Desperately Seeking Suffrage: The Fight for the Prisoner’s Right to Vote

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It is now nine years since the European Court of Human Rights declared that the blanket ban on convicted prisoners voting in national and European elections was in violation of the ‘right to vote’ under Article 3 of the First Protocol to the European Convention on Human Rights (1950). Since that time the government have pursued a (failed) appeal against that decision – and subsequent European Court decisions upholding the tenor of its original decision – and have taken various measures either to ignore the ruling or delay the measures necessary for it to comply with its obligations, in international law, to pass measures that will be

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consistent with the Convention and the European Court’s jurisprudence.

The latest of these responses - the Voting Eligibility (Prisoners) Draft Bill 2012 – offers three options to Parliament with respect to reform, or non-reform in this area. The first two options will inevitably lead to further challenges on the basis of proportionality, but the latter option (retaining the status quo) will expose the government to condemnation with respect to its attitude towards human rights and threaten its (already brittle) relationship with the Council of Europe, the European Convention and the European Court of Rights.

In the meantime, prisoners remain disenfranchised and 2,534 cases pending against the UK government with respect to prisoner’s voting rights have been adjourned until September 2013 to allow the government to initiate its latest proposals.
This article will examine the legal and political fight for, and against, prisoner enfranchisement that has taken place since the ban was first challenged in the domestic court over twelve years ago. It begins by outlining the provisions of the new Draft Bill, but will then examine those proposals via a reflection of the various legal challenges to prisoner disenfranchisement, and the permissible residue of discretion allowed by the European Court’s margin of appreciation in this area. The article will also use the battle for the prisoner’s right to vote to illustrate the futility of human rights law, reminding the reader that despite several judicial pronouncements, prisoners are still not entitled to vote and have received no compensation or effective redress for breach of their human rights.
Prisoner disenfranchisement and the Draft Bill

The issue of prisoner enfranchisement has excited great legal, political and moral debate,² and in the UK has been at the centre of wider political and constitutional discussions surrounding human rights, the sovereignty of Parliament and the role of the European Convention on Human Rights and the European Court of Human Rights.

Following a series of protracted legal defeats before the European Court of Human Rights,³ in


³ Hirst v United Kingdom (No 2) (2004) 38 EHRR 40; Hirst v United Kingdom (No 2) (2006) 42 EHRR 41(Grand Chamber); and MT and Greens v United Kingdom (2011) 53 EHRR 21. The government was also granted permission to appear as a part to
November 2012 the government published a Draft Bill – the Voting Eligibility (Prisoners) Draft Bill, offering a Committee of both Houses three options for possible reform in this area and inviting the Committee to conduct full Parliamentary scrutiny of those options, although the Bill concedesthat there will, no doubt, be other possible options for the Joint Committee to consider. This relatively flexible approach contrasts with previous consultation papers, which offered the public limited options, including an express instruction not to suggest total enfranchisement for prisoners.

It will be interesting, therefore, to see the government’s response if the Committee suggests that option, or other

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Italy’s appeal to the Grand Chamber in *Scoppola v Italy* (2013) 56 EHRR 19, overruling the Chamber’s decision in *Scoppola v Italy* (2000) 15 EHRR 12.

4 Cm 8499. The Bill was presented to Parliament by the Lord Chancellor and Secretary of State for Justice.


more generous options than on offer in the Draft Bill, below. It is also frustrating to note that the Bill offers the option of retaining the status quo, an option clearly not allowed it by the European Court’s jurisprudence, and one which is included to prepare the government for a potential face off with the European Court of Human Rights and the Council of Europe.

The Bill then states that once the Committee has finished its scrutiny, the Government will reflect on its recommendations and continue the legislative process by introducing a Bill, refined following Parliamentary scrutiny, for debate as soon as possible thereafter.7

Clause 1 of the Bill offers the first option: a ban for prisoners sentenced to 4 years or more. This threshold has been offered in previous proposals,8 and appears to be the furthest that the government is prepared to go in complying with its obligations under

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7 The Voting Eligibility (Prisoners) Draft Bill, Introduction, 5.
8 See notes 52 and 53 below.
the Convention and the Human Rights Act 1998. Schedule 1 of the Bill then clarifies Clause 1 by stating that both a prisoner serving a custodial sentence for a term of 4 years or more and a prisoner serving a life sentence, is disqualified from voting at a parliamentary or local government election.\textsuperscript{9} A custodial sentence is defined as a sentence of imprisonment, detention or custody passed in respect of any offence,\textsuperscript{10} and a prisoner as a person detained in, or on temporary release from, prison, or someone who is unlawfully at large, but who would otherwise be so detained.\textsuperscript{11}

The Schedule also applies to life sentence prisoners and a life sentence is defined as either a sentence of imprisonment, detention or custody for life, or during Her Majesty’s Pleasure, passed in respect of an offence, or a sentence for public protection under ss 225

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\item\textsuperscript{9} The Voting Eligibility (Prisoners) Draft Bill, Schedule 1, paragraphs 1 and 2 respectively.
\item\textsuperscript{10} ibid, para. 3(1).
\item\textsuperscript{11} ibid, para. 4(1).
\end{itemize}
or 226 of the Criminal Justice Act 2003 (including one passed as a result of the Armed Forces Act 2006).\textsuperscript{12} The inclusion of life sentences in the Bill makes it clear that the government do not want to entertain the argument that a life sentence prisoner should become enfranchised once they have served their minimum term within the life sentence. In this sense the present government has the same view as the previous Labour government, who made it clear that such prisoners would not be included in any proposals for extending prisoner enfranchisement.\textsuperscript{13} This argument has been used in a number of domestic court cases involving challenges to the present ban; the prisoners arguing that the retention of the ban, once the minimum term has expired, is both illogical and in breach of the right to liberty as, by that stage, the causal link between punishment and

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\textsuperscript{12} ibid, paras.3(2)(a) and (b) respectively. \\
\textsuperscript{13} Voting Rights of Convicted Prisoners within the United Kingdom, Consultation Paper CP6/09, April 8 2009), see note 30 below.
\end{flushleft}
disenfranchisement has been broken. This issue was not fully addressed by the Grand Chamber of the European Court in Hirst (No 2), although the Chamber stated provisionally that it saw no logical justification for the ban to extend beyond the punishment period given that disqualification was seen as part of the prisoner’s punishment.

Clause 2 of the Bill then offers the option of a ban for all prisoners sentenced to more than 6 months. This option is subject to the matters clarified in Schedule 2 of the Bill, which are the same as those applied to Schedule 1, above, and Schedule 3 with respect to the third option, below. For the reasons stated later in this article the second option, the lowest threshold offered by any government in response to the European Court’s

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15 Hirst v United Kingdom (No2) (2004) 38 EHRR 40, [49].
rulings, is almost certainly outside the margin of appreciation offered to the government by the tenor of the *Scoppola v Italy (No 3)*\(^{16}\) judgment, while option one is only questionably within it, because of its inflexibility and the failure to take account of, or apply exemptions for, the nature of any specific offences that warrant such a sentence, or the character, behaviour and risk of the individual prisoner.

Clause 3 of the Bill proposes a ban for all convicted prisoners – in other words a re-statement of the current situation and as mentioned above is inserted in clear defiance of the European Court’s rulings and to prepare the government for the inevitable conflict with the Court and the Council of Europe should the Joint Committee propose, or Parliament otherwise adopt, a plan to retain the current legal position.

The possibility that Parliament may choose the final option is certainly not fanciful, given the

\(^{16}\) (2013) 56 EHRR 19.
government’s current antipathy towards the Court and the Convention, and the desire to reform its approach towards the European Court and the Human Rights Act 1998. This article will proceed on the basis that the Joint Committee, and then the government, propose something less drastic and will comment on any such proposals with respect to their compatibility with the Convention and the Court’s jurisprudence. The article will also examine the impact that the legal and political battle has had on the prisoners’ attempts to vindicate their right to vote, but before doing so, it will be helpful to outline the battle thus far, beginning with the relevant domestic legislation and its legal challenges.

**Prisoner disenfranchisement in domestic law**

The current law is contained in the Representation of the People Act 1983. Section 3 of the Act provides that:
A convicted prisoner 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 government election.

Further, s 8 of the European Parliamentary Elections Act 2002 extends that restriction to elections to the European Parliament. Although this article will not examine the compatibility of the ban under EU law, it is noted that an unsuccessful challenge has been made in that respect in the Scottish courts,\textsuperscript{17} and that the prisoner is currently appealing to the Supreme Court on this issue.\textsuperscript{18}

Although the legislation excludes prisoners on remand, the provision applies a blanket ban on all convicted prisoners serving a sentence at the time of election, and following the coming into force of the Human Rights Act 1998 it was challenged by serving

\textsuperscript{17} Re McGeough’s Application for Judicial Review [2011] CSOH 65.

\textsuperscript{18} See ‘UK accused of dithering over prisoners’ voting rights’ The Guardian (16 July 2012).
prisoners in the domestic courts as being incompatible with Article 3 of the First Protocol to the Convention, which provides:

The High Contracting Parties undertake to hold free elections...under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

However, in *R v Secretary of State for the Home Department, ex parte Pearson and Martinez; Hirst v Attorney-General*,¹⁹ the High Court ruled that the legislation constituted a legitimate and proportionate interference with the right to vote under Article 3 of the First Protocol. The decision was based on its reading of the existing jurisprudence in this area, which appeared to offer a wide margin of appreciation to each member state. In particular, Kennedy LJ stated it was Parliament’s role to maintain and enhance the integrity of the electoral process, and that although recognising

that the existence of a legitimate aim might be difficult to articulate, there were clearly elements of punishment and electoral law to consider. In his Lordship’s view, Parliament had taken the view that convicted prisoners had forfeited their right to have a say in the way the country was being governed whilst they remained in custody. There was a broad spectrum of approaches among democratic societies and the United Kingdom fell into the middle of the spectrum. The United Kingdom’s position in that spectrum was clearly a matter for the Parliament and not the courts, even in difficult cases such as the post-tariff discretionary life sentence prisoner.\textsuperscript{20}

The views of Kennedy LJ, encapsulating as they do the need for judicial deference and the need for the UK government to be provided with a wide margin of appreciation by the European Court in this area, have informed the arguments of political and public opinion

\textsuperscript{20} [2001] HRLR 39, [40-41].
against prisoner enfranchisement for over ten years. Although the views of the domestic court were overridden by the European Court of Human Rights in *Hirst (No 2)*, it is evident in later European Court decisions that there is indeed room for such deference from both courts; although it appears that by the time that the European Court conceded such the government’s view had become so entrenched that any opportunity for democratic dialogue had been lost.

**Challenging disenfranchisement in Strasbourg**

On appeal to Strasbourg, in *Hirst v United Kingdom (No 2)*\(^{21}\) the European Court of Human Rights held that the UK blanket ban was disproportionate as it applied to every prisoner irrespective of their sentence and was thus beyond the government’s margin of appreciation in this

The government’s appeal to the Grand Chamber of the European Court was unsuccessful, the Grand Chamber stressed that the right to vote was crucial to the foundations of a meaningful democracy and was a right, and not a privilege. Further, there was no question that prisoners forfeited their Convention rights merely because of their status as prisoners; there was no place under the Convention for automatic disenfranchisement based purely on what might offend public opinion. In the Grand Chamber’s view:

…although the Convention did not exclude the imposition of restrictions on individuals who, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations, the principle of proportionality required a discernible and

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23 (2006) 42 EHRR 41.
24 ibid at [59] of the Grand Chamber’s judgment.
25 ibid [69].

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sufficient link between the sanction and the conduct and the circumstances of the individual concerned.\textsuperscript{26}

The Grand Chamber did, however, accept that the domestic legislation \textit{might} be regarded as pursuing the aims pleaded by the government, in so far as it was aimed at preventing crime, enhancing civic responsibility and respect for the rule of law, and of conferring a punishment in addition to the sentence.\textsuperscript{27}

Thus, it found no reason to exclude these aims as incompatible with the right guaranteed by article 3 per se. However, it noted that the provisions applied in a blanket fashion to the full range of offences which warranted imprisonment; the criminal courts made no reference to disenfranchisement during sentencing, and it was not apparent that there was any direct link between the facts of any individual case and the removal of the

\textsuperscript{26} ibid [71] [author’s italics].
\textsuperscript{27} ibid [74].
right to vote. Further it noted that any issue of justification appeared to be regarded as a matter for the legislature, thus excluding the courts from any assessment as to the proportionality of the measure. Although the Grand Chamber offered little guidance as to what measures were necessary to comply with Article 3, it stressed that the domestic legislature had never sought to weigh the competing interests or to assess the proportionality of the ban as it affected convicted prisoners.

As we shall see, the government did not respond to the decision in *Hirst (No 2)*, resulting in further action being taken against it before the European Court. Thus, in *MT and Greens v United Kingdom*, it was held that the failure of the government to pass legislation in response to *Hirst* was in breach of Article 3 and gave the

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28 ibid [77]. In addition, there had been no substantive debate by the legislature on the continued justification of the policy in the light of modern day penal policy and of current human rights standards.  
government 6 months - from 23 November 2010 - to pass legislation complying with the judgment. Further, given the government’s failure to respond to Hirst (No 2), further pressure was placed on it by subsequent European Court decisions, beginning with the decision in Frodl v Austria, which appeared to narrow the government’s margin of appreciation. In Frodl, the Court held that there had been a violation of Article 3 when a prisoner had been disenfranchised under a law that provided that anyone committing an offence with intent that carried a sentence of more than one year would forfeit the right to vote. Although the European Court accepted that the ban was less restrictive than the one considered in Hirst, it found that the lack of judicial input into the decision to disenfranchise the particular prisoner led to a violation of Article 3. This suggested that any legislative restriction on the prisoner’s right to vote would need to include this impartial judicial

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30 (2011) 52 EHRR 5.
31 ibid [36].
safeguard, although the judgment in *Hirst* indicated that such a safeguard was merely desirable rather than compulsory.

In addition, certain parts of the judgment in *Frodl* suggested that there may have to be a link between the offence and democracy:

It is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions.\(^{32}\)

Whether that suggests that the offence would need to be related to electoral offences or the like, or whether that is just an example of such, in any case the Court stressed:

The essential purpose of [these] criteria is to establish disenfranchisement as an exception

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\(^{32}\) ibid [34] [author’s italics].
even in the case of convicted prisoners, ensuring that such a measure is accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary...\(^{33}\)

The Court refused Austria’s request to appeal that decision to the Grand Chamber, and subsequently, in *Scoppola v Italy (No 3)*,\(^{34}\) the European Court re-iterated the unacceptability of blanket bans by finding that an automatic life time ban on voting for those sentenced to life imprisonment was indiscriminate, disproportionate and outside any acceptable margin of appreciation. At this stage, therefore, an impasse had been reached between a UK government, that was unwilling to comply

\(^{33}\) ibid [35].

\(^{34}\) (2013) 56 EHRR 19. The case concerned a complaint made by Franco Scoppola, who is detained in Parma prison, having been sentenced in 2002 to life imprisonment. Under article 29 of the Italian Criminal Code, a life sentence, and a sentence of at least five years, entails a lifetime ban from public office, which in turn amounts to a permanent forfeiture of the prisoner’s right to vote.
with its obligations under the Convention to enfranchise at least some prisoners, and the European Court, who appeared to be offering little margin, or guidance, to the UK government on what reform would be acceptable. Any possible dialogue between the government and the Court, thus, had broken down, and instead a diplomatic argument had broken out as to the role of the European Court in establishing the fundamental rules for prisoner enfranchisement.

In the light of this growing, restrictive jurisprudence, and the failed attempt to appeal the *MT and Greens* case to the Grand Chamber, the United Kingdom requested and was allowed to make representations in Italy’s Grand Chamber appeal in *Scoppola*. In particular, pending the outcome of the *Scoppola* appeal, the UK government had been allowed

a further extension of the time limit set by the Court to amend its inconsistent domestic legislation; having already ignored the limits set by the Court in its previous cases. On 22 May 2012 the Grand Chamber of the European Court of Human Rights delivered its long awaited judgment in the case of *Scoppola v Italy*. The Grand Chamber held that the decisions in the UK cases are still good law and must be complied with and gave the UK government 6 months to make legislative proposals to amend the existing law so that it complies with the Convention and those previous rulings.

The Grand Chamber stressed that the right to vote was crucial to establishing an effective and meaningful democracy,\(^{37}\) but that such a right was not absolute and that the Contracting Parties were to be afforded a margin of appreciation in the limitations that they applied to that right;\(^{38}\) the question for the Court,

\(^{37}\) *Scoppola v Italy (No 3)* (n 34) [82].

\(^{38}\) ibid [83].
therefore, was as to the proportionality of that interference.  

With respect to reconsidering the Grand Chamber’s decision in *Hirst (No 2)*, it noted that since that judgment nothing appeared to have changed at the European and Convention levels that might justify the re-examination of the principles laid down in that case; indeed, the Court noted that, on the contrary, if anything, the trend was towards fewer restrictions on convicted prisoners’ voting rights. Accordingly, the Court reaffirmed the principles in *Hirst (No 2)*, in particular the fact that when disenfranchisement affected a group of people generally, automatically and indiscriminately, based solely on the fact that they were serving a prison sentence, irrespective of the length of sentence and irrespective of the nature or gravity of their offence and

\[39\] ibid [92].  
\[40\] ibid [95].
their individual circumstances, it was not compatible with Article 3.\(^{41}\)

The Grand Chamber then considered the requirement of judicial intervention in the decision to disenfranchise the prisoner, noting that in the present case the Chamber had followed the decision in *Frodl v Austria*,\(^{42}\) and found a violation of Article 3, because the nature or gravity of the offence committed by the applicant had not been examined by a judge. However, in the Grand Chamber’s view, while the intervention of a judge was clearly likely, in principle, to guarantee the proportionality of the restrictions on prisoners’ voting rights, such restrictions would not necessarily be automatic, general and indiscriminate simply because they had not been ordered by a judge.\(^{43}\) The Grand Chamber also pointed out that such a requirement was not expressly mentioned in the Grand Chamber’s

\(^{41}\) ibid [93].
\(^{42}\) (2011) 52 EHRR 5.
\(^{43}\) Scoppola v Italy (No 3) (n 34) [99].
judgment in *Hirst (No 2)* as part of the essential criteria in determining the proportionality of any disenfranchisement matter; the factor of judicial intervention being regarded as merely preferable.\(^4^4\) Accordingly, States could decide either to leave it to the courts to determine the proportionality of any measure restricting prisoners’ voting rights, or to incorporate provisions into their laws defining the circumstances in which such a measure should be applied.\(^4^5\)

With respect to the compatibility of the relevant Italian Law as it affected the applicant’s case with Article 3, the Grand Chamber noted that the provisions showed the national legislature’s concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account factors such as the gravity of the offence which had been committed and the conduct of the offender. Further, the measures were only applied in connection with certain

\(^{4^4}\) ibid [100].
\(^{4^5}\) ibid [102].
offences against the State or the judicial system, or to offences which the courts considered to warrant a sentence of at least three years’ imprisonment. 46 Further, on the facts, the applicant had been found guilty of serious offences and sentenced to life imprisonment, 47 and in those circumstances it could not conclude that the disenfranchisement provided by Italian law had the general, automatic and indiscriminate character that had led it, in Hirst (No 2), to find a violation of Article 3. 48 Unlike in Hirst (No 2), a large number of convicted prisoners in Italy were not deprived of the right to vote in parliamentary elections. 49 Furthermore, the Grand Chamber noted that under Italian law a prisoner could, three years after finishing their sentence and displaying good conduct, apply for rehabilitation so as to recover

46 ibid [106].
47 ibid [107]. This sentence had in fact been subsequently commuted to 30 years.
48 ibid [108].
49 ibid.
the right to vote.\textsuperscript{50} Accordingly, the Grand Chamber found that the government’s margin of appreciation in this sphere had not been overstepped and that therefore there had been no violation of Article 3.\textsuperscript{51}

The decision in \textit{Scoppola (No 3)} affects the UK’s law and the government’s response to reform in this area in a number of ways. First, and most specifically, the Grand Chamber has overruled the Court’s previous judgment in \textit{Frodl} to the effect that judicial involvement in the decision to disenfranchise a prisoner was a prerequisite for compatibility. It is now clear that the decision to disenfranchise a prisoner can be made by the legislature and/or the judiciary provided the rules are not arbitrary and disproportionate, as they were found to be in \textit{Hirst}. However, given successive governments’ failure to respond to reform in a proportionate and logical manner, it might be suggested that the inclusion

\textsuperscript{50} ibid [109]. This rehabilitation request can be lodged earlier where early release was granted in connection with a re-education scheme.  
\textsuperscript{51} ibid [110].
of a judicial involvement in the decision to disenfranchise might protect the prisoner from arbitrary interference, and the government from further legal challenge.

Secondly, the Grand Chamber has made it clear that each state will be provided with a wider margin of appreciation with respect to choosing which prisoners will be disenfranchised than was thought possible prior to this decision. This wider margin is apparent in the *Scoppola* case itself, as the Grand Chamber have overruled the Chamber’s decision to the effect that a life time ban was arbitrary and thus in violation of Article 3 of the First Protocol. Thirdly, however, the Grand Chamber has stressed that any proposals must comply with the basic requirements of legality and proportionality that it laid down in *Hirst (No 2)*; in other words, any exclusion must be sufficiently related to the legitimate aims of crime prevention and the rule of law, and to the prisoner’s crime, as well as satisfying the test
of proportionality. Hence the Grand Chamber will not tolerate a blanket ban based on the idea that all prisoners forfeit their right to vote - a choice offered to the Joint Committee by the recent Draft Bill. Further, although extensive bans are permitted – for example the lifetime ban in Italy – there should be sufficient safeguards to ensure that the ban does not operate in an arbitrary fashion. For example, in Scoppola the Grand Chamber noted that Italian law militated against the lifetime ban by allowing the prisoner to appeal against the decision in the future.

**Responding to the European Court’s decisions in Hirst and MT and Greens**

It is within the above guidelines, therefore, that the government must respond to the European Court’s rulings. Before considering the options available to the government, and the compatibility of the recent Draft
Bill proposals with the Convention, it is worth noting earlier responses of the last two governments to the issue of prisoner enfranchisement.

As stated earlier, in *Hirst (No 2)*, the UK had been given little or no guidance as to what measures were necessary to comply with Article 3 and the judgment. Thus, the United Kingdom government was left to decide on the best means of securing compliance. In December 2006 a consultation document was published by the Department of Constitutional Affairs, setting out the principles of prisoner enfranchisement and the options available to the United Kingdom, which was followed by the Ministry of Justice’s second stage consultation document, outlining the government’s initial proposals. In these documents the government

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suggested a number of options of enfranchisement, but favoured the idea that prisoners sentenced to less than one years’ imprisonment would be automatically entitled to vote (subject to certain exceptions based on the type of offence for which the prisoner had been convicted). There followed a number of criticisms from both the Joint Select Committee on Human Rights,\textsuperscript{54} and the Council of Europe,\textsuperscript{55} with respect to the government’s refusal to act on these recommendations and to introduce amending legislation.

Following the decision in \textit{M and T}, the government suggested, initially, that those serving sentences of 4 years or less would be enfranchised,\textsuperscript{56} but

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\textsuperscript{55} Committee of Ministers Interim Resolution CM/ResDH (2009) 160.
\textsuperscript{56} ‘Thirty thousand prisoners will get the right to vote after victory in the European courts’ \textit{The Daily Telegraph} (6 January 2011) page 2. See Cabinet Office, ‘Government approach to prisoner voting
\end{flushleft}
later proposed that only those sentenced to one year or less would be allowed to vote.\textsuperscript{57} However, in February 2011, it abandoned those reforms and instead proposed that there was to be an open vote in the House of Commons on prisoner voting.\textsuperscript{58} The European Court in \textit{Hirst (No 2)} had indeed highlighted the fact that Parliament had never debated the issue of prisoner enfranchisement. However, it is clear that the Court would not regard such debate as an alternative to legislative action,\textsuperscript{59} despite the constitutional legitimacy


\textsuperscript{58} ‘Tory “free vote” on prisoner polls’ \textit{Independent on Sunday} (1 February 2011).

\textsuperscript{59} See D Thompson, ‘Votes for prisoners or not? Sleep walking into a constitutional nightmare’ (2011) SLT 153.
of such procedure in gathering parliamentary views on this matter.\textsuperscript{60}

The vote was preceded by a meeting of the parliamentary constitutional committee, which received advice over the legal implications of the government’s refusal to comply with \textit{Hirst} and stressed that a blanket provision of any nature, irrespective of the length of the sentence, would not be acceptable to the European Court of Human Rights.\textsuperscript{61} In particular Eric Metcalfe of JUSTICE stressed that the problem was the blanket nature of the ban, of the individual decision-making of it, not the length, stressing that there was not a magic figure that ‘with one leap we are free.’\textsuperscript{62} This warning was consistent with the European Court’s stance at that time, but as we have seen is probably over cautious given the

\textsuperscript{60} See D Nicol, ‘Legitimacy of the Commons debate on prisoner voting’ [2011] PL 681.
\textsuperscript{62} ibid, at paragraph 12.
widen of the state’s margin of appreciation via the decision of the Grand Chamber in Scoppola.

Pre-empting the vote, the then Justice Secretary, Kenneth Clarke, stressed that the government would comply with its obligations and that at least some prisoners would get the right to vote, promising that the government was going to do the minimum necessary to comply with the ruling.\(^6^3\) However, by a large majority it was decided to take no action to give prisoners the right to vote and to defy the European Court’s judgment in Hirst (No 2).\(^6^4\) In the House of Commons, senior Tory backbencher David Davis and former Labour Justice Secretary Jack Straw urged the House to defy the Court’s ruling and MPs backed that motion by a majority of 234 to 22.\(^6^5\)

\(^6^3\) J Kirkup, ‘Prisoners will get the vote, Kenneth Clark says’ The Daily Telegraph (9 February 2011).
\(^6^5\) HC Deb 10 February 2011, vol 523, col 584 (Division 199).
The proceedings, inevitably, excited passionate views, and the majority’s view is typically summarized by David Ruffley (Bury St Edmunds) (Conservative):

It is completely unacceptable … that a criminal who has violated law to such an extent that that he or she is incarcerated and has their freedom withdrawn … should be given the right to vote in a democratic election. It would give the British public the impression that the system has more respect for the criminal than for the sensitivities and interests of the victim, which are far too often overlooked. … It would give the impression of a Parliament out of touch at best, and at worst the poodle of a European court.\(^66\)

Of the minority, Tom Brake (Carshalton and Wallington) (Liberal Democrat) put forward two reasons in favour of allowing prisoners the right to vote:

\(^{66}\) HC Deb 10 February 2011, vol 523, col 540.
The first is that when the European Court of Human Rights finds that UK law contravenes the European convention… the UK government should address that illegality. Once we start picking and choosing the laws that we should apply and those that we can disregard… where does it end? The Americans know where it ends: in Guantanamo Bay and Abu Gharib... The second reason… is that it is the appropriate course of action. Prisoners have committed a crime. Their punishment is to lose their liberty. That is fair and just. What is then gained by seeking to inflict civil death on them? In what way does that benefit the victim? ...What is the logic behind the ban? We do not remove prisoners’ access to health care, nor do we stop them practising their religion, so why should we impose a blanket ban on prisoners’ right to vote?\(^67\)

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\(^67\) HC Deb 10 February 2011, vol 523, cols 543-4.
Those two contrasting views have been reproduced to stress the current impasse between the government and the European Court and to contextualise the variety of proposals offered in the recent Draft Bill. Those proposals, and their compatibility with human rights law, will be considered later in the article, but the article will now consider how the government’s reluctance to comply with the judgments has impacted on the prisoner’s right to seek justice in the domestic courts.

**Seeking justice in the domestic courts Post-Hirst**

Given the continual dispute between the government and the Council of Europe and the European Court of Human Rights on this issue, it has been largely forgotten that prisoners have lost their right to vote in national and local elections since the European Court’s first rulings in 2004 and 2005 without any legal redress. In particular, during this period prisoners had lost the right to
participate in the May 2010 general election. If the government was not prepared to fulfil its international obligations by responding to the Court’s rulings, then could the prisoners make use of the Human Rights Act 1998 in domestic courts to gain redress?

As the 1998 Act adopts an interpretative approach to remedying Convention rights violations, the domestic courts’ role is correspondingly limited. The court may under s.3, when it is possible to do so, interpret legislation in line with Convention rights, but cannot re-write legislation which is clearly incompatible with such rights; its only power in such cases being to issue a declaration of incompatibility. The inability of the courts to provide redress for breaches of Convention rights is similarly limited, as it is not possible to award compensation for the acts of public authorities that were clearly lawful at that time. It is in the context of these limitations that the article will now examine two domestic challenges to the government’s failure to
respond to the European Court’s decisions in *Hirst (No 2)* and *MT and Greens*.

Prior to the General Election, a test case was brought to challenge the compatibility of the 1983 Act, but in *R (Chester) v Secretary of State for Justice*, the Administrative Court refused to grant a declaration of incompatibility with respect to s.3 and, specifically, the government’s decision not to allow post–tariff life sentence prisoners the right to vote, despite the fact that a general declaration had been made by the Scottish courts. This was because the court was concerned that the parliamentary process of legislative reform would be interfered with if it granted a declaration before the proposed statutory provisions were in place, and the decision was upheld by the Court of Appeal. In

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70 *Chester v Secretary of State for Justice, The Times*, January 17 2011. For similar refusals in the Scottish and Northern Ireland courts, see, respectively, *Traynor v Secretary of State for Scotland*.
refusing what was seen by Laws LJ as a request by the prisoner for an advisory opinion, his Lordship described the grant of such an opinion in the present case, as to what legislation, as yet undrafted might possibly contain, as a ‘step too far’.  

The real obstacle to the granting of the declaration sought by the prisoners was of course that had it been given, the courts, rather than Parliament, would have taken upon itself to decide whether the exclusion of post-tariff life sentence prisoners from voting was consistent with the margin of appreciation offered to the government from the decision in Hirst (No 2). As stated earlier, this issue was not fully addressed by the Grand Chamber of the European Court in Hirst (No 2); although the Chamber stated provisionally that it saw


[71] Chester v Secretary of State for Justice (above, n 14) [31] (Laws LJ). His Lordship distinguished the decision of the Court of Appeal in R v HM Treasury, ex parte Smedley [1985] 1 QB 657 on the basis that in that case a proposed piece of delegated legislation would have been ultra vires enabling primary legislation.
no logical justification for the ban to extend beyond the punishment period given that disqualification was seen as part of the prisoner’s punishment.\textsuperscript{72} Of course, the domestic courts’ refusal to grant further declarations of incompatibility to mark the continuous defiance of the government to change the law was based on the assumption it would usurp Parliament’s duty to respond to the judgment of the European Court and to enact appropriate legislation - a function it had no intention of carrying out. It is suggested that a declaration of incompatibility, as the only possible remedy available to the prisoners given the domestic courts’ inability to grant compensation under the Human Rights Act 1998, should have been granted to highlight the government’s continued refusal to abide by even the bare essentials of the \textit{Hirst} and \textit{MT and Greens} judgments, and that the European Court should recognise that the refusal to grant such a declaration in these specific circumstances is a

\textsuperscript{72} \textit{Hirst v United Kingdom (No 2)} (2004) 38 EHRR 40 at [49].
breach of Article 13 of the Convention (the right to an effective remedy). That should be the case despite the European Court having accepted in *MT and Greens* that as a general rule there is no right of a victim to have domestic legislation declared incompatible with Convention rights by the domestic courts.

The decision in *Chester* was followed by the High Court decision in *Tovey, Hydes and others v Ministry of Justice*, a case which raised a number of issues with respect to the remedies available to disenfranchised prisoners and the effectiveness of the Human Rights Act 1998. Following the decision of the European Court in *MT and Greens v United Kingdom*, the prisoners sought both a declaration of incompatibility of both s.3 of the 1983 Act and s.8 of the European Parliamentary Elections Act 2002, and damages for the fact that they were not allowed to vote in the May 2010

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74 The High Court decided to take Tovey and Hyde’s claims as the ‘lead’ cases for 583 similar claims being made by prisoners.
General Election, and for the government’s failure to implement legislation in response to the decision of the Grand Chamber in *Hirst (No 2)*.

The Ministry firstly sought to defend that action, and to strike the case out, by reliance on s.6(2)(a) of the 1998 Act, which provides that s.6(1) does not apply where as a result of one or more provisions of primary legislation the relevant public authority could not have acted differently; or, under s.6(2)(b), that it was acting so as to enforce provisions of primary legislation which, though incompatible with the Convention, cannot be read down so as to be interpreted in a way which permit it to act otherwise. Secondly, with respect to the claim that the government failed to implement changes to the legislation following the European Court’s ruling in *Hirst*, the Ministry sought to rely on s.6(6) of the 1998 Act, which provides that although an act of a public authority (for the purposes of s.6(1)) includes a failure to act, it does not include (a) a failure to introduce in, or lay
before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order.

As the first claim was dependant on proving that the public authorities could have acted other than in breach of Convention rights, the High Court was asked to consider employing s.3 of the Human Rights Act 1998 to interpret the relevant legislation in a Convention compliant manner. Section 3(1) of the 1998 Act provides that primary and subordinate legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with Convention rights, although the section further provides that s.3(1) does not affect the validity, continuing operation and enforcement of any such legislation if the primary legislation prevents removal of that incompatibility. 75

Longstaff J stated that both legislative provisions were clear and that unless they could be interpreted so as to accommodate the judgment in Hirst, a prisoner must

75 Human Rights Act 1998, s 3(2)(b), s 3(2)(c).
be refused the vote. The question for the court, therefore, was whether an alternative interpretation was possible within the ambit of s.3 of the Human Rights Act 1998. In addressing this issue his Lordship referred to the approach previously adopted by Lord Bingham in Sheldrake v Director of Public Prosecutions, where he stated that although the interpretive obligation under s.3 is a ‘very strong and far-reaching one, and may require the court to depart from the legislative intention of Parliament’, there is a limit beyond which a Convention compliant interpretation is not possible. Applying those tests his Lordship stated that in this case the claimant would need to persuade a court that a provision which provides that he is ‘legally incapable’ of exercising the vote provides instead that he was ‘legally capable’; that the court ‘would have to interpret and apply the

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76 Tovey and Hydes v Ministry of Justice [2011] EWHC 271 at [35].
77 [2005] 1 AC 264 (HL).
78 ibid, para.28; relying on the House of Lords decision in Ghaidan v Godin-Mendoza [2004] 2 AC 557 as illustrated in R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837 (HL) and Bellinger v Bellinger [2003] 2 AC 467 (HL).
legislation as though “No” could mean “Yes”.’ In his Lordship’s view ‘such an interpretation on the face of it flies directly counter to the legislative wording’. However great the imperative to adapt UK statutes to provide for fundamental rights basic to democratic states, to interpret the statute in this way would be a step too far – for it would, in Lord Bingham’s words, ‘change the substance of the provision completely, or would remove its pith and substance.’

His Lordship also considered an additional argument, rejected earlier by the Court of Appeal in Chester v Ministry of Justice, that as the European Court in Frodl v Austria had decided that a judge had to take the decision on disenfranchisement as part of the

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79 Tovey (n 76) [37].
80 ibid.
81 ibid [38].
82 [2010] EWCA Civ 1439, at [24].
83 (2011) 52 EHRR 5.
sentencing process,\textsuperscript{84} s.3 of the 1998 Act required the court to read down the 1983 Act by adding words that would confer on the judiciary the function of deciding on the prisoner’s enfranchisement. Alternatively, and if that would amount to constitutional legislation, it had been asked to make a further declaration of incompatibility. Although this argument had not been raised specifically in this case, Langstaff J noted that it had been rejected by the Scottish Registration Appeals Court as involving a substantial departure from a fundamental feature of the legislation.\textsuperscript{85} Although his Lordship in this case did not feel bound to follow these previous decisions, he found nothing to persuade him that the clear “no” in the words of the statute could be interpreted to mean “yes”.\textsuperscript{86}

\textsuperscript{84} This part of the European Court’s judgment was subsequently overruled by the Grand Chamber’s decision in \textit{Scoppola v Italy}.

\textsuperscript{85} Smith \textit{v} Scott [2007] CSIH 9, relying on the approach of Lord Nicholls of Birkenhead in \textit{Re S (Minors)} [2002] UKHL 10, [27]. See also the decision of the Northern Ireland High Court in \textit{R v Secretary of State, ex parte Toner and Walsh} [1997] NIQB 18.

\textsuperscript{86} Tovey (n 76) [45].
His Lordship then considered the claim that the failure of the Secretary of State to amend the statute in the light of the *Hirst (No 2)* judgment justified an award of compensation under the Human Rights Act. His Lordship rejected this argument with reference to s. 6(6) of the Act, above, adding that s. 6(6) itself was not susceptible to a reading down by interpreting it in a way which, though wholly impermissible in English common law, would advance a Convention right.\(^{87}\) Specifically, his Lordship held that the words in s. 6(6) did not permit anything to be read in or reduced so that a failure to introduce a proposal for legislation, or to make primary legislation, is not excluded from the word ‘act’ within s. 6.

Further, Longstaff J opined that s.6 was not open to the interpretative obligation in s.3 because it came from the self same Act and would involve one section of the Act (s.3) having predominance over another (s.6). In

\(^{87}\) ibid [47].
his Lordship’s view, the Act was intended to give effect and authority to the Convention in UK law, specifically within the limits set by the Act, of which s.6(6) was one.\textsuperscript{88} It is submitted at this stage that it should not necessarily be impermissible to interpret one section of the Act in the light of another so as to achieve the general purpose of the legislation, which is not only to give effect to the Convention within its specific provisions, but more widely, to ensure that domestic law (including the Human Rights Act itself) is applied in a manner that is consistent with Convention case law and principles, including the right to an effective remedy for breach of Convention rights.\textsuperscript{89} In any case, his Lordship noted that the section was not preventing the claimant from having the vote; it simply prevented him from suing for compensation, not for a breach of the right to

\textsuperscript{88} ibid.
\textsuperscript{89} Notwithstanding this view, the author agrees with his Lordship’s view that s. 6(6) was not realistically capable of being interpreted in a way which would allow compensation to be awarded for a failure to introduce or pass legislation to rectify a breach of the Convention or to fill a gap of protection.
vote, but for a failure to introduce legislation to remedy such a breach.\textsuperscript{90}

His Lordship then gave another reason why the claim for compensation should fail: that the European Court itself had determinedly turned its face against any monetary award for prisoners seeking enfranchisement.\textsuperscript{91} His Lordship relied on the Grand Chamber’s judgment in \textit{Hirst (No 2)} where, in considering the claim for non-pecuniary loss, it stated that:

\begin{quote}
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 the judgment. \textit{In the circumstances} it considers that
\end{quote}

\textsuperscript{90} \textit{Tovey} (n 76) [47].
\textsuperscript{91} ibid [48].
this may be regarded as providing the applicant with just satisfaction for the breach in this case.\textsuperscript{92}

It is suggested, therefore, that the European Court was not attempting to lay down any general rules or principles regarding non-pecuniary loss in these cases, but rather was stating that, \textit{assuming that the government would comply with its ruling}, a declaration of a violation of Article 3 would be appropriate and satisfactory in this situation.

His Lordship also sought to rely on the European Court’s recent judgment in \textit{MT and Greens v United Kingdom},\textsuperscript{93} where it considered the award of punitive and aggravated damages inappropriate in the present case, because such damages are awarded, respectively, to reflect the particular characteristic of the violations suffered by the victims and to serve as a deterrent in

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\textsuperscript{92} \textit{Hirst v United Kingdom (No 2)} (2006) 42 EHRR 41 at [93] [author’s italics].  
\textsuperscript{93} \textit{The Times}, 24 November 2010.
\end{flushleft}
respect of violations of a similar nature by the State; and
to reflect the fact that they were victims of an
administrative practice. This was the case even though it
was a cause of regret and concern to the Court that no
amending measures had been brought forward in the five
years since the Hirst (No 2) judgment.\textsuperscript{94} Further, with
respect to compensatory damages, although the Court
accepted that ‘the continuing prohibition on voting may
give rise to some feelings of frustration in respect of
those prisoners who could reasonably expect potentially
to benefit from any change in the law’, a finding of a
violation, ‘\textit{when viewed in tandem with the Court’s
direction under Article 46}’, to bring forward legislative
proposals within six months of the judgment, constituted
‘sufficient just satisfaction \textit{in the present cases}’.\textsuperscript{95}

Again, it is clear that the European Court’s
decision on Article 41 was made on the facts, and was
particularly influenced by the Court’s assumption that

\textsuperscript{94} \textit{MT and Greens v United Kingdom} (n 29) at [97].
\textsuperscript{95} ibid [98] [author’s italics].
the government had every intention of complying with the judgments in *Hirst (No 2)* and, of course, with the pilot judgment made in the case before it. Thus, although the European Court may, as a general norm, have set itself against the grant of non-punitive awards in these cases, it may well reserve itself the opportunity of granting such awards, including punitive and aggravated awards, when a state deliberately defies the judgments of the Court and fails to provide just satisfaction in the form envisaged by the Court. There is certainly no rule that non-pecuniary loss is not available in cases of disenfranchisement, because in one case the European Court awarded 3,000 euros for such loss when a mentally disabled person was barred from voting.\(^96\) The decisions in *Hirst (No 2)* and *MT and Greens* should certainly not be taken by the domestic courts, or the government, as an indication that the European Court

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\(^96\) *Kiss v Hungary*, Application No. 38832/06, at [48] of the judgment. The Court merely stated that the applicant must have suffered some non-pecuniary damage, but did not explain why.
would refuse to grant non-pecuniary loss in cases where the victim has been denied the right to vote.

Further, the fact that both the legislature and the domestic courts are not willing, or able, to grant any form of just satisfaction, means that the European Court will again be asked to rule on this issue, when domestic prisoners take further action against the government for its refusal to comply with both judgments. In this regard it is interesting to note that the European Court has recently issued a press release stating that it will adjourn the 2,534 cases pending against the UK government with respect to prisoner’s voting rights until September 2013 to allow the government to initiate its latest proposals, under the monitoring of the Committee of Ministers. The expectation of the UK government is, of course, that if in the near future Parliament does pass legislation

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complying with the European Court’s rulings, a subsequent European Court will rule that such measures constitute just satisfaction, and that no non-pecuniary loss will be offered to the prisoners under Article 41 of the Convention. The realisation that the Court might not award financial redress to the prisoners has, of course, encouraged the last two governments to employ its delaying tactics in this area. To deny the prisoners adequate redress for their loss of voting rights would question the efficacy not only of the Human Rights Act, already shown in Chester and Tovey, but also the European Convention’s machinery for redressing Convention rights’ violations.

Finally, Langstaff J considered the prisoners’ claim for a declaration of incompatibility under s.4 of the Human Rights Act 1998. His Lordship noted that a declaration had already been granted by the Scottish courts in Smith v Scott and thus concluded that there appeared to be nothing of additional practical use in
granting a declaration in this case. Nevertheless, his Lordship conceded that it might just be arguable that a court might be persuaded that it was a matter of personal importance to a prisoner to know that he had rights which were denied him, and to secure a declaration to that effect. However, his Lordship stressed that the provisions’ incompatibility arose because of the blanket nature of the ban, and that the Convention and the case law of the European Court did not require a state to introduce the franchise universally to all prisoners. His Lordship recognised that the state had a wide margin of appreciation in deciding the category of prisoner for whom a restriction on the right to vote would not be a disproportionate interference with his rights generally. Thus, noting that the prisoner Hydes was serving a sentence for burglary with a minimum of 4 years and 265 days, he concluded that it was not obvious that however that margin be exercised in honouring the

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98 Tovey (n 76) [51].  
99 ibid.
government’s international obligations he would be within that category which would then be enfranchised. Consequently, it could not be said that if the compatibility were removed the prisoner in question would be entitled to vote; all would depend on how, legitimately, Parliament chose to legislate.\textsuperscript{100} Accordingly, his Lordship struck the prisoner’s claim out, finding in the alternative that it had no reasonable prospect of success.\textsuperscript{101}

In making this decision his Lordship simply follows the approach of both the High Court and the Court of Appeal in \textit{Chester}; that until Parliament actually passes legislation in an attempt to comply with the judgment in \textit{Hirst}, it would be inappropriate and futile to grant a declaration of incompatibility of the present legislative provisions. Whilst agreeing with the

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\textsuperscript{100} ibid [52].
\textsuperscript{101} ibid [54]. At this stage, it should be noted that prisoners such as Hydes would not benefit from even the most generous proposal in the recent Draft Bill.
\end{flushleft}
domestic court’s general findings that to decide otherwise would usurp Parliament’s legislative role in drafting provisions to comply with the European Court’s judgments in *Hirst* and *MT and Greens*, such an argument seems to lose its constitutional strength when the government has made it clear on several occasions that it has no intention of abiding by the judgments. Admittedly, this was not clear to the High Court when the case was decided, yet it is not certain whether it would still have felt it inappropriate to make a declaration even had the case been decided after the parliamentary vote - the court perhaps feeling that this was a diplomatic and political issue which needed to be resolved by the government and Parliament rather than the courts. This deadlock, and the prisoners’ deep sense of frustration is, of course, exacerbated by the fact that the European Court will not give clear guidance on the legitimate scope of any reform that may be undertaken by the government. Accordingly, a further declaration of incompatibility was the *only* remedy available to the
prisoners at that stage. Neither, it is suggested, would such a declaration have been futile, as it would provide another warning to the government to remove incompatible legislation, and may, eventually, lead the European Court to award compensation in subsequent proceedings, given that the government has refused to provide just satisfaction in line with its own rulings and those of the domestic courts.

**Prisoner enfranchisement: the options**

Following the recent decision of the Grand Chamber in *Scoppola* the United Kingdom government was given 6 months from that judgment to provide the Court with proposals that satisfy Article 3 of the First Protocol and the general criteria provided by the Grand Chamber, above. In the meantime, prisoners remain disenfranchised and 2,534 cases pending against the UK government with respect to prisoners’ voting rights have
been adjourned until September 2013 to allow the government to initiate its latest proposals. Thus, although the government appear to have a relatively broad discretion, it is clear that the current blanket ban is unacceptable and that any measures need to show a relationship between the nature and seriousness of the offence and the act of disenfranchisement. Thus, the government’s response to the judgment will need to consider measures which are potentially acceptable to the Court and the government’s Convention obligations.

The options outlined in the recently published Draft Bill have already been examined, as have the previous reactions to the European Court’s rulings. This leaves us with the current situation and the question whether any of the government’s proposals, other than a total ban, would be acceptable to the European Court. It

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is suggested that a ban for all prisoners other than those serving 6 months or less, would be regarded as arbitrary by the Court and thus not in compliance with Article 3; particularly as those prisoners who would benefit from the relaxation would be so small as to question whether the very essence of the right in Article 3 was being extended to prisoners. Thus, although such a measure may be politically popular, in the sense that it is felt to meet the bare minimum of the government’s obligations, it is more than likely to be rejected by the Court in (inevitable) subsequent proceedings.

The proposal to extend the franchise to those serving less than 4 years would, applying the reasons stated by Eric Metcalfe, above, be equally objectionable, particularly if such a threshold is automatic and merely a convenient figure, and uninformed by the nature and seriousness of the offence. Of course since that opinion was offered, the Grand Chamber (in Scoppola) has widened the margin of appreciation available to States
and it might be suggested that a threshold of 4 years may fit within that margin. Nevertheless, as we have seen, the Grand Chamber in upholding relevant Italian law noted that the provisions showed the national legislature’s concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account factors such as the gravity of the offence which had been committed and the conduct of the offender. The Court also noted that the measures were only applied in connection with certain offences against the State or the judicial system, or to offences that the courts considered to warrant a sentence of at least 3 years’ imprisonment. Any measures, therefore, require some articulation of why these offences may justify a ban, or suspension, of the prisoner’s right to vote; and a blanket ban based entirely on the length of the sentence may not pass muster with the Court. Equally, as suggested earlier in this article, the inclusion of a judicial control, although not strictly required, would provide a welcome safeguard against arbitrary interference predicated on beliefs that
prisoners should lose the right to vote simply because they are prisoners.

What must not be forgotten, of course, is that the measures proposed by the Joint Committee, or ultimately adopted by Parliament may, in certain respects, be harsher than contained in the current law. For example, Italian law provides for a lifetime ban (albeit subject to appeal) for serious offences and life sentence prisoners, and for a suspension of the right beyond shorter sentences, whilst our domestic law gives back the right to vote automatically on release. This illustrates the arbitrary nature of the current domestic law, which looks solely to the fact of incarceration, although ironically our laws impose a lesser penalty on offenders than those States who have had their provisions accepted by the Court as consistent with Article 3. It would, therefore, be open for the government to justify longer bans for those convicted of very serious offences, especially if those
offences have a relationship with the convicted person’s disregard for society and the rule of law.

There remains the further question as to whether particular offences, such as electoral fraud or those involving abuse of public office, should be singled out for special treatment, perhaps in the form of an, appealable, lifetime ban. No such proposals appear to be in the government’s mind, although the Joint Committee have been enjoined to consider options other than those contained in clauses 1 to 3.

Indeed there exists within Member States of the Council of Europe a wide range of legal provisions covering the issue of prisoner enfranchisement.\(^\text{103}\) These range from total or *de facto* bans,\(^\text{104}\) complete

\(^{103}\) See House of Commons Library, Standard Note SN/PC/01764, 22 November 2012 (Appendix).
\(^{104}\) Andorra, Armenia, Bulgaria, Estonia, Georgia (an application has been made to the Court challenging domestic law), Liechtenstein (a draft Bill has been presented to Parliament), Russia and San Marino.
enfranchisement,\textsuperscript{105} and other laws which provide for partial disenfranchisement for certain offences, and lengths of sentences, often at the discretion of the trial judge. The UK government are bound to argue that certain regimes in the Council of Europe have harsher regimes than its current ban or the more generous of its recent proposals, often disenfranchising beyond the sentence. However, it should be noted that many of those regimes have not been challenged before the European Court of Human Rights, whilst others possess the, albeit not mandatory, safeguard of judicial input. Rather than draw invidious comparisons with other regimes, the government is better advised to follow the general tenor of the Court’s judgments, which have consistently warned against arbitrary and blanket bans lacking an

\textsuperscript{105} Albania, Azerbaijan, Bosnia and Herzegovina (apart from those sentenced by the International Criminal Court), Croatia, Czech Republic, Denmark, Finland, Ireland (since 2006), Latvia (apart from local elections), Lithuania, Macedonia, Montenegro, Serbia, Slovenia, Spain, Sweden, Switzerland.
appropriate link between the crime, the sentence and disenfranchisement.

Observations and conclusions

The litigation surrounding the right to vote for convicted prisoners has exposed a range of political, public and judicial attitudes towards prisoner enfranchisement, and prisoners’ rights in general. On one hand, the initial decision of the domestic courts represented the idea of automatic forfeiture based on general and unarticulated ideas of punishment and civic responsibility, and this view has been adopted by successive governments during and since the judgment in *Hirst (No 2)* in their desire to retain the status quo. On the other hand, the decisions of the European Court of Human Rights in *Hirst (No 2), Frodl* and *Scoppola* question the bald assertion of automatic forfeiture and insist on a clear link between reasoned legitimate aims of sentencing and
punishment and the loss of the prisoner’s prima facie right to vote. This clearly limits the scope of any reform that the current government does introduce, leaving the government the stark choice between genuine and real compliance or a diplomatic, and possible legal, impasse between it and the Council of Europe.

The reluctance and ultimate refusal by successive governments to accept that prisoners maintain their basic human rights on incarceration is certainly not novel, and prisoners have fought long and hard to gain their rights to procedural justice in disciplinary proceedings, the right to legal and personal correspondence, the right to marry and found a family, and the right to due process in matters relating to release and recall from prison.

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107 Golder v United Kingdom (1975) 1 EHRR 524 and Silver v United Kingdom (1983) 5 EHRR 347.
All of these cases have been staunchly defended by the government, and in the cases of prison discipline and the right to found a family, appealed, unsuccessfully, to the Grand Chamber of the European Court. The referral to the Grand Chamber in MT and Greens, therefore, is another instance of the government reluctantly accepting the spirit and tenor of judgments of the Court and attempting every avenue of appeal before accepting the inevitability that prisoners do enjoy their Convention rights. However, the reluctance of the government to accept the judgment of the Court in this area is unprecedented; the government being prepared to defy the European Court and compromise its relations with the Council of Europe and its obligations under international human rights law for the sake of denying prisoners the right to vote.

The government’s inflexible and intransigent stance with respect to the prisoner’s right to vote reflects the deep-rooted belief, shared by many politicians and
on occasion by members of the domestic judiciary, that
prisoners forgo their rights on incarceration and that their
civil status is suspended on their sentence; thus
relegating their rights to mere expectations that are
enjoyed at the discretion of Parliament, and the
administrative decisions of Secretaries of State and the
prison authorities.\textsuperscript{110} This idea of automatic forfeiture
has often been supported in domestic decisions relating
to questions such as whether prisoners should enjoy the
general right to free speech,\textsuperscript{111} or the right to found a
family whilst in prison.\textsuperscript{112} So too, it appears to be at the
heart of many objections to extending the franchise to
sentenced prisoners.

\textsuperscript{110} See S Foster, “Automatic Forfeiture of Fundamental Rights:
Prisoners, Freedom of Expression and the Right to Vote” (2007)
16(1) Nottingham Law Journal 1.
\textsuperscript{111} R v Secretary of State for the Home Department, ex parte
O’Brien and Simms [1999] 3 All ER 400 (HL) and R (Nilsen) v
Secretary of State for the Home Department [2005] 1 WLR 1028
(CA), on the question of whether prisoners could gain access to
journalists and write their memoirs whilst in prison.
\textsuperscript{112} R (Mellor) v Secretary of State for the Home Department [2001]
EWCA Civ 472; [2001] 3 WLR 533 and Dickson v Premier Prison
The battle for prisoner enfranchisement has also exposed the futility of the prisoners’ protracted and successful challenge to the offending legislation in both the domestic courts under the Human Rights Act 1998 and before the European Court of Human Rights under the Convention machinery. The European Court denied the prisoners substantive compensation for the loss of their right to vote, on the ground that finding the government in violation of Article 3 was “just satisfaction” and thus sufficient to dispense with the prisoners’ claims. This reflects the Court’s reluctance to award non-pecuniary loss for breach of an individual’s democratic rights, where it is difficult to assess the damage to the victim and where there may be no evidence of loss of liberty, or harm to the victim’s property or person. This is, of course, compounded by the domestic courts’ refusal to grant such damages under the Human Rights Act 1998, and then to refuse to grant further declarations of incompatibility to mark the government’s consistent failure to comply with the European Court’s ruling.
The failure of the European Court to grant substantial compensation in *Hirst* and *MT and Greens* was clearly predicated on the belief that the government would adhere to the ruling in *Hirst*, and the warning given in *MT and Greens*, and consequently change the law. It thus allows it to feel secure in the knowledge that whatever diplomatic and political pressure may be placed on it to comply with the rulings, there would be no possibility of having to meet large compensation claims – the very factor which forced the government to put forward limited proposals for reform at the end of last year.\(^{113}\)

It is clear that unless and until the government takes a measured and appropriate response to the judgments in *Hirst*, *MT and Greens*, and now *Scoppola (No 3)*; it will continue to be in breach of its obligations

\[^{113}\text{R Watson, A Asthana and F Gibb, ‘Cameron seeks extra cover on jail votes’ }\textit{The Times} (19 February 2011) page 5; S Coates, ‘Cameron is clear to defy Europe on human rights’ }\textit{The Times}, (18 February 2011) pages 1, 9.]
under the European Convention. As noted previously,\(^{114}\) the government’s continued illiberal and restrictive approach to the reform of prisoner enfranchisement laid it open to potential challenge in Strasbourg and in the domestic courts, and the refusal of successive governments to pass the necessary legislative measures to comply with the European Court’s ruling in *Hirst* then led, inevitably, to further challenges under the Convention and the Human Rights Act 1998. These difficulties have now re-surfaced after the Grand Chamber’s ruling in *Scoppola v Italy*. Unlike the situation after *MT and Greens*, the government now appears to have a wider margin of appreciation and an opportunity to introduce provisions, which, in certain respects, are less generous to prisoner enfranchisement. However, any such provisions must take note of the basic principles set out in the recent judgment and must be informed by logic, proportionality and a desire only to

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disenfranchise individuals that are truly deserving of such a penalty. The simple fact that the individual is at the relevant time a lawfully incarcerated prisoner will not suffice, and ill-thought out variations on that theme will also be unacceptable.

The Voting Eligibility (Prisoners) Draft Bill offers three options: a ban for prisoners sentenced to 4 years or more, a ban for all prisoners sentenced to more than 6 months, or a ban for all convicted prisoners. For the reasons stated above, the second possibility is almost certainly outside the margin of appreciation offered to the government by the Scoppola judgment, and the first one only questionably within it because of its inflexibility. The final possibility is not worthy of a state that professes to believe in the rule of law and which has obligated itself in international law to abide by decisions of the Court. As with the 2006 proposals, it displays the government’s contempt for the Council of Europe, the Convention and the Court, and the basic notions of
human rights, and constitutional and democratic fair play. It is to be hoped, therefore, that the Committee provides more proportionate and reasoned options, reflecting the real tenor of the European Court’s jurisprudence and allowing the injustice of the previous law, and the failure to achieve justice for its shortcomings, to be redressed.