European Court of Human Rights rulings: are there options for governments?

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In the European Court of Human Rights decision in *Hirst v UK No.2* and *Greens and MT* the UK's blanket ban on prisoner enfranchisement was deemed to be a violation of Protocol 1 Article 3 of the *European Convention on Human Rights*. On 12 April 2011 the Court's Grand Chamber rejected the Government's request for a reconsideration of the earlier rulings. Therefore, the Court's judgment of November 2010 in *Greens and MT* became final (under Article 44 of the European Convention). The UK was given a six-month deadline from 11 April in which to enact legislation to comply with the Court's rulings in *Hirst 2* and *Greens and MT*.

The Government is reluctant to allow all prisoners to vote and to pay compensation to prisoners who have been denied voting rights, but is also aware of its obligations under international law and under the European Convention on Human Rights. Parliament debated the issue in January and February 2011, voting in February in support of a motion to maintain the ban on prisoner enfranchisement.

How should or could the UK respond to the Court's rulings? What would be the consequences, for example, of the Government allowing a partial enfranchisement? Could the Government simply ignore the ruling or refuse to remedy the current situation? Could the UK derogate from the Convention or enter a reservation and thereby circumvent the ruling; or withdraw from the Convention and/or jurisdiction of the Court altogether? The consequences of non-compliance have given rise to discussion and some disagreement among lawyers and politicians, and the Government has said it does not intend to withdraw from the Convention.

This Note complements SN/PC/1764, Prisoners' voting rights, 29 March 2011, and SN/IA/5936, "The European Convention on Human Rights and the Court of Human Rights: issues and reforms", 14 April 2011.

Contents

1 Introduction

In March 2004 the European Court of Human Rights ruled unanimously against the UK's blanket ban on prisoners voting in Hirst v UK No. 2 (hereafter *Hirst 2*).[1] The Court concluded that

> The fact that a convicted prisoner is deprived of his liberty does not mean that he loses the protection of other fundamental rights in the Convention.[...] The right to vote for [...] elected representatives must also be acknowledged as being the indispensable foundation of a democratic system. Any devaluation or weakening of that right threatens to undermine that system and it should not be lightly or casually removed.[2]

The UK Government appealed to the European Court's Grand Chamber, but on 6 October 2005 this Court upheld the ruling. The then Labour Government launched a two-stage consultation. The first considered the principles of prisoner enfranchisement (completed

1 Application no. 74025/01, judgment 30 March 2004, para 41

2 Judgment in the case of *Hirst v The United Kingdom (No. 2)*, 30 March 2008

2007) and the second looked at the practicalities of enfranchising prisoners (completed 2009). In June 2010 the Council of Europe's Committee of Ministers (CM) gave the Government a three-month deadline to announce changes to the blanket ban. The Court received 2,500 similar applications, including *Greens and M.T. v. the United Kingdom*[3] and decided to adopt the "pilot judgment procedure",[4] giving the UK Government six months from the date when *Greens and M.T.* became final to introduce legislation to bring the disputed law into line with the Convention. The Court also decided that it would not examine any comparable cases pending new legislation, and would strike out all such registered cases once legislation had been introduced in the UK. Pending cases concerning prisoners' right to vote include *Apinis v. Latvia* (no. 46549/06), *Gladkov v. Russia* (no. 15162/05) and *Toner v. the United Kingdom* (no. 8195/08).

In September 2010, some five years after the *Hirst 2* ruling, and in the absence of any Government remedy, the CM outlined the kind of solution it would find acceptable:

> The measures to be adopted should ensure that if a restriction is maintained on the right of convicted persons in custody to vote, such a restriction is proportionate with a discernible and sufficient link between the sanction, and the conduct and circumstances of the individual concerned.[5]

On 2 December 2010 the CM commented for the fourth time on the UK Government's failure to implement changes to the blanket ban on prisoners voting in time for the May 2010 general election, and announced that it would reconsider the matter in March 2011 "in the light of further information to be provided by the authorities on general measures".[6] The Committee also "Expressed hope that the elections scheduled for 2011 in Scotland, Wales and Northern Ireland can be performed in a way that complies with the Convention" and called on the UK to "present an action plan for implementation of the judgment which includes a clear timetable for the adoption of the measures envisaged, without further delay".

On 11 January 2011 there was a Westminster Hall adjournment debate on the matter of prisoner enfranchisement, in which many Members were against giving prisoners the right to vote.

On 26 January 2011 the CoE Parliamentary Assembly approved draft recommendations and proposals to improve the Committee of Ministers' oversight of the implementation of Court judgments. The draft resolution stated in paragraph 7.10 that "The United Kingdom must put to an end the practice of delaying full implementation of Court judgments with respect to politically sensitive issues, such as prisoners' voting rights".[7]

On 10 February 2011 the House of Commons debated the issue again and backed a motion by 234 to 22 on a free vote opposing giving prisoners the right to vote. Ministers and opposition frontbenchers abstained.

On 1 March 2011 the Government updated the CM on national developments on the prisoner voting issue. The Note tackled the CM's criticism that there had been no substantive parliamentary debate on the disenfranchisement of prisoners by pointing to the two recent

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3 Application nos. 60041/08 & 60054/08

4 For further information on the pilot judgment procedure, see SN/IA/5936, 14 April 2011.

5 Committee of Ministers 15 September 2010

6 Committee of Minister, 2 December 2010

7 Doc 12455, "Implementation of judgments of the European Court of Human Rights" & Resolution 1787(2011)

debates on this subject. It stated, with regard to the second of these, that "The vote is not binding on the Government but provides a clear indication of the nature and strength of feeling in the House of Commons", outlined the "significant difficulties" posed by the *Hirst* and *Greens and MT* judgments for the UK, and announced the request for a referral of *Greens* to the Grand Chamber of the Court:

> The Government considers 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 judgment becomes final. Since the *Greens and MT* judgment effectively confirms the *Hirst* judgment, the letter of referral requests that the Grand Chamber reconsider *Hirst* on the basis that:
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> > § the margin of appreciation should be broader than the Court stated – and should not exclude a ban on prisoners voting in the UK context;
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> > § the UK sentencing regime makes imprisonment a last resort and allows judges to take account of all the circumstances of the offender in determining the term served – so a custodial sentence meets a level of seriousness sufficient to warrant disenfranchisement, and is applied after consideration of the individual case;
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> > § the recent debates in Parliament demonstrate the strong views of democratically elected representatives, and the fact that modern day opinion is supportive of the ban;
> >
> > § since *Hirst* (and *Greens and MT*), the domestic courts have opined on the matter (*Chester*) restating that there is a range of reasonable views on the subject of prisoners voting, and that many take the view that a bar where a custodial sentence is imposed should properly be within the margin of appreciation of the UK;
> >
> > § Member States take many different approaches, which reinforces the notion of a wide margin of appreciation; and disenfranchisement in the UK ends when detention ends, which is a matter for the judge – so again, the length of disenfranchisement is based on the judicial consideration of the individual's circumstances.
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> The referral letter suggests to the Court that the arguably contradictory lines of jurisprudence (*Frodl v Austria* and *Scoppola v Italy*) is another reason the Grand Chamber may wish to reconsider the matter.

On 10 March 2011 the CM adopted a decision "to resume consideration of the questions raised by the judgment once the referral request has been considered". Adam Wagner, a barrister at 1 Crown Office Row Chambers, wrote of the UK Government's request:

> This is, to put it lightly, a bold tactic. The UK is asking the court to reopen a judgment which is effectively closed, and to rehear a case which has already reached the highest possible level of the court's appeal process. It is hard to imagine the court accepting this, given the implications for other states who fail to comply with rulings and who could see the any revision of *Hirst No. 2* as a licence to ignore judgments. With 21 judgments against it in 2010, the UK is a good citizen in this regard, as compared to Russia (217) and Turkey (278). The stakes are high if even a "good" citizen refuses to implement a ruling.
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> So it appears that the prisoner voting issue has reached uncharted territory. Before it is resolved, the UK's relationship with the Strasbourg court may have

> to be re-examined at a fundamental level. The government may simply be buying time before its human rights commission decides what to do (if anything) about that relationship. And the court will almost certainly find the UK's daring tactics unappealing. But given the erratic nature of this ping-pong ball of an issue, it is increasingly hard to predict what will happen next.[8]

In a Court press release on 31 March 2011, Thomas Hammaberg, the CoE Commissioner for Human Rights, supported a wider debate on universal suffrage, which he considered a "democratic cornerstone" of human rights:[9]

> This problem should indeed be discussed, and not only in the UK. A thorough debate would raise a number of issues of crucial importance such as: the very purpose of penal sentences; which human rights should remain for those deprived of their liberty; what approach is likely to promote reintegration of convicts; and what treatment may minimise recidivism and thereby reduce crime. [...].
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> Prisoners, though deprived of physical liberty, have human rights. Measures should be taken to ensure that imprisonment does not undermine rights which are unconnected to the intention of the punishment. Indeed, authorities should ensure, for instance, that a prisoner can receive health care and have contact with his or her family. The right to study, to be informed and to vote belongs to this same category of rights which should be protected.

On 11 April 2011 the Grand Chamber of the European Court rejected the referral requests relating to the case of *Greens and M.T. v. UK*. The Court's Chamber judgment of 23 November 2010 thereby became final, triggering the six-month deadline from 11 April 2011 for the Government to introduce legislative proposals to bring the disputed law/s in line with the Convention and "to enact the relevant legislation within any time frame decided by the Committee of Ministers".[10]

The Government may, in the context of legislation to grant voting rights to prisoners, also seek to legislate to prevent prisoners from gaining compensation from the domestic courts on account of their disenfranchisement. It has also been suggested that the Government will introduce legislation, as required by the Court, but encourage Conservative MPs to vote against it. Legal advice leaked to the press was reported to state that if the Government made a "genuine attempt" to introduce legislation to allow prisoners to vote, even if it was voted down, this would be enough to "persuade Strasbourg that the UK has done its best" and they would escape censure.

2 Prisoner voting rights in international law

2.1 Universal suffrage: international human rights treaties

The European Convention is not the only international human rights treaty to provide for a universal right to vote. The 1948 *Universal Declaration of Human Rights* states in Article 21 that everyone has the right to take part in the government of his or her country, directly or through freely chosen representatives. It further stipulated that "the will of the people shall be expressed in elections which shall be by universal and equal suffrage".

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8 Adam Wagner, UK Human Rights blog, "An unappealing tactic on prisoner votes?", 14 March 2011

9 Press release - 283(2011)

10 Court press release no. 328, 12 April 2011

Protocol 1, Article 3 of the European Convention on Human Rights

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

Article 25 of the United Nations *International Covenant on Civil and Political Rights* (ICCPR) provides that every citizen should have the right to take part in the conduct of public affairs, to vote in elections which have universal suffrage and to have equal access to public service. The UK has ratified the ICCPR.

The UN Human Rights Committee, which monitors adherence to the ICCPR, has expressed concern about countries that do not allow prisoners to vote. In December 2001 this Committee could not see the justification for voting bans for prisoners "in modern times, considering that it amounts to an additional punishment and that it does not contribute towards the prisoners' reformation and social rehabilitation, contrary to Article 10, Paragraph 3, in conjunction with Article 25 of the Covenant". The Committee concluded, "The State party should now reconsider its law in depriving convicted prisoners of the right to vote".[11]

2.2 European Court of Human Rights case law on prisoner enfranchisement

The European Court has in the past "accepted various restrictions on certain convicted persons", but only in specific circumstances, as the Court outlined in *Hirst 2*:

> 65. In some early cases, the Commission considered that it was open to the legislature to remove political rights from persons convicted of "uncitizen-like conduct" (gross abuse in their exercise of public life during the Second World War) and from a person sentenced to eight months' imprisonment for refusing to report for military service, where reference was made to the notion of dishonour that certain convictions carried with them for a specific period and which might be taken into account by the legislature in respect of the exercise of political rights (see *X v. the Netherlands*, no. 6573/74, Commission decision of 19 December 1974, Decisions and Reports (DR) 1, p. 87, and *H. v. the Netherlands*, no. 9914/82, Commission decision of 4 July 1983, DR 33, p. 246). In *Patrick Holland v. Ireland* (no. 24827/94, Commission decision of 14 April 1998, DR 93-A, p. 15), where, since there was no provision permitting a serving prisoner to vote in prison, the applicant, who was sentenced to seven years for possessing explosives, was *de facto* deprived of the right to vote, the Commission found that the suspension of the right to vote did not thwart the free expression of the opinion of the people in the choice of the legislature and could not be considered arbitrary in the circumstances of the case.
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> 66. The Court itself rejected complaints about a judge-imposed bar on voting on a member of Parliament convicted of fiscal fraud offences and sentenced to three years' imprisonment with the additional penalty of being barred from exercising public functions for two years (see *M.D.U. v. Italy* (dec.), no. 58540/00, 28 January 2003).
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> 67. The Government argued that the Chamber judgment finding a violation in respect of the bar on this applicant, a prisoner sentenced to life imprisonment, was an unexpected reversal of the tenor of the above cases.

[11] UN Human Rights Committee, Concluding Observations, International Covenant on Civil and Political Rights, Part 10, 6 December 2001

68. This is, however, the first time that the Court has had occasion to consider a general and automatic disenfranchisement of convicted prisoners. It would note that in *Patrick Holland* (cited above), the case closest to the facts of the present application, the Commission confined itself to the question of whether the bar was arbitrary and omitted to give attention to other elements of the test laid down by the Court in *Mathieu-Mohin and Clerfayt* (cited above), namely, the legitimacy of the aim and the proportionality of the measure. In consequence, the Court cannot attach decisive weight to the decision. The Chamber's finding of a violation did not, therefore, contradict a previous judgment of the Court; on the contrary, the Chamber sought to apply the precedent of *Mathieu-Mohin and Clerfayt* to the facts before it.

69. In this case, the Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention (see, among many authorities, *Kalashnikov v. Russia*, no. 47095/99, ECHR 2002-VI, and *Van der Ven v. the Netherlands*, no. 50901/99, ECHR 2003-II); they continue to enjoy the right to respect for family life (*Płoski v. Poland*, no. 26761/95, 12 November 2002, and *X v. the United Kingdom*, no. 9054/80, Commission decision of 8 October 1982, DR 30, p. 113); the right to freedom of expression (*Yankov v. Bulgaria*, no. 39084/97, §§ 126-45, ECHR 2003-XII, and *T. v. the United Kingdom*, no. 8231/78, Commission's report of 12 October 1983, DR 49, p. 5, §§ 44-84); the right to practise their religion (*Poltoratskiy v. Ukraine*, no. 38812/97, §§ 167-71, ECHR 2003-V); the right of effective access to a lawyer or to a court for the purposes of Article 6 (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, and *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18); the right to respect for correspondence (*Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61); and the right to marry (*Hamer v. the United Kingdom*, no. 7114/75, Commission's report of 13 December 1979, DR 24, p. 5, and *Draper v. the United Kingdom*, no. 8186/78, Commission's report of 10 July 1980, DR 24, p. 72). Any restrictions on these other rights must be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment (see, for example, *Silver and Others*, cited above, pp. 38-41, §§ 99-105, where broad restrictions on the right of prisoners to correspond fell foul of Article 8, but the stopping of specific letters containing threats or other objectionable references was justifiable in the interests of the prevention of disorder or crime).

70. There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.

71. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a

> public position or whose conduct threatened to undermine the rule of law or democratic foundations (see, for example, *X v. the Netherlands*, cited above, and, *mutatis mutandis*, *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187, where the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic traits, to stand for election). The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. The Court notes in this regard the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by express judicial decision (see paragraph 32 above). As in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness.[12]

Subsequent judgments have emphasised the importance of the principle of proportionality (see below): for example, in *Calmanovici v Romania* (42250/02), 1 July 2008; *Frodl v Austria* (20201/04), 8 April 2010 and *Scoppola No 3 v Italy* (126/05), 18 January 2011.

2.3 Proportionality and the margin of appreciation

Clayton and Tomlinson's *The Law of Human Rights*, notes that the concept of a 'margin of appreciation' can be traced back in French administrative law to the Conseil d'Etat, suggesting that it is a (poor) translation of the French 'marge d'appréciation'[13] Under the Convention, they suggest that the margin of appreciation:

> [...] Refers to the latitude allowed to Member States in their observance of the Convention ... The doctrine has ...been defined as the line at which international supervision should give way to the state's discretion in enacting or enforcing its laws.[14]

In principle, this means that the Convention should not "impose *uniform* rules across the states which contract to it. Instead, the Convention prescribes standards of conduct and leaves the choice of implementation to the states themselves."[15]

The doctrine of proportionality is central to the Court's evaluation of the right of the individual and the general public interests of society. The application of proportionality can, says Arai-Takahashi, be seen "as the other side of the margin of appreciation". The Court has used the term "margin of appreciation" in many hundreds of rulings to take account of the room for manoeuvre that national authorities may be allowed in fulfilling some of their main obligations under the European Convention. However, like the principle, of proportionality, the concept of a margin of appreciation is not written into the Convention itself.

The margin of appreciation is not the same as a derogation from the Convention and it does not apply in respect of some Convention Articles, although Clayton and Tomlinson argue that "there is no reason in principle why the doctrine of margin of appreciation could not be applied to *all* of the Articles of the Convention".[16]

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12 *Hirst v UK (No. 2)*, 6 October 2005
13 A better translation being a margin of judgment
14 Clayton, R and Tomlinson, H, *The Law of Human Rights*, Second Edition, Oxford, 2009, p 314
15 *Ibid*, p 315
16 *The Law of Human Rights*, 2009, p 317

With regard to these principles and the matter of prisoner enfranchisement, in *Frodl v Austria* the Court stated that "The severe measure of disenfranchisement must not ... be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned"; and that "... it is an essential element that the decision on disenfranchisement should be taken by a judge... and that there must be a link between the offence committed and issues relating to elections and democratic institutions".

Some commentators, such as Carl Gardner, a former Government lawyer and author of the 'Head of Legal' blog, have argued that the Court has been far more proscriptive in recent cases such as *Frodl,* "has gone way beyond its supervisory role, and has got into detailed policy-making for states."[17]

In *Hirst 2* the Court stated that the rights granted in Protocol 1(3) are not absolute and that "Contracting States must be given a margin of appreciation in this sphere (para. 60). However, Para. 82 stated that the UK's blanket ban (described as "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 Article 3 of Protocol No. 1".

The ruling recalled (para. 76) that "the Chamber found that the measure lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff (that period representing retribution and deterrence) had expired". The Court was also critical of the lack of parliamentary discussion of the blanket ban (para. 79):

The UK is not alone in its blanket ban, but, the Court noted, "it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote" (para. 81). The Court thought the blanket ban exceeded an acceptable margin of appreciation:

> 82. ... while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies 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 Article 3 of Protocol No. 1.

The Court acknowledged (para. 84) that in similar cases, "Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote", that it "must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation" and that it must leave

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[17] http://www.headoflegal.com/2010/11/03/prisoners-votes-and-judges-going-rogue/

"it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1". The Court made clear (para. 93) that the Government would have to remedy the situation "in due course" by introducing measures "as it considers appropriate to fulfil its obligations" and considered "that this may be regarded as providing the applicant with just satisfaction for the breach in this case".

The joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jevens in the *Hirst 2* judgment[18] questioned (paras. 5 and 6) the Court's inconsistent application of the margin of appreciation:

> In our opinion this categorical finding is difficult to reconcile with the declared intention to adhere to the Court's consistent case-law to the effect that Article 3 of Protocol No. 1 leaves a wide margin of appreciation to the Contracting States in determining their electoral system. In any event, the lack of precision in the wording of that Article and the sensitive political assessments involved call for caution. Unless restrictions impair the very essence of the right to vote or are arbitrary, national legislation on voting rights should be declared incompatible with Article 3 only if weighty reasons justify such a finding … [the majority] conclusion is in fact based on a "dynamic and evolutive" interpretation of Article 3 of Protocol No 1 … However, it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions. An "evolutive" or "dynamic" interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case.

Judge Costa, in an additional dissenting judgment (para. 9), criticised the majority, which "on the one hand theoretically asserts a wide margin of appreciation for the States as to the conditions in which a subjective right (derived from judicial interpretation!) may be exercised, but goes on to hold that there has been a violation of that right, thereby depriving the State of all margin and all means of appreciation".[19]

3 State responses to Court rulings: are there options?

Most commentators and experts are of the opinion that the Government must do something about the total ban on prisoner enfranchisement, but that it does not have to extend the franchise universally. Some believe the UK can simply ignore the Court ruling, while others think it can be circumvented. *The Times* reported on 11 January "it is understood that Downing Street wants to see legal advice on what the consequences would be of either doing nothing or legislating to defy the ECHR". Most legal experts confirm that while the UK remains a member of the Council of Europe and a State Party to the European Convention, it must fulfil the human rights obligations stemming from the Court judgment, but some suggest the UK could leave the jurisdiction of the Court and thereby avoid the consequences of the Court ruling in *Hirst 2*.

On 1 February 2011 the House of Commons Parliamentary and Constitutional Reform Committee considered how the Government could comply with the European Court ruling.

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[18] The Government lost by a majority vote of 12 to 5 that there had been a violation of Protocol 1(3).

[19] Grand Chamber judgment, 6 October 2005. In a human rights law blog, John Hirst himself was of the view that the margin of appreciation cannot help the Government to avoid giving the vote: "The margin of appreciation only extends to how to fully comply with the ruling, for example, whether to allow postal votes or install polling booths in prisons, and not to limit the scope of the judgment itself", UK Human Rights Blog, 19 December 2010

Giving evidence to the Committee, the former Lord Chancellor, the Rt Hon Lord MacKay of Clashfern, said:

> ... it is absolutely binding on us to obey the judgments of the European Court. Simply to say, 'Leave it till tomorrow', or, 'Leave it till the next year', or just say nothing about it, 'Let's ignore it', is not in accordance with the rule of law. I think to do that would be very wrong.[20]
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> ... if you set up a system that includes decisions by the courts, until you change that system you are bound by these judgments. Now, different judges take different points of view and they are all individuals and none of them are perfect ... but if you want to change the system then you have to do that in an orderly fashion.[21]
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> 16.At several points, he reinforced the importance of maintaining the rule of law, and of the Government and Parliament setting an example in this sphere:
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> if we believe in the rule of law, we are just as much bound to observe the decisions of the European Court on matters within their competence as we are to obey the decisions of our own courts in matters within their competence.[22]
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> ... personally, I do not believe that the rule of law should depend on what the punishment is. People are expected in our country to obey the law simply because that is what the law is that they are bound by.[23]
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> ... the rule of law is very valuable to us. We tend to take it for granted but we need to make sure that we do not let it slip.[24][20]

The Committee concluded: “The evidence we have received from our witnesses, including a former Lord Chancellor, is that, however morally justifiable it might be, this current situation is illegal under international law founded on the UK's treaty obligations”.[21]

In the parliamentary debate on the prisoner voting situation on 10 February 2011, the former Justice Secretary, Jack Straw, said the European Court had "set itself up as a supreme court for Europe with an ever-widening remit",[22] and that, with regard to its judgments, elected MPs were "expected to do the opposite of that in which we believe". He thought that by "extending their remit into areas way beyond any original conception of fundamental human rights”, the Court was “undermining its own legitimacy and its potential effectiveness”.[23] The Attorney General, Dominic Grieve, thought there would now be “quite a drawn-out dialogue between ourselves and the court".[24] He spoke about national obligations under international law and the possible dangers of not honouring them:

> There is no mechanism to enforce [...] The truth is that enforcing something against a Government who do not wish to have it enforced against them is very difficult, because the Government retain Executive power. If a judge in our High Court said that the Government should do something and the Government said, "We won't do it," it would be very difficult to do. Equally, however, it is worth bearing it in mind that the Government would be in rather serious breach of the principles of the rule of law and would, in fact, be behaving tyrannically.

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20 “Voting by Convicted Prisoners: Summary of Evidence - Political and Constitutional Reform Committee”, 1 February 2011

21 Political and Constitutional Reform Committee para. 22

22 HC Deb 10 February 2011 c 502

23 HC Deb 10 February 2011 c 504

24 Ibid c 516

> One needs to be careful. The principles on which United Kingdom Governments have always operated is that if international obligations confer a power on a court and a court orders compensation, we will honour those international obligations as it is our duty to do so, because without that we diminish our own status, in terms of our respect for international law as much as domestic law. It is therefore a bit of a red herring to suggest that just because something cannot be enforced, that is a justification for ignoring it. It might be a justification for enacting other legislation or taking other steps, but it would be a fairly momentous change in UK practice if we ignored something to which we had indicated by international treaty we subscribe.[25]

3.1 Doing nothing?

States cannot legally ignore a Court decision that they are in breach of the Convention; something must be done to remedy the situation, but the Court does not prescribe the remedy (beyond sums payable as "just satisfaction" to the applicant) or how it should be applied. The fact that the *Hirst 2* ruling says the UK's action should be "as it considers appropriate" does not mean that doing nothing would be an appropriate option, but neither does it necessarily mean the Government must extend the franchise universally. The UK is obliged to address it in some way that will receive the approval of the Committee of Ministers.

The Justice Secretary, Ken Clarke, told the BBC Radio Four Today Programme on 9 February 2011 that "In this country we have always followed the rule of law. The government and parliament does not defy the jurisdiction of courts whose jurisdiction it has always accepted". However, the Conservative MP, Dominic Raab (who is a former Foreign Office lawyer), thought that doing nothing about the ruling would not be difficult for the UK:

> The reassertion of our democratic prerogatives will come at negligible cost. The Strasbourg machinery contains the safeguard that it cannot enforce its own judgments or compensation awards. The worst that can happen is that the unimplemented judgment will sit – with hundreds of others – on the Committee of Ministers' list for review. There is no prospect of a fine, let alone Britain being kicked out of the Council of Europe. Despite egregious human rights abuses, military dictatorship in Greece and Russian atrocities in Chechnya, no state has ever been voted out of the Council of Europe.[26]

The former shadow home secretary, David Davis, argued in February 2011 that Britain cannot be forced to obey the European Convention or to pay compensation, that the European Court "has no power to fine Britain for non-compliance with its judgments" and was unlikely to expel the UK from the CoE. He thought "the matter will simply remain on the long list of unenforced judgments reviewed by the Committee of Ministers.[27]

On 18 February 2011 *The Times* reported a leaked document prepared for the Deputy Prime Minister, Nick Clegg, which allegedly made "clear that the Strasbourg court is only able to put "political rather than judicial" pressure on Britain, meaning the Government can ignore demands by prisoners for compensation".

> "The direct sanctions for failure to comply with Strasbourg judgment are political rather than judicial," the note says. "We are not aware of any country

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25 HC Deb 10 February 2011 c 512
26 *Telegraph* 14 February 2011
27 David Davis's article on the parliamentary vote on prisoner voting, 10 February 2011

> that has been expelled from the Council for non-execution of a judgment", it continues, concluding that this is "highly unlikely".[...]
>
> The note also states that Britain would open itself up to charges of hypocrisy since it has consistently criticised Turkey for failing to pay compensation awarded by Strasbourg. If the Government made a "genuine attempt" to introduce legislation to allow prisoners to vote, but this was then defeated in the Commons, it could be enough to "persuade Strasbourg that the UK has done its best" and could reasonably expect to avoid any further sanction .
>
> If Britain left the convention it could risk the country's membership of the European Union. "Both the Council of Europe and the EU require member states to adhere to their value, including respect for human rights. Ultimately, whether to expel the UK from either would be a political decision, but the UK would clearly lay itself open to expulsion by withdrawing from the ECHR," the note concludes.

In a speech on 6 April 2011, the Master of the Rolls, Lord Neuberger of Abbotsbury, said that Parliament remained sovereign and it was up to Parliament to choose whether to listen to European Court judges or ignore them.

> 56. It is true that membership of the Convention imposes obligations on the state to ensure that judgments of the Strasbourg court are implemented, but those obligations are in international law, not domestic law. And, ultimately, the implementation of a Strasbourg, or indeed a domestic court judgment is a matter for Parliament. If it chose not to implement a Strasbourg judgment, it might place the United Kingdom in breach of its treaty obligations, but as a matter of domestic law there would be nothing objectionable in such a course. It would be a political decision, with which the courts could not interfere.
>
> 57. While, in a sense, legal sovereignty is fettered so long as Parliament is required to implement a decision of the Strasbourg court, the fetter is however akin to that imposed by the European Communities Act 1972: neither is permanent. Any such fetter remains only so long as the Treaty obligation itself remains valid, but any country can withdraw from the Treaty, and that demonstrates that whatever limit membership imposes on legal sovereignty, it is a fetter which endures only whilst our membership endures – i.e. only while Parliament wants it to endure.
>
> 58. Secondly, under the 1998 Act the courts' role is to try and interpret every statute so as to comply with the Convention, and, if that is impossible, to warn Parliament that the statute does not comply – reflecting the alarm bell just mentioned. It is then for Parliament to decide whether to amend the legislation. If it chooses not to do so, that is an end to the matter from a legal point of view.
>
> 59. The court's limited privilege to review, not strike down, legislation cannot therefore impinge on Parliamentary sovereignty. First, the court's power only arises because it has been bestowed by Parliament through the 1998 Act, and what Parliament gives it can take away. That is well demonstrated by the fact that the English courts had no power to apply the Convention for the first fifty years of its life – i.e. until the 1998. Secondly, where legislation does not comply with the Convention, the ultimate decision as to what to do about it is in the hands of Parliament, not the courts.[28]

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[28] "Who are the masters now?", second Lord Alexander of Weedon lecture, 6 April 2011

3.2 Delaying?

The *Loizidou* case
In October 1998 the Turkish Government refused to pay damages of seven hundred thousand dollars to a Greek Cypriot woman, Titina Loizidou, in spite of being found in breach of the European Convention for denying her access to her property in northern Cyprus, which had been seized by Turkish troops in 1974. Turkey maintained that the decision to award her damages would jeopardise attempts to settle similar claims. The Loizidou case was initiated in 1979 and was eventually settled in late 2003, when the Turkish Government paid Ms Loizidou more than US$1 million. The Turkish Government said it had reached an "understanding" with the Council of Europe that the case would not set a precedent for some 600 similar cases pending before the Court of Human Rights.

The UK has sometimes been slow to implement changes to remedy Convention violations. In January 2006, in reply to a question about the UK's failure to implement certain European Court decisions, the Government set out the reasons why in each case it had delayed implementation of judgments (including the *Hirst 2* judgment) between 1998 and 2005.[29]

In May 2006, Lord Lester pursued late implementation with a further PQ on the Government's action to give effect to judgments in the cases of "(a) Hirst; (b) Paul and Audrey Edwards; (c) Connors; (d) SC; (e) HI; (f) Quinn; (g) John Murray; (h) Kevin Murray; (i) Magee & Averill; (j) JT; (k) TP & KM; and (l) Roche. [HL4624].

Baroness Ashton replied:

> (a) The Government have undertaken to issue a full public consultation on the issue of prisoners' voting rights in response to this judgment. It is premature to consider whether legislative amendment is necessary.
>
> (b) The Government have taken a series of administrative measures to give effect to this judgment, including arrangements to identify and monitor prisoners who may be at risk of suicide or self-harm. None of these required amendments to primary legislation.
>
> (c) The Housing Act 2004 enables judges to suspend eviction orders against residents on local authority Gypsy and Traveller sites for periods of up to 12 months at a time, bringing the situation in line with tenants of local authority housing. The Government are currently considering whether any further primary legislation is required to implement this judgment.
>
> (d) The European Court of Human Rights did not find in this case that any provision of United Kingdom legislation was incompatible with the convention rights. However, the Government have been working to develop a package of special procedures to assist defendants with limited cognitive function to participate effectively in their trials. The majority of these procedures will be contained in a new practice direction, although some primary legislation may be necessary as parliamentary time allows.
>
> (e) & (j) The Government are currently considering appropriate amendments to the Mental Health Act and Mental Capacity Act. Human rights considerations will of course be taken fully into account, including the impact of these judgments.

[29] HL Deb 10 January 2006 cc34-42WA

> (f), (g), (h) & (i) The Criminal Evidence (Northern Ireland) Order 1988 was amended by the Criminal Evidence (Northern Ireland) Order 1999. A review of police and criminal evidence legislation and codes of practice in Northern Ireland has been completed and is currently the subject of public consultation. Until these are implemented, administrative guidance issued to the Chief Constable and by the Attorney-General to prosecutors will continue to apply.
>
> (k) The position in relation to this case is as set out in the Answer given by my noble friend Lord Adonis on 24 April 2006 (*Official Report*, col. *WA 2*).
>
> (l) Given that the European Court of Human Rights did not find that the legislation involved was itself incompatible in this case, the Government do not believe that a remedial order is necessary. Instead, an action plan to ensure that staff are better equipped to handle information requests such as in this case has been developed and is being implemented.[30]

The Joint Committee on Human Rights commented in its Thirty-First Report on the UK's poor performance in implementing European Court judgments:

> 28. It is also disappointing to note that the United Kingdom is one of the top ten States for delay in respect of leading cases where such measures are necessary. The most disappointing statistic to emerge from the Report is that the United Kingdom has the highest proportion of leading cases waiting for an acceptable resolution for longer than five years.[38] Only Italy and Turkey have a higher number of leading cases outstanding for longer than five years.[39][FN 38]
>
> Leading cases are cases which the Committee of Ministers describe as 'cases which reveal a new systemic/general problem in a respondent state and which thus require the adoption of new general measures. Of the 15 leading cases against the UK which are waiting for a satisfactory conclusion, 8 of those cases have been subject to the supervision of the Committee of Ministers for longer than 5 years (53%).[31]

The Committee recommended that the Government explain "the reasons for any delay in relation to the introduction of general measures in each of the cases which have been subject to the supervision of the Committee of Ministers for longer than five years". The Government replied to the Joint Committee in January 2009 in stating:

> The statistic that the Joint Committee has selected about the proportion of leading cases waiting for resolution is somewhat misleading. While it is statistically accurate to say that, of 15 United Kingdom cases identified by the Committee of Ministers as leading cases, eight have been subject to supervision for more than five years, it should be noted that, in the Government's understanding, six of these cases are the Northern Ireland cases [a series of six cases dealing with the investigation of allegations of state involvement in killings in Northern Ireland], that have presented particular issues and challenges. The statistic selected by the Joint Committee does not

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30 HL Deb 17 May 2006 cc41-2WA

31 "Monitoring the Government's Response to Human Rights Judgements: Annual Report 2008", 31 October 2008. See also PQ at HL Deb10 January 2006 cc WA 35-42

> therefore disclose a particular systemic problem on the part of the United Kingdom.[32]

The Joint Committee reported its continuing concerns in its Fifteenth Report "Enhancing Parliament's role in relation to human rights judgments":

> The UK remains in the top ten countries in respect of the time taken to implement leading cases.[27] In September 2009, the Council of Europe Parliamentary Assembly Rapporteur on the Implementation of Judgments, Christos Pourgourides, expressed his "serious concern" that 36 of the 47 Council of Europe Member States were failing fully to implement judgments of the ECtHR within a reasonable time. Considering judgments which had not been fully implemented within five years or which revealed major structural problems,[28] the rapporteur included the United Kingdom within his list of countries about which he was particularly concerned, listing 13 judgments against the UK.[29] He also singled out the UK along with 10 other countries for special attention, in the light of the Government's approach to certain judgments which had taken a long time to implement (such those relating to as corporal punishment of children and the investigation of the use of lethal force by State agents in Northern Ireland).[30]

In its response the Government noted that a high proportion of cases outstanding related to the issue of the investigation of deaths in Northern Ireland (see PQ above),[33] on which work was progressing, with only one general measure remaining outstanding. The Government stated: "While it is important that these cases are brought to a close swiftly and effectively, and work will continue to accomplish this, the relatively large number of cases in the group has a disproportionate effect".[34]

3.3 Doing something?

In November 2010 David Cameron, reluctant to grant the right to vote to prisoners or to pay them compensation for their disenfranchisement, blamed the previous Labour government for leaving it with this "problem".[35] In December the Government announced proposals which would bar all offenders sentenced to four years or more from registering to vote, while prisoners sentenced to under four years would have the right to vote, unless the sentencing judge removed it. Mark Harper, the Minister for Political and Constitutional Reform, said of the new proposals:

> We believe that these proposals can meet the objectives that we have set out of implementing the judgment in a way that is proportionate; ensuring the most serious offenders will not be given the right to vote; and seeking to prevent future claims for compensation. We will bring forward legislation next year for Parliament to debate.[36]

The Cabinet Office minister, Francis Maude, told the BBC's Question Time on 10 February that the February 2011 parliamentary vote was not "the end of the matter" and the Government would have to "do something": "We are going to be obliged by this ruling to vote through - there will be an attempt to vote through - something which most people find

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32 Cm 7524, "Responding to Human Rights Judgments Government Response to the Joint Committee on Human Rights',

33 FN 9: "McKerr v UK, Finucane v UK, McShane v UK, Shanaghan v UK, Jordan v UK, Kelly & others v UK."

34 Response to the Joint Committee on Human Rights' Fifteenth Report of Session 2009-10

35 HC Deb 3 November 2010 c921

36 HC Deb 20 December 2010 c151WS

repugnant". The BBC reported on 11 February 2011 that “Ministers say they will do the "minimum to comply" with the ECHR ruling”.

Some CoE Member States apply a partial disenfranchisement. Austria, for example, disenfranchises all prisoners serving a sentence of more than a year. In the case of *Frodl v. Austria* the Court ruled that this too was unlawful, stating:

> ... prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty .... It is inconceivable, therefore that a prisoner should forfeit his Convention rights merely because of his status as a person detained following conviction.[37]

On 18 January 2011 in *Scoppola v Italy* (no 3) (126/05), the European Court held unanimously that “An automatic and indiscriminate restriction on a vitally important Convention right … falling outside any acceptable margin of appreciation, however wide that margin may be”. [This sentence is not very clear] The Prison Reform Trust commented that “These rulings suggest that any decision to disenfranchise must be proportionate to the offence committed. Therefore, disenfranchisement may lawfully be imposed only on a very small number of prisoners who have been sentenced for electoral fraud or a related offence”.

A Prison Reform Trust briefing on the issue suggested the UK Government would have to broaden the right to vote considerably if it was to avoid further challenges at the Court:

> The Hirst judgment and a number of subsequent judgments by the European Court have made it clear that a blanket ban on prisoners voting is incompatible with the principles of the Convention. Infringement of rights must be necessary, relevant and proportionate. The importance of these principles is underlined in the Hirst judgments, in Calmanovici v Romania (42250/02) (1 July 2008), in Frodl v Austria (20201/04) (8 April 2010) and in Scoppola No 3 v Italy (126/05) (18 January 2011). The implication of these rulings is that disenfranchisement may lawfully be imposed only on a very small number of prisoners who have committed electoral fraud or a related offence. This suggests that the UK will be open to further challenges under the European Convention on Human Rights unless it moves to enfranchise the vast majority of sentenced prisoners.[38]

The Commons Political and Constitutional Reform Committee report of 1 February 2011 made some interesting observations on the issue:

> **Conflict between United Kingdom statute law and international law**
> 10.The three witnesses were clear that the current situation, under which all convicted prisoners lose the right to vote for as long as they are imprisoned, is in breach of the European Convention, because "it strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate".[14] As Lord Mackay told us, It has nothing to do with the nature or gravity of their offence and their individual circumstances and that, they say, is wrong. That is the decision in *Hirst* and it stands still. What it says effectively is a blanket ban is unlawful under the Human Rights Convention.[15]
>
> **Incompatibility of any blanket ban based on prison sentence length**

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[37] *Frodl v Austira* 8 April 2010

[38] *Prison Reform Trust* “Barred from voting: the right to vote for sentenced prisoners”, February 2011

> 11.Moreover, the view of our witnesses was that a change in the law to limit the right to vote by reference to the length of prison sentence imposed would fail to put right the breach found by the European Court:
> A blanket ban based on period of sentence, whatever the length, if it is one year or if it is 20 years, is going to be incompatible with the judgment in *Hirst*.[16]
> In *Frodl v Austria* it was a one-year ban and that was found to be incompatible. In *Scoppola* it was a three year ban. The problem is the blanket nature of the ban, of the lack of individual decision-making on it, not the length. So there is not a magic figure that with one leap we are free.[17]
>
> **12.We have heard that an element of individual assessment would need to be introduced into the process of deciding whether and for how long a convicted criminal should be disenfranchised, if the Government and Parliament are to satisfy the judgments of the European Court. We have heard no suggestion as to who could fulfil this role if not the sentencing judge.**

The Committee also reported the possibility of sanctions against the UK, quoting Lord Mackay's opinion that if the Government persisted in "ignoring a judgment of the court", then there was "no doubt whatever that the right to damages becomes a realistic expectation". Lord Mackay also told the Committee that some action might mitigate in the Government's favour:

> 14.[...] the Courts would be unlikely to award damages if the law were to be changed in a way that constituted a genuine attempt to remedy the situation in the light of the judgments, even if the European Court decided subsequently that the remedy was insufficient: if the Parliament of the United Kingdom makes a genuine effort to deal with the *Hirst* problem, if I can call it that, I think it highly unlikely that they would sever any damages immediately if the court found that their solution was not absolutely up to the mark. In other words, we have tried hard to do what the court said; this is our best endeavour and the court have refused to tell us in advance what would be good enough. Therefore, I do not think it is at all likely that we would suffer any damages as a result of a second failure so long as it was seen to take account of what the European Court is saying and carefully weighing the kind of issues they raised as being necessary to consider before you deprive someone of the franchise.[19]

3.4 Derogating from the Convention?

Article 15 of the European Convention on Human Rights allows States parties to the Convention to derogate from certain Convention rights in time of "war or other public emergency threatening the life of the nation".[39] There are three substantive conditions for permissible derogations:

- There must be a public emergency threatening the life of the nation;
- Any measures taken in response must be "strictly required by the exigencies of the situation"; and

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[39] See also Library Standard Note "Derogations from the European Convention on Human Rights under Article 15", 13 November 2001 at http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHER_PAPERS/STANDARD_NOTE/snia-01143.pdf

- The measures taken in response must be in compliance with the state's other obligations under international law.

The derogation must also follow a certain procedure; there must be a formal announcement of the derogation and notice given, information on any measures adopted under it, and the ending of the derogation must be communicated to the CoE Secretary General. For a derogation to be valid, the emergency giving rise to it must be:

- actual or imminent, although states do not have to wait for disasters to strike before taking preventive measures,[40]
- involve the whole nation, although this does exclude emergencies which are confined to regions[41]
- threaten the continuance of the organised life of the community[42]
- exceptional, such that measures and restriction permitted by the Convention would be "plainly inadequate" to deal with the emergency.[43]

The UK has applied derogations in the past which took account of the situation in Northern Ireland, and were subsequently removed. Following the 9/11 terrorist attacks in the US in 2001, the Government enacted the *Anti-Terrorism Crime and Security Act 2001* (ATCSA 2001), which provided for indefinite detention of foreign nationals suspected of being involved in terrorism and who could not, for legal or political reasons, be repatriated to their countries of origin. For the ATCSA 2001 to be compatible with the European Convention, the Government derogated from its obligation to protect the right to liberty and security under Convention Article 5(1)(f),[44] on the grounds that there was a state of emergency. A number of foreign nationals, known as the 'Belmarsh detainees', were detained indefinitely under the ATCSA and could not be deported because of the UK's obligation of non-refoulement.[45] The Belmarsh prisoners challenged their detention and the validity of the derogation. In December 2004 the House of Lords accepted the Government's position that there was a public emergency threatening the life of the nation which could justify the derogation, but found the measure disproportionate and discriminatory (foreign national terror suspects posed no greater risk than national ones).[46] The Lords found the Government to be in breach of Articles 5 and 14 of the European Convention. Eleven Belmarsh detainees complained to the European Court about the Government's failure to release them immediately. In February 2009 in *A and Others v United Kingdom*, the Court of Human Rights dismissed the Belmarsh claim that the derogation under Article 5(1)(f) was invalid, but agreed with the Lords that the Government's measures introduced under that derogation were disproportionate (paras 181 and 190). The 2001 Convention derogation was later removed.

There is no provision for derogation from Protocol 1(3) and, in view of the Court's decision in *Hirst 2* and other similar cases, it is virtually impossible that an application for a derogation under Article 15 would be acceptable.

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40 *A v United Kingdom* [2009] ECHR 301 para. 177.
41 *Aksoy v. Turkey* (1997) 23 EHRR 553 para 70.
42 *Greek case* (1969) 12 YB 1 at 71-72, paras. 152-154.
43 *Greek case* (1969) 12 YB 1 at 71-72, paras. 152-154
44 The guarantee of the right to liberty and security, except for "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".
45 Non-refoulement is the principle that a person should not be returned to any country where he/she is likely to face persecution or torture
46 *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department* 16 December 2004

3.5 Making reservations to the Convention?

Under the 1969 UN *Vienna Convention on the Law of Treaties* (VCLT), a reservation is defined in Article 2(1)(d) as a:

> ... unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Article 57 of the European Convention states:

> 1. Any state may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> 2. Any reservation made under this article shall contain a brief statement of the law concerned.

The scope of this power was discussed by the Court of Human Rights in *Belilos v Switzerland*,[47] the background to which was as follows: B was convicted of and fined for participation in an unauthorised political demonstration. She alleged that her conviction violated her right to a fair trial under Convention Article 6 because of the very close links between the 'Police Board' which decided her case and the police who had arrested her. The Swiss had entered a reservation which said that the right to a fair trial under Article 6 "is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge". There was no statement of the law concerned with the reservation. The Court of Human Rights held that the reservation was not valid and that there had been a violation of Article 6.

The UK has had a reservation in respect of Article 2 of the First Protocol on the right to education, which is maintained under the terms of the *Human Rights Act 1998*.

3.6 Denouncing the Convention and withdrawing from the jurisdiction of the Court?

The European Convention provides for withdrawal or denunciation in Article 58:

> 1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date of which it became a Party to it and after six months' notice contained in a notification addressed to the Secretary-General of the Council of Europe, who shall inform the other High Contracting Parties.
>
> 2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

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[47] Belilos v Switzerland [(1988) 10 EHRR 466].

> 3. Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
>
> 4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms Article 56.

The UK first considered withdrawing from the Convention in 1956 over a case brought by Greece against the UK for its actions under emergency rule in Cyprus, which was at the time a British Crown Colony.[48] UK frustration with the former Commission of Human Rights and the Court in the 1990s (largely over the *McCann* case in 1995) led to UK threats not to renew the optional declaration providing for individual petition.[49]

Lord Hoffman implied in a lecture Judicial Studies Board Annual Lecture on 19 March 2009 that the European Court was over-reaching itself: "It cannot be right that the balance we in this country strike between freedom of the press and privacy should be decided by a Slovenian judge saying of a decision of the German Constitutional Court —

> "I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press…It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded."[50]

Lord Hoffmann was not surprised that "to the people of the United Kingdom, this judicial body does not enjoy the constitutional legitimacy which the people of the United States accord to their Supreme Court". While he had no problem with the Convention or the standards it set in human rights guarantees, he concluded "The problem is the Court; and the right of individual petition, which enables the Court to intervene in the details and nuances of the domestic laws of Member States". Some interpreted his speech as implying that the UK should leave the CoE, although this is not obvious from the text.

The consequences of such an action are uncertain, but a *Policy Exchange* analysis by Dr Michael Pinto-Duschinsky[51] looked at the consequences of UK withdrawal from the jurisdiction of the Court in an article called "Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK" (2011). He asks whether UK withdrawal from the Court's jurisdiction would mean withdrawing from the European Convention, concluding that "under the terms of Protocol 11 of the ECHR (which Britain signed in 1994), acceptance of the jurisdiction of the court is now an integral part of the treaty. Therefore, the UK can no longer leave the jurisdiction of the European Court of Human Rights without also rejecting the ECHR treaty". However, he outlines two ways in which the UK could withdraw from the jurisdiction of the Court and retain its commitment to the Convention:

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48 *Greece v United Kingdom 2* (1958-59). The UK did not withdraw from the Convention.

49 The Court found the UK in breach of the Convention in a case involving the killing of suspected IRA terrorists in Gibraltar. The Government did renew the right to individual petition.

50 Lord Hoffmann, "The Universality of Human Rights"

51 Dr Duschinsky is one of the members of the Government's new human rights commission. He is the president of the International Political Science Association's research committee on political finance and political corruption, member of the academic panel on party funding of the Committee on Standards in Public Life, and a director of the International Foundation for Electoral Systems.

> First, it could simply continue to incorporate the ECHR into UK law. This would signal a continuing adherence to the basic standards set forth in the convention without being a signatory to the convention by international treaty.
>
> Second, it could negotiate with the Council of Europe to permit it to remain a signatory of the ECHR without accepting the jurisdiction of the Strasbourg court.

Pinto-Duschinsky does not believe that in order to remain a member of the CoE, the UK must sign up to the Convention and accept the jurisdiction of the Court – this rule, he believes, was intended for more recent prospective members, particularly the former Communist states, and does not bind founder members such as the UK. He acknowledges that other lawyers (e.g. Rabinder Singh) dispute this. He also admits that ". There undoubtedly would be strong objections from the Council of Europe were the UK to consider rejecting the jurisdiction of the European Court of Human Rights but they would be based on political and diplomatic grounds, rather than legal ones".

Rosalind English, a barrister at 1 Crown Office Row Chambers, believes "It is hard to see, in practical terms, how British withdrawal from Strasbourg would not entail withdrawal from the Convention itself and indeed the Council, and the report acknowledges that such a move may well have this consequence", but as she points out, "the difficulties are diplomatic rather than legal in the strict sense of the word".[52]

Ken Clarke said on the Andrew Marr show on 20 February that "There's no question of this government denouncing the European Convention on Human Rights as part of our programme is to continue to adhere to that".[53] However, he said that when the UK took over the CoE chairmanship in November 2011, "I hope and I intend that we shall take the lead in trying to get this court to reform itself" with a view to getting clear "what the relationship is between national courts, national parliaments and the court in Strasbourg". Dominic Grieve made clear in March 2011 that the UK was at liberty to withdraw from the CoE, although that was not its policy or intention.[54]

3.7 Could the UK denounce the Convention and remain in the EU?

An Open Europe analysis[55] of the prisoner voting issues notes that "withdrawing from the ECHR would still leave a huge number of human rights locked in at the EU level":

> This is because first, the EU is set to join the ECHR in its own right and as a separate entity (although the UK has a veto over this) and secondly, the EU has its own catalogue of justiciable rights – the so-called Charter of Fundamental Rights, enshrined in the Lisbon Treaty. The Charter allows citizens to contest rights set down in EU law at the European Court of Justice (ECJ) and, in future, possibly also the ECHR (when the EU accedes to it).

Michael Pinto-Duschinsky looked at the implications for the UK's EU membership of withdrawal from the Court's jurisdiction. Ratification of the European Convention and accepting the jurisdiction of the Court have been a pre-condition of EU membership, but both

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52 UK Human Rights blog 9 February 2011
53 *BBC News* 20 February 2011
54 HC Deb 1 March 2011 c157
55 Open Europe, "Prisoners' right to vote: the blurred line between the European Convention on Human Rights and the European Union", February 2011

Open Europe and Pinto-Duschinsky maintain that there is no formal EU Treaty requirement that binds existing Member States to remain party to the European Convention. Pinto-Duschinsky cites experts who gave evidence to the House of Commons Home Affairs and Constitutional Affairs Committees in October 2006 (Rabinder Singh QC and Jonathan Fisher QC) who appeared to share this opinion. Singh did not want to be definitive, but said he "had always understood, as a legal matter, that membership of the European Union today requires adherence to the European Convention on Human Rights [...] what we expect of potential new entrants, so I think it is a matter of legal obligation".[56] Fisher said: "It seems to me, on a reading of that, that if we put in place a bill of rights and obligations which replaces the European Convention and remains true to incorporating in it those fundamental human rights that we are speaking of and that we have been talking about this morning, I cannot conceive of how it can be said that we are not respecting fundamental rights as guaranteed by the Convention".[57]

However, Professor Francesca Klug told the Committee that the UK could *not* remain in the EU if it left the Convention, because "it is a requirement now of the European Union that you ratify the Convention. You do not have to incorporate it into your laws, as we have done with the Human Rights Act, but you do have to ratify the European Convention on Human Rights to be a member of the EU".[58] The then Lord Chancellor, Lord Falconer, tended towards this view, telling the Committee: "I think the reason why there is some doubt is because the way that the relevant treaties are drafted does not express it as a condition, but to all intents and purposes, I believe it is not possible to be a member of the European Union and to have left or denounced the European Convention on Human Rights".[59]

Pinto-Duschinsky pointed out that as the EU intends to ratify the European Convention, "Were a country to denounce the convention treaty, it would still be bound by its membership of the EU to adhere to the terms of the convention in matters falling under EU jurisdiction. However, this in itself would not necessitate its individual adherence to the convention". He also maintained that withdrawal from the Convention "would not in itself entail the abandonments" of values emphasised in Article 2 of the *Treaty on European Union*, which establishes several broad human rights values, such as respect for human dignity, freedom, democracy, equality and respect for human rights. He underlined that under Article 6(3) of the *Treaty on European Union* (TEU), fundamental rights as guaranteed by the European Convention "and as they result from the constitutional traditions common to the Member States" constitute the general principles of the EU's law. He conceded that the meaning and implications of this were "far from clear", but that:

> As far as the requirements imposed on individual member states of the EU are concerned, one senior British lawyer interviewed for this report insisted that a country needs to adhere to the same general standards as those set out in the ECHR. This is something less precise than adherence to the ECHR itself.
>
> Moreover, if a member country of the EU adheres to standards as high as those set out in the ECHR (or incorporates the ECHR into its national legislation), there is nothing in Article 6.3 that requires that country to accept the jurisdiction of the Strasbourg court as the preferred method of enforcement of those standards.

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56 Q 63
57 Q 41
58 Q 17
59 Q 96

Other Member States might, he said, decide under Article 7(1) TEU that UK withdrawal from the Convention constituted a "clear risk of a serious breach" of the core values of the EU, which could result in UK suspension from the EU. However, in his opinion, this was "barely conceivable".

Rosalind English thought that reports on the linkage between adherence to the European Convention and EU membership had been "much exaggerated":

> The EU under the Lisbon Treaty is indeed due to become signatory of the ECHR but this is no more to the point than the fact that the EU is now constituted as a treaty-signing body, like one of its member states. Nothing in the relevant treaties requires continued adherence to the ECHR as a condition of continued UK membership of the EU. To repeat a well-rehearsed aphorism of statute interpretation, if they had meant to say that, they would have said it. This is underlined by the explicit requirement that ECHR membership is now required for accession; by implication, therefore, it is not an obligation for existing member states.[60]

According to Open Europe, withdrawing from the Convention would enable the UK to ignore the European Court's ruling on prisoners' voting rights in UK general elections, but "it is far from clear whether it would enable the UK to do so for local or European Parliament elections, as voting rights for these elections are covered by EU law as well as national law" (under 'Citizenship of the Union', Article 20 of the *Treaty on the Functioning of the European Union*). The author also emphasised that a unilateral UK withdrawal from the Convention would not mean a full repatriation of human rights legislation, and that EU accession to the European Convention "could allow the European Court of Human Rights' rulings to impact on the UK through the back door". For this reason, Open Europe suggested that if the UK withdraws from the Convention, "it should also seek to negotiate a genuine opt out from the EU's Charter of Fundamental Rights and guarantees that any rulings from the European Court of Human Rights on EU legislation are not applicable to the UK".

Rosalind English commented in April 2011 on an attempt by a prisoner in a Scottish prison, George McGeogh, to argue that his disenfranchisement under Section 3 of the *Representation of the People Act* breached his human rights under EU law. Article 20(2)(b) of the *Treaty on the Functioning of the European Union* (TFEU), provides that "the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State". McGeogh argued that under UK law he had been deprived of enjoyment of his citizenship right and that this law contravened the EU principle of equal treatment and respect for fundamental rights. Lord Tyre dismissed the petition, but expressed his views on the proposed EU law incompatibility.

> In Lord Tyne's view, the words in 20(2)(b) "under the same conditions as nationals of that State" which follow the comma are "critical". They make clear that the right which is conferred in the first part of the sub-paragraph is conferred upon citizens who are not "nationals of that State". Otherwise the comparison explicit in the words "under the same conditions" would make no sense. Nor did the ECJ case law convince him that EU citizenship rights can be asserted without the need to demonstrate a cross-border element between member states. The right of a national of a member state to vote in municipal

[60] UK Human Rights blog, 9 February 2011

elections in that state is not an EU law right whose exercise is governed by the provisions of the Treaties. [61]

3.8 Temporary withdrawal from the Convention in order to obtain a reservation?

No Council of Europe Member States has ever withdrawn from and then re-ratified the European Convention with a reservation, in order to pursue a particular policy that conflicted with the Convention. However, such action has been considered in the past. Ed Bates, [62] in an article asking "what options, if any, does a State have in international law if it is simply unwilling to accept a legal obligation(s) created by a human rights treaty that it has already ratified", looked at attempts by the Labour government under Tony Blair to effect a "strategic denunciation" (i.e. denunciation and re-ratification) of the Convention in relation to the *Chahal* case.[63] The Prime Minister had suggested on the BBC's "Frost Programme" on 26 January 2003 that because of concerns about the threat to national security posed by asylum seekers, the Government might consider withdrawing from the Convention and re-ratifying it with a reservation against Convention Article 3, which prohibits inhuman or degrading treatment or torture (or returning a person to a state where they might suffer such ill-treatment). Bates cites legal opinion as to the acceptability of such a move:

> Writing in his personal capacity the Deputy Head of the Council of Europe's Legal Advice Department, Jörg Polakiewicz, has suggested that Council of Europe treaties may not be strategically denounced.203 The view has also been presented that strategic denunciation is unwelcome, but not actually illegal. Hence the Council of Europe's Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) has noted that there are 'no formal rules' against strategic denunciation, albeit it is a 'highly undesirable' practice.204 The ILC Special Rapporteur on Reservations to Treaties has cited the view of Polakiewicz as referred to immediately above and commented that, '[o]n the universal level . . . such a conclusion [is] undoubtedly too rigid'.205 Indeed, he seems to assume that strategic denunciation is legal, at least in some contexts.206 The same may be said for the Chief of the Treaty Section at the United Nations' Office of Legal Affairs. Writing in his personal capacity, he has argued that strategic denunciation is a legally valid, if not necessarily very welcome, course. By use of the device a State adheres 'strictly to the letter of treaty law in applying' Article 19 VCLT.207 On this basis it might be said if a treaty includes an unqualified right for its denunciation then States are entitled to rely on this. A disincentive for a State to resort to strategic denunciation is the political cost to its credibility.208 Such States also risk that the subsequent reservation will be objected to by other States Parties who may block the entry into force between themselves and the strategically denouncing State.
>
> **Footnotes**:
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> 203 See Treaty-Making CoE 96 and Ziemele 119 (referring to the ECHR)
>
> 204 CAHDI, 'Practical Issues Regarding Reservations to International Treaties (Appendix IV)', 19th meeting, CM (2000) 50, App. 4 (2000), available at https://wcm.coe.int/ViewDoc.jsp?id=348409&Lang=en.
>
> 205 International Law Commission (Fifty-fifth session, 2003), 'Eighth Report on Reservations to Treaties (Mr Alain Pellet, Special Rapporteur)', A/CN.4/535, para 41.

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61 Rosalind English, UK Human Rights Blog, 13 April 2011

62 International and Comparative Law Quarterly, vol 57, October 2008 pp 751–788 "AVOIDING LEGAL OBLIGATIONS CREATED BY HUMAN RIGHTS TREATIES", Ed Bates, School of Law, University of Southampton

63 Chahal v United Kingdom (1996) 23 EHRR 413

206 See International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Sixth Session, UN GAOR, 59th Sess, Supp No 10, UN Doc A/56/10 (2004) 271. See also International Law Commission, Summary Record of the 2651st meeting, A/CN.4/ SR.2651, Yearbook of the International Law Commission 2000 Vol I, 320 (para 71).

207 See Kohona 438. See also Legal Opinion prepared by the British Institute of International and Comparative Law (Mads Andenas and David Spivack), The UN Drug Conventions Regime and Policy Reform (2003) 6 (available at <http://www.senliscouncil.net/documents/BIICL_ opinion>(accessed 6 October 2007).

208 See n 69 above.

In a Joint Opinion of 29 January 2003 on the UK proposal for a “strategic denunciation”, David Pannick QC and Shaheed Fatima, of Blackstone Chambers, concluded that “it is strongly arguable that the ECHR does not permit a Contracting State to use the power of denunciation of the Convention (that is, withdrawal) as a device to secure a reservation which could not otherwise validly be made, and therefore the proposal floated by the Prime Minister would be invalid and unlawful. The Joint Opinion confirmed that, with regard to the general validity of a denunciation for the purpose of resigning with a reservation, “There is no authority which assists on whether a Contracting State could use Article 57 to denounce the ECHR for the purpose of re-joining with a reservation”, but pointed to the Trinidad and Tobago case (see below). The authors argued against the use of Articles 57 and 58 in such a manner:

> (1) In substance, the Government is seeking to derogate from Article 3 in a time of national emergency. Article 15 expressly prohibits such a step.
>
> (2) Alternatively, it is seeking to make a reservation which it chose not to make under Article 57 when signing the Convention and which it therefore cannot now make.
>
> (3) It is strongly arguable that it is an abuse of rights, or action which is not in good faith, for the Government to denounce the Convention for the sole purpose of re-joining with a reservation in the terms it would have adopted under Article 15 if permitted to do so, or in the terms which it would have adopted under Article 57 if parties to the Convention could make fresh reservations. If such a step were permissible, the restrictions on derogations in Article 15, and the restrictions in Article 57 on making reservations after signing, would have little effect: a State could always achieve its objective by denunciation, and immediate re-ratification with an appropriately worded reservation.
>
> 17 This argument relies on the observations of the European Court in Ireland v United Kingdom (1978) 2 EHRR 25 at paragraph 239 : "unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a collective enforcement".
>
> This recognises that the ECHR is designed to impose higher standards than other treaties. It would be incompatible with the objects and purposes of the ECHR if a Contracting State could circumvent its obligations by using the device under consideration.

They also maintained that Article 57 might only apply to temporary reservations "in the sense that they are designed to allow for time for the State to bring its laws into line with the requirements of the ECHR".[64]

The cases of Trinidad and Tobago and Guyana

Although there are no examples of states withdrawing from the European Convention and later re-ratifying with a reservation, there have been a few such actions in relation to other international human rights instruments.[65]

In 1998 and 1999 the Governments of Trinidad and Tobago and Guyana informed the UN Secretary General of their withdrawal from the *First Optional Protocol to the UN International Covenant on Civil and Political Rights* (ICCPR) and simultaneously deposited an instrument of re-accession with a reservation purporting to preclude the Human Rights Committee from considering "communications relating to any prisoner who is under sentence of death in respect of any manner relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith". Trinidad and Tobago also notified the Secretary General of the Organization of American States of its withdrawal from the *American Convention on Human Rights*. The withdrawal became effective a year later. The purpose of re-acceding with new reservations was to preclude defendants on death row from filing petitions with the UN Human Rights Committee As Laurence R. Helfer commented in "Not Fully Committed? Reservations, Risk, and Treaty Design" (2006): "The states adopted this strategy in response to increasing constraints on their ability to impose capital sentences as a result of decisions by international tribunals in favor of death row defendants".

The reaction of other states to the actions of Trinidad and Tobago and Guyana was "overwhelmingly negative" (Helfer, p.371) and eleven European countries filed objections to the two reservations and the procedure by which they had been carried out. France described the manoeuvre as an "abuse of process" and a "clear violation of the principle of good faith" (Helfer, ibid). In spite of the reservation, a majority of the UN Human Rights Committee concluded that the substance of the reservation was incompatible with the object and purpose of the Optional Protocol and it removed the reservation from Trinidad and Tobago's re-accession to the Protocol. Trinidad and Tobago was not willing to re-ratify without the reservation and so denounced the Optional Protocol.

3.9 Suspension or expulsion from the Council of Europe?

The Convention enforcement mechanism includes the initiation of proceedings for non-compliance in the Grand Chamber of the Court. Sanctions can include suspension or expulsion from the Council of Europe or from the CoE Assembly. Greece and Turkey have been suspended from the CoE Assembly. Following the installation of the Colonels' military dictatorship in 1967, Greece withdrew from the organisation in 1969 *before* the CM voted for its suspension. The country was readmitted to the organisation in 1974 following the fall of the regime. Turkey was suspended from the Assembly following the military coup in 1980. In 1984 it regained its right to vote in the Assembly after democratic elections had taken place.[66]

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[64] See Concurring Opinion of Judge De Meyer in the European Court in *Belilos v Switzerland* (1988) 10 EHRR 466, 493-494

[65] For examples of these, see Amnesty International report, "Unacceptably Limiting Human Rights Protection", March 1999, AI INDEX: AMR 05/01/99

[66] *European Navigator*

Russian expulsion from the CoE was recommended by the CoE Assembly in 2000 for its actions in Chechnya, but the CM decided against expulsion and Russia was suspended from the Assembly. Azerbaijan was threatened with suspension in 2009 because amendments to its Constitution were deemed to violate its 2002 commitments on democracy.

The procedures for expulsion and suspension of a CoE Member State are set out in Articles 8 and 9 of the CoE Statute. Any Member which has seriously violated the provisions laid down in Article 3 may be suspended from its rights of representation and may be asked by the CM to withdraw from the organisation. If the State does not agree to the request, the CM may decide that the state has ceased to be a member of the CoE from a specific date. Where a state has not fulfilled its financial obligations, the CM may suspend its right of representation on the CM and in the Assembly during the period in which its obligations remain unfulfilled.

The CM *Rules of Procedure* state:

> Article 26
>
> All consideration of the suspension of a Member must begin by a proposal for suspension put forward by at least one representative. The proposal must have been included in the agenda of the session at which it is discussed. The Member concerned shall receive through the Secretary General a notification of the decision reached in its case. This notification shall set out the legal and financial consequences of the decision.
>
> Article 27
>
> The procedure specified in the preceding article shall be followed in the event of a decision that a Member who has been suspended shall cease to be a Member or cease to be suspended.
>
> Article 28
>
> The Secretary General shall transmit to the Committee any notice of withdrawal received from a Member. The Committee shall discuss it at its next meeting and decide on its legal and financial consequences, which shall be notified to the Member concerned by the Secretary General.

A Statutory Resolution adopted by the CM in 1951 provides that the CM will consult the Parliamentary Assembly before inviting a Member State to withdraw, but the final decision lies with the CM.

4 Compensation?

4.1 European Court awards of damages

Under Article 41 of the European Convention, the European Court may if it finds a violation grant “just satisfaction” to the applicant by way of compensation. “Just satisfaction” or the award of compensation for pecuniary loss, non-pecuniary loss or costs and expenses, cannot be claimed as a right by applicants to the Court, but is granted if the Court so determines. Just satisfaction, but no damages, may be awarded, as in the UK cases Fox, Campbell and Hartley, Brogan and others, Thynne, Gunnell and Wilson, Hussein, Singh, Saunders, Findlay , Robins, Golder, Boner and Maxwell, John Murray, Benham, Welch, Silver, Goodwin, Chahal, Abdulaziz and others, Clift, Kay and Others.

UK cases in which damages were awarded include: Young, James and Webster, Campbell and Cosans, Johnson, Darnell, Granger, O, H, W, B, R, McMichael, Boyle, Gaskin, Halford, Gillow, Colman, ADT.

CoE Member States, under the supervision of the CM, are responsible for making sure judgments are respected in full and just satisfaction paid where required.[67] The Court's Practice Directions on the granting of just satisfaction state:

> 1. The award of just satisfaction is not an automatic consequence of a finding by the European Court of Human Rights that there has been a violation of a right guaranteed by the European Convention on Human Rights or its Protocols. The wording of Article 41, which provides that the Court shall award just satisfaction only if domestic law does not allow complete reparation to be made, and even then only "if necessary" (*s'il y a lieu* in the French text), makes this clear.
>
> 2. Furthermore, the Court will only award such satisfaction as is considered to be "just" (*équitable* in the French text) in the circumstances. Consequently, regard will be had to the particular features of each case. The Court may decide that for some heads of alleged prejudice the finding of violation in itself constitutes adequate just satisfaction, without there being any call to afford financial compensation. It may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even not to make any award at all. This may be the case, for example, if the situation complained of, the amount of damage or the level of the costs is due to the applicant's own fault. In setting the amount of an award, the Court may also consider the respective positions of the applicant as the party injured by a violation and the Contracting State as responsible for the public interest. Finally, the Court will normally take into account the local economic circumstances.[68]

The Court ruled in *Hirst 2* that the implementation by the UK Government of measures to secure the right to vote "may be regarded as providing the applicant with just satisfaction for the breach in this case".[69] John Hirst was awarded €23,200 in costs and expenses in October 2005. In *Greens and M.T. v. the United Kingdom*, the European Court did not consider that aggravated or punitive damages were appropriate in the applicants' cases and concluded "that the finding of a violation, taken together with the Court's directions under Article 46, constituted sufficient just satisfaction in the applicants' cases". The UK was required to pay costs and expenses of €5,000.[70] The Court held that in any future cases it would probably consider it was not necessary or reasonable to incur such legal costs and would make no such award.

Adam Wagner looked at the likelihood of compensation for future litigants in the light of *Hirst 2*:

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[67] The Committee of Ministers website has a very detailed account of the award of just satisfaction compensation and EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS – INTRODUCTION explains the monitoring and implementation procedures.

[68] "Practice Direction: Just Satisfaction Claims", 28 March 2007

[69] Application no. 74025/01, 6 October 2005 http://cmiskp.echr.coe.int/tkp197/view.asp?item=16&portal=hbkm&action=html&highlight=&sessionid=4040653&skin=hudoc-en

[70] Press release, 23 November 2010, "Time Limit Imposed on United Kingdom Government to Introduce Legislation Giving Convicted Prisoners the Vote", Chamber judgment in the case *Greens and M.T. v. the United Kingdom*

> [...] it should also be noted that the court declined in this case to impose punitive damages on the UK for failing to allow prisoners to vote. Its declaration, and the repeated warnings by the Council of Europe, amounted to 'just satisfaction' (Strasbourg language for an effective remedy in human rights cases) without having to resort to damages. As such, the £750 per prisoner damages estimate which has been suggested in the press may be inaccurate. The prisoners were awarded €5,000 in total, but this was for costs and expenses. The court has also said that it will not entertain costs applications in future cases, but presumably this does not apply to the 2,500 or so cases which have already been launched.
>
> So, it would appear that if the UK fails to change the law within six months of this judgment becoming final, it will face the unfreezing of 2,500 similar claims, which are highly likely to succeed given that the legal principles are identical. It will then have to pay out the costs of those cases, which if similar would amount to around £6,000,000. This is of course a very rough estimate, and since at least 550 cases were launched in a group represented by the same lawyers, the economies of scale may mean the ultimate figure is less.[...]
>
> Update, 23 November 2010 - The Guardian has reported on the case. The article suggests that the government could face compensation payments of "up to £160m" – it is not clear where this figure is taken from, given that the applicants here were awarded no compensation. If this refers to costs, then by my back of the envelope calculation, it could only happen if all 70,000 prisoners brought claims and were awarded €2,500 each. This is extremely unlikely, given that the court made clear in the most recent case that it would not entertain applications for costs in similar future cases.[71]

Mark Harper said in November 2010 that "the only thing worse than giving prisoners the vote would be giving them the vote and then having to give them compensation on top of that.[72] The Justice Minister, Lord McNally, was more circumspect:

> ***4.2*** **The Government are aware of approximately 250 claims in the domestic courts relating to the general election this year. The Government have made an application to the High Court for these claims to be struck out on the basis that there is no action for damages under the Human Rights Act for a failure to introduce legislation. This application will be heard by the High Court on 9 February 2011. There are three cases against the UK before the European Court for Human Rights in relation to prisoners' voting rights. The Committee of Ministers, in its decision statement following its 15 September 2010 meeting, noted that the Court had received a further 1,340 applications. These have yet to be communicated to the Government.[73]*Damages under the Human Rights Act 1998***

The Human Rights Act 1998 (HRA) seeks to give direct effect to the European Convention in domestic law, thereby enabling claimants to bring an action directly before UK courts. HRA Section 8 provides for the award of damages for cases taken up under that Act. However, the 1998 Act is not 'encouraging' with regard to compensation, and House of Lords rulings concerning the HRA have generally not been so either. In July 2006 the Department for

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71 One Crown Office, Adam Wagner, November 2010
72 HC Deb 2 November 2010 c 774
73 HL Deb 4 November 2010 c WA446

Constitutional Affairs' "Review of the Implementation of the Human Rights Act" commented on applications for compensation from UK litigants under the HRA:

> [...] section 8(3) of the Human Rights Act expressly limits the circumstances in which damages may be awarded for a breach of Convention rights. This has been interpreted so strictly by the courts that informed legal commentators regularly complain that it is now very difficult to obtain damages under the Human Rights Act. The House of Lords has held that a finding of breach is generally sufficient redress under the HRA. They therefore declined to award damages even where the consequence of the breach was that a prisoner served an additional 21 days in prison.[8] They also held that the level of damages should be commensurate with the levels of compensation available in Strasbourg – which are generally acknowledged to be lower than those available for domestic law torts. **Moreover section 8(4) of the Act requires domestic courts to take into account the principles applied by the European Court of Human Rights in relation to damages**. These include, for example, the fact that in deciding whether to award compensation account may be taken of the conduct and character of the claimant.[9] Needless to say, none of this is ever reported in the popular press.
>
> [8] *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 [9] *e.g. McCann v UK (1996) 21 EHRR 97* [10] *Daily Telegraph*, 7 June 2006 "KFC meal ensures siege man's rights", *The Sun*, www.thesun.co.uk/article/ 0,,2-2006260255,00.html, "A finger nickin' good farce"[74]

In *Chester v Secretary of State for Justice and Wakefield Metropolitan District Council* Lord Justice Laws accepted that Chester's case was in part "driven by the long delay – still at present continuing – in promoting legislation to give effect to the decision in Hirst", but concluded that the court simply "no role to sanction government for such failures." He continued:

> Under the HRA the Minister has no obligation to act on a declaration of incompatibility. If he does not, the complainant's remedy is to take proceedings in Strasbourg where he will be able to deploy the domestic court's judgment to the effect that his Convention rights have been violated. And failure by a Member State of the Council of Europe to give effect to a decision of the European Court of Human Rights sounds at the political level; it is as such not amenable to sanctions in the national courts.

4.3 The *Tovey and Hydes* claims

By early 2011 there were 583 claims from serving prisoners seeking damages for being deprived of the vote and a declaration that their rights under Convention Protocol 1(3) had been breached, and that around 1,000 further claims were anticipated. Anthony Tovey's claim was identified as the lead case and was heard at the High Court on 9 February. The High Court struck out the claims in *Tovey and Hydes v Secretary of State for Justice*. Mr Justice Langstaff concluded:

> 53. ... that there are no reasonable grounds in domestic law for bringing a claim for damages or a declaration for being disenfranchised whilst a prisoner. Statute precludes it. Case-law is against it. European authority is against the payment of compensatory damages in respect of it. A claim for a declaration is not hopeless, but difficult. The fact the Secretary of State (or the State) has not acted to remedy the contravention identified in **Hirst** and **Greens** does not itself

[74] Department for Constitutional Affairs, "Review of the Implementation of the Human Rights Act", July 2006

> give rise to a claim for damages, because the express wording of Statute prevents it. Even if he (or the State) had acted to fulfil the UK's obligations, it is far from certain that Mr. Hydes himself would have had the vote, since there are many ways short of full prisoner enfranchisement which are capable of remedying the breach which **Hirst** identified.
>
> 54. These are all matters of law. On the law, as it stands, the claim by Mr. Hydes cannot hope to succeed. It must therefore be struck out. Alternatively, I would have held that the claim had no reasonable prospect of success upon the same bases (and certainly insofar as it is a claim for damages, do so on the additional ground that the European Court has held there to be sufficient "just satisfaction" without payment of compensation).

Carl Gardner, writing on the HeadofLegal blog on 3 November 2010, thought:

> In terms of practical risks, the real fear is not test cases in our courts – it's lawful in domestic legal terms for the UK to maintain its prisoner voting ban, since section 3 of the Representation of the People Act 1983 is incompatible with human rights (odd and counter-intuitive, I know, but that really is how the Human Rights Act is designed to work). So no prisoner can get damages here. Though it is possible they could get low damages eventually in Strasbourg after their legal cases have failed here.
>
> The real risk was that the UK might just be the first state hauled back before the court for non-compliance, under new "infraction" procedures that came in this year. Unlikely, since two thirds of signatory states to the ECHR would have had to vote to put the UK in the dock (many of whom themselves restrict prisoners from voting), but just to be the first possible "infractee" would have been daft for a country that rightly thinks it's better at human rights than many others who have signed the ECHR.

5 Further reading

- Court of Human Rights Factsheet, "Prisoners' right to vote", February 2011
- House of Commons Political and Constitutional Reform Committee, 5th Report, Political and Constitutional Reform Committee report: Voting by Convicted Prisoners: Summary of Evidence
- *Tovey and Another v Ministry of Justice* [2011] EWHC 271 (QB)
- *The Independent* "Prisoners lose voting compensation bid", Jan Colley, 18 February 2011
- *The Guardian* "Prisoners' vote compensation claims blocked by high court", 18 February 2011
- *Head of Legal*, "Have lawyers really "cleared" the government to defy Strasbourg over prisoners' votes?" Carl Gardner, 18 February 2011. This report has a link to what is claimed to be the advice referred to by the Times newspaper in February 2011. It presents an interesting analysis, particularly on the question of an appeal to the Grand Chamber in *MT and Greens* and the potential for prisoners to use EU law to force the government to allow them to vote in the European Parliament elections in 2014.
- Secretariat of the Committee of Ministers, Communication from the British Government on prisoner voting rights, 8-10 March 2011
- Human Rights Blog
- "Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK", 2011, by Michael Pinto-Duschinsky.

- Withdrawal from the European court of human rights is not a legal problem, Criticisms of the Policy Exchange report distracts from legitimate points made in a political debate masquerading as a legal one
- Rosalind English on the UK Human Rights blog, part of the Guardian Legal Network, 9 February 2011
- Ed Bates, "The Evolution of the European Convention on Human Rights From its Inception to the Creation of a Permanent Court of Human Rights", Oxford University Press, 2010
- The Rt Hon Lord Judge, The Judicial Studies Board Lecture, 2010 Inner Temple 17 March 2010
- Reform of Strasbourg Court: a modest proposal – Aidan O'Neill QC, 28 March 2011 by 1 Crown Office Row
- *German Law Journal* No. 6 1 June 2006 "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine", Ignacio de la Rasilla del Moral
- *Oxford Journal of Legal Studies* 2006 26(4) pp 705-732, "Two Concepts of the Margin of Appreciation" George Letsas
- "The Margin of Appreciation Doctrine and the Principal of Proportionality in the ECHR", Yutaka Arai-Takahashi, 2001
- *European Journal of International Law*, Vol 16 Issue 5 2005, "Toward a General Margin of Appreciation Doctrine in International Law?" Yuval Shany