COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF HIRST v. THE UNITED KINGDOM (NO. 2)

(Application no. 74025/01)

JUDGMENT

STRASBOURG

6 October 2005

This judgment is final but may be subject to editorial revision.

In the case of Hirst v. the United Kingdom (no. 2),

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr L. CAFLISCH,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr K. TRAJA,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs A. MULARONI,
Ms L. MIJOVIĆ,
Mr S.E. JEBENS,
Ms D. JOČIENĖ,
Mr J. ŠIKUTA, *judges*,

and Mr E. FRIBERGH, *Deputy Registrar*,

Having deliberated in private on 27 April and on 29 August 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 74025/01) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr John Hirst ("the applicant"), on 5 July 2001.

2. The applicant, who had been granted legal aid, was represented by Mr E. Abrahamson, a solicitor practising in Liverpool. The United Kingdom Government ("the Government") were represented by their Agents, initially by Mr J. Grainger and subsequently by Ms E. Willmott, both of the Foreign and Commonwealth Office, London.

3. The applicant alleged that as a convicted prisoner in detention he had been subject to a blanket ban on voting in elections. He invoked Article 3 of Protocol No. 1 alone and in conjunction with Article 14, as well as Article 10 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 8 July 2003 it was declared partly admissible by a Chamber of that Section, composed of the following judges: Mr M. Pellonpää, Sir Nicolas Bratza, Mrs V. Strážnická, Mr R. Maruste, Mr S. Pavlovschi, Mr L. Garlicki, Mr J. Borrego Borrego, and also of Mr M. O'Boyle, Section Registrar.

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 December 2003 (Rule 59 § 3). In its judgment of 30 March 2004 ("the Chamber judgment"), the Chamber held unanimously that there had been a violation of Article 3 of Protocol No. 1 and that no separate issues arose under Articles 14 and 10 of the Convention. It also held that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

6. On 23 June 2004 the Government made a request for the case to be referred to the Grand Chamber (Article 43 of the Convention).

7. On 10 November 2004 a panel of the Grand Chamber decided to accept the request for a referral (Rule 73).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

9. The applicant and the Government each filed a memorial. Observations were also received from the Prison Reform Trust, the AIRE Centre and the Government of Latvia, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties replied to those comments at the hearing mentioned below (Rule 44 § 5).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 27 April 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms E. WILMOTT, *Agent*,
Mr R. SINGH, Q.C., *Counsel*,
Ms M. HODGSON,
Mr M. RAWLINGS,
Mr B. DAW, *Advisers*;

(b) *for the applicant*

Ms F. KRAUSE, *Counsel*,
Mr E. ABRAHAMSON, *Solicitor*.

The Court heard addresses by Mr Singh and Ms Krause.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1950.

12. On 11 February 1980, the applicant pleaded guilty to manslaughter on ground of diminished responsibility. His plea of guilty was accepted on the basis of medical evidence that the applicant was a man with a gross personality disorder to such a degree that he was amoral. He was sentenced to a term of discretionary life imprisonment.

13. The applicant's tariff (that part of the sentence relating to retribution and deterrence) expired on 25 June 1994. His continued detention was based on considerations relating to risk and dangerousness, the Parole Board considering that he continued to present a risk of serious harm to the public.

14. The applicant, who is barred by section 3 of the Representation of the People Act 1983 from voting in parliamentary or local elections, issued proceedings in the High Court under section 4 of the Human Rights Act 1998, seeking a declaration that this provision was incompatible with the European Convention on Human Rights.

15. The applicant's application was heard before the Divisional Court on 21 and 22 March 2001, together with the application for judicial review of two other prisoners, Mr Pearson and Mr Feal-Martinez, who had applied for registration as electors and been refused by the Registration Officer and who also sought a declaration of incompatibility.

16. In the Divisional Court judgment dated 4 April 2001, Lord Justice Kennedy noted that section 3 had a long history and cited the Secretary of State's reasons, given in the proceedings, for maintaining the current policy:

> "By committing offences which by themselves or taken with any aggravating circumstances including the offender's character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have a say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative."

Examining the state of practice in other jurisdictions, he observed that in Europe only eight countries, including the United Kingdom, did not give convicted prisoners a vote, while 20 did not disenfranchise prisoners and eight imposed a more restricted disenfranchisement. Reference was made to the United States Supreme Court which had rejected a challenge to the Californian Constitution's disenfranchisement of convicted prisoners (*Richardson v. Ramirez* [1974] 418 US 24). Some considerable attention was given to Canadian precedents, which were relied on by both parties, in particular the Canadian Supreme Court which in the case of *Sauvé v. Canada (No. 1)* ([1992] 2 SCR 438) struck down the disenfranchisement

of all prisoners as too widely drawn and infringing against the minimum impairment rule and the Federal Court of Appeal which upheld in *Sauvé (No. 2)* ([2000] 2 CF) the subsequent legislative provision which restricted the ban to prisoners serving a sentence of two years or more in a correctional institution. While it was noted that the Canadian courts were applying a differently phrased provision in their Charter of Rights and Freedoms, the court commented that the judgment of Linden JA in the second case in the Federal Court of Appeal contained helpful observations, in particular as regarded the danger of the courts usurping the role of parliament. The cases before the European Commission of Human Rights and this Court were also reviewed, the court noting that the Commission had been consistent in its approach in accepting restrictions on persons convicted and detained.

Lord Justice Kennedy concluded:

> "... I return to what was said by the European Court in paragraph 52 of its judgment in Mathieu-Mohin. Of course as far as an individual prisoner is concerned disenfranchisement does impair the very essence of his right to vote, but that is too simplistic an approach, because what Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and 'the free expression of the opinion of the people in the choice of the legislature'. If an individual is to be disenfranchised that must be in the pursuit of a legitimate aim. In the case of a convicted prisoner serving his sentence the aim may not be easy to articulate. Clearly there is an element of punishment, and also an element of electoral law. As the Home Secretary said, Parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to have a say in the way the country is governed. The Working Group said that such prisoners had lost the moral authority to vote. Perhaps the best course is that suggested by Linden JA, namely to leave to philosophers the true nature of this disenfranchisement whilst recognising that the legislation does different things.
>
> The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this court to defer to the legislature. It is easy to be critical of a law which operates against a wide spectrum (e.g. in relation to its effect on post-tariff discretionary life prisoners, and those detained under some provision of the Mental Health Act 1983), but, as is clear from the authorities, those states which disenfranchise following conviction do not all limit the period of disenfranchisement to the period in custody. Parliament in this country could have provided differently in order to meet the objectives which it discerned, and like McLachlin J in Canada, I would accept that the tailoring process seldom admits of perfection, so the courts must afford some leeway to the legislator. As [counsel for the Secretary of State] submits, there is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, either by way of further fine tuning, as was recently done in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts. That applies even to the 'hard cases' of post-tariff discretionary life sentence prisoners... They have all been convicted and if, for example, Parliament were to have said that all those sentenced to life imprisonment lose the franchise for life the apparent anomaly of their position would disappear. ...

> If section 3 (1) of the 1983 Act can meet the challenge of Article 3 [of the First Protocol] then Article 14 has nothing to offer, any more than Article 10."

17. The applicant's claims were accordingly rejected as were those of the other prisoners.

18. On 2 May 2001, an application for permission to appeal was filed on behalf of Pearson and Feal-Martinez, together with a 43-page skeleton argument. On 15 May 2001, Lord Justice Buxton considered the application on the papers and refused permission on the grounds that the appeal had no real prospect of success.

19. On 19 May 2001, the applicant filed an application for permission to appeal. On 7 June 2001, his application was considered on the papers by Lord Justice Simon Brown who refused permission for the same reasons as Lord Justice Buxton in relation to the earlier applications. The applicant's renewed application, together with the renewed applications of Pearson and Feal-Martinez, were refused on 18 June 2001, after oral argument, by Lord Justice Simon Brown.

20. On 25 May 2004, the applicant was released from prison on licence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. Section 3 of the Representation of the People Act 1983 provides:

> "(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence ... is legally incapable of voting at any parliamentary or local election."

22. This section re-enacted without debate the provisions of section 4 of the Representation of the People Act 1969, the substance of which dated back to the Forfeiture Act 1870 of the previous century, which in turn reflected earlier rules of law relating to the forfeiture of certain rights by a convicted "felon" (the so-called "civic death" of the times of King Edward III).

23. The disqualification does not apply to persons imprisoned for contempt of court (section 3(2)a) or to those imprisoned only for default in, for example, paying a fine (section 3(2)c).

24. During the passage through Parliament of the Representation of the People Act 2000, which permitted remand prisoners and unconvicted mental patients to vote, Mr Howarth MP, speaking for the Government, maintained the view that "it should be part of a convicted prisoner's punishment that he loses rights and one of them is the right to vote". The Act was accompanied by a statement of compatibility under section 19 of the Human Rights Act 1998, namely, a statement that in introducing the measure in Parliament the Secretary of State considered its provisions to be compatible with the Convention.

25. Section 4 of the Human Rights Act 1998 provides:

"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

III. RELEVANT INTERNATIONAL MATERIALS

A. International Covenant on Civil and Political Rights ("ICCPR")

26. Relevant provisions of the ICCPR provide:

Article 25

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote..."

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

27. In the General Comment (No. 25(57)) adopted by the Human Rights Committee under Article 40(4) of the ICCPR dated 12 July 1996, the Committee stated, *inter alia*, concerning the right guaranteed under Article 25:

"14. In their reports, State parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote."

B. European Prison Rules (Recommendation No. R (87)3 Council of Europe)

28. These set out the minimum standards to be applied in the conditions of imprisonment, including the principle below:

> "64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this."

C. Recommendation No. R (2003)23 of the Committee of Ministers to member States on the management by prison administrations of life sentence and other long-term prisoners

29. This recommendation, adopted on 9 October 2003, noted the increase in life sentences and aimed to give guidance to member states on the management of long-term prisoners.

30. The aims of the management of such prisoners should be

> "2. ...- to ensure that prisons are safe and secure places for these prisoners ...;
>
> - to counteract the damaging effects of life and long-term imprisonment;
>
> - to increase and improve the possibilities of these prisoners to be successfully resettled and to lead a law-abiding life following their release."

31. General principles included the following:

> "3. Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence (individualisation principle).
>
> 4. Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community (normalisation principle).
>
> 5. Prisoners should be given opportunities to exercise personal responsibility in daily prison life (responsibility principle)."

D. Code of Good Practice in Electoral Matters

32. This document adopted by the European Commission for Democracy through Law (the Venice Commission) at its 51st Plenary Session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002 includes the Commission's guidelines as to the circumstances in which there may be deprivation of the right to vote or to be elected:

> "d. ...

i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions;

ii. it must be provided for by law;

iii. the proportionality principle must be observed; conditions for disenfranchising individuals of the right to stand for election may be less strict than for disenfranchising them;

iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;

v. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law."

E. Law and practice in Contracting States

33. According to the Government's survey based on information obtained from its diplomatic representation, eighteen countries allowed prisoners to vote without restriction (Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, the Former Yugoslav Republic of Macedonia, Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden, Switzerland, Ukraine), in thirteen states all prisoners were barred from or unable to vote (Armenia, Belgium[1], Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia[2], Turkey, the United Kingdom), while in 12 states the right to vote of prisoners could be limited in some other way (Austria[3], Bosnia and Herzegovina[4], France[5], Greece[6], Italy[7], Luxembourg[8], Malta[9], Norway[10], Poland[11], Romania, Spain[12]).

[1] Where in fact the period of disqualification may extend beyond the end of the prison term.
[2] There is no bar but no arrangements are made to enable prisoners to vote.
[3] The vote is removed from prisoners sentenced for more than one year and if they committed the crime with intent.
[4] A restriction on voting applies to prisoners accused of serious violations of international law or indicted before the international tribunal.
[5] Prisoners may vote if the right is given by the court.
[6] Restrictions apply to prisoners sentenced to terms over ten years, while life imprisonment attracts a permanent deprivation of the right to vote. For terms of one to ten years, courts may also restrict votes for one to five years where the conduct shows moral perversity.
[7] Serious offenders and bankrupts with a sentence of five years or more automatically lose the vote, while minor offenders debarred from holding public office lose the right at the discretion of the judge.
[8] Unless the sentencing court removes civil rights as part of sentencing.
[9] Prisoners convicted of a serious crime lose the vote.
[10] Right to vote may be revoked by a court though this is very rare and possibly restricted to treason and national security cases.
[11] Prisoners sentenced to three years or more where the crime is blameworthy (very serious) may lose the right to vote.

34. Other material before the Court indicates that in Romania prisoners may be debarred from voting if the principal sentence exceeds two years, while in Latvia prisoners serving a sentence of imprisonment in penitentiaries are not entitled to vote, as are prisoners in Liechtenstein.

F. Relevant case-law from other States

1. Canada

35. In 1992, the Canadian Supreme Court unanimously struck down a legislative provision barring all prisoners from voting (*Sauvé v. Canada (No. 1)* [1992] 2 SCR 438). Amendments were introduced limiting the ban to prisoners serving a sentence of two years or more. The Federal Court of Appeal upheld the provision. However, following the decision of the Divisional Court in the present case, the Supreme Court on 31 October 2002 in *Sauvé v. the Attorney General of Canada (No. 2)* held by five votes to four that section 51(e) of the Canada Elections Act 1985, which denied the right to vote to every person imprisoned in a correctional institution serving a sentence of two years or more, was unconstitutional as infringing Articles 1 and 3 of the Canadian Charter of Rights and Freedoms:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

> "3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

36. The majority opinion given by McLachlin C.J. considered that the right to vote was fundamental to their democracy and the rule of law and could not be lightly set aside. Limits on it required not deference, but careful examination. The majority found that the Government had failed to identify particular problems that required denying the right to vote and that the measure did not satisfy the proportionality test, in particular as the Government had failed to establish a rational connection between the denial of the right to vote and its stated objectives.

As regarded the objective of promoting civic responsibility and respect for the law, denying penitentiary inmates the right to vote was more likely to send messages that undermined respect for the law and democracy than messages that enhance those values. The legitimacy of the law and the obligation to obey the law flowed directly from the right of every citizen to vote. To deny prisoners the right to vote was to lose an important means of teaching them democratic values and social responsibility and ran counter to

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[12] Unless, which rarely happens the sentencing judge expressly removes the right to vote.

democratic principles of inclusiveness, equality, and citizen participation and was inconsistent with the respect for the dignity of every person that lay at the heart of Canadian democracy and the Charter.

As regarded the second objective of imposing appropriate punishment, it was considered that the Government had offered no credible theory about why it should be allowed to deny a fundamental democratic right as a form of state punishment. Nor could it be regarded as a legitimate form of punishment as it was arbitrary – it was not tailored to the acts and circumstances of the individual offender and bore little relation to the offender's particular crime – and did not serve a valid criminal law purpose, as neither the record nor common sense supported the claim that disenfranchisement deterred crime or rehabilitated criminals.

37. The minority opinion given by Gonthier J. found that the objectives of the measure were pressing and substantial and based upon a reasonable and rational social or political philosophy. The first objective, that of enhancing civic responsibility and respect for the rule of law, related to the promotion of good citizenship. The social rejection of serious crime reflected a moral line which safeguarded the social contract and the rule of law and bolstered the importance of the nexus between individuals and the community. The 'promotion of civic responsibility' might be abstract or symbolic, but symbolic or abstract purposes could be valid of their own accord and must not be downplayed simply for the reason of their being symbolic. As concerned the second objective, the enhancement of the general purposes of the criminal sanction, the measure clearly had a punitive aspect with a retributive function. It was a valid objective for Parliament to develop appropriate sanctions and punishments for serious crime. The disenfranchisement was a civil disability arising from the criminal conviction. It was also proportionate, as the measure was rationally connected to the objectives and carefully tailored to apply to perpetrators of serious crimes. The disenfranchisement of serious criminal offenders served to deliver a message to both the community and the offenders themselves that serious criminal activity would not be tolerated by the community. Society, on this view, could choose to curtail temporarily the availability of the vote to serious criminals to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, were prerequisites to democratic participation. The minority referred to a need for deference to Parliament in its drawing of a line and to be sensitive to the fact that there may be many possible reasonable and rational balances.

2. South Africa

38. On 1 April 1999, in *August and another v. Electoral Commission and others* (CCT8/99: 1999 (3) SA 1), the Constitutional Court of South Africa considered the application of prisoners for a declaration and orders that the Electoral Commission take measures enabling them and other

prisoners to register and vote while in prison. It noted that under the South African Constitution the right of every adult citizen to vote in elections for legislative bodies was set out in unqualified terms and underlined the importance of the right:

> "The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts."

39. The court found that the right to vote by its very nature imposed positive obligations upon the legislature and the executive and that the Electoral Act must be interpreted in a way that gave effect to constitutional declarations, guarantees and responsibilities. It noted that many democratic societies imposed voting disabilities on some categories of prisoners. Although there were no comparable provisions in the Constitution, it recognised that limitations might be imposed upon the exercise of fundamental rights, provided they were *inter alia* reasonable and justifiable. The question of whether legislation barring prisoners would be justified under the Constitution was not raised in the proceedings and it emphasised that the judgment was not to be read as preventing Parliament from disenfranchising certain categories of prisoners. In the absence of such legislation, prisoners had the constitutional right to vote and neither the Commission nor the court had the power to disenfranchise them. It concluded that the Commission was under the obligation to make reasonable arrangements for prisoners to vote.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

40. The applicant complains that he has been disenfranchised, invoking Article 3 of Protocol No. 1 which provides:

> "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."

A. The Chamber judgment

41. The Chamber found that the exclusion from voting imposed on convicted prisoners in detention was disproportionate. It had regard to the fact that it stripped a large group of people of the vote; that it applied

automatically irrespective of length of sentence or the gravity of the offence; and that the results were arbitrary and anomalous, depending on the timing of elections. It further noted that as insofar as the disqualification from voting was to be seen as part of a prisoner's punishment, there was no logical justification for the disqualification to continue in the case of the present applicant, who had completed that part of his sentence relating to punishment and deterrence. It concluded at paragraph 51:

> "The Court accepts that this is an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners' right to vote can still be justified in modern times and if so how a fair balance is to be struck. In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing court should be left with an overriding discretion to deprive a convicted person of his right to vote. The Court would observe that there is no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners. It cannot accept however that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation. The applicant in the present case lost his right to vote as the result of the imposition of an automatic and blanket restriction on convicted prisoners' franchise and may therefore claim to be a victim of the measure. The Court cannot speculate as to whether the applicant would still have been deprived of the vote even if a more limited restriction on the right of prisoners to vote had been imposed, which was such as to comply with the requirements of Article 3 of Protocol No. 1."

B. Arguments of the parties

1. The applicant

42. The applicant adopted the terms of the Chamber judgment, submitting that the Government's allegation that it would require the radical revision of the laws of many Contracting States was misconceived as the judgment was based on the specific situation in the United Kingdom and directed at a blanket disenfranchisement of convicted persons which arose not out of a reasoned and properly justified decision following thorough debate but out of adherence to historical tradition. He also rejected the argument that the Chamber had not given appropriate weight to the margin of appreciation, submitting that on the facts of this case the concept had little bearing.

43. The applicant emphasised that there was a presumption in favour of enfranchisement, which was in harmony with the fundamental nature of democracy. It was not a privilege, as was sometimes asserted, even for prisoners, who continued to enjoy their inviolable rights which could only be derogated from in very exceptional circumstances. The restriction on voting rights did not pursue any legitimate aim. Little thought, if any, had in

fact been given to the disenfranchisement of prisoners by the legislature, the 1983 Act being a consolidating Act adopted without debate on the point; nor had any thorough debate occurred during the passage of the 2000 Act. The domestic court did not examine the lawfulness of the ban either but decided the applicant's case on the basis of deference to Parliament.

44. The reason relied on in Parliament was that the disenfranchisement of a convicted prisoner was considered part of his punishment. The applicant however disputed that punishment could legitimately remove fundamental rights other than the deprivation of liberty and argued that this was inconsistent with the stated rehabilitative aim of prison. There was no evidence that the ban pursued the purported aims nor had any link been shown between the removal of the vote and the prevention of crime or respect for the rule of law. Most courts and citizens were totally unaware that loss of voting rights accompanied the imposition of a sentence of imprisonment. The purported aim of enhancing civic responsibility was raised *ex post facto* and was to be treated with circumspection. Indeed, the applicant argued that the ban took away civic responsibility and eroded respect for the rule of law, serving to alienate prisoners further from society.

45. The blanket ban was also disproportionate, arbitrary and impaired the essence of the right. It was unrelated to the nature or seriousness of the offence and varied in its effects on prisoners depending on whether their imprisonment coincided with an election. It potentially deprived a significant proportion of the population (over 48,000) of a voice or the possibility of challenging, electorally, the penal policy which affected them. In addition, the applicant submitted that, as a post-tariff prisoner, the punishment element of his sentence had expired and he was held on grounds of risk, in which case there could no longer be any punishment-based justification. He pointed to the recently introduced sentence of "intermittent" custody, whereby a person was able to vote during periods of release in the community while being unable to vote while in prison, as undermining the alleged aims of preventing other convicted prisoners from voting.

46. He further referred to a trend in Canada, South Africa and various European states to enfranchise prisoners, claiming that 19 countries operated no ban while eight had only a partial or specific ban. He concluded that there was no convincing reason, beyond punishment, to remove the vote from convicted prisoners and that this additional sanction was not in keeping with the idea that the punishment of imprisonment was the deprivation of liberty and that the prisoner did not thereby forfeit any other of his fundamental rights save in so far as this was necessitated by, for example, considerations of security. In his view, the ban was simply concerned with moral judgment and it was unacceptable, as tantamount to the elected choosing the electorate, for the right to vote to be made subject to the moral judgments imposed by the persons who had been elected.

2. The Government

47. The Government submitted that under Article 3 of Protocol No. 1 the right to vote was not absolute and that a wide margin of appreciation was to be allowed to Contracting States in determining the conditions under which the right to vote was exercised. They argued that the Chamber judgment failed to give due weight to this consideration. In their view, it wrongly thought that the law on voting by prisoners was the product of passive adherence to a historic tradition. They asserted that the policy has been adhered to over many years with the explicit approval of Parliament, most recently in the Representation of the People Act 2000, which was accompanied by a statement of compatibility under the Human Rights Act. The Chamber also failed to give due regard to the extensive variation between Contracting States on the issue of voting by convicted prisoners, ranging from no prohibition to bans extending beyond the term of the sentence. In some thirteen countries prisoners were unable to vote. A variety of approaches was also taken by democratic states outside Europe. The Chamber's judgment was inconsistent with the settled approach of the Convention organs and there was no prior hint of any problem with the kind of restriction adopted by the United Kingdom.

48. Furthermore, the matter had been considered fully by the national courts applying the principles of the Convention under the Human Rights Act 1998, yet the Chamber paid little attention to this fact while concentrating on the views of a court in another country (*Sauvé No. 2*, cited at paragraphs 35-37 above). As regarded the Canadian precedent, they pointed out that the second *Sauvé* case was decided by a narrow majority of 5 to 4, concerned a law, different in text and structure, interpreted by domestic courts to which the doctrine of margin of appreciation did not apply and that there was a strong dissent which was more in accord with the Convention organs' case-law. The South African case (*August v. Electoral Commission*, cited at paragraphs 38-39 above) was not relevant as it concerned practical obstacles to voting, not a statutory prohibition.

49. The Government also considered that the Chamber erred in effectively assessing the compatibility of national law *in abstracto*, overlooking that on the facts of this case, if the United Kingdom were to reform the law and only ban those who had committed the most serious offences, the applicant, convicted of an offence of homicide and sentenced to life imprisonment, would still have been barred. Thus, the finding of a violation was a surprising result, and offensive to many people. The Chamber had furthermore misstated the number of prisoners disenfranchised, including those who were on remand and not affected.

50. The Government argued that the disqualification in this case pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to

have a say in the way such rules were made for the duration of their sentence. Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country. The Council of Europe Recommendation concerning the management of life prisoners relied on by the AIRE Centre in its intervention was not binding and made no reference to voting and in any event the legislation was not incompatible with its principles.

51. The measure was also proportionate as it only affected those who had been convicted of crimes sufficiently serious, in the individual circumstances, to warrant an immediate custodial sentence, excluding those subject to fines, suspended sentences, community service or detention for contempt of court as well as fine defaulters and remand prisoners. Moreover, as soon as prisoners ceased to be detained the legal incapacity was removed. The duration was accordingly fixed by the court at the time of sentencing.

52. As regards the allegedly arbitrary effects, the Government argued that, unless the Court were to hold that there was no margin of appreciation at all in this context, it had to be accepted that a line must be drawn somewhere. Finally, the impact on this particular applicant was not disproportionate since he was imprisoned for life and would not, in any event, have benefited from a more tailored ban, such as that in Austria, affecting those sentenced for over one year. They concluded with their concern that the Chamber had failed to give any explanation as to what steps the United Kingdom would have to take to render its regime compatible with Article 3 of Protocol No. 1 and urged that in the interests of legal certainty Contracting States received detailed guidance.

3. Third party interveners

53. The Prison Reform Trust submitted that the disenfranchisement of sentenced prisoners was a relic from the nineteenth century which dated back to the Forfeiture Act 1870, the origins of which were rooted in a notion of civic death. It argued that social exclusion was a major cause of crime and re-offending and that the ban on voting militated against ideas of rehabilitation and civic responsibility, by further excluding those already on the margins of society and further isolating them from the communities to which they would return on release. It neither deterred crime nor acted as an appropriate punishment. Its recently launched campaign for restoring the vote to prisoners had received wide cross-party support and the idea was also backed by the Anglican and Catholic churches, penal reform groups and the current and former Chief Inspectors of Prisons for England and Wales, the President of the Prison Governors' Association, as well as many senior managers in the Prison Service.

54. The AIRE Centre drew attention to the Council of Europe Recommendation on the management by prison administrations of life

sentence and other long-term prisoners (see paragraphs 29-31 above), which aimed to give guidance to member States in counteracting the negative effects of long term imprisonment and preparing prisoners for life in the community on release. It referred to three principles contained in the Recommendation: the "normalisation principle", the "responsibility principle" and the "individualisation principle" (see paragraph 31 above). It argued that although there was no express reference to the right of prisoners to vote these principles supported the extension of the vote to prisoners by fostering their connection with society, increasing awareness of their stake in society and taking into account their personal circumstances and characteristics.

55. The Latvian Government were concerned that the Chamber's judgment would have a horizontal effect on other countries which imposed a blanket ban on convicted prisoners voting in elections. They submitted that States should in this area be afforded a wide margin of appreciation, in particular taking into account the historical and political evolution of the country and that the Court was not competent to replace the view of a democratic country with its own view as to what was in the best interests of democracy. In their view the Chamber had failed to pay enough attention to the preventive aspect of the voting ban, namely in the general sense of combating criminality and in avoiding that those who have committed serious offences participate in decision-making that may result in bringing to power individuals or groups that are in some way related to criminal structures. Moreover, the Chamber failed to appreciate that in modern systems of criminal justice imprisonment was used as a last resort and that although the voting ban was automatic it still related to the assessment of the crime itself and the convict's personality.

B. The Court's assessment

1. General principles

56. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom.

57. However, having regard to the preparatory work to Article 3 of the Protocol and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, pp. 22-23, §§ 46-51). Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States'

commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference (*Mathieu-Mohin*, § 50).

58. The Court has had frequent occasion to underline the importance of democratic principles underlying the interpretation and application of the Convention (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, § 45) and it would use this occasion to emphasise that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see also the importance of these rights as recognised internationally, Relevant International Materials, paragraphs 26-39 above).

59. As pointed out by the applicant, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle (*Mathieu-Mohin*, § 51, citing *X. v. Germany*, no. 2728/66, Commission decision of 6 October 1967, Collection 25, pp. 38-41).

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be given a margin of appreciation in this sphere.

61. There has been much discussion of the width of this margin in the present case. The Court would re-affirm that the margin in this area is wide (*Mathieu-Mohin*, § 52, and more recently, *Matthews v. United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV, and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.

62. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin*, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and

effectiveness of an electoral procedure aimed at identifying the will of people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (*Hilbe v. Liechtenstein* (dec.) no. 31981/96, ECHR 1999-VI, *Melnychenko v. Ukraine*, no. 17707/02, § 56, ECHR 2004-X). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis*, *Aziz v. Cyprus*, no. 669949/01, § 28, ECHR 2004-V).

2. Prisoners

63. The present case highlights the status of the right to vote of convicted prisoners who are detained.

64. The case-law of the Convention organs has, in the past, accepted various restrictions on certain convicted persons.

65. In some early cases, the Commission considered that it was open to the legislature to remove political rights from persons convicted of "uncitizenlike 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 (no. 6573/74, Commission decision of 19 December 1974, Decisions and Reports (DR) 1, p. 87, and no. 9914/82, Commission decision of 4 July 1983, DR 33, p. 245). In *Patrick Holland v. Ireland* (no. 24827/94, Commission decision of 14 April 1998, DR 93, 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 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.

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 (*M.D.U. v. Italy*, no. 58540/00, decision of 28 January 2003).

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.

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*, 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*, 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 was therefore not in contradiction of a previous judgment of the Court; on the contrary, the Chamber sought to apply the precedent of *Mathieu-Mohin* 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; *Van der Ven v. the Netherlands*, no. 50901/99, ECHR 2003-II); they continue to enjoy the right to respect for family life (*Ploski v. Poland*, no. 26761/95, judgment of 12 November 2002; *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, §§ 126-145, ECHR 2003-XII, *T. v. the United Kingdom*, no. 8231/78, Commission report of 12 October 1983, DR 49, p. 5, §§ 44-84), the right to practise their religion (*Poltoratskiy v. Ukraine*, no. 38812/97, §§ 167-171, ECHR 2003-V), the right of effective access to a lawyer or to court for the purposes of Article 6 (*Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, no. 80; *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 report of 13 December 1979, DR 24, p. 5; *Draper v. the United Kingdom*, no. 8186/78, Commission report of 10 July 1980, DR 24, p. 72). Any restrictions on these other rights require to 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*, cited above, §§ 99-105, where broad restrictions on the right of prisoners to correspond fell foul of Article 8 but stopping of specific letters, containing threats or other objectionable

references were justifiable in the interests of the prevention of disorder or crime).

70. There is, therefore, no question 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 are 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, no. 6573/74, cited above; and, *mutatis mutandis*, *Glimmerveen and Hagenbeek v. the Netherlands,* applications 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, however, not be undertaken 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.

3. Application in the present case

72. Turning to this application, the Court recalls that the applicant, sentenced to life imprisonment for manslaughter, was disenfranchised during his period of detention by section 3 of the 1983 Act which applied to persons convicted and serving a custodial sentence. The Government argued that the Chamber erred in its approach, claiming that it had assessed the compatibility of the legislation with the Convention in the abstract without consideration of whether removal of the vote from the applicant as a person convicted of a serious offence and sentenced to life imprisonment disclosed a violation. The Court does not accept this criticism. The applicant's complaint was in no sense an *actio popularis*. He was directly and immediately affected by the legislative provision of which complaint is made and in these circumstances the Chamber was justified in examining

the compatibility with the Convention of such a measure, without regard to the question whether if the measure had been framed otherwise and in a way which was compatible with the Convention, the applicant might still have been deprived of the vote. The Divisional Court similarly examined the compatibility with the Convention of the measure in question. It would not in any event be right for the Court to assume that, if Parliament were to amend the current law, restrictions on the right to vote would necessarily still apply to post-tariff life prisoners or to conclude that such an amendment would necessarily be compatible with Article 3 of Protocol No. 1.

73. The Court will therefore determine whether the measure in question pursued a legitimate aim in a proportionate manner having regard to the principles identified above.

a. Legitimate aim

74. The Court would recall that Article 3 of Protocol No.1 does not, as other provisions of the Convention, specify or limit the aims which a measure must pursue. A wider range of purposes may therefore be compatible with Article 3 (see, for example, *Podkolzina*, cited above, § 34). The Government have submitted that the measure pursues the aim of preventing crime by sanctioning the conduct of convicted prisoners and also the aim of enhancing civic responsibility and respect for the rule of law. The Court would note that at the time of the passage of the latest legislation the Government stated that the aim of the bar on convicted prisoners was to confer an additional punishment. This was also the position espoused by the Secretary of State in the domestic proceedings brought by the applicant. While the primary emphasis at the domestic level may perhaps have been the idea of punishment, it may nevertheless be considered as implied in the references to the forfeiting of rights that the measure is meant to give an incentive to citizen-like conduct.

75. Although rejecting the notion that imprisonment after conviction involves the forfeiture of rights beyond the right to liberty, and especially the assertion that voting is a privilege not a right (see paragraph 59 above), the Court accepts that section 3 may be regarded as pursuing the aims identified by the Government. It recalls that the Chamber in its judgment expressed reservations as to the validity of these aims, citing the majority opinion of the Canadian Supreme Court in *Sauvé No. 2* (see paragraphs 44-47 of the Chamber judgment). However, whatever doubt there may be as to the efficacy of achieving these aims through a bar on voting, the Court finds no reason in the circumstances of this application to exclude these aims as untenable or *per se* incompatible with the right guaranteed under Article 3 of Protocol No. 1.

b. Proportionality

76. The Court recalls 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.

77. The Government have argued that the measure was proportionate, pointing out *inter alia* that it only affected some 48,000 prisoners (not the 70,000 stated in the Chamber judgment which omitted to take into account prisoners on remand who were no longer under any ban) and submitting that the ban was in fact restricted in its application as it affected only those convicted of crimes serious enough to warrant a custodial sentence and not including those detained on remand, for contempt of court or default in payment of fines. On the latter point, the Latvian Government have also placed emphasis on the fact that in Contracting States imprisonment was the last resort of criminal justice (paragraph 55 above). The Court, firstly, does not regard the difference in numbers identified above to be decisive. The fact remains that it is a significant figure and it cannot be claimed that the bar is negligible in its effects. Secondly, while it is true that there are categories of detained persons unaffected by the bar, it nonetheless includes a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Further, the Court observes that, even in the case of offenders whose offences are sufficiently serious to attract an immediate custodial sentence, whether the offender is in fact deprived of the right to vote will depend on whether the sentencing judge imposes such a sentence or elects for some other form of disposal, such as a community sentence. In this regard, it may be noted that in sentencing the criminal courts in England and Wales make no reference to disenfranchisement and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of any individual case and the removal of the right to vote.

78. The width of the margin of appreciation has been emphasised by the Government which argued that where the legislature and domestic courts have considered the matter and there is no clear consensus in Contracting States, it must be within the range of possible approaches to remove the vote from any person whose conduct was so serious as to merit imprisonment.

79. As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended

that a convicted prisoner should not be entitled to vote. It is also true that the Working Party, which recommended the amendment to the law to allow unconvicted prisoners to vote, recorded that successive Governments had taken the view that convicted prisoners had lost the moral authority to vote and did not therefore argue for a change in the legislation. It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.

80. It is also evident from the judgment of the Divisional Court that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was in general seen as a matter for Parliament and not for the national courts. The court did not therefore undertake any assessment of proportionality of the measure itself. It may also be noted that the court found support in the decision of the Federal Court of Appeal in *Sauvé No. 2*, which was later overturned by the Canadian Supreme Court.

81. As regards the existence or not of any consensus among Contracting States, the Court would note that, although there is some disagreement about the state of the law in certain States, it is undisputed that the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote. It may also be said that the law in the United Kingdom is less far-reaching than in certain other States. Not only are exceptions made for persons committed to prison for contempt of court or for default in paying fines, but unlike the position in some countries, the legal incapacity to vote is removed as soon as the person ceases to be detained. However the fact remains that 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. Even on the Government's own figures the number of such States does not exceed 13. Moreover, and even if no common European approach to the problem can be discerned, this cannot of itself be determinative of the issue.

82. Therefore, 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 Act of 2000 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.

83. Turning to the Government's comments concerning the lack of guidance from the Chamber as to what, if any, restrictions on the right of convicted prisoners to vote would be compatible with the Convention, the Court notes that its function is in principle to rule on the compatibility with the Convention of the existing measures. It is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention (see, among other authorities, *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-II; *Öcalan v. Turkey* [GC], no. 46221/99, § 210, 2005-...). In cases where a systemic violation has been found the Court has, with a view to assisting the respondent State to fulfil its obligations under Article 46, indicated the type of measure that might be taken to put an end to the situation found to exist (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, §§ 193-194, ECHR 2004-...). In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see *Assanidze,* cited above, § 202).

84. In a case such as the present, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1 (see, for example, the cases concerning procedures governing the continued detention of life prisoners, where Court case-law and domestic legislation have evolved progressively: *Thynne, Wilson and Gunnell v. the United Kingdom*, judgment of 25 October 1990, Series A no. 190-A, *Singh v. the United Kingdom*, judgment of 21 February 1996, *Reports* 1996-I, *Stafford v. the United Kingdom* [GC], no. 46295/99, ECHR 2002-IV).

85. The Court concludes that there has been a violation of Article 3 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

86. The applicant complains that he is discriminated against as a convicted prisoner, invoking Article 14 which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

87. Having regard to the conclusion above under Article 3 of Protocol No. 1 to the Convention, the Court, like the Chamber, considers that no separate issue arises under Article 14.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

88. The applicant complains that the disenfranchisement prevents him from exercising his right to freedom of expression through voting, invoking Article 10 of the Convention which provides as relevant:

"1. Everyone has the right to freedom of expression. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

89. The Court considers that Article 3 of Protocol No. 1 may be regarded as the *lex specialis* as regards the exercise of the right to vote and, like the Chamber, finds that no separate issue arises under Article 10 in the present case.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

91. The applicant claimed 5,000 pounds sterling (GBP) for suffering and distress caused by the violation.

92. The Government were of the view that any finding of a violation should in itself constitute just satisfaction for the applicant. If alternatively the Court were to make an award, it considered the amount should not be more than GBP 1,000.

93. The Chamber found as follows (see paragraph 60 of the Chamber judgment):

> "The Court has considered below the applicant's claims for his own costs in the proceedings. As regards non-pecuniary damage, the Court notes that it will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the right to vote in compliance with this judgment. In the circumstances, it considers that this may be regarded as providing the applicant with just satisfaction for the breach in this case."

94. Like the Chamber, the Court does not award any monetary compensation under this head.

B. Costs and expenses

95. The applicant claimed the costs incurred in the High Court and Court of Appeal in seeking redress in the domestic system in relation to the breach of his rights, namely his solicitors' and counsel's fees and expenses in the High Court of GBP 26,115.82 and in the Court of Appeal of GBP 13,203.64. For costs in Strasbourg, the applicant had claimed before the Chamber GBP 18,212.50 for solicitors' and counsel's fees and expenses. For proceedings before the Grand Chamber since the Chamber judgment, the applicant claimed additional reimbursement of GBP 20,503.75 for his solicitors' and counsel's fees and expenses broken down to GBP 7,800 for 26 hours of work (at GBP 300 an hour), GBP 1,650 for 55 letters and phone calls (at GBP 30 each), GBP 1,653.75 for value-added tax (VAT), GBP 8,000 for counsel's fees during two days in connection with the hearing and 20 hours of work plus GBP 1,400 for value-added tax. He also claimed some GBP 300 as out of pocket expenses (the cost of telephone calls etc).

96. The Government submitted that, as the applicant was legally aided during the domestic proceedings, he did not actually incur any costs. To the extent that the applicant appeared to be claiming that further sums should be awarded that were not covered by legal aid, they submitted that any such further costs should not be regarded as necessarily incurred or reasonable as to quantum and that they should be disallowed. As regards the additional costs claimed for the Grand Chamber proceedings in Strasbourg the Government submitted that the hourly rate (GBP 300) charged by the solicitor was excessive, as was the flat rate for correspondence. No more than GBP 4,000 should be awarded in respect of solicitors' fees. As regards counsel's fees the hourly rate was also excessive, as was the number of hours charged for the preparation of a very short pleading. No more than GBP 3,000 should be recoverable.

97. The Chamber found as follows (see paragraphs 63 and 64 of the Chamber judgment):

> "The Court recalls that that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, 25 March 1999, § 79, and *Smith and Grady*

v. the United Kingdom (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000-IX). This may include domestic legal costs actually and necessarily incurred to prevent or redress the breach of the Convention (see, for example, *I.J.L., G.M.R. and A.K.P. v. the United Kingdom* (*Article 41*), nos. 29522/95, 30056/96 and 30574/96, § 18, 25 September 2001). Since however in the present case the costs of the applicant's legal representation in his application to the High Court and Court of Appeal contesting his disenfranchisement were paid by the legal aid authorities, it cannot be said that he incurred those expenses and he has not shown that he was required, or remains liable, to pay his representatives any further sums in that regard. This application before the Court cannot be used as a retrospective opportunity to charge fees above the rates allowed by domestic legal aid scales.

As regards the costs claimed for the proceedings in Strasbourg, the Court notes the Government's objections and finds that the claims may be regarded as unduly high, in particular as regards the claim for three days for a hearing which lasted one morning and the lack of itemisation of work done by the solicitor. While some complaints were declared inadmissible, the applicant's essential concern and the bulk of the argument centred on the bar on his right to vote, on which point he was successful under Article 3 of Protocol No. 1. No deduction has therefore been made on that account. Taking into account the amount of legal aid paid by the Council of Europe and in light of the circumstances of the case, the Court awards 12,000 euros (EUR) inclusive of VAT for legal costs and expenses. In respect of the applicant's own claim for expenses in pursuing his application, the Court notes the lack of any itemisation but accepts that some costs have been incurred by him. It awards to the applicant himself EUR 144."

98. The Court maintains the Chamber finding that no award for costs in domestic proceedings is appropriate. Although significant work was necessarily involved in preparation for and attendance at the Grand Chamber hearing, it finds the amount claimed for the period after the Chamber judgment excessive and unreasonable as to quantum. Taking into account the amount paid by way of legal aid by the Council of Europe, it increases the award for legal costs and expenses to a total of 23,000 euros (EUR), inclusive of VAT. For the applicant's own out of pocket expenses, which are largely unitemised, it awards EUR 200.

C. Default interest

99. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to five that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

2. *Holds* unanimously that no separate issue arises under Article 14 of the Convention;

3. *Holds* unanimously that no separate issue arises under Article 10 of the Convention;

4. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

5. *Holds* by twelve votes to five
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:
      (i) EUR 23,000 **(**twenty three thousand euros) in respect of costs and expenses incurred by the applicant's legal representatives in the Strasbourg proceedings;
      (ii) EUR 200 (two hundred euros) in respect of his own costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 October 2005.

Erik Fribergh	Luzius Wildhaber
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate and joint opinions are annexed to this judgment:

(a) concurring opinion of Mr Caflisch;
(b) joint concurring opinion of Mrs Tulkens and Mr Zagrebelsky;
(c) joint dissenting opinion of Mr Wildhaber, Mr Costa, Mr Lorenzen, Mr Kovler and Mr Jebens;
(d) dissenting opinion of Mr Costa.

L.W.
E.F.

CONCURRING OPINION OF JUDGE CAFLISCH

1. On the whole I agree with both the Court's finding and its reasoning. I should like, however, to comment on some of the arguments made by the respondent State and by one of the third-party interveners. I shall add a few words on what restrictions may or may not be imposed on the individual rights secured by Article 3 of Additional Protocol No. 1.

2. There may well be, in contemporary democratic States, a presumption of universal suffrage. This does not mean, however, that the State is unable to restrict the right to vote, to elect and to stand for election, and it may well be that the Contracting States enjoy a "wide" margin of appreciation in this respect – although this expression carries little meaning, except to suggest that States have some leeway. There must, however, be limits to those restrictions; and it is up to this Court, rather than the Contracting Parties, to determine whether a given restriction is compatible with the individual right to vote, to elect and to stand for election. To make this determination, the Court will rely on the legitimate aim pursued by the measure of exclusion and on the proportionality of the latter (see *Mathieu-Mohin and Clerfait v. Belgium*, judgment of 2 March 1987, Series A, No. 113, p. 23, § 52). In other, more general words, more would have been said by asserting that measures of exclusion must be "reasonable" than by referring to a "wide" margin of appreciation.

3. This has not, it seems, been fully appreciated by the respondent State and even less by the Latvian Government as a third-party intervener. The United Kingdom Government argued that the Chamber's judgment was inconsistent with the Convention organs' settled approach and that there was no prior hint at any problem with the kind of restrictions adopted by the United Kingdom (judgment, § 47); it also pointed out that the matter had been fully considered by the domestic courts applying Convention principles under the Human Rights Act, 1998. Accordingly, it criticised the Chamber for having drawn its own conclusions instead of relying on national traditions or the views of the national courts. This argument was taken up and carried one step further by the Latvian Government which asserted (judgment, § 55) that this Court was not entitled to replace the views of a democratic country by its own view as to what was in the best interests of democracy. This assertion calls for two comments. First, the question to be answered here is one of law, not of "best interests". Second, and more importantly, the Latvian thesis, if accepted, would suggest that all this Court may do is to follow in the footsteps of the national authorities. This is a suggestion I cannot and do not accept. Contracting States' margin of appreciation in Article 3 matters may indeed, as has been contended, be relatively wide; but the determination of its limits cannot be virtually

abandoned to the State concerned and must be subject to "European control".

4. The United Kingdom Government also suggested that the policy behind the relevant legislation rested on a tradition explicitly supported by Parliament, most recently in the Representation of the People Act, 2000. It criticised the Chamber for having assessed that legislation *in abstracto*, without taking account of the facts of the case: even if the United Kingdom were to reform the law and limit its application to those who have committed the most serious crimes, the applicant, as he had been convicted of homicide and sentenced to life imprisonment, would still be disenfranchised. Accordingly, concluded the Government, the finding of a violation would be a surprise and offensive to many (judgment, §§ 47 and 49). That may well be so, but the decisions taken by this Court are not made to please or indispose members of the public, but to uphold human rights principles.

5. The United Kingdom Government further contended that disenfranchisement in the present case was in harmony with the objectives of preventing crime and punishing offenders, thereby enhancing civic responsibility (judgment, § 50). I doubt that very much. I believe, on the contrary, that participation in the democratic process may serve as a first step toward re-socialisation.

6. Finally there is the argument that the situation in the United Kingdom was substantially improved by the passage of the Representation of the People Act, 2000, especially because that Act enables remand prisoners to vote (judgment, § 51). This argument seems wrong. Detainees on remand enjoy the presumption of innocence under Article 6 (1) of the Convention. To destroy that presumption by depriving detainees on remand of their voting rights amounts to a violation of that provision. All that the new legislation achieved in this respect was to remove a potential for violations of the presumption of innocence.

7. It might have been useful that the Court, in addition to finding a violation of Article 3 of Additional Protocol No. 1, indicate some of the parameters to be respected by democratic States when limiting the right to participate in votes or elections. These parameters should, in my view, include the following elements:

8. The measures of disenfranchisement that may be taken must be prescribed by law.

a. The latter cannot be a blanket law: it may not, simply, disenfranchise the author of every violation sanctioned by a prison term. It must, in other words, be restricted to major crimes, as rightly pointed out by the Venice Commission in its Code of Good Practice in Electoral Matters (judgment, § 32). It cannot simply be assumed that whoever serves a sentence has breached the social contract.

b. The legislation in question must provide that disenfranchisement, as a complementary sanction, is a matter to be decided by the judge, not the executive. This element, too, will be found in the Code of Good Practice adopted by the Venice Commission.

c. Finally – and this may be the essential point for the present case – in those Contracting States where the sentence may comprise a punitive part (retribution and deterrence) and a period of detention based on the risk inherent in the prisoner's release – the disenfranchisement must remain confined to the punitive part and may not be extended to the remainder of the sentence. In the instant case this would indeed seem to be confirmed by the fact that retribution is one of the reasons adduced by the United Kingdom legislator for enacting the legislation discussed here, and certainly a central one. This reason is no longer relevant, therefore, as soon as a person ceases to be detained for punitive purposes. This is, in my view, a major argument for holding that Article 3 of Additional Protocol No. 1 had been breached.

9. Two out of the above four elements are contained in the Code of Good Practice of the Venice Commission: I say this not because I consider that Code to be binding but because, in the subject-matter considered here, these elements make eminent sense.

JOINT CONCURRING OPINION OF JUDGES TULKENS AND ZAGREBELSKY

We share the view of the majority of the Court that the applicant's disenfranchisement as a result of his serving a prison sentence constitutes a violation of Article 3 of Protocol No. 1 to the Convention. We entirely agree with the general principles set out in the judgment which make a fundamental contribution to the question of the right of convicted prisoners to vote (§§ 56 to 71)**.** However, as regards the application of these principles in the present case, to some extent, our reasoning differs from the one developed in the judgment.

At the time the applicant was deprived of his right to vote, the law provided for all prisoners to lose the right to vote. It was not until the 2000 reform that remand prisoners (and mental patients who had not been convicted) were allowed to vote. Since 2000 all convicted prisoners are banned from voting for so long as they remain in prison, irrespective of the offence they have been convicted of, with the minor exceptions of persons imprisoned for contempt of court or for defaulting on fines.

In our view, the real reason for this provision is the fact that the person is in prison. This was obvious before the 2000 reform, when even the question of conviction was irrelevant. But even after that reform the extremely wide scope of criminal offences for which prisoners may be banned from voting, irrespective of the gravity or nature of the offence, shows that the rationale for their disqualification is the fact that they are serving a prison sentence. They would not lose the right to vote if they were not in prison.

We admit that a prison sentence may reflect a judge's negative evaluation of the offence and the offender's character, which may in turn exceptionally justify an additional penalty such as the loss of the right to vote. However, the reasons for not handing down an immediate custodial sentence may vary. A defendant's age, health or family situation may result in his or her receiving a suspended sentence. Thus the same criminal offence and the same criminal character can lead to a prison sentence or to a suspended sentence. In our view this, in addition to the failure to take into consideration the nature and gravity of the offence, demonstrates that the real reason for the ban is the fact that the person is in prison.

This is not an acceptable reason. There are no practical reasons for denying prisoners the right to vote (remand prisoners do vote) and prisoners in general continue to enjoy the fundamental rights guaranteed by the Convention, except for the right to liberty. As to the right to vote there is no room in the Convention for the old idea of "civic death" that lies behind the ban on convicted prisoners' voting.

We would conclude, therefore, that the failure of the United Kingdom legal system to take into consideration the gravity and nature of the offence of which the prisoner has been convicted is only one of the aspects to be

taken into account. The fact that by law a convicted person's imprisonment is the ground for his or her disenfranchisement is, in our view, conclusive. The lack of a rational basis for that provision is a sufficient reason for finding a violation of the Convention, without there being any need to conduct a detailed examination of the question of proportionality.

The different approach taken by the majority of the Court is, in our view, open to some of the criticism mentioned by Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in their separate opinion. In particular, we note that the discussion about proportionality has led the Court to evaluate not only the law and its consequences, but also the parliamentary debate (see paragraph 80 of the judgment). This is an area in which two sources of legitimacy meet, the Court on the one hand and the national parliament on the other. This is a difficult and slippery terrain for the Court in view of the nature of its role, especially when it itself accepts that a wide margin of appreciation must be given to the Contracting States.

JOINT DISSENTING OPINION OF JUDGES WILDHABER, COSTA, LORENZEN, KOVLER AND JEBENS

1. We are not able to agree with the conclusion of the majority that there has been a violation of Article 3 of Protocol No. 1 because convicted prisoners, under the legislation of the United Kingdom, are prevented from voting while serving their sentence. Our reasons for not finding a violation are as follows.

2. In accordance with Article 3 of Protocol No. 1, the Contracting States are obliged "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". The wording of this Article is different from nearly all other substantive clauses in the Convention and its Protocols in that it does not directly grant individual rights and contains no other conditions for the elections, including in relation to the scope of a right to vote, than the requirement that "the free expression of the opinion of the people" must be ensured. This indicates that the guarantee of a proper functioning of the democratic process was considered to be of primary importance. This is also why the Commission in its early case-law did not consider that the Article granted individual rights (No. 530/59, dec. 4.1.1960, Coll. 2; No. 1028/61, dec. 18.9.1961, Coll. 6, 69, p. 78). The Commission then changed its approach, and the Court subsequently held that the Article does grant individual rights, including the right to vote, while at the same time recognising that such individual rights are not absolute but are open to "implied limitations" leaving the Contracting States "a wide margin of appreciation", which is nonetheless subject to the Court's scrutiny. The Court must therefore satisfy itself that limitations do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness (see, firstly, *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, p. 23, § 52, and, more recently, *Py v. France*, no. 66289/01, §§ 45-47, ECHR 2005-). Even though Article 3 of Protocol No. 1 contains no clause stating the conditions for restrictions, such as can be found, for example, in the second paragraphs of Articles 8-11 of the Convention, the Court has further held that any restriction must pursue a legitimate aim and that the means employed must not be disproportionate. Like the majority we will limit our examination to these two conditions, thus implicitly accepting that the United Kingdom legislation does not in itself impair the very essence of the right to vote and deprive it of its effectiveness, as was found in *Aziz v. Cyprus* (no. 69949/01, §§ 29-30, ECHR 2004-V), where an ethnic minority of the Cypriot population was barred from voting.

3. As Article 3 of Protocol No. 1 does not prescribe what aims may justify restrictions of the protected rights, such restrictions cannot in our

opinion be limited to the lists set out in the second paragraphs of Articles 8-11. Furthermore, we would point out that the Convention institutions in their case-law have to date been very careful not to challenge the aims relied upon by the respondent Government to justify a restriction of a right under the Convention or its Protocols. This has also been the case in respect of restrictions on the right to vote. Thus, in its decision of 4 July 1983 in *H. v. the Netherlands* (no. 9914/82, Decisions and Reports. 33, p. 242) the Commission found that such a restriction concerning persons sentenced to a term of imprisonment exceeding one year could be explained "by the notion of dishonour that certain convictions carry with them for a specific period, which may be taken into consideration by legislation in respect of the exercise of political rights". In *M.D.U. v. Italy* ((dec.), no. 58540/00, 28 January 2003) the Court accepted that a ban on voting for a two-year period imposed in connection with a conviction for tax fraud served "the proper functioning and preservation of the democratic regime". Accordingly, we have no difficulty in accepting that the restriction of prisoners' right to vote under the United Kingdom legislation was legitimate for the purposes of preventing crime, punishing offenders and enhancing civic responsibility and respect for the rule of law, as submitted by the respondent Government. However, since, unlike the Chamber, which left the question open, the majority accept that the restriction in question served legitimate aims, there is no need for us to pursue this question any further.

4. As stated above, the Court has consistently held in its case-law that the Contracting States have a wide margin of appreciation in this sphere. The Court has furthermore accepted that the relevant criteria may vary according to historical and political factors peculiar to each State. In the recent *Py v. France* judgment (cited above, § 46) the Court thus stated:

> "Contracting States have a wide margin of appreciation, given that their legislation on elections varies from place to place and from time to time. The rules on granting the right to vote, reflecting the need to ensure both citizen participation and knowledge of the particular situation of the region in question, vary according to the historical and political factors peculiar to each State. The number of situations provided for in the legislation on elections in many member States of the Council of Europe shows the diversity of possible choice on the subject. However, none of these criteria should in principle be considered more valid than any other provided that it guarantees the expression of the will of the people through free, fair and regular elections. For the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another."

In the light of such considerations Article 3 of Protocol No. 1 cannot be considered to preclude restrictions of the right to vote that are of a general character, provided that they are not arbitrary and do not affect "the free expression of the opinion of the people", examples being conditions concerning age, nationality**,** or residence (see, for example, *Hilbe v.*

Liechtenstein (dec.), no. 31981/96, ECHR 1999-VI, and *Py*, cited above). Unlike the majority we do not find that a general restriction on prisoners' right to vote should in principle be judged differently, and the case-law of the Convention institutions to date does not support any other conclusion, as appears from the analysis set out in the majority's opinion (see paragraphs 65-69 of the judgment). Nor do we find that such a decision needs to be taken by a judge in each individual case. To the contrary, it is obviously compatible with the guarantee of the right to vote to let the legislature decide such issues in the abstract.

5. The majority have reaffirmed that the margin of appreciation in this area is wide, and have rightly paid attention to the numerous ways of organising and running electoral systems and the wealth of differences in this field in terms of, *inter alia*, historical development, cultural diversity and political thought within Europe. Nonetheless, the majority have concluded that a general restriction on voting for persons serving a prison sentence "must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be" (see paragraph 82 of the judgment). 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. We are unable to agree that such reasons have been adduced.

6. It has been part of the Court's reasoning in some cases in recent years to emphasise its role in developing human rights and the necessity to maintain a dynamic and evolutive approach in its interpretation of the Convention and its Protocols in order to make reforms or improvements possible (see, for example, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI). The majority have not made reference to this case-law, but that does not in our opinion change the reality of the situation that their conclusion is in fact based on a "dynamic and evolutive" interpretation of Article 3 of Protocol No 1.

We do not dispute that it is an important task for the Court to ensure that the rights granted by the Convention system comply with "present-day conditions", and that accordingly a "dynamic and evolutive" approach may in certain situations be justified. 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.

The majority submit that "it is a minority of Contracting States in which a blanket restriction on the right of serving prisoners to vote is imposed or in which there is no provision allowing prisoners to vote" (see paragraph 81 of the judgment). The judgment of the Grand Chamber – which refers in detail to two recent judgments of the Canadian Supreme Court and the Constitutional Court of South Africa – unfortunately contains only summary information concerning the legislation on prisoners' right to vote in the Contracting States.

According to the information available to the Court, some 18 countries out of the 45 Contracting States have no restrictions on prisoners' right to vote (see paragraph 33). On the other hand, in some 13 States prisoners are not able to vote either because of a ban in their legislation or *de facto* because appropriate arrangements have not been made. It is essential to note that in at least four of those States the disenfranchisement has its basis in a recently adopted Constitution (Russia, Armenia, Hungary and Georgia). In at least 13 other countries more or less far-reaching restrictions on prisoners' right to vote are prescribed in domestic legislation, and in four of those States the restrictions have a constitutional basis (Luxembourg, Austria, Turkey and Malta). The finding of the majority will create legislative problems not only for States with a general ban such as exists in the United Kingdom. As the majority have considered that it is not the role of the Court to indicate what, if any, restrictions on the right of serving prisoners to vote would be compatible with the Convention (see paragraph 83), the judgment in the present case implies that all States with such restrictions will face difficult assessments as to whether their legislation complies with the requirements of the Convention.

Our conclusion is that the legislation in Europe shows that there is little consensus about whether or not prisoners should have the right to vote. In fact, the majority of member States know such restrictions, although some have blanket and some limited restrictions. Thus, the legislation in the United Kingdom cannot be claimed to be in disharmony with a common European standard.

7. Furthermore, the majority attach importance to an alleged lack of evidence that the Parliament of the United Kingdom "has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a serving prisoner to vote" (see paragraph 80). It is, however, undisputed that a multi-party Speakers Conference on Electoral Law in 1968 unanimously recommended that a convicted person should not be entitled to vote. We also note that the Government's proposal to amend the Representation of the People Act 2000 to permit remand prisoners and unconvicted mental patients to vote was based on the opinion that it should be part of a convicted prisoner's punishment to lose, *inter alia*, the right to

vote. Had a majority of the members of Parliament disagreed with this opinion, it would have been open to them to decide otherwise. The majority of the Court have held – as did the Chamber – that no importance could be attached to this as "it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards" (see paragraph 79). We disagree with this objection as it is not for the Court to prescribe the way in which national legislatures carry out their legislative functions. It must be assumed that section 3 of the Representation of the People Act 2000 reflects political, social and cultural values in the United Kingdom.

8. Regarding in particular the requirement that any restrictions must not be disproportionate, we consider it essential to underline that the severity of the punishment not only reflects the seriousness of the crime committed, but also the relevance and weight of the aims relied upon by the respondent Government when limiting voting rights for convicted persons. We do not rule out the possibility that restrictions may be disproportionate in respect of minor offences and/or very short sentences. However, there is no need to enter into this question in the circumstances of the present case. The Court has consistently held in its case-law that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention. It is, in our opinion, difficult to see in what circumstances restrictions on voting rights would be acceptable, if not in the case of persons sentenced to life imprisonment. Generally speaking, the Court's judgment concentrates above all on finding the British legislation incompatible with the Convention *in abstracto*. We regret that despite this focus it gives the States little or no guidance as to what would be solutions compatible with the Convention. Since restrictions on the right to vote continue to be compatible, it would seem obvious that the deprivation of the right to vote for the most serious offences such as murder or manslaughter, is not excluded in the future. Either the majority are of the view that deprivations for the post-tariff period are excluded, or else they think that a judge has to order such deprivations in each individual case. We think that it would have been desirable to indicate the correct answer.

9. Our own opinion whether persons serving a prison sentence should be allowed to vote in general or other elections matters little. Taking into account the sensitive political character of this issue, the diversity of the legal systems within the Contracting States and the lack of a sufficiently clear basis for such a right in Article 3 of Protocol No. 1, we are not able to accept that it is for the Court to impose on national legal systems an obligation either to abolish disenfranchisement for prisoners or to allow it only to a very limited extent.

DISSENTING OPINION OF JUDGE COSTA

(Translation)

1. I voted the same way as my colleagues, Judges Wildhaber, Lorenzen, Kovler and Jebens and readily subscribe to their opinion, which is therefore our joint opinion.

2. I should, however, like to add one or two brief comments of my own to their reasoning, with which I concur.

3. Firstly, while I readily agree with my colleagues (see point no. 3 in our joint opinion) that there is no need to pursue the question of whether the statutory restriction on the right of prisoners to vote served a "legitimate aim" any further, I confess to having doubts about the legitimacy – or rationality – of that aim. It is perfectly conceivable, for example, that a person who has been convicted of electoral fraud, of exceeding the maximum permitted amount of electoral expenditure or even of corruption should be deprived for a time of his or her rights to vote and to stand for election. The reason for this is that there exists a logical and perhaps even a natural connection between the impugned act and the aim of the penalty (which, though ancillary, is important) that serves as punishment for such acts and as a deterrent to others. The same does not hold true, at least not in any obvious way, of a ban on voting and/or standing for election that is imposed for <u>any</u> offence that leads to a prison sentence.

4. However, I do not propose to press this point, firstly, because, in common with the other dissenting judges and, indeed, those in the majority, I consider that when applying Article 3 of Protocol No. 1, which, unlike Articles 8 to 11 of the Convention, does not contain an exhaustive list of "legitimate aims", it is necessary to make an exception to the general rule and to construe such aims broadly. Secondly, limiting the States' room to manoeuvre in this sphere as regards the <u>aims</u> they are free to pursue in their legislation could, paradoxically, lead me to rejoin the majority by another route (indeed, I have to admit that on reading the careful concurring opinion of my colleague, Judge Caflisch, I was tempted to follow a similar path).

5. However, once I had rejected that approach and accepted that the States have a wide margin of appreciation to decide on the aims of any restriction, limitation or even outright ban on the right to vote (and/or the right to stand for election), how could I, without being inconsistent, reduce that margin when it came to assessing the proportionality of the measure restricting universal suffrage (a concept which, of course, remains the democratic ideal)?

6. How would I be able to approve of the *Py v. France* judgment of 11 January 2005 (which I am all the more at liberty to cite in that I did not sit in the case)? In that judgment, the Court unanimously (as, indeed, the United Nations Human Rights Committee had done in its Views dated

15 July 2002, which were cited under the section on Relevant Domestic Law and International Case-Law and in paragraph 63) held that the minimum ten-year-residence qualifying period for being eligible to vote in elections to Congress in New Caledonia did not impair the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, and that there had been no violation of that provision. How, then, could I approve of that judgment and at the same time agree with the judgment in the present case when it states at paragraph 82: "while ... the margin of appreciation is wide, it is not all-embracing", which in practice means that a prisoner sentenced to a discretionary life sentence would have the right to vote under Article 3 of Protocol No. 1 (but when would the right become effective?). Are there not two "standards"?

7. It might perhaps be objected that the *Py* judgment took into account "local requirements", within the meaning of Article 56 § 3 of the Convention. That is true. But what of the decision in *Hilbe v. Lichtenstein* (7 September 1999, *Reports* 1999-IV)? In holding that a Lichtenstein national who was resident in Switzerland did not have the right to vote in Liechtenstein parliamentary elections (Article 56 was not, so far as I am aware, applicable in the case), the Court noted: "the Contracting States have a wide margin of appreciation to make the right to vote subject to conditions" before going on simply to conclude that the residence requirement "cannot be regarded as unreasonable or arbitrary or, therefore, as incompatible with Article 3 of Protocol No. 1".

8. As stated in point 4 of our joint opinion, the Court's case-law permits restrictions of the right to vote that are of a general character, such as conditions concerning age, nationality, or residence (provided they are not arbitrary and do not affect the free expression of the opinion of the people). With due respect, I see no convincing arguments in the majority's reasoning that could persuade me that the measure to which the applicant was subject was arbitrary, or even that it affected the free expression of the opinion of the people.

9. The point is that one must avoid confusing the ideal to be attained and which I support – which is to make every effort to bring the isolation of convicted prisoners to an end, even when they have been convicted of the most serious crimes, and to prepare for their reintegration into society and citizenship – and the reality of the *Hirst (no. 2)* judgment, 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.

Draft Brighton Declaration

FEBRUARY 2012

PROPOSALS FOR AMENDMENT of the European Convention on Human Rights and the response of the European Court.

The Brighton Declaration

On 23 February 2012 the Ministers' Deputies of the Council of Europe were presented with a draft of the "Brighton Declaration" for approval at the High Level Conference on the Future of the European Court of Human Rights due to be held in Brighton in April 2012.

The UK government has included virtually all the proposals for reform in this declaration (save for applicants' fees, compulsory representation, and the sunset clause), which will require an additional protocol to amend the European Convention on Human Rights, Protocol 15.

- Subsidiarity. Amendment of the Convention to include the principle of subsidiarity (para.19(b)) defined at para.16.
- Margin of Appreciation. Amendment of the Convention to include the principle of the Margin of Appreciation (para.19(b)) defined at para 17 seemingly with no distinction between different types of cases.
- Advisory Opinions. Amendment of the Convention to include advisory opinions of an ECJ style, not binding upon national courts, but with no right to go back to the ECHR in the same case (para.19)d).
- 6 month time limit. Amendment of the Convention to reduce the time limit for applications to two OR three OR four months (para.23(a)).
- De Minimis. Amendment of the Convention to remove the requirement for prior domestic consideration to apply the de minimis rule (para.23(b)).
- Same in Substance. Amendment of the Convention to include the UK proposal to make a case inadmissible where previously examined by a national court, unless the national court "**clearly erred**" in its interpretation, or raises a serious question affecting the interpretation of the Convention (para.23(c)).
- Additional Judges. Amendment of the Convention to allow for the appointment of additional judges, either just to deal with inadmissible and repetitive cases, or to deal with everything (para.28(f)).
- Grand Chamber Reliquishment. Amendment of the Convention to remove the ability to object when a Chamber seeks to relinquish jurisdiction (para.33(e)).

Additional features include specific recommendations for national implementation, the consideration of **representative applications** for violations involving large numbers of applicants, invites the Committee of Ministers to consider the introduction of sanctions including **financial penalties**, and proposes the establishment of a **Commission on the future of the Convention and the Court**.

OPEN SOCIETY JUSTICE INITIATIVE

Opinion of the Court

On 20 February 2012 the European Court of Human Rights sitting in Plenary issued an opinion in preparation for the Brighton Conference, responding to the proposals of State Parties.

The Court does not offer a definition of subsidiarity, but does suggest that States must reaffirm their commitment to the system of human rights protection, which requires "making every effort to secure the Convention rights and freedoms at national level and accepting that these efforts are subject to judicial scrutiny at European level". In a separate speech the President of the Court said that subsidiarity and the margin of appreciation should not be put in the Convention.

The Court is unconvinced that the proposed new admissibility criteria "will have any significant impact on the Court's case-load" as such cases would require "systematic and thorough examination." Such options might be considered for the long-term reform of the Court, together with the possibility of the court selecting cases for adjudication, where there was an option of referring the cases not taken to another international process or to a national mechanism.

The Court identifies four types of cases where reform is needed, and makes initial proposals for reform.

- **Inadmissible Cases (Categories VI and VII).** The Single Judge procedure will continue to be used. In addition, the Court is considering expanding the new filtering procedure to all countries and applying the six-month rule more strictly, which could be "reduced considerably" given modern communication methods.
- **Repetitive Cases (Category V).** There are 34,000 of these cases in the system. The Court proposes that a list of the cases is referred to the State concerned for them to be settled in an appropriate way, with judgment to be given in default if redress is not given.
- **Non-repetitive, non-priority cases (Category IV).** (19,000 cases). The Court proposes to extend the use of the summary procedure for cases that can be dealt with by "Well-Established Case-Law" currently used only for repetitive cases.
- **Priority Cases (Categories I, II, III).** (6,000 cases). Some will also be repetitive, such as prison condition cases.

Funding

In order to achieve a balance in filtering between cases in and cases out, the Court needs 1.5 A-grade lawyers together with 13 B-grade lawyers to work on cases from Russia and Turkey, together with eight B-grade lawyers to work on cases from Italy, Bulgaria, Moldova, Serbia and Hungary. According to official figures this would cost approximately €987,000 a year, or €21,000 for each State Party.

In order to clear the backlog of inadmissible cases by 2015, the Court will need 12 seconded lawyers for a three year period from Turkey, Romania, Poland, Ukraine, Moldova, Italy, Bulgaria, Serbia, Germany, France, Slovenia, and Croatia. In addition, the Court would need two further seconded lawyers, one from from Montenegro and one from Bosnia Herzegovina, for one year each. The existing seconded lawyers from Russia will be sufficient to clear that part of the backlog.

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EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 222 (2012)
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Court says that it is up to member States to decide how to regulate the ban on prisoners voting

In today's judgment in the case of **Scoppola v. Italy (n° 3)** (application no. 126/05), the Court has confirmed the **Hirst (no. 2) v. the United Kingdom** (no. 74025/01) judgment of October 2005, again holding that general, automatic and indiscriminate disenfranchisement of all serving prisoners, irrespective of the nature or gravity of their offences, is incompatible with Article 3 of Protocol No. 1 (right to free elections) of the European Convention on Human Rights. However, it accepted the United Kingdom Government's argument that each State has a wide discretion as to how it regulates the ban, both as regards the types of offence that should result in the loss of the vote and as to whether disenfranchisement should be ordered by a judge in an individual case or should result from general application of a law.

The case concerned Mr Scoppola's loss of the vote following his criminal conviction for killing his wife and wounding one of his sons.

The UK Government had been given leave to make submissions as a third party.

The Court held, by a majority, that there had been **no violation of Article 3 of Protocol No. 1 (right to free elections)** to the Convention. Under Italian law only prisoners convicted of certain offences against the State or the judicial system, or sentenced to at least three years' imprisonment, lost the right to vote. There was, therefore, no general, automatic, indiscriminate measure of the kind that led the Court to find a violation of Article 3 of Protocol No. 1 in the **Hirst (no. 2)** case.

Implications for the judgment Greens and M.T. v. the United Kingdom (nos. 60041/08 & 60054/08)

On 23 November 2010 the Court adopted a judgment in the case of **Greens and M.T.** It noted that there had been no amendment to the law in the UK since the **Hirst (no. 2)** judgment in 2005. This had led to a situation where approximately 2,500 similar applications had been lodged with the Court, with the number continuing to grow.

The Court did not consider it appropriate to give guidance as to the content of future legislative proposals, which was a decision for the Government. However, it took the view that the lengthy delay to date demonstrated the need to set a timetable for the introduction of proposals to amend the electoral law. The Court therefore held that the UK Government should bring forward legislative proposals to amend the law within six months of the date on which **Greens and M.T.** became final. The Government was further required to enact the relevant legislation within any time-frame decided by the Committee of Ministers, the executive arm of the Council of Europe, which supervises the implementation of the Court's judgments. The Court did not award any damages to the applicants and held that in future cases no financial compensation would be payable. On 11 April 2011 the Panel of the Grand Chamber refused the applicants' request to refer the case to the Grand Chamber. The judgment therefore became final on that date.

On 30 August 2011, the Court examined the UK Government's request that the timetable set out in its judgment in **Greens and M.T.** be deferred to expire six months from the Grand Chamber judgment in **Scoppola (no. 3)**. The Court expressed the view that further unnecessary delay could not be contemplated, having regard to the time which had already passed since the Court's ruling in **Hirst (no. 2)**. However, it considered it

reasonable to grant an extension of six months, to start running from the date of the Grand Chamber judgment in **Scoppola (no. 3).**

The delivery of that judgment, which is final[1] immediately, means that the six month period referred to in **Greens and M.T.** begins to run today.

The Court indicated in its judgment in **Greens and M.T.** that, if the UK Government complied with the time-frame, it would proceed to strike out all the similar pending cases.

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[1] Grand Chamber judgments are final (Article 44 of the Convention). All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their implementation. Further information about the implementation process can be found here: www.coe.int/t/dghl/monitoring/execution

ESIL Reflections

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The Burdens and Benefits of Brighton

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More than a month has passed since the conclusion of the high-level conference on the future of the European Court of Human Rights (ECtHR) held at Brighton, England—the third such gathering devoted to overhauling the Strasbourg supervisory system in response to the crushing backlog of pending applications and the structural human rights problems that are their root cause. Unlike the conferences in Interlaken and Izmir, however, the delegates in Brighton gathered under a cloud of vociferous protests against the Court by the public and government officials in the United Kingdom. According to a 2011 poll, a majority of voters believe that the UK government should withdraw from the European Convention on Human Rights—a view likely stoked by incendiary statements such as Prime Minister David Cameron's exclamation that implementing an ECtHR judgment recognizing prisoners' right to vote "makes me feel sick."

A pervasive air of backlash against the Court suffused the lead up to the Brighton Conference. Whereas previous reform proposals stressed the need to strengthen the regional human rights system, ECtHR watchers were shocked that a draft of the Brighton Declaration—leaked to the public in late February 2012—contained a blueprint for clipping the Strasbourg Court's wings and weakening supranational review of member states' human rights practices. The final text is anodyne in comparison, and most observers are breathing a collective sigh of relief that the outcome of the conference was not as bad as they had initially feared.

The Brighton Declaration is, however, a watershed—or, perhaps more accurately, a low water mark—in at least one important respect. It directs the Committee of Ministers to prepare the text of a new Protocol to the Convention. If approved, the Protocol will be the first amendment in the nearly sixty-year history of the Council of Europe's human rights system to include provisions that restrict rather than enhance the authority and discretion of ECtHR judges.

In this brief commentary, I first review the Brighton Declaration provisions that reflect the member states' attempt to rein in the power of Strasbourg judges. I then introduce and defend a proposal to condition access to the new Protocol's "benefits" to those member states that are adequately shouldering the "burdens" of more deeply embedding the Convention and ECtHR case law in their national legal orders. I conclude by identifying alternative ways to implement this proposal and discuss their potential benefits and drawbacks.

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The Brighton Declaration is divided into seven substantive sections. Three sections—implementation of the Convention at national level; processing of applications; and execution of judgments of the Court—correspond to what the Council of Europe has labeled the upstream, midstream, and downstream causes of the ECtHR's docket crisis. The remaining four sections address the interaction between the Court and national authorities; applications to the Court; judges and jurisprudence of the Court; and the longer-term future of the Convention system. The proposals to amend the Convention to restrict the ECtHR's authority appear in these latter provisions. They include:

- adding to the Convention's preamble express references to the principle of subsidiarity and to the doctrine of the margin of appreciation—references that many observers view as a signal to the ECtHR to give greater deference to member states (¶12.b);
- eliminating, from the "significant disadvantage" ground for declaring an application inadmissible, the safeguard clause that permits the ECtHR to review the application if it "has not been duly considered by a domestic tribunal" (¶15.c);
- removing the parties' ability to object to a Chamber's decision to relinquish a case to the Grand Chamber, a venue viewed as more sympathetic to national governments (¶25.d).

Supplementing these "hard law" provisions are several nonbinding statements that, with varying degrees of subtly, suggest that the ECtHR should rein in its scrutiny of national governments:

- an assertion that "the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation" (¶11);
- a recommendation that the ECtHR "take a strict and consistent approach" to declaring inadmissible complaints that have "been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case law of the Court including on the margin of appreciation" (¶15.d);
- an invitation to the Court "to have regard to the importance of consistency where judgments relate to aspects of the same issue, so as to ensure their cumulative effect continues to afford States Parties an appropriate margin of appreciation" (¶25.c); and

- a timetable for the Committee of Ministers to determine whether existing reforms have "proven to be sufficient to assure sustainable functioning" of the ECtHR, or whether "more profound changes are necessary" (¶34).

To be fair, the Brighton Declaration also reaffirms member states' "deep and abiding commitment" to the Convention, its institutions, and the right of individual petition (¶¶1-2). In addition, member states recognize their responsibility to ensure the effective domestic implementation of the Convention and to abide by ECtHR judgments against them (¶¶3-4). The opening paragraph of the section on "implementation of the Convention at national level" makes this point succinctly and forcefully:

> All laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention. States Parties must also provide means by which remedies may be sought for alleged violations of the Convention. National courts and tribunals should take into account the Convention and the case law of the Court (¶7).

The Declaration then lists the "specific measures" to achieve the objectives in this paragraph. These measures include establishing independent national human rights institutions; authorizing parliaments to review the Convention-compatibility of draft legislation; introducing new legal remedies; encouraging courts to take the Convention and ECtHR case law into account; facilitating litigants' ability to raise Convention violations; and training and informing officials at all levels of government about the Convention's requirements (¶9.c).

It bears emphasizing, however, that these commitment to domestic implementation are couched in hortatory, aspirational language. States "should" take these steps. They will "consider" these measures "so far as relevant" and will "encourage" their adoption (¶¶7, 9.c). None of these pledges will be part of the new Protocol that the Declaration contemplates. This creates a structural imbalance in the proposal to amend the Convention. A binding international instrument will give member states the "benefits" of the Brighton Declaration—dismissal of more applications and more deferential review of those considered on the merits—without a corresponding obligation to shoulder the "burdens" of fully implementing the Convention and ECtHR jurisprudence in national legal systems.

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To forestall this imbalance, I propose that the envisaged new Protocol require member states to embed the Convention and ECtHR case law more firmly in their respective domestic legal orders. Such a proposal is—with the notable exception of the recent backlash against the Strasbourg Court in the UK—the next logical step in a decades-long evolution of the European human rights system.

Over the last quarter century, a growing number of countries have incorporated the Convention into domestic law. As the Strasbourg system matured, the percentage of incorporating countries increased such that by 2004 the treaty had "become an integral part of the domestic legal orders of all states parties." A more rapid shift has occurred with respect to the ability of national courts to reopen judicial proceedings following adverse ECtHR judgments. In 2000, the Committee of Ministers launched a campaign urging governments to authorize this remedy. By 2006, reopened proceedings were available in criminal cases in 80% of member states, and in civil and administrative cases in approximately half of those states. Procedures to verify the Convention-compatibility of draft legislation and administrative regulations are another area of rapid progress encouraged by the Committee of Ministers. Such procedures now exist in various forms in all member countries.

The domestic implementation clauses of the Brighton Declaration, summarized above, reinforce these efforts. Taken together, these recommendations—and governments' generally favorable responses to them—create an *acquis* of best practices for how to more firmly embed the Convention and ECtHR judgments in national legal orders. The ultimate goal of this process, as I have previously argued, is for national decision-makers to acquire the authority and capacity to serve as first-line defenders and remediators of human rights violations in Europe, with the ECtHR serving as a backstop where national actors fail to carry out these functions.

Although member states have made significant strides toward this goal over the last decade, the progress has been uneven. This is especially true for the endemic structural human rights problems in a handful of countries that generate numerous applications to Strasbourg. Well-known examples include excessively lengthy judicial proceedings in Italy; executive meddling in final court judgments in the Ukraine; disappearances in the Kurdish regions of Turkey; and discrimination against Roma communities in several Eastern European countries. The result is marked and growing geographic imbalance in the ECtHR's case load. At the end of 2011, just five of 47 member states—Italy, Romania, Russia, Turkey, and the Ukraine—accounted for more than 61% of all applications to the Court, with Russia alone the source of more than 26% of all complaints. Adding the next five states increased the proportion to 78%. The reason for these disparities, as Helen Keller and her coauthors explain in an insightful 2011 journal article, is that "the systems of judicial relief in these countries are particularly problematic . . . owing to structural problems affecting the efficiency of the judicial work or to deficiencies concerning respect for the principle of the rule of law."

The disproportionate percentage of applications from this small group of countries highlights the need to disaggregate proposals for greater subsidiarity and a wider margin of appreciation from "the principle of equal treatment of all States Parties," which the Brighton Declaration reaffirms (¶20.c). Nonbinding pledges to improve domestic implementation of the Convention and to speed compliance with ECtHR judgments—and the financial and technical assistance from the Council of Europe that facilitate them—are well and good. But they are no longer sufficient. If a new treaty is required to meet the crisis that the Strasbourg system now faces, that instrument should include

specific and binding commitments to more securely anchor the Convention and ECtHR judgments in national legal orders. In addition, and more crucially, the Protocol should make compliance with those commitments a condition of applying the narrower admissibility rules and more deferential judicial review standards that the Brighton Declaration contemplates.

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Although my proposal to reform the ECtHR will likely be controversial, there are several reasons to think that it may be politically feasible. First, the *acquis* of best practices on embeddedness that has built up over the last decade has strong support from the member states, acting on their own and through recommendations of the Council of Europe adopted by consensus. Second, the three recent high-level conferences on the ECtHR's future have reaffirmed the basic elements of the *acquis* that would comprise the Protocol's "burdens." Third, the amendment could be structured to give states a modicum of flexibility regarding embeddedness. For example, it could include a phase-in clause to give governments additional time to adjust their laws and practices, or. Or it could allow states to accept different packages of commitments, an approach used by the European Social Charter. Such a procedure would be especially useful for states that oppose specific implementation measures, such as reopening judgments in civil cases. Finally, the Protocol would not single out countries based on how many applications are pending against them, either in absolute or relative terms. Rather, it would provide a template to assess whether any ratifying state had adopted the implementation measures that the amendment requires.

Assuming that the political will exists for such a proposal, how might it be implemented? An important initial issue relates to the new Protocol's entry-into-force rules. Previous systemic overhauls of the European human rights system—such as Protocol No. 11, which established a permanent Court, and Protocol No. 14, which authorized single judges and three-judge committees to dismiss inadmissible applications—have required ratification by all member states. More modest reforms, such as Protocol No. 9, which gave private litigants a right to appeal to the ECtHR the reports of the erstwhile European Commission, could be adopted on a country by country basis. The new amendment falls somewhere in between these two extremes.

If the drafters choose an opt-in approach, each member of the Council of Europe would confront a "package deal" treaty that includes both the burdens and the benefits of the Brighton Declaration. A state could eschew this deal altogether. Such a country would continue to be governed by existing admissibility rules and supranational review standards. But it would avoid the Protocol's hard law obligation to implement the Convention domestically. (The nonbinding recommendations of the high-level conferences would retain their persuasive authority.) Conversely, a state that ratified the Protocol would be subject to its narrower admissibility requirements and more deferential review standards. It would, however, also undertake a binding commitment to embed the Convention and ECtHR judgments in national law.

An opt-in Protocol must also include a mechanism to ensure that ratifying states adhere to this bargain. If the Protocol's embeddedness obligations will be effective immediately, the drafters could create a preclearance procedure by which a new or existing Council of Europe body would determine whether a state has implemented the necessary measures. A green light from that body would be a prerequisite to ratification. As an alternative or in addition, the drafters could establish a mechanism to review compliance after ratification. Such a mechanism might be designed in a variety of ways. States could submit periodic reports to a Council of Europe body to demonstrate their compliance. Or the ECtHR could make such an assessment, either on its own authority or in response to a complaint by a private litigant or another state. Finally, the Protocol would also need a suspension clause to identify the conditions under which a country that falls out of compliance with its embeddedness obligations would lose some or all of the benefits of the amendment's more sovereignty-friendly admissibility rules and review standards.

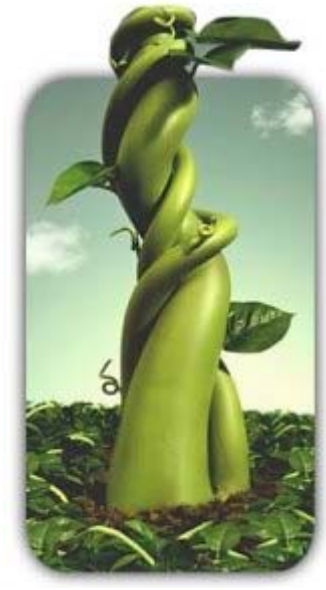
One possible downside of an opt-in approach is that it would not do enough to reduce the ECtHR's backlog of cases. This might occur if several of the ten member states that generate most applications to the Court decided not to ratify the amendment. In that event, the Protocol might curb the number of politically controversial judgments that the ECtHR issues against states with comparatively good records of protecting civil and political liberties, but have limited impact in reducing complaints from countries with enduring, structural human rights problems.

How might the process differ if all 47 member states were required to ratify the Protocol to bring it into force? In that event, countries in which the Convention or ECtHR judgments are less deeply embedded may seek to water down the Protocol's implementation rules or the mechanisms for reviewing compliance with them. The result is likely to be a weaker legal instrument than would be agreed to under an opt-in scenario. In addition, the prospect of region-wide ratification would likely require more extensive negotiations, postponing the adoption of the final text. A further delay of several years would follow as each country proceeded through its domestic ratification process. Once the amendment was in force, however, it would avoid the potential legitimacy concerns raised by applying different admissibility rules and judicial review standards to different member states. There would also be modest efficiency gains for ECtHR judges and Registry lawyers from applying a uniform set of procedures.

Whichever design strategy is adopted, what is essential is to link the burdens and benefits of Brighton in a single legal instrument. Doing so would create a positive incentive for member states to bolster national systems of human rights protection and, ultimately, to take primary responsibility for preventing and remedying the vast majority of violations of civil and political liberties. The judges in Strasbourg could then concentrate their considerable legal talents on monitoring the proper functioning of those national systems, stepping into the breach where those systems falter, and ensuring that the Convention remains a living instrument that responds to evolving regional and global understandings of human rights.

Beanstalks and golden eggs

June 20, 2011 by Rosalind English



In her lecture at Gresham College last week Baroness Hale speculated how high the human rights tree might grow before it presents a threat to the surrounding constitutional ecosystem. Our words, not hers, but she preferred the arboreal image to the more established but inherently nonsensical notion of a "living instrument" as an expression of the Convention's adaptability over time. This tree, she suggested, should not be allowed to transmogrify in to a gigantic beanstalk, crashing through the sky, inspiring false dreams and unrealisable ambitions.

The seeds of this tree – or treacherous beanstalk, whichever way one prefers to look at it – were sown in the seventies when the Strasbourg Court chose a "purposive" rather than a literal construction of the language used in the Convention. This means that judges enforcing the norms of the Convention need not confine themselves to the terms as stated or clearly implicit in the written text, nor to the purpose that might be derived from the preparatory materials and the historical context. Thus in the landmark case of Golder v United Kingdom, the Court ruled that Article 6 not only conferred an explicit right to a fair trial but implied that citizens should be granted the right of access to justice, something that could not be discovered within the four corners of the Convention as a document.

Then the "birching" case came along and the majority of the Court held – in the teeth of the British judge's objections – that judicial corporal punishment on the Isle of Man breached the Convention's prohibition on torture and inhuman treatment, although nothing in Article 3 or the negotiating records of the Convention suggested that the anti-torture idea should extend so far. So this was the second idea, that the Convention must be interpreted in the light of present day developments and practices among the member states.

The third idea, first articulated in Airey v Ireland, is that the rights protected must be 'practical and effective' rather than 'theoretical or illusory'

As Baroness Hale, explains, there are "at least" four different ways in which the Convention jurisprudence has developed beyond the expectations of the original parties, some of which have proved more problematic than others. She categorises them as follows:

(a) the interpretation of the 'autonomous concepts' in the Convention;

(b) the implication of further rights into those expressed;

(c) the development of positive obligations; and

(d) the narrowing of the margin of appreciation permitted to member states.

Each category brings a series of definitional problems in its train. The "autonomous concept" doctrine in (a) has set off a cascade of worthy but sterile litigation about the question of what kinds of public law claims now count as 'civil rights'. See Nicol J's fascinating judgment in Andrew Crosbie v Secretary of State for Defence [2011] EWHC 879 for a condensed history of this litigation and our comment on it here.

In describing the development of implied rights Baroness Hale wisely steers clear of the flourishing colony of rights in the penumbra of Article 8 and touches upon instead on the obligation on States to respect the right to life, which has come to imply a duty to investigate suspicious deaths, and the implied right of everybody including prisoners to participate in Parliamentary elections under Article 3 Protocol 1.

She does raise the lid of Article 3 to look at the evolution of "positive" obligations under (c), noting the glimmering of embryonic socio-legal rights in cases like Limbuela (it is inhuman and degrading to deny certain categories of asylum seeker access to state support). The creativity of the Strasbourg Court in this regard has attracted perhaps the most vociferous criticism in the current debate about the viability of the Convention and its jurisprudence in a recession-hit Europe, since it is argued that the Court was not mandated to determine what standard of social welfare should prevail in any of the Council member states.

The attenuation of signatory states' manoeuverability under the Convention – the narrowing, in other words, of their "margin of appreciation" – is exemplified in the stand-off over prisoner voting and by the response of local courts to Strasbourg rulings, most recently the decision by the Supreme Court to bow under the Strasbourg yoke by interpreting the power granted by statute to the authorities to retain DNA evidence to mean no power of retention (see our comment).

In conclusion, Baroness Hale calls for a number of uncontroversial positions to be adopted. The development of the Convention should not actually "contradict" the Convention's own express language. Furthermore, such development should

- be consistent with the established principles of Convention jurisprudence
- reflect the standards set in other international instruments relevant to the subject-matter in hand (although note the difficulties that arise when this consistency is actually sought)
- reflect the common European understanding, "however that may be deduced"
- seek to strike a fair balance, between the universal values of freedom and equality embodied in the Convention, and the particular choices made by the democratically elected Parliaments of the member states.

This is an admirably straightforward acknowledgement of the current problems created by rights litigation. But Baroness Hale fails to address, or to attempt to dismantle, the real juggernaut in the room. This is the widely cherished myth that rights are universal moral attributes that purport to be independent of circumstance or politics.

Rights are nothing more than codified claims to a certain benefit. They do not embody morality in some cryptic or condensed way which must be recognised at all costs. So the acrobatics exhorted upon us by this address and many similar lectures and judicial speeches, though interesting in terms of intellectual contortionism, are entirely unnecessary. The Convention is nothing more than a programme reflecting a set of historical contingencies, and these generalisations will change as the contingencies do. Baroness Hale's own speech reveals how this happens: the prohibition on retrospective illegality under Article 7 meant no punishment without law in the 1950s, but was made to cede ground when it was decided that marital rape should be recognised as a crime in 1992, and punishment was duly imposed for conduct which was not a crime at the time that it was committed. It was a good thing, we all will agree, that judicial restraint did not allow Article 7 to prevail. But Convention principles are amenable to infinite interpretation not by virtue of their underlying universality but by the brevity of their expression. Without some honest recognition of this, society's common sense is trampled in the stampede for a foothold on the stalk of the great beanstalk reaching its upper branches into the elevated clouds of illusion and hollow hope.

Colm O'Cinneide: Prisoners Votes (Again) and the 'Constitutional Illegitimacy' of the ECHR

 The relationship between the UK and the European Court of Human Rights is once again in the news. On the 22th May last, the Grand Chamber of the Strasbourg Court delivered its judgment in *Scoppola v. Italy* (No. 3), Application No. 126/05. This decision marks a potentially decisive moment in the long-running saga of prisoner voting rights. In essence, the Grand Chamber reaffirmed its ruling in *Hirst v UK (No. 2)* that a blanket and indiscriminate prohibition on prisoners voting was not in conformity with Article 3 of the First Protocol (the right to free elections). However, it also recognised that states enjoyed a wide margin of discretion when it came to regulating the circumstances in which prisoners should be entitled to vote. In particular, 'Contracting States may decide either to leave it to the courts to determine the proportionality of a measure restricting convicted prisoners' voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied', as long as they refrain from imposing 'any general, automatic and indiscriminate restriction' (see para. 102 of the judgment).

In other words, the *Hirst d*ecision has been upheld, but the UK has been given room to manoeuvre in how it responds to this requirement. However, the UK government must bring forward legislative proposals to amend the existing blanket ban within six months. If it does not, then in accordance with the Court's 'pilot' judgment in *Greens and M.T. v UK*, the 2500 pending cases before the Court on this issue will be 'unfrozen', which in turn may expose the UK to multiple claims for damages.

The judgment in *Scoppola* has been excellently analysed in depth by a number of commentators: see in particular Adam Wagner's posting on the UK Human Rights Law blog, Carl Gardner's analysis at Head of Legal and Marko Milanovic's comment on the judgment on the EJIL: *Talk* blog. As Joshua Rozenberg has argued, the Court has effectively extended an olive branch to the UK government, which it might be wise to accept. However, the judgment has also attracted the usual media outrage, as examined by ObiterJ on Law and Lawyers, with the Daily Mail describing the decision as representing 'Contempt for Democracy'. The Prime Minister has stated at Question Time in the House of Commons that the will of Parliament should prevail over the views of the Strasbourg Court on this issue (H. C. Debs. 23 May 2012, col. 1127), while Jack Straw and David Davis have in a letter to the Daily Telegraph called on Parliament to defy Strasbourg.

It appears therefore as if no easy resolution to the stand-off on prisoner voting rights between the Court and the UK is yet in sight. It has been just over one month since the Brighton Declaration, where as Mark Elliott has discussed on this blog the UK joined the other state parties to the ECHR in affirming the crucial role played by the Strasbourg Court in protecting human rights and rule of law across Europe and committed itself to respecting judgments of the Court. (See in particular paragraph 3 of the Declaration, which states in unambiguous language that [w]here the Court finds a violation, the State Parties must abide by the final judgment of the Court'.) The UK government thus appears to have got itself into a tangled mess. Its words and deeds in respect of the ECHR appear to be getting dangerously out of synch. Even if legislation amending the blanket ban on prisoner voting is laid before Parliament within the six month time-limit imposed by the Court, the Prime Minister's comments will certainly have fortified parliamentary opposition to making any concessions on this issue. As things stand, the UK is still locked on a collision course with Strasbourg, unless a dramatic political change of direction takes place.

Much of the hostility directed towards the Strasbourg Court is based on a visceral distaste of giving prisoners voting rights. Famously, even contemplating this idea appears to make the Prime Minister nauseous. Given the quasi-sacred status accorded to the idea of universal franchise within the UK constitutional order (the doctrine of parliamentary sovereignty is now justified on the basis that the House of Commons is elected by popular vote), it is perhaps odd that Strasbourg's mild request for amendment of the blanket disenfranchisement imposed on prisoners has attracted such a backlash. However, the rights and wrongs of this issue have been discussed before on this blog by Jeff King.

What has not been discussed in detail here or elsewhere is the argument made by Jack Straw MP, David Davis MP, Michael Pinto-Duschinsky, Dominic Raab MP and others that the Strasbourg Court is acting in a constitutionally illegitimate manner in insisting on a repeal of the blanket ban on prisoners voting, and that it would be a violation of democratic principles for the UK to defer to the decision of an unelected international court on such a manner. This argument drives much of the opposition to the Court's rulings in this context. It also explains why David Davis and Jack Straw in their above-mentioned letter to the Telegraph have described these judgments as infringing 'our constitutional rights'. It even underscores the call by Pinto-Duschinsky, Raab and others for the UK to consider withdrawing from the jurisdiction of the Court and/or from the Convention, which they argue would be a necessary and justified step if the Court fails to mend its ways and exercise greater self-restraint.

This argument that it is 'constitutionally illegitimate' for Strasbourg to rule against the UK on the blanket ban on prisoners voting is based on two distinct but inter-related elements. First of all, it assumes that the European Court of Human Rights has gone beyond the legitimate scope of its authority by treating the Convention as a 'living instrument' and adopting a teleological interpretative approach to its provisions. In its eyes of its critics, the original drafters of the Convention never intended it to be read in this way: as a result, the Court is abusing its authority when in a decision such as *Hirst* it interprets the right to free elections in Article 3 of the First Protocol as extending to cover the right to vote. Secondly, the assumption is also made that it is contrary for democratic principles for the UK to bind itself to follow the determinations of an unelected body such as the Strasbourg Court. However, both these assumptions are open to challenge.

To begin with, the argument that the Court is going beyond its mandate is open to question. As Danny Nicol has argued, the *travaux préparatoires* of the ECHR make it clear that there was no consensus among the original negotiators that it should be read in a narrow and minimalist manner ('Original Intent and the European Convention on Human Rights' (2005) *Public Law* 152-17). Furthermore, international treaty instruments such as the Convention are usually expected to be interpreted in a purposive manner, not by reference to the original intent of their drafters. In their letter to the Telegraph, Davis and Straw state that the job of the Court 'is to apply the principles of the Convention as originally intended by those who signed it – nothing more, nothing less', and go on to say that the Vienna Convention on the Law of Treaties requires that 'international treaties must be interpreted as their drafters intended'. However, this appears to be a straightforwardly incorrect interpretation of international law. The provisions of the Vienna Convention are notoriously vague: however, Articles 31 and 32 make it clear that courts should focus on the 'object and purpose' of treaties, and that the intention of the drafters can only ever be taken into account in a 'supplementary' manner. The 'living instrument' approach adopted by Strasbourg is very similar to that adopted by other human rights bodies, as well as by constitutional and supreme courts in Europe and across the Commonwealth. Of course, views will differ on whether the Court got it wrong when it decided *Hirst*, *Greens* and *Scoppola*. However, it is by no means obvious that its overall interpretative approach is 'illegitimate'.

Secondly, the argument that it is undemocratic for the UK to defer to decisions of the Strasbourg Court can also be challenged. The UK consented to the jurisdiction of the Court and voluntarily undertook to abide by its decisions. This would appear to be completely compatible in principle with the principle of democratic self-governance and national sovereignty: as Jeremy Waldron has commented, '[p]art of the point of being a sovereign is that you take on obligations'. Furthermore, as previously noted, Parliament is under no constitutional obligation to give effect to a Strasbourg judgment: it can choose to disregard any judgment of the Court, or even to withdraw from the Convention, at any time. If it does so, the UK may experience strong diplomatic pressure to change its mind from other states. Its international credibility may also be fatally undermined by a refusal to respect a judgment of the Court, as this would call into question its commitment to the principles of human rights and rule of law which it consistently demands that other states respect. However, Parliament, not Strasbourg, retains the final say.

This means that the current relationship between the UK and the Strasbourg Court would seem to be entirely compatible with democratic principles. The fact that the UK faces considerable pressure to comply with *Hirst*, *Greens* and *Scoppola* does not mean that the Court's role under the Convention is illegitimate or anti-democratic: it simply reflects the fact that the expectation that Parliament should respect international law, human rights and the rule of law may at times require it to exercise its powers differently from how it would if left to its own devices. If anything, the Strasbourg Court could be seen as playing a positive role in enhancing British democracy: as Richard Bellamy (no lover of judicial supremacy) has argued, it helps to protect the rights of those who do not enjoy effective access to Parliament and the political process. It also helps to link democracy in the UK to democratic progress elsewhere, and makes possible a convergence of standards which elevates rights protection, democracy and the rule of law across the Council of Europe zone as a whole.

None of these objections constitute a full and complete answer to the Court's critics. Neither do they establish a complete case as to why Parliament should defer to the Court's views on prisoner voting. Opinions will inevitably differ as to when Strasbourg has crossed the line between law and politics, or when it has made a questionable decision. However, the claim that the Court's position on prisoner voting rights is 'constitutionally illegitimate' seems to be seriously open to debate.

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