

Analysing the prisoner voting saga and the British challenge to Strasbourg

The prisoner voting issue has become a cause célèbre in the UK. In successive Grand Chamber judgments - *Hirst v United Kingdom No 2*¹ (2005) and *Scoppola No 3 v Italy* (2012)² – Strasbourg has made it clear that the British blanket ban on convicted prisoners voting is incompatible with Art 3 of Prot 1 to the ECHR.³ Yet the Prime Minister has insisted that the issue is for ‘Parliament to decide, not a foreign court’,⁴ British MPs having voted to reject *Hirst* back in February 2011. The Court’s Art 46 order⁵ requiring the introduction of legislative proposals to secure compliance with *Hirst* was therefore met by the (eventual) publication of a Bill (the ‘Voting Eligibility (Prisoners) Draft Bill’)⁶ which included options to reform the law, but also one to *confirm* the current blanket ban. There remains a prospect, then, of a showdown whereby British MPs positively reject *Hirst* by legislating in conscious defiance of it. That would be without precedent in the Court’s history,⁷ and it could have major ramifications for the Convention system. In the view of the Joint (Parliamentary) Committee set up to consider the Bill just referred to (the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (hereafter ‘the Joint Committee on Prisoner Voting’)), a defiant stance from the UK would not only undermine its ‘international standing’, it would ‘give succour to those states in the Council of Europe who have a poor record of protecting human rights and who may draw on such an action as setting a precedent that they may wish to follow’.⁸ So the prisoner voting issue risks evolving into a crisis ‘threatening the entire Convention

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¹ *Hirst v United Kingdom No 2* 2005-IX; (2006) 42 EHRR 41 GC - see text accompanying n 12 infra. Chamber judgment: Application No 74025/01, Merits, 30 March 2004.

² *Scoppola v Italy No 3* (2013) 56 EHRR 19 GC, see text accompanying n 83 infra.

³ The leading Strasbourg authorities on prisoner voting are *Hirst* n 1 supra and see text accompanying n 12 infra; *Scoppola v Italy No 3* supra n 2; *Anchugov and Gladkov v Russia* Application No 11157/04, Merits, 4 July 2013 (bar on prisoner voting enshrined in constitution: violation) and *Soyler v Turkey* Application No 29411/07, Merits, 17 September 2013 (almost full bar on prisoner voting: violation). In the UK, see R (*on the application of Chester*) v *Secretary of State for Justice* [2013] UKSC 63 (‘Chester’), see further n 40, 52, 89, 125, 147 and 201 below.

Other Strasbourg judgments include: *Frodl v Austria* (2011) 52 EHRR 5 (8 April 2010), see text accompanying n 43 infra, Chamber judgment (first section); Grand Chamber rehearing request rejected – aspects overturned by the Grand Chamber judgment in *Scoppola No 3*; and *Greens and MT v United Kingdom* ECHR 2010; (2011) 53 EHRR 21 (23 November 2010), Chamber judgment (fourth section), see text accompanying n 46 infra; Grand Chamber rehearing request rejected. Recent important cases on Art 3 Prot 1 include *Alajos Kiss v Hungary* Application No 38832/06, Merits, 20 May 2010 (blanket disenfranchisement for those with ‘diminished faculties’: violation); *Sitaropoulos and Giakoumopoulos v Greece* ECHR 2012; (2013) 56 EHRR 9 GC (Greek nationals resident overseas unable vote in parliamentary elections due to lack of legislation: no violation) and *Shindler v United Kingdom* Application No 19840/09, Merits, 7 May 2013 (non-resident citizens restricted from voting after 15 years overseas: no violation).

⁴ HC Deb vol 545, col 1127 (23 May 2012) and see HC Deb, vol 551, col 923 (24 Oct 2012) (‘prisoners are not getting the vote under this Government’).

⁵ See text accompanying n 55 below.

⁶ The relevant documentation can be found on the website for the Joint Select Committee on the Draft Voting Eligibility (Prisoners) Bill: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-voting-eligibility-prisoners-bill/> (last accessed 31 January 2014).

⁷ Draft Voting Eligibility (Prisoners) Bill, Session 2013-2014, 18 December 2013, (HL Paper 103; HC 924) at [100].

⁸ *Ibid* at [113].

system'.⁹ Indeed, the Secretary General of the Council of Europe has suggested that a 'bad example' set by the UK could mark 'the beginning of the weakening of the Convention system and probably after a while'¹⁰ its dissolution.

Against this background, this article reflects upon the prisoner voting saga (to date at least) and the evolution of the 'British' challenge to the Court over recent years. To be clear, the term 'British' is employed for convenience, mainly to reflect the positions adopted by the British government and certain Westminster politicians at various, relevant stages, and so does not imply that there is a single, British¹¹ view toward the Convention, or with respect to prisoner voting. The article proceeds in four parts.

Part one offers a critical perspective on the key prisoner voting judgments delivered by the Court over 2005-2010, starting with *Hirst*. We shall examine why that judgment was controversial, firstly, from the perspective of the standard of review Strasbourg employed (in respect of which there was some disagreement), and secondly, as the judgment was ambiguous. We shall then see that subsequent Strasbourg case law on prisoner voting gave out mixed messages as to the requirements of the ECHR in this field.

Part two examines how the Strasbourg Court sought to use its influence to force the UK to comply with *Hirst*, resorting to its Art 46 powers. But we shall also observe how the British government and British MPs reacted to this, the latter by voting overwhelmingly against a change in the law (February 2011). We shall see that this gave rise to a certain amount of brinkmanship, or so it seemed, between the UK and Strasbourg, and how the latter reacted via the Grand Chamber judgment in *Scoppola v Italy No 3* (May 2012).

The analysis in part three might at first appear to be a digression, since it adopts a broader perspective, addressing the domestic context in terms of why the Court's influence on the UK has become so contentious in recent years. It is hoped, however, that the reader will appreciate that this perspective provides part of the explanation as to why the prisoner voting issue has become regarded as the focal point for what in fact is a broader controversy. The reality, it seems, is that the substantive (prisoner voting) matter has assumed secondary importance to a broader debate about the UK's relationship with Strasbourg, the latter being regarded as too intrusive in relation to the former. The third part of this article therefore provides an important perspective on the saga, helping to explain why, even though the Strasbourg Court's judgments, especially the Court's 2012 ruling in *Scoppola*, might be regarded as having only a mild, law-reforming effect, there remains real resistance to reform on the part of some, as a matter of principle, it seems.

Against that background the final part of this article reflects upon the saga as a whole. It is submitted that there are lessons to be derived for the UK and for the Court.

I – The prisoner voting saga: 2005-2010 (the initial Strasbourg jurisprudence)

The origin of the saga, from the perspective of the Strasbourg jurisprudence at least, is the 2005 Grand Chamber judgment in *Hirst*. This built on long-standing and uncontested¹² jurisprudence to the effect that, despite its general wording, Art 3 of Prot 1

⁹ Ibid at [230] and see [109]-[110].

¹⁰ Ibid at [109], citing Mr Jagland, Secretary General of the Council of Europe. See also [108] and [110].

¹¹ In this connection, as regards the suggestion that there is less concern with the Convention in Northern Ireland, Scotland and Wales see n 133 below. Nor is it suggested that there is a single British government view, there currently being a coalition government in the UK in which, speaking generally, the Liberal Democrats are regarded as more in favour of European human rights law, than the Conservatives.

¹² Part of the controversy, as far as some British politicians are concerned, associated with *Hirst* relates to arguments that Art 3 Prot 1 does not contain a 'right to vote', and that the Convention's drafters did not intend to include it. On this see the Report on the Draft Voting Eligibility (Prisoners) Bill chap 3.

establishes an individual right to vote.¹³ That said, the ruling was controversial within the Court itself for it divided the Grand Chamber (12 to 5), the division being, apparently, about a difference of approach as to the appropriate review function to be performed by Strasbourg. We examine this below, before we comment on a further aspect of why *Hirst* and the case law that followed in 2010 were contentious; the 2005 judgment was ambiguous, and later rulings adopted different readings of the case.

Hirst and the margin of appreciation

The controversy over the standard of review centred upon the margin of appreciation. In essence, the UK position, largely endorsed by the minority, was that the British blanket ban on convicted prisoners voting (based mainly upon section 3(1) of the Representation of the People Act 1983 (ROPA 1983))¹⁴ was reasonable, and that Strasbourg should acknowledge that, by accepting that British law came within the margin of appreciation, there being no violation of the ECHR. British law, it was submitted, was proportionate since it lasted only as long as the imprisonment itself, and *only* applied to those convicted of ‘crimes sufficiently serious, to warrant an immediate custodial sentence’.¹⁵ Moreover, there were thirteen European countries (as of 2005) where prisoners were unable to vote, and a variety of approaches were taken by democratic States outside Europe.¹⁶

Finding a violation of Art 3 Prot 1, the Court observed that the ban was automatic and covered ‘a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity’.¹⁷ It acknowledged that only ‘a minority of Contracting States’¹⁸ (no more than 13) had blanket bans or made no provision for allowing prisoners to vote, but stated that, ‘even if no common European approach to the problem [could] be discerned, [that could not] in itself be determinative of the issue’. As to the Court’s entitlement to hold that British law contravened the Convention, even though the ban was framed in primary legislation (here the Court referred to the ‘weight’¹⁹ to be attached to the British Parliament’s position), it was observed that the British Parliament had not seriously debated the appropriateness of the ban in modern times, and certainly not from the perspective articulated by the Court, with its eye to justifying restrictions on ‘the *right* of a convicted prisoner to vote’ (emphasis added).²⁰

¹³ See further Harris *et al*, *The Law of the European Convention on Human Rights*, (Oxford: Oxford University Press, 2014) chap 23 (forthcoming). For relevant international and comparative materials on the right to vote, see *Hirst* GC at [26]-[34] and *Scoppola* GC at [40]-[48]. In *Yevdokimov and Rezanov v Russian Federation* (1410/2005), View, CCPR/C/101/D/1410/2005, the Human Rights Committee cited *Hirst* when adopting the view (with two dissenting votes) that there had been a violation of Art 25, ICCPR (Russian blanket ban on prisoners voting; see also *Anchugov and Gladkov v Russia*, n 3 *supra*).

¹⁴ This stipulates that all convicted prisoners are ineligible to vote in parliamentary and local elections whilst they are detained in a penal institution. Those imprisoned for contempt and default, and on remand, may vote. For a very informative document on the domestic context to the prisoner voting saga, see House of Commons Library, Standard Note (SN/PC/01764), ‘Prisoner Voting Rights’, 15 Jan 2014.

¹⁵ *Hirst* GC [51], *cf* the excluded categories of prisoners noted in n 14. See also [52] and [77].

¹⁶ *Hirst* GC [47].

¹⁷ *Hirst* GC [77], and see *Anchugov and Gladkov* n 3 above at [105].

¹⁸ *Hirst* GC [81]. See text accompanying n 171 *infra* for updated figures.

¹⁹ *Hirst* GC [79]. See the joint concurring opinion of Judges Tulkens and Zagrebelsky, and the joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens at [7]. On the absence of a proper domestic debate in the Russian context, see *Anchugov and Gladkov v Russia* n 3 above at [109].

²⁰ The *Hirst* Grand Chamber noted that ‘there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote’. There had not been ‘any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote’, *Hirst* GC [79]; see also [22], pointing out that s 3 ROPA was a re-enactment, without debate, of legislation from 1969, which in turn dated back to 1870.

As the emphasised part of the passage just quoted indicates, *Hirst* required ECHR States to adopt a rights-based *model* for (convicted) prisoner voting.²¹ The judgment did *not* expressly state this, but it was the necessary implication of the ruling, which held that it was unacceptable under ‘modern-day penal policy and current human rights standards’,²² for the UK to have a general, automatic and thus indiscriminate denial of the *right* of convicted prisoners to vote. What was at stake was ‘not a privilege’, whilst ‘[i]n the twenty-first century’, ‘the presumption in a democratic State’ had to be ‘in favour of inclusion’,²³ prisoners not forfeiting their ‘Convention rights merely because of [their] status as a person detained following conviction’, or simply because public opinion favoured this.²⁴ The right could be heavily qualified, but British law was closed to considerations related to its proportionality, the Grand Chamber adopting a rather *in abstracto* approach to s 3 ROPA 1983,²⁵ which was ‘a blunt instrument’, imposing ‘a blanket restriction on all convicted prisoners’,²⁶ stripping ‘of *their Convention right to vote* a significant category of persons’ (emphasis added), and doing so ‘in a way which is indiscriminate’. The Court stated in paragraph 82 of the judgment that the ban:

‘applie[d] automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right *must be seen as falling outside any acceptable margin of appreciation*, however wide that margin might be, and as being incompatible with Art 3 of Prot No. 1’.²⁷

So, contrary to the British submissions, section 3 ROPA fell outside the margin of appreciation; that margin was ‘wide’ but *not* ‘all-embracing’.²⁸

Insisting that the Court had been correct to reject the British government’s arguments as to the limited review function to be employed, in his separate opinion Judge Caflisch argued that Strasbourg had the authority to set minimum standards, and here it had defined the ‘parameters to be respected by democratic States when limiting the right to participate in votes or elections’.²⁹ The very purpose of the ECHR was to make the national laws of contracting States subject to ‘European control’;³⁰ Strasbourg was *not* bound to simply defer to the UK, holding that its law was reasonable and so find

As for the domestic courts, they had treated the human rights compatibility of the ban as a mainly political matter, *Hirst* GC [80].

²¹ See also *Hirst* GC [63]-[71], and at [69] especially. The point came through much more clearly in the concurring opinions attached to the judgment.

²² *Hirst* GC [79], and *Anchugov and Gladkov* n 3 above at [103].

²³ *Hirst* GC [59], and see [75].

²⁴ *Hirst* GC [70]. The Court found a violation of Art 3 Prot 1 in Strasbourg’s capacity to ‘determine in the last resort’ whether that Article had been complied with, its role being to ensure that the ‘very essence’ of the right in question was not infringed, and that restrictions on it were imposed for ‘legitimate aim[s]’ and were not ‘disproportionate’, *Hirst* GC [62]. It had to assess whether exclusion ‘of any groups or categories of the general population’ from the franchise were ‘reconcilable with the underlying purposes of Art 3 of Prot No 1’ *ibid*.

²⁵ The majority argued that this was not so, see [72], but the minority disagreed, see Joint dissenting opinion of Judges Wildhaber et al [8].

²⁶ *Hirst* GC [82].

²⁷ *Hirst* GC [82], emphasis added.

²⁸ *Hirst* GC [82]. See also [61]. And see Concurring Opinion of Judge Caflisch.

²⁹ Concurring Opinion of Judge Caflisch [7].

³⁰ Concurring Opinion of Judge Caflisch (stressing that ‘it is up to this Court, rather than the Contracting Parties, to determine whether a given restriction [in national law] is compatible with the [Convention, and here the] individual right to vote’, at [2], and criticising the UK government’s contention that Strasbourg judges were drawing their ‘own conclusions instead of relying on national traditions or the views of the national courts’, at [3]).

no violation, on the basis that the national legislature and domestic courts had adopted positions on the matter and as there was no clear European consensus on the issue.

However, five dissenting judges³¹ (which included the Court's then President (Wildhaber) and its subsequent President (Costa)) appeared to question this, at least on the facts of *Hirst*. Adopting a wide margin of appreciation (deferential) approach,³² they cited the politically sensitive nature of the prisoner voting issue, the fact that the right to vote was an implied right read into Art 3 Prot 1, and the absence of a clear enough European standard on prisoner disenfranchisement in 2005. For them the Grand Chamber was being too activist in a field that *should* have been reserved for the UK in the exercise of its margin of appreciation (the Court was 'not a legislator and should be careful not to assume legislative functions').³³ From that point of departure, the dissenters also strongly implied that the majority had adopted their own preferred solution to the substantive issue, losing sight of the Court's international status: '[o]ur own opinion' on the prisoner voting issue 'matter[ed] little'. In a similar vein Judge Costa argued that the majority had confused '*the ideal to be attained*' (original emphasis) – which was 'to bring the isolation of convicted prisoners to an end, even when they have been convicted of the most serious crimes, and to prepare for their reintegration into society and citizenship'³⁴ – and the appropriate deferential (wide margin of appreciation) approach required of the Court for the case at hand. As the joint dissenters put it, Strasbourg should not '*impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent*' (emphasis added).

Mixed messages, and idealism, not self-restraint from Strasbourg?

As this last passage reveals, the dissenters doubted whether the Court genuinely had left the UK with a wide (remaining) margin of appreciation within which to amend domestic law. As they read the judgment, only two reform options were available: restore the vote to prisoners in the post-tariff phase of detention (such as *Hirst*; the tariff part of the sentence relating to the minimum period to be served for retribution and deterrence), or amend domestic law such that only judges could disenfranchise prisoners as part of sentencing.³⁵

In fact, *Hirst* was highly ambiguous here. On the one hand, it was capable of a minimalist reading. The Grand Chamber stated that it would not direct the UK how to amend its domestic law, implying that it was adopting an appropriately restrained approach by doing so.³⁶ On the other hand, it criticised the fact that the courts in the UK did not identify a 'direct link' between removal of the right to vote and incarceration.³⁷ It also stated that 'the severe measure of disenfranchisement' could not be 'undertaken lightly', and that 'the principle of proportionality require[d] a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned'.³⁸ These passages were highlighted as essential features of *Hirst* by both the

³¹ Joint dissenting opinion of Judges Wildhaber *et al.*

³² See also the Dissenting Opinion of Judge Costa.

³³ *Ibid.* [6].

³⁴ *Ibid.*

³⁵ *Ibid.* [9].

³⁶ 'Contracting States [had] adopted a number of different ways of addressing the question of the right of convicted prisoners to vote'. Thus, Strasbourg 'confined itself' to concluding that UK law was outside 'any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights' in question, see *Hirst* GC [84].

³⁷ *Hirst* GC [77].

³⁸ *Hirst* GC [71].

Committee of Ministers³⁹ and the Court of Appeal,⁴⁰ although they were downplayed (seven years later) by the Grand Chamber in *Scoppola* (May 2012) when *Hirst* was revisited.

Arguably the reference to proportionality suggested that the specific ‘conduct’ (crime committed) had to match the ‘sanction’ (disenfranchisement) for the individual prisoner concerned, the intervention of a judge being best suited to that.⁴¹ This was the approach adopted, in April 2010, in the chamber judgment, *Frodl v Austria*.⁴² It paid lip-service to the margin of appreciation citing what it referred to as the ‘*Hirst* test’, which entailed that, ‘besides ruling out automatic and blanket restrictions’ it was ‘an *essential element* that the *decision on disenfranchisement should be taken by a judge*, taking into account the particular circumstances, *and that there must be a link between the offence committed and issues relating to elections and democratic institutions*’.⁴³ *Frodl* stated:

‘The essential purpose of these criteria is to establish disenfranchisement *as an exception even in the case of convicted prisoners*, ensuring that such a measure is accompanied by *specific reasoning given in an individual decision explaining why* in the circumstances of the specific case *disenfranchisement was necessary*, taking the above elements into account’.⁴⁴

Frodl was confirmed when Austria’s Art 43(1) request that it be referred to the Grand Chamber for a rehearing was rejected. Austria dutifully amended its law soon after this, although in fact, and as we note later, aspects of *Frodl* were later overturned by the Grand Chamber in *Scoppola* (2012). Before then, in January 2011 in the chamber judgment in that case the Court applied *Frodl* insofar as judicial disenfranchisement and adequate reasoning by a domestic court in respect of the nature and gravity of the offence committed was a general principle of the Art 3 Protocol 1 prisoner voting case law.⁴⁵

By contrast, in *Greens and M.T. v UK*⁴⁶ (November 2010), a near identical case to *Hirst*, which was sandwiched in between the Austrian and Italian judgments, the Court adopted the ‘minimalist’ reading of the 2005 Grand Chamber judgment. It merely cited paragraph 82 of *Hirst*,⁴⁷ indicating that it was the automatic and blanket nature of restrictions on prisoner voting which were unacceptable, and emphasising the great latitude that the UK had to amend domestic law.⁴⁸ The idealist passages from *Hirst* noted above were not cited and the judgment implied that *Frodl* could be confined to its facts.⁴⁹

³⁹ Committee of Minister (109 2nd meeting, 15 September 2010, Committee of Ministers, at [7]) in the follow-up to *Hirst*.

⁴⁰ See *Chester v Secretary of State for Justice & Anor* [2010] EWCA Civ 1439 at [13], [15] and [35] (noting that ‘The government will no doubt consider carefully whether compliance with these standards requires a decision-making role in specific cases to be accorded to the judiciary’).

⁴¹ Compare to the Venice Commission’s Code of Good Practice in Electoral Matters, as cited in *Hirst* GC at [32], aspects of which were cited with approval at [71], and see also the Concurring Opinion of Judge Caflich. See also n 49 infra.

⁴² See n 3 supra, *Frodl* [35].

⁴³ *Frodl* [34], emphasis added.

⁴⁴ [35], emphasis added.

⁴⁵ *Scoppola* (Chamber judgment) [49].

⁴⁶ n 3 supra. The applicants had been denied the vote in the June 2009 European Parliamentary elections, and the May 2010 general election. The Court noted that section 3 of ROPA had not been amended, and that the blanket restriction had been extended by the European Parliamentary Elections Act 2002; citing *Hirst* GC [82], it concluded that there had been a violation of Art 3 of Prot 1 (but not of Art 13).

⁴⁷ See text accompanying n 27 supra.

⁴⁸ *Greens* [113] and [114] (‘a wide range of policy alternatives... available to the Government’).

⁴⁹ *Greens* [113]. Nonetheless, in early 2011 legal experts advised a Parliamentary Select Committee that, considering the jurisprudence overall, Art 3 Prot 1 required a scheme of individualised assessment for disenfranchisement (by the sentencing judge, probably). See Political and Constitutional Reform

We may therefore conclude our analysis of the relevant 2005-2010 jurisprudence by noting Strasbourg's mixed messages on prisoner voting.⁵⁰ *Hirst* itself had been unclear. *Greens* might have backtracked on it; given the ambiguity of the 2005 judgment one cannot say for sure. *Frodl* either made Strasbourg law more explicit or significantly advanced it. But the fact that a reference to the Grand Chamber was rejected indicated that *Frodl*, which had explicitly referred to the '*Hirst* test' and required that disenfranchisement be 'an exception even in the case of convicted prisoners', was final, and so 'good' Strasbourg law. That was particularly striking given that *Hirst* had been controversial, the minority accusing the majority, in effect, of judicial activism.

We shall return to the (probably, now predictable) criticisms of these 2005 and 2010 rulings in the last section of this article. For now, however, our focus shifts to the enforcement of *Hirst*.

II – Enforcing 'European control' on prisoner voting, confronting Strasbourg and its reaction

That the May 2010 UK general election took place with the blanket ban in full effect⁵¹ was a demonstration of the ineffectiveness of both the domestic legal challenges,⁵² and the political criticism (both domestically⁵³ and from the Committee of Ministers)⁵⁴ directed at the UK (or its government) over its failure to implement *Hirst* over the preceding five years. In the afore-mentioned *Greens* judgment (November 2010), then, the Court ordered that the process of reforming the blanket ban be got underway. Applying Art 46 of the Convention, the Court held that:

'the respondent State *must* introduce *legislative proposals* to amend section 3 of the 1983 Act and, if appropriate, section 8 of the [European Parliamentary Elections Act] 2002 Act, within six months of the date on which the present judgment becomes final, *with a view to the enactment of an electoral law to achieve compliance* with

Committee, Fifth Report of Session 2010–11 (HC 776), 'Voting by Convicted Prisoners: Summary of Evidence', [12]. The *Scoppola No 3* Grand Chamber judgment does not require this, see n 92 below.

⁵⁰ See Briant, 'The requirements of prisoner voting rights: mixed messages from Strasbourg' (2011) 70(2) *Cambridge Law Journal* 279.

⁵¹ No legislative proposals were tabled over 2005-2010, a two-stage consultation process undertaken by the Labour government between 2006 and 2009, examining the policy options for reform, proving fruitless in that regard. See the excellent article by Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after *Hirst v United Kingdom*' (2011) 22 *Kings Law Journal* 309 at 311-322. In his autobiography the Minister of Justice 2007-2010 acknowledged that he 'spent three years ensuring that the government took no decision' on *Hirst*, see J Straw, *Last Man Standing*, (Macmillan, 2012) at 538–539.

⁵² Domestic legal challenges to the prisoner voting ban merely resulted in a declaration of incompatibility under the HRA; see *Greens* [27]-[40]. See also *Chester* n 3 (the Supreme Court declined to issue a further declaration of incompatibility).

⁵³ See Joint Committee on Human Rights, 'Enhancing Parliament's Role in relation to human rights judgments', 15th Report of 2009-2010, March 2010 at 34 at para 108 (delay in implementing *Hirst* showed a 'lack of commitment on the part of the government to proposing a solution for Parliament to consider').

⁵⁴ Acting under Art 46(2), ECHR the Committee of Ministers had been sharp in its criticism of the failure to implement *Hirst*, see Interim Resolution CM/ResDH(2009)1601 ('serious concern' that the law might not be reformed prior to the 2010 May general election, and urging reform), and its decisions (i) CM/Del/Dec(2010)1078 (8 March 2010) (call to 'rapidly adopt' legislative change); (ii) CM/Del/Dec(2010)1086 7 June 2010 (after May 2010 general election, 'profound regret' that law not amended, urging reform to prevent further, repetitive applications) and (iii) CM/Del/Dec(2010)1100 (6 December 2010) (the predicted risk of repetitive applications had materialised, as had been confirmed in *Greens*). See also the Committee's statement on *Hirst* and *Greens* at its meeting of 10 March 2011, noting that the UK was seeking a rehearing of the latter before the Grand Chamber; following United Kingdom's unsuccessful attempt to obtain a rehearing of the *Greens* case, the Committee of Ministers 'invited the United Kingdom authorities to present an action plan [on reform]... without delay' (8 June 2011).

the Court's judgment in *Hirst* according to any time-scale determined by the Committee of Ministers'.⁵⁵

Invoking the pilot judgment procedure⁵⁶ *Greens* noted that several thousand British prisoner voting applications had reached Strasbourg, and the potential for many more.⁵⁷ However, it indicated that it was *not* intent on using these cases to rack up judgments against the UK, or using them to try to fine it into compliance.⁵⁸ Adopting a 'constitutional' model of review,⁵⁹ *Greens* indicated that Strasbourg was ready to dispense with all follow-up cases (around 1,500 were registered),⁶⁰ and future comparable cases, without compensation⁶¹ - *if* the requested proposals for legislative reform noted above were tabled, and appropriate reform followed. That said, there was an implied threat of minimal *costs* awards in respect of the many *Hirst*-like applications that had reached and could yet be made to Strasbourg by disenfranchised prisoners.⁶²

As students of the ECHR know, the Court's orders (like its judgments more generally) create international legal obligations, and these are not necessarily directly enforceable in domestic law, and so compliance may rely upon a cooperative approach from the (sovereign) respondent State. Then again, Convention States are unlikely to want to be exposed as being directly opposed to the Court, and willing to reject the obligations it may establish via its authoritative interpretation of the Convention, in a case directed against it, and which the State has undertaken to abide by (Art 46(1)). Doubtless it was for such reasons that over 2005-2010 the UK government never actually stated that it was not prepared to abide by *Hirst*. The influence of the 'unenforceable' orders made in *Greens* therefore resided in the international legal obligations the relevant judgments established, which were final and binding on the UK (Art 46(1)). Above all, however, their effectiveness rested on the assumption that the UK government would not be prepared to flout those obligations and the Court's authority, *if forced into having to adopt a position on the matter* - the orders turning the screw in that regard, so-to-speak. In *Greens* the UK (in reality, its government) was presented with an ultimatum: it had six months to either demonstrate its acceptance in principle of

⁵⁵ *Greens* [115] emphasis added. See also the operative part of judgment paras 6(a) and 6(b). On the Court's general use of Art 46, see *Harris et al* n 13 supra at p 162.

⁵⁶ See *Greens* at [106]-[109], and with specific commentary on *Greens*, Leach, 'Resolving Systematic Human rights Violations' in Besson (ed), *The European Court of Human Rights After Protocol 14*, (Schulthes, 2011), 215 at 219-225. See also *Greens* [111] (referring to '[t]he failure of the respondent State to introduce legislative proposals to put an end to the current incompatibility of the electoral law with Article 3 of Protocol No. 1'. This was 'not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs', but it also 'represented a threat to the future effectiveness of the Convention machinery').

⁵⁷ See *Greens* at [75] (estimated that more than 100,000 prisoners 'were likely to have been affected by the ban at one time or another since the Court's judgment in *Hirst*').

⁵⁸ In *Greens* the finding of a violation was considered sufficient just satisfaction when taken with the Art 46 order to bring forward legislative proposals for reform, [97]-[98]. The Court refused to award aggravated or punitive damages. Any orders for costs made in subsequent judgments would, like *Hirst*, need to be enforced; see Report on Draft Voting Eligibility (Prisoners) Bill at [104].

⁵⁹ *Cf* Leach, n 56 supra at 219 and 223-224, see *Greens* [118]-[120].

⁶⁰ *Greens* [111] (another 1,000 applications were unregistered).

⁶¹ Five thousand Euros were awarded for costs and expenses. The Court stated that it 'would be *likely* to consider that legal costs [for the follow-up cases] were not reasonably and necessarily incurred and would *not*, therefore, be *likely* to award costs under Article 41', *ibid.* [120], emphasis added. As to follow-up applications (i.e. *Hirst*-like cases already registered with the Court) these would be *discontinued* pending the introduction of the 'legislative proposals'; once the latter were *tabled*, the applications would be struck out (Article 37(1)(c)), but could be restored if appropriate legislation was not actually passed, [121]. *Hirst*-like applications not yet registered would be suspended, but could be revived, [122].

⁶² See Report on Draft Voting Eligibility (Prisoners) Bill at [103]-[104].

Strasbourg's (*Greens*) position on prisoner voting (by tabling legislative proposals) or, by its inaction, its conscious and deliberate rejection of the same, thereby incurring the political consequences associated with this. How the government reacted to this ultimatum and the brinkmanship that ensued are now examined.

Resisting enforcement: British politicians take a stand against Strasbourg

In November 2010, in acknowledgement of the binding obligations on the UK, the British government announced that the law *would* be changed in due course, but in very grudging tones (the Prime Minister⁶³ told MPs it made him 'physically ill even to contemplate having to give the vote to anyone who is in prison'). David Davis MP, a former shadow Home Secretary - and *not* a member of the government-, immediately called for Parliament to challenge *Hirst*.⁶⁴ He sponsored a private (Backbench⁶⁵) Parliamentary debate in February 2011⁶⁶ proposing:

That this House notes the ruling of the European Court of Human Rights in *Hirst v the United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that *legislative decisions of this nature should be a matter for democratically-elected lawmakers*; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand [emphasis added].

The vote was carried by an overwhelming majority: 234 votes to just 22.

Had a plan come to fruition? Without suggesting so, the author notes that the British Attorney General, who spoke at the February 2011 merely to provide the legal background to *Hirst*, also took the opportunity to pose a rhetorical question: 'how can we find a way to persuade the Court to respect the views that the legislature may express without having to withdraw from the Convention or the Council of Europe entirely, which, I have to say, would not come without [heavy political] cost or consequence for this country?'⁶⁷ Through 'a dialogue' with Strasbourg, he said, 'about what the House considers to be proper and reasonable in respect of prisoner voting, we have to see *whether we can bring our weight to bear as a legislature in the development of the jurisprudence of the Court*'.⁶⁸

It transpired that the February 2011 debate certainly did not amount to a constructive dialogue embracing Strasbourg's modern penal policy and rights-based perspective on prisoner voting, the Court (in *Hirst*) having noted that such a debate had

⁶³ HC Deb, vol 517, col 921(3 Nov 2010). The UK would *have* to yield, he argued, given the threat of repeated Strasbourg fines from follow-up cases. the figure of £160 million was mentioned. See also Mark Harper MP, Minister for Political and Constitutional Reform, HC Deb, vol 517, col 772 (2 Nov 2010). The official government announcement set out proposals for reform (HC Deb, Vol 520, Col 151W (20 December 2010), again signalled a 'gritted teeth' acceptance of the fact that the UK government now *had* to adhere to the UK's international obligations, falling into line with Strasbourg. The intention was to do 'the minimum required... and no more'.

⁶⁴ 5 Nov 2010, 'Senior Conservative calls for prison vote debate', BBC News (last accessed 1 October 2013).

⁶⁵ It was a Backbench Business (House of Commons) debate, i.e. the topic was chosen by MPs themselves, and did not form part of official government business. Ministers and their official Opposition counterparts abstained.

⁶⁶ HC Deb, vol 523, col 493 (10 Feb 2011), see Nicol, 'Legitimacy of the commons debate on prisoner voting', (2011) *Public Law* 681.

⁶⁷ Dominic Grieve MP, *ibid.* col 512.

⁶⁸ *Ibid.* col 511, emphasis added.

yet to take place.⁶⁹ Rather, the initiators of the February 2011 debate were sharply critical of the Court for what they regarded as its general activism and intrusiveness; the essence of their argument on prisoner voting, nonetheless, was that British law was reasonable and should not be changed: it *was* perfectly acceptable, British MPs insisted, to temporarily disenfranchise those who had convicted an offence deemed serious enough to merit a custodial sentence. Moreover, in a debate which exposed some measure of anti-European sentiment on the part of some MPs,⁷⁰ as the motion put it, ‘legislative decisions of this nature should be a matter for democratically-elected lawmakers’.

In reality, then, against the background of the Court’s Art 46 orders the overwhelming vote in favour of retaining the British blanket ban was a threatened democratic, *not* government override in respect of *Hirst*. ‘Threatened’ – for the UK government, representing the UK on the international stage, had indicated that it was prepared to comply with *Hirst*, and it was not bound by the vote, so in that sense the vote did not conclude matters. ‘Democratic override’ – for, nonetheless, British MPs would have to agree to any amendment, and independently they were now sending a clear ‘think again’⁷¹ message to Strasbourg, the vote amounting to a ‘right of recall, the right of review and the right of challenge’.⁷² There was also a ‘barrage of hostile [anti-Strasbourg] criticism’⁷³ in the press, unparalleled in the Court’s 50-year history, according to the Court’s Deputy Registrar.

This formed the context to the UK government’s Art 43(1) request⁷⁴ that *Greens* - and, in effect, *Hirst* - be reheard by the Grand Chamber. Of course, it was not expressed in the language of democratic override, but it sought to reinvigorate the debate about the margin of appreciation, and the division of opinion on that that had occurred back in *Hirst*. The essential argument was that Strasbourg *should* accommodate the British position, which was a reasonable one, now undoubtedly reflecting a ‘principled view strongly held by many in the United Kingdom, *and by their democratically accountable representatives*’ (emphasis added). A side-letter sent to the Committee of Ministers (supervising the implementation of *Hirst*) noted that the House of Commons debate was a direct reaction to the government’s announcement that it intended to change the law. The February 2011 vote provided ‘a clear indication of the nature and strength of feeling’ amongst British MPs, leaving ‘the UK Government significant difficulties’. The referral request was therefore made as, amongst other things, ‘[t]he Government consider[ed] it proper that *confronted with such difficulties in reconciling the judgments with the national context that these matters are put to the Court before the [Greens] judgment becomes final*’ (emphasis added).

Strasbourg’s reaction

The rehearing request was rejected (11 April 2011), but the Grand Chamber panel promptly agreed to Italy’s request (made 15 April 2011) for a rehearing of *Scoppola* whereupon the Court deferred the deadline for compliance with the *Greens* Art 46 orders until six months after the date of the *Italian* Grand Chamber judgment. The British government sought the deferral, its tone being that it was going to seek permission to intervene in *Scoppola*, and that an authoritative ruling would resolve the ‘uncertainty

⁶⁹ See n 20 above. And see Fredman, ‘From Dialogue to Deliberation: Human Rights Adjudication and Prisoner’s Right to Vote’, (2013) April *Public Law* 292 at 308-310.

⁷⁰ Cf comments made by the Joint Committee on Prisoner Voting at n 165 below.

⁷¹ Davis n 63 at col 498. See also Jack Straw MP at col 504.

⁷² Ibid. col 498.

⁷³ See O’Boyle, ‘The Future of the European Court of Human Rights’ [2011] 12 *German Law Journal* 1862, at 1862. A debate in defence of the ECHR was held in the House of Lords, see HL Deb, Vol 727, col 1493 (19 May 2011).

⁷⁴ *Communication from the government in the case of Hirst No. 2 against the United Kingdom (Application No. 74025/01)*, DH - DD(2011)139, 1 March 2011.

generated⁷⁵ by the inconsistencies in the relevant Strasbourg law (which included the *Frodl* and *Greens* discrepancies), thereby enabling the UK to put domestic law on a Convention-compliant footing.⁷⁶

The timing of the UK third party intervention⁷⁷ in *Scoppola* was such that it coincided with the assumption by the UK of the chairmanship of the Committee of Ministers, a key feature of which was the Brighton Declaration of April 2012, discussed below. One aspect of that, as we shall observe, was the place of the margin of appreciation and the principle of subsidiarity in the Convention regime of supervision. In the meantime, and predictably, the UK submissions in *Scoppola*, presented in person by the British Attorney General, took that theme up, seeking once again to reopen the margin of appreciation debate in issue in *Hirst*.⁷⁸ Prisoner voting was a social policy issue,⁷⁹ such that Strasbourg should respect a decision made by a sovereign Parliament, unless its solution was manifestly unreasonable. The appropriate function for the Court was that of ‘review’ of a State’s domestic law – affording the widest of margins given the issues in question – not ‘judgmental substitution’.⁸⁰ So, whilst the British government fully accepted that the Court had the final word on the compatibility of British law with the Convention,⁸¹ and whilst the *principles* of law established in *Hirst* were *not* disputed, their *application* to the British context was. Strasbourg was urged to ‘re-visit’ that case, which would be ‘a brave step, [but] more importantly, the correct one in principle’.⁸²

Strasbourg stands its ground, but seeks appeasement(?) (Scoppola (Grand Chamber, 2012))

It is worth pausing at this stage to consider the Court’s position. It was, in effect, being asked to set aside its Art 46 orders and reverse the outcome (if not the law) of *Hirst*. That would indeed have been a ‘brave’ step, for it would have amounted to a recognition of the fact that it had erred by not affording the UK a broader margin of appreciation in the 2005 case. The message communicated to all States might have been that certain Grand Chamber judgments could be reopened later via a threatened democratic override from a balky Parliament. Of course, we cannot know if such considerations influenced the Court’s decision to reject the *Greens* rehearing request. As to the *Scoppola* Grand Chamber judgment the position adopted was that *Hirst* had *already* decided the blanket prisoner voting ban issue, and that there was no good basis in law for it to depart from that precedent in 2012. The Grand Chamber stated that:

‘[i]t [did] not appear..., that anything has occurred or changed at the European and Convention levels since the *Hirst* (no. 2) judgment that might lend support to

⁷⁵ See the letter of 26 July 2011 and reply from the Court published by the Secretariat of the Committee of Ministers (document DH - DD(2011)679E).

⁷⁶ *Ibid.*

⁷⁷ See *Scoppola v Italy No 3: Oral Submissions of the United Kingdom* and *Scoppola v Italy No 3: Observations of the Government of the United Kingdom*. The Attorney General had announced his approach in a speech delivered on 24 October 2011, ‘European Convention on Human Rights - current challenges’, available at <http://www.attorneygeneral.gov.uk> (accessed 1 October 2013).

⁷⁸ If an appropriate margin of appreciation was accorded, it was argued (once again) that it would be accepted that the British approach *did* conform with the *Hirst* requirement of ‘a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned’, *Hirst* [71]. See also *Hirst* [51]-[52] (arguments on the proportionality of the British approach). The link was that the vote could be denied to those who committed a criminal offence serious enough to warrant imprisonment. Thus the United Kingdom’s ban was not a blunt instrument that did not take into account individual circumstances.

⁷⁹ *Scoppola v Italy No 3: Observations of the Government of the United Kingdom*, [6] and see [12].

⁸⁰ *Scoppola v Italy No 3: Observations of the Government of the United Kingdom*, [13].

⁸¹ *Ibid.* at [9].

⁸² n 77 *supra*, Oral Submissions.

the suggestion that the principles set forth in that case should be re-examined. On the contrary, analysis of the relevant international and European documents [citing paragraphs 40-44 of the judgment] and comparative-law information [citing paragraphs 45-60] reveals the opposite trend, if anything – towards fewer restrictions on convicted prisoners’ voting rights.’⁸³

The second sentence of this passage referred back to earlier parts of the *Scoppola* judgment, concerning comparative law and the existence of a stronger European standard against blanket bans on convicted prisoners voting than existed in 2005.⁸⁴ Not including the United Kingdom, just 6 other States identified by the Court automatically disenfranchised convicted prisoners serving prison sentences (Armenia, Bulgaria, Estonia, Georgia, Hungary, and Russia).⁸⁵ Without explicitly saying so, then, the Court heavily implied that *Hirst* accorded with a European norm of 2012. A special Press Release issued on the Court’s behalf demonstrated an eagerness to make it clear that it had listened to the UK government’s views, even though it had upheld *Hirst*.⁸⁶

On the face of it, then, the Court did not engage with the principal submission made by the UK regarding the margin of appreciation available to it. Nonetheless, it is arguable that *Scoppola* reflected an appeasement⁸⁷ stance. The judgment stated that the principles of law established by *Hirst* were ‘reaffirm[ed]’;⁸⁸ Art 3 Prot 1 did not permit disenfranchisement ‘based solely on the fact that [the persons concerned] are serving a prison sentence’.⁸⁹ The ambiguity of the 2005 judgment was glossed over, the 2012 Court adopting the minimalist, *Greens* version of the case with the ‘idealist’ passages played down as not setting key principles⁹⁰ (even though, as we noted above, they had been seen as central aspects of the case by the dissenters in *Hirst*, by the Committee of Ministers, the Court of Appeal⁹¹ and by the unanimous court in *Frodl*). So, the Court now rejected the *Frodl* approach,⁹² setting generous boundaries for Art 3 Prot 1, as was demonstrated by the no violation finding in *Scoppola* itself (by 16 votes to one, thereby overturning the chamber judgment), despite the wide-ranging restrictions on prisoner voting in issue. The Italian legislator had decided that restrictions applied in specific contexts, demonstrating that the justification for restrictions on prisoner voting rights could be basic and general. Its model came within the wide margin of appreciation the Court was (now?) prepared to grant, it not mattering that there was, in fact, automatic denial of the vote to those

⁸³ *Scoppola* GC at [95].

⁸⁴ Interestingly, the implication of what it said may be that a Grand Chamber judgment – the strongest expression of European control – can be re-examined subsequently, and changed in a way that potentially downgraded human rights protection. But only if there were sound reasons connected to the broader evolution of Convention law, or, as it put, developments on ‘the European and Convention levels’.

⁸⁵ Of the 43 States featured in the Court’s survey (*Scoppola* [45]-[48]), 36 did not have blanket bans; 19 had no restrictions on prisoner voting rights.

⁸⁶ See the Court’s Press Release of 22 May 2012 (‘Implications of *Scoppola* (no. 3) Grand Chamber judgment’).

⁸⁷ cf H Fenwick, ‘An appeasement approach in the European Court of Human Rights?’, 2012 (7 April 2012) <http://ukconstitutionallaw.org/blog/> (UK Constitutional Law Group blog) (last accessed 1 October 2013). See also M Milanovic, ‘Prisoner voting and strategic judging’ (22 May 2012) www.ejiltalk.org/ (*EJIL: Talk!*) (accessed 1 October 2013).

⁸⁸ *Scoppola* [96].

⁸⁹ *Scoppola* [96]. For strong criticism of the approach see Lord Sumption’s judgment in *Chester*, n 2 supra.

⁹⁰ Although see [100] and *cf Hirst* [71].

⁹¹ See n 39-40 supra.

⁹² *Frodl* had taken ‘a broad view of the principles set out’ in *Hirst*, one which the *Scoppola* Grand Chamber did ‘not fully share’, [99]. The Court’s survey of comparative law revealed that ‘arrangements for restricting the right of convicted prisoners to vote vary considerably from one national legal system to another, particularly as to the need for such restrictions to be ordered by a court’, *Scoppola* GC [101].

categories of prisoners identified by the legislature, and that, in fact, Italian law was harsher in some contexts than UK law.⁹³

Thus, following *Hirst* (or the version of that case endorsed by the Grand Chamber in 2012) Strasbourg still required observance of a minimum European standard – some form of rights-based approach to convicted prisoner voting – but made it very clear that the model could be very basic and that the boundaries for reform within which the UK had to work really were wide⁹⁴ (and, arguably, more so than *Hirst* had granted, at least as the dissenters in that case saw things). Was this an example of ‘strategic judging’?⁹⁵ Commenting on *Scoppola*, the British Attorney General referred to the ‘in-built flexibility’ that the relevant law had gained compared to *Hirst*, one which led him to ‘think that... we had actually been quite successful [in *Scoppola*]... but not as successful as some people had wished...’.⁹⁶ In his dissent in *Scoppola* Judge Thor Björgvinsson criticised the Grand Chamber for having ‘retreat[ed] from the main arguments advanced’ in 2005, having ‘[r]egrettably ... now stripped the *Hirst* judgment of all its bite as a landmark precedent for the protection of prisoners’ voting rights in Europe’.⁹⁷

Back to British MPs: confrontation looming?

The Prime Minister’s and the UK government’s reaction to *Scoppola* - the ‘Voting Eligibility (Prisoners) Draft Bill’,⁹⁸ including the (clearly incompatible)⁹⁹ option to *confirm*

⁹³ *Scoppola* had been convicted of a life sentence (later reduced to 30 years) following serious offences (including murder). Under the Italian system voting rights are lost if a person is barred from public office, as will occur upon conviction for a series of specified offences, such as embezzlement of public funds. There is automatic disenfranchisement for prisoners sentenced to over three years but less than five, who lose the vote for five years. Those sentenced to over five years are *permanently* disenfranchised. After a broad appraisal of the Italian regime, the Court concluded, by 16 votes to one, that there had been *no* violation of the Convention in *Scoppola*. The Italian system did not suffer the *Hirst*-like flaw of being a ‘general, automatic and indiscriminate’ regime; and so it did not disenfranchise ‘a large number of convicted prisoners’, [108]. The Italian legislature had shown its ‘concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender’, [106]. The Court was satisfied that the manner of application of the disenfranchisement and the legal framework surrounding it were a proportionate response to the legitimate aims pursued, [104]. This was because Italian law adjusted ‘the duration of the measure [disenfranchisement] to the sentence imposed and thus, by the same token, to the gravity of the offence’, [106]. The three year threshold entailed that those imprisoned for minor offences did not lose the vote, whilst those convicted of more serious offences would have done so in a context in which the domestic court had regard ‘to the circumstances in which they were committed and to the offender’s personal situation’, [108]. That allowed consideration of ‘the offender’s personal situation, and ... mitigating and aggravating circumstances’ ([106]) to be taken into account. Finally, as to the permanent forfeiture point, it was stressed that Italian law was not excessively rigid, for an application could be made for restoration of the vote in certain circumstances, [109].

⁹⁴ See *Scoppola* [83] and *Soyler v Turkey* n 3 above [33].

⁹⁵ See Milanovic n 87 *supra*.

⁹⁶ Oral Evidence Taken before the Justice Committee on Wednesday 24 October 2012, ‘The Work of the Attorney General’ (to be published as HC 644-i: uncorrected version of the text, at Q31).

⁹⁷ Dissenting Opinion of Judge Thór Björgvinsson. For him the Italian regime was (as with *Hirst*) blunt and indiscriminate in its effects and so incompatible with an approach to prisoner voting that was properly rights-based.

⁹⁸ The relevant document can be found on the website for the Joint Select Committee on the Draft Voting Eligibility (Prisoners) Bill: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-voting-eligibility-prisoners-bill/> (last accessed 31 January 2014).

⁹⁹ The Committee of Ministers welcomed the Voting Eligibility (Prisoners) Draft Bill, but pointed out that the no reform option (i.e. retention of the blanket ban) ‘cannot be considered compatible with the [ECHR]’, Decision of the Committee of Ministers, 4-6 December 2012. It decided to resume consideration of the case in September 2013. In view of that decision, the Court decided (*Firth and 2,353 Others v United Kingdom* Application Nos 47784/09 and others, Decision, 26 March 2013) to adjourn 2,354 prisoners’ voting cases before it until the Committee’s resumption of the matter.

the current blanket ban – was noted in the introduction to this article. At that stage, the official position was that the UK was under an international law obligation to implement the relevant Strasbourg ruling(s), but that Parliament, i.e. MPs, had a ‘right’ to refuse to do so (leaving the UK in breach of international law).¹⁰⁰ Nonetheless, the new Minister of Justice left no doubt that his own personal view is that the Court has aggrandised its jurisdiction,¹⁰¹ and that reform of the Strasbourg system further to the Brighton Declaration is imperative.¹⁰²

The Bill’s Draft status entailed that it was issued for consultation, before being formally introduced to Parliament. The saga therefore rolled on into 2013 as the Draft Bill, and the wider context to *Hirst*, was the subject of detailed scrutiny by the Joint Committee on Prisoner Voting (made up of 6 MPs and 6 peers). After interviewing nearly 40 public figures, lawyers, politicians and academics, and receiving written evidence from over 40 organisations and individuals its Report (18 December 2013)¹⁰³ was, in favour of reform: ‘the vote [was] a right, not a privilege’, its removal ‘without good reason’ undermined ‘democratic legitimacy’, and required ‘clearly defined, legitimate objectives’.¹⁰⁴ So, ‘the case for depriving prisoners of the vote [simply] as a part of their punishment [was] weak’.¹⁰⁵

This echoed Strasbourg’s rights-based approach. Significantly, however, the Committee’s conclusions were primarily based on its own assessment of the relevant British law and its historical evolution, ‘regardless’¹⁰⁶ of the Convention, and it also treated the matter of *whether* the UK ‘should’ comply with *Hirst* as a separate issue, as we discuss below. Recognising, nonetheless, that the decision on whether to comply with *Hirst* or not was ultimately for Parliament, the Report was clear that on that the balance of the argument was, in its view, very much in favour of compliance. After all, the change in the

¹⁰⁰ HC Deb vol 553, cols 745-746 and 751 (22 Nov 2012).

¹⁰¹ HC Deb vol 553, col 750, (22 Nov 2012). See also at col 757, indicating that the ‘central issue’ was that Parliament had a moral mandate to defy a Court which had aggrandised its jurisdiction. For Grayling’s hostile remarks about the Court more generally, see *The Daily Telegraph*, ‘Bill of Rights: Let us concentrate on real human rights’, 17 December 2012, and *The Guardian*, ‘Grayling says European court of human rights has lost legitimacy’, 30 December 2013.

¹⁰² *Ibid.* cols 748, 757 and 761.

¹⁰³ Draft Voting Eligibility (Prisoners) Bill, Session 2013-2014, 18 December 2013, (HL Paper 103; HC 924).

¹⁰⁴ Draft Voting Eligibility (Prisoners) Bill, Session 2013-2014, 18 December 2013, (HL Paper 103; HC 924).

For the September 2013 Committee of Ministers meeting the UK reported that the Parliamentary Committee examining the Draft Bill would not complete its work until 18 December 2013. The Committee of Ministers resolved to resume consideration of the matter at its December 2013 meeting. The Court then announced that it would not adjourn the follow-up cases (*Letter from the Registry of the European Court of Human Rights concerning the case of Firth and 2,280 others against United Kingdom (Hirst and Greens group of cases)* (Application No. 47784/09). See also *McLean and Cole v United Kingdom* Application Nos 12626/13 and 2522/12, Decision, 11 June 2013 (Court refused to examine complaint from prisoner in relation to future elections).

For a government discussion document examining, amongst other things, the enforcement options available to the Committee of Ministers/ Council of Europe, and the UK’s potential financial liabilities, see ‘Written Submission by HMG (VEP0050)’ (16 October 2013), available from the website for Joint Select Committee on the Draft Voting Eligibility (Prisoners) Bill, see n 6 *supra*. Since the entry into force of Protocol 14, there is also the possibility of ‘infringement proceedings’, see Arts 46(4)-(5), ECHR, although these lack ‘bite’ and have not been employed to date.

¹⁰⁴ n 7 *supra* [155] (‘the arguments for relaxing this prohibition are, on any rational assessment, persuasive. The Government has failed to advance a plausible case for the prohibition in terms of penal policy—disenfranchisement linked to detention is an ineffective and arbitrary punishment, particularly for the tens of thousands of prisoners serving short sentences who pass through the prison system each year’, para 231).

¹⁰⁵ *Ibid* [156].

¹⁰⁶ *Ibid* [128], emphasis added and see [154]. See chapters 2 and 3 of the Report, respectively examining the history of prisoner voting in the UK, and under the ECHR.

law required was only minor, and supported by the Committee; the ‘small modification’¹⁰⁷ required simply did not merit defying Strasbourg with the major political consequences that could entail, let alone withdrawing from the Convention.¹⁰⁸ As we note below,¹⁰⁹ its broader conclusion – albeit by a majority – was that the UK should either comply with Strasbourg rulings directed against it or denounce the Convention.

The Joint Committee therefore proposed that the Draft Bill include a Convention-compliant reform proposal,¹¹⁰ and *not* one to reinstate the blanket ban, and that the Bill be brought to the 2014-2015 session of Parliament (commencing June, 2014). Nonetheless, even if the government follows the Joint Committee’s recommendation, amendments can be proposed in Parliament, so it is very likely that an option to retain the current ban will be tabled, and that British MPs *will* therefore debate whether to comply with *Hirst*, this following the February 2011 debate, when many MPs insisted that *Strasbourg* should back down.

In this last connection the Formal Minutes of the Joint Committee’s meetings indicate that, in fact, it was divided by 7 votes to 3 (10 members being present for the relevant vote) on whether the UK should comply with *Hirst*. The minority supported non-compliance, on the basis that in *Hirst*, ‘the ECtHR ha[d] exceeded its mandate in seeking to dictate to a democratically elected legislature the detailed arrangements regarding prisoner voting’.¹¹¹ According to the Chair of the Joint Committee, Nick Gibb MP, who formed part of the minority, matters had gone ‘beyond... prisoner voting’, the issue now being whether the UK should ‘stand firm ... to prevent future incursions into the sovereignty of our democracy’.¹¹²

As the Report itself acknowledged, ‘[u]nderlying’ the Committee’s whole inquiry was ‘a far-reaching debate about the United Kingdom’s future relationship with the European Court of Human Rights, the Convention system as a whole and our attachment to the rule of law’.¹¹³ This was, apparently, at the root of the Committee’s division. It is *this* ‘debate’, and its relevance to the resolution (or otherwise) of the prisoner voting saga, that we now turn to, for, it is submitted, it helps to explain precisely why *Hirst* has become such a focal point for disagreement.

III – The ‘underlying... debate’: the UK’s ‘relationship with the European Court of Human Rights’

Readers of this journal will know that, putting prisoner voting to one side, the Court has been under a very bright spotlight in the UK in recent years. Academics have defended it, arguing that much of the criticism is exaggerated and inaccurate.¹¹⁴ This is not the place for a detailed examination of the various issues that have proved most controversial from the UK perspective. However, mention may be made of those cases involving the (initial) inability to deport certain suspected terrorists protected by the ‘*Chahal*’¹¹⁵ ‘real risk’

¹⁰⁷ Ibid [235].

¹⁰⁸ Denunciation, was not an option ‘that we could countenance in respect of an issue of modest practical importance’, *ibid* [229].

¹⁰⁹ See text accompanying n 151.

¹¹⁰ Prisoners serving sentences of 12 months or less should be entitled to vote (thus those ‘convicted of particularly serious crimes’, *ibid* [238], would be disenfranchised), and prisoners should be entitled to apply to vote 6 months before their scheduled release date, see chapters 5-7 of the Report.

¹¹¹ Formal Minutes (deleted paragraph 227).

¹¹² See ‘Nick Gibb MP: With respect, I disagree with my committee. Prisoners should not have the vote’ available at <http://www.conservativehome.com/> (accessed 31 Jan 2014)

¹¹³ See also [7].

¹¹⁴ See Donald, Gordon and Leach, *The UK and the European Court of Human Rights*, (Equality and Human Rights Commission Research Report 83, (2012)).

¹¹⁵ *Chahal v UK* 23 EHRR 413 [GC].

principle (which the UK had previously challenged, unsuccessfully, at Strasbourg)¹¹⁶ including that of Abu Qatada.¹¹⁷ Even though no violation of Art 3 was found in that case, Strasbourg held that Art 6(1) constituted a bar to deportation, on the facts, breaking new legal ground in doing so (as it was entitled to, given its role as authoritative interpreter of the Convention).

The Abu Qatada case excited very considerable, hostile domestic reactions (amongst the press and some politicians) and, to its credit, the UK government went to considerable lengths to abide by the ruling,¹¹⁸ demonstrating the importance it attaches to the UK's international obligations. Nevertheless, statements made to Parliament by the (Conservative) British Home Secretary saw her express exasperation with the ruling,¹¹⁹ implying that European judges had acted unreasonably by disagreeing with the interpretation of Convention law (in particular that on Art 6(1)) adopted by the House of Lords (as it then was) when the case was heard under the Human Rights Act 1998 (HRA).¹²⁰ She has called for the repeal of the HRA whilst the (Conservative) Justice Secretary has indicated that there will be a commitment to do just that in the next Conservative manifesto;¹²¹ and that proposals will also be brought forward to 'curtail' the role of the Court in the UK, and to make the UK Supreme Court 'supreme'. More recently the Home Secretary has argued that withdrawal from the Convention is something that should be contemplated if this is regarded as necessary. We observe, then, that there is an internal (domestic law) and an external (international law) dimension to the 'underlying' issue of the UK's relationship with Strasbourg, and we shall now see that in some respects both have combined together in a negative way as far as the Court is concerned.

The HRA's 'alienating effect'?

In terms of the internal (domestic) aspect, the HRA might have been cited as offering a model example for giving effect to Convention rights in domestic law. Arguably, however, within the UK it has had 'an alienating effect'¹²² as regards the Convention

¹¹⁶ see Moeckli, 'Saadi v Italy: The Rules of the Game Have Not Changed' (2008) 8(3) *Human Rights Law Review* 534.

¹¹⁷ *Othman (Abu Qatada) v United Kingdom* ECHR 2012; (2012) 55 EHRR 1. There was no violation of Art 3, the Court accepting that the robust Memoranda of Understanding in place was sufficient to defeat the 'Chahal' 'real risk' test.

¹¹⁸ It took until July 2013 for Abu Qatada's deportation to Jordan to take place, after securing guarantees, via a special treaty with Jordan, that evidence obtained by torture would not be used in his trial there.

¹¹⁹ See McCloskey, 'Human Rights, Governments and Judicial Independence', (2012) 5 *European Human Rights Law Review* 479.

Another highly sensitive area for British politicians concerns Art 8 and the inability to deport non-nationals convicted of certain crimes, see House of Commons Library, Standard Note (SH/HA/6355), 'Article 8 of the ECHR and immigration case', 18 Oct 2013.

¹²⁰ In fact, in *Othman*, n 117 above at [263], Strasbourg endorsed the approach to Art 6(1) (and evidence obtained by torture in an overseas trial) adopted by the Court of Appeal.

¹²¹ See also *The Guardian*, 'Conservatives promise to scrap Human Rights Act after next election', 30 September 2013.

¹²² Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, (18 December 2012) at p 233 (Lord Lester). In this regard note the Prime Minister's comments in relation to prisoner voting, n 4 supra, and his statement made in relation to the (United Kingdom) Supreme Court judgment (*R (on the application of F (by his litigation friend F)) and Thompson (FC) Respondents v Secretary of State for the Home Department (Appellant)*) [2010] UKSC 17), concerning Art 8 issues raised by the inability of an applicant to receive independent review of his indefinite listing on the sex offenders' register (the ruling was 'completely offensive', fied 'in the face of common sense', and it was 'about time we ensured that decisions are made in this Parliament rather than in the courts', (HC Deb, vol 523, col 955 (16 Feb 2011)). See, further, the *Report for the Wilton Park Conference on the '2020 Vision for the European Court of Human Rights'* (held 17 Nov 2011-20 Nov 2011 under the United Kingdom Chairmanship of the Council of Europe), WP1139, criticising 'incautious remarks' about the Court from politicians and judges, at 2.

more generally, and especially among those (a tabloid press, in particular) for whom “Europe” is a dirty word).¹²³ Why?

In the absence of a written constitution or a UK Bill of Rights, *domestic* human rights jurisprudence in the UK places very heavy reliance on the Convention.¹²⁴ The HRA requires domestic courts to ‘take into account’ Strasbourg jurisprudence and this they have done by an approach which entails that they will *usually* – but not always¹²⁵ – apply a clear and constant line of Strasbourg jurisprudence, especially that from the Grand Chamber.¹²⁶ This may have served to *increase* the potential for friction between Strasbourg and the UK insofar as the impression has been gained that the UK courts have become subservient to Strasbourg. Certainly some of the main (political) architects of the HRA¹²⁷ have strongly argued that the latter has occurred, whilst some senior judicial figures have spoken extra-judicially about the need for the courts to take a more hesitating approach to Strasbourg cases, in order to maintain the integrity of UK law.¹²⁸ The former Lord Chief Justice has called for amendments to the HRA to make it clear that ‘in this jurisdiction the Supreme Court is, at the very least, a court of equal standing with the Strasbourg Court’.¹²⁹ As well as this, there may also be a (flawed) perception that, with the HRA in place, and with Convention rights so carefully considered in the domestic context, by senior judges, Strasbourg should not be finding violations of the Convention with respect to the UK. Jack Straw – the Minister responsible for the introduction of the HRA in 1998 – has led the resistance to *Hirst*, and argued that since the HRA took effect it has been Strasbourg that has ‘caused [the] real difficulty’,¹³⁰ not the domestic courts (implying that the latter’s interpretation of the Convention were reasonable, unlike the former’s). This may reflect a failure to appreciate the Court’s role as the authoritative interpreter of the Convention.

¹²³ For a general perspective on the UK and Europe, and the constitutional issues arising, see Lord Neuberger, ‘The British and Europe’, 12 Feb 2014.

¹²⁴ See S1(1) of the HRA, defining ‘Convention rights’ as those covered by Articles 2-14 of the Convention, and those protected by Protocol 1 (i.e. the rights the UK has accepted under the ECHR itself).

¹²⁵ It may decline to do so in certain circumstances, enabling it to enter into a dialogue with the Strasbourg Court on the correct interpretation of Convention rights, something which has allowed the domestic courts to express their concerns with aspects of ECHR law, and which the Court has welcomed, leading to some adjustments to Strasbourg law *cf* Judge Bratza’s separate opinion in *Al-Khawaja v United Kingdom* ECHR 2011; (2012) 54 EHRR 23 GC, and see text accompanying n 182 *infra*. Nevertheless, according to the Supreme Court, there are limits to such a dialogue, ‘particularly where [as with prisoner voting] the matter has been already to a Grand Chamber’. In such circumstances, as the Supreme Court put it, it would ‘have... to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for [the Supreme Court] to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level’, per Lord Mance, *Chester* n 3 above at [27], and see [28]-[29].

¹²⁶ *Manchester City Council v Pinnock* [2010] UKSC 45, at [48], and see previously (Baroness) Hale, ‘Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?’, (2012) 12(1) *Human Rights Law Review* 65.

¹²⁷ Jack Straw MP, Home Secretary at the time of the passage of the HRA, and one of the leading opponents to a change in the law on prisoner voting, together with another architect of the HRA, Lord Irvine of Lairg ((Lord) Irvine, ‘A British Interpretation of Convention Rights’ (2012) *Public Law* 237) have been highly critical of the domestic courts for interpreting section 2(1) in a way that follows Strasbourg jurisprudence too enthusiastically, absorbing it into domestic law in an effective, almost self-executing way. Certain senior judicial figures have also spoken extra-judicially of the need for domestic courts to not defer to so readily to Strasbourg, requiring a more reserved stance to be adopted to section 2(1), thereby indicating hesitations about the suitability of Strasbourg law and assumptions of automatic applicability to the British context, see Lord Judge (former Lord Chief Justice), ‘Constitutional Change – Unfinished Business’ (3 December 2013); and Laws LJ, ‘The Common Law and Europe’, (27 November 2013).

¹²⁸ Laws LJ, *ibid*.

¹²⁹ Lord Judge n 127 *supra* at [46].

¹³⁰ Straw, *Aspects of Law Reform: An Insider’s Perspective*, (Cambridge: Cambridge University Press, 2013) at 30.

The ECHR: an external Bill of Rights and the margin of appreciation

In some respects, then, the introduction of the Convention into UK domestic law has not had the placating effect that may have been anticipated back in 1998. The HRA has, apparently, become regarded as more “European” than British¹³¹ – so much so that the view has been taken that a ‘fresh beginning’¹³² is required as regards the model of human rights protection in domestic law. This was the conclusion of the Commission on a UK Bill of Rights, set up in March 2011 (almost immediately after the February 2011 debate), in its Report of late 2012. The arguments that there should be a UK Bill of Rights to replace the HRA rested, at least in part, on the absence of ‘widespread public acceptance of the *legitimacy* of [the UK’s] current human rights structures’, in respect of which there was a lack of ‘ownership’.¹³³

The very close adherence to ECHR law provided by the UK courts under the HRA may have prompted considerations related to the quality of that law, and its suitability to the UK, and so indirectly raised questions over Strasbourg review itself. Jack Straw and David Davis MP¹³⁴ initiated the February 2011 House of Commons debate, reiterating their full support for the general principles and ideals of human rights protection covered by the ECHR, and laying claim to their own human rights credentials.¹³⁵ Neither supported withdrawal from the Convention, or argued that Strasbourg rulings could be freely ignored. But, it was argued, in essence, the Strasbourg Court had aggrandized its jurisdiction and become like a constitutional court, and so, like other such courts, should be subject to some form of democratic override¹³⁶ (a point which also arose in the context of domestic debates about the future of the HRA).¹³⁷ Prisoner voting illustrated the point, it was argued, and for a whole variety of reasons.¹³⁸

¹³¹ Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, (18 December 2012) at [80].

¹³² *Ibid* [84].

¹³³ *Ibid* at [80]. See, however, Baroness Kennedy and Philippe Sands QC, ‘In Defence of Rights’, in Commission Report n 131, who were very clear that there were *no* concerns about ‘ownership’ in Northern Ireland, Scotland, Wales and ‘large parts of England’, at [88(v)].

¹³⁴ *cf* Jack Straw n 66 *supra* col 502. See also Straw and Davis’ reaction to *Scoppola*, *The Daily Telegraph*, ‘We must defy Strasbourg on prisoner votes’, 24 May 2012.

¹³⁵ On Jack Straw MP, see n 127 above. Davis is a former (Conservative) shadow Home Secretary who, in 2008, resigned his position as an MP in order to challenge the then Labour government’s approach to civil liberties in the context of anti-terrorism measures, winning the subsequent by-election.

¹³⁶ This point was pursued by Jack Straw MP, and has been since: see Straw n 130 *supra* chap 2. He has argued that Strasbourg’s interpretation of the Convention as a type of European Bill of Rights lacked constitutional legitimacy, *ibid.* at 42-43 and 45-46, as it has never properly been sanctioned by the States, who only truly consented to the Court’s decisions when it is ‘confining itself to those basic rights for which it was established’, *ibid.* 46. The absence of a democratic override was explained by the fact that ‘the treaties never anticipated this vastly expanded role for the Court’, *ibid.* at 26.

¹³⁷ Talk of a ‘democratic override’ was also relevant to domestic debates about the future of human rights protection in the UK that were underway under the auspices of the (UK) Commission on a Bill of Rights, on which see n 131 *supra*. As to a ‘democratic override’, see ‘side-letter dated 28 July 2011 from Sir Leigh Lewis KCB (Commission on a Bill of Rights) to Deputy PM Nick Clegg’ at 4-5 available at <http://www.justice.gov.uk>. Various suggestions, *none of which were supported by the full Commission*, were made: that the Council of Europe’s Parliamentary Assembly, or Committee of Ministers, or both, might be able to override a Court decision; or that the Committee of Ministers might not enforce a judgment if the ‘most senior democratic institution’ in the respondent State opposed it; or that ‘ground-breaking’ violations found by the Court should require some form of consultation (and so approval?) with other Council of Europe institutions.

¹³⁸ It was argued that for convicted prisoners voting *was* a privilege, or a civic right, *not* the human right identified by Strasbourg (a view that was rejected by the Joint Committee on Prisoner Voting Report, see text accompanying n 104 *supra*) and that what was in issue was a matter of ‘penal policy’, not raising fundamental rights issues as with cases concerning terrorist deportations or the proper regulation of phone-tapping and the intelligence agencies, areas which were (according to the speaker) properly within the Court’s remit, Jack Straw MP *ibid.* at col 502. More generally, it was argued that the Convention system

Straw and Davis cited Lord Hoffmann's¹³⁹ well known attack on the Court, in which the later complained that Strasbourg considered itself to be 'the equivalent of the Supreme Court of the United States, laying down a federal law of Europe'.¹⁴⁰ He called for Strasbourg to afford more margin of appreciation, above all in cases when it lacked 'constitutional competence', and given its status as a 'foreign court'.¹⁴¹ That would recognise the appropriate distribution of powers between Strasbourg judges and the member States with respect to those realms in which the latter had 'not surrendered their sovereign powers'.¹⁴² Other former (and current¹⁴³) members of the senior judiciary have spoken in similar, if less direct tones, to Lord Hoffmann. Lord Judge has expressed his 'profound concern' about a 'democratic deficit'¹⁴⁴ arising given the effects of some Strasbourg judgments, with the possible 'gradual emergence of a court with equivalent jurisdiction throughout Europe of that enjoyed by the [US] Supreme Court'. For him 'sovereignty' on issues such as prisoner voting rights (which he referred to explicitly) and

was designed to and should protect much more serious rights than those in issue in *Hirst*, *ibid.*. It was also said that the Court had misused of the 'living instrument' doctrine, David Davis *ibid.* at col 497.

It was also argued that British law was reasonable, it being perfectly proper for a legislature to adopt a position whereby a person who had been *convicted* of a crime that was sufficiently serious to go to prison temporarily lost certain privileges, including the ability to vote (David Davis n 66 *supra* at col 493 (and see also at 494 referring to a 'social contract' approach)). A further argument was that Art 3 of Prot 1 did not articulate an individual right to vote, and it was clear, or so it was maintained, that the UK never intended or expected it to be interpreted this way when it accepted the Convention and its first Protocol, let alone that some prisoners would derive the vote from it, *Ibid.* cols 497-498. See, however, the Attorney General's response at col 497 and see n 12 *supra* (the Joint Committee of Prisoner Voting's view).

¹³⁹ Hoffmann, 'The universality of human rights' (2009) 125 *Law Quarterly Review* 416. Lord Hoffmann was a Law Lord for 14 years prior to his retirement from judicial office in 2009. See also criticism of the Court by Jonathan Sumption QC, as he then was, who at the time of speaking was due to become a member of the Supreme Court: Sumption, 'Judicial and Political Decision Making: The Uncertain Boundary', F.A. Mann Lecture, Lincoln's Inn, London, 9 November 2011 at 13-16, and 21. For direct responses to Lord Hoffmann see, Metcalfe, 'The Strange Jurisprudence of Lord Hoffmann', (2009) 2 *UCL Human Rights Review* 35 and C Rozakis, 'Is the case law of the European Court of Human Rights a Procrustean Bed? Or is it a Contribution to the Creation of a European Public Order? A Modest Reply to Lord Hoffmann's Criticisms', (2009) 2 *UCL Human Rights Review* 51. Rozakis was the Vice-President of the Court. See also Bratza, 'The Relationship between the UK courts and Strasbourg', (2011) 5 *European Human Rights Law Review* 505 (Bratza was the Court's President, 4 November 2011 to 31 October 2012).

Lord Hoffmann had written the foreword to a publication released on the eve of the February 2011 debate by a right-wing think-tank, the general theme of which was that the Court's position with respect to the UK was constitutionally illegitimate and that a thorough reassessment of the UK's relationship with Strasbourg was essential, see Pinto-Duschinsky, *Bringing Rights Back Home* (London: Policy Exchange 2011). See also, taking a highly critical approach toward the Court: Raab, *Strasbourg in the Dock*, (London: Civitas, 2011) (Dominic Raab is a Conservative MP, and was a co-sponsor of the February 2011 debate), and Fisher, *Rescuing Human Rights* (London: Henry Jackson Society, 2012) (Jonathan Fisher QC, like M Pinto-Duschinsky, was a member of the (UK) Commission on a Bill of Rights, see n 131 *supra*).

¹⁴⁰ n 139 *supra* at 424.

¹⁴¹ *Ibid.* at 431.

¹⁴² *Ibid.*

¹⁴³ See Lord Sumption (member of the Supreme Court), 'The Limits of Law', 20 November 2013 for a strong opinion. And see Laws LJ n 127 above, especially [36] ('in a debate on Convention issues where there may be more than one civilised view, the balance to be struck between policy and rights, between the judiciary and government, is surely a matter for national constitutions ... There may perfectly properly be different answers to some human rights issues in different States on similar facts. I think the Strasbourg court should recognise this. The means of doing so is readily at hand: The doctrine of the margin of appreciation).

¹⁴⁴ Lord Judge n 127 *supra* at [47].

in relation to ‘the whole life tariff’¹⁴⁵ – matters on which ‘reasonable people will take different views’ - ‘should not be exported’ to a ‘foreign court’.¹⁴⁶

There is a view, then, supported by politicians and influential former senior judicial figures, that, from time to time, at least, the Court has abused its authority as an *international* body sitting above the UK, taking undue advantage of its European control power. Or, at the very least, that the Court’s role as a type of external European Bill of Rights is resulting in judgments that meddle too much in domestic affairs, constraining the UK’s freedom of action inappropriately. One solution, it is said, is that Strasbourg should afford States a greater margin of appreciation – as was argued by the UK government in *Hirst* and sought by its subsequent challenges to it.

This returns us to the prisoner voting issue, which, for critics of the Court, might be regarded as encapsulating so many of the issues just noted. What is more, as legislative change has been ordered by the Court it encourages direct comparisons to be made between the role of European judges and the domestic judiciary, whose ability to challenge legislation is very limited. The HRA regime leaves Parliament supreme in respect of legislation found to be clearly incompatible *with Convention rights*.¹⁴⁷ By contrast, despite its international status, Strasbourg has a greater, potential influence. ‘Greater’ – because, even if Strasbourg does not have express strike down powers, its judgments can make it clear that (on the facts of an individual case) the effects of *legislation* are contrary to the international legal obligations derived from the Convention, and in certain contexts it has started to order that legislative reform be got underway on the part of a respondent State, as occurred (for the first and only time for the UK, so far) with *Greens*. ‘Potential’ – because these are indeed international legal obligations and so Parliamentarians have the reassurance that they still have the ‘last word’; even if a Strasbourg ruling requires amendment to primary legislation, British MPs are required to sanction this – they cannot be forced to amend the law.

Yet it is this last point precisely, and that about ‘potential’ that the prisoner voting issue has brought into acute focus. Put another way, is Parliament’s potential to reject Strasbourg largely theoretical in reality, since it would come at such a high political cost? Of course, the Report of the Joint Committee on Prisoner Voting recognised that Parliament could not be forced to do anything in response to Strasbourg’s Art 46 orders. It also took the view that the UK was unlikely to be expelled from the Council of Europe for failing to implement *Hirst*.¹⁴⁸ Then again, it also noted that the possibility of conscious resistance to Strasbourg’s Art 46 order (via legislation confirming law known to be contrary to the Convention) had transformed the situation¹⁴⁹ into one that was potentially unprecedented, the political implications being very significant indeed.¹⁵⁰ As the Committee saw it, then, if MPs wanted ‘to uphold the United Kingdom’s long tradition of respect for and attachment to’ the rule of law, the UK should either accept

¹⁴⁵ Cf *Vinter v UK* Hudoc (2013) GC, on which see van Zyl Smit *et al*, ‘Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?’ (2014) 14 (1) *HRLR* 59.

¹⁴⁶ Lord Judge n 127 *supra* at [48].

¹⁴⁷ See S 4, HRA. Hence a declaration of incompatibility has been made in domestic cases challenging the prisoner voting ban, for analysis of the relevant case law, see *Chester* n 3 *supra*.

¹⁴⁸ See n 7 *supra* at [109]-100].

¹⁴⁹ So, the British situation on prisoner voting could be distinguished from that reflected by a general tardiness of some States to comply with Strasbourg (it being noted that ‘[h]uman rights abuses are indeed widespread in many Council of Europe member states, and [that] the governments of those states frequently drag their feet—sometimes for many years—in complying with judgments of the ECtHR against them’), n 7 *supra* at [100].

¹⁵⁰ See text accompanying n 8 *supra*.

Hirst or denounce the Convention.¹⁵¹ For the Committee (or at least a majority of it) Parliamentary sovereignty was ‘not an argument against giving effect to’ a Strasbourg ruling,¹⁵² i.e. international obligations; rather sovereignty resided ‘in Parliament’s power to withdraw from the Convention’, whereas, whilst the UK was a party to it, obligations were incurred which were not subject to ‘cherry picking’.¹⁵³

What should be done?

The above paragraphs have sought to illustrate why the Court’s jurisdiction has become a matter of considerable public debate in the UK. Whatever the merits and demerits of the claim that European judges have been illegitimately ‘setting [themselves] up as a supreme court for Europe, with an ever-widening remit’,¹⁵⁴ such a view is held by some senior politicians, and apparently, some former senior judges too. In many ways, it seems, prisoner voting has become a focal point for *this* issue, which has eclipsed the substantive issue itself (i.e. whether some convicted prisoners are enfranchised). The question has also arisen as to what might be done to *require* the Court to afford more margin of appreciation to States such as the UK.

In that connection we recall the UK-led attempt to bring pressure to bear on the Court by the States collectively, via the Brighton Declaration of April 2012. A Convention system grounded very strongly on the principle of subsidiarity was promoted by the UK,¹⁵⁵ as speeches from the Attorney General¹⁵⁶ and British Prime Minister¹⁵⁷ confirmed. Although there was no proposal for a democratic override in respect of the Court (a matter which had been subject of domestic debate),¹⁵⁸ an initial, leaked draft of

¹⁵¹ n 7 supra at [229]. And see the Executive Summary (‘The rule of law has been and should remain a fundamental tenet of UK policy. It is not possible to reconcile the principle of the rule of law with remaining within the Convention while declining to implement the judgment of the Court’).

¹⁵² Ibid at [111].

¹⁵³ Ibid at [112]. It is worth adding that this stance entailed the amendment to a preliminary draft version of the Report in which it was stated that Parliament *did have* a choice on whether to comply or not. See Formal Minutes former [224] (deleted from main Report).

¹⁵⁴ Jack Straw MP n 66 supra col 502. As regards the need to take a stand, see especially Dominic Raab MP’s speech closing the debate and at col 584.

¹⁵⁵ The new emphasis on ‘subsidiarity’ emerged in the Interlaken (February 2010), and Izmir Declarations (April 2011) when the main perspective was on States taking their obligations seriously, sharing responsibility for the ECHR with Strasbourg. At Izmir, however, which followed soon after the February debate, there were signs that the focus on subsidiarity would have a substantive edge (see Speech by Ken Clarke (Secretary of State for Justice, UK) at High Level Conference on the Future of the European Court of Human Rights, Izmir, 26 – 27 April 2011, and ‘Joint NGO Statement for the High Level Conference on the Future of the European Court of Human Rights, Izmir, Turkey’).

¹⁵⁶ n 77 supra (subsidiarity should be ‘the guiding principle governing the relationship between our national courts and [Strasbourg]’, which ‘should not normally need to intervene in cases that have already been properly considered by the national courts applying the Convention’. Also, the Court should ‘afford Member States a wide margin of appreciation where national parliaments have implemented Convention rights and where national courts have properly assessed the compatibility of that implementation with the Convention’). The argument that the Court should ‘focus on those serious cases which genuinely need to be dealt with at supranational level’ was employed by the Attorney General in a speech delivered in late January 2012: ‘London Common Law and Commercial Bar Lecture’ 26 Jan 2012, available at www.gov.uk/.

¹⁵⁷ Prime Minister David Cameron, ‘Speech on the European Court of Human Rights’, 25 January 2012 available at www.number10.gov.uk/. (reform of the ECHR system was required so that the Court could concentrate on its main purposes, that of ‘prevent[ing] the most serious violation of human rights’, frustration being expressed with the Court’s willingness, at times, to shrink the margin of appreciation available to States. There was ‘anxiety that the concept of human rights [was] being distorted’).

¹⁵⁸ See n 137 supra. The issue was taken seriously enough for the Court’s President to comment upon it in the lead up to the conclusion of the Brighton Declaration, see *The Guardian* (Joshua Rozenberg interview with Sir Nicolas Bratza), ‘Bratza bemused by UK’s disdain for Strasbourg’, 31 Jan 2012. President Bratza (as he then was) commented: ‘One of the central pillars of the Council of Europe and the [human rights] convention system is that of the rule of law. The rule of law must mean that where a court decides and

the Brighton Declaration attributed to the UK¹⁵⁹ included passages which were capable of being read as undermining the Court's position as *the* authoritative interpretative body for the Convention, and it suggested States should benefit from a 'considerable margin of appreciation' in *all* circumstances when Strasbourg performed the task of human rights review.

It transpired, however, that the Brighton Declaration recognised that the Court *already* applied the margin of appreciation doctrine, and that it was context-dependent;¹⁶⁰ it also stated that, '[t]he Court authoritatively interprets the Convention',¹⁶¹ and it underscored the duty of States to abide by and implement Strasbourg judgments.¹⁶² That said, the Declaration encouraged the Court 'to give *great prominence*' to 'principles such as subsidiarity and the doctrine of margin of appreciation' and '*consistently* [apply] these principles in its judgments',¹⁶³ the implication being, perhaps, that it did not always afford a sufficient margin in some cases. 'For reasons of transparency and accessibility', it was agreed that, 'a reference to the principle of subsidiarity and the doctrine of the margin of appreciation *as developed in the Court's case law* should be included in the Preamble to the Convention'.¹⁶⁴ Protocol 15, which is yet to enter into force, envisages this. It will not *require* the Court to adopt a wide margin of appreciation in all circumstances, and so does not offer the guarantee of restraint on Strasbourg's part that some British politicians may have desired.

And so we return to the 'underlying' debate which formed the context to the Joint Committee on Prisoner Voting's Report. Against the backdrop that has been described in the paragraphs above, should questions over the UK's future relationship with Strasbourg – the legitimacy issue - be linked to MPs' resolution of the prisoner voting issue?

The majority on the Joint Committee on Prisoner Voting were conciliatory; prisoner voting was not the battleground on which the 'underlying debate' should be fought out.¹⁶⁵ For the minority, however, prisoner voting was Parliament's opportunity to debate and, quite possibly, take a stand. It was appreciated that non-compliance with *Hirst* would give rise to 'serious [political] consequences';¹⁶⁶ but 'the gravity of the

delivers a final and binding judgment, it is complied with - whether it is approved of or not by the authorities concerned.

I believe it would be totally destructive of the system if one was to have any kind of system of democratic override: that is, that members of the national parliaments, the parliamentary assembly of the Council of Europe or, indeed, the Committee of Ministers could simply say: 'This is a decision we don't like and we are not going to implement it'.

¹⁵⁹ See Mowbray, 'European Court of Human Rights: May 2011-April 2012' (2012) 18 *European Public Law* 565 at 566.

¹⁶⁰ See Brighton Declaration para B11 (margin of appreciation applied, 'depending on the circumstances of the case and the rights and freedoms engaged').

¹⁶¹ Brighton Declaration para B10.

¹⁶² Brighton Declaration para 3.

¹⁶³ Brighton Dec para B12(a), emphasis added.

¹⁶⁴ Brighton Dec para B12(b), emphasis added. A new paragraph will be added as the final recital to the preamble, as follows: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.'

¹⁶⁵ See *supra* n 7 at [230], referring to 'the concern of the Secretary General of the Council of Europe [who had appeared as a witness before the Committee] to help the United Kingdom find a way out of the current crisis, which threatens the entire Convention system', [230]. See also [232] referring to popular opinion being opposed to a change in the law, but that 'the debate over prisoner voting has so often been lost in the wider debate over the United Kingdom's relationships both with the European Court of Human Rights and the European Union'.

¹⁶⁶ Formal Minutes (deleted paragraph 227).

decision before Parliament' entailed that, as a matter of principle, the Bill should have compliant and non-compliant options before it. One recalls here that the February 2011 debate was viewed by many British MPs as a threatened democratic override – and for those determined to take a stand against the Court, its subsequent refusal to reverse *Hirst* when it had the opportunity to do so (in *Scoppola*) has been regarded as epitomising of the problem confronting the UK today, i.e. a Court that is not subject to adequate control, and failing to afford a sufficient margin of appreciation to democratic institutions, even when they make their views plain.

The next steps on the part of both the British government and British MPs will be awaited, with the new parliamentary session in the UK due to commence in June 2014. It is possible that a compromise solution will be reached at that stage, or that the matter will be delayed further. Yet even if a resolution is found, it should be noted that the support offered by the majority on the Joint Committee on Prisoner Voting was conditional. The recommendation that the UK should comply with *Hirst* was accompanied by references to 'the recent and continuing reform of the Court, and... *the need for further reform of the Court and in particular of its relationship to democratically elected national legislatures*'.¹⁶⁷

It seems evident, then, that the broader matter of the UK's relationship with Strasbourg will remain an issue for the future, no matter how the prisoner voting issue may be resolved. In this regard there is a prospect that, as consideration is given to the place of Convention rights under a (potentially) modified domestic regime for human rights protection (reform of the HRA), questions will continue to arise as to the legitimate role for the Court as an external influence on UK law. And in this context the clouds on the horizon are potentially ominous. The Joint Committee's position of December 2013, it will be recalled, was that the UK either accept Strasbourg's rulings or denounce the Convention. Is the latter inconceivable? Two members¹⁶⁸ of the Commission on a Bill of Rights' dissented from the main Report of that particular body (December 2012) finding that there should be a British Bill of Rights, fearing that the push toward domestic reform would be a prelude to the UK's withdrawal from the ECHR itself.

IV – Reflecting on the prisoner voting saga and British challenges to Strasbourg

In the light of our examination of the prisoner voting saga to date, including how the issue has become woven into a broader debate about the UK's relationship with Strasbourg, we are in a position to stand back and reflect. In what follows the writer suggests that there are broad lessons to be learnt from both sides. In essence the arguments set out below proceed as follows. From the UK perspective the debate on the role and influence of the Strasbourg Court needs to gain a sense of proportion. It needs to be recognised that the Convention can have the capacity to act like a type of European Bill of Rights, but that the Court's influence is limited in that regard. At the same time, from Strasbourg's perspective it needs to be recognised that the Court itself is not beyond criticism, and that it may derive some important lessons from the prisoner voting saga.

Strasbourg's influence on prisoner voting

On the prisoner voting issue, the Court's influence (if the law is reformed) has been as follows. It has overridden the British view that it is within the range of reasonable responses to temporarily disenfranchise all those convicted of offences serious enough to

¹⁶⁷ n 7 supra at [230], emphasis added.

¹⁶⁸ Baroness Kennedy and Philippe Sands QC, 'In Defence of Rights', in Commission Report n 122 supra at 221 and see 226-230.

merit imprisonment. Instead it has nudged (and no more) the UK toward a mildly more enlightened (from a penological, 'ideal to be attained' (as Judge Costa put it) perspective) view on a key human rights issue - the franchise, and the rights of prisoners.¹⁶⁹ At the heart of the affair, Strasbourg's position is that it is upholding a core principle: the right to vote is a cardinal feature of a democratic society, requiring the adoption of a European standard to the effect that convicted prisoners cannot just be enfranchised *en bloc*. That outcome is supported by the Joint Committee on Prisoner Voting after its exhaustive examination of the matter.

From the British perspective, central to the controversy, or so it seems, is the fact that the UK Parliament is being required to amend domestic law at the instance of an *international* court. Then again, if one places the relevant case law in the broader context of the Strasbourg jurisprudence concerning the UK over the years one can strongly argue that, with prisoner voting too, the Court has respected the 'delicate balance' required of it identified by Paul Mahoney¹⁷⁰ (writing in his personal capacity, back in 2009, and *not* in relation to prisoner voting). It has not 'abdicate[d] to nationalist pressure [its] responsibility for assuring the effective human rights protection of vulnerable individuals [i.e., here, prisoners] in society who are liable to suffer from the excesses of majoritarianism rule, yet [it] ... resist[ed] the temptation to substitute [the judges'] personal choice for that of national democratic institutions'. With respect to the last point arguably the *Scoppola* (Grand Chamber) judgment upheld a conservative, European consensus, self-restrained line, more in keeping with the approach advocated by the *Hirst* minority. The point here is that, by the time of 2012 Grand Chamber judgment – and rather fortunately for the Court, perhaps -there *was* a clear European standard against blanket prisoner voting bans; only six States plus the UK had them, or the equivalent (the figure now being four (Armenia, Bulgaria, Estonia and Russia) plus the UK according to the Joint Prisoner Voting Committee),¹⁷¹ and the trend against (no doubt influenced by *Hirst* itself) was in keeping with comparative law. The standard upheld in *Scoppola*, then, is less susceptible to the accusation of 'judicial legislation' than *Hirst* (when 13 States retained bans or similar measures) - and *especially* as in 2012 the Grand Chamber left no doubt at all that the boundaries for law reform *were* very wide.

The questions for UK politicians, then, may be as follows. Do the minor modifications to domestic law required by *Hirst/Scoppola*, and other judgments regarded as unwelcome by some, and which require an approach that is more in harmony with a core European one, even though it may displace one that is regarded as reasonable in the British context, really merit defiance of the Court? Alternatively, are such modifications, provided they remain minor and in keeping with the 'delicate balance' (Mahoney) approach, not an inherent feature of being part of the European Convention system and the ideals it protects? In that regard does it not need to be recognised that membership of the Convention involves participation in a scheme for the collective enforcement of certain human rights, the rationale for which is that the domestic law of each State is kept within certain boundaries, Strasbourg being the *authoritative* interpreter of those boundaries (as the Brighton Declaration acknowledges¹⁷²)? As such, a State, such as the UK, which has introduced ECHR law into domestic law in an effective way (the HRA) will not be immune from Strasbourg review (especially in cases when the domestic courts

¹⁶⁹ See more generally, Dirk Van Zyl Smit and Sonja Snacken, *Principles of European prison law and policy : penology and human rights*, (Oxford, OUP: 2009).

¹⁷⁰ Mahoney, 'Reconciling universality of human rights and local democracy: the European experience' in Villiger et al (eds), *Festschrift für Renate Jaeger* (Kehl am Rhein: N.P. Engel, 2011) 147 at 161. Paul Mahoney is a former Registrar of the Court (2001-2005) whose work with the Court dates back to the early 1970s. He became a Strasbourg judge in 2013.

¹⁷¹ See n 7 *supra* at [232].

¹⁷² Brighton Declaration B10.

adopt a restrictive or limited approach to Convention rights). It also means that the Court may, over the objections of the UK Parliament, still legitimately have a law-reforming influence in relation to the effects of legislation that fall outside the European boundaries the Court articulates, especially if the domestic law has become outmoded by a clearly developed European standard, even if the matter relates to an issue of social policy (a basic, rights-based approach to prisoner voting) that British MPs would prefer not to adopt. Evidently, this requires recognition of a more positive role for the Court, and the Convention, than that associated with crude arguments that its influence is illegitimate as it has aggrandised its jurisdiction, and as it is a 'foreign' court, prisoner voting being exclusively a matter for 'democratically-elected' lawmakers. The debate requires acknowledgment that being part of the Convention system entails an acceptance of the Strasbourg regime as *a type* of European Bill of Rights, with the ability to 'foster a broad congruence in the constitutional arrangements to be shared by a range of neighbouring states based on democracy, the rule of law and respect for human rights'.¹⁷³ The Court's capacity to act in this way is hardly controversial, for its long-standing function in that regard was acknowledged to the extent that Convention rights and the Strasbourg jurisprudence were made the central focus of the the HRA regime back in 1998.

So, with respect to the UK's future relationship with Strasbourg, it is submitted that there needs to be a mature debate about the role of the Convention and the Court, and what it means to be part of the Strasbourg system.¹⁷⁴ The debate needs to be based on facts, rather than a perception that Strasbourg readily overturns the decisions of democratically-elected representatives and domestic courts, and a clear understanding of why it has done so, when it has. But that must also encompass a careful debate on what the proper role and remit of the Strasbourg Court is. British criticisms of the absence of a democratic override within the Strasbourg system should then be seen in the context of a serious examination of whether such a mechanism is genuinely required (let alone whether it is compatible with the ECHR), given the limited influence of the Court in practice, and whether the safeguards that exist within the Strasbourg system to check against overly-creative judgments (however that be defined) are already appropriate. Any future debate should also encompass a full and proper consideration of the broader role the Court plays in the pan-European context, that is across the 47 member State Council of Europe.

Messages from the reform process being heard in Strasbourg?

But this does not mean that the Court itself has no lessons to derive from the prisoner voting saga, and events related to it. It is submitted that it does – but that matters also need to be seen in the context of the reform process that has been underway since the Interlaken Conference of 2010, which included the Brighton Declaration of April 2012.

To be clear, that Declaration and its immediate predecessors addressed a whole host of vitally important matters to do with the Court's sustainability and future operation.¹⁷⁵ The reform process has demonstrated the very considerable support for the Court that exists across Europe, and the genuine desire to preserve the system. That said, other important aspects of the Brighton Declaration clearly have a resonance with aspects of the prisoner voting saga that we have examined. The need for clarity and consistency on the part of the Court (generally speaking, rather than with respect to

¹⁷³ Sales, 'Strasbourg jurisprudence and the HRA: A Response to Lord Irvine', (2012) *Public Law* 253 at 266.

¹⁷⁴ It must be conceded that, for some at least, the question of the UK's broader relations with Europe are inextricably linked to this; for further insights see Kennedy and Sands n 122, at 229-230.

¹⁷⁵ On the Declaration generally, see Patrick, 'Building on Brighton: a foundation for the future of the European Court of Human Rights?', (2012) 9(1) *Justice Journal* 32.

prisoner voting specifically) was prominent in the Declaration, the call being for a clear Strasbourg jurisprudence,¹⁷⁶ the States directly linking this issue, it should be emphasized, to the Court's 'credibility' and 'authority'.¹⁷⁷ The Brighton Declaration also highlighted the importance of the Court not departing from settled precedents without cogent reasons, and it was invited 'in particular... to have regard to the importance of consistency where judgments relate to aspects of the same issue, so as to ensure their cumulative effect continues to afford States Parties an appropriate margin of appreciation'.¹⁷⁸ The 'central role' of the Grand Chamber as a means of ensuring consistency was emphasised.¹⁷⁹

These comments prompt us to recall the ambiguity of *Hirst*; did the *Frodl* judges take advantage of this? From the perspective of the Court's limited remit as an international court of human rights, *Frodl* surely *was* activist, having the appearance of a personal crusade to improve European law on prisoner voting. It should have been reheard by the Grand Chamber as part of its 'central role', rather than the indirect rehearing of it that occurred in *Scoppola* (Grand Chamber). In this regard, one may note that since 'Brighton' the Court has changed its Rules, relinquishment to the Grand Chamber being required 'where the resolution of a question raised in a case before the chamber might have a result inconsistent with the Court's case-law'.¹⁸⁰ In recent years the Court has also improved its internal mechanisms for case law consistency.

The Court's receptivity to messages concerning the importance of the principle of subsidiarity communicated to it during the reform process, including by the UK government,¹⁸¹ also appears to be in evidence. There has been a very notable emphasis on the notion of dialogue between European judges and domestic courts in recent years,¹⁸² something which has been encouraged by the Brighton Declaration.¹⁸³ The Strasbourg judges are apparently seeking to make it clear that European control is not dictatorial but involves working partnerships between institutions operating at the international and domestic levels. President Spielmann has highlighted 'recent case-law' involving the margin of appreciation as revealing 'a trend towards judicial self-restraint when it is clear that the superior national courts have, at the domestic level, examined the case in light of the relevant Convention provision and case-law principles'.¹⁸⁴ Referring to

¹⁷⁶ The Brighton Declaration paras 23 (especially) and 24. The Court was also encouraged to take 'a strict and consistent approach in declaring [manifestly ill-founded] applications inadmissible, clarifying its case law to this effect as necessary', at para C15(d).

¹⁷⁷ The Brighton Declaration para 21, and see also Preamble para 5.

¹⁷⁸ Brighton Declaration para E 25(c).

¹⁷⁹ It was decided that Art 30 of the Convention should be amended to remove the words 'unless one of the parties to the case objects' (see, now, Protocol 15 to the ECHR, Art 3). Brighton Dec para E 25(d) and (e). Section E also emphasised the importance of having a high calibre bench and expressing approval of the measures being taken to improve the quality of the selection process for Strasbourg judges, paras E 21, 22, 24, 25(a) and (b).

¹⁸⁰ Rule 72(2) (as amended 6 February 2013). Would this have prevented the *Frodl* judges advancing the law as they did, claiming to be acting consistently with *Hirst*? In that regard the Brighton Declaration appeared to remind the Court of the need to ensure that the checks and balances in the Strasbourg system to counteract inappropriate creativity on the part of a chamber – the Grand Chamber rehearing system – are working effectively.

¹⁸¹ cf the British Attorney General's speech, n 77 supra.

¹⁸² cf Judge Bratza's separate opinion in *Al-Khawaja v United Kingdom* ECHR 2011; (2012) 54 EHRR 23 GC. See also O'Boyle, 'European Court of Human Rights and national courts: a challenging dialogue?' Irish Law Society Conference, 13 October 2012 (copy on file with author); Costa, 'The Relationship Between the European Court of Human Rights and National Constitutional Courts?' (2013) 3 *European Human Rights Law Review* 264.

¹⁸³ The Brighton Declaration para 12 (c) and (d).

¹⁸⁴ President Spielmann, 'Speech at Yerevan Pan-European Conference' (3 July 2013), citing *Von Hannover No 2 v Germany* hudoc (2012) GC.

the *Animal Defenders International*¹⁸⁵ ruling it was noted that the same approach was apparent ‘in relation to national Parliaments’:

‘where legislators carefully weigh up the relevant human rights aspects of a piece of legislation, and seek to achieve a reasonable accommodation between individual rights and others aspects of public interest, the Court has shown itself inclined to accept the balance that has been struck’.¹⁸⁶

This approach leaves the Court – the authoritative body in interpreting the Convention - with the final say on whether the ‘balance’ struck is reasonable. The crucial issue, of course, is how deferential it will be in any case in the performance of that scrutiny - how much margin of appreciation will the Court afford? In this regard, Protocol 15 foresees an amendment to the Convention’s Preamble, but the new text will not direct the Court *how* to apply the margin of appreciation.¹⁸⁷ Arguably, then, the Court’s independence has been upheld,¹⁸⁸ whilst President Spielmann has downplayed the significance of this aspect of Protocol 15.¹⁸⁹ Then again, according to former President Costa, the new Preamble *does* send a ‘clear’ ‘message’: ‘governments (or some of them) wish to compel the Court to exercise increased self-restraint [more margin of appreciation, presumably] in its scrutiny, especially when sensitive human rights issues arise or when national Parliaments are involved’. Costa identified prisoner voting as the ‘most obvious example of this’.¹⁹⁰

The real issue, of course, as *Hirst* demonstrated, is *how* the Court actually employs the margin of appreciation in any given case. Here, we may recall the division between the majority and minority in that case. With an eye to lessons to be learnt by the Court, we may note that *Hirst*, *Frodl*, *Greens* and *Scoppola* apparently demonstrated some breadth of opinion as to the Court’s legitimate standard setting function, and the role of the margin of appreciation. Can European judges prioritise the Convention right in question over national interests and inspire a certain measure of law reform absent a strong (or very strong) European consensus on the matter in issue? Can they perform their own, independent constitutional-rights/ proportionality analysis of the measures employed by

¹⁸⁵ *Animal Defenders International v United Kingdom* ECHR 2013; (2013) 57 EHRR 21 GC (the no violation finding was by 9 votes to 8).

¹⁸⁶ See also *Shindler v UK* 7 May 2013 [117]-[118] (no violation in case of voting rights restrictions for non-resident citizens).

¹⁸⁷ Cf text accompanying n 164 supra.

¹⁸⁸ cf the speech of Sir Nicolas Bratza (President of the Court, as he then was) at the Brighton Conference (‘The principal characteristic of a court in a system governed by the rule of law is its independence. In order to fulfil its role the European Court must not only be independent; it must also be seen to be independent. That is why we are, I have to say, uncomfortable with the idea that Governments can in some way dictate to the Court how its case-law should evolve or how it should carry out the judicial functions conferred on it’).

¹⁸⁹ See Spielmann, ‘Whither the margin of appreciation’, 20 March 2014 and see n 184 supra (Yerevan Conference), commenting that the preamble to be inserted by Protocol 15 did not ‘set out to modify’ the margin of appreciation concept. The Court’s official ‘Opinion’ on Protocol 15 cautiously states that ‘there clearly was no common intention of the High Contracting Parties to alter either the substance of the Convention or its system of international, collective enforcement’ (emphasis added), European Court of Human Rights, *Opinion of the Court on Draft Protocol 15 to the ECHR (6 February 2013)* para 4. For the Court the new paragraph to be inserted into the preamble ‘affirms the pre-eminent role of the Court in protecting human rights in Europe’, para 3.

¹⁹⁰ Costa, ‘The relationship between the European Court of Human Rights and the national courts’, 2013 (3) *European Human Rights Law Review* 264 at 265.

a State to restrict human rights¹⁹¹ potentially setting a ‘landmark precedent for the protection of prisoners’ voting rights in Europe?’¹⁹²

It would seem that the judges in *Frodll* would have answered these questions mainly in the affirmative. Arguably the *Hirst* minority (more reliance being placed on European consensus, and the margin of appreciation) would have answered them mainly in the negative, adopting a cautious and self-restrained approach. The majority in *Hirst* (if there was a *single*, majority approach) may have lay someone in between; it was rather ambiguous, as we have seen. As noted above, it is submitted that the Court’s final word on the issue, in *Scoppola*, reflected a more limited conceptualisation of Strasbourg’s status and influence.

This author contends that the amended Preamble should serve as a reminder to the Strasbourg judges of the limitations on their role, and the need to confine it strictly to the ‘delicate balance’ function identified by Mahoney.¹⁹³ In this regard it is submitted that *Hirst* may be open to criticism. The author’s personal view is that the *Hirst* minority were correct; that judgment was a bold decision for its day (but, it may be stressed, not outrageously so) for an international court to adopt, and *Frodll* even more so. That said, it is also arguable that the Grand Chamber ruling in *Scoppola* amounted to an appropriate self-correction, even though the Court did not acknowledge this (as it might have).

Moreover, it is suggested that, generally speaking, Grand Chamber cases of recent years have demonstrated a cautious approach on the Court’s part, especially when dealing with matters that relate to social policy.¹⁹⁴ This issue merits more detailed study, but if the author’s impressions are correct the Court has been in listening mode with respect to subsidiarity (more broadly defined), and trends in the jurisprudence chime with the comments made by its Deputy-Registrar, Michael O’Boyle, back in 2011 (i.e. before the Brighton Declaration, and before the full escalation of the prisoner voting issue, which he was *not* commenting directly upon). For the Court to maintain its authority, he argued, it needs to proceed with caution and restraint,¹⁹⁵ striving for ‘a better balance between judicial self-restraint and judicial activism in its decision-making’. Strasbourg Judges, he argued, had to develop the law carefully and incrementally to avoid ‘friction between the national and the international spheres’, and ‘a crisis of confidence that would undermine the entire system’.¹⁹⁶ To that end ‘constant vigilance’ was required to ensure that the balance between orderly progression of the case law and States’ confidence in the system was not upset ‘in a busy court composed of five sections’. A key role for the Grand Chamber President was to ‘counsel restraint’, and to emphasise that Strasbourg judges are *not* ‘members of a constitutional court with a corresponding latitude of vision but... judges of an international court subject to a particular philosophy

¹⁹¹ See Letsas, ‘Judge Rozakis’s Separate Opinions and the Strasbourg Dilemma’, in Spielmann *et al*, *The European Convention on Human Rights: A Living and Dynamic Instrument - Liber Amicorum in Honour of Judge Rozakis* (Bruxelles: Bruylant 2011).

¹⁹² Cf Judge Thór Björgvinsson’s dissent in *Scoppola*, text accompanying n 97.

¹⁹³ See text accompanying n 170 *supra*.

¹⁹⁴ This review does not purport to be exhaustive, but see the judgments in (and separate opinions attached to): *A, B and C v Ireland* ECHR 2010; (2011) 53 EHRR 13 GC; *Lautsi v Italy* ECHR 2011; (2012) 54 EHRR 3 GC; *Stummer v Austria* ECHR 2011; (2012) 54 EHRR 11 GC; *S.H. and Others v Austria* ECHR 2011; (2012) 54 EHRR 4 GC; and *Van der Heijden v the Netherlands* (2013) 57 EHRR 13 GC. However, by contrast see *X and others v Austria* ECHR 2012; (2013) 57 EHRR 14 GC. On a similar theme see Petter Ru, ‘The Interlaken, Izmir and Brighton Declarations’ (2013) 31 *Nordic Journal of Human Rights* 28.

¹⁹⁵ O’Boyle, ‘The Legitimacy of Strasbourg Review: Time for a Reality Check?’, in Titium (ed), *La conscience des droits: mélanges en l’honneur de Jean-Paul Costa* (Paris: Dalloz, 2011) 489 at 494-496. See also Bratza, n 139 *supra* at 510 (‘the Court should perhaps show greater awareness of the consequences of its judgments on domestic law and practices, not only in the respondent state concerned, but more widely throughout Europe’).

¹⁹⁶ *Ibid.* at 495.

of legal interpretation that has been well articulated in many of the leading judgments... and accepted by many generations of judges'.¹⁹⁷ Its members should not set the law in accordance with what the judges think it ought to be, rather they should adopt 'an orderly approach to the development of legal principles'.¹⁹⁸

O'Boyle's comments invite some final observations on the evolution of Strasbourg's case law on prisoner voting, and the UK's resistance thus far to *Hirst*. Looking back to that judgment today – with the benefit of hindsight, of course – and recalling the division between the majority and majority, one can see how the Court could have adopted an alternative approach. It could have found *no* violation on the specific facts of *Hirst* (the applicant having been convicted of manslaughter, and so, presumably, could have been disenfranchised under a post-*Scoppola* regime). By doing so, however, it would *not* have had to abdicate a European standard setting role, simply deferring to the UK position by reference to a wide margin of appreciation. Rather, concluding that there was no violation, the Court could still have started to set down general principles with respect to prisoner voting rights, indicating that the effects of the blanket ban on convicted prisoners itself were *vulnerable* to a *future* legal challenge, given that that ban was (i) closed to considerations as to proportionality in respect of (ii) the *emergence* of a clear European-norm on a rights-based approach to prisoner enfranchisement in Europe.¹⁹⁹ Later on, when the European consensus on that second point had hardened, it might have found a violation on the individual facts of an appropriate case, for example one involving a very short sentence or a minor offence,²⁰⁰ explaining in clear and compelling terms why this was justified (for example, as there was a clear European consensus against disenfranchisement for such minor offences, and/or because the effects of the ban had been demonstrated to be arbitrary and haphazard on the facts of the case²⁰¹). Of course, this would not have guaranteed cooperation on the part of British MPs. Then again, such a step-by-step, and incremental approach would accord with the one traditionally adopted by the Court. It would have required it to accept a slower pace of reform, but it might have softened the impact of Strasbourg review, provided a more solid, and nuanced, basis upon which to override the position of British MPs, and increased the opportunities for (a much needed) 'dialogue' with the relevant national authorities.

In contrast, by advancing the way it did in a Grand Chamber ruling (*Hirst*) – which could not be reversed without detracting from the Court's authority –, arguably Strasbourg took unnecessary risks, and all the more so to the extent (for it was not entirely clear) that it considered itself entitled to find a violation given the absence of a serious, modern debate on the prisoner voting issue by British MPs.²⁰² The issue here is

¹⁹⁷ Ibid. at 496.

¹⁹⁸ Ibid. a 495.

¹⁹⁹ In other cases the Court has adopted an approach which involves warning a State to keep an area of law 'under review', as it may become vulnerable to Strasbourg challenge in the future. For example, concerning Art 8 and the rights of transsexuals: *Sheffield and Horsham v United Kingdom* 1998-V; (1999) 27 EHRR 163 GC para 60 and then *Christine Goodwin v United Kingdom* 2002-VI; (2002) 35 EHRR 18 GC para 92. See recently *Stummer v Austria* ECHR 2011; (2012) 54 EHRR 11 GC para 110 and *S.H. and Others v Austria* ECHR 2011; (2012) 54 EHRR 4 GC para 118 (note also at para 92, the Court's refusal to review the law in the abstract).

²⁰⁰ Cf Joint dissenting opinion of Judges Wildhaber et al [8].

²⁰¹ The British ban's arbitrary and haphazard effects were the main point of criticism identified by the Supreme Court in *Chester*, n 3 above (see Lord Mance at [35]; Baroness Hale at [96] and [98] and Lord Clarke at [109] – see also Draft Voting Eligibility (Prisoners) Bill, Session 2013-2014, 18 December 2013, (HL Paper 103; HC 924), making similar points. The *Hirst* GC judgment hardly covered this point, other than references to the 'indiscriminate' nature of the ban and its sweeping effects. The point was made, however, in the chamber judgment in *Hirst* n 1 supra at [49].

²⁰² See n 20 supra.

that, as the Secretary General of the Council of Europe has noted, the Court's future authority might unravel when faced with a clear refusal to comply by a State such as the UK, in particular. Arguably, then, in the brinkmanship that occurred over 2011-2012, the Court *needed* the UK to comply with its judgment in *Hirst* and, one would suggest, sought compromise – the *Scoppola* Grand Chamber ruling arguably reflecting this. To the extent that that Grand Chamber judgment did grant the UK a greater margin of appreciation than *Hirst* – or even appeared to do so - it risks being seen as a demonstration of the 'weight'²⁰³ that British MPs successfully brought to 'bear' on Strasbourg. The danger for the Court may be that this will be noted not just in the UK, but across Europe, in other countries that have started to express concern about the Court's influence,²⁰⁴ and who may, therefore, start to adopt similar tactics to those engaged by British MPs, if not the UK government. Before Brighton, for example, there were initiatives before the Dutch Parliament to press for a greater margin of appreciation,²⁰⁵ although ultimately the Senate passed a resolution supporting the Court.²⁰⁶ There have been hostile reactions elsewhere in Europe in respect of individual judgments against particular States.²⁰⁷

What the prisoner voting saga has demonstrated, then, is that the enforcement of certain Court judgments, and even its Art 46 orders may be subject to a certain amount of brinkmanship. After all, it was British MPs' *threatened* resistance, growing out of their private debate, that gave the British government an apparently respectable basis to return to Strasbourg seeking the reversal of *Hirst*. It trod a fine line doing so; it did not suffer the punitive element of European control, i.e. the reputational damage of directly defying the Court, but pressure was still exerted upon Strasbourg, the UK government arguing (somewhat disingenuously, perhaps) that it was in a constitutional fix, being caught in the crossfire of disagreement between European judges and democratically-elected MPs. This would not be a good defence at international law for a failure to implement the international obligations underlying a Strasbourg judgment; then again, it is a reminder that the Court is an international institution whose authority cannot be taken for granted. The Court must be aware that if national legislatures were to adopt such obstructive strategies it could be very damaging indeed for it in the longer term. To be clear, the author's point here is not that the Court must kowtow to national legislatures, but that it needs to proceed with caution and self-restraint, so that it is on very solid ground when risking future confrontations.

V - Conclusion

This article has set out the unfolding story (to date) of the prisoner voting saga. The substantive issue (prisoner voting) has become intertwined with broader constitutional questions for the UK regarding the place and status of European human rights law, both in terms of domestic law, but also as regards UK membership of the Convention itself.

It remains to be seen whether some convicted prisoners will be able to vote in the next general election in the UK, scheduled for May 2015 (or the European Parliament elections of 2014). The bigger issue, of course, is what stance MPs will adopt

²⁰³ See text accompanying n 68 above.

²⁰⁴ See Van de Heyning, 'The Natural 'Home' of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights', (2012) 31(1) *Yearbook of European law* 128 at 130-131 and especially Zwart, 'More human rights than Court', in Flogaitis et al (eds), *The European Court of Human Rights and its Discontents*, (Cheltenham: Edward Elgar: 2013) 71 at 72-78.

²⁰⁵ For a summary of French academic literature criticising the Court for failing to adopt a sufficient margin of appreciation, see Mahoney n 170 supra at 157.

²⁰⁶ See Gerards and Terlouw, 'Solutions for the European Court of Human Rights' in Flogaitis et al n 204 supra chap 14, and at 181-182.

²⁰⁷ See Costa, 'On the Legitimacy of the European Court of Human Rights' judgments', (2011) *European Constitutional law Review* 173 at 174.

in terms of whether they are prepared to consciously defy the Court on *Hirst*, given the broader, potential implications of doing so, not just for the UK, but for the Convention system overall.²⁰⁸ Here it is submitted, and in agreement with the majority view of the Joint Committee on Prisoner Voting, Strasbourg's impact on UK law needs to be brought into perspective. Its influence on prisoner voting has been limited, and its ability to correct itself, albeit under pressure from the UK, has been demonstrated.

It also remains to be seen to what extent the UK's adherence to the ECHR might be a feature of the May 2015 election campaign. Here we have noted²⁰⁹ that dissenting voices on the Commission on a UK Bill of Rights feared that possible future reform of the HRA would be a preliminary step to withdrawal from the Convention itself. It seems that, if elected, the Conservative party intend to reform the HRA, whilst some senior Conservative politicians have indicated that withdrawal from the ECHR is not inconceivable.²¹⁰ The Council of Europe's Commissioner for Human Rights has argued that the UK should indeed withdraw from the Convention, rather than undermine it by picking and choosing which judgments to implement,²¹¹ a position which the Joint Committee on Prisoner Voting has, in effect, endorsed. But could such a momentous step really occur? At what cost? The political cost of withdrawal should not be underestimated for the UK. As for the ECHR system, the price could be very high too. For his part, the Secretary General of the Council of Europe has expressed concern that other States could follow a British withdrawal, there being 'forces in many countries that dislike being under an international court',²¹² and referring to the crisis in Crimea as one which demonstrated the importance of having 'a common legal basis'.

Summing up, the UK's relationship with Strasbourg looks set to be a topic of considerable public debate in the years ahead, and even have a wider influence on the continuing evolution of the Convention. The fact that UK withdrawal from the ECHR is being referred to even as a remote possibility entails that it is imperative that there be a thorough and mature debate about the momentous implications of that. The prisoner voting issue (and other cases regarded as unwelcome intrusions into UK law, by some) needs to be seen with a sense of proportion and a broader context concerning the role of the Court in Europe. At the same time it is suggested above that the Court is not immune from criticism either,²¹³ and whilst, with respect to prisoner voting, it was not bullied into submission by the threats from one State, it may have lessons to learn from the saga and the challenge brought to it by the UK. In that connection there should be a very careful appreciation, too, of the positive changes brought about by the reform process that has been underway at Strasbourg since Interlaken, and how British challenges to the legitimacy of the Court, the resolution of the prisoner voting issue, and the broader matter of the UK's continued membership of the Convention could have a significant destabilising impact on this.²¹⁴

Postscript

[short note on latest development, if relevant]

²⁰⁸ See text accompanying n 8 supra.

²⁰⁹ See n 168 above.

²¹⁰ *The Guardian*, 'Grayling says European court of human rights has lost legitimacy', 30 December 2013.

²¹¹ See 'Written Submission by Nils Muižnieks, Council of Europe Commissioner for Human Rights (VEP 0053)' submitted to Joint Select Committee on the Draft Voting Eligibility (Prisoners) Bill, n 6 supra.

²¹² *The Financial Times*, 'UK must stick with human rights convention, warns Council of Europe', 23 March 2014.

²¹³ For recent pieces, from senior Strasbourg figures, acknowledging this, see O'Boyle n 195 supra, Costa n 207 supra and Bratza n 139 supra.

²¹⁴ cf comments made in Harris, O'Boyle and Warbrick n 13 supra at 179.

END.