicted of various crimes, including drug trafficking, illegal deprivation of liberty, extortion and abuse of official powers, were restricted from voting by virtue of the Russian Constitution which disqualified all prisoners from voting. The Committee also alluded to the principle of proportionality in disenfranchisement of prisoners. It stated that disenfranchisement on the basis of a conviction should be proportionate to the offence and the sentence.⁷² The Committee held that the right to vote is not an absolute right. If any restrictions are to be imposed, they should not be discriminatory and unreasonable.

In its General Comment No. 25 on prisoners' right to vote, the ICCPR Committee held that the right to vote provides that every individual eligible to vote should be included in the voting processes and no one should be discriminated on the bases of status.⁷³ States should therefore take positive measures to overcome impediments to freedom of movement which prevent people from vote.⁷⁴

Article 10 of the ICCPR gives emphasis not on punitive ways of punishing offenders but it advocates that prisoners should be treated in a reformatory and rehabilitative manner. In that light, it is clear that depriving prisoners of their right to vote without a just reason goes against the object of incarceration.

4 Regional Conventions

4.1 The African Charter on Human and Peoples' Rights

Article 13(1) of the African Charter on Human and Peoples' Rights guarantees every citizen "the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".⁷⁵ However, no communication or case on prisoners' right to vote has been placed before the African Commission on Human and Peoples' rights or the African Court.⁷⁶ Neither the African Commission nor the African Court has jurisprudence on prisoners' right to vote. However, the African Commission has interpreted in numerous communication brought before it the permissible limitations of rights under the Charter. The African Charter allows the exercise of the right to vote within the provisions of the law. The jurisprudence of the African Commission has placed emphasis on maintaining the objectives of the Charter. In the case of *Civil Liberties*

⁷¹ Communication No. 1410/2005.

⁷² Para 7.4 of the judgement.

⁷³ General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service, Art. 25, 1996.

⁷⁴ UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

⁷⁵ Article 13(1) of the African Charter.

⁷⁶ Africa Criminal Justice Reform, *Factsheet – The right of prisoners to vote in Africa*, 17 May 2019, available at <https://acjr.org.za/resource-centre/fact-sheet-17-prisoners-vote.pdf>, p. 4; Abebe, *supra* note 17, p. 410.

Organization v. Nigeria the Commission held that authorities should not enact provisions which would limit the exercise of rights.⁷⁷ It was further held that the authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards.⁷⁸

In the case of *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, it was held that the reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.⁷⁹

Moreover, the Commission has held that where a state claims to be acting under legislation previously laid down by law, it must show that such law is consistent with its obligations under the Charter.⁸⁰ The Commission further held that restrictions should be the exception and must be interpreted strictly, but where they are necessary they must be as minimal as possible.⁸¹

4.2 European Convention on Human Rights

Article 3 of Protocol 1 to the European Convention on Human Rights provides for the right to vote. The European Court of Human Rights has made numerous judgments on the disenfranchisement of prisoners.⁸² The case of *Hirst v. UK* is one such important case that decided on the blanket ban of prisoners from exercising the right to vote. The case concerned the validity of the prohibition on voting for convicted prisoners found in section 3 of the Representation of the People Act 1983, which provides that:

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

The government of the UK argued for a blanket ban on the basis that a prisoner who breaches social rules lose the right to participate in the governance of the country.⁸³ The government argued that it had a wide margin of appreciation as such disenfranchisement was to prevent crime, to punish offences, enhance civic responsibility and promote respect for the law. The government claimed that the ban pursued these legitimate aims, and that the disenfranchisement was proportionate to these aims.⁸⁴ Consequently, prisoners who had breached the social contract by their criminal acts could be regarded as temporarily forfeiting the right to take part in the government of the country.⁸⁵

Hirst argued that there was no evidence that the UK ban met the purported aims, nor was there any link between the removal of the right to vote, and the prevention of crime, or respect for

⁷⁷ Para. 70.

⁷⁸ In the case of *Civil Liberties Organization v. Nigeria*, Communication No 101/93, para. 15.

⁷⁹ *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos 105/93, 128/94, 130/94 and 152/96 (2000) 7 IHRR 265, para 70.

⁸⁰ *Jawara v. The Gambia*, Nos. 147/95 and 149/96, para. 59.

⁸¹ *Ibid.*

⁸² Some of the cases that have been decided by the Court includes the case of *Frodl v. Austria* (application no. 20201/04); *Scoppola v. Italy* (No #) App 126/05, Grand Chamber judgement of 22 May 2012; *Greens and M.T. v. the United Kingdom*, no. 882 23.11.2010.

⁸³ *Hirst v. UK* (No.2), Application No.74025/01, para. 47.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, para. 50.

the rule of law.⁸⁶ If it was a punishment, it was disproportionate as it did not relate to the seriousness of the offence. It was also arbitrary because its practical effect depended on whether an election was called during the period of imprisonment. It was further argued that the claim to enhance civic responsibility was ill-founded as the measure undermined respect for the rule of law and alienated prisoners.⁸⁷ It unfairly affected large numbers of prisoners, who were then denied a voice in the democratic process and specifically denied any opportunity to affect penal policy.⁸⁸ It was further argued that the effect of the ban was tantamount to the elected choosing the electorate.⁸⁹

In case of *Hirst* the majority decision ruled that a blanket ban on convicted prisoners was a violation of Article 3 of Protocol No 1 to the European Convention on Human Rights. The Court also noted that, although the right to vote is a right and not a privilege and Article 3 of Protocol No. 1 is not absolute, there is room for implied limitations, and states must be given a margin of appreciation.⁹⁰ The Court further held that a denial of the right to vote undermines respect for the law, and the principles of equality and inclusion.⁹¹ The Court further laid out that a limitation on the right to vote has to be proportionate, pursued for a legitimate aim and justifiable.

In the case of *Scoppola v. Italy* the grand chamber of the European Court of Human Rights confirmed the decision in *Hirst* which outlawed the blanket ban on prisoners.⁹² In the *Scoppola* case, the applicant had been convicted of murder and attempted murder and sentence to life imprisonment. The life sentence imposed on the applicant entailed a lifetime ban from public office, which meant that prisoners' right to vote was forfeited permanently. Consequently, the electoral committee deleted the applicant's name from the electoral roll. The applicant filed his petition to the European Court of Human Rights on the basis that the ban was a violation of Article 3 of Protocol 1 to the European Convention of Human Rights. The Grand Chamber reaffirmed the key principle of *Hirst*, namely that blanket restrictions on prisoner voting which lack scrutiny of proportionality by the legislature are incompatible with the Convention.

In the case of *Frodl v. Austria* the Court acknowledged that while states are allowed a wide margin of appreciation in the manner in which they run elections, the principle of proportionality as laid out in the *Hirst* case still applies.⁹³ The Court held that any limitation on the right to vote should pursue a legitimate aim and the measures taken must demonstrate proportionality in the manner in which the aims are being pursued. In the *Frodl* case, the Court also introduced the need for limitation of rights by the court instead of the legislature. The Court reasoned that "there should be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and such a measure should preferably be imposed not by operation of a law but by the decision of a judge following judicial proceedings, irrespective of the nature or gravity of their offence and their individual circumstance".⁹⁴

⁸⁶ *Ibid.*, para. 45.

⁸⁷ *Ibid.*, para. 44.

⁸⁸ *Ibid.*, para. 45.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, para. 60.

⁹¹ Easton, *supra* note 13, p. 449.

⁹² App 126/05, Grand Chamber judgement of 22 May 2012.

⁹³ Application no. 20201/04, para. 28.

⁹⁴ *Frodl v. Austria*, *supra* note 9, para. 28.

5 The Right to Vote in Zimbabwe

Zimbabwe has a history of disputed elections since 2000 when the main opposition party, Movement for Democratic Change (MDC), gained momentum and posed a huge challenge to the ruling party's victory of many years. Since then every election outcome has been contested with the 2013 general election producing the greatest number of petitions.⁹⁵ At least 100 electoral petitions were filed to challenge parliamentary results.⁹⁶ Zimbabwean elections have been marred by incidences of violence. Some of the forms of violence include allegations of murder, beatings, rape, death threats, etc.⁹⁷ The Amnesty Internal Report noted that the 2008 elections violence led to the internal displacement of persons with an estimate of 2800 fleeing from their homes.⁹⁸ It reported "people suspected to have voted for the opposition parties, human rights defenders and officials of the Movement for Democratic Change (MDC) were targeted for beatings, arbitrary arrest, unlawful detention, torture and other ill-treatment, arbitrary killing, abduction, forced eviction and displacement."⁹⁹ The Zimbabwe Election Support Network also reported that the 2018 elections had a number of anomalies which including intimidation and harassment of opposition sympathisers.¹⁰⁰ The Research Advocacy Unit reported that Zimbabwe has the most violent elections compared to other countries in Southern Africa.¹⁰¹

The 2013 Constitution of Zimbabwe provides in section 67(3)(a) that "every Zimbabwean citizen who is of or over eighteen years of age has the right to vote in all elections and referendums ..."¹⁰² Though not explicit, it can be inferred from this provision that by virtue of citizenship, prisoners are entitled to exercise the right to vote. Section 155(1) of the Constitution the principles of an electoral system which should be adhered to. It provides that elections should be peaceful, free and fair and based on universal adult suffrage and equality of votes. Section 155(2) imposes an obligation on the state to ensure that "every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote and must facilitate voting by persons with disabilities or special needs". It can be therefore be argued that prisoners can be categorised as persons with special needs in this regard. Since they are incarcerated, they cannot vote in their registered constituencies and therefore require special arrangements in order to be able to vote.

The 2013 Constitution does not have any provision that disqualifies prisoners from voting unlike the previous Lancaster house Constitution which prevented prisoners who were serving a sentence of six months and above from voting.¹⁰³ The Referendum Act also allows anyone

⁹⁵ T. Mutangi, 'An Overview of the Practice and Procedure When Litigating Election Petitions in Zimbabwe', paper presented at National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe, held at Cresta Lodge, Harare, Zimbabwe, on 8 and 9 November 2017, available at Zimbabwe Legal Information Institute at <https://zimlil.org/content/overview-practice-and-procedure-when-litigating-election-petitions-zimbabwe>.

⁹⁶ *Ibid.*

⁹⁷ C. Nyamututa, 'Electoral Conflict and Justice: The Case of Zimbabwe', 5:1 *African Journal of Legal Studies* pp. 63-89, at p. 66

⁹⁸ Amnesty International Zimbabwe, *Time for Accountability*, 2008, p. 2.

⁹⁹ *Ibid.*

¹⁰⁰ Report on the 30 July 2018 Harmonised Elections, Zimbabwe Election Support Network, p. 41.

¹⁰¹ Research Advocacy Unit Zimbabwe, *Political Violence and Elections*, 2018, p. 2.

¹⁰² Section 67(3) of the Constitution of the Republic of Zimbabwe, 2013.

¹⁰³ A. Ingham-Thorpe and B.D. Crozier, 'The Independent Commissions: Success or Failure?', in O. C. Ruppel, K. M. Scherr and A. D. Berndt (eds.), *Assessing Progress in the Implementation of Zimbabwe's New Constitution, National, Regional and Global Perspectives* (2017) pp. 197-230, at p. 205.

above the age of 18 to vote.¹⁰⁴ The only persons that are disqualified from voting as stipulated in the fourth schedule of the Constitution are the following:

- (a) mentally disordered or intellectually handicapped persons
- (b) anyone declared by order of a court to be incapable of managing his or her affairs during the duration of that order
- (c) anyone convicted of an offence under the Electoral Law and declared by the High Court to be disqualified for registration as a voter or from voting, for the period he or she has been declared disqualified, but the period must not exceed five years.

Besides these disqualifications, no other limitation of the right to vote is provided in the Zimbabwean legal framework. The reality however is that prisoners in Zimbabwe have been disenfranchised and failed to exercise their right to vote in all the previously held elections and referendums despite that they are not among the persons that are disqualified from voting. However, the interpretation of some provisions of the Electoral Act has led to the curtailment of prisoners' right to vote. These provisions will be discussed in this section.

Zimbabwe's electoral system is constituency based. Paragraph 1(2) of the 4th Schedule to the Constitution provides as follows: "(2) The Electoral Law may prescribe additional residential requirements to ensure that voters are registered on the most appropriate voters roll, but any such requirements must be consistent with this Constitution, in particular with s 67." This system has been the stumbling block on prisoners' right to vote.

Section 23(3) of the Electoral Act requires voters to be registered in the constituency that they reside in order to cast votes in that constituency. Section 23(3) provides that a person's name can be deleted from the voter's roll if they cease to reside in that constituency for a period of 18 months. Prior to the Amendment Act No. 6 of 2018, the period required upon the which a person's name would be maintained in the register after relocating from the constituency was 12 months but it was extended to 18 months by Amendment Act No 6 of 2018.

Section 23(3) provides that:

- A voter who is registered on the voters roll for a constituency, other than a voter who has been registered in that constituency in terms of the proviso to subsection (1), shall not be entitled to have his or her name retained on such roll if, for a continuous period of eighteen months, he or she has ceased to reside in that constituency: Provided that nothing in this subsection shall prevent his or her name from being struck off such voters roll—
- (a) on his or her being registered in another constituency; or
 - (b) if he or she becomes disqualified for registration as a voter

Section 23(3) of the Electoral Act gives a presumption that a resident in a particular constituency has inherent interests in that constituency and hence is eligible to vote. It follows from this provision that all prisoners who would be serving a sentence of over 18 months will not be able to vote in any constituency. There is no doubt that section 23(3) of the Act gives a limitation to the right to vote especially to prisoners who will be serving a sentence longer than 18 months.

Further, section 52 of the Electoral Act provides that the polling station shall be set up in a constituency. Section 52(1) of the Electoral Act requires a polling station to be set up in a place accessible by members of the public. It has been the argument of the Zimbabwe Electoral Commission (ZEC) that a prison cannot be a polling station because it is inaccessible to members of the public.¹⁰⁵ The question that arises therefore is whether the residency

¹⁰⁴ Referendum Act Chapter 2:10.

¹⁰⁵ *Musarurwa and others v. Minister of Justice and Parliamentary affairs and ors*, 4896/17.

requirements under section 23 of the Act violate the right to vote as provided in section 67 of the Constitution. Is it a reasonable limitation of rights in terms of the Constitution?

5.1 Limitation of Rights under the Zimbabwean Constitution

The Constitution provides for the general limitation of rights provided that such limitation is “fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity and freedom”.¹⁰⁶ It stipulates as follows:

(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or freedom concerned;
- (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
- (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
- (f) whether there are any less restrictive means of achieving the purpose of the limitation

The question then would be whether the failure to afford prisoners’ right on the basis that they cease to reside in their constituency is a justifiable limitation of the right in terms of section 86(2) of the Constitution. ZEC justified the disenfranchisement of prisoners in the 2013 elections on the basis of limited resources and time constraints.¹⁰⁷ In the 2013 elections, the then ZEC chairperson Justice Rita Makarau stated that the Electoral Act requires one to be registered as a voter in a constituency that he resides in order to be eligible for voting. She stated that:

As ZEC, we acknowledge that Chapter 4, Section 4.18 of the new charter states that every Zimbabwean has the right to vote. However, we do not have mechanisms for prisoners to vote in this year’s elections. We have already started engaging with relevant stakeholders to enable prisoners to vote in future. There are many things involved before allowing prisoners to vote, which is why, as ZEC, we are saying they will not be able to vote now, but in future. It is not a matter of us just walking into prisons and letting them cast their votes during elections. Others are serving 20 years in prison; who are they going to vote for? Political parties would have to campaign in prisons, and this needs security. Prisoners have to be educated on the political environment outside prison, therefore, all this cannot be done within the short time left. For one to register as a voter, one needs to secure an identity card and establish the ward or constituency he/she belongs to, and inmates had to go through all the required processes in the short time given to be able to vote.¹⁰⁸

ZEC failed to make any arrangements to ensure that prisoners exercise their right despite acknowledging the existence of the right. This prompted prisoners who were incarcerated for a lengthy period to petition the court, in the case of *Musarurwa and others v. Minister of Justice*, to compel the Commission to register their names in the voters roll so that they were eligible for voting in the 2018 elections.¹⁰⁹ ZEC’s opposition to the matter was that prisoners have no residence status in a particular residence as prisons cannot be used as a polling stations. The matter is, at the time of writing, still pending and a judgement is yet to be handed down.

¹⁰⁶ Section 86 of the 2013 Constitution of Zimbabwe.

¹⁰⁷ Ingham-Thorpe and Crozier, *supra* note 103.

¹⁰⁸ Zimbabwe Independent, ‘Prison won’t vote: Makarau’, 12 July 2013, available at <https://www.theindependent.co.zw/2013/07/12/prison-inmates-wont-vote-makarau/>.

¹⁰⁹ *Musarurwa and others v. Minister of Justice and Parliamentary affairs and ors*, *supra* note 105

The failure to afford prisoners the right to vote is a violation of the right to vote. Such limitation is not justifiable in a democratic state and does not comply with the international and regional human rights standards that requires proportionality and pursuance of a justifiable aim. Section 155(2) of the Constitution requires states to take appropriate measures to give effects to the right enshrined in the Constitution. There is no law that bars ZEC from establishing a polling station in a prison. The fact that it is not accessible by members of the public is immaterial as this voting station will only be set up to cater for prisoners. Setting up a polling station in a prison is one of the appropriate measures that the state can take. Prisons are located in constituencies and these will be the prisoners' designated constituencies for purposes of voting only. An administrative measure can be made that prisoners will not be transferred once they register to vote so that their names remains in the voters' roll of their constituency. It is simply a matter of taking appropriate administrative measures.

Further, the argument that prisoners should not vote in local elections can also be countered by the fact that prisoners serving a lengthy period of time or life imprisonment have acquired sufficient interest on the issues of that constituency. Issues like water provision, electricity and other service delivery would equally affect the prisoner in the same way that it would affect a person outside of prison in the same constituency. Consequently, there is no justification of applying the limitation clause to the right to vote on the basis of residence status for those serving a lengthy period of incarceration.

Section 92(3) of the Constitution provides that "the President and the Vice President are directly elected jointly by registered voters throughout Zimbabwe". This therefore means that the constituency of the president and the vice president are not limited to the local geographical demarcations within the country. The whole of Zimbabwe is the relevant constituency in which any adult citizen within its boundaries should have a way of casting their votes regardless of their residential status. Consequently, prisoners would be entitled to vote in presidential election without being required to be residents of a particular constituency. Citizenship will suffice. Therefore, the blanket ban of prisoners' right to vote in Zimbabwe is unconstitutional and does not qualify under the permissible limitation of the rights as provided in section 86 of the Constitution. There is a need to clearly demarcate the operation and extend of the limitation of the right to vote if such limitation is to be permissible. Further postal voting can also be extended to prisoners.

Section 155 of the Constitution outlines the principles of elections which should be adhered to. These principles should be read in line with the bill of rights. Section 155(1) provides that the "state should ensure that every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote and must facilitate voting by persons with disabilities or special needs". Therefore, the Electoral Commission has an obligation to ensure that prisoners are registered on the voters' roll and are able to cast their votes. It can also be argued that prisoners can qualify to be persons with special needs in terms of section 155(1) of the Constitution. Due to their incarceration they cannot vote in their registered constituencies and as such special arrangements should be made to facilitate voting.

Postal voting is another way of ensuring that persons who are outside their constituency are eligible to vote. Postal voting is permissible to members of a disciplined force or as an electoral officer, or those that are outside their constituency because they are on duty in the service of the government and spouses of such persons.¹¹⁰ In the case of *Gabriel Shumba and ors v. Minister of Justice Legal and Parliamentary Affairs and ors* the Court held that people who leave the constituency on their own without a mandate for national duty cannot exercise the

¹¹⁰ Section 72 of the Constitution.

right to vote.¹¹¹ In the case of *Bukaibenyu v. Chairperson Zimbabwe Electoral Commission and others*, Malaba J held that “the Constitution did not place an obligation upon the State to make arrangements for voters who for personal reasons were unable to attend at the polling stations to vote”.¹¹²

6 Prisoners’ Right to Vote in South Africa

In South Africa, the period before 1994 which was governed by the interim Constitution provided for adult universal suffrage.¹¹³ Its provisions did not specifically deny or limit the exercise of this right. However, it gave a provision to the effect that there should be an act of parliament put in place to regulate the right. Following that provision, the Electoral Act of 1993 was put in place which disqualified four categories of persons. Two of the categories were based on mental disabilities the other on substance abuse and lastly imprisonment. Of importance is S 16(d) of this Act which disqualified inmates imprisoned for specified offences of the right to vote. This statute came into effect just before the 1994 elections, and because of the concerns raised and the violence that arose in prisons, the then President F W de Klerk exercised special powers in amending S 16(d) of the Electoral Act.¹¹⁴ The adjustments narrowed the limitation of the right to vote only to inmates convicted of murder, robbery with aggravating circumstances, rape and attempts to commit such offences. All other prisoners who had not committed the specified offences were illegible to vote.

From there came the 1996 Constitution providing for the right to vote for all adult citizens and a national common voters role. The 1996 Constitution has no provisions of disqualification of voters as far as this political right is concerned except only in terms of the limitation clause which sets the requirement of reasonableness and justifiability.¹¹⁵ The Electoral Act of 1998 was then promulgated providing for the right to vote with no disqualifications on any class of prisoners. However, S 8(2)(e) of the Electoral Act provided for a disqualification to a person who is not an ordinary resident in the voting district for which that person has applied for registration. With these regulations in place the 1999 general election was conducted, and prisoners could not vote. The Electoral Commission justified the limitation of the right based on logistical reasons. This disenfranchisement was challenged in the decided case of *August v. Electoral Commission* where the Court ruled that the state had the duty to ensure the right to vote and that the Commission had failed in this duty to ensure that all illegible prisoners have voted.¹¹⁶ However, the Court made it clear that its decision on this case does not imply that disenfranchisement of some categories of some prisoners to vote is outright unlawful but that a proper inquiry should be done in order to limit the right reasonably and justifiably in terms of S 36 of the Constitution.

In 2003 the Electoral Laws Amendment Act 34 of 2003 was enacted. This amendment disqualified all the persons sentenced to imprisonment without a fine option. The rationale behind this provision was to preserve the integrity of the voting process.¹¹⁷ After this amendment which sought to deprive all sentenced prisoners of their right to vote in the 2004 election, the National Institute for Crime Prevention and the Reintegration of Offenders

¹¹¹ CCZ 4/18.

¹¹² *Bukaibenyu v. Chairperson Zimbabwe Electoral Commission and others*, CCZ12/17.

¹¹³ Section 21(2) Interim Constitution.

¹¹⁴ I. Currie and J. De Waal, *The Bill of Rights Handbook* (Juta & Co, South Africa, 2005) p. 461.

¹¹⁵ Section 36 of the Constitution of the Republic of South Africa.

¹¹⁶ *August v. Electoral Commission* 1999 (4) BCLR 363.

¹¹⁷ I. Currie and J. De Waal, *supra* note 114.

(NICRO) and two prisoners contested the constitutionality of the amendment in the case of *Minister of Home Affairs v. NICRO*.¹¹⁸

The state raised three arguments supporting the disenfranchisement of prisoners. The first argument was based on the issues of logistics especially that the state has limited human and organisational resources. The second argument was that prisoners are in a self-induced peril or predicament; there are other people who are legible to vote but may not be able to who would better deserve arrangements on how they can be able to cast their votes. Lastly, it was argued that denying prisoners this political right is the government's stance to denounce crime and impliedly deter the public to participate in crime.

The Court outright dismissed the first two reasons and ruled that the state had failed to establish that it lacked the resources to support such an important democratic right. The Court further held that that the right to vote is a valuable right which could not be infringed on the basis of public misconceptions regarding its implications.¹¹⁹ Therefore, the argument that the state would appear to be condoning crime was also dismissed based on the fact that it is insufficient to deny prisoners' right to vote as a symbol of how the government is anti-crime. De Vos argued that by its nature the right to vote gives an obligation to the state and the legislature to enable and ensure the practical exercise of this right.¹²⁰ Limiting the right also require an inquiry on the social setting with which the right is to be implemented as well as the practicality of realising the right considering the economic standing of the country. The court therefore declared S 8 (2) (f) and S 24 B of the Electoral Act invalid.

The *NICRO* case has set precedence in South Africa in as far as prisoners' right to vote is concerned. Although one can argue that this right has been finally regulated and enforced in South Africa, it should be noted that prisoners can only vote in national and provincial elections.¹²¹ The rationale behind that being that prisoners would not have an interest in the local governance of that constituency, and therefore they do not relate to the socio-economic and political issues of the area.¹²²

Despite the recognition of the right to vote, prisoner voter turnout has been low. In the 2014 national and provincial elections in South Africa, of the total prison population of 157,394, only approximately 9 per cent of the prison population registered to vote.¹²³ The reason advanced is that prisoners lacked interest on what was being voted for and rather preferred to utilise their time on other activities in prison such as studying or working.¹²⁴

The low numbers of prisoners that voted has been caused mainly by logistical issues. Some of the logistical issues include limited dissemination of information on prisoners' right to vote,

¹¹⁸ *Minister of Home Affairs v. National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others*, 2005 (3) SA 280 (CC).

¹¹⁹ *Ibid.*

¹²⁰ P. De Vos, 'Prisoner's Right to Litigation in South Africa: A Critical Evaluation Civil Society Prison Reform Initiative (CSPRI)', 3 *Cape Town* (2004).

¹²¹ Africa Criminal Justice Reform, Factsheet – The Right of Prisoners to Vote in Africa, 17 May 2019 available at <https://acjr.org.za/resource-centre/fact-sheet-17-prisoners-vote.pdf>, p. 2.

¹²² *Ibid.*

¹²³ Penal International Reform, *The Right of Prisoners to Vote: A Global Overview*, 2016, p. 5. It was also noted that in Ireland that only one in five prisoners who register to vote end up voting.

¹²⁴ *Ibid.*, p. 6.

complicated voting process and just the general failure by the government to facilitate the voting process.¹²⁵

7 Prisoners' Right to Vote in Sweden

Sweden has four fundamental laws namely the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. These documents make up the Constitution of Sweden.¹²⁶

The Instrument of Government is a general fundamental law which lays down how the country is to be governed. The Freedom of the Press Act regulates the use of the freedom of expression in printed media and the principle of public access to official documents. The Fundamental Law on Freedom of Expression regulates the use of the freedom of expression in non-printed media. The Act of Succession lays down how the Swedish throne is inherited between members of the Bernadotte family.¹²⁷

Article 4 of the Instrument of Government provides for the right to vote for everyone. It stipulates that “[e]very Swedish citizen who is currently domiciled within the Realm or who has ever been domiciled within the Realm, and who has reached the age of eighteen, is entitled to vote in an election to the Riksdag”.¹²⁸

Sweden incorporated the European Convention of Human rights into its Constitution. Article 19 of the Instrument of Government provides that “no act of law or other provision may be adopted which contravenes Sweden’s undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms”.¹²⁹ Therefore Sweden is bound by the decisions of the European Court of Human Rights on disfranchising of voters discussed above.

Our interview with the correction services in Sweden revealed that a polling station is actually established at a prison. Election officers from the Electoral Commission provides voter education among prisoners. They encourage them to vote. Prisoners get information about the political parties that are contesting through the televisions which are provided at the prison. Political parties are not allowed to campaign in the prisons.

The Elections Act (2005:837) allows for voting by messenger. This type of voting is applicable to those that cannot go to the voting reception point due to impairments such as illness, old age and the inmates of a remand centres and those of a penal institutions.¹³⁰ Section 6 of Chapter 7 of the Elections Act provides as follows:

For general elections to the Riksdag and to municipal and county council assemblies and elections to the European Parliament, a vote by messenger may be arranged no earlier than 24 days prior to the election day. For other elections, a vote by messenger may be arranged no earlier than 10 days prior to the election day. However, a vote by messenger that is delivered at a foreign mission may in these cases be arranged no earlier than 20 days prior to the election day.

¹²⁵ *Ibid.*, p. 5.

¹²⁶ *The Constitution of Sweden, the Fundamental Laws and the Riksdag Act*, Sveriges Riksdag, Stockholm, Sweden, 2016, p. 27.

¹²⁷ *Ibid.*

¹²⁸ Article 4 of the Instrument of Government.

¹²⁹ Article 19 of the Instrument of Government.

¹³⁰ Chapter 7, section 6.

Employees of a remand or penal institution delivers the voting papers on behalf of the prisoners who wish to vote by messenger.¹³¹

Further, the Elections Act allows the name of a person to be on the voter's roll for a period of ten years even if the person has ceased to be a resident of Sweden. The only requirement is for that person to give written notice of their address to the Swedish Tax Agency.¹³²

8 Conclusion

The right to vote is clearly provided in the Constitution. However, its implementation has been seriously curtailed for prisoners on the basis of administrative requirements that a prisoner should be a resident in a constituency and if he/she ceases to reside in that constituency for a period of 18 months he/she is removed from the voters' roll. We have argued that such requirement is not reasonable and justifiable. A blanket ban on all prisoners from voting is not permissible. The jurisprudence of the African commission on Human and Peoples' Rights, the ICCPR Committee, and the European Court of Human Rights have highlighted that rights can only be limited if the limitation serve a legitimate aim, justifiable, objective and reasonable in a democratic society.

In order to implement prisoners' rights to vote in Zimbabwe, the South African and Swedish approach can be adopted to circumvent the requirement of residency status in a constituency. Prisoners can be allowed to vote in the presidential elections only since these are not constituency based. This will also ensure that the prison population do not disproportionately affect the votes in local elections and paint a wrong picture about a candidate's popularity.

Alternatively, the Swedish approach of voting by messenger for inmates in remand centres and penal institutions can also be utilised to guarantee the prisoners' right to vote. Remand officers, electoral officers and independent observers will be responsible for the administration of voting by messengers in order to ensure transparency and avoid vote coercion and rigging.

The Swedish electoral system also allows prisoners who are resident of a constituency in which the prison is located to vote. The same approach can be adopted because this prisoner has interests in the particular constituency where he/ she stays.

We also recommend that polling station be established at prison centres without necessarily creating a separate constituency since the Electoral Act already prescribes the constituencies that are demarcated for purposes of voting. The requirement that polling stations should be accessible to the public is not an impediment to setting up a polling station at prisons. Polling stations at prisons will simply be reserved for prisoners only.

¹³¹ Chapter 7, section 5(4) of the Electoral Act.

¹³² Chapter 5, section 2 of the Elections Act.