



**Promoting fair and
effective criminal justice**

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The right of prisoners to vote: a global overview

Findings from a multi-jurisdictional survey for PRI by Allen & Overy, Ashurst, Baker & McKenzie, Clifford Chance, Dechert, DLA Piper, Lalive, and White & Case LLP and brokered for Advocates for International Development (A4ID).

Introduction

The right to vote for people deprived of their liberty varies widely from country to country, and even within some countries (eg. the USA). In some countries voting rights for prisoners are subject to restrictions and/or conditions, whereas in other countries people convicted of an offence are automatically disenfranchised for the period of their prison term, or even after they have served their time of parole.

This report aims to provide a brief overview of the extent of (dis)enfranchisement of detained persons in a range of jurisdictions. In countries where voting rights are partially restricted or completely denied, conditions and the rationale for these restrictions are, where possible, identified.

Legal framework

The right to vote – without discrimination – is set out in the Universal Declaration of Human Rights (UDHR), which provides that '*[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives*' (article 21).¹ The UDHR, though not a treaty in itself, is generally considered customary international law and therefore has binding status.

The International Covenant on Civil and Political Rights (ICCPR), which is legally binding on the 168 State Parties² that have ratified it, indicates that the right to vote is to be exercised through voting in '*genuine periodic elections which shall be by universal and equal suffrage*'³

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.un.org/en/universal-declaration-human-rights/> [accessed 17 March 2016].

² See <http://indicators.ohchr.org/> [accessed 17 March 2016].

³ UN General Assembly, *International Covenant on Civil and Political Rights (art. 25)*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [accessed 10 March 2016].

and that no distinction should be made based on ‘*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*’⁴.

Though international law does not offer specific provisions on voting rights for prisoners as such, it is clear that, ‘*[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants*’.⁵

Although not an absolute right, limitations to the exercise of the right to vote need to be *objective and reasonable*, and the length of the suspension of this right should be *proportionate to the offense and the sentence*.⁶ Pre-trial detainees should not be excluded from exercising their right to vote⁷ as they must be considered innocent unless and until proven guilty.

Research methodology

In a 2015 study for PRI, eight international law firms reviewed the extent of (dis)enfranchisement of detained persons in dozens of jurisdictions worldwide, and, where applicable, the conditions under which voting rights were restricted.⁸

Advocates for International Development (A4ID) sent out a questionnaire (**annex 1**) to law firms in 76 countries and information from 66 jurisdictions (**annex 2**) was received. While the research method presented some difficulties, the following analysis presents an interesting overview of the extent of (dis)enfranchisement of detained persons, based on information provided by law firms across the globe on a large number of countries from different regions.

Results

The findings from the research showed that, while only occasionally used as sanction on its own – generally for ‘election-related’ offences – in approximately 45 per cent of the jurisdictions, conviction to imprisonment is automatically followed by disenfranchisement.

In 29 of the 66 jurisdictions included in the study (eg. Kyrgyzstan, Lebanon, New Zealand) prisoners who are convicted and serving a prison sentence are not entitled to vote (a so-called blanket ban). In India, this includes pre-trial detainees where, although so-called ‘undertrials’ are presumed innocent under Indian law, they are not allowed to vote.

⁴ Art 2, *International Covenant on Civil and Political Rights*

⁵ UN General Assembly, *Basic Principles for the Treatment of Prisoners: resolution / adopted by the General Assembly*, 28 March 1991, A/RES/45/111, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx> [accessed 10 March 2016].

⁶ 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. (Emphasis added).

⁷ *Ibid.*

⁸ Research was conducted by Allen & Overy, Ashurst, Baker & McKenzie, Clifford Chance, Dechert, DLA Piper, Lalive, and White & Case LLP pro bono and brokered by Advocates for International Development (A4ID).

Disenfranchisement only extends to 'undertrials' in prison and does not include those released on bail.⁹

In the majority of jurisdictions surveyed, pre-trial detainees are allowed to vote, but this is not always adequately facilitated. For example, in Peru, pre-trial detainees legally do have the right to vote, but they are not able to exercise this right in practice as there are no voting facilities in prison. In 2011, a Bill was proposed to the Peruvian Congress with the aim of implementing the right to vote of persons under preventive detention. However, to date the Bill has not been approved.¹⁰

Restrictions / conditions

In the approximately 55 per cent of the jurisdictions surveyed where prisoners have the right to vote in principle, restrictions and/or conditions still apply. These limitations are generally based on the severity or type of offence and/or the length of the sentence imposed.

In Iceland, the Electoral Law restricts the civil rights of offenders who: have committed a crime '*considered heinous by public opinion*', have reached the age of 18 at the time the offence was committed, and are convicted to at least four years in prison without probation.¹¹

The right to vote in Kuwait is not dependent on the length of the prison sentence, but on the severity of the offence. The Electoral Law denies voting rights to those '*convicted of a criminal felony or an offense involving moral turpitude or breach of trust, until he is rehabilitated*'.¹² Deprivation of voting rights can therefore continue after the prisoner's release.

In some countries, restrictions are related to the type of election. For example, in the Czech Republic and Latvia, prisoners may not be entitled to vote in local elections on the grounds that they are 'not affected by local issues'.

In Ukraine, prisoners are not entitled to vote in local elections as they are not deemed to be part of a local community during their imprisonment. It is important to note that a similar restriction applies to military personnel and students in Ukraine. On the grounds that prisoners remain citizens of their country, their entitlement to vote in national elections is upheld.

Rationale

In only a small number of jurisdictions is a rationale offered by legislators or the judiciary for restricting or completely revoking the right to vote. If provided, it is generally based on the premise that those who have committed crimes against the public should not be allowed to determine or participate in political processes.

In Poland, the court may impose deprivation of public rights if the following conditions are cumulatively met: a) the accused is sentenced to imprisonment for not less than three years, and b) the court finds that the criminal offence in a given case has been committed with a

⁹ *General Elections 2014 Reference Handbook*, Chapter 43; Representation of the People Act, 1952, Section 62 (5).

¹⁰ Bill No. 590/2011; see also: <http://www.congreso.gob.pe/?K=1>

¹¹ Electoral Law, art. 5, available at: <http://eng.innanrikisraduneyti.is/laws-and-regulations/nr/6713>

¹² Law No. 35 of 1962 (Regarding The Election Of The National Assembly Members) (the "**Electoral Law**"), art. 2.

'motivation deserving special condemnation'.¹³ This *'motivation deserving special condemnation'* is considered the main criterion for the court to deprive a person of public rights, including the right to vote, and is explained in jurisprudence as those motives that run particularly strongly against the established social norms, and that result in commitment of a criminal offence that is intensely repellent to the society at large, causing reactions of indignation or outrage.¹⁴

Since 2009, conviction to imprisonment in Belgium does not automatically lead to disenfranchisement. Here, although temporary deprivation of voting rights is justified on the grounds that those who have committed certain offences are not worthy of exercising these rights, it is also acknowledged that this does infringe on a fundamental right. Therefore, a Belgian judge is tasked with a proportionality test: they must balance the possibility of excluding 'unworthy' citizens from exercising their right to vote with the requirement not to deprive them *disproportionately* of a fundamental right.

In Brazil, restriction of voting rights is justified on ethical grounds: that it would be morally unacceptable for a person convicted of a crime to participate in the country's political life, whether voting or running for public office.

The Political Rights Law in Egypt was enacted in 2014. No insight into the legislator's intention is available; however, in an explanatory note on the law it replaced, Law No. 73 of 1956, the legislator indicated that, by using his/her right to vote, an individual actively participates in the country's social and political life and that a person who commits a crime against public morality, or an offence *'that tarnishes his or her reputation, should be excluded from this participation due to his or her questionable character'*.

Alternatives to imprisonment

In the vast majority of jurisdictions surveyed, offenders serving non-custodial criminal sentences are entitled to vote. However, in some jurisdictions (eg. Belgium, Ethiopia, and Tunisia), disenfranchisement can be handed down by the court as an additional sentence, which could result in restriction of voting rights of those serving a non-custodial sentence.

In other jurisdictions (eg. Brazil, Kuwait), the law does not distinguish between those deprived of liberty and those serving non-custodial sanctions, and disenfranchisement following a final court decision can therefore also affect those serving a non-custodial sentence.

Exercising the right to vote

The findings indicate that prisoners' participation in elections can be low, even where they do have the right to vote. For example, in the 2010 state elections in Victoria, Australia, only 26.4 per cent¹⁵ of the prison population exercised their right to vote.¹⁶ In the 2014 national

¹³ Penal Code (*Kodeks karny*) dated 6 June 1997, as amended, art. 39.

¹⁴ Appellate Court in Lublin decision dated 27 April 1999, case no. II AKa 12/99, Appellate Court in Cracow decision dated 16 January 2002, case no. II AKa 308/01.

¹⁵ 'Prisoners and Voting', Victorian Electoral Commission, available at <https://www.vec.vic.gov.au/files/RP-PrisonersVoting.pdf> [accessed 18 March 2016].

¹⁶ Voter turnout among the general population was 92.96 per cent. Section 11 – Statistical overview of the election, available at <https://www.vec.vic.gov.au/files/ER-2010-Section11.pdf> [accessed 18 March 2016].

and provincial elections in South Africa, of the total prison population of 157,394, only 14,283¹⁷ (approx. nine per cent) of the prison population registered to vote.¹⁸

There are several possible causes for these low participation levels. Practical difficulties such as limited provision of information in prisons on how to register for vote, complicated procedures in casting votes, and the failure by governments and/or prison management to facilitate voting are likely to be contributing factors.

In Uganda, for example, the right to vote is protected under the Constitution, which does not make a distinction between the right of prisoners and other citizens.¹⁹ The Uganda Prisons Act of 2006 is silent on the voting rights of prisoners, but it does confirm that prisoners' rights are subject to the Constitution.²⁰ In practice however, there is no regulatory framework in place to ensure that prisoners are able to exercise their right to vote. In its 2015 annual report, the Uganda Human Rights Commission noted that Ugandan inmates, including those held in remand and pre-trial detainees, '*were not allowed to register [to vote] and there was no mechanism in place for their registration*'.²¹ As registration is a prerequisite to being able to vote, this means that Ugandan prisoners are prevented from exercising this constitutional right.²²

Similarly, in Kenya, the Constitution (adopted in 2010) protects prisoners' right to vote. In 2012 a complaint was brought successfully before the High Court in Nairobi about the alleged failure of the Independent Electoral and Boundaries Commission (IEBC) to facilitate prisoners' right to vote for the 2013 general elections.²³ The Court found that, while the IEBC had not deliberately excluded prisoners from voting, it had failed to meet its obligation to facilitate prisoner voting. It stated that the setting up of registration and polling centres for prisoners did not constitute sufficient facilitation and promotion of the right to vote.²⁴ The Court stated that the IEBC cannot '*be a passive actor*' but must have '*an activist sense in ensuring fundamental rights are promoted and fulfilled*' and quoted a previous judgement which stated that the Constitutional right to vote '*not only puts a bulwark against any government action that infringes on that right but also necessarily places a positive obligation on the State to ensure that its citizens vote voluntarily*'.²⁵

In Ireland, while, according to the Irish Prison Service (IPS), 'considerable efforts' are made to facilitate voting for prisoners and prisoners acknowledge that it is easier to vote for them in

¹⁷ Information obtained from survey.

¹⁸ The voter turnout of the general population was 73.48 per cent. *Electoral Commission National and Provincial Elections Report 2014*, available at <http://www.elections.org.za/content/Dynamic.aspx?id=3292&name=Elections&LeftMenuId=100&Breadcrumb=220> [accessed 18 March 2016].

¹⁹ Constitution of the Republic of Uganda, 1995, chapter 4, art. 38 and chapter 5, art. 59; Jamil Ddamulira Mujuzi, *The Ugandan Transfer of Convicted Offenders Act, 2012: A commentary*, 12 African Hum. Rts. L. J. 599, 605 (2012) (quoting proceedings of the Constituent Assembly May 18, 1995).

²⁰ Prisons Act, 2006, pt. VIII, art. 57.

²¹ Uganda Human Rights Commission, 17th Annual Report 2015 94 (2015).

²² Electoral Commission Act, 1997, art. 19(2).

²³ *Kituo Cha Sheria v. Independent Electoral and Boundaries Commission*, Constitutional Petition 574 of 2012 (Jan. 21, 2013).

²⁴ *Ibid*, at paras. 24-25.

²⁵ *Ibid*, at para. 9; *Kaur v. Ministry of Justice, National Cohesion and Constitution Affairs and Others*, Petition 556 of 2012 at para. 18.

prison than elsewhere, prisoner participation remains very low. In general, only one in five prisoners who register to vote end up voting, and for the Children's Referendum in 2012²⁶, only eight per cent²⁷ of the prison population exercised their right to vote. During an interview with a focus group of prisoners at Wheatfield Prison, most of those who didn't vote indicated they had *'little interest in the issues or candidates'* and preferred to spend their time studying or working, rather than voting.²⁸ A prison service spokesperson attributes low participation levels also to the current registration procedures: *'As registration only takes place once a year the population may be totally different come election time. With regard to the supplementary register, you only have a two-day window to after the election is called to get the forms out and return the completed forms to the council'*²⁹.

Reinstating voting rights post-release

In some jurisdictions (eg. the majority of US states, Belgium, Luxembourg, Kuwait, Poland) voting rights may not be automatically reinstated upon release from prison. In Luxembourg, for example, a prison sentence of more than ten years automatically entails a lifelong disenfranchisement and this may also be decided against a person sentenced for a felony to imprisonment of between five and ten years.³⁰

In 11 US states, voting rights for former prisoners are restricted indefinitely (**annex 3**). In Kentucky, Florida and Iowa, former prisoners cannot vote unless the state Governor personally restores their rights. In November 2015, with only two weeks left in the office, Governor Steve Beshear of Kentucky issued an executive order restoring voting rights for non-violent former offenders who had completed their sentences, allowing 170,000 former offenders to register to vote.³¹ However, on 22 December 2015, his newly elected successor rescinded the executive order, stating that restoration of voting rights for former prisoners is *'an issue that should be determined by an act of the General Assembly and amendment to the Constitution'*³². Hence, people with a criminal conviction in the state of Kentucky still need to apply individually to the Governor to have their voting rights restored.³³

Developments

Over the past decades, legislation and jurisprudence on (dis)enfranchisement of prisoners has slowly developed.

²⁶ National referendum on an amendment to the Constitution of Ireland, relating to children's rights and the rights and duties of the State in the protection of children.

²⁷ National turnout was 33.5 per cent. Michelle Hennessy, *Prisoners can vote – so why don't they?*, 26 February 2016, available at: <http://www.thejournal.ie/prisoners-voting-2622117-Feb2016/> [accessed 27 February 2016].

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Luxembourg Penal Code, art. 11, 12.

³¹ Ari Berman, *Kentucky restores voting rights for thousands of ex-felons*, The Nation, 24 November 2015, available at: <http://www.thenation.com/article/kentucky-restores-voting-rights-for-thousands-of-ex-felons/> [accessed 12 January 2016].

³² Executive Order 2015-052, Signed Dec. 22, 2015, Matthew G. Bevin, Governor (R) Kentucky, available at: <http://felonvoting.procon.org/sourcefiles/bevin-executive-order-2015-052.pdf> [accessed 10 March 2016].

³³ See <http://felonvoting.procon.org/view.resource.php?resourceID=000286#kentucky> [accessed 10 March 2016].

In 2001, two Russian prisoners brought a complaint to the UN Human Rights Committee (HRC), in which they successfully argued that the blanket ban on prisoners voting contained in the Russian Constitution violated art. 25 of the ICCPR. The HRC asked Russia to amend its constitution to comply with the Covenant.³⁴

In 2005, the European Court of Human Rights (ECtHR) ruled in the case *Hirst v the United Kingdom (No 2)*, in which the blanket ban on voting rights for British prisoners was successfully challenged. The Court elaborated that: *'[P]risoners in general continue to enjoy all fundamental rights and freedoms guaranteed under the Convention save for the right to liberty [...]'*, and that *'[a]ny restrictions on these rights must be justified'*³⁵. The Court further introduced a proportionality test, stating that *'[t]he severe measure of disenfranchisement must not [...] be resorted to lightly'*, and that in order to limit the right to vote, as protected under the European Convention of Human Rights³⁶, *'a discernible and sufficient link between the sanction and the conduct and the circumstances of the individual concerned'*³⁷, is required. So far, the United Kingdom has ignored this ruling.

With the passage of the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill in 2010, adding Section 80(1)(d) to the New Zealand Electoral Act of 1993, any person sentenced to a term of imprisonment is prohibited from voting in general and local elections. Prior to the amendment only those sentenced to life imprisonment, preventive detention or a term of imprisonment of three years or more were prohibited from voting. In 2015, the compatibility of this blanket ban with the New Zealand Bill of Rights Act 1990 (NZBORA)³⁸, was challenged before the High Court. Section 12 of the NZBORA enshrines into national law art. 25 of the ICCPR. The Court declared the blanket ban inconsistent with the NZBORA, sending a strong message to the Parliament that Section 80(1)(d) of the New Zealand Electoral Act of 1993 contravenes the NZBORA, and by extension New Zealand's international obligations under the ICCPR.³⁹

In 2015, the European Court of Justice decided that, EU member states can ban prisoners' voting rights, as long as it *'takes into account the nature and gravity of the criminal offence committed and the duration of the penalty'*⁴⁰. In introducing this proportionality test, the Court confirms that a blanket ban on voting rights is likely to be unlawful.

Conclusion and recommendations

Disenfranchisement can be viewed as counter-productive to the purpose of imprisonment and the role of a penitentiary system which – as outlined in the International Covenant on

³⁴ *Yevdokimov & Rezanov v Russian Federation*, CCPR/C/101/D/1410/2005. See <http://ehrac.org.uk/wp-content/uploads/2014/10/EHRAC-Bulletin-16-ENG.pdf> [accessed 18 March 2016].

³⁵ *Hirst v the United Kingdom (No 2)*, [2005] ECHR 681.

³⁶ Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, available at: <http://www.hri.org/docs/ECHR50.html> [accessed 18 March 2016].

³⁷ *Hirst v the United Kingdom (No 2)*, [2005] ECHR 681.

³⁸ New Zealand Bill of Rights Act 1990, available at <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html> [accessed 18 March 2016].

³⁹ *Taylor v Attorney-General of New Zealand* [2015] NZHC 1706 [24 July 2015].

⁴⁰ Case C-650/13 *Thierry Delvigne v Commune de Lesparre Medoc and Prefet de la Gironde* [2015] OJ C 129.

Civil and Political Rights (ICCPR) and the UN Nelson Mandela Rules – is to rehabilitate offenders and thereby reduce recidivism.

The revised UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) – widely recognised as the blueprint for prison management – state that the purpose of imprisonment can be achieved only if it is used to achieve, ‘*so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life*’⁴¹.

In addition, the Nelson Mandela Rules state that:

- ‘[t]he prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners’⁴²; and
- ‘[t]he treatment of prisoners should emphasize not their exclusion from the community but their continuing part in it’⁴³.

In *Sauvé v. Canada*, the Supreme Court of Canada furthermore considered 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. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny inmates the right to vote is to lose an important means of teaching them democratic values and social responsibility*’⁴⁴. The Court further stated that: ‘*Denying inmates the right to vote [...] removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration*’⁴⁵.

Bearing in mind international standards, states should:

1. Ensure that all pre-trial detainees have the right to vote.
2. Review legislation and policy on the deprivation of voting rights of convicted prisoners, bearing in mind the ultimate purpose of imprisonment as set out in the ICCPR and the UN Nelson Mandela Rules, and with particular attention to the long-term or life-time deprivation of civil rights of former prisoners who have served their sentences.
3. Ensure that voting facilities are in place for all those prisoners who wish to register and cast a vote.

⁴¹ 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-minimum-rules-treatment-prisoners-smr> [accessed 10 March 2016].

⁴² *Ibid*, Rule 5.

⁴³ *Ibid*, Rule 88 (1).

⁴⁴ *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519.

⁴⁵ *Ibid*.

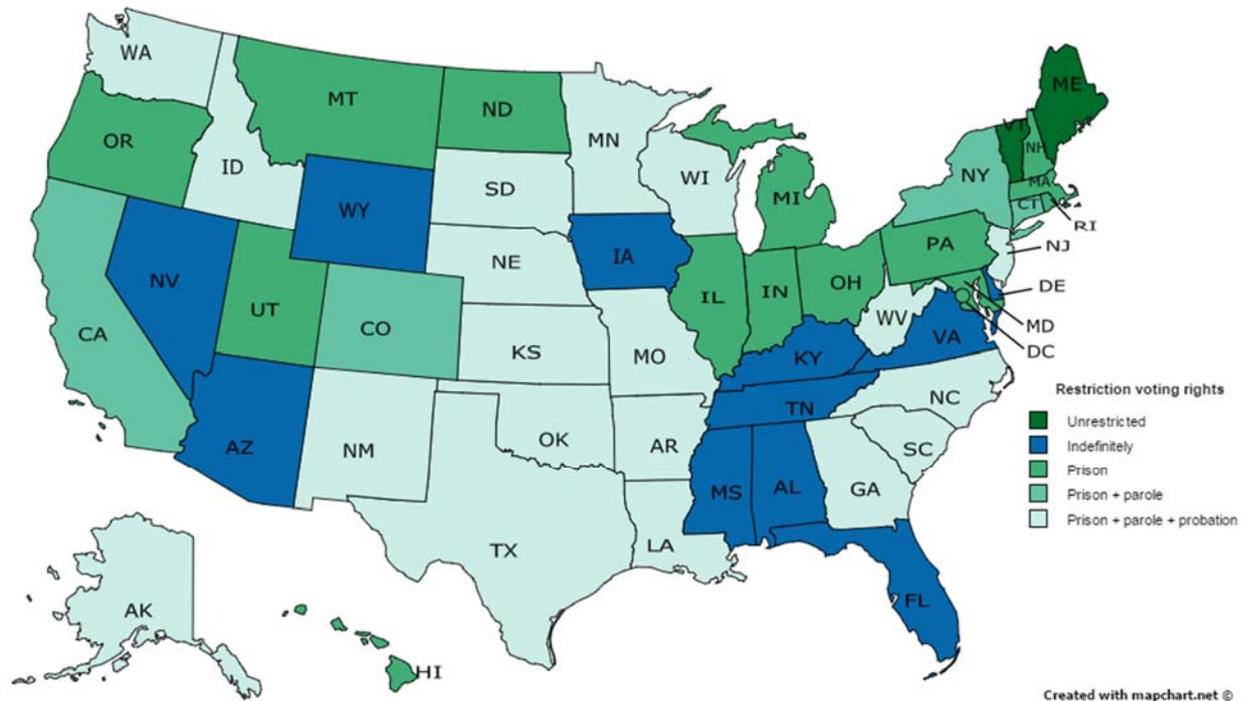
Annex 1 – Questionnaire

1. Does domestic legislation entitle prisoners to vote? Please consider local, national and supra-national elections (eg. EU)
2. If yes, are there any restrictions or conditions to this right, considering local and/or national, differentiation based on length of sentence and/or severity of offence, during pre-trial detention and after release?
3. Are any restrictions set out in legislation or subject to judicial discretion?
4. In case of legislative regulation, what is the rationale given by the legislator for the restrictions applied? In case of judicial decision, which are the criteria to be considered by the judge and is there a right of appeal?
5. Are offenders subject to non-custodial measures entitled to vote (for example, individuals on community service, under house arrest and/or subject to probation orders)?
6. Is disenfranchisement ever used as a sanction in its own right (i.e. can it be handed down as a sentence)?
7. Do governments and/or prison administrations have a legal obligation to facilitate prisoners' right to vote? If so, how does this operate in practice?

Annex 2 – Countries surveyed

Algeria	Lebanon
Argentina	Lithuania
Armenia	Luxembourg
Australia	Malaysia
Azerbaijan	Mexico
Belarus	Morocco
Belgium	Namibia
Botswana	New Zealand
Brazil	Norway
Bulgaria	Peru
Canada	Poland
China	Romania
Colombia	Russia
Czech Republic	Singapore
Denmark	South Africa
Djibouti	Spain
Egypt	Sudan
Estonia	Sweden
Ethiopia	Switzerland
Finland	Tajikistan
Georgia	Tanzania
Ghana	Thailand
Hong Kong	Tunisia
Iceland	Turkey
India	Uganda
Ireland	Ukraine
Israel	United Arab Emirates
Japan	United Kingdom
Kazakhstan	United States
Kenya	Uzbekistan
Kuwait	Venezuela
Kyrgyzstan	Vietnam
Latvia	Zimbabwe

Annex 3 – Voting rights US States



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