THE CONSTITUTIONAL CONTROVERSY OF PRISONER VOTING: RIGHTS AND INSTITUTIONS BETWEEN THE UK AND EUROPE

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by

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ABSTRACT

The Constitutional Controversy of Prisoner Voting: Rights and Institutions Between the UK and Europe

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In *Hirst v United Kingdom (No.2)* (*Hirst*) the European Court of Human Rights (ECtHR) held that the UK's legislative ban on prisoner voting violated Article 3 of Protocol 1 of the European Convention on Human Rights. Following *Hirst,* a protracted constitutional clash between the UK and Strasbourg ensued, as the UK resolutely resisted compliance with the judgment in *Hirst*. The UK Government introduced administrative amendments which appear to have resolved the clash. However, this thesis argues that these amendments fundamentally undermine the ECtHR's requirements for legislative amendments, as the Committee of Ministers of the Council of Europe sanctioned a form of corrective compliance.

This thesis unravels the constitutional controversy of prisoner voting, which enables detailed understanding of the multifaceted nature of inter-institutional roles and relationships in rights protection. In exploring the clash, first to situate the discussion, this thesis delineates the background context to prisoner voting. It then explores the key principles relevant to rights protection in the UK and at the European level. The core of this thesis provides a detailed analysis of the approaches of the domestic courts, European courts and political institutions to prisoners' voting rights. Crucially, rather than attributing blame to any one institutional actor, this thesis argues that the clash reveals multiple institutional failures in terms of rights protection. As such, it is proposed that the clash constitutes a "lose-lose-lose-lose-lose" scenario.

It is a "loss" to the domestic courts, as their generally hands-off approach to prisoners' voting rights undermined human rights protection, revealing judicial reticence regarding the exercise of the constitutional role accorded to them under the Human Rights Act 1998 (HRA), which contributed to their failure to hold the UK Government to account. It is a "loss" for Parliamentary protection of rights as Parliament's involvement was circumvented and the clash has seemingly been resolved by executive administrative amendments. Further, it constitutes a "loss" for the Government, as its resolution of the clash was only reached after several years of prolonged conflict in which it sustained repeated criticism for its recalcitrant response to

prisoner voting, resulting in reputational damage. It is a "loss" for the ECtHR, as its jurisprudence and its legitimacy were undermined by the UK's non-compliance and its loss was then solidified by the CM's endorsement of the UK's administrative amendments which undermined the ECtHR's requirement for legislative change. The CM's acceptance of the UK's administrative amendments also constitutes a loss to the authority of Strasbourg's political institutions.

In assessing why each institution lost, this thesis argues that the domestic courts' reticence was primarily evident in their decision to refrain from granting a second declaration under s.4 HRA. The domestic courts were excessively deferential to the political branches as they were overly concerned with the expected negative political responses to the declaration. Instead, it is argued that the Supreme Court in *Chester* in particular, should have recognised the declaratory nature of s.4 HRA, that it respects and allows for political discretion. The Court's non-interventionist approach accorded the political branches greater leeway to procrastinate and opt for minimalist compliance. Therefore, the Court should have granted a second declaration to reiterate the incompatibility. Further, whilst the Joint Committee on Human Rights had a valuable role in monitoring the Government's compliance, ultimately Parliament failed to take an active role in the issue of prisoner voting. This accorded the Government greater scope to resist compliance. Moreover, the main cause of the ECtHR's loss is the lack of clarity and consistency of the ECtHR's case-law which undermined its procedural legitimacy. This further enabled the Government to resist *Hirst*. Therefore, a clearer and more consistent approach would have ameliorated the ECtHR's loss. The CM's loss was crystallised by its acceptance of the UK's administrative amendments and in doing so, it also undermined the ECtHR's case-law. The CM should have remained robust that legislative amendments were required to ensure compliance with *Hirst.*

The analysis of these multi-dimensional institutional losses shows the institutional tensions that exist within and between institutions in navigating their roles in terms of upholding rights. When rights protection is placed under pressure by conflict, this can reveal challenges and weaknesses in the mechanisms of rights protection. Whilst ideally institutions should work collaboratively to ensure that rights are upheld, this can jar with the conflict-ridden reality of rights protection which may lead to rights being undermined. This analysis therefore extends understanding of the reasons why the prisoner voting clash specifically resulted in major challenges, and this thesis also considers what this shows about the roles and relationships of

the key institutions discussed in rights protection. Crucially, this thesis argues that prisoner voting reveals that the institutional losses were mutually reinforcing and contributed together to rights protection being undermined. Therefore, blame cannot be solely attributed to one institution. Rather, each loss contributed to other losses. This thesis considers the broader lessons that can be learnt from the clash to attenuate or avoid such losses from occurring in the future. It concludes that the lesson of the prisoner voting rights controversy is that multi-institutional robustness is required to ensure effective compliance and that rights are upheld. For instance, this thesis argues that: domestic courts should confidently exercise their powers and grant a declaration of incompatibility under s.4 HRA; the UK Parliament should have greater oversight of the executive's role in human rights issues at the supranational level; Strasbourg's institutions should further enhance domestic parliament's involvement; the ECtHR's judgments should be as clear and as consistent as possible to increase its procedural legitimacy; and there should be institutional cohesion between CM and the ECtHR, meaning that the CM should refrain from sanctioning amendments which would fundamentally override, undermine or contradict the ECtHR's judgment. Reinforcing institutional robustness and emphasising the combined institutional effort required to uphold rights could therefore operate to enhance rights protection, increasing the likelihood of effective compliance.

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INTRODUCTION

I. Introduction

In the United Kingdom (UK), s.3 of the Representation of the People Act 1983 (RPA 1983) disenfranchises prisoners upon incarceration. The Grand Chamber of the European Court of Human Rights (ECtHR) in *Hirst*[1] held that the UK's legislative ban on prisoner voting violates Article 3 of Protocol 1 (A3P1) of the European Convention on Human Rights (ECHR). *Hirst* resulted in a thirteen-year constitutional clash, from 2005 to 2018, between the UK and Strasbourg. The clash has ostensibly been resolved by the UK Government's introduction of administrative amendments.[2] However, as this thesis argues, such amendments constitute a form of corrective compliance, which undermine rights protection.

The UK's protracted non-compliance with *Hirst* exacerbated institutional tensions between the UK and Strasbourg and therefore, the case study of prisoners' voting rights is of considerable legal and political significance. The prisoner voting clash is especially important as the length and also the nature of the UK's non-compliance with the ECtHR's judgment was exceptional, being informed and inflamed by vociferous political resistance. The case study is the lens through which to explore the impact of such intractable conflict on rights protection. Therefore, this research is necessary to enable a comprehensive understanding as to why the ECtHR's adjudication on the issue of prisoner voting resulted in such controversy and what this reveals about constitutional systems of rights protection and institutional roles and relationships in protecting rights.

With the relationship between the UK and Strasbourg under increasing 'strain',[3] the prisoner voting conflict acted as a key driver of domestic rights-based reform, which further demonstrates that prisoner voting is an important case study in the UK regarding rights protection. For instance, the Conservative Government argued that prisoner voting litigation demonstrated the ECtHR's 'mission creep', which showed that rights reform was required.[4]

[1] *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41.
[2] HC Deb 2 November 2017, vol 630, cols 1007–1008.
[3] K. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 4-6.
[4] Conservatives, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (2014) (*Protecting Human Rights*) 3, 5; see also, Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (CP 588, 2021) 29-31 ('MOJ, *HRA Reform*').

Further, cases such as *Othman v United Kingdom*,[5] in which the ECtHR held the UK was prohibited from deporting the alleged terrorist, Abu Qatada, as this would violate Article 6 ECHR, also provoked political consternation towards the ECtHR and fuelled calls for reform.[6] More recently, the Conservative Government's proposals for 'a modern Bill of Rights', aim to curb Strasbourg's influence and re-emphasise domestic rights protection.[7] The Government's reform plans have been criticised for potentially undermining human rights protection and for representing a continuation of Euroscepticism.[8]

Notably, such tensions extend beyond the UK's relationship with Strasbourg, being apparent in terms of the UK's relationship with the European Union (EU). Mounting Euroscepticism ultimately led to a referendum in which a 'slim majority' of the UK population voted to leave the EU (commonly referred to as "Brexit").[9] Whilst the UK has now withdrawn from the EU, this thesis still provides some, albeit less detailed, consideration of the relationship between the UK and the EU in rights protection, through the lens of the Court of Justice of the European Union's (CJEU) intervention in the prisoner voting case, *Delvigne*.[10] The involvement of another European court in the already fraught issue of prisoner voting, especially a court that does not specifically exist to protect individual rights, generated further political hostility towards European rights protection. The UK's recalcitrant response and sustained non-compliance arguably highlights the limits of European rights protection systems in securing the effective protection of rights.

This thesis therefore unravels the inter-institutional tensions that can result where national and European conceptions of rights protection conflict. Prisoner voting reveals how institutional tensions and considerations can ultimately dominate or usurp the specific rights issue in question. Therefore, prisoner voting exposes the challenges in rights protection systems, as arguably the mechanisms and structures of national and European systems in themselves

[5] *Othman v United Kingdom* (2012) 55 EHRR 1, para 287.
[6] see HC Deb 7 February 2012, vol 540, col 165; HC Deb 8 July 2013, vol 566, col 24; The Conservative Party Manifesto, *Strong Leadership A Clear Economic Plan A Brighter, More Secure Future* (2015) 60.
[7] MOJ *HRA Reform* (n.4); see also, The Conservative Party Manifesto (n.6) 58-60.
[8] See L. Buchan, 'Conservatives accused of trying to undermine Human Rights Act with manifesto plan' *The Independent* (London, 24 November 2019) <https://www.independent.co.uk/news/uk/politics/conservative-manifesto-human-rights-act-update-boris-johnson-national-security-a9216146.html> accessed 14 April 2022; J. Dawson, *Reform of the Human Rights Act* (House of Commons Library 9406, 2021) 44-45; D. Giannoulopoulos, 'The Eurosceptic right and (our) human rights: the threat to the Human Rights Act and the Convention on Human Rights is alive and well' (2020) 3 EHRLR 255, 226.
[9] K. Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80(4) MLR 711, 711; see also, M. Gordon, 'Brexit: a challenge for the UK Constitution, of the UK Constitution?' [2016] EuConst 409, 412-414.
[10] Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc* EU:C:2015:363.

contributed to the struggle to find a workable legal solution to the issue of prisoners' voting rights. Moreover, in unsettled times, as exemplified by Brexit and possible Human Rights Act 1998 (HRA) reform, arguably the evolving constitutional landscape has shaped, or possibly caused, the prisoner voting controversy. The analysis of national and European approaches to prisoner voting will demonstrate how different institutions potentially negotiate with, accommodate or challenge each other, to preserve and enhance their own power and influence.

Prisoner voting illustrates the contestability of rights issues and shows how this contestability is magnified where rights protection is beset by controversy. The resultant clash exposes the challenges in ensuring the effective protection of rights, demonstrating how ideals regarding how rights protection should function - that institutions should endeavour to protect rights and ensure that rights are upheld to the highest standard possible - can fail to reflect the reality of rights protection. This thesis argues that the prisoner voting clash resulted in losses for all the institutions involved, and that these were mutually reinforcing multi-institutional losses. This multifaceted analysis of the institutional losses arising from the prisoner voting clash is the key contribution of the thesis. Crucially, this thesis argues the clash constitutes a "lose-lose-lose-lose-lose" for rights protection. It is a "loss" to the domestic courts, as their generally non-interventionist approach to prisoners' voting rights undermined human rights protection, revealing judicial reticence regarding the exercise of the constitutional role accorded to them by Parliament under the Human Rights Act 1998 (HRA). This highlights the domestic courts general failure to hold the Government to account in relation to prisoner voting. It is a "loss" for parliamentary protection of rights, as Parliament's involvement was bypassed and the clash has ostensibly been resolved by the executive's administrative amendments which leave the impugned legislation, s.3 of the Representation of the People Act 1983, intact. Further, it constitutes a "loss" for the UK Government as the protracted nature of the conflict meant it sustained repeated criticism for its recalcitrant response to prisoner voting, which resulted in reputational damage with regards to its role in respecting rights. It is a "loss" for the ECtHR, as its legitimacy was challenged by the UK's non-compliance with its judgment in *Hirst* and its loss was solidified by the CM's endorsement of the UK's administrative amendments which undermined the ECtHR's requirement for legislative change. The CM's capitulation to the Government also constitutes a "loss" for the authority of Strasbourg's political institutions.

In exploring the institutional failures that caused these losses, this thesis argues that the domestic courts' reticence to utilise their constitutional role under the HRA in the prisoner voting clash is primarily evident in their misinterpretation of s.4 HRA, as exemplified by the

Supreme Court's judgment in *Chester*.[11] In declining to grant a second declaration under s.4 the domestic courts were excessively deferential to the political branches, as they were overly concerned with the anticipated negative political responses to the declaration. This highlights the mutually reinforcing nature of the losses as the Court's non-interventionist approach accorded the political branches greater scope to procrastinate, enabling the Government to present domestic institutions as united in their resistance against Strasbourg. Alongside other institutions, the domestic courts' contributed to an environment in which the administrative amendments constituted a possible solution to the clash. Instead it is argued that the Supreme Court in *Chester* should have recognised that s.4 is declaratory and therefore, that it respects and allows for the exercise of political discretion. The mechanism of s.4 is designed to uphold parliamentary sovereignty as the political branches have the final discretion whether to accept a declaration and if so, then how to remedy a declaration. Therefore, the Court should have granted a second declaration to reiterate the incompatibility, demonstrating that the Court was willing to take an active role in upholding prisoners' voting rights. Further, whilst the Joint Committee on Human Rights had a valuable role in monitoring the Government's compliance with prisoner voting litigation, ultimately the anti-Strasbourg political narrative thrived and Parliament failed to take an active role regarding prisoners' voting rights which accorded the Government greater leeway to control the issue of prisoner voting. Regarding the ECtHR, the primary cause of the ECtHR's loss is due to the lack of clarity and consistency of the ECtHR's case-law. This undermined its procedural legitimacy, which provided further scope for the Government to challenge and resist *Hirst*. Therefore, due to the ECtHR's conditional legitimacy, caution, clarity and consistency were required. The CM's loss was crystallised by its acceptance of the UK's administrative amendments and its consequent failure to properly uphold the ECtHR's case-law. The CM should have remained robust that in accordance with the ECtHR's case-law on prisoner voting, legislative amendments through Parliament were required.

This highlights how each loss contributed to other losses, with no institution emerging unscathed which lead to rights protection being undermined. This reveals the inter-institutional tensions that exist between institutions in rights protection. When these relationships are placed under pressure, this can generate inter-institutional conflict in which challenges in the mechanisms of rights protection are revealed. Such conflict can undermine constructive

[11] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 (*Chester*).

collaboration in terms of rights protection, resulting in institutional compromises and eventually, capitulation in which rights protection is minimised. It is possible to learn more broadly from these institutional losses and this thesis seeks to unveil the core reasons why prisoner voting has proved problematic and assess what this reveals about the legitimacy, authority and relationships of Parliament, Government, the courts and European institutions in rights-based decision-making. The prisoner voting clash can provide insight into how institutions should exercise their powers, so that such losses and deleterious clashes are averted or lessened in the future. Crucially, it argues there needs to be multi-institutional robustness to ensure that the rights violation is effectively remedied. For instance, this thesis argues that: domestic courts should confidently exercise their powers to make a declaration of incompatibility under s.4 HRA; the UK Parliament should have greater oversight of the executive's role in human rights issues at the supranational level; Strasbourg's institutions should further enhance domestic parliament's involvement; the ECtHR's judgments should be as clear and as consistent as possible to increase its procedural legitimacy; and there should be institutional cohesion between CM and the ECtHR, which requires that the CM refrains from sanctioning amendments which would fundamentally override, undermine or contradict the ECtHR's judgment. Therefore, this thesis makes a dual contribution, the first being specific to understanding the prisoners' voting rights clash and the second in enabling a more general understanding of rights protection in the UK.

II. The methodology applied in this research

This research is based on a doctrinal analysis of a range of sources including, primary legal sources (case law and statute) and secondary legal sources (academic publications and political documents). This thesis conducts a detailed case-by-case analysis of prisoners' voting rights case law at both the domestic and European level. This analysis is essential to enable a thorough understanding of the courts' roles in the clash. Analysis of political sources relevant to prisoner voting allows for the political dimension of the clash to be explored. Moreover, as will be shown, *Hirst* precipitated a proliferation of literature exploring prisoner voting.[12] This thesis brings together existing research, but also goes beyond it, by providing a comprehensive consideration of domestic and European approaches to prisoner voting. This thorough doctrinal

[12] e.g. E. Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 HRLRev 503; S. Briant, 'Dialogue, diplomacy and defiance: prisoners' voting rights at home and in Strasbourg' [2011] EHRLR 243; C.R.G. Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom' (2011) 22 KLJ 309.

analysis establishes a complete picture of key institutions' involvement in the clash, facilitating the development of original findings. Therefore, this thesis' originality arises from the multi-level analysis of the prisoners' voting rights clash and the analysis of the interactions that arise between these levels. Moreover, this thesis provides a multi-institutional analysis of the clash and the various inter-institutional dynamics that occur. This enables a detailed assessment of the institutional losses that occurred and the causes of such losses (delineated above).

Notably, this thesis is a case study on prisoner voting, which is an exceptional example of a constitutional clash between the UK and Strasbourg. This is due to the scale and duration of the controversy, which resulted in an unprecedented thirteen-year clash. It could be argued that the exceptional nature of the dispute limits the utility of the prisoner voting case study – that any insights to be gleaned should be confined to the case study. Yet, as this thesis will reveal, its very exceptionalism makes it especially significant and an issue that requires further examination. Political actors have used the prisoners' voting rights clash to illustrate broader issues with rights protection in the UK, which also indicates how it provides an important benchmark for the operation of the system as a whole. Further, it will be shown that the case study does have broader implications, particularly in revealing how systems of rights function (or not) under pressure, which facilitates understanding of how rights protection might be improved.

III. Overview of chapters

This thesis has seven chapters. The first details the background context and provides a timeline of the prisoner voting clash to underpin discussion in subsequent chapters.

Chapter two explores key principles pertaining to domestic rights protection in the UK, focusing on issues relevant to prisoner voting case law. In doing so, it explores the UK's constitutional context in terms of rights, noting that common law rights and the HRA, have strengthened judicial rights protection. In particular, the judicial discretion whether to make a declaration of incompatibility under s.4 HRA is assessed, as prisoner voting raises complex issues regarding how domestic courts have approached their s.4 discretion. This chapter then briefly explores how key constitutional principles, such as parliamentary sovereignty, the rule of law and the separation of powers, operate within the current setting of the HRA. Subsequent chapters consider how these principles implicitly or explicitly underpinned judicial and political decision-making in the prisoner voting clash. Chapter two then assesses the contestability of political and legal rights-based decision-making, as this contestability is

heightened in prisoner voting. It then explores deference and dialogue, which are fundamental principles that feature in prisoner voting litigation. Notably, the judiciary may misapply deference and the metaphor of dialogue may fail to encapsulate the political reality of inter-institutional relationships. Moreover, this chapter contends that both sections 3 and 4 HRA have the potential to be tools for deference and/or dialogue, but whether this potential is realised depends on the context of the case. Finally, this chapter proposes that institutions should aim to work collaboratively to enhance rights.

Chapter three explores European approaches to rights protection. As such, it mainly elucidates the multifaceted nature of Strasbourg's legitimacy. The UK's relationship with Strasbourg is founded on an uneasy compromise, which underpins institutional tensions between them. Such tensions might be exacerbated in controversial cases such as prisoner voting, in which the UK challenged Strasbourg's legitimacy in adjudicating on prisoner voting. Moreover, in resisting Strasbourg the UK asserted its sovereignty, expressing qualms regarding Strasbourg's democratic illegitimacy in rights-based review, with such concerns heightened by the ECtHR's foreign status. The chapter explores key factors relevant to the ECtHR's procedural legitimacy, which includes an assessment of proportionality, subsidiarity, the margin of appreciation (MoA) and the role of dialogue. Whilst the Court's application of these factors can enhance its legitimacy, depending on the case, they can also undermine it, fuelling broader challenges to Strasbourg's legitimacy. This chapter then briefly considers the legitimacy of the CJEU's role in rights protection and outlines the UK's Eurosceptic stance towards the EU, with the UK seeking to curtail the influence of external rights protection.

Chapters four to six then apply the key issues discussed in chapters two and three to the case study of prisoner voting. Chapter four explores how the domestic courts' generally hands-off approaches to prisoner voting contributed to the dilution of rights protection, resulting in a "loss" to the domestic courts. This was especially evident in relation to the judicial approach to their discretion under s.4. This thesis proposes an original way of understanding s.4 as a "double filter mechanism": the first filter is the judicial 'decisional space' whether to grant a declaration and the second filter is the political 'decisional space' whether to 'accept' a declaration.[13] In exploring the application of this mechanism, this chapter argues the Supreme Court in *Chester* declined a declaration due to its application of constitutional considerations

[13] C. Chandrachud, 'Reconfiguring the discourse on political responses to declarations of incompatibility' [2014] PL 624, 625.

including; deference to Parliament, institutional defensiveness, uncertainty regarding the proper focus for review (legislation or litigant?) and the significance of Strasbourg's impact on the domestic courts. This chapter puts forward a different approach to the use of the double filter mechanism, mainly that different constitutional considerations should be applied which support a declaration. For instance, it should be emphasised in the judicial decisional space that s.4 is declaratory and respects parliamentary sovereignty, therefore maximising the political decisional space. The Supreme Court's reluctance to become embroiled in the clash was evident in relation to its consideration of EU law in *Chester*. Furthermore, in *Moohan*[14] the Supreme Court showed reluctance to go beyond Strasbourg, opting for a non-interventionist approach. The domestic courts' reluctance to engage with the protracted political procrastination, arguably highlights the boundaries of the domestic courts' willingness to adopt a bold approach to rights when faced with ardent political opposition. This contributed to the "loss" to the domestic courts.

Chapter five assesses the European courts' approaches to prisoners' voting rights. This chapter argues the outcome of the clash represents a "loss" for the ECtHR. In unravelling the reasons for this loss, detailed analysis of the ECtHR's prisoner voting case law exposes challenges with the procedural legitimacy of the ECtHR's judgments. With the 'preconditions' for conflict present,[15] the ECtHR in *Hirst* could have demonstrated increased attention to political sensitivities. To minimise future losses to the ECtHR, the consistency and transparency of the ECtHR's judgments should be as unassailable as possible. Yet, even if procedural legitimacy was improved the clash may still have occurred. The clash demonstrates challenges to the ECtHR's legitimacy and the fundamental tension of the ECtHR's role in upholding rights, whilst also respecting its subsidiary function. It exposes the limits of the ECtHR's role in ensuring effective compliance, with the ECtHR's loss being crystallised by the Committee of Ministers of the Council of Europe's (CM) decision to endorse the UK Government's administrative amendments as compliance. Finally, this chapter contends that the CJEU's involvement in *Delvigne* constituted a dual threat to the UK - prisoners could challenge their disenfranchisement under EU law and it could bolster their claims in Strasbourg. However, post-Brexit, challenging disenfranchisement under EU law is no longer an option. Yet, if future

[14] *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.
[15] K. Dzehtsiarou, 'Prisoner Voting Saga: Reasons for Challenges' in H. Hardman and B. Dickson (eds), *Electoral Rights in Europe Advances and Challenges* (Taylor and Francis 2017) 94.

litigation to Strasbourg were to arise, there remains the possibility that *Delvigne* may still support prisoners' claims.

Chapter six explores political responses to prisoner voting in institutions at both the domestic and European level. This chapter posits that the recalcitrant domestic political response was linked to resistance towards enfranchising prisoners and hostility towards Strasbourg. Key constitutional principles were utilised to justify political procrastination. For instance, the political branches vaguely referred to parliamentary sovereignty as a reason and an instrument to avoid non-compliance with *Hirst*. The administrative amendments demonstrate that the executive circumvented Parliament, signifying a "loss" for parliamentary protection of rights. This chapter also highlights the non-coercive nature of s.4: it allows for political resistance. Further, political question marks regarding Strasbourg's legitimacy underpinned the clash. Prisoner voting reveals the challenges facing Strasbourg's political institutions in securing effective compliance. The CM endorsed minimal compliance, overriding the ECtHR's stipulation that legislative amendments were required, compounding Strasbourg's "losses". Due to these challenges, the State remains key in securing effective compliance and it is necessary to build the State's institutional willingness, resilience and capacity to comply, such as by enhancing the role of domestic Parliaments. Regarding the CJEU's involvement in *Delvigne*, with the threat of adjudication under EU law now removed, this arguably contributed to the ultimate "loss" to prisoners' voting rights, as it loosened 'the screws on the UK government'.[16]

Chapter seven concludes this thesis and summarises key arguments and explores the potential broader ramifications of the prisoner voting episode. Overall, it argues the clash constituted a "lose-lose-lose-lose-lose" scenario for rights protection. It is a "loss" to the domestic courts, as their hands-off approach undermined rights and exposed institutional weaknesses. It is a "loss" for Parliamentary protection of rights, as the amendments circumvented Parliament's involvement. Further, it is a "loss" for the UK Government, as its resolution of the clash was only reached after several years of prolonged conflict. It is a "loss" for the ECtHR, as its jurisprudence was diluted. It is a "loss" for Strasbourg's political institutions as the CM capitulated to the UK's recalcitrance and endorsed a form of corrective compliance. More generally, it constitutes a "loss" for the litigants and prisoners, as the legislation remains

[16] H. van Eijken and J.W. van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?' (2016) 12 EuConst 114, 130.

unamended. This chapter argues that the multi-institutional losses were mutually reinforcing. Further, due to the nature of the system for rights protection in the UK, which involves both legal and political institutions, this chapter stresses the importance of multi-institutional robustness in rights protection. The conclusion finally explores the extent to which prisoner voting can inform rights reform at the domestic and ECHR level.

CHAPTER ONE: BACKGROUND TO PRISONERS' VOTING RIGHTS*

1.1 Introduction

In examining the prisoners' voting rights clash, it is necessary to first situate the discussion by providing the background context to prisoner voting. Therefore, this chapter explores the UK's historical approach to prisoners' voting rights (section 1.2). Crucially, this analysis reveals how the history of prisoner disenfranchisement is varied – the ban on prisoner voting has not always been present.[1]

The chapter then considers Strasbourg's approach to voting rights and highlights the importance of the European Court of Human Right's (ECtHR) recognition of an individual right to vote (section 1.3).[2] Further, analysis of the EU's approach to voting rights reveals that prior to *Delvigne*,[3] the right to vote in European Parliament elections was dependent on the exercise of free movement rights and equal treatment between non-national EU citizens and nationals (section 1.4). The chapter then concludes by providing a timeline of the political response to the prisoner voting clash, which highlights the intractable and often fraught nature of the controversy (section 1.5).

1.2 The UK's approach to prisoners' voting rights

This section provides an overview of the UK's historical approach to disenfranchising prisoners. Notably, 'there has been some form of bar on prisoners voting in UK legislation for most of the past 140 years'.[4] Successive Governments have justified this on the basis that where a crime is committed, the individual breaks the social contract, resulting in disenfranchisement.[5] However, this thesis does not critically assess the cogency of the Government's justifications – this has been explored elsewhere.[6]

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* This chapter draws on some material published in E. Adams, 'Prisoners' Voting Rights: Case Closed?' (*UKConstLBlog*, 30 January 2019) <https://ukconstitutionallaw.org/> accessed 14 April 2022.

[1] C.R.G. Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2013) 66 ParlAff 511, 521 ('A Perfect Storm').

[2] *Mathieu-Mohin and Clerfayt v Belgium* [1988] 10 EHRR 1 (*Mathieu-Mohin*).

[3] Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc* EU:C:2015:363 (*Delvigne*).

[4] Ministry of Justice, *Voting Eligibility (Prisoners) Draft Bill* (Cm 8499, 2012) 3 (MOJ, '*Draft Bill*').

[5] ibid 3.

[6] e.g. H. Lardy, 'Prisoner disenfranchisement constitutional rights and wrongs' [2002] PL 524; Murray, 'A Perfect Storm' (n.1) 525-527.

Historically, in the UK, the right to vote was linked to male ownership of property.[7] Prior to 1870, those found guilty of a 'felony or treason'[8] were punished through an 'attainder' which constituted the 'loss of all civil rights' and also led to the loss of 'possessions'.[9] Therefore, prisoners 'could not own or transfer property'.[10] As the right to vote was conditional on ownership of property, prisoners convicted of a felony or treason could not vote.[11] However, prisoners convicted of a 'misdemeanour' did not lose their property rights and consequently imprisonment did not disenfranchise them, although, practically, by virtue of their incarceration they were unable to vote.[12]

The Forfeiture Act 1870 removed the 'confiscation of property on conviction of serious offences', which could have enabled some prisoners who owned property to vote.[13] However, s.2 of the Forfeiture Act 1870 enshrined prisoner disenfranchisement[14] and 'prisoners convicted of a felony and sentenced to more than 12 months were expressly prohibited from voting'.[15] Notably, however, prisoners 'convicted of a misdemeanour or sentenced to less than 12 months' were not disenfranchised by statute, yet due to their incarceration they were effectively disenfranchised as they were unable to attend 'the polls' or register to vote.[16] Subsequently, s.41(5) of the Representation of the People Act 1918 (RPA) established that prisons could not be classified as residences, which meant prisoners could not use prisons as their address for the purpose of registering to vote.[17] Moreover, case law developed the 'ordinary-residence rule' which prohibited 'prisoners from registering at their home address'.[18] These residency requirements practically prevented prisoners from voting.[19]

However, prisoner voting 'restrictions' were 'progressively relaxed', as the RPA 1948 enabled prisoners who were not disenfranchised under the 'Forfeiture Act 1870 … to vote by postal ballot as long as they were still registered at their home address'.[20] This relaxation was further

[7] D. Cheney, 'Prisoners as Citizens in a Democracy' (2008) 47 Howard JCrimJust 134, 134.
[8] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL Paper 103, HC 924) 7 ('Joint Committee on Draft Bill').
[9] Murray, 'A Perfect Storm' (n.1) 514-515.
[10] Joint Committee on Draft Bill (n.8) 7.
[11] ibid 7.
[12] Ministry of Justice, *Voting Rights of Convicted Prisoners Detained within the United Kingdom* (Second Stage Consultation, CP6/09, 2009) 46 (MOJ, '*Voting Rights*').
[13] Joint Committee on Draft Bill (n.8) 7.
[14] Lardy, 'Prisoner disenfranchisement' (n.6) 526; Forfeiture Act 1870, s.2.
[15] Joint Committee on Draft Bill (n.8) 10.
[16] Murray, 'A Perfect Storm'(n.1) 516.
[17] ibid 517; Representation of the People Act 1918, s.41(5).
[18] ibid.
[19] ibid 517-518.
[20] Joint Committee on Draft Bill (n.8) 11; Representation of the People Act 1948, s.8(1)(e).

evidenced by s.1 of the Criminal Law Act 1967, which removed 'the distinction between felonies and misdemeanours', which meant 'subject to … administrative restrictions', prisoners could vote by postal ballot.[21]

Despite this relaxation, the 1968 'multi-party Speakers Conference on Electoral Law unanimously' advised that convicted prisoners should be disenfranchised.[22] This led to the enactment of s.4 RPA 1969, which banned convicted prisoners from voting.[23] The disenfranchisement of prisoners was later enshrined in s.3(1) RPA 1983, which provides that, '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 government election'.[24] Prisoners therefore lose their right to vote regardless of the duration of their sentence and disenfranchisement is automatic, due to conviction resulting in imprisonment.[25] Therefore, as Lardy notes, the disenfranchisement of prisoners is 'a civil incapacity which arises in consequence of criminal liability rather than part of the formal punishment for criminal wrongdoing' and 'upon release' disenfranchisement ends.[26]

Subsequently, 'a working group on electoral procedures was established' which reviewed 'electoral law and practice'.[27] It was recommended that prisoners on remand and unconvicted mental patients should be able to vote and these changes were enshrined in the RPA 2000.[28] Prior to the RPA 2000, remand prisoners were not technically disenfranchised by the 1969 Act, which solely concerned convicted prisoners.[29] However, there were administrative restrictions which had the effect of disenfranchising remand prisoners, as they could be 'included in the electoral register but only if resident at their home address on the relevant date. They were not permitted to use the prison as an address for the purposes of voter registration'.[30] S.7A RPA 2000, now permits remand prisoners to use the prison as their residence.[31] The justification for enabling prisoners on remand to vote is that they have not yet been convicted.[32] Therefore,

[21] ibid 9, 11; Criminal Law Act 1967, s.1.
[22] *R (Pearson) v Secretary of State for the Home Department, Hirst v Attorney General* [2001] EWHC Admin 239, [2001] HRLR 39 [7] *(Pearson)*.
[23] Joint Committee on Draft Bill (n.8) 9; Representation of the People Act 1969, s.4.
[24] Representation of the People Act 1983, s.3(1) (RPA 1983).
[25] Lardy, 'Prisoner disenfranchisement' (n.6) 526.
[26] ibid 527.
[27] *Pearson* (n.22) [7].
[28] ibid.
[29] Joint Committee on Draft Bill (n.8)10.
[30] H. Lardy, 'Democracy by Default: The Representation of the People Act 2000' (2001) 54(1) MLR 63, 73 ('Democracy by Default').
[31] Murray, 'A Perfect Storm' (n.1) 521; Representation of the People Act 2000, s.7A (RPA 2000).
[32] Lardy, 'Democracy by Default' (n.30) 73.

prior to the litigation in *Hirst,* the prisoner voting ban did not include those imprisoned for contempt of court,[33] default of a sentence,[34] unconvicted mental patients[35] and prisoners on remand.[36] The RPA 2000 was passed with a statement of compatibility under s.19 Human Rights Act 1998 (HRA).[37]

Examination of the UK's historical approach to prisoner voting therefore reveals that the law on prisoner voting was complex and characterised by instability - it was not always the case that there was a 'ban' on prisoner voting in the UK.[38]

1.3 The right to vote and the European Convention on Human Rights (ECHR)

This section explores Strasbourg's approach to voting rights more generally, as prior to *Hirst* there were few cases on prisoner voting[39] and in these cases, 'Depriving convicted prisoners of their right to vote was generally accepted'.[40] Therefore, the ECtHR's finding of a violation in *Hirst* was highly significant and Strasbourg's jurisprudence on prisoner voting is analysed in chapter five.

The right to vote is a human right and internationally, Article 21 of the Universal Declaration of Human Rights 1948 and Article 25 of the International Covenant on Civil and Political Rights 1976 enshrine that right.[41] Regionally, the Preamble to the ECHR reaffirms Contracting Parties commitment to democracy, noting the 'profound belief in those fundamental freedoms which are … best maintained … by an effective political democracy'.[42] Article 3 of Protocol 1 ECHR (A3P1) was adopted on 20 March 1952[43] and enshrines the right to free elections. It states: '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

[33] RPA 1983 (n.24) s.3(2)(a).
[34] ibid s.3(2)(c).
[35] RPA 2000 (n.30) s.2, s.4.
[36] ibid s.5.
[37] *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41, para 24.
[38] Murray, 'A Perfect Storm' (n.1) 521.
[39] e.g. *H v the Netherlands* [1983] 33 DR 242; *Holland v Ireland* [1998] 93A DR 15. Also considered by the ECtHR in: *M.D.U. v Italy* App no 58540/00 (ECtHR, 28 January 2003).
[40] E. Bodnár, 'The level of protection of the right to free elections in the practice of the European Court of Human Rights' in H. Hardman and B. Dickson (eds), *Electoral Rights in Europe: Advances and Challenges* (Routledge 2017) 51.
[41] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III), Article 21; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 25.
[42] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) 1950, Preamble (ECHR).
[43] Bodnár (n.40) 50.

people in the choice of the legislature'.[44] Notably, A3P1 does not express the right to free elections as an individual or collective right, rather, reference to 'the High Contracting Parties' seemed to reflect a purely 'inter-state' obligation.[45]

However, in the seminal case, *Mathieu-Mohin*, the ECtHR held that A3P1 gives rise to the individual right to vote and the right to stand for election.[46] This case is a non-prisoner voting case, in which there was a legal restriction which prevented the applicants from being members 'of the Flemish Council'.[47] The applicants argued this violated A3P1.[48] However, the Court found there was no violation of A3P1.[49] In reaching this decision, the Court emphasised the importance of A3P1, stating it 'enshrines a characteristic principle of democracy'.[50] The Court noted that A3P1 had been interpreted by some as giving rise to a purely inter-state obligation.[51] However, the Court rejected this interpretation due to the lack of evidence in both the Preamble and the Travaux Préparatoires that individual petition should be excluded.[52] The Court stated that 'the inter-State colouring of the wording' is used due to the importance of the right.[53] Therefore, significantly, the Court confirmed A3P1 comprises a right to vote.[54]

Crucially, whilst the Court recognised the importance of A3P1, it stated the 'rights in question are not absolute'.[55] Contracting States have 'a wide margin of appreciation' (MoA) to determine voting rights.[56] However, the Court established a test for determining whether A3P1 has been 'complied with', which requires that the Court must be satisfied:

> '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. In

[44] ECHR (n.42) Article 3 of Protocol 1.
[45] Bodnár (n.40) 50-51; S. Dothan, 'Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement' in A. Roberts and others (eds), *Comparative International Law* (OUP 2018) 379.
[46] *Mathieu-Mohin* (n.2) para 51.
[47] ibid para 11.
[48] ibid para 44.
[49] ibid para 57.
[50] ibid para 47.
[51] ibid para 48.
[52] ibid para 49.
[53] ibid para 50.
[54] ibid paras 48-51; the Court notes, 'universal suffrage' had been recognised in the Commission case *X v Germany* 10 Yearbook 338; and 'the concept of subjective rights of participation – the 'right to vote' and the 'right to stand for election to the legislature' in *W, X, Y and Z v Belgium* App no 6745/76 (1975) 18 Yearbook 244.
[55] *Mathieu-Mohin* (n.2) para 52.
[56] ibid.

particular, such conditions must not thwart the free expression of the opinion of the people in the choice of the legislature'.[57]

The Court clarified that the meaning of 'legislature' may extend beyond national parliaments but must be determined by reference to the 'constitutional structure of the State'.[58] The Court also stressed that in terms of the appointment of the legislature, there is no 'obligation to introduce a specific system'[59] and States are afforded a 'wide margin of appreciation'.[60]

In a few pivotal paragraphs, the Court provided crucial clarification on the interpretation of A3P1. The judgment highlights the 'tension between rights and democracy',[61] as the democratic quality of A3P1 contributes to contentious questions regarding the appropriate institutional division of power. The rights in A3P1 are recognised as important, but the Court emphasised the wide MoA, which as Foster argues demonstrates deference to States to determine their democratic processes.[62] Yet, ultimately the Court remains guardian of A3P1 and if the State acts disproportionately, then a violation might be found.[63]

1.4 The EU and the right to vote

Regarding the EU and voting rights, as Shaw notes, the impetus for securing 'effective political representation' in the EU 'has a very long history', which dates back to 'the inception of the Assembly itself'.[64] At the core of discussions regarding political representation, there was both a desire to advance EU citizenship and to secure the democratic legitimacy of EU institutions, especially the 'European Parliament'.[65] The Treaties enshrined a foundational commitment to

[57] ibid.
[58] ibid para 53; see also *Matthews v United Kingdom* (1998) 28 EHRR 361, paras 36-44.
[59] ibid para 54.
[60] ibid.
[61] S. Graziadei, 'Democracy v Human Rights? The Strasbourg Court and the Challenge of Power Sharing' (2016) 12 EuConst 54, 55-56.
[62] S. Foster, 'Prisoners, the right to vote and the Human Rights Act 1998' (2001) 6(2) CovLJ 71, 75 ('Prisoners, the right to vote'); cf S. Wheatley, 'Minorities under the ECHR and the Construction of a "Democratic Society" [2007] PL 770, 792 - notes issues with ECtHR's deference to the 'majority'.
[63] Foster, 'Prisoners, the right to vote' (n.62) 75.
[64] J. Shaw, 'The Political Representation of Europe's Citizens: Developments' (2008) 4 EuConst 162, 163; N.B. the Assembly was the precursor to the European Parliament – 'the origins of the European Parliament lie in the Common Assembly of the European Coal and Steel Community (ECSC). … The assembly subsequently acquired the name 'European Parliament''; see Fact Sheets on the European Union, The European Parliament: Historical background <https://www.europarl.europa.eu/factsheets/en/sheet/11/the-european-parliament-historical-background> accessed 18 July 2022.
[65] ibid 164.

'direct universal suffrage'[66] and this led to the Direct Elections Act 1976 (as amended),[67] which provides for direct and universal elections to the European Parliament. Therefore, the European Parliament is the only 'directly legitimated European institution' and consequently, Treaty reform sought to bolster its authority and influence.[68] For instance, EU citizenship was formally entrenched in the Treaty of Maastricht and subsequently, the Treaty of Lisbon further embedded the importance of political representation at an EU level.[69] In terms of voting rights, Article 39(1) of the EU Charter of Fundamental Rights 'corresponds to' Article 20(2)TFEU.[70] Article 39(1) provides that EU citizens have 'the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the *same conditions* as nationals of that State'.[71] This enshrines the principle of 'equal treatment', precluding discrimination of an EU citizen residing in another member state.[72] Article 39(2) of the Charter 'corresponds to Article 14(3) TEU'.[73] It provides that 'Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot'.[74] This formally recognises the 'essential principles of democratic elections'.[75] As Van Eijken and Van Rossem note, these provisions in the Charter have not materialised 'out of thin air', rather they reflect the 'provisions in other constitutional documents of the EU'.[76]

The CJEU considered voting rights under EU law in key cases *Spain*[77] and *Eman.*[78] Both cases affirmed that Article 19 EC (now Article 22 TFEU) concerned the 'principle of non-discrimination on grounds of nationality' in the exercise of the right to vote in elections to the

[66] Treaty Establishing the European Coal and Steel Community [1951], Article 21; Shaw (n.64) 164.
[67] Act concerning the election of the members of the Assembly by direct universal suffrage [1976] OJ L278/5 ('The 1976 Act'); As amended by Council Decision 2002/772/EC of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom [2002] OJ L283/1.
[68] V. Lopez, 'The Lisbon Treaty's Provisions on Democratic Principles - A Legal Framework for Participatory Democracy' (2010) 16(1) EPL 123, 128; see also Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Article 223 (TFEU); Consolidated Version of the Treaty on European Union [2012] OJ C326/13, Article 14(3) (TEU) – also enshrine commitment to universal suffrage.
[69] Shaw (n.64) 163, 168; e.g. Articles 20(2)(b), 22(1) and (2) TFEU.
[70] Charter of Fundamental Rights of the European Union [2012] OJ C326/02, Article 39(1) (The Charter); Explanations Relating to the Charter of Fundamental Rights [2007] C 303/02, Explanation on Article 39 – states Article 22 TFEU provides the 'legal base … for the adoption of detailed arrangements for the exercise of that right' ('Charter Explanations').
[71] ibid (emphasis added).
[72] H. van Eijken and J.W. van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?' (2016) 12 EuConst 114, 117.
[73] Charter Explanations (n.70) Explanation on Article 39.
[74] The Charter (n.70) Article 39(2).
[75] van Eijken and van Rossem (n.72) 117.
[76] ibid 120.
[77] Case C-145/04 *Spain v United Kingdom* EU:C:2006:543 (*Spain*).
[78] Case C-300/04 *Eman and Sevinger v College van Burgemeester en Wethouders van Den Haag* EU:C:2006:545 (*Eman*).

European Parliament and the application of equal treatment principles and that the right to vote was for Member States to determine.[79] In *Spain*, the CJEU confirmed that Member States should not be prohibited from extending the right to vote in European Parliament elections to those who have a 'close link' with the Member State who are not 'nationals of that state or another Member State'.[80] Therefore, the CJEU reiterated that Member States have 'competence' determine voting rights but in doing so must comply with EU law.[81] In *Eman*, the CJEU confirmed that equal treatment or non-discrimination under the 'general principles' of EU law 'requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'.[82] The CJEU therefore placed less emphasis on the exercise of free movement rights.[83] In both cases, the CJEU did not consider voting rights in relation to the Charter. Further, the CJEU refrained from expressly endorsing a right to vote for all EU citizens. However, as Coutts argues, the CJEU 'did not state unequivocally that no such right existed', which left scope for uncertainty on whether there was a right.[84] Yet, as these cases demonstrate, prior to the prisoner voting case *Delvigne*, the right to vote in European Parliament elections was ostensibly contingent on the exercise of free movement rights and equal treatment between non-national EU citizens and nationals.[85] However, in *Delvigne* the CJEU adopted an expansive approach to rights protection and recognised the right to vote in European Parliament elections, independent of the exercise of free movement rights (assessed in chapter five).[86]

1.5 The prisoner voting clash: a timeline of the political response

This section provides a chronological overview of key events in relation to prisoner voting. In particular, this section focuses on detailing the UK political response to prisoner voting (as a detailed case-by-case analysis of domestic jurisprudence is provided in chapter four and European jurisprudence in chapter five). This timeline situates and informs the discussion in subsequent chapters.

[79] *Spain* (n.77) paras 66, 76; *Eman* (n.78) para 53; S. Coutts, 'Delvigne: a multi-levelled political citizenship' [2017] ELRev 867, 873.
[80] *Spain* (n.77) para 76.
[81] ibid para 78.
[82] *Eman* (n.78) para 57.
[83] Shaw (n.64) 184-185.
[84] Coutts (n.79) 874
[85] ibid.
[86] *Delvigne* (n.3) paras 41, 44.

First, however, it must be noted this section includes analysis of statements made during parliamentary debates and therefore, the context of the debates must be recognised, as during these debates MPs sought to advance their political agendas. As Kavanagh notes, parliamentary debates are focused on 'political persuasion, not legal interpretation'.[87] Caution must be exercised and one must refrain from 'giving statements from the parliamentary record a significance they cannot bear … statements … may only reflect the intention of the government, not Parliament as a whole'.[88] Further, views expressed in Hansard 'have sometimes been used to support diametrically opposed conclusions'.[89] Therefore, this demonstrates that prudence is required when assessing parliamentary debates - the context and political agendas underpinning the debates should be considered. This is especially warranted when the political controversy of prisoner voting is considered, as the debates contain impassioned and sometimes hyperbolic statements, which are phrased to have maximum political impact.

Following the ECtHR's judgment in 2004 in *Hirst,*[90] debates in the House of Lords revealed mixed views regarding the judgment.[91] After the Grand Chamber's judgment in *Hirst* in 2005, it was not immediately evident that reform to prisoner voting would result in sustained delay. However, it subsequently became apparent that delay tactics governed successive Governments' agendas.

1.5.1 Two-stage consultation process

In a written statement, Lord Falconer (then Lord Chancellor), stated the Labour Government intended to introduce a two-stage consultation process on prisoner voting.[92] However, it was not until December 2006 that the first consultation was published[93] and Lord Falconer noted prisoner voting 'is a contentious issue. The Government are firm in their belief that individuals who have committed an offence serious enough to warrant a term of imprisonment should not be able to vote while in prison'.[94]

[87] A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 15.
[88] ibid.
[89] ibid 13.
[90] *Hirst v United Kingdom* (2004) 38 EHRR 40.
[91] HL Deb 14 July 2004, vol 663, cols 1243-1244.
[92] HL Deb 2 February 2006, vol 678, col WA26.
[93] Some greeted its publication with discontent e.g. HC Deb 13 December 2006, vol 454, col 1013.
[94] Department for Constitutional Affairs, *Voting Rights of Convicted Prisoners Detained within the United Kingdom – the UK Government's response to the Grand Chamber of the European Court of Human Rights*

Therefore, as Hiebert argues, the consultation 'was prefaced … around a strong defence of the blanket ban'.[95] The first stage detailed the 'arguments for and against' enfranchisement[96] and indicated various options, including retaining the ban.[97] The consultation closed in March 2007, but it took until April 2009 for the second stage of the consultation to be published.[98] This proposed that to comply with *Hirst* 'a limited enfranchisement of convicted prisoners in custody should take place, with eligibility determined on the basis of sentence length'.[99] However, it concluded that Parliament must decide the issue.[100] The consultation closed in September 2009.[101]

Despite the consultations prisoners remained disenfranchised. The consultations provided a façade of compliance, enabling the Government to 'play for time'.[102] As Murray explains, there were background policy considerations which prevented the Labour Government from enfranchising prisoners, as it sought to demonstrate it pursued 'a tough penal policy in the 2010 general election campaign' and enfranchising prisoners would appear antithetical to that aim.[103] However, as Foster argues, in delaying compliance the UK 'reneged on its international law obligations' to comply with the ECtHR's judgment.[104]

1.5.2 Criticism of political delay

Nonetheless, the political delay had not gone unnoticed. In 2007, in *Smith v Scott,* the Registration Appeal Court Scotland granted a declaration of incompatibility, that s.3(1) of the RPA 1983 was incompatible with A3P1.[105] In doing so, the court was critical of the political delay and noted that the timetable for compliance had 'slipped, and slipped badly'.[106] The declaration represented a strong message that the UK flouted its international legal

judgment in the case of Hirst v the United Kingdom (First Stage Consultation CP29/06, 2006) 7; HL Deb 14 December 2006 vol 687, col WA201-202.
[95] J. Hiebert, 'The Human Rights Act: Ambiguity about Parliamentary Sovereignty' (2013) 14 GermanLJ 2253, 2258 ('The Human Rights Act').
[96] Department for Constitutional Affairs (n.94) 7.
[97] ibid 23-29.
[98] MOJ, *Voting Rights* (n.12) 10.
[99] ibid 21.
[100] ibid.
[101] ibid 10.
[102] C.R.G. Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom' (2011) 22 KLJ 309, 320.
[103] ibid 321.
[104] S. Foster, 'Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote' (2009) 9(3) HRLRev 489, 507.
[105] *Smith v Scott* [2007] CSIH 9, 2007 SC 345 [54], [56] (*Smith*).
[106] ibid [43].

obligations.[107] Further, the Joint Committee on Human Rights (JCHR) repeatedly expressed 'disappointment' with the delay.[108] At the European level, the Committee of Ministers of the Council of Europe (CM) adopted an interim resolution, in which 'serious concern' was expressed regarding 'the substantial delay'.[109] The CM confirmed the UK had submitted an action plan which provided that 'draft legislation' would have been considered by Parliament in May 2008.[110] However, draft legislation was not considered by the deadline. In the House of Lords, Lord Ramsbotham put forward an amendment to the Constitutional Reform and Governance Bill 2009-10, which proposed that s.3 RPA 1983 should be removed.[111] Further, Lord Ramsbotham vented criticism at the Government's 'prevarication', with the 'so-called consultations' criticised as a 'charade'.[112] Whilst the amendment was defeated, it demonstrates an attempt to circumvent the delay.

1.5.3 Further delay: an intrinsic malaise

In 2010, the new Conservative-Liberal Democrat coalition Government was also confronted by the issue of prisoner voting. Despite increasing pressure to comply, David Cameron notoriously asserted that giving prisoners the right to vote made him 'physically ill'.[113] This intrinsic malaise towards enfranchising prisoners became emblematic of the prisoner voting clash. However, as Hiebert and Kelly observe, this was despite the Liberal Democrats having 'profoundly different views' on prisoner disenfranchisement to the Conservatives and having supported prisoner enfranchisement.[114] Yet the 'potential fragility of the coalition agreement' and public hostility towards prisoner voting generally tempered the Liberal Democrats willingness to take a stand on prisoner voting.[115]

Nevertheless, following the ECtHR's judgment in *Greens*, and the imposition of a six month deadline for the UK to comply, it seemed compliance might be achieved.[116] The push to take

[107] M. Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in J. Jowell, D. Oliver and C. O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015) 53.
[108] e.g. Joint Committee on Human Rights (JCHR), *Implementation of Strasbourg Judgments: First Progress Report – Thirteenth Report of Session 2005-06* (2005-2006) 19; JCHR, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights* (2006-07, HL 128, HC 728) 29.
[109] Committee of Ministers, Interim Resolution CM/ResDH(2009)160: Execution of the judgment of the European Court of Human Rights Hirst against the United Kingdom No.2 (1072nd meeting, 3 December 2009) <https://hudoc.exec.coe.int/eng?i=001-97148> accessed 14 April 2022.
[110] ibid.
[111] HL Deb 7 April 2010, vol 718, col 1632.
[112] ibid col 1643.
[113] HC Deb 3 November 2010, vol 517, col 921.
[114] J. Hiebert and J. Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (CUP 2015) 381.
[115] ibid 382.
[116] *Greens and MT v United Kingdom* (2011) 53 EHRR 21 paras 112, 115 (*Greens*).

remedial action stemmed from fears regarding the 'costs of litigation and compensation'.[117] In a written statement, Mark Harper MP (then Minister for Political and Constitutional Reform), stated that prisoners sentenced to four years or less would 'retain the right to vote' and 'legislation will provide that the sentencing judge will be able to remove that right if they consider that appropriate'.[118] This reflected the 'absolute duty to uphold the rule of law'.[119] Harper stressed that if the UK failed to comply, then Strasbourg may require the UK to pay damages.[120]

In a Westminster Hall debate on prisoner voting, Phillip Hollobone MP argued the UK required 'some backbone … if we are to take on the European Court of Human Rights and resist its judgment'.[121] This reveals the simmering 'anti-Strasbourg sentiment'.[122] Subsequently, the Political and Constitutional Reform Committee published a report on 8 February 2011 to assess 'the current legal position' with regards to prisoner disenfranchisement.[123] In the report the Government's proposals to enfranchise prisoners sentenced to less than four years were criticised for lacking proportionality.[124]

1.5.4 Backbench debate on prisoner voting

On 10 February 2011, a backbench debate on prisoners' voting rights was held.[125] David Davis MP who was *'not* a member of the government' alongside other MPs 'sponsored' the debate, which sought to 'challenge *Hirst*'.[126] Therefore, the debate also challenged the Government's proposals to comply with *Hirst* and the debate 'demonstrates the depth of Parliament's opposition to remedial measures'.[127] As Davis stated, the debate gave the House of Commons 'not the Government - the right to assert its own right to make a decision on something of very great democratic importance'.[128] The motion put forward stated:

[117] Hiebert and Kelly (n.114) 382.
[118] HC Deb 20 December 2010, vol 520, col 151W.
[119] ibid.
[120] ibid col 150W.
[121] HC Deb 11 January 2011, vol 521, col 1W.
[122] E. Bates, 'Democratic Override (or Rejection) and the Authority of the Strasbourg Court: The UK Parliament and Prisoner Voting' in M. Saul, A. Føllesdal and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (CUP 2017) 297 ('Democratic Override').
[123] House of Commons Political and Constitutional Reform Committee, *Voting by convicted prisoners: summary of evidence* (HC 2010-11, 776-I) 2.
[124] ibid 4.
[125] HC Deb 10 February 2011, vol 523, col 493.
[126] E. Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 HRLRev 503, 513; for MPs who sponsored the debate see HC Deb 10 February 2011, vol 523, col 493.
[127] Hiebert, 'The Human Rights Act' (n.95) 2261.
[128] HC Deb 10 February 2011, vol 523, col 493.

> 'That this House notes the ruling of the European Court of Human Rights in *Hirst v the United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand'.[129]

This motion was passed by 234 to 22.[130] Introducing the motion, Davis stated: 'First, is the requirement to give prisoners the vote sensible, just, right and proper? Secondly, who should decide? Should it be the European Court of Human Rights, or this House on behalf of the British people?'.[131] As George Hollingbery MP noted, the problem with this approach is it 'seems to conflate two highly related but different issues, one of which is the right of prisoners to vote and the other is the enforceability of the European convention on human rights'.[132] This conflation of issues is apparent in the debate, as it oscillates between issues, with the second issue receiving the most discussion.

Regarding the first issue, Davis argued that: '"If you break the law, you cannot make the law"'[133] and *Hirst* was 'plainly wrong'.[134] Further, public hostility towards enfranchising prisoners was repeatedly asserted.[135] Conversely, the Attorney General noted the UK was bound by its 'international legal obligation', despite *Hirst* being 'unsatisfactory'.[136] Whilst the majority of MPs opposed prisoner enfranchisement, some MPs genuinely engaged with attempts to find a solution to the clash. For example, Eleanor Laing MP stated she would 'vote for the motion', but in doing so, noted there was a way to resolve the issue 'by drawing a distinction between different crimes, and by introducing some judicial discretion in sentencing'.[137] By contrast, Kate Green MP argued against the motion, emphasising the rehabilitative function of voting.[138]

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[129] ibid.
[130] ibid col 584; 'neither the government nor opposition front benches voted on the motion' - Hiebert, 'The Human Rights Act' (n.95) 2261.
[131] ibid col 493.
[132] ibid col 496.
[133] ibid col 493.
[134] ibid col 495.
[135] ibid cols 518, 529, 540, 575.
[136] ibid col 511.
[137] ibid col 567.
[138] ibid col 546.

However, as Murray notes, for many years successive governments ascribed to a retributive approach towards penal policy, which meant MPs who advocated the rehabilitative function of voting were in the minority and their voices were 'almost inaudible'.[139] Further, the quality of the debate was lacking.[140] It frequently centred on the 'desire to maintain a historical position rather than on a frank reassessment of the justification of the legislation'.[141] Perhaps this is due to the ECtHR's finding in *Hirst* that UK legislation pursued legitimate aims and therefore, the justifications for prisoner disenfranchisement seemed less significant.[142] Yet there could have been greater consideration of the justifications, which might have facilitated more discussion regarding how to resolve the clash.

Instead, criticism of Strasbourg monopolised the debate. For example, in addressing the second issue, the 'who should decide' question, Davis stated that whilst he did not agree with withdrawing from the Convention, he emphasised the conditionality of the ECtHR's authority.[143] A core theme of discontent centred on allegations that Strasbourg had acted beyond its original mandate.[144] Moreover, as Murray notes, the debate demonstrates how some MPs sought to distinguish *Hirst* from other ECtHR judgments.[145] This was achieved by 'trivialising' the importance of the right to vote, as it was argued that voting concerned an issue of policy over which Parliament historically had 'undisputed control'.[146] For example, Jack Straw MP argued the issue of prisoner voting concerned 'penal policy' and did not constitute 'a breach of human rights'.[147] Therefore, as Murray observes, this bolstered the contention that the ECtHR had extended 'its remit beyond 'traditional' rights'.[148] Perhaps *because* prisoners are an unpopular minority, this enabled the issue to be pushed to the bottom of the political agenda, as Roach argues, 'legislatures are ill-suited to interpreting rights, especially the rights of the truly unpopular'.[149]

[139] Murray, 'A Perfect Storm' (n.1) 526-527.
[140] Hiebert, 'The Human Rights Act' (n.95) 2272.
[141] ibid.
[142] K. Roach, 'The Varied Roles of Courts and Legislatures in Rights Protections' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 420-421 ('The Varied Roles of Courts').
[143] HC Deb 10 February 2011, vol 523, col 496-497.
[144] ibid col 502.
[145] Murray, 'A Perfect Storm' (n.1) 531.
[146] ibid 532-533.
[147] HC Deb 10 February 2011, vol 523, col 502.
[148] Murray, 'A Perfect Storm' (n.1) 533.
[149] Roach (n.142) 420.

Therefore, the 'who should decide' issue was answered firmly in favour of Parliament.[150] This was reinforced with references to parliamentary sovereignty. [151] Notably, the Government's proposals to enfranchise prisoners sentenced to less than four years were criticised by some as unacceptable, as it would enfranchise those convicted of serious offences.[152] Earlier glimmers of compliance appeared extinguished, as frustration towards Strasbourg bubbled over and parliamentary sovereignty was robustly asserted. As Fredman argues, the debate was problematically conducted 'in highly emotive terms, with little supporting evidence or justification' - the debate lacked 'sufficiently deliberative credentials'.[153] This entrenched the denial of prisoners' voting rights. The debate was mainly focused on asserting resistance to Strasbourg and had 'little to do with the merits or demerits of the case for some prisoner enfranchisement'.[154] Sathanapally argues problems with the debate were compounded by the motion being based on a 'statement of opinion', as opposed to being directed to legislation or policy.[155] As Hiebert notes, the debate failed to focus on the legislative 'justification for the ban', so did not adequately probe 'whether legislation is consistent with rights', instead, 'broader constitutional principles' were prioritised (discussed in chapter six).[156] Yet conversely, arguably the lack of focus on such issues is explicable, as the backbench debate is a political process and the purpose of the debate is to put forward a political position, as opposed to necessarily scrutinising legislative justifications or devising a legislative position. Backbench debates are not led by Government and therefore, they provide a means for backbenchers to challenge issues they oppose. The debate was therefore largely premised on defending the '*status quo*'.[157]

1.5.5 Draft Bill and Joint Committee Report

Backbench debates are not binding on Government[158] and therefore, whether the debate would influence the Government's response to *Hirst* was uncertain.[159] Nevertheless, following the debate, delay tactics informed the Government's agenda. For instance, in *Greens* (March 2011)

[150] HC Deb 10 February 2011, vol 523, col 498.
[151] ibid cols 575, 580.
[152] ibid cols 518, 537, 555, 560, 569-570.
[153] S. Fredman, 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Rights to Vote' in M. Hunt, H. Hooper and P. Yowell, *Parliaments and Human Rights* (Hart 2015) 465 ('From Dialogue to Deliberation').
[154] Bates, 'Democratic Override' (n.122) 288.
[155] A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012) 216.
[156] Hiebert, 'The Human Rights Act' (n.95) 2269.
[157] Bates, 'Democratic Override' (n.122) 288.
[158] Backbench Business Committee, *'Work of the Committee in the 2010-15 Parliament – First Special Report of Session 2014-15'* (HC 1106, 2015) 7-8.
[159] Hiebert, 'The Human Rights Act' (n.95) 2262.

the UK Government made a referral request to the Grand Chamber.[160] Whilst the ECtHR denied this request, in making the request the Government referred to the backbench debate to indicate legislative amendments would be met with parliamentary opposition.[161] Following the ECtHR's denial of the referral, the six month deadline for compliance with *Greens* was 'triggered on 11 April 2011'.[162] However, the UK subsequently made a third-party intervention in *Scoppola v Italy*[163] and was given a further six month extension to introduce legislation from the date of the judgment in *Scoppola,* 22 May 2012.

On 22 November 2012, the Government published the Voting Eligibility (Prisoners) Draft Bill.[164] The Bill put forward 'three options', from disenfranchising prisoners sentenced 'to 4 years or more', 'to more than 6 months' or 'for all convicted prisoners – a restatement of the existing ban'.[165] In the debate that followed publication of the draft Bill, the themes of the backbench debate resurfaced, with anti-Strasbourg rhetoric and assertions of parliamentary sovereignty.[166] As Hiebert and Kelly note, some considered the Bill was another 'stalling tactic'.[167] However, the Government submitted an action plan to the CM[168] and the CM 'welcomed and strongly supported' the introduction of the draft Bill but stated 'the third option aimed at retaining the blanket restriction' would be incompatible with the ECHR.[169]

The Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (the Committee) conducted pre-legislative scrutiny and published a report on 18 December 2013.[170] As part of this, the Committee canvassed extensive written evidence from experts regarding, for example, the 'historical and philosophical justifications' for prisoner disenfranchisement.[171] As Fredman notes, MPs including David Davis MP and Jack Straw MP in their oral evidence, were subject to extensive questioning, requiring them to justify their views expressed in the backbench

[160] Secretariat of the Committee of Ministers, Communication from the Government in the Case of Hirst No. 2 against the United Kingdom, DH-DD(2011)139 (1108th meeting, 8-10 March 2011) <https://hudoc.exec.coe.int/eng?i=DH-DD(2011)139E> accessed 14 April 2022.
[161] ibid; see Hiebert, 'The Human Rights Act' (n.95) 2264.
[162] A. Horne and I. White, *Prisoners' voting rights (2005 to May 2015)* (House of Commons Library, Parliament and Constitution Centre, 2015) 39.
[163] *Scoppola v Italy (No.3)* (2013) 1 Costs LO 62, (2013) 56 EHRR 19 (*Scoppola*).
[164] MOJ, *Draft Bill* (n.4).
[165] ibid 3.
[166] HC Deb 22 November 2012, vol 553, cols 745-762.
[167] Hiebert and Kelly (n.114) 387.
[168] Secretariat of the Committee of Ministers, Action Plan (23/11/12), Communication from the United Kingdom concerning the cases of Hirst No. 2 and Greens and MT v United Kingdom, DH-DD(2012)1106 (27 November 2012) <https://hudoc.exec.coe.int/eng?i=DH-DD(2012)1106E> accessed 14 April 2022.
[169] Committee of Ministers, Decision Cases No.30, CM/Del/Dec(2012)1157/30 (1157th meeting, 6 December 2012) <https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2012)1157/30> accessed 14 April 2022.
[170] Joint Committee on Draft Bill (n.8).
[171] ibid 73-74.

debate.[172] The Committee therefore facilitated extensive deliberation on prisoner voting. This demonstrates that whilst the debates in Parliament did not generally consider justifications for disenfranchisement, this was addressed elsewhere.

The Committee was critical of the Government's inclusion of a proposal to retain the ban stating it would be 'unlawful'.[173] It was unconvinced by the proposals in the Draft Bill and instead recommended prisoners sentenced to 12 months or less should be entitled to vote' and 'prisoners should be entitled to apply, up to 6 months before their scheduled release date, to be registered to vote'.[174] Notably, these proposals were more restrictive than Mark Harper MP's proposals in 2010, demonstrating endorsement of more minimal compliance. The Committee recommended a Bill should be introduced at the start of the 2014-15 session.[175] However, a Bill was not introduced.

The JCHR stressed that Parliament should 'give effect' to the Committee's recommendations.[176] The CM also issued a decision in which it 'urged' the UK to proceed with the Committee's recommendations.[177] The CM subsequently expressed 'profound concern and disappointment' that a Bill had not been introduced.[178] The UK communicated with the CM and restated it was considering how to implement *Hirst*.[179] However, prisoner voting litigation rumbled on, with ECtHR judgments in *Firth*[180] and *McHug*h.[181] Matters were further complicated by the CJEU's forthcoming judgment *Delvigne*. In a letter to the CM, the UK Government utilised *Delvigne* to stall compliance, arguing they needed to consider 'that case

[172] Fredman (n.153) 465-466.
[173] Joint Committee on Draft Bill (n.8) 62-63.
[174] ibid.
[175] ibid.
[176] JCHR, *Seventh Report of Session 2014-15* (2014-15, HL 130, HC 1088) 15.
[177] Committee of Ministers, Decision Cases No. 28, CM/Del/Dec(2014)1193/28 (1193rd meeting, 6 March 2014) <https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2014)1193/28> accessed 14 April 2022.
[178] Committee of Ministers, Decision Cases No. 27 CM/Del/Dec(2014)1208/27 (1208th meeting, 25 September 2014) <https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2014)1208/27> accessed 14 April 2022.
[179] Secretariat of the Committee of Ministers, Communication from the United Kingdom concerning the cases of Hirst No.2 and Greens and M.T against the United Kingdom, DD-DD(2014)768 (1208th meeting, 23-25 September 2014) <https://hudoc.exec.coe.int/eng?i=DH-DD(2014)768E> accessed 14 April 2022.
[180] *Firth v United Kingdom* (2016) 63 EHRR 25.
[181] *McHugh v The United Kingdom App no 51987/08* (ECtHR, 20 January 2015).

together with the cases in this group, given the potential implications and overlap'.[182] Yet, the CM noted that 'notwithstanding' *Delvigne* the UK still needed to comply.[183]

In September 2015, the CM adopted a decision expressing its concern with the delay.[184] On 2 December 2015, Michael Gove MP (then Lord Chancellor), indicated that the Government intended to 'produce a more substantive response' to the Joint Committee report.[185] Strasbourg condemned the UK's resistance and the CM adopted an interim resolution and expressed 'profound concern' with the non-compliance.[186] The CM called upon the UK to continue to engage in a 'high level dialogue' to facilitate compliance.[187] In October 2015, the CJEU's judgment *Delvigne* was delivered. The political reaction to *Delvigne* was predominately dismissive (discussed in chapter six).[188]

1.5.6 Administrative amendments[189]

On 2 November 2017, David Lidington MP (then Secretary of State for Justice) announced the Government sought to introduce 'administrative changes' to 'address' *Hirst* but significantly, 'the bar on convicted prisoners in custody from voting' was retained.[190] Lidington explained that first, the sentencing judge will 'make it clear' that upon incarceration the prisoner would be disenfranchised.[191] This was to remedy the 'concern' identified in *Hirst* that there was insufficient 'clarity in confirming to offenders that they cannot vote in prison'.[192] Second, offenders released on temporary licence would be allowed to vote, via amendments to prisoner service guidance. This would permit 'up to one hundred offenders' to vote, but significantly,

[182] Secretariat of the Committee of Ministers, Communication from the United Kingdom concerning the cases of Hirst No.2 and Greens and M.T against the United Kingdom, DH-DD(2015)782 (1236 meeting, 22-24 September 2015) <https://hudoc.exec.coe.int/eng?i=DH-DD(2015)782E> accessed 14 April 2022.
[183] Committee of Ministers, Decision cases No.25 – Hirst No.2 group against the United Kingdom, CM/Del/Dec(2015)1236/25 (1236 meeting, 22-24 September 2015) <https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2015)1236/25> accessed 14 April 2022.
[184] ibid.
[185] House of Lords, *Revised transcript of evidence taken before The Select Committee on the Constitution* (Evidence Session 1, Questions 1-12, 2 December 2015) 17; for analysis, see S. Foster, 'Prisoners' voting rights: still no joy for the right to vote, but a light at the end of a very long tunnel?' [2013] CovLJ 51.
[186] Committee of Ministers, Interim Resolution CM/ResDH(2015)251, Execution of the judgments of the European Court of Human Rights Hirst and three other cases against the United Kingdom (1243rd meeting, 9 December 2015) <https://hudoc.exec.coe.int/eng?i=001-159677> accessed 14 April 2022.
[187] ibid.
[188] M. Holehouse, 'David Cameron: I will ignore Europe's top court on prisoner voting' *The Telegraph* (London, 04 Oct 2015) <https://www.telegraph.co.uk/news/uknews/law-and-order/11911057/David-Cameron-I-will-ignore-Europes-top-court-on-prisoner-voting.html> accessed 14 April 2022.
[189] See E. Adams, 'Prisoners' Voting Rights: Case Closed?' (*UKConstLBlog,* 30 January 2019) <https://ukconstitutionallaw.org/> accessed 14 April 2022.
[190] HC Deb 2 November 2017, vol 630, cols 1007–1008.
[191] ibid.
[192] ibid.

'none of them will be able to vote from prison'.[193] It would principally include prisoners serving short sentences, deemed eligible for release on temporary licence.

The response to Lidington's announcement in the House of Commons was mostly positive; Robert Neill MP commended Lidington 'on having grasped the nettle that none of his predecessors grasped'.[194] Further, Cheryl Gillan MP argued it constituted an 'elegant and sensible solution'.[195] However, Kerry McCarthy MP contended the amendments were 'a tiny concession from the Government' which deprived prisoners 'of their rights'.[196] Conversely, reflecting the disdain that had largely characterised the prisoner voting clash, Philip Davies MP argued the amendment would be 'about as popular with the general public as finding a rattlesnake in a lucky dip' and the ECtHR was composed of 'unelected, unaccountable pseudo-judges'.[197]

The Government submitted an action plan to the CM, which included Lidington's proposals and also stated that prison service guidance would be amended to *clarify* that offenders released on Home Detention Curfew (HDC) can vote.[198] The Secretariat of the CM endorsed the action plan and noted that two new categories of prisoners had been enfranchised, those on temporary licence *and* those on HDC.[199] However, as Celiskoy notes, this was 'inaccurate', the action plan *clarified* the voting eligibility of prisoners on HDC, rather than introducing a 'new category of prisoners' who could vote.[200] Nonetheless, the CM adopted a decision in December 2017 that the proposed measures 'in light of the wide margin of appreciation', satisfied the requirements established in the ECtHR's case law and 'strongly encouraged' implementation.[201] In September 2018, the UK submitted an action report which confirmed the

[193] ibid.
[194] ibid.
[195] ibid cols 1010-1011.
[196] ibid cols 1011, 1013.
[197] ibid col 1013.
[198] Secretariat of the Committee of Minsters, Action plan (02/11/2017) – Communication from the United Kingdom concerning the case of HIRST (No.2) v the United Kingdom, DH-DD(2017)1229 (1302nd meeting, December 2017) <https://hudoc.exec.coe.int/eng?i=DH-DD(2017)1229E> accessed 14 April 2022; see Ministry of Justice, *Restrictions on Prisoner Voting Policy Framework*, 11 August 2020 <https://www.gov.uk/government/publications/restrictions-on-prisoner-voting-policy-framework> accessed 14 April 2022.
[199] Ministers' Deputies, Notes on the Agenda 1302nd Meeting, 5-7 December 2017, Hirst No.2 Group v the United Kingdom, CM/Notes/1302/H46-39 (1302nd meeting, 5-7 December 2017) <https://hudoc.exec.coe.int/eng?i=CM/Notes/1302/H46-39E> accessed 14 April 2022.
[200] E. Celiksoy, 'Execution of the Judgments of the European Court of Human Rights in Prisoners' Right to Vote Cases' (2020) 20(3) HRLRev 555, 574.
[201] Ministers' Deputies, Supervision of the execution of the European Court's judgments, CM/Del/Dec(2017)1302/H46-39E (1302nd meeting, 5-7 December 2017) <https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2017)1302/H46-39E> accessed 14 April 2022.

amendments had been implemented.[202] In December 2018, the CM adopted a final resolution and closed supervision of *Hirst*.[203] The endorsement of these amendments was surprising, as they constituted minimal compliance, as they undermined the requirements of the ECtHR's jurisprudence with the legislative ban in s.3 RPA 1983 remaining intact (assessed in chapter six).[204]

1.5.7 Other developments: Scotland and Wales[205]

Notably, Scotland has taken a different approach to prisoner voting in local and Scottish Parliament elections.[206] In February 2020, the Scottish Elections Bill was passed by a super-majority of MSPs.[207] S.5 of the Scottish Elections (Franchise and Representation) Act 2020 enfranchises prisoners sentenced to less than twelve months imprisonment to vote in local and Scottish parliamentary elections.[208] Therefore, Scotland legislated for a less restrictive approach to prisoner voting.

In Wales, the Welsh Government stated it planned to add amendments to the Local Government and Elections (Wales) Bill to enfranchise prisoners sentenced to less than four years imprisonment.[209] If adopted, Wales would have the most permissive approach to prisoner voting in local elections in the UK. However, 'due to the coronavirus crisis' taking priority, the proposed prisoner voting amendments were not introduced.[210] Murray further notes that the

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[202] Secretariat of the Committee of Ministers, Action report (02/09/2018) – Communication from the United Kingdom, DH-DD(2018)843 (1324th meeting, September 2018) <https://hudoc.exec.coe.int/eng?i=DH-DD(2018)843E> accessed 14 April 2022.

[203] Ministers' Deputies, Supervision of the execution of the European Court's judgments, CM/ResDH(2018)467 (1331st meeting, 4-6 December 2018) <https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2018)1331/H46-35E> accessed 14 April 2022.

[204] Adams (n.189).

[205] see N. Johnston, *Prisoners' voting rights: developments since May 2015* (HC Briefing Paper No.07461, 2020), 27-37 ('*Prisoners' voting rights*'); focusing on Scotland and Wales as there has been no 'transfer' of 'new competences with regard to elections' to the 'Northern Ireland Assembly', C.R.G. Murray, 'Prisoner Voting and Devolution: New Dimensions to an Old Dispute' (2021) 25(3) EdinLR 1, 12 ('New Dimensions'); for discussion of the fraught political context regarding devolution, see B. Dickson, 'Devolution in Northern Ireland' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 239-269.

[206] Equalities and Human Rights Committee, *Prisoner Voting in Scotland* (SP Paper 315, 3rd Report, session 5) 2018) 27.

[207] Scotland Act 2016, s.11 - a 'super-majority' ('two-thirds' of MSPs) are required for amendments to voting legislation.

[208] Scottish Elections (Franchise and Representation) Act 2020, s.5.

[209] List of Draft Amendments, Local Government and Elections (Wales) Bill, Draft prisoner voting amendments (27 January 2020): <https://business.senedd.wales/documents/s99494/Correspondence%20from%20the%20Minister%20for%20Housing%20and%20Local%20Government%20regarding%20prisoner%20voting%20amendmen.pdf> accessed 14 April 2022.

[210] J. James, Letter to Equality, Local Government and Communities Committee <https://business.senedd.wales/documents/s101154/Correspondence%20from%20the%20Minister%20for%20H

need to obtain support for the measure from a 'super majority of legislators' and 'the intertwining of England and Wales' criminal justice system combined to discourage' the Welsh Government from proceeding with the measures.[211] The Bill was passed on 18 November 2020, without including prisoner voting.[212] Therefore, the issue of prisoner voting has currently been shelved in Wales.

The approaches taken in both Scotland and Wales arguably challenge the UK Government's more restrictive administrative amendments. The fact Scotland has legislated and Wales intended to embrace less restrictive approaches to prisoner voting in terms of local elections, stems from a political motivation to distinguish their approach from the UK Government, to convey the message that they will use their devolved powers to ensure higher standards of rights protection.[213] To prisoners in the UK outside of Scotland and Wales, these developments could further support future litigation, evidencing a more proportionate approach to prisoner voting is required.[214] However, Scottish legislation is considerably more restrictive than the Welsh proposals, arguably demonstrating the prisoner voting clash still significantly narrowed the options regarding prisoner voting. Further, both Scotland and Wales refrained from endorsing complete enfranchisement, showing there were limits to how far they were willing to go.

1.6 Conclusion

This chapter has provided the historical context to prisoner voting in the UK and explored how both Strasbourg and the EU have approached the right to vote more generally. The history of prisoner disenfranchisement in the UK is complex and characterised by instability - a "ban" on prisoner voting has not always been present. The analysis of Strasbourg's approach to voting, reveals how the ECtHR's recognition of the importance of democracy, ultimately resulted in the ECtHR recognising an individual right to vote in *Mathieu-Mohin.* The EU's approach to voting rights reveals that prior to *Delvigne*, the right to vote in European Parliament elections was dependent on the exercise of free movement rights.

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ousing%20and%20Local%20Government%20-%20Stage%202%20-%2012%20May%202020.pdf> accessed 14 April 2022.

[211] Murray, 'New Dimensions' (n.205) 12-13, 19.

[212] Senedd Cymru Welsh Parliament, Plenary – Fifth Senedd – Wednesday, 18 November 2020, <https://business.senedd.wales/ieListDocuments.aspx?CId=401&MId=6677&Ver=4> accessed 14 April 2022.

[213] *Prisoner Voting in Scotland* (n.206) 27; National Assembly for Wales Equality, Local Government and Communities Committee of the Welsh Assembly, *Voting Rights for Prisoners* (June 2019) 37.

[214] See Murray, 'New Dimensions' (n.205) 22-24.

This chapter outlined the prisoner voting clash timeline and focused on the political response. The timeline reveals the fraught prisoner voting context, which was largely characterised by political procrastination and hostility to *Hirst*. As will be further discussed in chapter six, this persistent resistance is exemplified by the UK Government's administrative amendments, which constitute minimal compliance and controversially, leaves the prisoner voting ban in s.3 RPA 1983 intact.

CHAPTER TWO: THE DOMESTIC CONSTITUTIONAL CONTEXT OF HUMAN RIGHTS PROTECTION*

2.1 Introduction

This chapter considers key principles relevant to prisoner voting, to inform discussion in subsequent chapters. Therefore, this chapter includes an overview of rights protection in the UK (section 2.2). In particular, it briefly explores common law rights and examines sections 3 and 4 of the Human Rights Act 1998 (HRA) which have strengthened the judicial role in rights protection. As part of this, the judicial discretion whether to make a declaration under s.4 is assessed, as prisoner voting raises complex issues regarding how domestic courts have approached their s.4 discretion. Key constitutional principles are also explored, as they underpin constitutional considerations that arise in prisoner voting adjudication and shape the political response to *Hirst* (section 2.3).[1] The contestability of rights protection is elucidated (section 2.4). Deference and dialogue are then explained, being key principles that arise in relation to prisoner voting (section 2.5). Judicial application of these principles might assuage concerns regarding the judicial role in rights protection. However, depending on the case, deference might be "misapplied" and dialogue might not accurately reflect the realities of inter-institutional relationships. Whilst sections 3 and 4 have the potential to be tools for deference and/or dialogue, in practice this potential might not be realised. Normative conceptions regarding how rights protection should function, can jar with the potentially conflict-ridden reality, exposing flaws in systems of rights protection. This chapter concludes by delineating this thesis' expectations regarding the purpose of rights protection, mainly that institutions should strive to collaborate in rights protection (section 2.6). This is necessary to explain the expectations that underpin the analysis of the prisoner voting clash in chapters four to six.

2.2 Rights protection in the UK

To enable analysis of prisoner voting jurisprudence, this section provides an overview of rights protection in the UK. Prior to the HRA there was developing judicial recognition of common

* This chapter draws on some material published in E. Adams, 'Judicial Discretion and the Declaration of Incompatibility: Constitutional Considerations in Controversial Case' [2021] PL 311.

[1] *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41.

law rights[2] and some 'constitutional' or 'fundamental rights' were affirmed,[3] such as 'the right of access to court'[4] and the 'right to freedom of expression'.[5] These fundamental rights are given greater protection by the courts.[6] However, following the enactment of HRA, common law rights were in the 'shadow' of the HRA.[7] Nevertheless, there has been a 'resurgence' in common law rights protection[8] as demonstrated by recent Supreme Court judgments.[9] Masterman and Wheatle explain that for some, the common law is 'the primary vessel' for rights protection, 'supplemented by the' European Convention on Human Rights (ECHR or Convention).[10] Increased judicial power is arguably demonstrated by theories of common law constitutionalism[11] which place courts and the common law on a constitutional pedestal.[12] Arguably, the reinforcement of the common law has been driven by broader hostility to supranational rights protection, as the 'national' qualities of the common law are preferred over the 'non-national qualities' of the ECHR.[13] Of relevance is the relationship between common law constitutional rights and Convention rights, as this was explored in the prisoner voting case *Moohan* (discussed in chapter four).[14] However, despite a resurgence in common law rights protection, common law rights and Convention rights are not entirely 'aligned'.[15] As Bowen argues, the ECHR still has greater 'normative reach' and 'protective rigour'.[16] The rights recognised by the common law are not as 'co-extensive' as Convention rights.[17]

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[2] T. Hickman, *Public Law after the Human Rights Act* (Hart 2010) 17-21.
[3] M. Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2016) 68 CLP 85, 88 ('Beyond the Convention').
[4] ibid 88; e.g. *R v Secretary of State for the Home Department, Ex p Leech (No 2)* [1994] QB 198, [1993] 3 WLR 1125.
[5] ibid 88; e.g. *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, [1999] 3 WLR 328.
[6] see M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015) 216-21 ('*Parliamentary Sovereignty*').
[7] Elliott, 'Beyond the Convention' (n.3) 90; see also, R. Masterman and S. Wheatle, 'A common law resurgence in rights protection' [2015] EHRLR 57, 58-60 ('A common law resurgence').
[8] Elliott, 'Beyond the Convention' (n.3) 93.
[9] ibid 92; e.g. *A v BBC* [2014] UKSC 25, [2014] 1243; *R (Evans) v Attorney-General* [2015] UKSC 21, [2015] AC 1787; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324; *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455; *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.
[10] Masterman and Wheatle, 'A common law resurgence' (n.7) 64.
[11] G. Gee and A. Young, 'Regaining Sovereignty? Brexit, the UK Parliament and the Common Law' (2016) 22(1) EPL 131, 144-145; P. Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24(2) OJLS 237.
[12] T. Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23(3) OJLS 435, 439.
[13] Masterman and Wheatle, 'A common law resurgence' (n.7) 61.
[14] *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901 ('*Moohan*').
[15] Elliott, 'Beyond the Convention' (n.3) 94.
[16] P. Bowen, 'Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary' [2016] EHRLR 361, 376.
[17] Elliott, 'Beyond the Convention' (n.3) 89.

The HRA was enacted to 'bring rights home … to make more directly accessible the rights which the British people already enjoy under the Convention'.[18] It gives 'further effect to rights and freedoms guaranteed under the European Convention on Human Rights'[19] and crucially, Convention rights became enforceable in domestic courts, giving greater powers to the judiciary.[20] In interpreting Convention rights, s.2 HRA enshrines a link between domestic courts and Strasbourg, requiring domestic courts to 'take into account' relevant Strasbourg jurisprudence.[21] Therefore, s.2 is explored in chapter three as it raises issues regarding the domestic courts relationship and interactions with Strasbourg. Further, the HRA empowers domestic courts to review the compatibility of legislation with Convention rights. If a court deems legislation incompatible it will assess whether s.3 HRA applies, which requires courts 'so far at it is possible to do so' to interpret legislation in a way that is compatible with Convention rights.[22] Where s.3 does not apply, higher courts may consider whether to make a declaration of incompatibility under s.4 HRA.[23] Further, sections 6-8 HRA enable legal action against public authorities, with s.6 making it 'unlawful for a public authority to act in a way which is incompatible with a Convention right'.[24] Moreover, looking beyond the judicial role, it is clear the HRA requires multi-institutional involvement. For instance, s.19 HRA requires a Minister 'before Second Reading of the Bill' to 'make a statement' regarding the compatibility of legislation with Convention rights.[25] Parliament then considers the compatibility of the legislation with rights.[26] This has advanced the rights orientation of legislation, ensuring rights compatibility is considered,[27] allowing for greater parliamentary involvement in human rights issues.[28] Moreover, after a declaration, the elected branches can decide whether to remedy a declaration and if so, how.[29] In terms of the political branches' 'remedial space', the executive

[18] Home Office, *Rights Brought Home: The Human Rights Bill* (White Paper, Cm 3782, 1997) para 1.19 ('*Rights Brought Home*').
[19] Human Rights Act 1998, Introductory Text (HRA).
[20] e.g. C. O'Cinneide, 'Human Rights and the UK Constitution' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9thedn, OUP 2019) 58-93.
[21] HRA (n.19) s.2(1).
[22] ibid s.3(1).
[23] ibid ss.4(2)(5).
[24] ibid s.6(1).
[25] ibid s.19.
[26] In particular, the Joint Committee on Human Rights (JCHR), (a parliamentary committee), assesses the compatibility of legislation with rights - J. Hiebert, 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?' (2004) 82 TexLRev 1963, 1978.
[27] C. O'Cinneide, 'Democracy, Rights and the Constitution – New Directions in the Human Rights Act Era' (2004) 57 CLP 175, 194.
[28] M. Hunt, 'The Impact of the Human Rights Act on the Legislature: A Diminution of Democracy or a New Voice for Parliament?' [2010] EHRLR 601, 607.
[29] C. Chandrachud, 'Reconfiguring the discourse on political responses to declarations of incompatibility' [2014] PL 624.

may respond with a remedial order under s.10 HRA or Parliament may opt to legislate.[30] This demonstrates the multifaceted nature of rights protection in the UK, that it involves multiple institutions in the process of rights protection.

Having provided a brief overview of the HRA, it is necessary to explain s.3 and s.4 HRA, as domestic prisoner voting jurisprudence raises issues relating to these sections (analysed in chapter four). Although notably, the issues in prisoner voting mainly concern s.4 and therefore, s.4 will be the main focus of discussion. In terms of s.3, where a court deems there is a disproportionate interference with Convention rights,[31] the court then assesses whether s.3 applies. S.3 stipulates that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights'.[32] S.3 creates an enhanced judicial power of interpretation.[33] In early case law, the courts showed willingness to 'utilise the full amplitude of its interpretative powers' to ensure a Convention compliant interpretation under s.3.[34] Therefore, in the seminal judgment, *Ghaidan,*[35] the House of Lords (the Court) clarified the scope of courts' interpretative powers under s.3. In *Ghaidan* the majority held that upon the death of a partner that, in accordance with s.3, it was possible to interpret paragraph 2(2) of the first schedule to the Rent Act 1997 in such a way that 'cohabiting homosexual couples would be treated alike for the purposes of succession as a statutory tenant', removing the discriminatory effect of paragraph 2.[36]

In reaching this decision, Lord Nicholls noted that interpreting legislation under s.3 can enable courts to 'read words in' and 'modify the meaning' of legislation.[37] However, limits were placed on courts' interpretive powers, suggesting a more restrained approach.[38] First, courts must be aware that a s.3 interpretation does not enable courts to 'adopt a meaning inconsistent with a fundamental feature of legislation'.[39] Words implied 'must go with the grain of the

[30] ibid 625.
[31] See proportionality test: *R v A (No.2)* [2001] UKHL 25, [2002] 1 AC 45 [34]-[38], [94] (test adopted from *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 WLR 675).
[32] HRA (n.19) s.3(1).
[33] P. Sales and R. Ekins, 'Rights-Consistent interpretation and the Human Rights Act 1998' [2011] LQR 217, 231.
[34] A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 19-22 ('*Constitutional Review*'); e.g. *R v A (No.2)* [2001] UKHL 25, [2002] 1 AC 45; *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545; *R v Offen* [2001] 1 WLR 253, [2001] 2 All ER 154.
[35] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2003] 2 AC 557 (*Ghaidan*).
[36] ibid [35] (Lord Nicholls).
[37] ibid [32] (Lord Nicholls).
[38] S. Gardbaum, 'How Successful and Distinctive is the Human Rights Act? An Expatriate Comparatist's Assessment' (2011) 74(2) MLR 195, 207.
[39] *Ghaidan* (n.35) [33] (Lord Nicholls).

legislation'.[40] This limit is derived from *Re S*[41] and Kavanagh explains a fundamental feature is something that 'pervades the legislative scheme to such an extent, that to remove it would require radical reform more appropriate to Parliament than the courts'.[42] Second, courts should not 'make decisions for which they are not equipped' and some cases must be resolved by 'legislative deliberation'.[43] Sathanapally clarifies the second limit concerns 'the courts' capacity to make certain types of remedial choices'.[44] The court may deploy remedial deference and apply s.4, rather than s.3. Yet notably, Lord Steyn emphasised that s.3 'is the prime remedial remedy' and use of s.4 must be 'exceptional'.[45] The Court upheld the interpretative strengths of s.3, and whilst limits were placed on these powers, Convention compliant interpretations under s.3 are to be considered before s.4.[46]

Therefore, where a s.3 interpretation is not possible, the court may then consider whether to make a declaration.[47] In accordance with s.4(2) HRA, 'if the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility'.[48] The power to make a declaration is limited to the higher courts.[49] Whether the court applies s.3 or s.4 is context specific.[50] *Bellinger* demonstrates the application of a contextual approach.[51] *Bellinger* concerned s.11(c) of the Matrimonial Causes Act 1973 (MCA) which states that a marriage will be 'void unless the parties are respectively male and female'.[52] Mrs Bellinger, who had undergone gender reassignment, sought a declaration that her marriage to Mr Bellinger was valid.[53] The House of Lords (the Court) applied the ECtHR's recent judgment in *Goodwin v United Kingdom*,[54] in which the ECtHR held the UK's discriminatory treatment of 'transsexuals' breached Articles 8 and 12 of the Convention.[55] The Court held s.11(c) of the

[40] ibid.
[41] *Re S (Children) (Care Order; Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291 [40].
[42] Kavanagh, *Constitutional Review* (n.34) 60.
[43] *Ghaidan* (n.35) [33] (Lord Nicholls).
[44] A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012) 93.
[45] *Ghaidan* (n.35) [50] (Lord Steyn).
[46] A. Young, 'Ghaidan v Godin-Mendoza: avoiding the deference trap' [2005] PL 23, 27-28 ('Deference trap').
[47] C. Chandrachud and A. Kavanagh, 'Rights-based constitutional review in the UK - from form to function' in J. Bell and M.L. Paris (eds), *Constitutional Courts in a Changing Constitutional Landscape: Studies in Comparative Law and Legal Culture Series* (Edward Elgar 2016) 79.
[48] HRA (n.19) s.4(2).
[49] ibid s.4(5).
[50] Kavanagh, *Constitutional Review* (n.34) 132; Sathanapally (n.44) 99-100.
[51] *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 (*Bellinger*); see M. Cohn, 'Judicial activism in the House of Lords: a composite constitutionalist approach' [2007] PL 95, 105.
[52] *Bellinger* (n.51) [1].
[53] ibid.
[54] *Goodwin v United Kingdom* (2002) 35 EHRR 18.
[55] ibid [93], [103]-[104].

MCA was incompatible with Article 8 and Article 12.[56] In reaching this decision, the Court was aware that after the ECtHR's judgment in *Goodwin,* the Government had already taken steps to redress the incompatibility.[57] For example, Lord Nicholls stated that amendment to MCA is to be determined by Parliament, 'especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject'.[58] The Court was wary of introducing change in a 'piecemeal fashion' as this would undermine the law's coherence.[59] Further, the amendments to legislation raised issues with 'far reaching ramifications' and concerned issues of 'policy and administrative feasibility'.[60] Therefore, the Court made a declaration, as the circumstances of the case went beyond the Court's interpretative powers under s.3 HRA.[61]

2.2.1 Judicial discretion: s.4 HRA

In further exploring s.4, this section considers the judicial discretion under s.4. In chapter four it will be shown how domestic prisoner voting case law raises challenging issues concerning the judicial discretion to make a declaration. Importantly, in deciding whether to make a declaration, courts '*may* make a declaration of that incompatibility'.[62] 'May' indicates the judicial discretion.

To explore the scope of the judicial discretion, it is necessary to start with the parliamentary debates during the passage of the Human Rights Bill[63] which show the *intended* scope of the judicial discretion. Lord Irvine (then Lord Chancellor) explained that due to the seriousness of declarations, they would be 'very rare'.[64] The declaration is 'a *discretionary* remedy': cases may arise where courts do 'not wish to make a declaration' due to 'the facts'.[65] As Lord Irvine noted, 'there might be an alternative statutory appeal route … or … any other procedure which … the applicant should exhaust before seeking a declaration' *but* 'in the great majority of cases courts would … make declarations'.[66] Whilst not expressed as a closed list of factors, evidently Lord Irvine considered the scope of the judicial discretion to be relatively constrained. Upon

[56] *Bellinger* (n.51) [53].
[57] ibid [26].
[58] ibid [37].
[59] ibid [45].
[60] ibid [37].
[61] ibid [69].
[62] HRA (n.19) s.4(2).
[63] Kavanagh, *Constitutional Review* (n.34) 15.
[64] HL Deb 3 November 1997, vol 582, cols 1228, 1231; HL Deb 5 February 1998, vol 585, col 840.
[65] HL Deb 18 November 1997, vol 583, col 546.
[66] ibid (emphasis added).

finding incompatibility, courts would *usually* grant declarations. However, it is also clear the discretion was inbuilt by Parliament to provide courts with scope to refrain from making a declaration.[67]

Therefore, the scope of the judicial discretion was not fully delineated, leaving the judiciary to fill in the gaps. So *how* have courts exercised their discretion under s.4? In some cases courts have shown 'willingness' to make declarations, embracing an 'expository' approach; courts may make a declaration to send 'a message to the legislature'.[68] Yet, conversely, courts have also limited the discretion.[69] Significantly, as Stark argues, the discretion has occasionally been a source of 'confusion' and courts have shown 'reluctance' to make declarations.[70] For instance, some courts have adopted a case-focused, narrow approach by declining to make a declaration where the 'instant case' is not 'compelling', despite legislation being flawed.[71]

Importantly, the 'expected' political response to declarations might also affect judicial discretion.[72] UK courts are not empowered to strike out legislation, and s.4 is designed to respect parliamentary sovereignty;[73] having 'in-built deference to Parliament',[74] and being 'non-coercive'.[75] Therefore, as courts cannot strike down legislation,[76] this is emblematic of a system of 'weak-form judicial review'[77] - the court leaves the issue to the political branches to determine whether and how to remedy the incompatibility. By contrast, the United States (US) adopts a system of 'strong-form judicial review' which gives 'courts a wide-ranging power to invalidate legislation on the ground that the legislation' violates rights.[78] The legitimacy of strong-form review in particular has provoked extensive debate, with some vehemently opposing the undemocratic nature of courts engaging in constitutional review.[79] However,

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[67] ibid
[68] Sathanapally (n.44) 108; e.g. *R (Thompson & JF) v Secretary of State for the Home Department* [2009] EWCA Civ 792, [2010] 1 WLR 76 [33]; See also HC Deb 3 June 1998, vol 313, cols 459-460 and HRA (n.19) s.4(6).
[69] *R (Rusbridger) v Attorney General* [2003] UKHL 38, [2004] 1 AC 357 [35]-[36] (Lord Hutton).
[70] S. Stark, 'Facing facts: judicial approaches to section 4 of the Human Rights Act 1998' (2017) 133 LQR 631, 631.
[71] ibid 631.
[72] Chandrachud, 'Reconfiguring the discourse' (n.29) 625.
[73] Home Office, *Rights Brought Home* (n.18) para 2.13.
[74] A. Brady, *Proportionality and Deference under the UK Human Rights Act* (CUP 2012) 196.
[75] Sathanapally (n.44) 23.
[76] Home Office, *Rights Brought Home* (n.18) para 2.13; see HC Deb 16 February 1998, vol 307, col 780.
[77] M. Tushnet, 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 Wake Forest LRev 813, 814 ('New Forms of Judicial Review').
[78] ibid 814; for analysis of differences between US and European review see, P. Craig, 'Constitutional and Non-Constitutional Review' (2001) 54(1) CLP 147, 148-155.
[79] A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, New Haven and London, 1986) 16; J. Waldron, 'The Core of the Case Against Judicial Review' [2006] The Yale Law

weak-form review may help mitigate the counter-majoritarian criticisms which are levelled against strong-form review, as judicial powers are moderated - 'courts lack final authority to define and enforce constitutional guarantees'.[80]

As Chandrachud explains, there are a range of possible political responses to a declaration, which occupy a 'decisional space', where Government and Parliament determine whether to 'accept' a declaration.[81] There is also a 'remedial space', i.e. the 'legal modes' in which the declaration will be remedied.[82] However, there are political and legal repercussions for failing to remedy an incompatibility and consequently, the majority of declarations have been remedied.[83] This high level of compliance arguably indicates declarations are a strong remedy,[84] demonstrating a narrowing of the political decisional space.[85] Moreover, Chandrachud argues that the political decisional space has also been narrowed due to courts' 'strategic' use of declarations,[86] as courts are 'mindful of expected political reactions'.[87] Therefore, courts' strategic use of declarations shows judicial discretion could *also* be classified as a "decisional space".

So if the high rate of compliance narrows the political decisional space, to what extent does compliance affect the judicial decisional space for making a declaration? First, high rates of compliance might *encourage* judicial declarations. Bateup contends that judges may act strategically, refraining from granting declarations where they 'will be ignored or not implemented', potentially undermining judicial authority, demonstrating courts comparative institutional 'weakness'.[88] Yet if political compliance is likely, it may bolster judicial willingness to make a declaration, strengthening judicial authority.[89]

Journal 1346, 1359-1360, 1380-1386; Cf R. Fallon, 'The Core of an Uneasy Case *For* Judicial Review' (2008) 121(7) HarvLawRev 1693, 1705-1709, 1733-1734.

[80] R. Dixon, 'The Core Case for Weak-Form Judicial Review' (2017) 38 Cardozo LRev 2193, 2194; M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009) 23; N.B. whilst Waldron rejects strong-form review, he expresses admiration for the quality of legislative debate in the UK, Waldron, 'The Core of the Case' (n.79) 1384.

[81] Chandrachud (n.29) 625.

[82] ibid.

[83] Ministry of Justice, *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020-2021* (CP562, 2021) 37.

[84] Tushnet, 'New Forms of Judicial Review' (n.77) 836-837; Kavanagh, *Constitutional Review* (n.34) 287-292.

[85] Chandrachud (n.29) 625, 635-641.

[86] ibid 641.

[87] ibid 625.

[88] C. Bateup, 'Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights' (2009) 32 Hastings Int'l & CompLRev 529, 568-569.

[89] ibid 580-582.

Second, and conversely, if the effects of the declaration are understood as strong, depending on the case, rather than encouraging declarations this may *discourage* judicial use of s.4. In *Animal Defenders*[90] a declaration was not granted and Masterman argues there was 'an underlying concern' regarding 'the consequences' and 'potency' of the declaration.[91] Moreover, there is some evidence that some politicians view the declaration as 'having binding legal effect akin to a strike-down power'.[92] Politicians framing s.4 as binding might influence the judicial approach to s.4, arguably contributing to judicial understanding of declarations as strong. If so, due to constitutional considerations, judges might act strategically, considering it more deferential to refrain from making a declaration.[93] A declaration could be considered likely to upset the political branches – inflaming pre-existing political controversy by reopening an issue. Therefore, paradoxically, the strength of s.4 may instead lead to its underuse and weaken it.[94] The extent to which judicial understanding of the strength of s.4 might affect their willingness to make a declaration will be considered in relation to prisoner voting.

2.3 Constitutional principles: the constitutional context

This section provides background regarding the UK's constitutional context, exploring key constitutional principles specifically regarding rights protection. Space precludes detailed exposition of these principles, rather, this section outlines the key principles which can implicitly[95] or explicitly underpin both judicial and political decision-making. These principles can inform other broader constitutional considerations, as will be evidenced in later chapters.

2.3.1 Parliamentary sovereignty

The first key principle is parliamentary sovereignty, which Dicey influentially defined 'as the right to make or unmake any law whatever; and, further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[96]

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[90] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [33] (Lord Bingham) (*Animal Defenders*).
[91] R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011) 175 ('*The Separation of Powers*'); see also, C. Mallory and H. Tyrrell, 'Discretionary Space and Declarations of Incompatibility' (2021) 32(3) KLJ 466, 492-493.
[92] C. Chandrachud and A. Kavanagh (n.47) 90.
[93] See e.g. Kavanagh, *Constitutional Review* (n.34) 229; Cf A. Young, *Democratic Dialogue and the Constitution* (OUP 2017) 232 ('*Democratic Dialogue*').
[94] Masterman, *The Separation of Powers* (n.91) 175.
[95] For discussion of the role 'of implied constitutional principles in *judicial* decision-making in fundamental rights cases', see S. Wheatle, *Principled Reasoning in Human Rights Adjudication* (OUP 2017).
[96] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, MacMillan & Co ltd 1985) 40.

Parliamentary sovereignty incorporates both a 'positive side', that Parliament can legislate in a way which is *legally* unlimited and conversely, a 'negative side' that nobody, including courts, can 'override or derogate from an Act of Parliament'.[97] Parliamentary sovereignty is justified by some as a key principle in the UK constitution because of 'its ability to preserve democracy'.[98] The House of Commons, as the elected chamber, has the 'primary' role (the House of Lords is unelected).[99] As Gordon states, parliamentary sovereignty provides for 'the *primacy* of democracy, rather than democracy per se'.[100] Power is entrusted in an elected institution with participation at its core.[101]

As noted, the HRA enhanced domestic judicial protection of rights, but also sought to uphold parliamentary sovereignty.[102] However, following the enactment of the HRA there have been a multitude of accounts assessing whether parliamentary sovereignty has been 'preserved'.[103] Crucially, courts are *not* empowered to strike out legislation, which supports parliamentary sovereignty. Yet some have questioned whether this formal preservation of parliamentary sovereignty translates into practice.[104] S.3 HRA provides the judiciary with strong interpretative powers[105] and s.4 HRA has almost universally been complied with – perhaps indicating that s.4 has stronger 'legal' effects.[106] Moreover, Young observes that there are some 'indirect challenges' to parliamentary sovereignty, such as arguments that the HRA is a 'constitutional statute'.[107] Such challenges are arguably indicative of an 'unsettled

[97] ibid 40-41; N.B. As Young notes, there is a distinction between the 'old' view that Parliament 'cannot legislate so as to bind its successors'. Conversely there is 'the new view', that 'Parliament can bind its successors as to the manner and form in which legislation is enacted' - Young, *Democratic Dialogue* (n.93) 181; The key proponent of the 'new view' is W.I. Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959).
[98] A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009) 96 ('*Parliamentary Sovereignty*'); Cf D. Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defence of the Sovereignty of Parliament' in A. Horne and G. Drewry (eds), *Parliament and the Law* (2nd edn, Hart 2018) 298-300.
[99] Gordon, *Parliamentary Sovereignty* (n.6) 45.
[100] ibid 46.
[101] M. Gordon, 'The UK's Fundamental Constitutional Principle: Why the UK Parliament Is Still Sovereign and Why It Still Matters' (2015) 26(2) KLJ 229, 231.
[102] HL Deb 19 January 1998, vol 584, col 1294; see F. Klug and H. Wildbore 'Breaking new ground: the Joint Committee on Human Rights and the role of Parliament in human rights compliance' [2007] EHRLR 231.
[103] M. Elliott, 'Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention' (2002) 22 LS 340, 351.
[104] N. Bamforth, 'Parliamentary sovereignty and the Human Rights Act 1998' [1998] PL 572, 582; Kavanagh, *Constitutional Review* (n.34) 310-337.
[105] Kavanagh, *Constitutional Review* (n.34) 318-319.
[106] ibid 320-322.
[107] As Young explains, 'hierarchy between statutes' is precluded under Dicey's definition, therefore, '[a]ll statutes can be overturned by future legislation, either expressly or by implication'. *If* the HRA was a 'constitutional statute', this may protect it from 'implied repeal', therefore requiring 'a special procedure for its amendment' – Young, *Parliamentary Sovereignty* (n.98) 5, 9; See *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324; *Thoburn v Sunderland CC* [2002] EWHC 195, [2003] QB 151 [60]-[63] (Laws LJ); M. Elliott, 'Embracing "Constitutional" Legislation: Towards Fundamental Law?' (2003) 54 NIrLegal Q 25, 32.

constitution'.[108] However, despite potential challenges to parliamentary sovereignty, as Walker argues it is 'far from overturned', as it still signifies 'the touchstone of constitutional change'.[109]

A core issue in this thesis is whether the tension between respect for parliamentary, democratic determination of rights can be reconciled with the role of the court, as a non-democratic institution, in upholding rights. This thesis explores whether and how parliamentary sovereignty informs domestic courts' decision-making. For instance, Kavanagh argues, 'Once respect for parliamentary sovereignty is softened into the principle that … courts must respect the competence, expertise and legitimacy of Parliament … it boils down to an argument for deference'.[110] Yet, as will be shown, this is very much context specific, whilst courts may show deference to Parliament, rather than being deferential, some cases potentially represent challenges to parliamentary sovereignty.[111] Furthermore, whether and how parliamentary sovereignty features in the political approach to prisoners' voting rights will be assessed in chapter six.

2.3.2 Rule of law

The rule of law is another key constitutional principle, however, understandings of the rule of law are wide-ranging.[112] In terms of academic conceptions of the rule of law, Jowell argues it includes the ideal 'values of legality, certainty, equality and access to justice'.[113] Whereas Allan specifically emphasises 'due process and equality' as fundamental in 'enabling the law to serve as a genuine bulwark against arbitrary power'.[114] The rule of law has a vital role in restricting 'governmental power'.[115] Moreover, Poole explains 'the common law … gives practical shape and substance to the rule of law ideal'.[116] Regarding judicial application of the rule of law, notably it has at times been positioned against parliamentary sovereignty. In *R (Jackson)*[117] the

[108] N. Walker, 'Our constitutional unsettlement' [2014] PL 529, 536.
[109] ibid 542.
[110] Kavanagh, *Constitutional review* (n.34) 332.
[111] e.g. *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 (*Jackson*).
[112] e.g. T.R.S. Allan, 'The rule of law as the rule of reason: consent and constitutionalism' [1999] LQR 221; T. Bingham, *The Rule of Law* (Penguin 2010); Dicey (n.96) 189-191; P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467; J. Laws, 'The constitution: morals and rights' [1996] PL 622; A. Young, 'The Rule of Law in the United Kingdom: Formal or Substantive?' (2012) 6 Vienna Journal on International Constitutional Law 259.
[113] J. Jowell, 'The Rule of Law' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 14.
[114] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 122 .
[115] Jowell, 'The Rule of Law' (n.113) 17.
[116] Poole (n.12) 442.
[117] *Jackson* (n.111).

validity of the Hunting Act 2004 was challenged and some judges questioned parliamentary sovereignty 'as never before'.[118] Lord Hope contended that 'Parliamentary sovereignty is no longer, if it ever was, absolute'[119] and 'the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'.[120] Moreover in *Moohan*, Lord Hodge controversially suggested the common law could be used to curtail inappropriate use of legislative power (discussed in chapter four).[121] Such dicta might simply signify judicial rhetoric, as judicial willingness to refuse to apply legislation and limit parliamentary sovereignty appears remote.[122] Yet, judicial willingness to assert judicial authority as buttressed by the rule of law, is significant in exposing inter-institutional tensions, demonstrating that in some cases judges may seek to inflate the judicial role and the power of the court.[123]

In chapter six, the political application of the rule of law is also explored. The rule of law was framed differently depending on whether it was argued that *Hirst* should or should not be complied with, demonstrating its malleability. For instance, non-compliance was justified on the basis the ECtHR had flouted the rule of law, by acting beyond its mandate.[124] Whereas, others argued that failure to comply with the ECtHR's judgment would flout the rule of law.[125] Notably the rule of law requires that governments act 'according to law', this is underpinned by the principle of 'equality before the law' and for government to exercise its 'power fairly, reasonably and for the public good'.[126] This *also* encompasses compliance with international law.[127] Moreover, Bingham argues the rule of law also requires that 'the law must afford adequate protection to fundamental human rights'.[128] Commitment to the rule of law is confirmed at the European level, as being a Contracting Party to the ECHR requires States to

[118] J. Jowell, 'Parliamentary sovereignty under the new constitutional hypothesis' [2006] PL 562, 563.
[119] *Jackson* (n.111) [104] (Hope LJ).
[120] ibid [107]; see also [102] [104] (Steyn LJ); [159] (Baroness Hale)
[121] *Moohan* (n.14) [35] (Hodge JSC); Young, *Democratic Dialogue* (n.93) 304.
[122] Elliott, 'Beyond the Convention' (n.3) 115.
[123] e.g. *AXA General Insurance v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [50]-[51] (Hope SCJ).
[124] D. Nicol, 'Legitimacy of the Commons debate on prisoner voting' (2011) PL 681, 683.
[125] ibid 685.
[126] M. Elliott, 'Parliamentary sovereignty in a changing constitutional landscape' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 43 ('Parliamentary sovereignty').
[127] ibid.
[128] Bingham (n.112) 66; N.B. Bingham states 'this is not a principle which would be universally accepted as embraced within the rule of law'. This is one of the eight sub-rules/principles of the rule of law put forward by Lord Bingham, 37.

'accept the rule of law'.[129] Therefore, this casts doubt on the legitimacy of the Government's unwillingness to comply with *Hirst* (discussed in chapter six).

2.3.3 Separation of powers

A further key constitutional principle which *may* underpin both judicial and political decision-making, is the separation of powers. Masterman explains that a 'pure' or 'strict' understanding of the separation of powers requires that the legislature, executive and judiciary 'should be separate of each other, in respect of both their functions and their personnel'.[130] However such a strict theory does not apply to 'the Westminster model'.[131] As Knight notes, each of the 'three branches of government have a degree of law-making power'.[132] Yet Young observes that the Constitutional Reform Act 2005 has created more defined institutional roles, such as through the establishment of the Supreme Court.[133] Further, in terms of rights-based decision-making, the HRA has increased judicial power.[134]

Whilst it is possible to argue the HRA has 'created sharper distinctions' between institutions,[135] it clearly enables multi-institutional involvement - it 'envisages that all three branches of government should be actively involved in the protection of rights'.[136] For instance, this is demonstrated by s.19 HRA which provides for pre-legislative scrutiny of Bills; sections 3-4 HRA which enable courts to assess legislation for Convention compatibility; and finally, the political branches can then determine if and how to remedy the judicial interpretation or declaration.[137] This increased overlap has contributed to 'collaborative' understandings of inter-institutional relationships.[138] Arguably, collaboration appears antithetical to the separation of powers and perhaps dents its significance in the UK context – if institutions

[129] ibid 79-80; The Statute of the Council of Europe (London, 5.V.1949, European Treaty Series - No.1), Articles 3, 8.
[130] R. Masterman, *The Separation of Powers* (n.91) 11.
[131] ibid.
[132] C.J.S. Knight, 'Bi-polar sovereignty restated' (2009) 68(2) CLJ 361, 371.
[133] A. Young, 'The Relationship Between Parliament, the Executive and the Judiciary' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 327-328.
[134] ibid 328.
[135] S. Wheatle (n.95) 85-91.
[136] Masterman, *The Separation of Powers* (n.91) 45.
[137] e.g. in terms of remedial action after a s.4 declaration, a s.10 remedial order can be made, HRA (n.19) s.10; see also, Chandrachud (n.29) 625; J. Hiebert, 'The Human Rights Act: Ambiguity about Parliamentary Sovereignty' (2013) 14 GermanLJ 2253, 2254 (details the institutional stages at which rights-based scrutiny occurs).
[138] A. Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' in N.W. Barber, R. Ekins and P. Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 139 ('The Role of Courts').

collaborate, this undermines separation.[139] Yet as Kavanagh contends, this understanding *still* recognises a 'division of labour' (separation) between institutions, but it also recognises 'functions may be shared' between institutions, so rather than there being 'high walls' between institutions, there is 'interdependence, interaction, and interconnections between' institutions.[140]

Ultimately, Masterman and Wheatle advocate a 'variable' and 'fluid' understanding of the separation of powers, concluding it 'is neither a constitutional irrelevance, nor a free-standing and judicially-enforceable constitutional doctrine ... it conditions judicial self-perception, seeks to explain the bases of judicial power and places limitations on the exercise of those powers'.[141] The separation of powers may act as an anchoring principle demarcating institutional boundaries. It may be used by the judiciary 'to support a more activist' or 'interventionist' approach.[142] Judicial consideration of cases often involves a highly 'contextual' assessment of 'the relative institutional characteristics and the constitutional roles' of the legislature, executive and the judiciary.[143] This may then affect judicial willingness to hold the legislature or the executive to account and therefore, in some cases, the separation of powers may lead the judiciary to adopt a more restrained approach, it *may* be a reason for deference.[144] This restrained approach is apparent in the domestic judicial approach to prisoner voting. Further, implicit understandings of the separation of powers also featured in the political response to prisoner voting, as they deemed prisoner voting a political issue.

2.4 Political or legal determination of rights – or both?

The UK traditionally favours political, parliamentary determination of rights. This is reflected in accounts of political constitutionalism in which 'political controls' of the executive and constitution are emphasised.[145] In terms of rights, political constitutionalists emphasise 'parliamentary protections of human rights'.[146] Yet as discussed, the HRA reshaped

[139] A. Kavanagh, 'The Constitutional Separation of Powers' in D. Dyzenhaus and M. Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 235.
[140] ibid 237.
[141] R. Masterman and S. Wheatle, 'Unpacking the separation of powers: judicial independence, sovereignty and conceptual flexibility in the UK constitution' [2017] PL 469, 484-486.
[142] Wheatle (n.95) 85.
[143] Young, 'The Relationship Between' (n.133) 327.
[144] ibid 357.
[145] Young, *Democratic Dialogue* (n.93) 38, 42, 56; e.g. R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007); K. Ewing, 'The Resilience of the Political Constitution' (2013) 14 GermanLJ 2111; J.A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1; A. Tomkins, *Our Republican Constitution* (Hart 2005).
[146] Young, *Democratic Dialogue* (n.93) 38.

institutional roles, giving greater powers to the judiciary, suggesting a move towards more extensive 'legal controls'.[147] This arguably reflects a more legal constitutionalist vision of the constitution,[148] which 'advocates legal protections of human rights'.[149] As a result of the HRA, the line between law and politics is hazier as the judiciary have become involved in traditionally political matters.[150] As Masterman explains, issues which were previously non-justiciable, having been deemed in the political domain, are now justiciable, such as 'decisions with resource allocation implications', matters concerning 'national security' and also 'executive use of prerogative powers in areas of 'high' policy making'.[151] However, judges may attenuate the impact of adjudication by applying a deferential approach.[152] Judicial understanding of institutional roles may result in Parliament being deemed better suited to determine an issue if the matter raises problems of 'broad social policy' or is especially complex and sensitive or the 'subject of deep societal controversy'.[153] Judicial determination of rights does not necessarily usurp political determination of rights. Is it preferable for rights to be determined politically or legally, or is there a role for both?[154]

Those who favour political controls might challenge a move towards legal protection of rights. Rights are 'contestable' concepts, often requiring competing interests to be balanced, leading some to argue rights are better suited to political rather than legal determination.[155] Griffith objects to the wooliness of rights issues and argues that rights are political.[156] Consequently, the resolution of rights issues 'should not lie with the imprecisions of Bills of Rights or the illiberal instincts of judges'.[157] Rather, Griffith maintains that 'political decisions should be taken by politicians … who are removable'.[158] Politicians' removability, or 'accountability' is key.[159] Democracy is regarded as fundamental and therefore, judges being 'guardians' of rights

[147] ibid 42, 56.
[148] e.g. T.R.S. Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9(1) ICON 155; P. Craig, 'The Common Law' (n.11); J. Jowell, 'Parliamentary sovereignty' (n.118); J. Laws, 'Law and Democracy' [1995] PL 72; L. Steyn, 'Democracy, the rule of law and the role of the Judges' [2006] EHRLR 243.
[149] Young, *Democratic Dialogue* (n.93) 38.
[150] Masterman, *The Separation of Powers* (n.91) 89-90.
[151] ibid 90.
[152] ibid 113.
[153] Kavanagh, 'The Role of Courts' (n.138) 139; although, as noted, the HRA has also expanded justiciability of some issues, see Masterman, *The Separation of Powers* (n.91) 89-114.
[154] e.g. M. Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart 2000).
[155] Masterman, *The Separation of Powers* (n.91) 35-36.
[156] Griffith (n.145) 15.
[157] ibid 14-16.
[158] ibid 16.
[159] G. Gee and G. Webber, 'What is a Political Constitution?' (2010) 30(2) OJLS 273, 278.

is objectionable, due to courts' being non-democratic actors.[160] Legislative determination of rights is preferable to allow for multiple voices and input points - participation is fundamental.[161] Therefore, both the 'deliberative qualities of legislators' and 'the accountability of legislators to citizens' are superior to courts.[162] The legislature is representative of and responsive to citizens' interests. The judicial role in rights adjudication should be restricted, as courts are ineffective forums for tackling rights, especially 'qualified' rights.[163]

Conversely, in advocating for judicial determination of rights, the quality of judicial reasoning might be emphasised, as Young explains, some argue rights are 'objective principles' which are ascertained through 'moral reasoning', which is 'closely related' to the 'legal reasoning' carried out by judges.[164] Moreover, courts are litigant focused, which provides a tangible representation of how legislation affects individuals.[165] Further, courts' independence enables them to provide a valuable checking function.[166] As Kavanagh argues, judicial impartiality and independence from politics may help assuage 'the risks of democratic politics'.[167]

Yet ultimately the HRA provides for multi-institutional involvement, which shows that rights are a matter 'of *both* law and politics'.[168] Notably, the difference between political and legal constitutionalism should not be exaggerated: it is a matter of institutional *emphasis*, rather than institutional *exclusion*.[169] Political constitutionalists recognise courts have a role, but emphasise the enhancement of 'democratic controls'.[170] Equally, legal constitutionalists still accept the role of democratic institutions but the 'starting point' is legalistic.[171] However, the HRA precipitated theories which frame the UK as 'an alternative model'.[172] Some have argued for *both* political and legal protection of rights, without expressing preference for, or placing

[160] A. Kavanagh, 'Constitutional Review, the Courts and Democratic Scepticism' (2009) 62(1) CLP 102, 105.
[161] J. Waldron, *Law and Disagreement* (Oxford: Clarendon 1999) 282.
[162] R. Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 ICON 86, 92.
[163] A. Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 UTLJ 1, 3-5.
[164] Young, *Democratic Dialogue* (n.93) 6.
[165] Kavanagh, *Constitutional Review* (n.34) 352-353.
[166] Masterman, *The Separation of Powers* (n.91) 39.
[167] Kavanagh, *Constitutional Review* (n.34) 344; Cf D. Kyritsis, 'Constitutional Review in Representative Democracy' (2012) 32(2) OJLS 297, 322.
[168] Masterman, *The Separation of Powers* (n.91) 45.
[169] Young, *Democratic Dialogue* (n.93) 69, 84.
[170] ibid 84.
[171] ibid 84, 99.
[172] J. Hiebert 'Parliamentary Bills of Rights: an Alternative Model?' (2006) 69(1) MLR 7, 9; S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 AmJCompL 707; note Tomkins, formerly a proponent of political constitutionalism, now embraces a 'mixed constitution', A. Tomkins, 'What's Left of the Political Constitution? (2013) 14 GermanLJ 2275, 2276, 2292.

emphasis on political *or* legal controls. For example, Gardbaum argues the 'new Commonwealth model of constitutionalism' represents a viable 'middle ground' which is distinctive as it incorporates both 'mandatory pre-enactment political rights review' coupled with 'weak-form judicial review'.[173] The HRA is an example of this middle ground.[174] However, as Young argues, 'middle ground' conceptions are potentially problematic, as they can *still* 'collapse' into arguments for political *or* legal controls – a true middle ground is difficult to sustain.[175] As Kavanagh argues, perpetuating the dichotomy between political or legal controls risks presenting institutions as 'rivals' but *also* 'as institutional equivalents.'[176] Legislatures should not be judged by the same:

> 'standards we would expect of courts (such as independence, impartiality or proficiency in legal reasoning) it is equally futile to assess courts against the standards we expect of legislatures (such as democratic responsiveness to constituent concerns or broad-ranging deliberative capacity)'.[177]

Rather, Kavanagh argues we should be 'sensitive' to the composition and 'function' of each institution.[178] Different institutions may fail to match other institutions' standards due to their different institutional design, but this does not negate their value. This demonstrates the flexibility and context specific nature of rights adjudication – it is not necessarily an 'either or choice' between political or legal determination of rights.[179] However, despite attempts to reconcile the tension between political and legal determination of rights, it can surface as a source of contention. In the prisoner voting clash, the tension between political and legal determination of rights was heightened. The political branches' deemed prisoners' voting rights should be determined politically and judicial competence to determine prisoner voting was questioned and criticised.

2.5 Deference and dialogue

[173] S. Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013) 25 ('*The New Commonwealth Model*').
[174] S. Gardbaum, 'The Case for the New Commonwealth Model of Constitutionalism' (2013) 14 GermanLJ 2229, 2230 ('The Case for the New Commonwealth Model').
[175] Young, *Democratic Dialogue* (n.93) 22, 44-51, 66; N.B. Young does not attempt 'to forge a middle ground … it is better to recognize the ways in which accounts of democratic dialogue can add to, and draw from, accounts of political and legal constitutionalism' – Young *Democratic Dialogue*, 32.
[176] A. Kavanagh, 'Recasting the Political Constitution - From Rivals to Relationships' (2019) 30(1) KLJ 43, 58 ('Recasting the Political Constitution').
[177] ibid.
[178] ibid.
[179] Gardbaum, *The New Commonwealth Model* (n.173) 76.

The following sections explore whether and how deference and dialogue may underpin judicial decision-making. As Kavanagh explains, adjudication under the HRA requires courts to reconcile the 'twin demands' of respecting Parliament ('representative democracy') and also upholding 'Convention rights'.[180] Deference may be deployed by the courts to reconcile these demands, enabling courts to show their 'respect' to institutions, demonstrating 'inter-institutional comity'.[181] Moreover, whether and how courts deploy deference may impact the strength of constitutional review of legislation under the HRA. Further, understanding inter-institutional interactions as dialogue could mitigate concerns regarding constitutional review, as it embraces *both* judicial and legislative involvement. Democratic dialogue may be applied by some to explain 'legislative-judicial engagement on contested constitutional questions'.[182] For instance, in a seminal account of democratic dialogue, Hogg and Bushell explore dialogue in relation to the Canadian Charter of Rights and Freedoms.[183] They explain that dialogue minimises concerns regarding the lack of democratic legitimacy of courts in judicial review of human rights legislation, as the legislature *can* respond to courts' judgments.[184] Dialogue attempts to reconcile the 'extremities and excesses of judicial and legislative supremacy'.[185] Whether deference and dialogue can ameliorate such tensions is a key issue that underpins this thesis, as normative understandings of how these principles should function may in some cases fail to reflect reality. The extent to which prisoner voting jurisprudence gives rise to deference and dialogue will be assessed in chapters four to six and therefore, to explore judicial application of these principles in subsequent chapters, it is first necessary to consider conceptions of deference and dialogue.

2.5.1 Deference

Deference is 'a form of judicial minimalism, where courts … refrain from a full exercise of their powers in order to provide the legislature with a wider choice of discretionary action'.[186]

[180] Kavanagh, *Constitutional Review* (n.34) 167-168.
[181] ibid 169.
[182] E. Carolan, 'Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations' (2016) 36(2) LS 209, 209.
[183] Hogg and Bushell assess s.33 of the Canadian Charter of Rights and Freedoms (the Charter) which functions as a form of 'legislative override', as it enables the legislature to declare that an Act will operate notwithstanding s.2 or ss.7-15 of the Charter. In Canada, courts can decline to apply legislation that infringes Charter rights, but the notwithstanding clause enables the legislature to respond by taking positive action to override the court's decision. See P. Hogg and A. Bushell, 'The *Charter* Dialogue Between the Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)' (1997) 35 Osgoode Hall LJ 75, 82-83 ('The *Charter* Dialogue').
[184] ibid 80.
[185] P.J. Yap, 'Defending dialogue' [2012] PL 527, 528.
[186] Young, *Democratic Dialogue* (n.93) 230.

It is a judicial construct, which varies in terms of strength and predictability of application.[187] In *R v Lambert*, Lord Woolf held courts are constitutionally required to sometimes 'pay deference to the view of Parliament'.[188] Yet, notably, deference has not been universally embraced and has received judicial criticism.[189] Judges may defer by for instance, affording weight to the legislature and/or the executive and may adopt 'self-restraint', being mindful of 'the appropriate roles' of institutions.[190] The primary focus for this thesis will be deference to the legislature or legislation in relation to s.3 and s.4 HRA. Deference may be applied at the 'rights stage', which requires courts to consider whether legislation is incompatible with Convention rights and courts may opt to defer to respect 'Parliament's judgment as to the scope of a right'.[191] Courts may alter the 'intensity' of the application of the proportionality test.[192] As will be shown, the domestic courts did not carry out a proportionality assessment in relation to prisoner voting and therefore, deference at the 'interpretation' or remedial stage will be the focus, where deference may be applied to decline 'to interpret a statute in a Convention-compatible manner'.[193]

Regarding academic approaches to deference, some advocate a 'non-doctrinal approach to deference', which simply 'incorporates deference into the normal process of adjudication' on a 'case-by-case basis'.[194] In contrast, a doctrine of 'due deference', 'adds on a theory of deference in addition to the normal process of adjudication.'[195] Kavanagh observes deference depends on 'how much weight' judges ascribe to the elected branches, that deference 'tends to be partial, rather than absolute' and that deference is context specific.[196] Kavanagh proposes that 'judges always owe a duty of '*minimal deference'* to parliamentary and executive decisions, but '*substantial deference'* is only owed exceptionally.[197] '*Minimal deference*',

[187] F. Klug, 'Judicial deference under the Human Rights Act 1998' [2003] EHRLR 125, 129-130.
[188] *R v Lambert* [2002] QB 1112, [2001] 2 WLR 211 [16] (Lord Woolf CJ).
[189] e.g. *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 [75]-[76]; *Huang v SSHD* [2007] UKHL 11, [2007] 2 AC 167 [14]-[16].
[190] Kavanagh, *Constitutional Review* (n.34) 171, 177.
[191] A. Young, 'Deference trap' (n.46) 29.
[192] Kavanagh, *Constitutional Review* (n.34) 237; see Brady (n.74).
[193] Young, 'Deference trap' (n.46) 30-31.
[194] A. Young, 'Will you, Won't you, Will you join the Deference Dance?' (2014) 34(2) OJLS 375, 385 ('Deference Dance'); see e.g. T.R.S. Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' [2006] CLJ 671, 672; J. King, 'Institutional Approaches to Judicial Restraint' (2007) 28(3) OJLS 409, 410 ('Institutional Approaches').
[195] Young, 'Deference Dance' (n.194) 385; refers to King, 'Institutional Approaches' (n.194) 410; see e.g. due deference approach, M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference' in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003).
[196] A. Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222, 223-227 ('Defending Deference').
[197] Kavanagh, *Constitutional Review* (n.34) 181.

encompasses a weak presumption that the elected branches 'decisions are treated with respect', as they are the 'primary decision maker(s)'.[198] Conversely, '*substantial deference'* must 'be earned', it only applies when courts recognise they 'suffer from institutional shortcomings'.[199] There are 'three main grounds for substantial deference' where the elected branches have: 'more institutional competence; more expertise; and/or more legitimacy to assess the particular issue'.[200] The weight ascribed to such factors is 'is a matter of degree'[201] (considered in chapter four).

Notably, Bateup observes that in some cases there is evidence of 'judicial minimalism', where judges refrain from adjudicating on an issue to enable 'increased space for democratic consideration and choice'.[202] This allows the judiciary 'to reduce their involvement in controversial or sensitive constitutional issues … to protect themselves from potential political backlash'.[203] Kavanagh recognises the contextual nature of judicial decision-making, that factors leading to substantial deference *may* arise and *may* contribute to a more deferential approach – but crucially, deference should not be applied 'in a routine or blanket fashion'.[204] Depending on the context of the case, restraint can be justifiable as:

> 'rights are not the only value that judges must take into account. ... Rights have to be balanced against institutional reasons pertaining to the limits of the judicial role, the propriety of judicial intervention in certain contexts, and the degree to which an innovative judicial decision will be accepted either by politicians or the populace at large.'[205]

As Kavanagh argues, 'courts suffer from institutional and political limitations that can prevent them from protecting rights in every case'.[206] Yet whilst rights 'are not the only value' in judicial decision-making, what if courts apply *too* much deference and/or "misapply" deference? Judicial minimalism may problematically 'go too far in downplaying the judiciary's substantive contribution to broader constitutional discussion'.[207] It could potentially 'water-

[198] ibid.
[199] ibid 182.
[200] ibid.
[201] ibid 191.
[202] C. Bateup, 'The Dialogic Promise – Assessing the Normative Potential of Theories of Constitutional Dialogue'(2006) 71 BrookLRev 1109, 1131 ('The Dialogic Promise').
[203] ibid 1132.
[204] Kavanagh, *Constitutional Review* (n.34) 201.
[205] A. Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 UTLJ 23, 31-32 ('Judicial Restraint').
[206] ibid 40.
[207] Bateup, 'The Dialogic Promise' (n.202) 1135.

down protections for human rights'.[208] Therefore, "misapplication" of deference could problematically decrease judicial willingness to utilise their powers under the HRA, exacerbating confusion and inconsistent approaches. This could have a disempowering effect, whereby courts stifle not only their own powers, but also stifle the involvement of the political branches, feeding into a multi-institutional inertia to redress rights violations.

2.5.2 Dialogue

Hogg and Bushell influentially argue that democratic dialogue between courts and the legislature occurs 'where a judicial decision is open to legislative reversal, modification or avoidance'.[209] They explain that dialogue did not entail institutions 'literally "talking" to each other', but that judgments 'usually left room for a legislative response'.[210] Hogg and Bushell's account of democratic dialogue,[211] triggered an 'avalanche' of academic commentary, in which the viability and scope of dialogue has been scrutinised.[212] For instance, in a detailed account exploring democratic dialogue, Young explains the 'starting point' for dialogue is to assess 'how legislatures and the judiciary can best work together to provide for better outcomes and more legitimate means of resolving rights-issues'.[213] Young argues dialogue can be framed as consisting of 'different forms of inter-institutional interaction', which include 'constitutional collaboration' and 'constitutional counter-balancing'.[214] 'Constitutional collaboration' occurs where institutions interact to 'achieve a better protection of rights.'[215] This may encompass institutions adjusting 'their understanding of human rights in the light of the reasoning of the other institution'.[216] 'Constitutional counter-balancing' mechanisms ensure 'that inter-institutional interactions are capable of facilitating dialogue'.[217] For instance, constitutional counter-balancing supports 'equality' of participation between institutions, as the legislature can respond to courts when they contravene their 'constitutional role' (and vice versa).[218] It

[208] Hickman (n.2) 168, 171; N.B. Young warns that where courts 'defer twice over' this may lead to the under-protection of rights - Young, 'Deference trap' (n.46) 31.
[209] Hogg and Bushell, 'The *Charter* Dialogue' (n.183) 79.
[210] P. Hogg, A. Bushell and W. Wright, '*Charter* Dialogue Revisited - or "Much Ado About Metaphors"' (2007) 45(1) Osgoode Hall LJ 1, 4-5 ('Dialogue Revisited').
[211] For detail of the four features that facilitate dialogue under the Charter see Hogg and Bushell, 'The *Charter* Dialogue' (n.183) 79.
[212] Hogg, Bushell and Wright, 'Dialogue Revisited' (n.210) 26; e.g. Bateup, 'The Dialogic Promise' (n.202) 1109; Sales and Ekins (n.33) 218; A. Young, 'Is dialogue working under the Human Rights Act' [2011] PL 773, 774 ('Is dialogue working').
[213] Young, *Democratic Dialogue* (n.93) 99.
[214] ibid 113.
[215] ibid.
[216] ibid 121.
[217] ibid 114
[218] ibid 113-114.

ensures 'checks and balances' are maintained between institutions - 'that interactions … are not such that one institution's analysis always dominates that of another'.[219] These are potentially helpful 'mechanisms' through which inter-institutional interactions can be analysed.[220] However, whilst dialogue might be desirable, the utility and cogency of democratic dialogue has been questioned (explored below).[221]

2.5.3 Sections 3 and 4 HRA 1998: tools for deference and/or dialogue?

Having outlined deference and democratic dialogue, this section considers whether and how deference and dialogue feature in judicial decision-making under s.3 and s.4 HRA – whether these sections are tools for deference and/or dialogue. This section unpicks the relationship between deference and dialogue by questioning whether deference facilitates dialogue and whether they are interconnected or independent principles. Further, it briefly considers whether the judicial approach to rights review is influenced by the potential for dialogue to occur. Understanding how these principles may feature in judicial decision-making is necessary, as this informs understanding of the judicial role in rights protection and how the exercise of judicial power may be influenced by constitutional and institutional considerations. Therefore, significantly, this section provides further insight into inter-institutional roles, relationships and dynamics under the HRA. This also underpins analysis in subsequent chapters regarding whether and how the principles of deference and dialogue were applied in prisoner voting. Notably, whilst issues relating to s.3 do arise in prisoner voting cases,[222] these cases predominately raise issues regarding the judicial discretion whether to make a declaration under s.4.[223] Therefore, the primary focus will be s.4 HRA.

Young's normative theory of democratic dialogue will form the main basis for discussion.[224] In considering the relationship between deference and dialogue, Young argues that deference can lead to democratic dialogue and explains that deference 'is most suited to facilitating dialogue through encouraging constitutional collaboration between the legislature and the

[219] ibid 117.
[220] N.B. Young does not seek 'to argue that institutions should, or that they have a duty to collaborate in this manner. Rather, … aims to describe and evaluate different mechanisms of constitutional collaboration, assessing the extent to which these mechanisms can facilitate a better protection of rights', ibid 113.
[221] e.g. L. Tremblay, 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures' (2005) 3(4) ICON 617, 619.
[222] e.g. *Smith v Scott* [2007] CSIH 9, 2007 SC 345 [26]-[27] (*Smith*).
[223] ibid [38]; *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 [39] (Mance JSC).
[224] Young, *Democratic Dialogue* (n.93) 226.

judiciary to ascertain the content of human rights, rather than as regards the appropriate way of resolving a breach of human rights'.[225]

To enhance dialogue, s.3, s.4 'and deference need to be combined', with deference being relevant to the variable 'ways in which the legislature and the courts reason about the content of rights' and with s.3 and s.4 being relevant in terms of how human rights breaches are remedied by the legislature and courts.[226] Young argues that s.3 should be applied to determine 'a non-contestable or non-watershed rights issue' and s.4 should be applied to determine 'a contestable or watershed rights issue' (although there are exceptions).[227] Dialogue will be enabled when the weight afforded to the legislature reflects institutions' respective roles, where the court is 'transparent' in articulating its justifications for choosing between these sections.[228] Legislatures should then engage transparently with the court's judgment.[229] However, Young maintains courts should be careful to distinguish between 'substantive and remedial deference', to avoid deferring twice.[230] For example, if the right is contestable and the court decides to make a declaration 'despite there being no good grounds for rejecting the ability of the court to interpret legislation' this can lead the court to deferring 'twice over'.[231] This could weaken judicial rights protection, instead allowing for 'a pure parliamentary model' of rights protection, restricting dialogue.[232]

Young explains that s.3 and s.4 are primarily applied in relation to 'remedial deference',[233] where courts' defer to 'Parliament's function as a legislator'.[234] In terms of s.3 Kavanagh explains it has the potential to result in institutional interactions, Parliament can 'do nothing' (restricting interaction) or Parliament can alter the court's 'interpretation' (facilitating interaction).[235] Young argues Parliament should only opt to alter a court's s.3 interpretation where 'the court has transgressed its proper constitutional role'.[236] Therefore, s.3 is a powerful

[225] ibid.
[226] ibid 230.
[227] ibid 223. For exceptions, see 224-226.
[228] ibid 237.
[229] ibid.
[230] ibid 231.
[231] ibid; see also, A. Young, 'In Defence of Due Deference' (2009) 72(4) MLR 554, 577-578 ('In Defence').
[232] Young, 'Is dialogue working' (n.212) 774; Young, 'The deference trap' (n.46) 33 – suggests a 'two-stage test' should be adopted at the 'interpretative stage' to avoid the 'deference trap'.
[233] Young, *Democratic Dialogue* (n.93) 237.
[234] Young, 'The deference trap' (n.46) 29; Young, *Democratic Dialogue* (n.93) 230.
[235] A. Kavanagh, 'Choosing between sections 3 and 4 of the Human Rights Act 1998: judicial reasoning after *Ghaidan v Mendoza*' in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning Under the UK Human Rights Act* (CUP 2007) 136; see also G. Phillipson, 'Deference, Discretion, and Democracy in the Human Rights Act Era' (2007) 60(1) CLP 40, 67.
[236] Young, *Democratic Dialogue* (n.93) 237.

tool, as it has an 'immediate effect on the legislation'.[237] Further, as Crawford notes, the majority of courts' s.3 interpretations have remained unchallenged by the legislature, as s.3 cases are 'relatively invisible' and Parliament is generally unaware of s.3 judgments.[238] This demonstrates s.3 *could* be less deferential and less likely to result in inter-institutional interactions.

Where factors preclude the use of s.3, Young argues courts should exercise remedial deference and use s.4 instead.[239] This suggests that s.4 could be perceived as more deferential. Yet *is* s.4 more deferential? As discussed, s.4 was drafted to ensure respect for parliamentary sovereignty, it is 'non-coercive'.[240] Yet as Kavanagh contends, it cannot be argued that s.4 'is *generally* more deferential' than s.3, as in some cases the government might prefer s.3, due to the potential political costs following a declaration.[241] Fundamentally, context is key.[242] As discussed, the high rate of political compliance with declarations might indicate that s.4 is closer to strong-form review and this might alter judicial understanding of s.4, making it seem less deferential, leading the judiciary to refrain from making a declaration.

By contrast, arguably s.4 could be viewed as an effective tool for dialogue.[243] After the court grants a declaration the political branches have discretion whether and how to respond.[244] Yet it is questionable whether dialogue motivates courts to make a declaration. As Kavanagh observes dialogue might be a factor in the judicial equation, but it is not necessarily 'a *dominant* determinant of the judicial role'.[245] Whether dialogue motivated judicial decision-making in terms of prisoner voting will be considered in chapter four. Even if s.4 has the *potential* to lead to inter-institutional interactions, whether this potential is realised will depend on a multitude of factors, such as the transparency of the court's judgment and whether and how the legislature utilises the judgment to remedy a violation.[246] As King observes, 'the type of response' that

[237] S. Fredman, 'From deference to democracy: the role of equality under the Human Rights Act 1998' [2006] LQR 53, 79.
[238] C. Crawford, 'Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998' (2014) 25 KLJ 34, 36, 46.
[239] Young, *Democratic Dialogue* (n.93) 237.
[240] Sathanapally (n.44) 91.
[241] A. Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G. Huscroft (ed), *Expounding the Constitution: Essays In Constitutional Theory* (CUP 2008) 214.
[242] ibid 214.
[243] Klug (n.187) 131-132; R. Clayton, 'Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] PL 33, 46; R. Edwards, 'Judicial Deference under the Human Rights Act' (2006) 65(6) MLR 859, 878; Cf T. Hickman, 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' [2005] PL 306, 326; Sales and Ekins (n.33) 230.
[244] Gardbaum 'The Case for the New Commonwealth Model' (n.174) 2230.
[245] A. Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 63(1) UTLJ 83, 118 ('The Lure and the Limits').
[246] Young, *Democratic Dialogue* (n.93) 226, 237.

the political branches opt for, affects 'the quality of deliberation'.[247] Further, as discussed the high rate of compliance with declarations indicates the 'decisional space' available to the political branches is quite restricted,[248] possibly reducing scope for inter-institutional interactions. Further, Klug argues in some cases s.4 has been under-used which challenges the 'dialogue model', as courts have refrained from issuing a declaration,[249] due to the 'erroneous, assumption that legislative amendment *must* follow a declaration'.[250] Young also observes that inappropriate application of deferential reasoning could impede 'constitutional collaboration', such as where courts decline to grant a declaration where warranted.[251]

Yet, whilst conceding the risk of double deference and the risks of an unwarranted deferential approach, Young generally frames deference under the HRA as potentially enabling dialogue.[252] However, depending on how deference is interpreted, it could impede inter-institutional interactions and therefore be independent from dialogue. For example, Kavanagh argues that one of the 'distortions of dialogue', is that for some it precludes the possibility of deference, as to generate dialogue, Judges should engage in a 'transparent exchange of ideas' with the legislature and deference may hinder this exchange.[253] This suggests a transparent, deferential approach to enable dialogue is untenable, as dialogue and deference *could* be viewed as antithetical concepts.[254] Therefore, arguably deference should be avoided as it undermines, rather than facilitates dialogue. Would the absence of potential for interactions be a factor in the judicial equation whether to make a declaration? Kavanagh contends that in practice the judiciary often opt to respect and defer to Parliament[255] - Judges would not be dissuaded from deferring, where deference would limit or preclude dialogue. Where the court opts for 'substantial deference',[256] the court might leave the issue for the elected branches, without indicating why the court has chosen to defer, narrowing the opportunity for dialogue.

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[247] J. King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 181.
[248] Chandrachud (n.29) 635-641.
[249] e.g. *R (Pearson) v Secretary of State for the Home Department, Hirst v Attorney General* [2001] EWHC Admin 239, [2001] HRLR 39.
[250] Klug (n.187) 131.
[251] Young, *Democratic Dialogue* (n.93) 232.
[252] ibid 226.
[253] Kavanagh, 'The Lure and the Limits' (n.245) 115.
[254] ibid 105; Young, 'Is dialogue working' (n.212) 796-797; L. Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 93 – argues most consider that 'dialogue' and 'deference' are 'alternative options' but notes 'deference can also be regarded as a facilitator for dialogue'.
[255] Kavanagh, 'The Lure and the Limits' (n.245) 115.
[256] Kavanagh, *Constitutional Review* (n.34) 182.

Ultimately, both s.3 and s.4 both have the *potential* to be tools for deference and/or dialogue. However, in practice, the relationship between deference and dialogue is highly context dependent, they can operate independently or in a more interconnected way. Deference is a nebulous concept that can pervade courts' judgments in multifaceted ways and can occur regarding assessments of incompatibility and how infringements of rights should be remedied. Yet dialogue is not necessarily facilitated at both stages. Whether and how deference and dialogue are applied or arise will depend on the context of the case.

2.5.4 Exposing issues with dialogue

Dialogue is generally framed as positive, as something desirable to be achieved. It is evidently preferable for inter-institutional relationships to be collaborative, as unproductive, entrenched conflict may destabilise relationships. Harlow advocates for a 'collaborative model of coordinate construction', where institutions 'pay due respect to each other's opinions'.[257] Yet, the preceding analysis has shown that whilst s.3 and s.4 might be tools for democratic dialogue, in practice courts might not be motivated by dialogue and it might not occur. For instance, when a declaration has been granted, it might be expected that Parliament will collaborate with the judiciary by engaging with the court's judgment. However, as King observes, in practice, Parliament tends to be 'uninterested' in courts' 'reasoning', with declarations drawing minimal parliamentary attention.[258] This reduces scope for dialogue. Therefore, Carolan argues dialogue theory is problematic, as it may interpret a court's judgment 'not as a standalone decision but … as part of a potential engagement between … institutions', this will be 'regardless of whether engagement is intended, necessary or desirable. In many instances of adjudication' a 'political response' might not be necessary.[259] Dialogue might facilitate the expectation 'that Parliament ought to respond to judicial reasoning on issues where there was some ambiguity or contestation over the original legislative intent' – but in fact, Parliament may have little or 'no interest in engaging' with the issue.[260]

What if institutional interactions do not arise or are unconstructive? As Jhaveri observes, dialogue is flawed as it may ignore 'interbranch imbalance, constitutional conflict, and/or fraught interbranch exchange'.[261] Whilst Young recognises the role of constitutional counter-

[257] C. Harlow, 'The Human Rights Act and 'Coordinate Construction': Towards a 'Parliament Square' Axis for Human Rights?' in N.W. Barber, R. Ekins and P. Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 172.
[258] J. King, 'Rights and the Rule of Law in Third Way Constitutionalism' (2015) 30 ConstCommentary 101, 121.
[259] Carolan (n.182) 215, 226; N.B. Carolan distinguishes 'collaborative constitutionalism' from dialogue.
[260] ibid.
[261] S. Jhaveri, 'Interrogating dialogic theories of judicial review' (2019) 17(3) ICON 811, 813.

balancing and the potential for inter-institutional conflict, this is framed to produce inter-institutional 'equality' to facilitate dialogue – as 'constitutional collaboration requires sufficient constitutional counter-balancing'.[262] However, conflict will not necessarily result in dialogue. In some cases where rights protection is placed under pressure, institutional relationships may be one-sided, disconnected, unproductive and even damaging, limiting space for and undermining collaboration – exacerbating inter-institutional tensions and potentially undermining rights.[263] Due to the possible distortions of dialogue, Kavanagh argues it is important to recognise that 'dialogue is not a theory. It is a metaphor in search of a theory. … We would do well to leave it behind us, discarding all its distorting baggage'.[264]

This thesis does not advocate that dialogue should be discarded. Instead, the purpose of this section has been to inform the assessment of inter-institutional interactions in subsequent chapters in relation to prisoner voting, bearing in mind the distorting *potential* of dialogue. Therefore, analysis in subsequent chapters seeks to unravel the reality of inter-institutional interactions (if any).

2.6 The purpose of rights protection

Having explored different conceptions of rights protection, it is necessary to define the expectations which underpin this thesis regarding the purpose of rights protection, as this fundamentally informs the assessment of the prisoner voting case study. The importance of human rights is contested, with some challenging and criticising rights, as encapsulated by Bentham's well-known criticism that rights are 'nonsense upon stilts'.[265] However, this thesis does not delve into a critical assessment of the merits or demerits of rights, nor does it explore the jurisprudential underpinnings of rights,[266] but rather, proceeds on the basis that human rights are of fundamental importance and institutions should be committed to protecting rights. This is a commitment which is arguably reflected in the existing norms and arrangements of the UK constitution.

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[262] Young, *Democratic Dialogue* (n.93) 114, 140.
[263] N.B. Carolan argues: 'Dialogue disguises conflict as principled conversation; collaboration accepts conflict and aims to make it fruitful' - Carolan (n.182) 225-226.
[264] Kavanagh, 'The Lure and the Limits' (n.245) 120.
[265] J. Bentham 'Anarchical Fallacies: An Examination of the Declarations of Rights Issued During the French Revolution' in J. Bowring (ed), *The Works of Jeremy Bentham* (William Tait 1843) Vol. II, 501; see A. MacIntyre, *After Virtue: a study in moral theory* (2nd edn, Duckworth 1981) 70; cf R. Dworkin, *Taking Rights Seriously* (Duckworth 1978).
[266] see Loughlin (n.154) 194-214; R. Cruft, M. Liao and M. Renzo (eds), *The Philosophical Foundations of Human Rights* (OUP 2015).

This thesis argues for the merits of rights protection and that the purpose of systems of rights protection is to ensure that rights are upheld to the highest standard possible, but that where rights violations do occur, they should be effectively redressed. As part of this purpose, domestically, the three branches of government (the legislature, the executive and the judiciary), should seek to support the advancement of rights, so that rights protection is enhanced and rights protection is adaptable to changes in social and legal mores. Further, at the European level, institutions that protect rights must strive to maintain the delicate balance between furthering rights, whilst also affording adequate respect to their subsidiary status. Therefore, in advancing rights protection, this does not mean that both domestic and European institutions should utilise their powers without considering relevant institutional and constitutional considerations – rather, these factors should be given due consideration.[267] However, care must be taken to ensure that such factors do not overshadow rights protection where unwarranted, as this could undermine the mechanism of rights protection. Further, the three branches of government should strive to work cooperatively or collaboratively in protecting rights, as this arguably best facilitates the system's smooth functioning.[268] Such collaboration might be evidenced by these institutions respecting different institutions' decisions about rights, aiming to work constructively to further the purpose of rights protection.[269] The European dimension adds another layer to this cooperative framework, as domestic institutions should also strive to cooperate with European rights institutions in ensuring the furtherance of rights protection.

Whilst *ideally* institutions should collaborate as harmoniously as possible in protecting rights this does not mean disagreement or even conflict is precluded; in practice 'disagreement and conflict' can and often do occur.[270] There are institutional tensions and challenges that underpin rights protection, with institutions having different roles in rights protection and institutions reasoning 'about rights in a different manner'.[271] Therefore, in "collaborating", institutional agreement is far from guaranteed. Disagreement and conflict may in some cases serve a valuable function, allowing institutions to air discontent and potentially accommodate their

[267] A. Kavanagh, *Constitutional Review* (n.34) 271.
[268] e.g. Carolan (n.182) 225-226; Harlow (n.257) 172; Young, *Democratic Dialogue* (n.93) 113.
[269] e.g. Young, *Democratic Dialogue* (n.93) 124.
[270] Kavanagh, 'Recasting the Political Constitution' (n.176) 67; see also Young - whilst there is evidence of 'commitment to rights within the UK' there is also 'disagreement about the ways in which rights are protected and disagreement about watershed issues of human rights' - Young, *Democratic Dialogue* (n.93) 113-114, 124, 177-178.
[271] Young, *Democratic Dialogue* (n.93) 114, 159.

differences in such a way that it ultimately supports rights protection.[272] However, disagreement and conflict could result in outcomes that undermine rights. This might occur where a case is especially controversial, as it concerns contested social or moral issues and therefore, judicial consideration of the issue may generate increased political hostility. Whilst disagreement and conflict do not necessarily indicate disrespect, in some cases, the disagreement may lead to disrespectful discourse. Difficulties can arise where such disagreement and conflict descend into intractable and counterproductive conflict, in which the rights issue gets lost in political power play.[273]

A possible argument is that due to the tensions underpinning systems of rights protection it is inevitable that these tensions may be exacerbated, resulting in political clashes. Cooperation might prove elusive in some cases as other political, constitutional, or institutional factors should be prioritised above the rights issue. Arguably, these clashes are *part* of the system of rights protection and it must be accepted that disagreement will not necessarily result in "good" outcomes for rights.

Whilst it is conceded that conflict may in some cases undermine rights, prisoner voting highlights this outcome is far from ideal. In prisoner voting, the underlying challenges in rights protection were highlighted and institutional and constitutional tensions were exacerbated to such an extent, that it led to institutional inertia, in which a cycle of condemnation fuelled destructive discourse and the mechanism of rights protection under the HRA arguably faltered. There was entrenched conflict. Therefore, the three branches of government and European institutions should endeavour to avoid this exacerbation of conflict. As Kavanagh argues, 'each branch of government' should aim to engage in 'constructive' relationships and each branch should seek to 'minimise' conflict, as it can place 'the constitutional framework under strain'.[274] Not only does sustained conflict potentially undermine the rights in question, but it can also expose challenges to the broader mechanism and purpose of rights protection and also lead to detrimental outcomes to the institutions.

2.7 Conclusion

This chapter assessed key principles relating to rights protection in the UK, focusing on issues which are particularly relevant to the analysis of prisoner voting case law in subsequent

[272] e.g. ibid 159-160; Carolan (n.182) 225.
[273] Kavanagh, 'Recasting the Political Constitution' (n.176) 67.
[274] ibid.

chapters. It was noted that the judiciary are empowered to protect rights via the common law and that their role has been enhanced under the HRA. The scope of the judicial discretion under s.4 HRA was also delineated. Key constitutional principles which implicitly and explicitly underpinned decision-making in both the domestic courts' adjudication of prisoner voting and also the political response to prisoner voting were outlined. Such constitutional principles may feed into broader constitutional considerations (explored in chapter four). The complexity and contestability of rights protection was briefly explicated, as such issues form the foundations for contestation in the prisoner voting clash.

Further, it was argued that principles of deference and dialogue might ameliorate concerns regarding the judicial role in rights adjudication. However, upon analysis, in some cases there might be a mismatch between normative understandings of how the judiciary should utilise these principles and judicial application of these principles in practice. Deference could be "misapplied", evidencing judicial reluctance to utilise their powers under the HRA - exacerbating confusion regarding rights protection under the HRA. Whilst s.3 and s.4 HRA have the potential to be tools for deference and/or dialogue, this is highly context dependent and subject to how the judiciary utilise these tools. This exposed potential problems with dialogue, as dialogue might not influence judicial decision-making and analysis of the 'political reality' of s.4, can demonstrate that no dialogue arises.[275] Finally, this chapter argued that systems of rights protection should strive to uphold rights and institutions should work collaboratively to achieve this purpose. However, it was acknowledged that in some cases conflict might occur which can heighten the challenges and flaws of rights protection. An analysis of prisoner voting in later chapters will explore the reality of inter-institutional relationships and interactions, assessing whether and, if so, how collaboration and/or conflict occurred.

[275] G. Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles' in R. Masterman and I. Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (OUP 2013) 49.

CHAPTER THREE: THE EUROPEAN CONTEXT OF HUMAN RIGHTS PROTECTION

3.1 Introduction

This chapter explores the tensions and complexities that arise from the protection of rights at the European level. The European Convention on Human Rights[1] (ECHR) and the European Court of Human Rights (ECtHR or the Court) are the main focus as Strasbourg has been at the centre of the prisoner voting clash. Yet, whilst the UK has withdrawn from the European Union (EU), following *Delvigne*,[2] an analysis of the Court of Justice of the European Union's (CJEU) role in terms of rights protection, specifically regarding the Charter of Fundamental Rights of the European Union (the Charter) is also necessary. It demonstrates how the already complex system of rights protection is further complicated as the CJEU represents another powerful institution in rights adjudication.

This chapter assesses the multifaceted nature of Strasbourg's legitimacy (section 3.2). The UK's relationship with Strasbourg is founded on an uneasy compromise which underpins and reinforces tensions between Strasbourg and the UK. Whilst original consent to the ECHR might be a source of legitimacy, States may argue that the ECtHR has undermined consent by adopting "excessively" evolutive reasoning (section 3.3). This can contribute to broader underlying legitimacy challenges, including disquiet regarding Strasbourg's lack of democratic legitimacy and the Court's role in rights review as States assert their sovereignty to resist Strasbourg (section 3.4). This chapter also explores the type of review adopted by the Court and the contestability of Strasbourg's role in rights review. It then considers key doctrines relevant to the procedural legitimacy of the Court's judgments, including proportionality, subsidiarity, the margin of appreciation (MoA) and also dialogue (section 3.5). Explanation of these doctrines enables their application to be assessed in relation to prisoner voting. Whilst such factors can enhance the legitimacy of the Court's judgments, depending on the case, they can also undermine it as the standard of rights protection can be weakened. In exploring the legitimising potential of dialogue between the ECtHR and domestic courts, s.2 Human Rights

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) 1950 (ECHR).
[2] Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde* EU:C:2015:648 (*Delvigne*).

Act 1998 (HRA) is assessed. Whilst s.2 concerns the domestic courts roles under the HRA, it is necessary to consider s.2 in this chapter, rather than chapter two, because it encompasses the relationship *between* domestic courts and Strasbourg – it links to the discussion of European rights protection. Moreover, it is shown how key principles such as subsidiarity and dialogue are also relevant to the decision-making of Strasbourg's political institutions.

The chapter then finally explores the legitimacy of the CJEU in relation to rights protection, specifically in relation to the Charter (section 3.6). The relationship between the UK and EU has generally been underpinned by Euroscepticism and this scepticism is evident in qualms regarding the CJEU's legitimacy relating to rights protection. This has arguably been reinforced by scepticism towards Strasbourg (and vice versa).[3] The complexity of the Charter's relationship with the ECHR is briefly expounded, as whilst the CJEU is not a human rights court equivalent to the ECtHR, the Charter's legally binding status has further solidified the CJEU's role in rights protection.

3.2 Questioning Strasbourg's legitimacy

The framework of legitimacy is applied in this chapter, as issues regarding the ECtHR's legitimacy informs understanding of the ECtHR in terms of its role and how it functions in rights protection. Questioning whether the ECtHR is legitimate prompts several interrelated questions, including: how can we measure the ECtHR's legitimacy?; what factors are relevant to the ECtHR's legitimacy?; why does the ECtHR's legitimacy matter?; what factors can challenge the ECtHR's legitimacy?; and are the challenges to the ECtHR's legitimacy in themselves legitimate? This chapter does not seek to answer these questions in turn, rather they broadly underpin and inform the discussion of legitimacy that follows. Moreover, the framework of legitimacy underpins the assessment of prisoner voting in later chapters, as the prisoner voting clash implicitly and explicitly raises questions regarding Strasbourg's legitimacy.

Notably, there have been mounting challenges to Strasbourg's legitimacy. Some States argue Strasbourg has excessively encroached 'in the domestic sphere'.[4] For instance, proposals to replace the HRA with a British Bill of Rights demonstrate a desire to dilute Strasbourg's

[3] K. Ziegler, E. Wicks and L. Hodson eds, *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 506 ('*A Strained Relationship*').
[4] F. de Londras and K. Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 3 ('*Great Debates*').

influence as it is advocated that domestic decision-making should be prioritised.[5] As Føllesdal explains, the ECtHR's legitimacy has been challenged for various reasons including: 'poor *performance*' due to a 'backlog' of cases, non-implementation of the ECtHR's judgments, a 'lack of *legality*' as States may object to evolutive interpretation and also claims that the ECtHR is 'normatively illegitimate' being 'undemocratic and generally unaccountable'.[6] Such factors have contributed to increased scepticism towards the ECtHR. This sceptical discourse also pervades human rights law more generally and human rights are arguably facing 'a legitimacy crisis'.[7] However, crucially, as Donald and Leach note, States may challenge legitimacy for 'self-serving purposes', such as to further domestic political agendas, which is a salutary reminder that 'resistance' to Strasbourg 'does *not* necessarily denote an underlying crisis of legitimacy'.[8] Criticisms of and challenges to Strasbourg's legitimacy must be situated in the political context in which they are made.

3.2.1 What is meant by "legitimacy"?

Legitimacy is challenging to define, it is a multifaceted term and subsumes different meanings.[9] Donald and Leach observe the term "legitimacy" is eschewed by some as the nebulous nature of legitimacy may render it devoid of value.[10] Nevertheless, whilst these flaws are noted, due to prisoner voting raising legitimacy issues, it remains necessary to unpick meanings of legitimacy. Legitimacy may encompass 'the *quality* of the authoritativeness of an institution, action or actor' and suggests that 'decisions of that institution ought to be respected, followed and honoured'.[11] Yet, where an institution is illegitimate the 'authority of its decisions and the correlating duty to follow them' may be challenged.[12] Donald and Leach note that legitimacy may be categorised as 'normative legitimacy', 'legal legitimacy' and 'social legitimacy'.[13]

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[5] A. Føllesdal, 'Much ado about nothing? International judicial review of human rights in well-functioning democracies' in A. Føllesdal, J. Schaffer and G. Ulfstein (eds), *The Legitimacy International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 279 ('Much ado'); H. Fenwick and R. Masterman, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?' (2017) 80(6) MLR 1111, 1112.
[6] Føllesdal, 'Much ado' (n.5) 276.
[7] C. O'Cinneide, 'Rights under pressure' [2017] EHRLR 43, 43.
[8] A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (OUP 2016) 116 ('*Parliaments and the ECtHR*').
[9] A. Føllesdal, B. Peters and G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National and Global Context* (CUP 2013) 14; Føllesdal discusses the 'taxonomy of legitimacy' in A. Føllesdal, 'The Legitimacy Deficits in the Human Rights Judiciary: Elements and Implications of a Normative Theory' (2013) 14 Theo Inq Law 14 339, 345-346 ('The Legitimacy Deficits').
[10] Donald and Leach (n.8) 116.
[11] B. Çali, A. Koch and N. Bruch, *The Legitimacy of the European Court of Human Rights: The View from the Ground* (Department of Political Science, UCL 2011) 4.
[12] ibid.
[13] Donald and Leach (n.8) 119-120.

Normative legitimacy is the '*normative "pull"* or compliance-eliciting force that the concept of "legitimacy" exerts with regard to the international judiciary'.[14] 'Legal legitimacy' concerns whether institutions have 'legal authority' and whether their judgments conform with 'principles of legality'.[15] 'Social legitimacy' is defined as the 'public belief' that the institution 'has *rightful authority* to secure general *compliance*'.[16]

It is necessary to narrow the analysis by focusing on the legitimacy of the ECtHR. For instance, De Londras and Dzehtsiarou define the ECtHR's legitimacy as:

> 'respect and support for the Court emanating from stakeholders' confidence that the Court will decide cases consistently, in a manner that respects the nature of both the Convention (as a human rights instrument) and its jurisdiction (as subsidiary and limited), and by reference to appropriate materials considered within a methodologically sound framework'.[17]

Legitimacy may include an assessment of the 'processes by which decisions are made', such as 'the independence enjoyed by … actors, procedural regularity in the workings of the Court, mechanisms and processes of textual change' – De Londras and Dzehtsiarou refer to this as *'input legitimacy*'.[18] The legitimacy of the Court's judgments may be measured in relation to the cogency, 'quality' and 'transparency' of the judgment.[19] Section 3.5 considers how the Court's application of proportionality, subsidiarity, the MoA and also arguably, dialogue are components of the legitimacy of the ECtHR's judgments. Linked to this is *'output legitimacy*', which concerns the 'quality of the outputs of the process itself' or whether the Court 'applies or reinforces a right in a way that is sensible and effective for the Convention system and rights enjoyment generally'.[20] Strasbourg's legitimacy may also be affected by State's receptiveness and compliance with the ECtHR's judgment - *'outcome legitimacy'*.[21] As Mottershaw and Murray explain, 'It is only through implementation that … judgments can contribute to the

[14] Føllesdal, 'The Legitimacy Deficits' (n.9) 345; cited by Donald and Leach (n.8) 119.
[15] ibid; cited by Donald and Leach (n.8) 220.
[16] ibid; cited by Donald and Leach (n.8) 220.
[17] F. de Londras and K. Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 HRLRev 523, 526 ('Managing Judicial Innovation').
[18] De Londras and Dzehtsiarou, *Great Debates* (n.4) 1.
[19] ibid 6-7.
[20] ibid 1-2; see also Føllesdal, Peters, Ulfstein (n.9) 14, note the 'distinction between output and input legitimacy' was referred to in – F.W. Scharpf, 'Problem-Solving Effectiveness and Democratic accountability in the EU' (2003) MPIfG Working Paper.
[21] ibid 3.

realisation of rights'.[22] There is also *'perceived legitimacy'* in terms of whether 'stakeholders' support the Court (discussed in chapter six).[23]

Challenges to the ECtHR's legitimacy can have a 'corrosive effect'[24] as they may ultimately undermine the Court's effectiveness, 'an international tribunal without legitimacy cannot be effective'.[25] Legitimacy is therefore linked to 'effectiveness', as Shany explains, 'an effective court is more legitimate than an ineffective court; and a legitimate court would be in a better position to become effective than an illegitimate court'.[26] The following sections further explore Strasbourg's legitimacy, specifically in terms of its relationship with the UK and possible challenges to Strasbourg's legitimacy.

3.3 Consent and legitimacy: the UK's reluctant relinquishment of power

De Londras and Dzehtsiarou examine the sources of Strasbourg's legitimacy, and argue States' 'original consent' to the ECHR may be an initial source of legitimacy.[27] Legitimacy is derived from States' consent to the ECHR, which accords Strasbourg 'a form of delegated democratic authority based on states' freely given consent'.[28] Yet, if Contracting Parties perceive that the Court has gone 'too far' and acted beyond original consent, States might challenge the Court's legitimacy.[29]

3.3.1 Shaky foundations of legitimacy: the UK's ratification of the ECHR

To consider why original consent, whilst important, may be limited as a source of legitimacy it is necessary to briefly explore the UK's ratification of the ECHR and the UK's stance in relation to the Convention. The UK's stance warrants consideration as this is the focus of the thesis. The UK ratified the ECHR in 1951 and the ECHR came into effect in 1953.[30] The ECHR was drafted in response to human rights abuses that occurred during the Second World War

[22] E. Mottershaw and R. Murray, 'National responses to human rights judgments: the need for government coordination and implementation' [2012] EHRLR 639, 639.
[23] De Londras and Dzehtsiarou, *Great Debates* (n.4) 2.
[24] N. Bratza, 'Living Instrument or Dead Letter – the Future of the ECHR' (2014) EHRLR 116, 128.
[25] K. Dzehtsiarou and D. Coffey, 'Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights' (2014) 37 Hastings Int' & CompLRev 271, 272.
[26] Y. Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 158.
[27] De Londras and Dzehtsiarou, *Great Debates* (n.4) 3.
[28] Donald and Leach (n.8) 127.
[29] K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 154 ('*European Consensus*').
[30] G. Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42 ICLQ 796, 824; E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 2 ('*The Evolution*').

and ‘as a collective pact against totalitarianism’.[31] The negotiating history of the ECHR highlights ‘the deeply controversial and contestable nature of rights’.[32] For instance, some States, including the UK, favoured a ‘minimalist view’, that the purpose of ECHR should be to prevent totalitarianism,[33] whilst other negotiators foresaw a greater role for the ECHR, advocating for a ‘European Bill of Rights’.[34] The existence of two competing negotiating ‘camps’, demonstrates ‘the political nature of the rights’ with States adopting different views regarding the legitimate scope of European rights protection.[35]

Arguably the UK’s more minimalist view of the ECHR was informed by reluctance to relinquish too much sovereignty.[36] The UK opposed the establishment of a Court and the inclusion of a right to individual petition.[37] There were conflicting views regarding ‘the ambit of the rights and freedoms guaranteed and the ultimate objective(s) of the ECHR’.[38] Therefore, compromises were made to secure ratification of the ECHR.[39] The right to individual petition and the jurisdiction of the Court (previously comprised of the European Commission on Human Rights and the ECtHR), were made subject to optional clauses, representing an important retention of sovereignty.[40] Nevertheless, the UK eventually accepted these clauses in 1966.[41] As Bates observes, States’ ‘acceptance’ of optional clauses and the ‘right to individual petition … were critical to unlocking the potential of the Convention as a European Bill of Rights’.[42] Despite resistance from the UK,[43] the right to individual petition was made mandatory through Protocol 11.[44] Protocol 11 also abolished the European Commission on

[31] Bates, *The Evolution* (n.30) 63.
[32] D. Nicol, ‘Original intent and the European Convention on Human Rights’ [2005] PL 152, 172 (‘Original intent’).
[33] ibid 158; for ‘the division in views’ amongst States see Bates, ‘*The Evolution*’ (n.30) 89-90.
[34] Bates, *The Evolution* (n.30) 104; see also S. Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (CUP 2009) 22 (‘*The European Convention*’).
[35] Nicol (n.32) 171-172.
[36] E. Wicks, ‘The United Kingdom Government’s Perceptions of the European Convention on Human Rights at the Time of Entry’ [2000] PL 438, 444-445.
[37] ibid 447-448.
[38] A. Mowbray, ‘Between the will of the Contracting Parties and the needs of today: extending the scope of Convention rights and freedoms beyond what could have been foreseen by the drafters of the ECHR’ in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 19.
[39] Bates, *The Evolution* (n.30) 79.
[40] E. Bates, ‘British sovereignty and the European Court of Human Rights’ [2012] LQR 382, 391.
[41] ibid
[42] Bates, *The Evolution* (n.30) 139.
[43] ibid 457-459.
[44] Protocol No.11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby [1994] ETS 155, Article 34 (Protocol No. 11).

Human Rights and established the ECtHR as the new permanent Court[45] to interpret and apply the Convention.[46]

Ratification of the ECHR came with 'costs', as evidenced by 'the scope of the obligations under the Convention and the likelihood of being found in violation'.[47] Whilst Strasbourg was careful not to increase these 'costs too suddenly', gradually these 'costs' increased as the ECHR acquired more 'bite'.[48] Notably, 'from the late 1970s' Strasbourg became more assured in its adjudication of rights and the volume of cases increased and more violations were found.[49]

3.3.2 Evolutive interpretation

As the volume of cases increased, the Court developed its evolutive or dynamic interpretation of the ECHR[50] and in *Tyrer v United Kingdom* the ECtHR held that the ECHR functions as a 'living instrument which … must be interpreted in the light of present-day conditions'.[51] This was necessary to ensure the ECHR remains flexible to modern developments.[52] Importantly, there are limits to the Court's application of evolutive reasoning. The Court 'cannot deploy evolutive interpretation arbitrarily; rather, it should reflect a real change in human rights protection – not a perceived or desired one'.[53] Whilst the ECtHR is permitted to 'interpret' the Convention, 'it cannot revise the text or bend it to reach any result it wishes'.[54]

In some cases, the Court's legitimacy in dynamically developing the ECHR has been questioned.[55] Whether the Court's approach is perceived as legitimate in a given State will vary depending on the State's perspective (i.e. whether the State ascribes to the minimalist or more

[45] ibid Article 19.
[46] ECHR (n.1) Article 32.
[47] N. Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71(2) MLR 183, 210.
[48] ibid.
[49] Bates, *The Evolution* (n.30) 150; see e.g. *Golder v United Kingdom* (A/18) (1979-80) 1 EHRR 524; *Ireland v United Kingdom* App no 5310/71 (1978) DR; *The Sunday Times v United Kingdom* (A/30) (1979-80) 2 EHRR 245.
[50] K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12(10) GermanLJ 1730, 1731.
[51] *Tyrer v United Kingdom* (1979-80) 2 EHRR 1, para 31.
[52] C. Rozakis, 'Is the Case-law of the European Court of Human Rights a Procrustean Bed? Or is it a Contribution to the Creation of a European Public Order? A Modest Reply to Lord Hoffmann's Criticisms' (2009) 2 UCL HumRtsRev 51, 61-62.
[53] Dzehtsiarou, *European Consensus* (n.29) 150; Rozakis (n.52) 61-62.
[54] S. Dothan, 'In defence of expansive interpretation in the European Court of Human Rights' [2014] CJICL 508, 515.
[55] N. Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2018) 25(3) EPL 445, 468 ('The Relationship Between'); see also R. Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) HRLRev 473, 479 ('The Future of the ECtHR').

expansive view of the ECHR).[56] From the UK Government's perspective, in terms of prisoner voting, arguments that Strasbourg has gone too far are rooted in an historically limited conception of Strasbourg's role.[57]

Therefore, whilst original consent is a source of Strasbourg's legitimacy where the Court adopts evolutive reasoning, States may argue the Court's evolutive interpretation is *illegitimate*, as the State has not consented to it.[58] When States originally consented to the ECHR this 'did not necessarily extend to the interpretive methods deployed by the court'.[59] States may highlight that as they voluntarily consented to the ECHR, Strasbourg's legitimacy is *conditional* on State's consent.[60] However, as Dzehtsiarou argues, when embarking on 'evolutive interpretation' 'European consensus' may provide 'updated consent', arguably operating as a legitimacy enhancing factor (discussed in chapter five).[61] Further, Strasbourg's legitimacy is multi-layered and is supplemented by other factors.[62] For example, there is also general 'political-normative legitimacy' which supports the ECtHR's legitimacy 'in the first place'.[63] Çali, Koch and Bruch argue there are 'three logics prevalent in political-normative legitimacy', including a logic of 'enhancement' of States' rights protection; 'prevention of state failures' and 'harmonisation of rights standards'.[64] These factors are additional sources of legitimacy. Moreover, the ECtHR's legitimacy may be assessed in relation to its processes, the quality of the Courts judgments and the willingness of States to comply with Strasbourg jurisprudence (section 3.5). Even when a State resists a judgment for going 'too far',[65] such resistance may dent, but is unlikely to irrevocably undermine the Court's legitimacy.

3.4 Democratic illegitimacy?

Objections to the Court's evolutive reasoning may be part of additional reservations regarding its legitimacy, such as concerns regarding the Court's lack of democratic legitimacy and the

[56] De Londras and Dzehtsiarou, *Great Debates* (n.4) 73.
[57] Nicol (n.32) 172.
[58] De Londras and Dzehtsiarou, 'Managing Judicial Innovation' (n.17) 529.
[59] K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] PL 534, 537 ('Does consensus matter').
[60] Dzehtsiarou, *European Consensus* (n.29) 151-152.
[61] ibid; Cf Letsas, argues *against* relying on factors such as consensus and instead advocates 'a moral reading of the Convention', which supports evolutive interpretation in G. Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' A. Føllesdal, B. Peters, G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 124-141.
[62] Çali, Koch, Bruch (n.11) 11.
[63] ibid 8.
[64] ibid.
[65] Dzehtsiarou, *European Consensus* (n.29) 154.

Court's perceived encroachment into national sovereignty. In chapter two, it was argued that in theory the UK conforms to a system of weak-form judicial review. However, in practice, the strength of review will largely be delineated by context.

Therefore, it is first necessary to ascertain whether the ECtHR adopts strong or weak-form review. Notably, the ECtHR cannot strike out Contracting States' legislation, which indicates that Strasbourg adopts a system of weak-form review.[66] Nevertheless a combination of Article 46 ECHR which requires States to abide by the Court's judgments to which they are a party and the supervision of the execution of judgments by the Committee of Ministers of the Council of Europe (CM) can strengthen the effect of Strasbourg's review.[67] By way of background the CM's role must be briefly explicated. The CM is responsible for supervising Contracting Parties' 'execution' of the ECtHR's judgments.[68] It is 'a political body'[69] formed from 'representatives' from each Contracting Party, these representatives are the Ministers for Foreign Affairs of each State.[70] Each Minister has a permanent representative or deputy.[71] The CM is 'assisted by a secretariat body, the Department for the Execution of Judgments of the ECtHR' ('the Department for Execution').[72] As part of this role, the Department for Execution engages in dialogue with domestic institutions, 'through early assessments of action plans / action reports and regular contact meetings' and can provide the respondent State with advice to enable execution.[73] This then facilitates a 'collective discussion' regarding implementation of the judgment(s) to occur at the CM's 'intergovernmental Human Rights (DH) meetings'.[74] In chapter six it will be discussed how other Council of Europe institutions are also increasingly involved in supporting the CM's monitoring role.

[66] G. Ulfstein, 'A Transnational Separation of Powers?' in M. Saul, A. Føllesdal and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (CUP 2017) 25.
[67] R. Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the Hirst Case' in A. Føllesdal, J.K. Schaffer and G. Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 266 ('The Democratic Legitimacy'); A. von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 ICON 1023, 1024.
[68] ECHR (n.1) Article 46(2).
[69] A. von Staden, *Strategies of Compliance with the European Court of Human Rights* (University of Pennsylvania Press 2018) 19 ('*Strategies of Compliance*').
[70] The Statute of the Council of Europe (London, 5.V.1949, European Treaty Series – No.1), Article 14.
[71] Donald and Leach (n.8) 37.
[72] ibid.
[73] E.L. Abdelgawad, 'Dialogue and the Implementation of the European Court of Human Rights' Judgments' (2016) 34(4) Netherlands Quarterly of Human Rights 340, 346.
[74] ibid 343, 346.

This shows that there are costs for failing to comply with Strasbourg's judgments amounting to 'a breach of international legal obligations'.[75] Therefore, Bellamy argues the ECtHR adopts a 'soft version of strong review'.[76] The context of the case, such as how the Court exercises its powers and the impact of the Court's judgment, may indicate stronger review. For instance, regarding the types of remedies to secure implementation of its judgment, the Court may require payment of 'just satisfaction' in accordance with Article 41 ECHR.[77] Further, where applicable, the Court may stipulate that 'individual measures' are necessary to end the violation and to ensure 'the injured party is put … in the same situation as that party enjoyed prior to the violation'.[78] The Court can require 'general measures', which concern 'wider changes to law or practice which … are needed to put an end to the Convention violation'.[79] In some cases the ECtHR has moved away from its traditionally declaratory approach to redress and embraced more prescriptive judgments, via Article 46 judgments and the application of the pilot judgment procedure.[80] Depending on the amount of discretion left to States, as determined by the level of prescriptiveness of the judgment and State compliance, the effect of the ECtHR's judgments might be closer to Bellamy's *soft* version of strong-form review.

For those who predominately seek to prioritise domestic protection of rights, this might be an uncomfortable development, further calling into question the Court's legitimacy, as the stronger Strasbourg's power of review, the more it can detract from domestic protection of rights.[81] More broadly, there has been recognition of the 'constitutionalisation' of the ECtHR.[82] For instance, Wildhaber argues the Court's application of 'constitutional justice' is evidenced by the fact the ECtHR decides similar cases to domestic Supreme Courts, affording it a 'quasi-

[75] Ulfstein (n.66) 25.
[76] Bellamy (n.67) 268.
[77] F. de Londras and Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights' (2017) 66 ICLQ 467, 472 ('Mission Impossible?').
[78] see Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies) Rule 6 <https://rm.coe.int/16806eebf0> accessed 14 April 2022.; see de Londras and Dzehtsiarou, 'Mission Impossible?' (n.77) 472-473.
[79] de Londras and K. Dzehtsiarou, 'Mission Impossible?' (n.77) 473; see ibid Rule 6.
[80] Donald and Leach (n.8) 31-33; see *Greens and MT v United Kingdom* (2011) 53 EHRR 21, para 107.
[81] ibid 33-34.
[82] see e.g. F. de Londras, 'Dual functionality and the persistent frailty of the European Court of Human Rights' [2013] EHRLR 38, 38-40; S. Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights' (2003) 23(3) OJLS 405; W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9(3) HRLRev 397, 401-402, 450.

Constitutional Court' status.[83] To counter this the UK has sought to re-emphasise *domestic* rights enforcement.[84]

However, whilst some cases might indicate a stronger form of review, Strasbourg's power of review should not be overstated. As Dzehtsiarou argues, the Court has no power to 'coercively implement its decisions', rather States are required to 'still accept the legitimacy of the Court's judgments even when the Court rules against them'.[85] Further, the majority of applications are deemed 'inadmissible', which reduces the Court's potential for adjudication in the first place.[86] Additionally, doctrines such as proportionality, subsidiarity and the MoA (section 3.5) structure and modify the Court's power of review.[87] There is a duality in the ECtHR's role, as the ECtHR safeguards rights, but in doing so, it must also ensure that it respects its subsidiary role.[88] The Court's application of these doctrines could potentially enhance the Court's legitimacy.[89] Crucially, as will be discussed, the Strasbourg Court remains 'subsidiary' to the Contracting Parties, who retain 'primary responsibility for maintaining and furthering human rights'.[90] The Court may provide a less prescriptive approach, which is arguably indicative of a weaker standard of review.[91] However, in some cases, the Court's application of the MoA can also undermine the Court's legitimacy, due to inconsistent or unclear application. Therefore, a contextual analysis of Strasbourg jurisprudence is required to determine the strength of the ECtHR's judgments.

3.4.1 Is the ECtHR's review problematic?

Qualms regarding the undemocratic nature of constitutional review are arguably heightened by the fact the ECtHR is a *foreign* court adjudicating on rights.[92] As Ulfstein posits, it is arguably understood as 'a more grave interference in national democracy, since the relevant legislature is not able to respond by amending the ECHR, as opposed to amending its national

[83] L. Wildhaber, 'Rethinking the European Court of Human Rights' in J. Christoffersen and M.R. Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2013) 227.
[84] S. Greer and L. Wildhaber, 'Revising the Debate about "Constitutionalising" the European Court of Human Rights' (2012) HRLRev 655, 660-661.
[85] Dzehtsiarou and Coffey, 'Legitimacy and Independence' (n.25) 279.
[86] Føllesdal, 'Much ado' (n.5) 290.
[87] A. Føllesdal, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights' (2009) 40 Journal of Social Philosophy 595, 595 ('The Legitimacy of International Human Rights Review').
[88] Vogiatzis, 'The Relationship Between' (n.55) 473.
[89] Donald and Leach (n.8) 125.
[90] Rozakis (n.52) 61.
[91] A. Føllesdal, 'Why the European Court of Human Rights Might be Democratically Legitimate – A Modest Defense' (2009) 27 Nordic Journal of Human Rights 260, 299 ('A Modest Defense').
[92] see Føllesdal, 'The Legitimacy of International Human Rights Review' (n.87) 596; von Staden, 'The Democratic Legitimacy' (n.67) 1024.

constitution'.[93] However, ECtHR Judges are elected by the Parliamentary Assembly of the Council of Europe, which enhances the Court's legitimacy.[94] Although crucially, Strasbourg's democratic credentials are *not* equivalent to directly elected 'national parliaments'.[95] Further, whilst judicial independence at the European level is a fundamental component of the ECtHR's legitimacy,[96] the Court's 'reputation' for independence is 'mixed'.[97] Structural issues regarding judicial elections to the ECtHR arguably contribute to 'an appearance of bias', as there is some, albeit 'minimal', evidence that judges are more inclined to 'side with their own government in grave cases'.[98] Moreover, concerns regarding European judges' lack of democratic legitimacy are compounded by the 'lack of accountability' which may enable judges to abuse 'their discretionary powers'.[99] Bellamy argues the Court's distance from domestic institutions has negative implications, as 'the drawbacks political constitutionalists note with relying on courts for the defence of rights may be amplified in the case of judicial review' by supranational courts.[100] These supranational courts are 'less aware of the impact on other rights and moral concerns of citizens than a domestic court',[101] there is a 'knowledge gap'.[102] The ECtHR's distance may mean it is too far removed from domestic political decision-making and the nuances of that decision-making may be overlooked.

Conversely, there are advantages to European rights review and Strasbourg's distance may be a strength, as the Court has a crucial role in safeguarding rights where domestic institutions have failed. Føllesdal defends the ECtHR's review and argues it acts as 'a safety mechanism, not replacement for democratic deliberation'.[103] This safety mechanism was evident in relation to prisoners' voting rights. Further, concerns regarding European judges' lack of accountability are partly attenuated, as they must comply with 'professional standards' and there are also several 'forms of non-electoral accountability'.[104] Donald and Leach observe the ECtHR's case

[93] Ulfstein (n.66) 24.
[94] J.P. Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 EuConst 173, 175; von Staden, 'The Democratic Legitimacy' (n.67) 1031.
[95] K. Dzehtsiarou, 'Prisoner Voting Saga: Reasons for Challenges' in H. Hardman and B. Dickson (eds), *Electoral Rights in Europe Advances and Challenges* (Taylor and Francis 2017) 105 ('Prisoner Voting Saga').
[96] Dzehtsiarou and Coffey, 'Legitimacy and Independence' (n.25) 272, 277; see also, E. Voeten, 'Politics, Judicial Behaviour, and Institutional Design' in J. Christoffersen and M.R. Madsen (eds), *The European Court of Human Rights Between Law and Politics* (OUP 2011) 61.
[97] Shany (n.27) 263-264; cf Costa (n.94) 175.
[98] ibid 263-264.
[99] Føllesdal, 'Much ado' (n.5) 287-288.
[100] Bellamy, 'The Democratic Legitimacy' (n.67) 257.
[101] ibid.
[102] L. Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016) 110 ('*Procedural Dialogue*').
[103] Føllesdal, 'A Modest Defense' (n.91) 300.
[104] Føllesdal, 'Much ado' (n.5) 288.

law on democracy has a positive impact in 'enhancing the capacities of states to better protect and uphold democratic standards'.[105] This may ultimately increase 'confidence in the democratic credentials of national decision-makers'.[106]

Yet change, however constructive, which has been instigated by a *Court* at the *European* level can result in friction, as demonstrated by prisoner voting. Despite Strasbourg's valuable role in upholding rights and promoting enhanced democratic standards within States, Contracting Parties may still resist the Court.[107] Such resistance may highlight challenges to the Court's normative legitimacy. The tension between the ECtHR's role to ensure effective rights protection and the need to respect States' sovereignty is highlighted. If a State considers Strasbourg lacks legitimacy (normative and/or social), this legitimacy deficit may be compounded by a perceived lack of legal legitimacy and lack of input or output legitimacy regarding the judgment itself, possibly leading States to resist implementation. This is problematic, as a key component of the ECtHR's authority is linked to implementation - non-implementation can undermine 'the effective and smooth functioning of the entire Convention system'.[108] Failure to implement further undermines the ECtHR's legitimacy (outcome legitimacy), possibly exacerbating doubts regarding the Court's normative legitimacy.

Moreover, the Court's normative legitimacy might be weaker in different States and therefore, more prone to rupture – the Court's authority and judgments are open to challenge on grounds of illegitimacy. As discussed, the UK's relationship with Strasbourg has historically been characterised by the UK's desire to retain sovereignty.[109] The HRA enables claims for breaches of Convention rights to be considered in domestic courts. Before the enactment of the HRA, 'the dualist nature of the constitution largely precluded direct reliance on the Convention rights' domestically and therefore, the ECtHR's influence was less pronounced.[110] In enacting the HRA, the UK sought to regain some sovereignty and authority by emphasising domestic enforcement, *yet* paradoxically, in doing so it also solidified the Court's jurisdiction.[111] There was no longer a 'legal disconnect between' the ECtHR's judgments and the impact of its

[105] Donald and Leach (n.8) 130.
[106] ibid 154.
[107] Glas, *Procedural Dialogue* (n.102) 111.
[108] ibid 112.
[109] Bates, *'The Evolution'* (n.30) 90, 101.
[110] R. Masterman, 'The United Kingdom: From Strasbourg Surrogacy towards a British Bill of Rights?' in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-dynamics at the National and EU Level* (Intersentia 2016) 450 ('Strasbourg Surrogacy').
[111] ibid.

judgments domestically.[112] As Krisch argues, British courts generally adopt a conscientious approach to applying Strasbourg jurisprudence in a manner 'hardly matched anywhere else in Europe'.[113] Therefore, Strasbourg's review may have been strengthened by domestic judicial conformity to Strasbourg's case law.[114] Moreover, Government and Parliament have also generally complied with Strasbourg's judgments.[115] The high rate of adherence to Strasbourg's jurisprudence, both judicially and politically, might indicate UK institutions have little or no concerns regarding Strasbourg's legitimacy. Yet, the generally conscientious approach to Strasbourg's case law has not increased the ECtHR's legitimacy, but rather, has resulted in further political challenges to the Court's legitimacy.[116]

Why is this? As Føllesdal asks, 'why are significant actors in these 'well-behaved' States worried about international human rights review, even though they have comparatively little to worry about?'.[117] Arguably this is because the incorporation of *European* standards of rights protection may be perceived as an encroachment on the UK's sovereignty, contributing to resentment.[118] As De Londras and Dzehtsiarou note, States comply with judgments as it 'is part and parcel of being contracting parties to the Convention and members of a European community of states' and as such, they have consented to the Court's 'jurisdiction'.[119] Although the high rate of compliance may indicate support for the ECtHR, States can assert their sovereignty to resist Strasbourg, demonstrating there may be 'dips' in support for the ECtHR particularly where States disagree with a judgment and may argue it infringes their sovereignty.[120] Being "well-behaved" does not necessarily indicate satisfaction with the Court's legitimacy, instead as prisoner voting will show, there is fragility in States' support for the ECtHR.

3.5 The procedural legitimacy of the ECtHR's judgments

[112] ibid.
[113] Krisch (n.47) 202.
[114] Ulfstein (n.66) 25.
[115] K. Brayson and G. Swain, 'The European Court of Human Rights and minorities in the United Kingdom: catalyst for change or hollow rhetoric?' in D. Anagnostou (ed), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh University Press 2013) 188.
[116] Masterman, 'Strasbourg Surrogacy' (n.110) 450.
[117] Føllesdal, 'Much ado'(n.5) 274.
[118] Masterman, 'Strasbourg Surrogacy' (n.110) 451, 456.
[119] De Londras and Dzehtsiarou, 'Managing Judicial Innovation' (n.17) 528.
[120] ibid 529.

This section focuses on the procedural aspects of the ECtHR's legitimacy. Dzehtsiarou argues the ECtHR's legitimacy is reinforced by States executing its judgments[121] and 'continued execution of … judgments relies upon … legitimacy, which itself is connected to decision-making'.[122] Therefore, the legitimacy of the ECtHR's judgments can be measured by the 'substantial persuasiveness and procedural clarity' of the judgments.[123] These factors are relevant to judgments' 'input' legitimacy.

The legitimacy of the ECtHR's judgments therefore includes 'procedural' factors, such as 'legal certainty', aided by the 'coherence' and 'transparency' of the judgment and 'substantial' factors, in which legitimacy is measured where a Court is 'well-informed … having consulted available binding and persuasive sources'.[124] Whilst the ECtHR is not bound by 'precedent', the Court generally supports its judgments with reference to prior judgments.[125] As Dothan contends, legitimacy may be increased by 'the use of norms and legal reasoning' and where courts' decisions are based on 'previous judgments'.[126]

In terms of the 'procedural' factors, the 'method' is important.[127] The 'quality' and legitimacy of the judgment may be enhanced by the Court providing 'reasons for its decisions'.[128] The Court may deploy certain doctrines including, proportionality, subsidiarity and the MoA, to enhance its reasoning, demonstrating it has balanced domestic interests, which may indicate that judicial 'self-restraint' is required.[129] Moreover, dialogue is another factor which might enhance the legitimacy of the Court's judgments. Yet the Court's application of these factors may be questioned, as for instance, the State may consider the Court has trespassed into domestic territory, by giving inadequate consideration to or inaptly applying these doctrines.[130] This may indicate a flaw in the procedural legitimacy of the ECtHR's judgment, potentially undermining its legal legitimacy, possibly leading to broader challenges to the ECtHR's normative legitimacy.

Therefore, this section provides brief examination of the key doctrines that may feature in the ECtHR's decision-making and which may affect the legitimacy of the ECtHR's case law, to

[121] Dzehtsiarou, 'Does Consensus Matter?' (n.59) 535.
[122] ibid 553.
[123] ibid.
[124] ibid 538.
[125] ibid 538-539.
[126] S. Dothan, 'How International Courts Enhance Their Legitimacy' (2013) 14 Theo Inq Law 455, 468, 471.
[127] De Londras and Dzehtsiarou, *Great Debates* (n.4) 6.
[128] ibid.
[129] ibid 7.
[130] Glas, *Procedural Dialogue* (n.102) 49.

enable the application of these doctrines to be explored in subsequent chapters in relation to prisoner voting.

3.5.1 Proportionality

Proportionality is a core doctrine which operates to 'establish the conditions for a legitimate interference with ECHR rights'.[131] It spans national and international jurisprudence[132] and was first 'introduced' in the context of the ECHR in the *Belgian Linguistics Case*.[133] Where applicable, the Court will assess whether the 'right has been impinged on' and if so, whether the 'limitation can be justified'.[134] In applying the proportionality test the Court may first consider whether there is an interference with a right, second, whether the 'interference was prescribed by law', third, whether the interference pursued a legitimate aim, fourth, whether any restriction of these rights is 'necessary in a democratic society'[135] and finally, the Court can assess whether a 'fair or reasonable balance' has been achieved between upholding the right and the public interest.[136] Notably, courts apply the proportionality test with variable 'degrees of deference' and its 'intensity … differs depending on the interference with rights, the policy area and the weight of the public interest'.[137] Whilst Articles 8-11 ECHR contain express limitation clauses which stipulate limits that may be placed on the rights 'in pursuit of legitimate aims',[138] in terms of Article 3 of Protocol 1 (A3P1), Dzehtsiarou argues it is a 'super-qualified' right, as it does not stipulate 'limitation clauses'.[139] This means States are accorded a 'wide margin of appreciation', so long as such limitations 'do not curtail the rights in question to such an extent as to impair their very essence'.[140] The application of proportionality in relation to prisoner voting will be considered in chapter five.

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[131] A. Zysset, 'Freedom of expression, the right to vote, and proportionality at the European Court of Human Rights: An internal critique' (2019) 17(1) ICON 230, 231.
[132] Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 190.
[133] A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 178; see *Belgian Linguistics Case v Belgium* App no 1474/62 (ECtHR, 23 July 1968).
[134] J. Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) CLJ 174, 174.
[135] G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 86.
[136] Arai-Takahashi, *The Margin of Appreciation* (n.132) 14; cf J. Christoffersen, *'Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights'* (Martinus Nijhoff Publishers 2009) 31.
[137] P. Popelier and C. Van De Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis' (2012) 31(1) YEL 230, 233, 240.
[138] Letsas, *A Theory of Interpretation* (n.135) 85.
[139] Dzehtsiarou, 'Prisoner Voting Saga' (n.95) 96.
[140] ibid; *Mathieu-Mohin and Clerfayt v Belgium* [1988] 10 EHRR 1, para 52.

Despite the significance of proportionality in judicial decision-making, proportionality has been subject to criticism.[141] Arai-Takahashi observes in some cases it has a 'rhetorical role', and a detailed assessment of the interference does not always follow, demonstrating a deferential approach.[142] De Londras and Dzehtsiarou explain that critics of proportionality may 'mount three major arguments relating to the test's utility, impact on human rights, and interference with substantive decision making on the national level'.[143] The 'utility critique' objects to the Court ostensibly presenting the proportionality test as objective when it is 'subjective'.[144] The 'impact on human rights' objection is that it reduces 'rights to the level of comparing various interests'.[145] Judicial application of the proportionality test might lead to 'substantive rather than procedural, judicial review', which can heighten qualms regarding the 'appropriate judicial role'.[146] Yet De Londras and Dzehtsiarou argue such concerns can be lessened by the 'structured nature' of the proportionality test, which can help 'transparency' and 'foreseeability'.[147] The proportionality test 'leaves ample space for subsidiarity and deference through' the application of the MoA in which the Court may demonstrate deference to national decision-making.[148] However, as Popelier and Van De Heyning observe, 'courts are not always coherent in conferring discretion on the legislature'.[149] This demonstrates that in practice, context is fundamental in the application of the majority of doctrines related to human rights.

3.5.2 Subsidiarity

Subsidiarity is a key doctrine which 'underpins' the entire Convention,[150] requiring that the ECHR and its judicial organs are subsidiary to national systems in terms of human rights.[151] Subsidiarity can be defined as:

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[141] S. Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7(3) ICON 468, 474; cf M. Khosla, 'Proportionality: An Assault on Human Rights: A Reply (2010) 8(2) ICON 298, 306; S. Tsakyrakis, *'Proportionality: An Assault on human rights?*: A rejoinder to Madhav Khosla' (2010) 8(2) ICON 307.
[142] Arai-Takahashi, *The Margin of Appreciation* (n.132)16.
[143] De Londras and Dzehtsiarou, *Great Debates* (n.4) 100.
[144] ibid.
[145] ibid 99-100.
[146] ibid 101.
[147] ibid 103-104; see also R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011) 67 ('*The Separation of Powers*').
[148] De Londras and Dzehtsiarou, *Great Debates* (n.4) 104.
[149] Popelier and Van De Heyning, 'Procedural Rationality' (n.137) 240.
[150] Costa (n.94) 179; see e.g. ECHR (n.1) Articles 1, 13, 19 and 35(1).
[151] P. Craig, 'Britain in the European Union' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011) 111; see *Belgian Linguistics* (n.133).

> 'the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court. The Court can and should intervene only where the domestic authorities fail in that task'.[152]

States therefore have the 'primary role' to ensure effective rights protection,[153] and the Court will intervene where States have failed to do so.[154] Subsidiarity encompasses deference to national institutions, as Donald and Leach argue, subsidiarity and the MoA illustrate 'arguments for judicial deference … apply with *greater* force to supranational than national courts'.[155] For instance, the Court's supranational status means deference may be required in recognition that domestic institutions have superior 'democratic legitimacy'[156] and are 'better equipped' and 'more closely acquainted with national problems, (constitutional) traditions, sensitivities and debates'.[157] As part of the Court's 'multi-dimensional legitimacy', the Court must protect rights whilst also respecting its subsidiary function.[158] This can be challenging to achieve, generating tensions,[159] as the Court could be criticised for too little deference to States (flouting subsidiarity) or too much deference (undermining rights).

Such challenges have contributed to Convention reform[160] and high-level conferences were convened to reform the ECtHR.[161] Notably, the adopted Declarations arising from the conferences repeatedly emphasise Strasbourg's subsidiary role.[162] For instance, the Brighton

[152] European Court of Human Rights, *'Interlaken Follow-Up: Principle of Subsidiarity'* (Note by the Jurisconsult 08/07/10) <https://www.echr.coe.int/Documents/2010_Interlaken_Follow-up_ENG.pdf> accessed 14 April 2022.
[153] Costa (n.94) 179.
[154] H. Keller and C. Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2016) 26(4) EJIL 829, 843.
[155] Donald and Leach (n.8) 135.
[156] P. Cumper and T. Lewis, 'Blanket bans, subsidiarity, and the procedural turn of the European Court of Human Rights' (2019) 68(3) ICLQ 611, 621.
[157] J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17(1) ELJ 80, 85 ('Pluralism, Deference').
[158] Vogiatzis, 'The Relationship Between' (n.55) 475; see also, P. Popelier and C. Van de Heyning, 'Subsidiarity post-Brighton: procedural rationality as answer' [2017] LJIL 5.
[159] e.g. A. Føllesdal, 'Subsidiarity and International Human Rights Courts: Respecting Self-Governance and Protecting Human Rights – or Neither' (2016) 79 LCP 147.
[160] e.g. Protocol No.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention [2004] CETS 194; Protocol No.15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms [2013] CETS 213 and Protocol No.16 to the Convention for the Protection of Human Rights and Fundamental Freedoms [2013] CETS 214.
[161] see L. Glas, 'From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?'(2020) 20 HRLRev 121.
[162] High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration (26-27 April 2011), 2-6; see also, High Level Conference on the Future of the European Court of Human Rights Brighton Declaration (19-20 April 2012) 2-3 ('Brighton Declaration'); High Level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility" Brussels Declaration (27 March 2015) (Brussels Declaration); High Level Conference meeting in Copenhagen at the initiative of the Danish Chairmanship of the Committee of Ministers, Copenhagen Declaration (12-13 April 2018) 2.

Declaration on the future of the ECtHR was drafted,[163] which led to Protocol 15 ECHR.[164] This Protocol adds subsidiarity and the MoA to the Preamble of the Convention.[165] Vogiatzis explains the amendments to the Preamble constitute 'a *compromise* between two competing tendencies: … the Strasbourg institutions, led by the Court' sought to reduce the Court's caseload,[166] whereas some States sought to emphasise 'judicial restraint', to address concerns regarding the ECtHR's perceived judicial activism - as arguably evidenced by cases such as *Hirst.*[167]

In exploring the ECtHR's approach to subsidiarity, Mowbray analyses the frequency of references made to subsidiarity in case law from 1992-2014.[168] The statistics show that post-Interlaken there was an increase in the 'yearly average numbers of references to subsidiarity' in the ECtHR's judgments.[169] Reports of Chamber judgments, from 1999-2009, note an average of seven references to subsidiarity were made per year but following the Interlaken conference, from 2010-June 2014, there was an increase in the average number of references to subsidiarity to 19.8 per year.[170] This increase arguably accounts for Judge Spano's observation that Strasbourg has entered an 'age of subsidiarity'.[171] Donald and Leach also argue that case law demonstrates a 'deepening' of subsidiarity.[172] For instance, increasingly there has been a 'procedural turn' in the ECtHR's case law, in which the Court held 'states have a positive obligation of a procedural nature under a particular Convention right'.[173] Moreover, and of particular relevance to this thesis, the Court has shown willingness to link the width of the MoA to the 'quality of parliamentary process'.[174] As Spano explains, the Court

[163] Brighton Declaration (n.162) 3.
[164] Protocol No.15 (n.160) Article 1.
[165] D. McGoldrick, 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' (2016) 65(1) ICLQ 21, 22.
[166] N. Vogiatzis, 'When 'reform' meets 'judicial restraint': Protocol 15 amending the European Convention on Human Rights' (2015) 66(2) NIrLegalQ 127, 128.
[167] ibid 128, 132.
[168] A. Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 HRLRev 313, 338.
[169] ibid.
[170] ibid.
[171] R. Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 HRLRev 487, 491 ('Universality or Diversity').
[172] Donald and Leach (n.8) 135.
[173] O.M. Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 IJCL 9, 13; see e.g. E. Brems and L. Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35(1) HRQ 176, 185-200; T. Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68 ICLQ 91.
[174] See *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 [108]; M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 Human RtsRev 754, 748.

may apply subsidiarity 'more robustly' in cases in which 'the national authorities have demonstrated … they have taken their obligations to secure Convention rights seriously.[175] This is a controversial factor which will be discussed in chapter five. Further, the ECtHR's inclination to engage in dialogue with institutions may also indicate a strengthening of subsidiarity.[176] Yet despite this, as *Hirst* will show, some cases can create seemingly 'irresolvable disagreements' between Strasbourg and domestic institutions.[177]

Strasbourg's subsidiary role is also apparent in the 'enforcement' of Strasbourg's jurisprudence.[178] As Glas observes, subsidiarity is evidenced by the generally 'declaratory nature of the Court's judgments' which affords States primary responsibility to redress a violation.[179] The CM is responsible for overseeing Contracting Parties' 'execution' of ECtHR's judgments.[180] Therefore, in addressing the CM's role, the Izmir Declaration emphasised the CM must 'apply fully the principle of subsidiarity' and in 'exercising its supervisory function' it should 'carry out its supervision only on the basis of legal analysis of the Court's judgments'.[181] States have 'the choice of means … to conform to their obligations under the Convention'[182] yet, the Court also has a 'complementary' role to the CM in securing compliance[183] and its role has been strengthened.[184] The Court may adopt a more prescriptive approach 'in stipulating remedies'[185] and can opt for a *less* deferential approach. As Glas argues, this could generate hostility from States towards the Court for flouting its subsidiary function, by trespassing into States' areas of competence – challenging the Court's 'legitimacy' and blurring the boundaries between the Court's and the CM's role.[186] By contrast, the consistent reiteration of Strasbourg's subsidiary role might foster increased deference, leading

[175] Spano, 'The Future of the ECtHR' (n.55) 481.
[176] Donald and Leach (n.8) 144; see European Court of Human Rights, *Dialogue Between Judges, "How can we ensure greater involvement of national courts in the Convention system?"* (Strasbourg 2012) 12-13.
[177] ibid.
[178] Vogiatzis, 'When 'reform' meets 'judicial restraint' (n.166) 139.
[179] Glas, *Procedural Dialogue* (n.102) 28; as evidenced by ECHR (n.1) Article 1.
[180] ECHR (n.1) Article 46(2).
[181] Izmir Declaration (n.162) H2-3, 6.
[182] ibid.
[183] L.A. Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments Under Article 46 ECHR' (2014) 32 NQHR 235, 260.
[184] Keller and Marti, 'Reconceptualizing Implementation' (n.154) 835-836, 838.
[185] B. Çali and A. Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe' (2014) 14 HRLRev 301, 309.
[186] Glas, *Procedural Dialogue* (n.102) 48.

to political concessions, resulting in the CM endorsing minimal compliance.[187] This may undermine rights, possibly fuelling challenges to Strasbourg's legitimacy.[188]

3.5.3 The margin of appreciation (MoA)

An interrelated doctrine to subsidiarity, is the MoA – as Spano argues, the MoA is 'the operational tool for the realisation of the subsidiary character of the Convention system'.[189] The MoA is a judicial construct, which has mainly been applied to qualified rights with express limitation clauses.[190] However, as noted, Protocol 15 adds the MoA to the Preamble.[191] The doctrine of the MoA was delineated in *Handyside v United Kingdom*.[192] The ECtHR stated that:

> 'The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines … it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals … State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them'.[193]

Importantly however, the Court held Contracting Parties are not afforded 'an unlimited power of appreciation' and the MoA 'goes hand in hand with a European supervision'.[194]

As Arai-Takahashi explains, the justification for the MoA is linked to the idea that 'the Convention would be supplementary' to domestic institutions in protecting rights.[195] In applying the MoA, the Court may recognise that States should develop human rights according

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[187] von Staden, *Strategies of Compliance* (n.69) 213.
[188] A. von Staden, 'Guest Blog: Minimalist Compliance in the UK Prisoner Voting Rights Cases' (*ECHR Blog*, 16 November 2018) <http://echrblog.blogspot.com/2018/11/guest-blog-minimalist-compliance-in-uk.html> accessed 14 April 2022 ('Minimalist Compliance').
[189] R. Spano, 'The European Court of Human Rights and National Courts: A Constructive Conversation of a Dialogue of Disrespect?' (2015) 33 Nordic Journal of Human Rights 1, 4-5.
[190] S. Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principles or Margin of Appreciation' (2010) 3 UCL HumRtsRev 1, 2.
[191] Protocol No.15 (n.160).
[192] *Handyside v United Kingdom* (1976) 1 EHRR 737; for earlier articulations of the MoA, see *Greece v United Kingdom* App No 176/56 (1958) CD; *Lawless v Ireland* App no 332/57 (1959) CD; *Ireland v UK* App no 5310/71 (1978) DR.
[193] *Handyside* (n.192) [48].
[194] ibid [49].
[195] Y. Arai-Takahashi, 'The margin of appreciation: a theoretical analysis of Strasbourg's variable geometry' in A. Føllesdal, B. Peters, G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National and Global Context* (CUP 2013) 62.

to their values, with the Court being subsidiary and guiding States when necessary.[196] Therefore, the MoA encompasses States 'freedom to act'.[197] Letsas distinguishes between two concepts of the MoA, the first is the 'substantive concept', which concerns 'the relationship between individual freedoms and collective goals'.[198] The second is 'the structural concept', which determines the 'limits or intensity of review' of the Court as 'an international tribunal'.[199] The Court may utilise the structural concept to assess whether States are 'better placed' to determine rights than the Court, which may support a deferential approach.[200] As Gerards explains this may be especially relevant where the case concerns sensitive issues, such as 'political, social or economic assessments', or moral issues.[201] Therefore, the MoA is significant, as it helps delineate the institutional division of power in the determination, protection and enforcement of rights.[202]

The MoA is connected to the Court's application of the doctrine of proportionality,[203] as Arai-Takahashi argues, proportionality is the 'other side of the margin of appreciation'.[204] The Court can either afford States a wide or narrow MoA and depending on the width of the MoA, this may affect the strictness of the Court's proportionality analysis.[205] Gerards observes that where there is a wide MoA, the Court may 'superficially' and 'generally' assess the national measure, applying a 'procedural test', with the burden of proof resting with the applicant.[206] Conversely, where there is a narrow MoA, the Court may undertake a more stringent, substantive analysis, assessing the facts and carefully balancing competing interests.[207] However, the relationship between the MoA and proportionality has not always been clearly articulated by the Court,[208] as in some cases, the intensity of the scrutiny has failed to correspond with the MoA applied.[209] For instance, the Court may state there is a wide MoA, but then undertake a rigorous assessment

[196] P. Unsworth, 'The margin of appreciation a vehicle for progression towards a moral reading of the ECHR? [2017] CovLJ 14, 17.
[197] H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer Academic Publishers 1996) 13.
[198] G. Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) OJLS 705, 706.
[199] ibid 705.
[200] ibid 709, 721.
[201] Gerards, 'Pluralism, Deference' (n.157) 110.
[202] T. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4(4) HumRtsQ 474, 495; O.M. Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 EuConst 27, 46.
[203] Legg, *The Margin of Appreciation* (n.133) 177-178.
[204] Arai-Takahashi, *The Margin of Appreciation* (n.132) 14.
[205] Gerards, 'Pluralism, Deference' (n.157) 80.
[206] ibid 105.
[207] ibid 106.
[208] ibid 193.
[209] ibid 106.

of the facts**,** balancing the interests, which may lead the Court to conclude that whilst the MoA is wide, there is a violation.[210]

This is potentially problematic, as it may undermine procedural legitimacy and possibly contribute to broader challenges to the Court's legitimacy. As Kratchovil argues, the Court may invoke the MoA when it is 'unrelated to the Court's decision' and it acts as 'a smoke screen', in which the Court fails to clearly articulate its interpretative reasoning.[211] Yet, although the vague nature of the MoA has been criticised,[212] there are several factors the Court may apply in determining the width of the MoA.[213] In particular, the factors which feature in prisoner voting case law will be assessed in chapter five, which include: the importance of the right and nature of the interference, the quality of Contracting Parties parliamentary processes, the degree of European consensus[214] and the Court's willingness to provide guidance. However, whilst the Court's application of these factors may provide a semblance of structure, arguably enhancing the judgment's cogency, transparency and legitimacy, in some cases, the Court's application of these factors may provide evidence of the obscuring potential of the MoA, undermining the judgment's procedural legitimacy. It might be challenging to discern which of the factors are attributed more weight and which, if any, of the factors will be decisive, as the Court does not always articulate its reasoning. This is significant as, where judgments are unclear, this might affect the State's willingness to comply.[215] Therefore, the cogency and legitimacy of the Court's application of these factors will be explored in relation to prisoner voting case law in chapter five.

3.5.4 Dialogue?

3.5.4.1 Dialogue between courts

Arguably, dialogue between domestic and European courts can increase the legitimacy of the ECtHR's judgments, indicating 'shared values and authority/expertise'.[216] A 'constructive

[210] ibid; see J. Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Right' (2018) 18 HRLRev 495, 504-505.
[211] J. Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 NQHR 324, 337.
[212] O'Donnell (n.202) 495.
[213] *S & Marper v the United Kingdom* (2009) 48 EHRR 50, para 102 – 'the nature of the Convention right', the 'importance' of the right, 'the nature of the interference and the object pursued by the interference'.
[214] Gerards, 'Pluralism, Deference' (n.157) 107.
[215] Vogiatzis, 'The Relationship Between' (n.55) 467.
[216] M. Amos, 'The dialogue between United Kingdom courts and the European Court of Human Rights' [2012] ICLQ 557, 575; see also, Glas, *Procedural Dialogue* (n.102) 127-133; B. Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme? (2012) 12(1) HRLRev 65, 78.

dialogue' can occur between national courts and the ECtHR,[217] demonstrating that courts can work together to ensure effective rights protection.[218] As Young explains, dialogue between courts is different from dialogue between courts and the legislature, as 'courts reason about rights in a similar manner'.[219] Such dialogue can enhance the domestic influence on the development of the ECHR.[220] Where there is 'a co-operative … relationship' between courts this can reduce the 'perceived risk of illegitimate incursion by the court into the democratic life' of States.[221] However, dialogue between courts cannot give rise to or increase courts 'democratic legitimacy'.[222]

From Strasbourg's viewpoint dialogue might be facilitated through the strengthening of subsidiarity and the MoA in the ECtHR's jurisprudence and also via reform to the ECHR.[223] The ECtHR might facilitate dialogue where an issue falls within the domestic MoA.[224] Young contends this might give rise to 'constitutional collaboration', as dialogue can arise due to the ECtHR's exercise of 'judicial restraint', increasing domestic courts' scope to determine an issue.[225] Ultimately, whether dialogue arises in practice depends on the case. In terms of reform, Protocol 16 ECHR is an optional Protocol which 'extends' the ECtHR's 'competence' to provide advisory opinions to national courts, regarding 'questions of principle relating to the interpretation or application' of Convention rights.[226] This is intended to reduce the Court's 'backlog of pending applications' and to foster dialogue between national courts and the ECtHR.[227] Whilst the UK has not ratified Protocol 16, it demonstrates how reform has sought to enhance dialogue between the courts.[228]

Dialogue can also arise at the admissibility stage and when the case is considered on the merits.[229] Yet, as noted in chapter two, labelling inter-institutional interactions as dialogue is

[217] K. Dzehtsiarou and N. O'Meara, 'Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?' (2014) 34(3) LS 444, 454; see e.g. *R v Horncastle* [2010] 2 AC 373, [2010] 2 WLR 47 [117]-[120] (Brown J); *Al-Khawaja, Tahery v United Kingdom* [2012] 2 Costs LO 139, (2012) 54 EHRR 23.
[218] Amos, 'The dialogue between' (n.216) 575-576.
[219] Young, *Democratic Dialogue and the Constitution* (OUP 2017) 255.
[220] Masterman, 'Strasbourg Surrogacy?' (n.110) 476.
[221] P. Mahoney, 'The relationship between the Strasbourg court and the national courts' [2014] LQR 568, 686.
[222] Amos, 'The dialogue between'(n.216) 579.
[223] ibid 560.
[224] ibid 567.
[225] Young, *Democratic Dialogue* (n.219) 261-262.
[226] Protocol No.16 (n.160).
[227] Dzehtsiarou and O'Meara (n.217) 445.
[228] see K. Lemmens, 'Protocol no 16 to the ECHR: managing backlog through complex judicial dialogue' (2019) 15(4) EuConst 691, 692.
[229] Amos, 'The dialogue between' (n.216) 562-563.

contested. Even when dialogue appears to have occurred, increased legitimacy is not guaranteed. For example, Amos argues that where the ECtHR finds differently to a domestic court, it will be considered 'domestically as illegitimate' and if a domestic court subsequently 'gives effect to' the judgment, this will also be 'illegitimate', as it furthers Strasbourg's interests, rather than 'national interests'.[230] Dialogue between courts might be perceived negatively as representing an unwarranted increase in judicial power, empowering courts to reach decisions better suited to the domestic legislature.[231] Moreover, the extent to which dialogue arises between courts is debateable.[232] Amos argues that first, delay can result in a slow response from the ECtHR, precluding meaningful dialogue, as the ECtHR may take over 'five years' to respond.[233] Second, in some cases, domestic courts do not consider an application before it reaches the ECtHR, due to the claim falling outside the HRA and therefore, there is no prospect of dialogue.[234] Finally, s.2 HRA can also impede dialogue as domestic courts may opt to mirror Strasbourg.[235]

The domestic courts approach to s.2 HRA is of particular relevance to prisoner voting, and therefore, it is necessary to clarify s.2 and the meaning of "mirroring" Strasbourg. S.2 states that UK courts or tribunals, when 'determining a question which has arisen in connection with a Convention right must take into account' relevant Strasbourg jurisprudence.[236] Yet, how have domestic courts interpreted this requirement to 'take into account' Strasbourg case law and to what extent does this affect the potential for dialogue?

In carving out domestic courts obligations under s.2 HRA, Lord Bingham in *R (Ullah) v Special Adjudicator* (*Ullah*)[237] stated, 'The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[238] This 'duty' has been labelled the 'mirror principle'.[239] Amos contends that in mirroring Strasbourg, the domestic courts' approach to s.2 could constitute an expression of 'judicial comity' with Strasbourg – demonstrating 'mutual respect, courtesy and good neighbourliness'.[240] Yet there is a tension

[230] ibid 578.
[231] ibid 580.
[232] ibid 559.
[233] ibid 563
[234] ibid 563-564
[235] ibid 564-565.
[236] Human Rights Act 1998, s.2(1) (HRA).
[237] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323.
[238] ibid [20] (Bingham J).
[239] N. Ferreira, 'The Supreme Court in a final push to go beyond Strasbourg' [2015] PL 367, 368.
[240] M. Amos, 'The Principle of Comity and the Relationship between British Courts and the European Court of Human Rights' (2009) 28(1) YEL 503, 504.

within s.2 which might constrain the judicial approach to s.2. Whilst parliamentary debates demonstrate Parliament intended that domestic courts should take ownership of human rights,[241] the judiciary must also be mindful that they do not trespass into legislative territory - courts do not have unlimited power.[242] In assessing their role under s.2, not only might domestic courts be keen to show comity with Strasbourg, but they might seek to maintain good relations with the domestic political branches.

Yet ensuring uniformity with Strasbourg may restrict judicial freedom to define rights domestically.[243] As Masterman explains, s.2 may constrain judicial creativity, as 'the UK is subject' to Strasbourg's supervision and domestic interpretations of the Convention may be overridden by the ECtHR.[244] This might also limit the potential for dialogue.[245] However, exceptions to the mirror principle have developed, which may foster dialogue.[246] As Lord Neuberger explained in *Manchester City Council v Pinnock*:[247]

> 'This court is not bound to follow every decision of the European court … Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle … it would be wrong for this court not to follow that line'.[248]

Fenwick and Masterman argue this constitutes the 'partial' or 'semi-mirror principle', which is gradually usurping the 'full mirror principle'.[249] There has been a 'steady dilution of the 'mirror principle', as domestic courts have articulated instances where they may 'depart from the Strasbourg line'.[250] Moreover, there has been a move towards a 'context specific' approach,

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[241] HL Deb 3 November 1997, vol 582, col 1245; HL Deb 18 November 1997, vol 583, col 514.
[242] A. Kavanagh, 'Strasbourg, the House of Lords or Elected Politicians: Who decides about rights after *Re P*?' (2009) 72(5) MLR 828, 837.
[243] *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 [106] (Brown J); *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435 [20] (Hope J).
[244] R. Masterman, *The Separation of Powers* (n.147) 54-55, 202.
[245] ibid 55.
[246] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [26] (Slynn J).
[247] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.
[248] ibid [48] (Neuberger J).
[249] Fenwick and Masterman (n.5) 1117-1118; 'full mirror principle' e.g. *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20] (Lord Bingham); 'partial mirror principle' e.g. *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.
[250] Fenwick and Masterman (n.5) 1119; e.g. *Commissioner for Police v DSD* [2018] UKSC 11, [2019] AC 196 [73]-[70], [91] (Neuberger JSC) .

that the duty to take into account is determined by context.[251] This highlights how there remains significant scope for domestic determination of rights.

Notably, Amos argues dialogue might occur where domestic courts consider that the ECtHR has reached the 'wrong' decision.[252] In *R v Horncastle*,[253] the Supreme Court invited the Grand Chamber to reassess the ECtHR's judgment in *Al-Khawaja and Tahery v United Kingdom*.[254] Young argues these types of cases could comprise 'characteristics of mechanisms of constitutional counter-balancing as well as measures of constitutional collaboration'.[255] Where domestic courts engage in constitutional counter-balancing on the basis that the ECtHR's judgment is wrong, to 'facilitate democratic dialogue, national courts need to ensure that this mechanism is used sparingly and only when there are good grounds for its exercise' – taking into account the 'relative expertise of the ECtHR' and whether there is 'a clear and constant line' of ECtHR jurisprudence.[256] Domestic courts' reasoning should be as clear as possible, to increase the likelihood of democratic dialogue.[257] Amos also observes dialogue might occur where the UK's margin of appreciation is engaged.[258] In *R (Nicklinson) v Ministry of Justice*,[259] Lord Neuberger proposed that where there is a 'wide margin of appreciation' and *Ullah* is consequently not 'in point',[260] then 'national courts … must decide the issue for themselves'.[261] This could facilitate collaboration.[262] Domestic courts have also demonstrated willingness to go beyond Strasbourg.[263] Further, in some cases judicial preference for common law rights protection has been asserted.[264] Dialogue might also be facilitated where case law is unclear

[251] e.g. *R (AB) v Secretary of State for Justice* [2021] UKSC 28, [2021] 3 WLR 494, [54]-[59] (Reed PSC); *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279, [72] (Mance SCJ); *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344 [18]-[21].
[252] Amos, 'The dialogue between' (n.216) 566.
[253] *Horncastle* (n.217) [117]-[120] (Brown J).
[254] *Al-Khawaja, Tahery v United Kingdom* (2012) 2 Costs LO 139, (2012) 54 EHRR 23.
[255] Young, *Democratic Dialogue* (n.219) 261.
[256] ibid 270.
[257] ibid.
[258] Amos 'The dialogue between' (n.216) 567; *Re G (Adoption: Unmarried Couple* [2008] UKHL 38, [2009] 1 AC 173 [31]-[34] (Lord Hoffmann).
[259] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.
[260] ibid [70] (Neuberger PSC).
[261] ibid.
[262] see Young, *Democratic Dialogue* (n.219) 262-268.
[263] e.g. *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198 [18]; *Re G* (n.258) [31] [37]-[38] (Hoffmann J); [50]-[53] (Hope J); *Rabone v Pennine Care NHS Foundation* [2012] UKSC 2, [2012] 2 AC 72 [112]-[114]; see F. Klug and H. Wildbore, 'Follow or lead? The Human Rights Act and the European Court of Human Rights' [2010] EHRLR 621, 627.
[264] *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA 420, [2013] QB 618; *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 [46]-[47] (Mance SCJ); *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

and inconsistent.[265] These exceptions illustrate that a form of dialogue can occur between courts, which can mitigate the strictures of *Ullah*.[266]

As argued in chapter two, the metaphor of dialogue has been criticised for its potential to misrepresent institutional decision-making - in some cases there may be no judicial intention to achieve dialogue.[267] S.2 requires the domestic judiciary to balance multi-institutional considerations, whether this is conducive to dialogue depends on how courts utilise their powers, such as the clarity and 'transparency' of judicial reasoning.[268] As such, depending on the case, there might be limits to the legitimising potential of dialogue. Whether prisoner voting litigation generated dialogue between the domestic and European courts will be explored in subsequent chapters.

3.5.4.2 Dialogue between the political branches and Strasbourg

A further opportunity for dialogue can arise between the political branches and Strasbourg regarding State's requirement to implement judgments in accordance with Article 46 ECHR.[269] As noted, the ECtHR's role in assisting the CM in securing compliance has been strengthened.[270] Further, domestic political branches may engage in dialogue with Strasbourg's political institutions. Whilst other institutions including Parliament, the courts, 'national human rights institutions' and 'civil society' may 'contribute to implementation',[271] the executive is accorded primary responsibility for liaising with the Council of Europe regarding implementation.[272] National 'parliamentarians' generally have 'limited' involvement in terms of communication with the CM regarding implementation.[273] Nevertheless, as will be elucidated in chapter six, in the UK, the parliamentary committee, the Joint Committee on Human Rights (JCHR), has a key role in providing domestic 'oversight' by monitoring compliance with the ECtHR's judgments.[274]

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[265] e.g. *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 [43] (Wilson JSC).
[266] A. Greene, 'Through the looking glass? Irish and UK approaches to Strasbourg Jurisprudence' (2016) 55(1) Irish Jurist 112, 120.
[267] E. Carolan, 'Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations' (2016) 36(2) LS 209, 215.
[268] Young, *Democratic Dialogue* (n.219) 268.
[269] Abdelgawad (n.73) 340, 341.
[270] ECHR (n.1) Article 46(3), Article 46(4).
[271] Mottershaw and Murray (n.22) 640.
[272] A. Donald, 'Parliaments as Compliance Partners in the European Convention on Human Rights System' in M. Saul, A. Føllesdal and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (CUP 2017) 84.
[273] Donald and Leach (n.8) 44.
[274] ibid 232, 234.

Regarding the potential for dialogue at the implementation stage, Abdelgawad argues that dialogue between the CM and the executive should focus on 'the most appropriate means to abide by a judgment'.[275] As the CM and ECtHR are unable to compel compliance, 'cooperation' is essential.[276] Normally discussions are focused 'on which general and/or individual measures are required', with the aim being to 'reach a consensual solution', balancing the requirements of the ECHR and also considering 'national peculiarities and/or difficulties', thereby giving effect to subsidiarity.[277] Therefore, dialogue can have a 'legitimating force on political authority and decision-making'.[278] Dialogue can be utilised where problems with non-implementation occur[279] and may help foster implementation.[280] Yet, 'political will' is fundamental in terms of securing implementation.[281] Where there is an absence of political will to comply, this may negatively shape resultant dialogue in a way that erodes rather than enhances legitimacy.

3.5.5 Brief reflections on Strasbourg's legitimacy

Overall, it has been shown how the key doctrines and principles discussed may enhance the legitimacy of the ECtHR's judgments. By contrast, in some cases, the ECtHR's application of these doctrines may be criticised by States, which may precipitate or compound challenges to the Court's legitimacy. Where a case is especially controversial rights protection may be placed under pressure, exacerbating underlying qualms regarding Strasbourg's legitimacy. This highlights the complexities in European rights protection, as the Court's multifaceted legitimacy means that challenges to the Court's legitimacy may be multi-layered.

3.6 The European Union: legitimacy and rights protection

With the UK having left the EU, it is evident that the relationship between the UK and EU has largely been characterised by pervasive Euroscepticism – as Reynolds argues, the 'UK could never really have been described as an enthusiastic participant in the European project'.[282] Indeed, rights protection is 'a source of Euroscepticism'.[283] This anti-EU sentiment fuelled

[275] Abdelgawad (n.73) 342.
[276] Glas, *Procedural Dialogue* (n.102) 108.
[277] Abdelgawad (n.73) 343.
[278] ibid 344.
[279] ibid 352.
[280] Glas, *Procedural Dialogue* (n.102) 130-131.
[281] Mottershaw and Murray (n.22) 645.
[282] S. Reynolds, 'It's not me it's you: Examining the print media's approach to 'Europe' in Brexit Britain' in M. Farrell, E. Drywood and E. Hughes (eds), *Human Rights in the Media: Fear and Fetish* (Routledge 2019) 46.
[283] S. Douglas-Scott, 'Fundamental Rights, Not Euroscepticism: Why the UK Should Embrace the EU Charter of Fundamental Rights' in K. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A*

challenges to the EU's legitimacy, culminating in Brexit, which plunged the UK and the EU into unchartered and frequently fraught territory, as the UK's disentanglement from the EU has been beset with complex political and legal challenges. Despite Brexit, EU law still merits consideration, due to the controversial prisoner voting case *Delvigne* (analysed in chapters five and six). The CJEU's judgment in *Delvigne* is highly important and was anxiously awaited by the UK Government, as it would provide crucial clarification regarding how the issue of prisoner voting was approached under EU law. It would also shed light on the relationship between rights protection under EU law and the ECHR. *Delvigne* had potentially significant ramifications in terms of the UK's approach to prisoner voting, as depending on the outcome, it could potentially further restrict the UK's scope to resist Strasbourg or could provide the UK with more ammunition to resist Strasbourg. Further, the assessment of *Delvigne* in later chapters, will illustrate how the involvement of another European court in the already contested issue of prisoner voting, exacerbated the UK's qualms regarding the legitimacy of European rights protection.

This section explores the UK's relationship with the EU in terms of rights protection and the associated legitimacy challenges, so that *Delvigne* can be assessed in later chapters. Issues concerning the EU's legitimacy are multifaceted and could be explored in multiple ways[284] and therefore, to narrow the focus, the legitimacy of the CJEU's role in rights protection will briefly be assessed, specifically focusing on the application of the Charter in relation to Member States, rather than the legitimacy of the CJEU's role more broadly.[285] Further, whilst the Charter is discussed, this is in overview only, as space precludes a detailed discussion of the intricacies of rights protection under the Charter. Therefore, this section includes an overview of the Charter, the UK's reaction to the Charter and the relationship between the ECHR and the Charter.

Strained Relationship? (Hart 2015) 268-269; see also, S. Sánchez, 'The Court and the Charter: The Impact of the Entry into force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2013) 49 CMLR 1564, 1583.

[284] e.g. A. Føllesdal, 'The Legitimacy Deficits of the European Union' (2006) 14(4) The Journal of Political Philosophy 441; V.A. Schmidt, 'Is There a Deficit of Throughput Legitimacy in the EU?' in S. Garben, I. Govaere and P. Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019).

[285] e.g. K. Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in M. Adams, H. de Waele and J. Meeusen (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013).

3.6.1 The Charter

While fundamental rights protection had already been recognised by the CJEU in its jurisprudence,[286] the Charter sought to improve the visibility of rights[287] and was given 'full legal force'[288] in 2009 via the Lisbon Treaty under Article 6(1) TEU.[289] The Charter includes rights contained in the ECHR, but also recognises rights which are not recognised in the Convention, including modern rights[290] such as, 'bioethics; rights of children; rights of persons with disabilities; and environmental concerns'.[291] Yet, crucially, these rights are not '*new* rights', they are derived from the CJEU's case law, the Member States 'constitutional traditions' and 'international agreements'.[292] There is a 'multilevel system' of rights protection[293] and Article 6(3) TEU confirms the CJEU may refer to other fundamental rights sources, including the ECHR and rights derived from the 'constitutional traditions' of Member States which 'constitute general principles of EU law'.[294]

Although the Charter enshrines a large number of rights, it does *not* transform the CJEU into a court that is equivalent to the ECtHR. The CJEU must remain cognisant of 'the limits of the EU's jurisdiction'.[295] If it overlooked this, it could exacerbate challenges to the CJEU's legitimacy, as arguably the CJEU's legitimacy in rights protection is on more tenuous ground, as it was not designed to be a human rights court, contributing to political concerns regarding the erosion of sovereignty.[296] Therefore, Article 51(1) of the Charter requires 'due regard for the principle of subsidiarity', which reflects that the CJEU must conform to the 'principle of conferral'.[297] Regarding Member States' obligations under the Charter, Article 51(1) states the

[286] e.g. Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] EU:C:1970:114, para 4; Case 26/69 *Stauder v City of Ulm* [1969] EU:C:1969:57.
[287] L. Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 CMLR 1201, 1204.
[288] R. Clayton and C. Murphy 'The emergence of the EU Charter of Fundamental Rights in UK law' [2013] EHRLR 469, 469.
[289] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Article 6(1) (TEU).
[290] G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20 Maastricht JEur&CompL 168, 172.
[291] Goldsmith (n.287) 1209.
[292] ibid.
[293] J.D. de la Rochere, 'Challenges for the protection of fundamental rights in the EU at the time of entry into force of the Lisbon Treaty' (2010) 33 Fordham Int'l LJ 1176, 1799.
[294] TEU (n.289) Article 6(3); For discussion of the relationship between General Principles and Charter rights see: M. Dougan, 'Judicial Review of Member State Action Under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52 CMLRev 1201, 1204-1207.
[295] P. Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration' (2013) 66 CLP 169, 186.
[296] P. Craig, 'The United Kingdom, the European Union, and Sovereignty', in R. Rawlings, P. Leyland and A. Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013) 175.
[297] K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 EuConst 375, 377; see TEU (n.289) Article 5(2).

Charter applies to 'Member States only when they are implementing Union law'.[298] Further, not all 'provisions' of the Charter have direct effect.[299] Article 52(1) sets out circumstances in which rights might be limited and the majority of the rights are non-absolute.[300] There are therefore limits placed on the Charter's application, demonstrating the Charter's application 'is narrower than' the ECHR in that it applies to Member States when they are implementing EU law.[301] However it is clear the Charter has helped further legitimise the CJEU's role in rights protection and the CJEU has an influential role in rights adjudication, which further complicates the picture of European rights protection. [302]

3.6.2 Resisting the Charter

The UK's reception to the Charter reflected its general aversion to European rights protection, with concerns regarding its legitimacy.[303] Therefore, the UK and Poland negotiated Protocol 30,[304] in which the UK sought to clarify that the CJEU's competences under the Charter were not unduly expanded.[305] Nevertheless, following Protocol 30, the status of the Charter in UK law was subject to confusion, as there was a gulf between political and legal interpretations of the effects of the Protocol.[306] Politically, Tony Blair (then Prime Minister), stated that Protocol 30 constituted an opt-out to the Charter and consequently, the Charter was not legally binding in the UK.[307] However, legally, in *R (NS) v Secretary of State for the Home Department*[308] the Court of Appeal made a preliminary reference to the CJEU which held the Charter was legally binding and Protocol 30 'does not call into question the applicability of the Charter in the

[298] Charter of Fundamental Rights of the European Union [2012] OJ C326/02, Article 51 (The Charter); see Case C-617/10 *Åklagaren v Åkerberg Fransson* EU:C:2013:105; note, the Explanations to the Charter state that the Charter binds 'Member States when they act in the scope of Union law' - Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, Explanation on Article 51.
[299] N.B. some provisions of EU law have direct effect and can be relied upon by individuals in national courts Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, para 3.
[300] The Charter (n.298) Article 52(1); see Lenaerts, 'Exploring the Limits' (n.297) 388-393.
[301] House of Lords, European Union Committee, *The UK, the EU and a British Bill of Rights* (12th Report of Session 2015-16, HL Paper 139, 9 May 2016) 49.
[302] S. Morano-Foadi and S. Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights' (2011) 17(5) ELJ 595, 610.
[303] C. Barnard, 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) 82(2) MLR 350, 351.
[304] Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom [2008] OJ C115/313 (Protocol No 30); see S. Peers, 'The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' (2012) 12(2) HRLRev 375, 376.
[305] ibid Article 1(1), Article 1(2) and Article 2.
[306] see V. Belling, 'Supranational Fundamental Rights or Primacy of Sovereignty? Legal Effects of the So-Called Opt-Out from the EU Charter of Fundamental Rights' (2012) 18(2) ELJ 251, 252.
[307] HC Deb 25 June 2007, vol 462, cols 37, 39; Douglas-Scott, 'Fundamental Rights' (n.283) 252-253.
[308] [2010] EWCA Civ 990.

United Kingdom or in Poland' and therefore Protocol 30 should never have been understood as an opt-out.[309] The power of the EU in relation to fundamental rights was retained.

Significantly, the European Union (Withdrawal) Act 2018 removed the application of the Charter post-Brexit.[310] Despite the Charter ceasing to apply, the UK Government maintains that human rights protection will not be lessened,[311] yet others refute this.[312] Regardless, the decision to remove the Charter post-Brexit is unsurprising, being indicative of the UK's resistance towards fundamental rights protection at the European level.[313]

3.6.3 The Charter and the ECHR

It is necessary to briefly delineate the relationship between the Charter and the Convention, as this will be relevant in assessing the CJEU's approach in *Delvigne*. Article 52(3) provides that the Charter rights 'which correspond to rights guaranteed by the' ECHR will have the same 'meaning and scope of those rights' in the ECHR and this 'provision shall not prevent Union law providing more extensive protection'.[314] Significantly, the protection 'may never be lower than that guaranteed by the ECHR'.[315] Article 53 affirms the Charter 'establishes a minimum standard of rights protection'.[316] Therefore, the Charter enshrines a clear connection between the CJEU and the ECHR.[317] The CJEU refers to Strasbourg jurisprudence to inform its approach to rights protection and the ECtHR can also refer to CJEU jurisprudence.[318] Harpaz argues the CJEU's 'reliance' on Strasbourg jurisprudence can help 'advance the predictability,

[309] Case C-411/10 and C-493/10 *NS v Secretary of State for the Home Department Others and M.E. and Others v Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform* EU:C:2011:865 paras 119-120; see also, *R (AB) v Secretary of State for the Home Department* [2013] EWHC 3453, [2014] 2 CMLR 22 [13]-[14] (Mostyn J).
[310] European Union (Withdrawal) Act 2018, s.5(4)-(5).
[311] Charter of Fundamental Rights of the EU Right by Right Analysis (5/12/2017) 4-5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf> accessed 14 April 2022.
[312] B. Kennedy, 'Rights after Brexit: some challenges ahead' (2019) 5 EHRLR 457; Barnard (n.303) 364; A. Ramshaw, 'What could have been and may still be: Brexit, the Charter of Fundamental Rights of the European Union and the right to have rights' (2020) 45(6) ELRev 824.
[313] Barnard (n.303) 365.
[314] The Charter (n.298) Article 52(3).
[315] Lenaerts, 'Exploring the Limits' (n.297) 394.
[316] L.F.M. Besselink, 'The Member States, the National Constitutions and the Scope of the Charter' (2001) 1 MJ 68, 72.
[317] S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11(4) HRLRev 645, 655.
[318] Eeckhout (n.295) 176; e.g. CJEU cases: Case 36/75 *Rutili v Ministre de l'intérieur* EU:C:1975:137; Case C-145/04 *Spain v United Kingdom* EU:C:2006:543 paras 94-96; Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Bauer Verlag* EU:C:1997:325 paras 24-26: ECtHR cases: *Goodwin v United Kingdom* (2002) 35 EHRR 18 para 43; *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979) para 58; *Sevinger and Eman v The Netherlands* (2008) 46 EHRR SE14 paras 6, 28.

legitimacy and effectiveness of the EU legal order', as it ensures 'European rights protection is more coherent'.[319] As the ECtHR is a dedicated human rights court, reference to Strasbourg jurisprudence may enhance the legitimacy of the CJEU's rights-based reasoning.[320] Moreover, the procedural legitimacy of the CJEU's judgments could be improved by reliance on Strasbourg jurisprudence, as the CJEU's reasoning tends to be 'concise, deductive and legalistic' whereas, the ECtHR's reasoning is more 'extensive'.[321] De Búrca argues that 'a better-informed and fuller style of judicial ruling which … expressly engages with international and regional standards of human rights protection would enjoy greater legitimacy'.[322] Yet, in some cases, the CJEU may refrain from expressly referring to ECHR jurisprudence. The CJEU may opt for a more 'isolated … interpretation of the Charter'.[323] Notably, Article 6(2) TEU also commits the Union to accede to the ECHR, yet the road to accession is hampered by difficulties, exemplified by the CJEU's rejection of the Draft Accession Agreement in Opinion 2/13.[324] This provides insight into the relationship between the CJEU and Strasbourg, as the CJEU provided a vehement 'defence of the … autonomy of EU law', highlighting the inter-institutional tensions that can arise.[325] Accession raises a plethora of issues, discussion of which is outside the scope of this thesis.[326]

Evidently the relationship between the EU and Strasbourg is complex.[327] The Charter solidified the legitimacy of pan-European rights protection, representing a deepening of the European commitment to uphold rights.[328] The CJEU is clearly another powerful actor in rights protection.[329] Its power is heightened by the fact EU law can result in disapplication of national

[319] G. Harpaz, 'The European Court of Justice and its Relations with the European Court of Human Rights - The Quest for Enhanced Reliance, Coherence and Legitimacy' (2009) 46 CMLRev 105, 119, 122.
[320] ibid 121.
[321] ibid.
[322] De Búrca (n.290) 181.
[323] X. Groussot, N.L. Lorenz and G. Petursson, 'The paradox of human rights protection in Europe: two courts, one goal?' in O.M. Ardardóttir and A. Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU, and National Legal Orders* (Routledge 2016) 14-15.
[324] TEU (n.289) Article 6(2); Opinion 2/13 Draft international agreement on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454.
[325] T. Horsley, 'The Court Hereby Rules…' - Legal Developments in EU Fundamental Rights Protection' (2015) 53 JCMS 108, 109-113.
[326] C. Eckes**,** 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76(2) MLR 254.
[327] Space precludes analysis see S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 CMLRev 629.
[328] Harpaz (n.319) 12.
[329] Morano-Foadi and Andreadakis (n.302) 599.

law deemed incompatible with the Charter.[330] Yet, the supremacy of EU law[331] could arguably also contribute to legitimacy challenges, as it limits opportunities for Member States to resist EU law in the same way as ECHR law.[332] For instance, in terms of prisoner voting, if the CJEU opted to reflect or go beyond ECtHR's level of rights protection, this could affect the UK's scope to resist the ECtHR's prisoner voting jurisprudence - it could lead to the disapplication of conflicting UK legislation, potentially triggering broader reform of voting law.[333] This could result in the mitigating mechanisms associated with adjudication under the ECHR being circumvented. The intermingling of ECHR law and EU law could potentially *reinforce* European rights scepticism, bolstering the UK versus European courts narrative. Even though the CJEU has not usurped the role of the ECtHR in terms of rights protection,[334] the fact the remedial implications are more potent and the CJEU was not established as a human rights court can exacerbate legitimacy challenges, especially as EU law represents a greater encroachment into State sovereignty.

Chapters five and six explore the challenges that can result where a gap emerges between domestic and European interpretations of rights, particularly where the CJEU is perceived by the Member State to have gone too far, by setting the level of protection "too" high.[335] In such cases, the CJEU may be criticised for activist reasoning, stirring up challenges to its legitimacy in rights protection.[336] As Sarmiento notes, where a Charter right conflicts with a Member State's protection of fundamental rights it highlights the 'illusion' of cooperation.[337] This can result in a potentially irreconcilable inter-institutional clash, which provides insight into how these complex relationships function (or not) under pressure.

3.7 Conclusion

[330] see e.g. *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33, [2016] QB 347; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777.
[331] The supremacy of EU law requires that where national law conflicts with provisions of EU law which have direct effect, EU law will prevail, Case 6/64 *Costa v ENEL* EU:C:1964:66, paras 593-594.
[332] However domestic courts have provided scope to resist directly effective provisions, *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; *Thoburn v Sunderland City Council* [2002] 4 All ER 156.
[333] H. van Eijken and J.W. van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship? [2016] 12 EuConst 114, 131.
[334] Douglas-Scott, 'Fundamental Rights' (n.283) 273.
[335] L. Rossi, 'How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon' (2008) 27(1) YEL 65, 83.
[336] e.g. M. Dawson, 'The political face of judicial activism: Europe's law-politics imbalance' in M. Dawson, B. De Witte and E. Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013) 12-13.
[337] D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 CMLRev 1267, 1268.

This chapter illuminated some key tensions, complexities and challenges in European rights protection. The exploration of Strasbourg's multi-layered legitimacy highlights the various ways its legitimacy might be challenged. The sometimes strained dynamic between the UK and Strasbourg is informed by the UK's foundational reluctance to relinquish power, highlighting that in the UK, Strasbourg's normative legitimacy is on weaker ground. Concerns regarding the Court's democratic illegitimacy are exacerbated by the Court's foreign status – which heightens the institutional tensions associated with constitutional review. Such tensions can lead to States such as the UK, asserting sovereignty to resist Strasbourg and challenge Strasbourg's legitimacy.

The explication of key doctrines highlights that whilst they can enhance the legitimacy of the Court's judgments, in some cases, they undermine judgments' procedural legitimacy, fuelling broader challenges to the Court's legitimacy. Of crucial importance is the Court's 'multi-dimensional' legitimacy, that it must ensure rights protection, whilst also giving effect to its subsidiary function. The Court may be criticised by a State for getting the balance "wrong". For instance, analysis of the MoA shows that whilst it might constitute a manifestation of subsidiarity, its application can be criticised for undermining the procedural legitimacy of the Court's judgments, due to its inconsistent and opaque application.

Further, the CJEU has an influential role in rights protection and the legally binding status of the Charter strengthened this power, adding a further layer of complexity. Echoing the UK's relationship with the ECHR, the UK's reaction to the Charter was indicative of a pervasive reluctance to relinquish power. European rights protection is generally viewed by political branches in the UK with scepticism and scrutiny, as its legitimacy is conditional on States' acceptance and compliance. Therefore, this could exacerbate the institutional tensions that might arise where a judgment is perceived to be activist.

CHAPTER FOUR: THE DOMESTIC COURTS' ADJUDICATION OF PRISONERS' VOTING RIGHTS: A "LOSS" FOR THE DOMESTIC COURTS*

4.1 Introduction

This chapter explores the domestic courts' adjudication of prisoners' voting rights. It is argued that overall, the courts' "lost" in terms of their role in prisoner voting due to their reticence to exercise the constitutional role accorded to them under the Human Rights Act 1998 (HRA). This meant the judiciary were generally reluctant to engage with the political procrastination which contributed to a deleterious dilution of rights, as the clash has been controversially concluded with administrative amendments.

In exploring the domestic courts' failures that caused their loss, first, the High Court's judgment in *Pearson*[1] is considered, in which the court deferred to Parliament on the issue of prisoner voting (section 4.2). This established the foundations for the domestic courts' generally guarded approach. Judicial reticence to play their constitutional role under the HRA is principally apparent in the domestic courts' exercise of their discretion under s.4 of the HRA. Whilst many human rights cases raise difficult questions, some rights issues such as prisoner voting have proved particularly controversial, when they concern contested social or moral questions or become the subject of heightened political dissonance, resistance or hostility. In such cases, wider constitutional considerations become especially relevant. Such constitutional considerations might include tensions between courts, Government and/or Parliament, exacerbated by concerns regarding courts' lack of democratic credentials.[2] In controversial cases, these constitutional considerations may be prioritised, becoming an impediment to judicial use of s.4, resulting in an inconsistent approach and contributing to uncertainty. In particular, wider constitutional considerations may distract the court from the substantive human rights issues at play in the case, by leading the court to question the constitutional suitability of a declaration of incompatibility.

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* This chapter draws on material published in E. Adams, 'Judicial Discretion and the Declaration of Incompatibility: Constitutional Considerations in Controversial Case' [2021] PL 311.

[1] *R (Pearson) v Secretary of State for the Home Department* [2001] EWHC Admin 239, [2001] HRLR 39 (*Pearson*).

[2] See A. Kavanagh, 'Constitutional Review, the Courts and Democratic Scepticism' (2009) 62(1) CLP 102, 106-107.

Therefore, the domestic courts' adjudication of prisoners' voting rights, *Smith v Scott*[3] (*Smith*) and *Chester*[4] will be considered, assessing how the courts approached their discretion to make a declaration (sections 4.3-4.5). The Supreme Court's judgment in *Chester* will be the focus because it raises challenging issues concerning the judicial discretion to make a declaration. Crucially, it will be argued that the prisoner voting case study demonstrates problems with the judicial approach to s.4, establishing a "double filter mechanism". The first filter is the judicial 'decisional space' whether to grant a declaration and the second filter is the political 'decisional space' whether to 'accept' a declaration.[5] These filters are interconnected and courts may act strategically by considering expected political responses to the declaration.[6] This reinforces the judicial focus on constitutional considerations. Prisoner voting highlights the practical operation of this filtering mechanism. The Supreme Court's approach in *Chester* demonstrates the Court expanded its discretion in the first filter by prioritising constitutional considerations. This pre-empted the exercise of subsequent political discretion, based on a judicial interpretation regarding how that political discretion would (or would not) be exercised. In anticipation of negative political responses to the declaration, the Court was overly deferential. A further declaration was declined due to a complex interplay of constitutional considerations including; deference to Parliament, institutional defensiveness, uncertainty regarding the proper focus for review (legislation or litigant?) and the significance of Strasbourg's impact on the domestic courts. These factors problematically led the Court to adopt a hands-off approach, highlighting how the prioritisation of these constitutional considerations reinforced reticence over protecting rights contributing to the domestic courts' loss. To ensure such losses do not occur in the future, it is argued that a different approach should be adopted. Courts should recognise that a declaration respects parliamentary sovereignty as it maximises the exercise of political discretion. In *Chester* the Court should have granted a second declaration to reiterate the incompatibility.

This chapter argues that the reticence which is evident regarding the declaration extends to broader issues (sections 4.6 - 4.7). For example, the Supreme Court in *Chester* adopted a reticent approach to EU law, avoiding a preliminary reference to the Court of Justice of the European Union (CJEU). Further, in *Moohan*[7], the Court declined to go further than Strasbourg

[3] *Smith v Scott* [2007] CSIH 9, 2007 SC 345 (*Smith*).
[4] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 (*Chester*).
[5] C. Chandrachud, 'Reconfiguring the discourse on political responses to declarations of incompatibility' [2014] PL 624, 625.
[6] ibid.
[7] *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.

in terms of prisoners' voting rights in referendums and refrained from recognising a common law right to vote. The chapter then finally considers the implications of the domestic courts' "loss" (section 4.8).

4.2 *R (Pearson) v Secretary of State for the Home Department (Pearson).*

Prior to Strasbourg's adjudication of prisoners' voting rights in *Hirst,* domestically, the issue of prisoner voting was first considered by the High Court in *Pearson*.[8] The claimants, Mr Hirst, Mr Pearson and Mr Feal-Martinez, as convicted prisoners contested their disenfranchisement and sought a declaration that s.3(1) of the Representation of the People Act 1983 (RPA 1983) was incompatible with Article 3 of Protocol 1 (A3P1) and Article 14 of the European Convention on Human Rights (ECHR).[9] Kennedy J dismissed the claimants' request for a declaration on procedural grounds.[10] The court held s.3 RPA 1983 pursued a legitimate aim and deferred to Parliament on the issue of proportionality.[11]

In reaching this decision, Kennedy J held there had been 'careful evaluation' of prisoner voting by the elected branches.[12] This supported a deferential approach.[13] However, was it legitimate for the court to refer to parliamentary materials and conclude there had been 'careful evaluation'? Article 9 of the Bill of Rights 1689 enshrines an important feature of parliamentary privilege, 'that freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[14] This gave rise to the 'exclusionary rule' which precludes courts from referring to 'Parliamentary material as an aid to statutory construction'.[15] Over the years, this rule has been refined[16] and courts have sometimes considered 'parliamentary engagement with the human rights issue … when assessing compatibility'.[17] For instance, where Parliament has engaged with a human rights issue, courts 'have drawn a positive inference'.[18] Conversely, if there is a lack of 'parliamentary

[8] *Pearson* (n.1).
[9] ibid [1]-[6] (Kennedy J).
[10] ibid [6]; F. Klug, 'Judicial Deference under the Human Rights Act 1998' [2003] EHRLR 125, 131.
[11] ibid [40]-[41].
[12] ibid [7]-[9], [20].
[13] ibid [20].
[14] Bill of Rights 1689, Article 9.
[15] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, [1992] 3 WLR 1032 [630] (Browne-Wilkinson LJ).
[16] ibid [630]-[640] (Browne-Wilkinson LJ); *Wilson v First County Trust* [2003] UKHL 40, [2004] 1 AC 816 [56], [60], [67] (Lord Nicholls), [116] (Lord Hope), [142] (Lord Hobhouse).
[17] A. Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34(3) OJLS 443, 456 ('Parliamentary Debates').
[18] ibid.

engagement with the human rights issue' courts have drawn a 'negative inference'.[19] In *Pearson*, it is implicit that Kennedy J drew a positive inference from the prisoner voting debates in Parliament, which supported a deferential approach.[20]

Moreover, in further delineating parliamentary privilege, Kavanagh observes that an 'evaluative dimension' can be identified in courts' reasoning, where the 'quality' of the debate is noted by the court.[21] An assessment of the 'quality of the substantive reasons' is to trespass into 'the forbidden territories' but an assessment of the 'quality of the decision-making process in Parliament' might be permissible as the court is not assessing the 'merits of the individual arguments'.[22] In *Pearson*, Kennedy J referred to the 'quality of the decision-making process', as he praised Parliament's '*careful* evaluation' of prisoner voting law.[23] However, Lardy criticises the court's reliance on the 'extremely limited' parliamentary debate, reducing its 'evidential force'.[24]

The court then considered whether s.3 RPA 1983 satisfied the requirements established in *Mathieu-Mohin.*[25] Whilst the court conceded that s.3 RPA 1983 impaired the essence of prisoners' right to vote, the court held the legislation pursued a legitimate aim, 'there is an element of punishment and also an element of electoral law', prisoners have 'lost the moral authority to vote'.[26] However, Kennedy J refrained from assessing the proportionality of the measure and instead stated 'it was appropriate for the court to defer to the legislature', as prisoners' voting rights falls within the 'middle of the spectrum' of States' approaches to prisoner disenfranchisement.[27]

Overall, arguably the court applied 'substantial deference' to prisoner voting.[28] For instance, the court deferred to the superior '*law-making competence* of Parliament'.[29] The court also deferred on the grounds of democratic legitimacy.[30] Moreover, uncertainty regarding prisoners'

[19] ibid.
[20] *Pearson* (n.1) [7], [20] (Kennedy J).
[21] Kavanagh, 'Parliamentary Debates' (n.17) 443.
[22] ibid 465.
[23] *Pearson* (n.1) [20], [7]-[9] (Kennedy J).
[24] H. Lardy, 'Prisoner disenfranchisement: constitutional rights and wrongs' [2002] PL 524, 541; see R. Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859, 862; also criticised by the ECtHR in *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41, para 79 (*Hirst*).
[25] *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1, para 52.
[26] *Pearson* (n.1) [40].
[27] ibid [41].
[28] A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 348, 182, 193 ('*Constitutional Review*').
[29] ibid 182; see *Pearson* (n.1) [20].
[30] ibid 190; see *Pearson* (n.1) [20]-[22].

voting rights contributed to deference.[31] The uncertainty arose due to a dearth of domestic and European Court of Human Rights (ECtHR) case law on prisoner voting.[32] Therefore, the court relied on Canadian jurisprudence on prisoner voting.[33] In Canada, s.51(e) of the Canada Elections Act 1985 disenfranchised prisoners.[34] In *Sauvé (No.1)*,[35] the Canadian Supreme Court held the blanket disenfranchisement of prisoners was disproportionate.[36] Following *Sauvé (No.1)*, the legislation was revised so that prisoners serving 'custodial sentences of two or more years' were disenfranchised.[37] However, the revised legislation was subsequently subject to another legal challenge in *Sauvé (No.2)*.[38] The Federal Court of Appeal rejected this challenge.[39] The High Court in *Pearson* utilised *Sauvé (No.2)* to support its deferential approach.[40] Yet *Sauvé (No.2)* concerned the Federal Court's consideration of the *revised* legislation. Therefore, the High Court's reliance on *Sauvé (No.2)* is questionable, as the revised Canadian legislation was not comparable to s.3 RPA. Moreover, after *Pearson* was decided, *Sauvé (No.2)* was appealed to the Canadian Supreme Court and it was held the revised legislation was disproportionate.[41]

Foster criticises *Pearson* and argues the court should have utilised the HRA 'to alert Parliament' to the flawed legislation.[42] However, arguably the infancy of the HRA and the scarcity of case law on prisoner voting precluded robust rights review - it was more institutionally respectful to adopt a deferential approach. Yet the court's reliance on the Federal Court's judgment in *Sauvé (No.2)* was inapt and the proportionality analysis inadequate. The High Court's hands-off approach underpins the domestic courts' approaches to prisoners' voting rights.

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[31] ibid 189, 190.
[32] Whilst prisoner voting had not been considered by the ECtHR, the High Court noted there were three European Commission decisions which held the complaints 'manifestly ill-founded and therefore inadmissible' *Pearson* (n.1) [12].
[33] *Pearson* (n.1) [24]-[38], [40]. N.B. the court considered the 'practice elsewhere', including the United States, Canada and South Africa [12]. The court noted the absence of European consensus, with eight States disenfranchising prisoners, '20 European States' allow prisoners to vote and in 'eight other States the ban is more targeted than in the United Kingdom' [20]-[23].
[34] ibid [24], [27].
[35] *Sauvé v Canada (No.1)* [1993] 2 SCR 438.
[36] *Pearson* (n.1) [28].
[37] Edwards (n.24) 862.
[38] *Sauvé v Canada (No.2)* [2000] 2 CF 117; *Pearson* (n.1) [28].
[39] *Pearson* (n.1) [28].
[40] ibid [29].
[41] Noted in: *Hirst v United Kingdom* (2004) 38 EHRR 40, para 25; *Sauvé v Canada* [2002] 3 SCR 519, [2002] SCC 68, para 64.
[42] S. Foster, 'Prisoners, the right to vote and the Human Rights Act 1998 [2001] CovLJ 71, 78; Lardy (n.24) 544-545.

4.3 Prisoner voting and judicial discretion

The fact s.4 is discretionary has particularly important implications in especially controversial cases and the prisoner voting case study will highlight judicial uncertainties regarding the application of s.4. The analysis in chapter two revealed that the s.4 judicial decisional space may be shaped by various factors, such as the expected political response.[43] The different constitutional considerations which shaped the Supreme Court's decisional space in *Chester* will be explored and it will be argued that s.4 can be understood as a "double filter mechanism", the first filter being the judicial decisional space and the second filter being the political decisional space. This is framed as "filters", as the mechanism filters the discretionary choices in s.4. Looking at the prisoner voting cases will enhance understanding of how this double filter mechanism functions. In particular, prisoner voting reveals how the mechanism might problematically be used to inform a reticent approach.[44] Therefore the flaws in how the judiciary exercised their discretion highlights the challenges in domestic courts' ability to uphold rights and contributed to the "loss" to the domestic courts.

4.3.1 *Smith v Scott* (*Smith*)*:* declaration made

The court in *Pearson* declined to grant a declaration on procedural grounds.[45] After *Hirst,* where the Grand Chamber of the ECtHR held the UK's prisoner voting ban violated A3P1,[46] prisoner disenfranchisement was considered again in UK domestic courts in 2007 in *Smith* by the Registration Appeal Court, Scotland. The appellant, Mr Smith, was prohibited from voting in the Scottish Parliament elections whilst imprisoned.[47] Following *Hirst,* the court considered whether s.3 RPA 1983 could be interpreted to ensure compatibility under s.3 HRA and if not, whether a declaration under s.4(2) HRA was required.[48]

Regarding s.3 HRA, the court held there was 'no grain of the legislation which could properly serve as a starting point' to afford prisoners' voting rights.[49] This finding was further compounded by the 'extensive consultation' that would be required by the Government to

[43] see C. Mallory and H. Tyrrell, 'Discretionary Space and Declarations of Incompatibility' (2021) 32(3) KLJ 466.
[44] Notably, judicial reticence regarding s.4 is also evident in other especially controversial cases, e.g. *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 (*Nicklinson*) - concerning assisted suicide and *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, [2018] HRLR 14 (*Re NIHRC*) – concerning abortion.
[45] *Pearson* (n.1) [6].
[46] *Hirst* (n.24) paras 82-85.
[47] *Smith* (n.3) [2]-[3].
[48] ibid [7].
[49] ibid [26].

comply with *Hirst*, due to the multiplicity of potential 'policy options' and therefore, the court was unable 'to make an uninformed choice'.[50]

Consequently, the court considered s.4 HRA and held it had competence to make a declaration[51] and then considered whether it 'should' make a declaration.[52] In doing so, the court explicitly engaged with its discretion whether to make a declaration. Due to the proximity of the election for the Scottish Parliament in May 2007, the court considered that the matter was urgent.[53] In deciding whether the court should make a declaration the court fully delineated the history of the issue and considered external sources, including the Government's Action Plan, which detailed the timetable for compliance and the court noted that Counsel for the Secretary of State conceded that 'there had been some slippage in the timetable'.[54] The court also reviewed statements from Hansard which specified the steps taken by Government and noted that the 'the timetable in the action plan has … slipped badly'.[55] The court's reference to Hansard demonstrates how the court drew a negative inference from the elected branches delay in executing the judgment. However, the court refrained from analysing the substantive reasoning and therefore, remained outside the 'forbidden territories'.[56] Criticism underpins the court's assessment and the court stated, 'it would be surprising if the Government had not given some consideration to these issues, at least as a contingency, long before then. The question of prisoners' voting rights is not new'.[57]

The court considered Lord Nicholls' judgment in *Bellinger*[58] that when a court exercises 'its discretion' under s.4 'the court will have regard to all the circumstances … it is desirable that in a case of such sensitivity … the court of final appeal … should formally record that the present state of statute law is incompatible with the Convention'.[59] The court held Lord Nicholls' judgment 'applies equally, or with greater force, to this case' and whilst *Bellinger* dealt with arguably more sensitive issues, the current case is of 'far reaching importance'.[60]

[50] ibid [26]-[27].
[51] ibid [29], [34]-[35].
[52] ibid [38].
[53] ibid.
[54] ibid [40], [52].
[55] ibid [43].
[56] Kavanagh, 'Parliamentary Debates' (n.17) 456.
[57] *Smith* (n.3) [52].
[58] *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.
[59] ibid [55] (Lord Nicholls).
[60] *Smith* (n.3) [54].

Evidently, the persistent political failure to comply with *Hirst* was exacerbated by the 'live' issues in the case [61] and the court issued a declaration that s.3 RPA 1983 was incompatible with A3P1.[62] The declaration served a red flag function to impel action.[63] Further, as Sathanapally argues, the court had some 'confidence' that making a declaration would trigger 'a prompt legislative response'.[64] The judicial confidence was arguably fuelled by the high compliance with declarations, which in this case supported a declaration.

4.3.2 *Chester*: no further declaration

Following the declaration in *Smith*, political prevarication prevailed, the declaration remained outstanding and compliance with *Hirst* proved elusive. Despite non-compliance, UK courts held a further declaration would not be granted.[65] In 2013, on appeal to the Supreme Court (the Court), two prisoners Chester and McGeoch, convicted of murder and sentenced to life imprisonment, sought judicial review of their disenfranchisement.[66] Chester's claim concerned the right to vote in UK and European parliamentary elections. Counsel for Chester submitted s.3 RPA 1983 and s.8(2)(3) of the European Parliamentary Elections Act 2002 (EPEA 2002) should be declared incompatible with A3P1.[67] McGeoch relied on EU law regarding his disenfranchisement from 'voting in local municipal and Scottish parliamentary elections'.[68] Significantly, the Court considered whether to make a further declaration, which provides a valuable insight into how courts approach the judicial decisional space. Analysis will be focused on assessing Chester's claim for a declaration in the Supreme Court, alongside the preceding High Court and Court of Appeal judgments.

Whilst the Court followed consistent Strasbourg jurisprudence on prisoner voting, that s.3 RPA 1983 was incompatible with A3P1, the Court declined to make a second declaration. The Court noted the ECtHR in *Greens*[69] previously established s.8(2)(3) of the EPEA 2002 was 'incompatible with A3P1'.[70] Lord Mance held following the declaration in *Smith*, the issue was

[61] A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012) 98.
[62] *Smith* (n.3) [54], [56].
[63] A. Young, *Democratic Dialogue and the Constitution* (OUP 2017) 124 ('*Democratic Dialogue*').
[64] Sathanapally (n.61) 99.
[65] *R v Secretary of State Ex p Toner and Walsh* [2007] NIQB 18 [9]; *Traynor and Fisher v Scottish Ministers and Secretary of State for Scotland* [2007] CSOH 78 [11]; *R (Chester) v Secretary of State for Justice* [2009] EWHC 2923 (Admin), [2010] HRLR 6 [35] ('*R (Chester)* [2009]'); *R (Chester) v Secretary of State for Justice* [2010] EWCA Civ 1439, [2011] 1 WLR 1436 [27] [35] ('*R (Chester)* [2010]') and *Tovey v Ministry of Justice* [2011] EWHC 271, [2011] HRLR 17 [51].
[66] *Chester* (n.4) [1] (Mance JSC).
[67] ibid [38] (Mance JSC).
[68] ibid [3] (Mance JSC).
[69] *Greens and MT v United Kingdom* (2011) 53 EHRR 21, para 70 (*Greens*).
[70] *Chester* (n.4) [39] (Mance JSC).

under 'active consideration' by Parliament and emphasised a declaration is 'discretionary'.[71] For Lord Mance, there was 'no point in making any further declaration'.[72] Baroness Hale stated the Court 'should be extremely slow' to grant a declaration because the appellant had not suffered a violation.[73]

This thesis argues that the Court refrained from making a second declaration, based on constitutional considerations including: deference to Parliament, institutional defensiveness, uncertainty regarding the proper focus for review (legislation or litigant?) and the significance of Strasbourg's impact on the domestic courts.

4.3.2.1 Deference to Parliament

Was Lord Mance right to say there was 'no point' granting a further declaration? Due to the Government's recalcitrant response, both in executing *Hirst* and responding to the declaration in *Smith*, the Court had the opportunity to assert its weight to the issue. However, Lord Mance agreed with conclusions reached at first instance and by the Court of Appeal.[74] Burton J in the High Court judgment in *Chester*, stressed the constitutional limitations of the court's role, they should defer to the legislature, refraining from deciding issues of social policy, especially where matters 'are highly contentious'.[75] Laws LJ in the Court of Appeal reached similar conclusions.[76]

In the High Court, Burton J stated the declaration issued in *Smith* was 'binding on the UK Government'.[77] However, this is incorrect, declarations are declaratory - Government and Parliament are not bound to take remedial action.[78] Yet Burton J's assertion indicates a shift in judicial understanding, as high political compliance with declarations can support judicial understanding of s.4 as a stronger mechanism, affecting the judicial discretion whether to make a declaration. Whilst it would have been novel for the Supreme Court to have issued a second declaration, legally s.4 does not exclude multiple declarations in relation to the same issue. Instead, although Lord Mance noted the declaration in *Smith* was 'properly made', the Court

[71] ibid.
[72] ibid.
[73] ibid [102] (Hale JSC).
[74] ibid [39] (Mance JSC).
[75] *R (Chester)* [2009] (n.65) [61] (Burton J).)
[76] *R (Chester)* [2010] (n.65) [35] (Laws LJ).
[77] *R (Chester)* [2009] (n.65) (Burton J).
[78] C.R.G. Murray, 'We Need to Talk: Democratic Dialogue and the Ongoing Saga of Prisoner Disenfranchisement' (2011) 62 NILQ 57, 69 ('We Need To Talk').

refrained from engaging with or criticising the Government's protracted delay,[79] emphatically maintaining there was 'no further … role for this court'.[80] Baroness Hale acknowledged UK law had 'an element of arbitrariness',[81] yet courts must 'tread delicately'.[82] The Court deflected detailed engagement with s.4, deferring due to institutional expertise, constitutional constraints and the superior democratic credentials of Parliament. The deferential option was to refrain from issuing a second declaration.

Nevertheless, the Supreme Court could have taken a more robust approach, by at least critically noting the protracted delay, as Government and Parliament being aware of the issue does not equate to action. Yet, notably, reluctance to criticise the political delay is also evident in the preceding cases which arguably underpinned the Supreme Court's approach.[83] For instance, in the Court of Appeal, Laws LJ stated the Court should not 'sanction' the Government for delay by issuing a declaration.[84] That Laws LJ considered a *further* declaration as having a sanctioning function, reveals strategic concerns regarding the political reception to declarations, portraying s.4 as a powerful tool. However, the lack of judicial engagement with delay is damaging for rights protection. As Murray cautioned, if other courts followed Burton J's 'refusal' at first instance to make a second declaration, this limits the judiciary 'to only ever crying out once in response to a breach of human rights, no matter how long ministers procrastinate over reform'.[85] By not crying out the Supreme Court implicitly endorsed this limiting effect. Whether this will constrain future courts remains to be seen.

4.3.2.2 Institutional defensiveness: safeguarding the Court's institutional role

A further constitutional consideration possibly dissuading the Court from making a declaration is institutional defensiveness. It can be inferred that in declining to make a declaration, the Court was acting defensively for two possible reasons. A concealed factor which dissuaded the court from granting a declaration was the Government's non-compliance and recalcitrant attitude to the declaration in *Smith*. As noted, courts may act strategically, being mindful of political effects of declarations. Kavanagh argues when courts adopt a restrained approach there is an interaction between 'substantive' and 'institutional reasons'.[86] 'Substantive reasons'

[79] *Chester* (n.4) [39] (Mance JSC).
[80] ibid [42] (Mance JSC).
[81] ibid [96] (Hale JSC).
[82] ibid [87] (Hale JSC).
[83] *R (Chester)* [2009] (n.65) [34] (Burton J).
[84] *R (Chester)* [2010] (n.65) [27] (Laws LJ); see *Chester* (n.4) [2] (Mance JSC) (notes Laws LJ's reasoning).
[85] Murray, 'We Need to Talk' (n.78) 70.
[86] A. Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 UTLJ 23, 27 ('Judicial Restraint').

concern the 'legal merits of the legal question'.[87] 'Institutional reasons' concern the 'extent and limits' of the court's function and the appropriateness 'of judicial intervention'.[88] Courts are not impervious to 'political and social' repercussions of their judgments.[89] The 'political context' of judgments,[90] especially regarding prisoner voting was patent, as the political branches' recalcitrance towards Strasbourg, exacerbated the controversy. Kavanagh states as 'the weakest branch of government', courts are dependent on 'not alienating the legislature and executive' and '*institutional reasons* can sometimes defeat substantive reasons'.[91] From the Court's perspective, Government and Parliament were dealing with prisoner voting and regardless, Chester would not benefit from legislative changes.[92] Substantive reasons for issuing a declaration were less pressing, but institutional costs were heavier. Multiple declarations could undermine respect for parliamentary sovereignty, exacerbating institutional tensions. This demonstrates the significance of constitutional considerations on the judicial decisional space, which precluded a further declaration.

Arguably, this also reveals how there was little or no prospect of democratic dialogue with the political branches on the issue of prisoner voting. Yet conversely, in refraining from granting a declaration, the Court's message appears to be one of support for the elected branches' approach to prisoners' voting rights, furthering inter-institutional comity. For example, Young argues the Court might have refrained from issuing a declaration because Parliament would have seen it 'in a more negative light', which could undermine 'democratic dialogue' and 'constitutional collaboration'.[93] Young suggests in some cases where declarations are not issued this could give rise to 'a subtler form of inter-institutional interaction' which could 'encourage Parliament to re-investigate the issue'.[94] However, in terms of prisoner voting, this 'subtler form' is unlikely to apply, as Lord Mance asserted the issue was 'before … Parliament and under active consideration' (although considering the protracted delay, Lord Mance's assertion is questionable).[95] Whilst in *some* cases democratic dialogue might be a relevant constitutional consideration in exercising judicial discretion, there is no explicit evidence that the Court sought to 'collaborate' or 'counter-balance' with the political branches on this issue.

[87] ibid.
[88] ibid.
[89] ibid 35-36.
[90] ibid 36.
[91] ibid.
[92] *Chester* (n.4) [40] (Mance JSC).
[93] Young (n.63) 234.
[94] ibid.
[95] *Chester* (n.4) [39] (Mance JSC).

This reflects the discussion in chapter two, that the judiciary are not dissuaded from deferring, where deference results in limiting or precluding dialogue.[96] Rather, the Court distanced itself from the issue of prisoner voting, arguably to avoid exacerbating the controversy.

If the Court made a declaration which was ignored, this could have negative implications for the Court's authority and reputation and the effectiveness of s.4. Kavanagh contends 'reputational concerns' can contribute to courts opting for a 'restrained' approach.[97] Moreover, Chandrachud argues courts may fear that if a declaration is ignored or 'rejected', this could create 'a constitutional precedent' in which future declarations are disregarded.[98] As noted, high compliance might increase judicial confidence to make a declaration. Conversely, high compliance can *also* fuel judicial understanding that s.4 is a strong mechanism and requires greater deference from the courts. Yet, political reluctance to comply regarding prisoner voting might also be understood as an acknowledgement of s.4's *declaratory* nature, rather than as an affront to the power and legitimacy of the court. However, a subtext of institutional defensiveness can be inferred as underpinning the decision. Judicial understanding of the declaration as strong could reinforce judicial fears that a declaration would precipitate an adverse reaction from the political branches and therefore, a declaration may transgress the Court's constitutional and institutional role, undermining its legitimacy. Further, granting another declaration which was likely to be ignored could weaken the potency of s.4 and the Court's authority. Arguably, Bateup's contention that the judiciary might refrain from making declarations due to fear they 'will be ignored or not implemented'[99] is applicable in relation to prisoner voting. As Murray argues regarding the earlier High Court case, the court seemed to wish to 'remain aloof from the controversy', in 'splendid isolation from certain constitutional disputes'.[100] The Supreme Court's judgment reflects this approach. However, this aloofness caused the Court's loss as not making a further declaration impeded the Court from adding its authoritative weight to prisoners' voting rights. This meant the Court failed to hold the Government to account for its non-compliant approach to prisoners' voting rights and this diluted rights protection.

[96] A. Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 63(1) UTLJ 83, 115.
[97] Kavanagh, 'Judicial Restraint' (n.86) 35.
[98] Chandrachud (n.5) 633.
[99] C. Bateup, 'Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights' (2009) 32 Hastings Int'l&CompLRev 529, 568-568.
[100] Murray, 'We need to talk' (n.78) 74.

4.3.2.3 Uncertainty regarding the proper focus for review: legislation or litigant?

Baroness Hale endorsed the minority approach in *Hirst* which maintained legislation should not be reviewed *in abstracto* and queried whether Chester was a victim.[101] However, as Stark observes, although a victim is necessary to initiate 'an action against a public authority' (s.7 of the HRA), s.4 does not 'require an actual victim's rights to be violated'.[102] Such a restrictive approach in not required.[103] Baroness Hale considered s.6 of the HRA, stating the Electoral Registration Officer's refusal to include Chester 'on the electoral role … could not have been incompatible with *his* Convention rights, because … the Convention does not give him the right to vote' post *Scoppola*.[104] In declining to make a declaration, Baroness Hale argued to avoid 'unmeritorious claims' the Court should refrain from making a 'declaration … at the instance of an individual litigant with whose own rights the provision … is not incompatible'.[105] Yet, s.4 does not require declarations be declined on this basis. Baroness Hale accepted a 'declaration *in abstracto*' may be made 'irrespective of whether the provision in question is incompatible with the rights of the individual litigant', for 'borderline' cases.[106] However, Baroness Hale did not define when a case is borderline, unhelpfully contributing to inconsistent applications of s.4. Rather, Baroness Hale endorsed a narrow approach.[107] Yet parliamentary debates reveal s.4 does not require a case specific approach.[108] Lord Mance confirmed the legislation was incompatible, but also observed that Chester would not benefit from proposed legislative amendments, providing additional justification for denying a declaration.[109] Lord Mance therefore also implicitly endorsed a narrower approach to the judicial decisional space regarding s.4.

However, as Ziegler observes, the Convention '*does* give Mr Chester the right to vote', but after *Scoppola* 'a contracting state *may* legislate to disenfranchise prisoners serving life sentences'.[110] Baroness Hale's and Lord Mance's approach, minimises the fact that the legislation itself *remained* incompatible with A3P1. This is significant as it shows that focusing

[101] *Chester* (n.4) [100] (Hale JSC).
[102] S. Stark, 'Facing facts: judicial approaches to section 4 of the Human Rights Act 1998' (2017) 133 LQR 631, 639-640.
[103] ibid 640.
[104] *Scoppola v Italy (No.3)* [2013] 1 Costs LO 62, (2013) 56 EHRR 19 (*Scoppola*); *Chester* (n.4) [101] (Hale JSC).
[105] *Chester* (n.4) [100], [102] (Hale JSC).
[106] ibid [102] (Hale JSC).
[107] ibid.
[108] HC Deb 3 June 1998, vol 313, cols 459-460.
[109] *Chester* (n.4) [40] (Mance JSC).
[110] R. Ziegler, 'The missing right to vote: The UK Supreme Court's judgment in Chester and McGeoch' (*UKConstLBlog,* 24 October 2013) <http://ukconstitutionallaw.org> accessed 14 April 2022 (emphasis added).

on the litigant rather than the legislation to avoid granting a second declaration and avoid institutional conflict, was constitutionally and institutionally problematic. Essentially, by assuming that Parliament would not enfranchise these specific litigants, the Court transgressed its institutional role. This is because whilst the ECtHR had held that a blanket ban violated voting rights, significantly, it also held that *Parliament* must determine which prisoners would be enfranchised under new legislation. Therefore, the Supreme Court pre-judged a discretionary choice that was for Parliament to determine at the second filter stage. Instead it would have been preferable if the Court had clearly delineated the respective roles of the relevant UK institutions, noting that it had already been held that blanket bans breach human rights; that Parliament should decide on which prisoners will be enfranchised in compliance with the ECtHR's judgment in *Hirst*; that Parliament still had to act in response to the judgment; and therefore, the HRA required the Court to simply reissue a declaration.

This narrow approach appears partly informed by a pervading indifference towards the appellants. Baroness Hale had 'no sympathy' for the appellants, arguing Chester could not 'sensibly have a claim to a remedy under' the HRA.[111] This demonstrates how the judicial focus on the litigants fostered an unnecessary personal assessment, further constraining the Court's discretion. At the more extreme and arguably unjustified end of the spectrum, Lord Sumption stated for those serving a short sentence, which coincides with an election, it is no 'more significant than the fact that it may coincide with a special anniversary, a long anticipated holiday or the only period of fine weather all summer'.[112] This facetiousness worryingly minimises the importance of the right to vote. It is inappropriate to suggest the loss of the right to vote is equivalent to missing a holiday or fine weather. There is no right to fine weather. Lord Sumption's focus was not on the exercise of the discretion under s.4, but on whether the Court 'should apply the principles … in *Hirst*'.[113] Nevertheless, Lord Sumption's views illustrate the potential perils of a personal focus on the appellant, revealing disregard for prisoners whose rights have been violated.

Overall, the narrow approach is problematic. As Buxton comments, it can detract from the potential for declarations to serve a 'wider purpose'.[114] Conversely, Stark argues that despite

[111] ibid [100] (Hale JSC).
[112] ibid [115] (Sumption JSC).
[113] ibid [112] (Sumption JSC).
[114] R. Buxton, 'The future of declarations of incompatibility' [2010] PL 213, 221.

some cases advancing a narrow approach, some courts are embracing expository justice.[115] This demonstrates the importance of a contextual analysis when assessing the judicial discretion, exemplifying the malleability of s.4. The malleability enables the decision whether to make a declaration to be approached flexibly, but it also creates inconsistent approaches, contributing to confusion regarding s.4, undermining legal certainty.

4.3.2.4 The significance of Strasbourg's impact on the domestic courts

The prisoner voting context is complex: the UK's procrastination addressing the declaration in *Smith* was part of a multi-institutional picture and the political branches' obstinacy was inextricably linked to political hostility towards Strasbourg, not to the domestic courts.[116] In approaching the judicial decisional space whether to make a declaration, the Court appears mindful of this contentious political context. Young suggests the decision not to make a declaration arguably shows the Court 'indirectly' undermining the ECtHR's judgment, representing an 'indirect form of constitutional counter-balancing',[117] which could 'be misconstrued as indirectly condoning the breach of Convention rights'.[118] It could be interpreted as indirect criticism and/or resistance to Strasbourg. For example, whilst Lord Sumption confirmed Strasbourg jurisprudence should be taken into account, his judgment is interlaced with criticism of Strasbourg's approach to prisoner voting.[119] Moreover, a pervading judicial weariness with prisoner voting litigation is evident.[120] Refraining from granting a declaration and engaging in criticism of political delay enabled the Court to remain detached from the controversy, perpetuating the violation.

However, arguably the Court also applied Strasbourg jurisprudence to *support* the decision to refrain from making a declaration. Article 46 of the Convention requires Contracting States to implement decisions of the ECtHR to which they are a party.[121] The Court considered its role in accordance with s.2 of the HRA.[122] Lord Mance held that domestic courts can depart from Strasbourg jurisprudence 'in the confidence that the reasoned expression of a diverging

[115] Stark, 'Facing facts' (n.102) 631, 632 – e.g. *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56, [2017] AC 365 [39].
[116] See C.R.G. Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2013) 66 ParlAff 511, 527-531.
[117] Young (n.63) 268, 273.
[118] ibid 274.
[119] *Chester* (n.4) [135]-[137] (Sumption JSC).
[120] *Chester* [39] (Mance JSC).
[121] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) 1950, Article 46 (ECHR).
[122] *Chester* (n.4) [25]-[35] (Mance JSC).

national viewpoint will lead to a serious review of the position in Strasbourg'.[123] However, crucially, Lord Mance observed the Court could only refuse to follow Strasbourg jurisprudence 'at the Grand Chamber level' where there is 'some truly fundamental principle of our law or some most egregious oversight or misunderstanding'.[124] Therefore, the Court mirrored Strasbourg jurisprudence. As noted, whilst Strasbourg jurisprudence which had established that the UK's prisoner voting ban violated A3P1 was followed, the Court was also persuaded that post *Scoppola* 'a lifelong ban on voting by prisoners sentenced for five or more years was legitimate'.[125] Lord Mance emphasised there was 'no prospect of any further meaningful dialogue between United Kingdom courts and Strasbourg'.[126] Dialogue was foreclosed, as although Lord Mance observed that cases such as *Horncastle* gave rise to 'valuable' dialogue between the courts, 'there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice'.[127] The consistent consideration of prisoners' voting rights by the Grand Chamber, was a factor which weighed against any dialogue.

Further, in *Greens* the ECtHR noted that domestic courts confirmed 'there was nothing to be achieved by the applicants in pursuing their legal challenges … in the hope of obtaining a further declaration'.[128] Moreover, the ECtHR in *Greens* also cast doubt on the effectiveness of the declaration as a remedy.[129] Whilst the Supreme Court did not refer to this, *Greens* provides evidence that Strasbourg also considered a further declaration unnecessary. Lord Mance noted the ECtHR in *McLean*[130] established it was necessary 'to defer consideration of applications concerning future elections' due to 'the ongoing parliamentary process', which was 'consistent' with the decision not to make a further declaration.[131] Parliament's consideration of the issue, rendered the Court's intervention unnecessary. Therefore, Strasbourg jurisprudence, particularly *Scoppola*, was used by the Court to support the judgment against a further declaration.[132]

[123] ibid [27] (Mance JSC).
[124] ibid.
[125] ibid [40] (Mance JSC).
[126] ibid [34] (Mance JSC).
[127] ibid [27] (Mance JSC); *R v Horncastle* [2010] 2 AC 373, [2010] 2 WLR 47.
[128] *Greens* (n.69) para 68.
[129] ibid para 68; see *Burden v United Kingdom* (2008) 47 EHRR 38, paras 40-43.
[130] *McLean and Cole v United Kingdom* (2013) 57 EHRR SE8 (*McLean*).
[131] *Chester* (n.4) [39] (Mance JSC).
[132] Ziegler (n.110); see *Scoppola* (n.104).

The Court's non-interventionist approach is arguably an expression of comity with Government and Parliament *and* following Strasbourg jurisprudence is an expression of comity with Strasbourg. It sought to keep Government, Parliament *and* Strasbourg onside, enabling the Court to avoid becoming mired in the constitutional controversy. The contours of the judicial decisional space are delineated by constitutional considerations and the anti-Strasbourg political context. Prisoner voting was *so* controversial, the Court applied a detached approach, avoiding engaging with political non-compliance. However, this is problematic, as the domestic courts' deliberate distance demonstrates a preoccupation with constitutional considerations at the expense of protecting rights which resulted in the domestic courts' loss.

4.4 The double filter mechanism: prisoner voting and constitutional considerations

The Court's prioritisation of constitutional considerations precluded a further declaration, highlighting problems with s.4. To explore this further, s.4 is presented as establishing a double filter mechanism. The first filter concerns the judicial decisional space whether to grant a declaration. If a declaration is made, the court may provide guidance through *obiter* recommendations.[133] Even where the court refrains from making a declaration, the court may still criticise the legislation or provide recommendations.[134] The second filter is the 'political decisional space' whether to accept a declaration.[135] If the political branches remedy a declaration, the political 'remedial space' then applies.[136] Crucially, the filters are interconnected. The first, judicial filter, can inform the operation of the second, political filter; where a declaration is made, the political branches then consider the declaration. Judicial awareness of the second filter can impact on the operation of the first filter, as courts consider how the political branches will react.

Further, constitutional considerations add another layer to this analysis. In exercising judicial discretion, constitutional considerations arising in the first filter are shaped by the courts' anticipation of possible constitutional issues at the second filter stage. Such constitutional issues may include the broader constitutional context, such as political resistance to the rights issue. The court then expands its discretion in the first filter by prioritising constitutional

[133] Chandrachud (n.5) 627-629.
[134] e.g. *Re NIHRC* (n.44) [135] (Mance JSC); a declaration was not made in *Re NIHRC*, but nonetheless, Lord Mance noted 'the present law clearly needs radical reconsideration. Those responsible for ensuring the compatibility … will no doubt … take account of these conclusions, at as early a time as possible, by considering whether and how to amend the law.'
[135] Chandrachud (n.5) 625.
[136] ibid.

considerations, to pre-empt the exercise of the second filter. Political antipathy towards prisoner voting, as exemplified by political resistance to Strasbourg, provided the broader constitutional context. This underpinned how the Supreme Court regarded the constitutional issues which could arise in relation to the second filter, if the Court made a further declaration, it was likely to be ignored. Therefore, we need to further unravel how the first filter constitutional considerations were connected to and shaped by anticipation of second filter constitutional issues.

Deference was a key constitutional consideration. In anticipating potential second filter constitutional issues, the Court considered that a declaration had been made and Parliament was considering the issue. Therefore, the Court sought to evade a perception of precipitating political reassessment of the issue. It was reluctant to be regarded as trespassing into Parliament's *democratic* remit.[137] The delicate constitutional context necessitated caution, reinforcing a deferential approach in the first filter: it was more deferential to refrain from a second declaration. The discretionary, declaratory nature of the declaration was asserted.

The Court also applied institutional defensiveness, if the Court made a further declaration, there may be undesirable repercussions at the second filter stage. Judicial understanding of the declaration as strong arguably contributed to fear that a further declaration might be institutionally disrespectful, possibly triggering political backlash. Further, if a declaration was ignored, it might undermine the Court's authority and the potency of declarations.

The constitutional consideration regarding the proper focus for review also posed issues. The Court adopted a narrow approach, focusing on the litigants' case being unpersuasive, enabling the Court to avoid engaging in a broader assessment of the incompatible legislation. Cognisance of the second filter shaped this consideration, as the Court sought to minimise exacerbation of institutional tensions. The narrower focus provided further justification for refraining from a declaration. It also demonstrated to the political branches that the Court considered the litigants could be excluded from future legislative amendments.[138] This shows how the judicial exercise of discretion at the first filter stage shapes the discretion at the second filter stage.

[137] *Chester* (n.4) [42] (Mance JSC).
[138] ibid [40] (Mance JSC).

Regarding the significance of Strasbourg's impact, the Court sought to avoid being caught in the middle of the clash between the UK political branches and the ECtHR. In seeking to appease both, the Court accepted the ECtHR's jurisprudence to support refraining from granting a further declaration, keeping the domestic political branches onside. The Court utilised its discretion as an intermediary between Strasbourg and the UK political branches by following the ECtHR's principles, whilst also avoiding adding to the existing pressure on the political branches to reach a decision at the second filter stage.

The double filter mechanism therefore demonstrates how constitutional considerations arise from the existence of the dual discretion in s.4. Prisoner voting shows how certain considerations problematically perpetuate a reticent and inconsistent approach to s.4, as they are prioritised to pre-empt political discretionary judgments, contributing to uncertainty. These constitutional considerations led the Court to adopt a non-interventionist approach. Arguably, this is understandable because, as Sathanapally argues, 'courts are not immune from public outrage'.[139] Prisoner voting is a controversial issue, the Court sought comity with Government and Parliament, which impeded engagement with the protracted political delay. Yet this approach is problematic, as to further inter-institutional comity the Court put on its institutional blinkers, shutting out the lengthy political procrastination. The political delay represented dual non-compliance, as the prevarication undermined the UK's international legal obligation to comply with *Hirst* and resulted in the declaration being ignored. Judicial confidence that *Parliament* would amend legislation in the second filter was misguided. Rather, the Government introduced *administrative* amendments, merely extending enfranchisement for up to one hundred prisoners[140] and the Committee of Ministers of the Council of Europe (CM) closed supervision of *Hirst.*[141] Parliament's involvement was circumvented.[142] The Court's prioritisation of constitutional considerations helped afford leeway to the *executive*.[143] The domestic courts' blinkered approach ultimately contributed to a dilution of rights protection, as demonstrated by the Government's administrative amendments. This signifies a "loss" for the domestic courts, highlighting how judicial reticence regarding prisoner voting contributed

[139] Sathanapally (n.61) 185.
[140] HC Deb 2 November 2017, vol 630, cols 1007–1008; See E. Adams, 'Prisoners' Voting Rights: Case Closed?', (*UKConstBlog,* 30 January 2019) <https://ukconstitutionallaw.org/> accessed 14 April 2022 ('Prisoners' Voting Rights').
[141] Ministers' Deputies, Supervision of the execution of the European Court's judgments, CM/ResDH(2018)467 (1331st meeting, 4-6 December 2018) <https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2018)1331/H46-35E> accessed 14 April 2022.
[142] e.g Adams, 'Prisoners' Voting Rights' (n.140).
[143] e.g. Stark, 'Facing Facts' (n.102) 633.

to rights protection being undermined. This "loss" is further elucidated in chapter six, as the political branches' response to domestic case law is explored.

4.5 Implications: the double filter mechanism and prioritisation of constitutional considerations

Notably, s.4 is discretionary and courts *may* refrain from granting a declaration.[144] However, as demonstrated in *Chester*, this may foster judicial reticence. This may compound underlying issues regarding s.4, perpetuating an inconsistent judicial approach resulting in the loss to the domestic courts.[145] It is questionable whether it would be preferable if declarations under s.4 were made mandatory, that courts *must* make a declaration once an incompatibility is found. However, it remains important that the discretion is retained, as noted in chapter two, Lord Irvine stated the declaration is 'a *discretionary* remedy': cases may arise where courts do 'not wish to make a declaration' due to 'the facts'.[146] Whilst not expressed as a closed list of factors, Lord Irvine indicated 'there might be an alternative statutory appeal route … or … any other procedure which … the applicant should exhaust before seeking a declaration' but 'in the great majority of cases courts would … make declarations'.[147] It is apparent that Parliament intended the judicial decisional space to be constrained, where legislation is held incompatible, the aforementioned limited factors would result in courts refraining from making a declaration. It is clear these limited factors do not apply to *Chester,* the facts in this case support a declaration, mainly the continued violation of voting rights, and there is no evidence that an alternative statutory appeal route or procedure should have been exhausted. This demonstrates that a second declaration should have been made.

Further, it is clear the retention of the discretion in s.4 is important as whilst in the majority of cases courts should make a declaration, as Lord Irvine stated, sometimes the facts might indicate a declaration is unwarranted. For instance, arguably the Court would have reached different conclusions as to whether a declaration should have made depending on what stage of the prisoner voting timeline the Supreme Court's judgment in *Chester* was held. Notably, Lord Mance stated the issue was 'before … Parliament and under active consideration'.[148] Yet

[144] *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, [2018] 3 WLR 415 [54], [57], [61] (Kerr JSC) (*Steinfeld*); see e.g. C. O'Cinneide, 'Human Rights and the UK Constitution' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 86.
[145] See E. Adams, 'Judicial Discretion and the Declaration of Incompatibility: Constitutional Considerations in Controversial Case' [2021] PL 311, 325-333 for discussion of how this applies in *Nicklinson* and *Re NIHRC.*
[146] HL Deb 18 November 1997, vol 583, col 546.
[147] ibid (emphasis added).
[148] *Chester* (n.4) [39] (Mance JSC).

was Parliament actively considering prisoner voting and to what extent should this impact on judicial discretion to make a declaration? *Chester* was held on 16 October 2013 and the judgment fell between the publication of the Voting Eligibility (Prisoners) Draft Bill on 22 November 2012[149] and the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill on 18 December 2013.[150] After the Supreme Court's judgment in *Chester*, the Joint Committee conducted pre-legislative scrutiny and published a report in which the Committee criticised the Government's inclusion of a proposal to retain the ban.[151] Therefore, the Joint Committee's report exposes qualms regarding the legitimacy of the Government's aims regarding prisoner enfranchisement. This demonstrates that at the time of Supreme Court's judgment in *Chester*, the Court should have made a second declaration – it would have constituted a clear statement from the Court that it did not condone the continued violation of prisoners' voting rights. Further, despite the draft Bill, considering the Government's continued general resistance to enfranchising prisoners and hostility towards Strasbourg, it was far from guaranteed that the political branches would act. Indeed it transpired that whilst the Committee recommended that a Bill should be introduced at the start of the 2014-15 session, no Bill was introduced.[152] Therefore, a further declaration might have been a factor which led to the formal introduction of the Bill to Parliament and this might have encouraged compliance.

Yet arguably where an issue is further along the legislative process, a point might be reached where it would be inappropriate for the courts to grant a declaration.[153] For instance, if a prisoners' voting rights Bill had been debated in the Commons and was currently before the Lords, should the Court have made a further declaration? A further declaration would still have been permitted legally – the court could still have a role in reiterating to Parliament to that legislation is incompatible and a declaration would still respect parliamentary sovereignty.[154] Despite this, on balance, in light of the particularly controversial constitutional context *if*

[149] Ministry of Justice, *Voting Eligibility (Prisoners) Draft Bill* (Cm 8499, 2012) (MOJ, '*Draft Bill*').
[150] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL Paper 103, HC 924) 62-63 ('Joint Committee on Draft Bill').
[151] ibid.
[152] e.g. *Bellinger* (n.58) [51]-[53] (Lord Nicholls) – 'The government's announcement of forthcoming legislation' did not remedy the incompatibility'.
[153] see Mallory and Tyrrell (n.43) 486-488; N.B. there is conflicting dicta on this issue e.g. in *Nicklinson* (n.44) [116] (Neuberger PSC) the Assisted Dying Bill was before Parliament and Lord Neuberger determined it was not appropriate to grant a declaration 'where the legislature is and has been actively considering the issue'; cf [345] (Kerr JSC) 'it is irrelevant to the compatibility of section 2(1) that Parliament has debated this issue a number of times without repealing that section'.
[154] E.g. *Steinfeld* (n.144) [58] (Kerr JSC) the amendment to a Bill did 'not herald any imminent change in the law to remove the admitted inequality of treatment. Even if it did, this would not constitute an inevitable contraindication to a declaration'.

Parliament *was* actively redressing the issue this might have indicated that a *further* declaration may have been unwarranted at this stage. This is because if there was a strong indication that Convention compliant legislation was imminent, then the core issue of non-compliance would be resolved, as both the ECtHR's judgment would be complied with and the first declaration would be remedied.

Therefore, this discussion demonstrates how the judicial decisional space whether to make a declaration might have been informed by the stage at which the issue of prisoner voting fell on the political timeline. At the stage where David Cameron proclaimed prisoner voting made him 'physically ill' and no action was being taken to redress *Hirst*, this could have been a factor which *strongly* indicated a declaration to reiterate the incompatibility and place pressure on the Government. Further, even at the *draft* Bill stage, a further declaration was still warranted as Convention compliant legislative amendment was not guaranteed and the political narrative remained predominately negative towards enfranchising prisoners. Yet a further declaration might have been unnecessary if the Bill was before Parliament and Convention compliant legislation was imminent, as the issue of non-compliance would have been resolved. Therefore, this illustrates how the retention of the s.4 discretion remains important.

Moreover, whilst the nature of rights protection under the HRA regularly involves courts' consideration of the boundaries of their role and relationships with other institutions,[155] as *Chester* shows, the core problem is the way constitutional considerations are used. They become the means of avoiding a declaration. The double filter mechanism demonstrates that in prisoner voting, first filter constitutional considerations are inexorable. Therefore, how should the judiciary apply constitutional considerations? Arguably courts could still recognise possible constitutional issues in the second filter and the importance of constitutional considerations in the first filter, but crucially, they should not be an obstacle to a declaration. Instead, different constitutional considerations can be applied to support making a declaration. For instance, in respecting parliamentary sovereignty, s.4 facilitates the exercise of political discretion at the second filter stage, leaving the political branches to determine their response to a declaration. Courts should therefore consider that the broad discretion is better exercised at the second filter stage, rather than the first filter stage. The political branches are better placed to determine the issue, respecting the democratic legislature. Moreover, in upholding

[155] e.g. Kavanagh, 'Judicial Restraint' (n.86) 28–29; J.E.K. Murkens, 'Judicious review: The constitutional practice of the UK Supreme Court' (2018) 77(2) CLJ 349.

the rule of law, the statutory scheme of s.4 is designed to afford the political branches opportunity to exercise their discretion at the second filter stage. The primary focus should be the incompatible legislation and courts should be clear that to show deference to Parliament, a declaration *remains* the best strategy, being of 'declaratory effect only'.[156] Courts should ensure they use the first filter to maximise the opportunities for political discretion at the second filter stage, rather than deferring due to reticence in a way which ultimately minimises opportunities for political discretion.

Yet it is conceded this approach might pose challenges, as paradoxically, the very existence of the double filter mechanism pushes the courts towards factors which promote reticence. The importance of political discretion within the mechanism can result in greater implicit weight being accorded to arguments that courts should defer in advance. Arguably judicial attention has been uneven, with greater attention having been accorded to the constitutional considerations which lead to reticence, whereas constitutional considerations which support granting a declaration have received comparatively little judicial attention.[157]

However, when the mechanism of s.4 is correctly understood, it reduces the scope for courts to use constitutional considerations as reasons to refrain from granting a declaration – the best way that courts can ensure parliamentary sovereignty is respected is by making a declaration.[158] A declaration remains respectful of institutional boundaries, as Parliament still has discretion whether to respond to a declaration at stage two of the double filter mechanism. Therefore, in *Chester* the Court could have applied different constitutional considerations in the first filter and in looking to the second filter, stressed that a declaration respects parliamentary sovereignty and could be used to justify the Court adding its weight by making a declaration. Domestic courts should be confident that the HRA affords courts the constitutional responsibility and legitimacy to make authoritative statements through declarations to reinforce human rights protection and to formally alert Parliament to incompatible legislation maximising the political decisional space at the second filter. Therefore, granting a declaration is more institutionally respectful than the existing judicial approach which leads the judiciary to pre-empt the exercise of political discretion based on judicial anticipation of the political response. Courts should be confident in their constitutional role, even if this risks upsetting the

[156] E. Wicks, 'The Supreme Court Judgment in Nicklinson: One Step Forward on Assisted Dying; Two Steps Back on Human Rights' (2014) 23(1) MedLRev 144, 154.
[157] e.g. *Steinfeld* (n.144) [53], [54], [56]-[58], [61].
[158] e.g. *Re NIHRC* (n.44) [39] (Hale PSC).

political branches and even if this results in declarations being ignored more often. If declarations were ignored more frequently, this would not weaken the judicial role but rather it would demonstrate that the judiciary was actively fulfilling its role within the scope of the legislation: the judiciary makes a declaration at stage one; the political branches can choose whether to accept this at stage two of the double filter mechanism.

Moreover, in terms of prisoner voting, it is notable that a breach had *already* been established by both the ECtHR and a domestic court had found the legislation incompatible. This prior finding of a breach could have been utilised by the Court in different ways. For instance, the Court could have used this factor, that a breach had already been found, to give the Court confidence to grant a further declaration. Alternatively, as a breach had already been found this could have been used to indicate that a further declaration was unnecessary. The Court opted for the latter option. However, arguably the Court's decision to view a prior determination of a breach as requiring non-intervention was wrongly decided. This is because whilst a breach had been found, this did not mean that it had been remedied – the Court overlooked the political branches continued non-compliance and that prisoners' voting rights remained violated. Therefore, the fact that a breach of the right to vote had been determined by both a domestic and supranational court, should have given the Supreme Court further confidence that making a second declaration was warranted, as this would have reinforced the domestic and supranational courts' efforts to secure compliance which could have reduced scope for political prevarication. As Parliament was *already* aware that legislation was incompatible, in this instance, a further declaration would have had a different function: to reiterate the incompatibility.[159] Of course, the political branches could still have ignored this and the administrative amendments could still have been the outcome. However, if the *Supreme Court* had made a declaration this would have represented a powerful message that it also objected to the sustained breach. This may have attenuated the ultimate "loss" for the domestic courts, demonstrating the Court is an active actor in addressing sustained political breaches of Convention rights. Therefore, this demonstrates that the Court should have made a further declaration of incompatibility.

4.6 Broader issues: reticence beyond the declaration

[159] Young (n.63) 234.

Domestic judicial reticence regarding prisoner voting extends beyond s.4. The remaining sections consider the additional ways in which the Supreme Court in *Chester* and subsequently, in *Moohan*, also adopted a generally reticent, restrained approach to the issue of prisoner voting. This contributes to domestic courts' "loss" in terms of the protection of prisoners' voting rights.

4.6.1 *Chester*: EU Law

Having considered the Supreme Court's approach in *Chester* to s.4, this section explores the Court's consideration of EU law. The additional dimension of EU law exposes further layers of complexity, raising issues regarding the effect of EU law domestically, the Court's interpretation of the CJEU's case law and the Court's consideration of the relationship between the CJEU's and the ECtHR's jurisprudence.

In *Chester,* Counsel for McGeoch relied on EU law to contest his disenfranchisement from 'voting in local municipal and Scottish parliamentary elections'.[160] However, McGeoch's claim he had a right to vote in Scottish parliamentary elections under EU law was dismissed, as it did not fall under either European Parliament (EP) or municipal elections.[161] The Court addressed the appellants' submissions that: Strasbourg jurisprudence on the right to vote had been imported into EU law and Articles 20 and 22 fTFEU, alongside Articles 39 and 40 of the Charter, enshrined an individual right to vote in EP elections.[162] Counsel for Chester 'adopted' McGeoch's submissions and also relied on Articles 6(3), 10 and 14(3) TEU arguing they incorporated Strasbourg jurisprudence on prisoner voting into EU law.[163]

Lord Mance conducted a thorough examination of *Spain v United Kingdom*[164] (*Spain*) and *Eman and Sevinger* (*Eman*)[165] in relation to the 'scope and effect of European Treaty law'.[166] These cases were decided prior to the legally binding status of the Charter.[167] The Court concluded they demonstrated there was no individual right to vote in EP elections 'which must be measured' in relation to Strasbourg jurisprudence on prisoner voting.[168] Lord Mance

[160] *Chester* (n.4) [3] (Mance JSC).
[161] ibid [45] (Mance JSC).
[162] ibid [46], [48] (Mance JSC).
[163] ibid [46] (Mance JSC).
[164] ibid; C-145/04 *Spain v United Kingdom* [2006] EU:C:2006:543 (*Spain*).
[165] Case C-300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag* [2006] EU:C:2006:545 (*Eman*).
[166] *Chester* (n.4) [48] (Mance JSC).
[167] H. van Eijken and J.W. van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship? [2016] 12 EuConst 114, 118.
[168] *Chester* (n.4) [56] (Mance JSC).

stressed that as provided for by 'the Treaties and the 1976 Act', the right to vote should be determined at the domestic level, and is 'a matter for national Parliaments, being of considerable national interest'.[169]

The Court then addressed submissions regarding Articles 20(2) and 22 TFEU, which detail voting in EP and municipal elections.[170] Lord Mance held there is no indication that Article 20(2)(b) TFEU bestows individual rights.[171] It is 'implicit' this article refers to 'citizens resident in a state other than that of their nationality'.[172] Article 20(2)(b) TFEU was not 'a self-standing provision' and following *Spain* and *Eman*, it concerned 'equal treatment' in terms of 'citizens residing in member states of which they were not nationals to be able to vote' and these rights are also contained in Article 22 TFEU.[173]

Lord Mance dismissed submissions regarding non-discrimination (Articles 18 and 19(1) TFEU) and distinguished the present case from the conclusions in *Eman* where, 'There was no justification for this different treatment of comparable situations in a context which fell within the scope of European law, that is voting by nationals residing *outside their own member state*'.[174]

The Court determined that there must be an additional link to EU law: EP elections are insufficient to engage the general principle of non-discrimination, there must be cross-border movement.[175] Lord Mance argued that *even* if the Court held that non-discrimination applied, there must be comparability, which was not relevant to the applicants, as prisoners are not in a comparable position to those who are free or on remand.[176]

Despite concluding there was no freestanding right to vote, Lord Mance also considered the appellants' claim in the alternative, assuming an individual right to vote under EU law had been affirmed.[177] Lord Mance held that even if there was such a right, the CJEU would have been unlikely to depart from the ECtHR's case law and would not 'go further' than

[169] ibid [58] (Mance JSC); Act concerning the election of the members of the Assembly by direct universal suffrage [1976] OJ L278/5 ('The 1976 Act').
[170] Consolidated Version of the Treaty on the Functioning of the European Union, Articles 20 and 22 (TFEU); *Chester* (n.4) [13] (Mance JSC).
[171] *Chester* [59] (Mance JSC).
[172] ibid.
[173] ibid.
[174] ibid [63] (Mance JSC) (emphasis added); TFEU (n.170) Articles 18 and 19(1).
[175] ibid [64] (Mance JSC).
[176] ibid [65] (Mance JSC).
[177] ibid [70] (Mance JSC).

Strasbourg.[178] The only relief could be a 'generally phrased declaration' that legislation in the UK was 'inconsistent with European Union Law'.[179] However, it is 'improbable that Convention rights' would necessitate 'the granting of declarations in the abstract' where it would be unlikely they would benefit from any proposed new scheme.[180] The Court would be unable to 'disapply' the prohibition on prisoner voting and to 'devise an alternative scheme of voting eligibility', as this would trespass into legislative territory.[181]

In terms of whether to grant a preliminary reference, courts of last instance are obliged to refer the issue to the CJEU[182] unless, for example, an issue is *acte clair*.[183] The CJEU in *CILFIT* held that an issue is *acte clair* where 'the correct application of Community law is so obvious as to leave no scope for any reasonable doubt'.[184] In *Chester*, Lord Mance argued the conclusions reached are '*acte clair*', being not 'open to reasonable doubt' and are 'by themselves sufficient to resolve the appeals'.[185] Therefore, the Court held it was unnecessary to make a preliminary reference.[186]

4.6.1.1 New scope for judicial input or a resistant approach to EU law?

In declining to grant a preliminary reference, arguably the Court's reliance on *Spain* and *Eman* to conclude that there is no individual right to vote in EP elections is understandable, as the CJEU in these cases established that Articles 20(2)(b) and 22 TFEU concerned equal treatment and the right to vote was for Member States to determine.[187] Nonetheless, Coutts argues that on reflection, the Supreme Court's conclusion that there is no individual right to vote is questionable.[188] The CJEU in *Spain* and *Eman* did not expressly state 'there is no right to vote attaching to Union citizenship' or 'that no such right existed for Union citizens'.[189] Further, *Spain* and *Eman* were decided prior to the Treaty of Lisbon and prior to Charter being legally

[178] ibid.
[179] ibid [72] (Mance JSC).
[180] ibid.
[181] ibid [74].
[182] As per TFEU (n.170) Article 267.
[183] for discussion of other situations where the court of final instance is not required to refer note Case 283/81 *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335, para 21, 'unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court'; see also M. Broberg and N. Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd edn, OUP 2021) 207-211.
[184] ibid para 21.
[185] *Chester* (n.4) [84].
[186] ibid.
[187] *Spain* (n.164) para 78; *Eman* (n.165) para 50; S. Coutts, 'Delvigne: a multi-levelled political citizenship' [2017] ELRev 867, 873.
[188] Coutts (n.187) 873, 874
[189] ibid 873, 874; *Chester* (n.4) [55]-[56], [58]-[59] (Mance JSC); *Spain* (n.164) para 78; *Eman* (n.165) para 50.

binding.[190] As Lansbergen notes, arguably the Supreme Court overlooked the generally more liberal approach to citizenship and fundamental rights protection that had subsequently been expounded by the CJEU.[191] Where there is some doubt that the CJEU 'may adopt an alternative view' the Court should have made a preliminary reference.[192] In failing to do so, the Court arguably stretched the doctrine of *acte clair*.[193] Arguably, there was 'reasonable doubt'.[194] Moreover, Lord Mance's detailed consideration of the alternative position if a right to vote had been established, demonstrates a chink in the Court's confidence that it was an *acte clair* – arguably indicating that a preliminary reference was warranted.

Lansbergen contends the Court's decision demonstrates the 'constitutional tensions' that can arise due to differences in national and European courts' approaches to rights protection.[195] Further, as explained in chapter three, the expanding scope of EU fundamental rights protection has generally been greeted with domestic political resistance, due to an aversion towards supranational rights protection.[196] This context underpinned political hostility towards enfranchising prisoners, which might have informed the Court's resistant approach - a clash with *another* European court could inflame the controversy.[197] Moreover, the stronger remedial implications of EU law arguably reinforced the Court's decision to avoid a preliminary reference.[198] Notably, Lord Mance rejected Advocate General (AG) Tizzano's approach in *Spain* and *Eman*, in which he expressed arguments in favour of granting voting rights to EU citizens.[199] In doing so, Lord Mance argued the CJEU had 'good reason' for rejecting AG Tizzano's approach as:

> '[e]ligibility to vote is under the Treaties and the 1976 Act a matter for national Parliaments, one of considerable national interest. There is no sign that the European Commission has ever sought to involve itself in or take issue with voting eligibility in members states'.[200]

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[190] Van Eijken and van Rossem (n.167) 118, 119.
[191] A. Lansbergen, 'Prisoner disenfranchisement in the United Kingdom and the scope of EU Law' [2014] EuConst 126, 138.
[192] ibid.
[193] ibid.
[194] *Chester* (n.4) [84] (Mance JSC).
[195] Lansbergen (n.191) 136.
[196] HC Deb 25 June 2007, vol 462, cols 37, 39.
[197] *Chester* (n.4) [58] (Mance JSC).
[198] Lansbergen (n.191) 140; N.B. in *Chester* (n.4) [75]-[83] (Mance JSC considered the appellants' claims for damages *had* a right to vote been established and constitutional factors featured heavily in this assessment).
[199] *Chester* (n.4) [57]-[58] (Mance JSC).
[200] ibid [58] (Mance JSC).

Lord Mance emphasised *national* autonomy over voting rights, exposing key constitutional and territorial tensions regarding the determination of voting rights.

It is arguable, therefore, that even if *Delvigne*[201] had been decided at the time of *Chester*, the Court would have disagreed with the CJEU's interpretation in *Delvigne* and refused a preliminary reference. For example, in *HS2*[202] the Supreme Court declined a preliminary reference and notably, in a separate opinion, Lord Neuberger and Lord Mance criticised the CJEU in *Inter-Environnement Bruxelles*[203] for its interpretation of the Strategic Environmental Assessment Directive (SEA) and the Environmental Impact Assessment Directive (EIA).[204] For example, Lord Mance and Lord Neuberger agreed with AG Kokott's opinion that 'required' in the SEA Directive 'covers only plans or projects which are based on a legal obligation'.[205] By contrast, the CJEU held 'required' should be interpreted as 'regulated'.[206] Therefore, Lord Neuberger and Lord Mance held:

> 'no reference under the CILFIT principles was required. The reasons given by the … Court of Justice would not have persuaded us to the contrary. ... the European Court of Justice has, in the interests of a more complete regulation of environmental developments, given a meaning which the European legislature clearly did not intend'.[207]

If a preliminary reference had been necessary, they would 'have wished' the CJEU to have reconsidered 'the correctness of its previous decision'.[208] Further, they added, 'Where the legislature has agreed a clearly expressed measure … it is not for courts to rewrite the legislation, to extend or "improve" it in respects which the legislator clearly did not intend'.[209] To do so may result in citizens losing confidence 'that European legislation will be given its intended and obvious effects'.[210] This demonstrates there may be instances in which the

[201] Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde* [2015] EU:C:2015:648 (*Delvigne*).
[202] *R (HS2 Action Alliance Limited) v The Secretary of State for Transport and another* [2014] UKSC 3, [2014] 1 WLR 324 (*HS2*).
[203] Case C-567/10 *Inter-Environnement Bruxelles ASBL and others v Région de Bruxelles-Capitale* EU:C:2012:159.
[204] *HS2* (n.202) [158]-[212] (Neuberger PSC and Mance JSC).
[205] ibid [175] (Neuberger PSC and Mance JSC); *Inter-Environnement Bruxelles* (n.203) para 19.
[206] *Inter-Environnement Bruxelles* (n.203) para 31; as noted in *HS2* (n.202) [160] (Neuberger PSC and Mance JSC).
[207] *HS2* (n.202) [188]-[189] (Neuberger PSC and Mance JSC).
[208] ibid [189] (Neuberger PSC and Mance JSC).
[209] ibid [172] (Neuberger PSC and Mance JSC).
[210] ibid.

Supreme Court disagrees with the CJEU's interpretation.[211] Therefore, regarding prisoner voting, the Court may have disagreed with the CJEU's strained interpretation of EU law in *Delvigne.* However, such disagreement would have been constitutionally contentious.

Overall, whilst the Court's approach in declining to make a preliminary reference is explicable on balance, considering the ambiguity in *Spain* and *Eman* and the more expansive approach to fundamental rights at the EU level, there was scope for reasonable doubt, which suggests a preliminary reference should have been made. Yet, even if there was EU case law confirming a right to vote for citizens not exercising free movement rights at the time of the judgment, it is possible the Supreme Court might have disagreed with the CJEU's interpretation.

4.6.1.2 The relationship between EU law and the ECHR

In considering the relationship between EU and ECHR jurisprudence, Lord Mance emphasised that *Spain* and *Eman* did not state that EU citizens had an individual right to vote, 'the scope and conditions of which must be measured by reference to the principles established' by the ECtHR.[212] As noted, Lord Mance distinguished his conclusions from AG Tizzano's approach.[213] AG Tizzano argued the right to vote 'is a fundamental right safeguarded by the European Convention' and consequently, EU citizens are 'vestees of the right to vote in the European Parliament, in the sense that, … they can all claim that right'.[214] In contrast, Lord Mance held 'Strasbourg jurisprudence operates as the relevant control, … It would not only unnecessarily duplicate that control at the … Union level, it could also lead to further conflict and uncertainty'.[215] That Lord Mance cites 'conflict and uncertainty' as a reason to resist duplication of control arguably highlights how the prospect of a further constitutional clash, constrained the Court. Yet Lord Mance overlooks the fact that Article 53(2) of the Charter requires that Charter rights correspond to the standards set by the ECtHR.

In assessing the 'position assuming contrary conclusions' were reached and that EU law recognised a right to vote, Lord Mance rejected Counsel's contention that EU law 'would or might go further than Strasbourg case law in allowing convicted prisoners the vote', arguing the CJEU 'pays close attention to and, with very few exceptions, follows Strasbourg

[211] ibid [196] (Neuberger PSC and Mance JSC) - also disagreed with the CJEU's interpretation of the EIA that 'since' meant 'provided that'.
[212] *Chester* (n.4) [56] (Mance JSC).
[213] *Spain* and *Eman* (n.164-n.165) Joined Opinion of AG Tizzano, para 68; *Chester* (n.4) [57] (Mance JSC).
[214] ibid paras 70-71.
[215] *Chester* (n.4) [58] (Mance JSC).

jurisprudence. Examples of divergence are few and far between'.[216] However, Lord Mance acknowledged an exceptional example where the CJEU went beyond the ECtHR's level of protection.[217] Yet, Lord Mance evaded detailed consideration of the Charter, including Articles 39 and 40 which concern the right to vote[218] and Article 52(3). As discussed in chapter three, Article 52(3) of the Charter requires that Charter rights 'correspond' to Convention rights, although the EU can provide 'more extensive protection.[219] Therefore, in some cases EU law *can go beyond* the protection established by the Convention, demonstrating the legally binding status of the Charter has further empowered the CJEU to protect rights. This highlights how Lord Mance's confidence that the CJEU would not go beyond Strasbourg case law was misplaced. Moreover, Lord Mance neglects consideration of Counsel's submission that protection of 'rights under European Union law cannot be any less than afforded to parallel rights under the Convention'.[220] This further demonstrates that a preliminary reference could have been made as the protection under EU law was, at the time, lower than the ECHR's protection.

If the Court *had* made a preliminary reference to the CJEU and if the outcome had been favourable to the appellants, the stronger remedial implications of EU law might have compelled the political branches to take action. The Court's approach is imbued with resistance to an expansive approach to rights protection under EU law.[221] Lord Mance's assessment of EU law ostensibly restricted the likelihood of success for future claimants seeking to rely on EU law in UK courts.[222] However, as will be discussed in chapters five and six, *Delvigne* demonstrates the Supreme Court had merely temporarily deflected the CJEU's adjudication of prisoners' voting rights under EU law – the ineluctable reality being that it was an issue on the CJEU's horizon.

4.7 *Moohan v Lord Advocate (Moohan)*

In *Moohan,* the Supreme Court considered prisoners' right to vote in referendums.[223] The petitioners', 'convicted of very serious offences', sought judicial review of the disenfranchisement enshrined in the Scottish Independence Referendum (Franchise) Act 2013

[216] ibid [70] (Mance JSC).
[217] ibid, cites *Eman* (n.165); cf *Sevinger and Eman v The Netherlands* (2008) 46 EHRR SE14.
[218] *Chester* (n.4) [59] (Mance JSC).
[219] Charter of Fundamental Rights of the European Union (2007) OJ C326/02, Article 52(3) (emphasis added).
[220] *Chester* (n.4) page 278 (Aidan O'Neill QC).
[221] Lansbergen (n.191) 140.
[222] ibid 141.
[223] *Moohan* (n.7) [2] (Hodge JSC).

(the Franchise Act) and claimed that convicted prisoners had a right to vote in the Scottish independence referendum.[224] The Franchise Act reflects the prisoner voting ban in s.3 RPA 1983.[225] This section demonstrates that *Moohan* perpetuates the Supreme Court's reticent approach towards prisoners' voting rights.

4.7.1 Relationship with Strasbourg

The petitioners' challenged the impugned legislation on several grounds.[226] This section focuses on the Court's assessment whether prisoners' 'blanket disenfranchisement' in the referendum was incompatible with A3P1.[227] As such, *Moohan* provides insight into the Court's relationship with Strasbourg. For example, Lord Hodge affirmed domestic courts 'are not bound' by Strasbourg jurisprudence, there is scope 'for disagreement and dialogue' between courts.[228] Domestic courts can 'choose to go further' when required.[229] Considering the meaning of A3P1, Lord Hodge argued the fact A3P1 requires States to 'hold free elections *at reasonable intervals*' indicated the 'drafters of A3P1 did not have referendums in mind.'[230] Further, Strasbourg case law did not support extending A3P1 to include referendums.[231] Consequently, 'A3P1 only applies to elections to the *legislature*[232] and the petitioners' claims were unsuccessful.[233]

Regarding the Court's approach to ECtHR jurisprudence, Fenwick and Masterman argue the Court endorsed the 'partial mirror principle',[234] as the Court recognised exceptions.[235] Notably, Baroness Hale stressed domestic courts are required to 'work out the answer for ourselves'.[236] The ECtHR's 'evolutive approach to the interpretation of the Convention … strongly suggests that it might indeed encompass a referendum such as this', as the ECtHR's judgment in *McLean* could be interpreted as meaning that A3P1 might include referendums.[237] However, despite

[224] ibid [1]-[2] (Hodge JSC).
[225] ibid [2] (Hodge JSC).
[226] ibid [5] (Hodge JSC).
[227] ibid.
[228] ibid [13] (Hodge JSC).
[229] ibid, notes *Manchester City Council v Pinnock* [2011] UKSC 6, [2011] 2 WLR 220 [48] (Neuberger JSC) (*Pinnock*).
[230] ibid [8] (Hodge JSC) (emphasis added).
[231] ibid [19]-[12], [15]-[18] (Hodge JSC).
[232] ibid [18] (Hodge JSC).
[233] ibid.
[234] H. Fenwick and R. Masterman, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?' (2017) 60(6) MLR 1111, 1117-1118; N.B. *Moohan* (n.7) [13] (Hodge JSC).
[235] *Moohan* (n.7) [13] (Hodge JSC).
[236] ibid [53] (Hale JSC); e.g. *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 [53]; *Pinnock* (n.229) [48] (Neuberger JSC); *Nicklinson* (n.44) [70] (Neuberger JSC).
[237] *Moohan* (n.7) [53] (Hale JSC); *Moohan* [11], [16] (Hodge JSC); see *McLean* (n.130) para 33.

this, Baroness Hale concluded A3P1 does not require that individuals can vote in referendums.[238] Notwithstanding the flexibility of the mirror principle, the majority mirrored Strasbourg's approach that A3P1 does not include referendums.[239]

By contrast, Lord Kerr, dissented and embraced evolutive interpretation[240] and emphasised that 'democracy is the only political model contemplated by the ECHR. The concept of universal entitlement to participate in the political process is the natural concomitant of the underlying premise of all human rights law'.[241] Accordingly, the conclusion 'that the choice of government by which one is to be ruled lies outside the sphere of protection that the Convention provides would be remarkable indeed'.[242] Lord Wilson also dissented, and in contrast to the majority, held 'there is no decision of the ECtHR in point'.[243] Therefore, the question became whether the Court could go beyond the ECtHR.[244] Lord Wilson considered the 'retreat from the *Ullah* principle' and listed the 'timeline' of developments in the case law.[245] Importantly, Lord Wilson stated that 'where there is no directly relevant decision of the ECtHR with which it would be possible (even if appropriate) to keep pace, we can and must do more. We must determine for ourselves the existence or otherwise of an alleged Convention right'.[246] For Lord Wilson, A3P1 had been violated.[247] Davis argues the minority approach is preferable, as it was anomalous to preclude A3P1 from extending to referendums.[248]

The dichotomy in the majority and minority approaches exemplifies the challenges inherent in the mirror principle.[249] Depending on judicial interpretation the Court can advance a restrictive or expansive approach to rights protection. In *Moohan*, arguably due to the contentious prisoner voting context, the majority sought to avoid exacerbating the pre-existing controversy and therefore, Strasbourg jurisprudence was mirrored *because* it supported the more restrictive approach. This arguably represents an expression of comity with Strasbourg *and* with the

[238] ibid [55] (Hale JSC).
[239] H. Davis, 'A bizarre anomaly? Rights of political participation and the Scottish independence referendum: Moohan v Lord Advocate' [2015] EHRLR 488, 489.
[240] *Moohan* (n.7) [71] (Kerr JSC).
[241] ibid [76] (Kerr JSC).
[242] ibid [77] (Kerr JSC).
[243] ibid [103] (Wilson JSC).
[244] ibid.
[245] ibid [104] (Wilson JSC).
[246] ibid [105] (Wilson JSC).
[247] ibid [106] (Wilson JSC).
[248] Davis (n.239) 494.
[249] Fenwick and Masterman (n.234) 1118; R. Masterman, 'Deconstructing the Mirror Principle' in R. Masterman and I. Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspective's* (OUP 2013) 121-137.

political branches.[250] In contrast, Lord Wilson noted the absence of clear jurisprudence, leading him to argue the Court could go beyond Strasbourg.[251] Furthermore, the divergence in approaches arguably affects the potential for dialogue to arise between the Supreme Court and the ECtHR. The majority approach is closed and restricts the potential for dialogue.[252] In contrast, the minority approach highlights willingness to take domestic ownership for human rights, which arguably opens up the potential for dialogue. *Moohan* therefore encapsulates the malleability of the relationship between the domestic courts and Strasbourg, which is influenced by context.

4.7.2 EU law

The appellants also argued their disenfranchisement was incompatible with EU law.[253] However, their claims were dismissed under EU law, as if there was a '"yes" vote in the referendum' this vote would not affect their citizenship, as EU citizenship would subsequently be determined during 'negotiations'.[254] The Court also affirmed *Chester* that 'EU law does not incorporate any right to vote'.[255] This demonstrates how Lord Mance's consideration of EU law in *Chester* had curtailed the likelihood of success for applicants relying on EU law to contest prisoner disenfranchisement in UK Courts.

4.7.3 Common law right to vote?

As noted in chapter two, there have been judicial and academic arguments supporting a revival of common law rights protection.[256] Such a 'resurgence' has arguably been driven by a desire to reassert 'national' decision-making.[257] Reflecting this, Counsel for Moohan submitted the Court should recognise a 'common law right to vote and the common law constitutional democratic principle of universal and equal suffrage'.[258] Lord Hodge recognised 'the right to

[250] *Moohan* (n.7) [2] (Hodge JSC) - by "political branches" in this case, this could refer to both the devolved Scottish Parliament and government and also the UK Parliament and Government, as a finding that the Franchise Act should extend to referendums, could lead to claims this also applies to the RPA 1983 and the RPA should also be extended to include referendums, as s.2 of the Franchise Act is 'determined by the' RPA 1983.
[251] Fenwick and Masterman (n.234) 1118.
[252] M. Amos, 'From Monologue to Dialogue' in R. Masterman and I. Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (2013 OUP) 154.
[253] *Moohan* (n.7) [5] (Hodge JSC).
[254] ibid [22] (Hodge JSC).
[255] ibid [23] (Hodge JSC).
[256] *A v BBC* [2014] UKSC 25, [2015] AC 588; *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA 420, [2013] QB 618; *HS2* (n.203); *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 [46]-[47] (Mance JSC); *R (Osborn) v Parole Board* [2013] UKSC 6, [2014] AC 1115; *Rabone v Pennine Care NHS Foundation* [2012] UKSC 2, [2012] 2 AC 72 [112]-[114] (Brown JSC); see R. Masterman and S. Wheatle, 'A common law resurgence in rights protection' [2015] EHRLR 57, 60.
[257] Masterman and Wheatle (n.256) 61.
[258] *Moohan* (n.7) 907 (Aidan O'Neil QC).

vote as a basic constitutional right', and the judiciary have an important constitutional role in 'adapting and developing the common law'.[259] However, Lord Hodge cited *Chester* in which Lord Sumption held: 'The courts have for many years interpreted statutes and developed the common law so as to achieve consistency between the domestic law of the United Kingdom and its international obligations, *so far as they are free to do so*'.[260] Lord Hodge emphasised that Lord Sumption's 'concluding words are an important limitation'.[261] Therefore, regarding the right to vote, it is inextricably 'derived from statute … It is not appropriate for the courts to develop the common law in order to supplement or override the statutory rules which determine our democratic franchise'.[262] It was held 'there is no common law right of universal and equal suffrage which could require the Scottish Parliament to extend the franchise in the Act to encompass convicted prisoners'.[263] Lady Hale agreed, noting the absurdity of such a suggestion.[264]

Therefore, the majority approach appears contrary to the general trend towards the expansion of common law rights. As Elliott argues, the Court's approach has noteworthy implications, as it conflicts with the 'dynamic' development of the common law, that the common law's level of rights protection is 'greater' than the ECHR.[265] Yet, as Elliott argues, the Court's outright dismissal of the 'possibility of *any* common-law right to vote' is 'odd', suggesting statute precludes 'the emergence or development of a common-law right'.[266] This highlights 'a misreading of both the relationship between common law and statute law … it is hard to see why the existence of one should preclude the existence of the other'.[267] The Court's emphatic conclusion that no common law right to vote exists highlights limits to judicial willingness to develop the common law.[268]

If the Court *had* found a common law right to vote, it would have distinct 'practical implications' compared to Convention rights.[269] For example, if legislation was held

[259] ibid [33] (Hodge JSC)
[260] ibid; see *Chester* (n.4) [121] (Sumption JSC) (emphasis added).
[261] ibid.
[262] ibid [33]-[34] (Hodge JSC).
[263] ibid [35] (Hodge JSC).
[264] ibid [56] (Hale JSC).
[265] M. Elliott, 'Moohan: prisoner voting, the independence referendum and the common law' (*Public Law For Everyone,* 17 December 2014) <https://publiclawforeveryone.com/2014/12/17/moohan-prisoner-voting-the-independence-referendum-and-the-common-law/> accessed 14 April 2022.
[266] ibid.
[267] ibid.
[268] ibid.
[269] ibid.

incompatible with the common law right, a declaration under s.4 would not be possible.[270] Instead, Elliott notes the 'impact' of such a common law right will be determined by the 'constitutional status of the legislation that may conflict with the right'.[271] In *Moohan*, Lord Hodge stated 'the impugned Act is an Act of the Scottish Parliament to which the doctrine of parliamentary sovereignty does not apply'[272] and as Elliott explains, this could render the Act 'vulnerable to invalidation on common-law as well as ECHR and EU grounds'.[273] Tickell criticises Lord Hodge's reasoning, arguing it demonstrates how 'without the protection of parliamentary sovereignty … devolved assemblies' become increasingly 'vulnerable to judicial inventiveness'.[274] By contrast, if the impugned Act 'is an Act of the UK Parliament', parliamentary sovereignty would apply.[275] As Lord Hodge stated, 'the common law cannot extend the franchise beyond that provided by parliamentary legislation'.[276]

Yet, Lord Hodge also controversially cautioned that if Parliament 'abusively' restricted the right to vote, the common law could be used to 'declare such legislation unlawful'.[277] Despite this, Lord Hodge qualified his remarks, noting this issue is 'a matter of debate' and 'there is no need to express any view on that question'.[278] However, this is redundant, as by raising the issue, Lord Hodge added his view - in exceptional circumstances the Court could curtail inappropriate use of legislative power,[279] by utilising strong-form review.[280] This could signify a possible challenge to parliamentary sovereignty.[281] As discussed in chapter two, such challenges to parliamentary sovereignty have been mooted in other cases.[282] These cases suggest that 'in the direst circumstances' where legislation infringes 'the very essence of the right in question' the judiciary could disapply legislation.[283] The common law could have

[270] ibid.
[271] ibid.
[272] *Moohan* (n.7) [34] (Hodge JSC).
[273] Elliott, 'Moohan' (n.265).
[274] A. Tickell, 'Litigating with a Blunderbuss: Prisoner Votes, *Moohan v Lord Advocate* and the Independence Referendum Franchise' (2015) 19 EdinLR 409, 413, 414.
[275] Elliott, 'Moohan' (n.265).
[276] *Moohan* (n.7) [35] (Hodge JSC).
[277] ibid.
[278] ibid.
[279] Young (n.63) 304.
[280] see J. Waldron, 'The Core of the Case Against Judicial Review' [2006] The Yale Law Journal, 1346, 1358.
[281] M. Gordon, 'The UK's Fundamental Constitutional Principle: Why the UK Parliament Is Still Sovereign and Why It Still Matters' (2015) 26(2) KLJ 229, 237; N.B. ultimately Gordon argues this should *not* be viewed as a challenge to parliamentary sovereignty, instead, parliamentary sovereignty remains 'the foundational principle of the contemporary constitution' 247-250.
[282] e.g. *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC [102], [104] (Steyn LJ); *AXA General Insurance v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [50]-[51] (Hope JSC).
[283] Elliott, 'Moohan' (n.265).

potentially more potent remedial implications than s.4.[284] Yet it is questionable whether the judicial threat of 'non-application or invalidation'[285] would ever be realised in practice, as such extreme steps risk generating a 'constitutional crisis'.[286] Perhaps, as this issue addressed the common law, which directly concerns courts' area of competence, Lord Hodge took a judicial swipe at parliamentary sovereignty, asserting the Court's authority. However, Lord Hodge's obiter comments conflict with the remainder of the judgment, which is generally deferential to Parliament's legislative supremacy and therefore, its impact is somewhat attenuated.[287]

In contrast, Lord Kerr noted he 'would prefer not to express a view' on whether there was a common law right to vote',[288] although Lord Kerr then argued:

> 'the common law can certainly evolve alongside statutory developments without necessarily being entirely eclipsed by the latter … democracy is a concept which the common law has sought to protect by the incremental development of a system of safeguarding fundamental rights.'[289]

Therefore, it was 'at least arguable' that prisoner disenfranchisement was 'incompatible with the common law'.[290] Lord Kerr's obiter comments have potentially significant consequences. As Young explains, it indicates that courts could 'transform a constitutional principle into a principle of the common law, even when there is no previous line of case law and even when there is a series of legislative interventions establishing how a constitutional principle is to be applied in the common law'.[291] However, ultimately, Lord Kerr expressed agreement with Lord Hodge, that in this case the common law 'could not succeed'.[292] Therefore, the significance of these obiter comments is diminished and should not be overstated.

The Court's consideration of the common law right to vote exposes domestic constitutional tensions, Lord Hodge's possible challenge to parliamentary sovereignty has the potential to be damaging to institutional relations, but this is lessened, as the majority judgment is

[284] ibid.
[285] ibid.
[286] M. Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2016) 68 CLP 85, 114; M. Elliott, 'Parliamentary Sovereignty in a Changing Constitutional Landscape', in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 48-55.
[287] e.g. *Moohan* (n.7) [34] (Hodge JSC).
[288] ibid [85] (Kerr JSC).
[289] ibid [86] [87] (Kerr JSC).
[290] ibid [87] (Kerr JSC).
[291] Young (n.63) 247.
[292] *Moohan* (n.7) [88] (Kerr JSC).

predominately deferential to Parliament. The Court was reluctant to exacerbate the prisoner voting clash. The judgment therefore mainly adopts the deferential, reticent approach to prisoner voting.

4.8 Implications of the domestic courts' "loss"

Overall, the prisoner voting clash represents a "loss" for the domestic courts. It has been shown how the domestic courts' attempted to navigate the highly strained political context and that in doing so, they ultimately failed to help produce a favourable outcome for rights. Essentially, alongside other institutions, in failing to hold the Government to account the domestic courts' created an environment where administrative amendments were a possible solution to the clash. Further, prisoners' voting rights shows the underlying challenges in UK courts' ability to effectively protect rights more generally. The way the Supreme Court approached its discretion under s.4 shows how the "wrong" constitutional considerations were applied which promoted reticence, which resulted in the "loss" to the domestic courts as their approach undermined the mechanism of s.4 and rights protection. Therefore, it reveals flaws in how domestic courts' might apply the double filter mechanism. Further, as has been shown, this general reticence percolated the Supreme Court's consideration of EU law in *Chester* and its approach to common law rights in *Moohan*.

It is therefore notable how constitutional and institutional factors pervade prisoner voting case law. For instance, the prioritisation of parliamentary decision-making, was used to support the mainly deferential approach. Moreover, the general reticence was arguably underpinned by background considerations of the separation of powers, which as discussed in chapter two, can be framed to support an 'interventionist' or non-interventionist role.[293] Depending on context, institutional boundaries can be emphasised or deemphasised. The domestic courts opted for a non-interventionist approach and limited their role, institutional boundaries were emphasised - prisoner voting was for Parliament to determine.

Why does it matter that the domestic courts "lost"? Does this have broader implications? The domestic courts adopted a variable approach to prisoner voting. In *Pearson*, the court adopted a *very* weak standard of review, which demonstrates that courts may be reluctant to uphold the rights of those who have been overlooked in the legislative process.[294] This is problematic and

[293] S. Wheatle, *Principled Reasoning in Human Rights Adjudication* (OUP 2017) 85.
[294] Kavanagh, *Constitutional Review* (n.28) 377; R. Dixon, 'The Core Case for Weak-Form Judicial Review' (2017) 38 Cardozo LRev 2193, 2209-2210.

could have broader implications, as Tushnet cautions, this arguably indicates that 'weak-form judicial review is fundamentally a sham, parliamentary supremacy parading under the guise of effective judicial review'.[295] However, the domestic courts' reticence must not be overstated, judicial review was not a "sham", as following litigation in the ECtHR, the court in *Smith* granted a declaration. Further, the courts consistently mirrored Strasbourg jurisprudence that prisoners' right to vote had been violated – *also* demonstrating comity with Strasbourg. Yet, when political prevarication continued to thwart implementation of the ECtHR's jurisprudence, the domestic courts subsequently refrained from taking further action. Prisoner voting indicates that regarding some issues, there may be a judicial accountability void,[296] as there may be limits to courts' willingness to redress legislative 'blockages',[297] which could have a corrosive effect on rights protection more generally. However, the domestic courts' reluctance to challenge political delay was arguably informed by fact that weak-form review does not empower courts to 'enforce their decisions' to remedy blockages in rights protection.[298] The courts considered that following *Hirst* the issue of prisoner voting was firmly in the political domain and there was no further role for the judiciary – institutional defensiveness informed this approach.

Yet, reluctance to take domestic judicial ownership of rights could have detrimental consequences. As Elliott argues, cases such as *Moohan*, in which the Court declined to recognise a common law right to vote, highlight that if the HRA was repealed and if a British Bill of Rights did not incorporate ECHR rights, the protection of rights under the common law would be less extensive than under the ECHR.[299] It could result in 'a lower level of protection'.[300] With the Government's position in relation to the HRA being changeable (discussed in chapter seven), Convention rights remain vulnerable to political erosion, and this arguably highlights how the judiciary should aim to be robust in rights protection. However, whilst the hands-off approach might be problematic in relation to prisoner voting, significantly, in other cases, 'judicial restraint' is unproblematic.[301] Alternatively, there are cases at the other

[295] M. Tushnet, 'New forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 Wake Forest LRev 813, 827.
[296] e.g. *Nicklinson* (n.44); *Re NIHRC* (n.44).
[297] Cf Dixon (n.294) 2204.
[298] ibid.
[299] Elliott, 'Moohan' (n.265).
[300] House of Lords, European Union Committee, *The UK, the EU and a British Bill of Rights* (12th Report of Session 2015-16, HL Paper 139, 9 May 2016) 24.
[301] e.g. *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295; *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428 [208]; see also, Kavanagh, 'Judicial Restraint' (n.86).

end of the spectrum in which domestic courts have been criticised for judicial activism.[302] Therefore, this does not mean that rights protection should be prioritised at any cost. It does not mean the common law should be used to override legislation that undermines rights, as this would be highly contentious.[303] Therefore, whether a domestic court's approach is considered "appropriate" depends on the context and outcome of the case. The courts' generally hands-off approach and reluctance to engage with the protracted political procrastination, highlights the boundaries of the domestic courts' willingness to adopt a bold approach to rights when faced with ardent political opposition.

4.9 Conclusion

Domestic prisoner voting litigation highlights how the double filter mechanism may expose judicial uncertainty regarding the status and purpose of declarations and reveals the constitutional causes for this uncertainty. The domestic courts reticence to play their constitutional role in the prisoner voting clash is mainly evident in their misreading of s.4 HRA. Whilst in *Smith*, the court made a declaration, highlighting the need for urgent action, in *Chester*, the Supreme Court swiftly decided not to issue a second declaration and deferred to Parliament. Significantly, the analysis of *Chester* highlights the following constitutional considerations might arise including, deference to Parliament, institutional defensiveness, uncertainty regarding the proper focus for review (legislation or litigant?) and the significance of Strasbourg's impact on domestic courts. Clear judicial engagement with s.4 was clouded by strategic concerns regarding the second filter. For instance, judicial understanding of the declaration as strong, contributed to judicial fear that a further declaration was institutionally disrespectful and might trigger an adverse political reaction. Further, if a subsequent declaration was ignored, this could have undermined the power of the Court and/or unravelled the potency of the declaration. Legally, the Court was not precluded from issuing a further declaration, but constitutional considerations underpin the judgment, exposing judicial uncertainty, confusion or reticence regarding the first filter. Such reticence contributed to the "loss" to the domestic courts in terms of prisoners' voting rights as they failed to hold the Government to account in relation to its approach to prisoner voting. The existence of the double filter mechanism demonstrates that constitutional considerations *are* relevant, but this has sometimes led to the prioritisation of the "wrong" considerations, producing inconsistent

[302] e.g. UKSC's controversial adjudication regarding Brexit: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61; *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373.
[303] Elliott, 'Beyond the Convention' (n.286) 114.

and overcomplicated approaches. Therefore, different constitutional considerations should be prioritised in recognition of the declaratory nature of s.4. Where appropriate, a declaration should be made to maximise the political decisional space. The Court in *Chester* should have confidently made a further declaration in recognition that in doing so the judiciary are fulfilling their constitutional role under the HRA in a way which respects institutional boundaries as parliamentary sovereignty is upheld. Yet as Parliament was already aware of the incompatible legislation, a further declaration would have served a different function - it would have reemphasised the incompatibility. This might have lessened the "loss" to domestic courts by at least demonstrating the Supreme Court was willing to respond to sustained political breaches of Convention rights.

In *Chester*, the Court also displayed reticence and resistance in relation to EU law and the Court inaptly declined to make a preliminary reference to the CJEU. The Court was influenced by constitutional and institutional factors, as the Court sought to resist EU law and as such, emphasised national decision-making. In *Moohan*, the majority declined to go beyond Strasbourg. This exposes another judicial limitation of the Court's role in terms of domestic rights protection. The Court's refusal to recognise a common law right to vote reflects this approach. However, Lord Hodge's challenge to parliamentary sovereignty indicates a rhetorical judicial willingness to assert the Court's authority to uphold rights. Regardless, the outcome remained that prisoners are still denied voting rights, with only the hollow prospect of being accorded such rights in the future. Yet, as will be discussed in subsequent chapters, the resultant "loss" cannot solely be attributed to the domestic courts, rather other institutions also had key roles in the contributing to the "loss".

CHAPTER FIVE: THE EUROPEAN COURTS' APPROACHES TO PRISONERS' VOTING RIGHTS

5.1 Introduction

This chapter primarily considers the European Court of Human Right's (ECtHR's or the Court's) adjudication of prisoners' voting rights. It also considers the Court of Justice of the European Union's (CJEU's) approach to prisoner voting. In first assessing the ECtHR's approach, it is argued that the outcome of the clash represents a "loss" for the ECtHR as its own legitimacy was undermined by the UK's protracted non-compliance with its judgment in *Hirst*[1] and its loss was then solidified by the Committee of Ministers of the Council of Europe's (CM's) endorsement of the UK's administrative amendments which undermined the ECtHR's requirement for legislative change. To explore the reasons for this "loss", it is necessary to gain an in-depth understanding of the ECtHR's judgments and this chapter includes a case-by-case analysis of key prisoner voting judgments which are relevant to the UK (sections 5.2-5.7).

The core reasons for the clash and the "loss" for the ECtHR are unravelled and the challenges to the Court's legitimacy are assessed (section 5.8). In analysing the Grand Chamber's judgment in *Hirst*, this thesis argues that the ECtHR's loss is caused by the fact that overall *Hirst* lacked clarity and consistency, as it transpired that at times the application of the wide margin of appreciation (MoA) was superficial, contributing to the judgment's opacity and ambiguity, undermining its procedural legitimacy. Whilst the Court fulfilled its role in upholding human rights, in doing so, the Court did not adequately appreciate the constitutional contentiousness of its judgment in the UK. The 'preconditions' for conflict were present,[2] arguably indicating that the Court should have been mindful of domestic political and legal sensitivities. However, judicial awareness of such sensitivities does not preclude finding a violation, rather it indicates that caution, clarity and consistency were required. The consequences of the lack of clarity inherent in *Hirst* are evident in subsequent prisoner voting cases in which the ECtHR attempted to refine and clarify its approach. The lack of clarity also provided further scope for the UK Government to question the authority of *Hirst* and continue

[1] *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41 (*Hirst*).
[2] K. Dzehtsiarou, 'Prisoner Voting Saga: Reasons for Challenges' in H. Hardman and B. Dickson (eds), *Electoral Rights in Europe Advances and Challenges* (Taylor and Francis 2017) ('Prisoner Voting Saga').

to resist the judgment. Ultimately, the UK merely adopted administrative amendments as opposed to the legislative amendments stipulated by the ECtHR. That the UK circumvented the ECtHR's requirements signifies a "loss" for the ECtHR.

Although the prisoner voting clash is an exceptional example of a standoff between the UK and Strasbourg, there are broader implications that can be gleaned (section 5.9). For instance, it reveals that especially controversial cases can expose tensions in European rights protection. The ECtHR must maintain a delicate balance in upholding and furthering human rights whilst also ensuring sufficient respect for its subsidiary position. The resultant clash between the UK elected branches and Strasbourg led to political attacks to Strasbourg's legitimacy (assessed in chapter six). The clash highlights the importance of ensuring the Court is alert to conflict and that its reasoning is as cogent as possible to address potential criticism of the Court's jurisprudence. Further, the clash shows the challenges and limits of the ECtHR in ensuring effective compliance. However, the resultant "loss" cannot solely be attributed to the Court but rather it is shared with the CM, as responsibility for enforcement is shared among institutions and the CM also undermined the Court's judgments (discussed in chapter six).

The CJEU's approach to prisoner voting in *Delvigne*[3] is considered, as the involvement of another European Court in an already contentious issue, exacerbated the already fraught context surrounding the adjudication of prisoner voting (section 5.10). *Delvigne* demonstrates the CJEU's bold approach to rights protection, as a freestanding right to vote was recognised. As with the ECtHR, such judicial innovation may be greeted with hostility from States. However, in contrast to the ECtHR, the direct effect and supremacy of EU law can lead to disapplication of national provisions, which further heightened the implications of *Delvigne*, so that the judgment posed more of a "threat".

5.2 Case analysis: *Hirst v United Kingdom (No.2)*

Prior to the Grand Chamber's judgment in *Hirst*, the Chamber of the ECtHR considered Hirst's claim that the UK's disenfranchisement of prisoners under s.3 of the Representation of the People Act 1983 (RPA 1983) violated Article 3 of Protocol 1 (A3P1) of the European Convention on Human Rights (ECHR or Convention).[4] Hirst served a discretionary life sentence for manslaughter, his tariff had expired but he was still detained, as he was deemed a

[3] Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc* EU:C:2015:648 (*Delvigne*).
[4] *Hirst v United Kingdom* (2004) 38 EHRR 40.

risk to the public and was precluded from voting.[5] The ECtHR unanimously held UK legislation breached A3P1.[6]

Following the ECtHR's judgment, the case was referred to the Grand Chamber of the ECtHR. The Grand Chamber (the Court) held by a majority of twelve to five that A3P1 had been violated.[7] The Court held the UK Government's aims could be construed as legitimate,[8] but s.3 RPA 1983 was not proportionate.[9] This analysis will integrate sections from the majority judgment (Judges Rozakis, Bratza, Bonello, Vajić, Traja, Mularoni, Mijovic, Jociene and Ŝikuta) and the concurring opinions (Judge Caflisch – separate concurring opinion and Judges Tulkens and Zagrebelsky – joint concurring opinion). The dissenting judgment will be considered (Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens and also Judge Costa provides a separate dissenting opinion).

5.2.1 The proportionality test

In considering proportionality, the Court confirmed that in determining whether the 'requirements' of A3P1 had 'been complied with' the Court had:

> '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. In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature'.[10]

Notably, the UK Government and dissenting judges contended that the ECtHR had incorrectly considered the compatibility question *in abstracto*.[11] As Stark explains, the ECtHR must have regard to Article 34 ECHR, which requires applicants to be 'victims' and this precludes the ECtHR from considering claims *in abstracto*.[12] This can be distinguished from s.4 of the Human Rights Act 1998 (HRA) which does not require a victim.[13] For the dissenting judges, Hirst was serving a post-tariff sentence and it would be doubtful whether any future

[5] ibid paras 9-11.
[6] ibid paras 47, 51-52.
[7] *Hirst* (n.1) para 85.
[8] ibid para 74.
[9] ibid paras 82, 84.
[10] ibid para 62; as established in *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1, para 52 (*Mathieu-Mohin*).
[11] ibid paras 72, O-III8.
[12] S. Stark, 'Facing facts: judicial approaches to section 4 of the Human Rights Act 1998' [2017] LQR 631, 634.
[13] ibid.

amendments would enable prisoners such as Hirst to vote.[14] Therefore, they argued the majority should have confined consideration of the case to the facts. [15]

Conversely, the majority refuted that the compatibility issue had been considered *in abstracto*.[16] The Court declined to 'assume' that the Government would amend the law to include or exclude post-tariff lifers and if post-tariff lifers were still excluded, the Court did not indicate whether A3P1 would be violated.[17] Therefore, whilst it was doubtful that post-tariff lifers would be enfranchised, Hirst *was* 'directly and immediately affected' by the legislation – he was disenfranchised in a way which was 'general and automatic'.[18]

5.2.2 Legitimate aim?

The majority noted that A3P1 does not stipulate the aims that must be pursued and consequently, a broad 'range of purposes may therefore be compatible'.[19] As explained in chapter three, as Dzehtsiarou argues, A3P1 does not stipulate 'limitation clauses', it is a 'super-qualified' right, which allows for broader limitations, so long as limitations 'do not affect the core of the right'.[20] The Court outlined the UK Government's submissions that disenfranchisement served the aims of 'preventing crime', 'enhancing civic responsibility and respect for the rule of law' and also 'to confer an additional punishment'.[21] The Court's consideration of the Government's aims largely reflects the Chamber's judgment. However, whilst the Court noted the Chamber had 'expressed reservations' regarding the aims on the basis of the Canadian Supreme Court decision in *Sauvé (No.2)*, the Court held these aims were not incompatible with A3P1.[22] For some, the Court's approach was too lenient.[23] Nonetheless, the dissenting Judges also held the UK Government's aims were legitimate as A3P1 'does not prescribe what aims may justify restrictions'.[24]

Yet, not all the Judges were convinced as to the legitimacy of the aims. For example, Judge Tulkens and Judge Zagrebelsky in a joint concurring opinion, argued 'the real reason' for

[14] *Hirst*, para O-III8; see also, Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 96.
[15] ibid para O-III8.
[16] ibid para 72.
[17] ibid.
[18] ibid para 68.
[19] ibid para 74.
[20] Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 96-97.
[21] *Hirst* (n.1) para 74.
[22] ibid para 75; *Sauvé v Canada (No.2)* [2002] 3 SCR 519, [2002] SCC.
[23] M. Plaxton and H. Lardy, 'Prisoner Disenfranchisement: Four Judicial Approaches' (2010) 28 Berkeley Journal of International Law 101, 121; K. Zeigler, 'Voting Eligibility: Strasbourg's Timidity' in K. Zeigler, E.Wicks and L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 173, 191.
[24] *Hirst* (n.1) para O-III3.

disenfranchisement 'is the fact that the person is in prison' which is unacceptable.[25] Therefore, the absence 'of a rational basis for that provision is sufficient reason for finding a violation of the Convention' and the proportionality analysis was unwarranted.[26] Further, Judge Caflisch, in a separate concurring opinion, disagreed with the UK Government's aims and stated the right to vote aids 'resocialisation'.[27] As Easton explains, the punitive aim of disenfranchisement is challenging to justify as Hirst was serving a sentence which had exceeded 'the punitive stage of the sentence' and retribution had been served.[28]

Arguably because broad limitations can be placed on the right to vote, the Court's hands-off assessment as to the legitimacy of the aims is justifiable. However, this leniency backfired, as it arguably facilitated the political branches' general failure to sincerely engage with prisoner voting. Instead, the issue became monopolised by anti-Strasbourg rhetoric.

5.2.3 Proportionality of the measure?

As the ban pursued a legitimate aim, the Court assessed the proportionality of the measure. For a measure to be proportionate there must be 'a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned'.[29]

The UK Government submitted that only '48,000 prisoners (not the 70,000 stated in the Chamber judgment)' were disenfranchised and consequently the 'ban was in fact restricted'.[30] However, as the Court observed, 48,000 'is a significant figure and it cannot be claimed that the bar is negligible'.[31] Whilst there are some exceptions, the ban encompasses 'a wide range of offenders and sentences'.[32] Moreover, the Court stated that upon sentencing of offenders the domestic courts 'make no reference to disenfranchisement' and there is a lack of 'any direct link between the facts of any individual case and the removal of the right to vote'.[33] The Court held there had been an absence of legislative debate and only a 'minority' of States' had a 'blanket' ban.[34] Such factors evidenced the disproportionality of the impugned legislation.

[25] ibid paras O-II3, O-II5.
[26] ibid para O-II6.
[27] ibid para O-I5.
[28] S. Easton, 'Electing the Electorate: The Problem of Prisoner Disenfranchisement' (2006) 69(3) MLR 443, 450.
[29] *Hirst* (n.1) para 71.
[30] ibid para 77.
[31] ibid.
[32] ibid.
[33] ibid.
[34] ibid paras 79, 81.

The Court held that s.3 RPA 1983:

> '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. … 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.'[35]

Therefore, the UK's ban was held disproportionate as it indiscriminately and automatically disenfranchised prisoners.

5.3 Defects exposed: was the MoA properly applied?

Whilst the majority recognised a "wide" MoA, this section argues this was superficial, as at times its application is inconsistent and opaque – the *true* MoA seemed narrower than the majority was willing to concede. The malleability of the MoA contributes to the judgment's ambiguity. This hampered the Court's consideration of prisoner voting in subsequent cases and arguably contributed to the ECtHR's "loss". This section highlights inconsistencies in the Court's application of the MoA which exposes the judgment's weaknesses and, more broadly, the challenges inherent in the application of the MoA.

As noted in chapter three, factors applicable to the determination of the MoA are interconnected with the Court's determination of proportionality. As De Londras and Dzehtsiarou explain, 'the margin of appreciation impacts on the strictness of scrutiny under the proportionality principle'.[36] The application of a wide MoA generally leads to a more generous, less probing proportionality assessment.[37] Yet in *Hirst*, although there was a wide MoA, a violation was found.

5.3.1 Importance of the right and the "wide" MoA

In determining the width of the MoA the Court considered the nature and the importance of the right to vote. Regarding the nature of the right, the more fundamental the right and the more

[35] ibid para 82.
[36] F. de Londras and K. Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 94 ('*Great Debates*').
[37] ibid 104.

severe the interference, the narrower the MoA.[38] Where the 'core' of such rights have been affected, the MoA will be narrower, but where the 'periphery' of these rights have been affected, the MoA will be wider.[39] Whilst the text of A3P1 does not provide for a right to vote,[40] an individual right to vote had been affirmed in *Mathieu-Mohin*.[41] Notably, as Graziadei argues, there is a 'tension between rights and democracy'.[42] The democratic nature of the right to free elections contributes to contentious questions regarding the appropriate allocation of institutional power to determine the right. Contracting Parties determine how democracy functions within the State (such as political engagement and voting eligibility) and therefore, States have diverse understandings of voting rights.[43] In terms of prisoner voting democratic States 'adopt very different regimes'.[44]

The ECHR enshrines a commitment to upholding democracy which is reflected in the ECtHR's case law.[45] Therefore, the majority in *Hirst* emphasised the importance of the right to vote being inextricably linked to democracy[46] - the 'presumption in a democratic state must be in favour of inclusion' of the right to vote.[47] However, crucially, 'it is for each Contracting State to mould … its own democratic vision'.[48] The rights contained in A3P1 'are not absolute' and there is a wide MoA.[49] Despite this, the Court stressed it must 'maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of people through universal suffrage'.[50] The Court added that 'departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates'.[51] The majority emphasised 'the right to vote is not a privilege'.[52] Therefore,

[38] J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17(1) ELJ 80, 112 ('Pluralism, Deference').
[39] ibid 112-113; e.g. *The Sunday Times v United Kingdom* (A/30) (1979-80) 2 EHRR 245, para 65.
[40] Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 97.
[41] *Mathieu-Mohin* (n.10) paras 48-51.
[42] S. Graziadei, 'Democracy v Human Rights? The Strasbourg Court and the Challenge of Power Sharing' (2016) 12 EuConst 54, 55-56.
[43] S. Dothan, 'Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement' in A. Roberts and others (eds), *Comparative International Law* (OUP 2018) 393.
[44] ibid 386.
[45] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) 1950, Preamble (ECHR); see J.P. Costa, 'The Links Between Democracy and Human Rights under the Case-Law of the European Court of Human Rights' (Council of Europe, 2008) 1 <https://www.echr.coe.int/Documents/Speech_20080605_Costa_Helsinki_ENG.pdf> accessed 14 April 2022.
[46] *Hirst* (n.1) para 58.
[47] ibid para 59.
[48] ibid para 61.
[49] ibid.
[50] ibid para 62.
[51] ibid.
[52] ibid para 59.

although there was a wide MoA, 'it is not all-embracing' and the ban '*on a vitally important right*' fell outside of the MoA.[53] The severity of the interference meant the 'essence' of the right had been infringed which led to a finding of a violation.[54]

Judge Caflisch, in a separate concurring opinion, also noted States have a '"wide" margin of appreciation'.[55] In contrast to the majority, he defined the wide MoA and argued that 'this expression carries little meaning, except to suggest that states have *some* leeway'.[56] He stressed that a 'relatively' wide MoA exists but the operation of A3P1 must be subject to 'European Control'.[57] '*Some* leeway' and a '*relatively* wide' MoA arguably indicate a more restrictive interpretation, yet the precise meaning and scope of the MoA remains unclear. Judge Caflisch's interpretation of the width of the MoA raises further questions regarding whether and how the scope of the MoA can be measured.

Judge Costa, in a separate dissenting opinion, argued the majority's approach to the MoA was problematic as:

> 'one must avoid confusing *the ideal* to be attained … and the *reality* of the Hirst (No.2) judgment, which on the one hand theoretically asserts a wide margin of appreciation for the State … 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'.[58]

For Judge Costa the MoA is narrowed, as s.3 RPA is found disproportionate. A wide MoA arguably contributes to expectations that 'there should be substantial deference to States', but as *Hirst* highlights, in practice, a wide MoA does not mean the Court's scrutiny is less intense - it does *not* preclude the finding of a violation.[59] As discussed in chapter three, this contributes to the MoA's lack of clarity.[60] Notably, in the joint dissenting judgment, the sensitive political context in determining prisoners' voting rights was recognised,[61] and whilst A3P1 was deemed

[53] ibid para 82 (emphasis added).
[54] ibid para 62.
[55] ibid para O-I2.
[56] ibid (emphasis added).
[57] ibid para O-I3.
[58] ibid para O-IV9.
[59] J. Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 NQHR 324, 347.
[60] ibid 347.
[61] *Hirst* (n.1) para O-III5.

important the 'essence' of the right to vote was not impaired and the wide MoA accorded to States to determine 'their electoral system' precluded finding a violation.[62]

This analysis reveals that although the right to vote is of significant importance, the judges diverged as to whether a violation should be found. This exposes how the application of the MoA is context and interpretation dependent. The variability and opacity of the MoA arguably contributed to domestic political qualms regarding Strasbourg's legitimacy (section 5.8).

5.3.2 Legislative debate

The lack of legislative debate was another key factor which affected the width of the MoA. As noted in chapter three, there has increasingly been a 'procedural turn' in the ECtHR's case law, as exemplified by the Court's assessment of 'parliamentary process' in some cases.[63] Yet the legitimacy of the procedural turn is subject to disagreement.[64] Some argue this trend is positive, representing a 'deepening' of subsidiarity,[65] which could encourage domestic institutions to take ownership of rights issues.[66] In some cases, parliamentary process may be a factor relevant to the width of the MoA.[67] Further, parliamentary process can also be 'weighed in the … proportionality analysis of the justifiability of the state's limitation of a right'.[68] This may mean the Court refrains from engaging in 'intense substantive review'.[69] However, as Saul observes, the Court does not always articulate the 'purpose' of parliamentary process - whether it is relevant to determining MoA and/or whether it is relevant to proportionality.[70] The Court often fails to articulate the 'criteria' it uses to assess 'parliamentary process', contributing to a lack of transparency.[71] Further, where the Court refers to parliamentary process to accord greater deference to domestic decision-making, indicating a wide MoA,[72] this could risk diluting 'the

[62] ibid.
[63] A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (OUP 2016) 136.
[64] T. Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68 ICLQ 91, 104.
[65] M. Saul, 'The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments' (2015) 15 Human RtsRev 745, 752 ('The ECtHR').
[66] P. Popelier and C. Van de Heyning, 'Subsidiarity post-Brighton: procedural rationality as answer' [2017] LJIL 5, 11 ('Subsidiarity post-Brighton').
[67] M. Saul, 'Structuring evaluations of parliamentary processes by the European Court of Human Rights' (2016) 20(8) IJHR 1077, 1090 ('Structuring evaluations').
[68] ibid 1078.
[69] Popelier and Van de Heyning, 'Subsidiarity post-Brighton' (n.66) 9-10.
[70] Saul, 'Structuring evaluations' (n.67) 1090.
[71] Saul, 'The ECtHR' (n.65) 759, 760 - however, Saul notes in exercising 'structural subsidiarity' that the Court tends to assess 'democracy, domestic expertise, and policy-maker nature and context'; see also, L. Lazarus and N. Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 392-394 – argue to increase transparency, there should be 'criteria for evaluating legislative debate'.
[72] Kleinlein (n.64) 96.

Convention's potency'.[73] Conversely, where the Court draws a negative inference from the lack of legislative debate, narrowing the MoA, this could trigger hostility from States, indicating a less deferential approach.[74] Therefore, as Kleinlein argues, the 'procedural turn does not necessarily smoothen the relationship between the Court and the national authorities'.[75]

In *Hirst*, the Court noted 'there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban'.[76] As part of this assessment, the Court observed the Government had held a 'multi-party Speaker's conference on Electoral Law in 1968' which endorsed prisoner disenfranchisement and also a 'Working Party' advised that unconvicted prisoners should vote and 'Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners'.[77] The majority also noted that the High Court in *Pearson* had not undertaken an 'assessment of proportionality of the measure itself' and 'found support for the decision of the Federal Court of Appeal in *Sauvé (No.2)*, which was later overturned by the Canadian Supreme Court'.[78] There is implied criticism of the domestic court's deferential approach[79] and reliance on *Sauvé (No.2).* Arguably, if the High Court in *Pearson* had reviewed proportionality, depending on the quality and outcome of its assessment, this might have attenuated the ECtHR's criticism and encouraged the ECtHR to heed the domestic approach.

The Court's criticism of the *lack* of legislative debate is particularly controversial. The dissenting Judges stated that 'it is not for the Court to prescribe the way in which legislatures carry out their legislative functions'.[80] Disenfranchisement *was* reviewed in the 1968 Speaker's conference and also when the RPA 2000 was enacted - if MPs opposed prisoner disenfranchisement they could have decided 'otherwise'.[81] Consequently, prisoner voting law 'reflects political, social and cultural values in the United Kingdom'.[82] Pivotally, Judge

[73] R. Masterman, 'Process and Substance in Judicial Review in the United Kingdom and at Strasbourg: Proportionality, Subsidiarity, Complementarity?' in J. Gerards and E. Brems (eds), *Procedural Review in European Fundamental Rights Cases* (CUP 2017) 243.
[74] Kleinlein (n.64) 104.
[75] ibid.
[76] *Hirst* (n.1) para 79.
[77] ibid.
[78] ibid para 80; see *R (Pearson) v Secretary of State for the Home Department* [2001] EWHC Admin 239 [2001] HRLR 39. (Relied on - *Sauvé v Canada (No.2)* [2000] 2 CF 117).
[79] A. Müller, 'Domestic authorities' obligations to co-develop the rights of the European Convention on Human Rights' (2016) 20(8) IJHR 1058, 1064, 1067.
[80] *Hirst* (n.1) para O-III7.
[81] ibid.
[82] ibid.

Tulkens and Judge Zagrebelsky in their concurring opinion cautioned that the Court's analysis of Parliamentary debate represents 'a difficult and slippery terrain for the Court' particularly when a wide MoA must be afforded to States.[83] Therefore, the Court's scrutiny of the UK's legislative process was questionable.

As discussed in chapter four, domestic courts are constrained by parliamentary privilege.[84] However, at the European level the ECtHR is not required to take 'domestic constitutional' legal issues into account, there may be 'systematic blindness of international law and tribunals to national (including constitutional) law'.[85] Therefore, the ECtHR may consider 'parliamentary debate' as a factor which might affect the 'width of the margin of appreciation accorded to the national legislature'.[86] However, the dissenting judges were correct to caution against critical analysis of parliamentary debates, as overlooking domestic legal issues can exacerbate inter-institutional tensions.[87] This demonstrates how the prisoner voting clash was not just politics versus law, but also concerned the potential violation of domestic legal rules.

However, as explained in chapter four, in some cases domestic courts have addressed 'parliamentary engagement with the human rights issue' by drawing 'a *positive* inference' from Parliament's consideration of a rights issue.[88] Alternatively, the court may draw 'a *negative* inference' from Parliament's lack of consideration of a rights issue.[89] These positive and negative-inference cases are also evident at the European level and notably, negative inference cases are rarer than positive inference cases.[90] In *Hirst* the Court drew a negative inference from the arguable dearth of legislative debate on prisoner voting,[91] which *narrowed* the MoA.[92] There was a powerful dissenting judgment and Saul suggests that cases in which the Court articulates a clear connection between the legislative debate and the MoA, provoke the most

[83] ibid.
[84] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, [1992] 3 WLR 1032 [630] (Lord Brown-Wilkinson); *Wilson v First County Trust* [2003] UKHL 40, [2004] 1 AC 816 [56], [60] [67] (Lord Nicholls), [116] (Lord Hope), [142] (Lord Hobhouse).
[85] D. Feldman, 'Sovereignties in Strasbourg' in R. Rawlings, P. Leyland and A. Young (eds), *Sovereignty and the Law* (2013 OUP) 227.
[86] A. Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34(3) OJLS 443, 446.
[87] *R (HS2 Action Alliance Limited) v The Secretary of State for Transport and another* [2014] UKSC 3, [2014] 1 WLR 324 (*HS2*) [79] (Reed JSC) whilst concerning EU law, the UKSC stated: 'If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom'.
[88] Kavanagh (n.86) 456.
[89] ibid.
[90] ibid 473; positive inference cases *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312 (*Animal Defenders*); *Shindler v UK* (2014) 58 EHRR 5, para 117.
[91] ibid.
[92] Saul, 'The ECtHR' (n.65) 754-755.

controversy 'amongst certain … judges'.[93] However, as Kavanagh argues, legislative debate is one factor and incompatibility would not be remedied solely by Parliament demonstrating that the issue had been debated.[94] Yet, the consequences of this assessment were highly significant in shaping the political response to the judgment, for example, it was key in motivating the backbench debate on prisoner voting.[95]

Further, in drawing positive or negative-inferences, Kavanagh argues parliamentary privilege precludes assessment of the 'quality of the substantive reasons', but assessment of the 'quality of the decision-making *process* in Parliament' might be legitimate.[96] The general academic consensus is that the Court focused on parliamentary process.[97] Nevertheless, Hooper is critical of the Court's assessment for merely amounting to 'one sentence' which cannot capture the complexity of Parliament's role.[98] However, if the Court *had* provided more detail, this could have compounded its infringement of domestic rules, heightening the controversy.

Overall, Kavanagh acknowledges that the Court in *Hirst* applied 'a more stringent standard' than domestic courts.[99] Kavanagh postulates this difference is informed by the importance of 'subsidiarity' which requires Strasbourg to afford primary responsibility for human rights to the State and the Court acts as a 'check and balance on this process'.[100] Therefore, 'it may be more natural' for the Court to assess legislative debate.[101] Yet, the Court should be cautious in exercising this checking function, especially when drawing a negative inference in controversial areas.[102] Whilst the Court's 'more stringent standard' is possible as it is not constrained by domestic constitutional principle,[103] this fuelled UK political hostility. Consequently, political dissent against Strasbourg is multi-layered. The prisoner voting clash

[93] ibid 755.
[94] Kavanagh (n.86) 476-477.
[95] HC Deb 10 February 2011, vol 523, col 493; Kavanagh (n.86) 478, *although* notes 'this debate was not legislatively focused'.
[96] Kavanagh (n.86) 465 (emphasis added).
[97] T. Lewis, '"Difficult and slippery terrain": Hansard, human rights and Hirst v UK' [2006] PL 209, 212; see Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 98; Kavanagh (n.86) 476; C.R.G. Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2013) 66 ParlAff 511, 523; Popelier and Van De Heyning, 'Procedural Rationality' (n.60) 253.
[98] H. Hooper, 'The Use of Parliamentary Materials by Courts in Proportionality Judgments, in M. Hunt, H. Hooper and P. Yowell eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 383.
[99] Kavanagh (n.86) 478.
[100] ibid.
[101] ibid.
[102] Hooper (n.98) 384.
[103] Kavanagh (n.86) 478.

is not simply "politics versus law" but includes domestic institutions objecting to the ECtHR's infringement of domestic *legal* rules.

5.3.3 Consensus

5.3.3.1. Problems with 'blanket ban'

In considering other Contracting Parties' approaches to prisoner voting, the majority noted that thirteen States included a 'blanket restriction' disenfranchising prisoners.[104] The Court recognised there was a lack of European consensus on prisoner voting.[105] It acknowledged the UK's approach was *'less* far-reaching' than other States, as UK law includes 'exceptions' to the ban and 'unlike the position in some countries, the legal incapacity to vote is removed as soon as the person ceases to be detained.[106] Notwithstanding these exceptions, the Court held there was a 'blanket restriction' with the UK being in the 'minority' of States.[107] This exposes the challenges in defining the scope of blanket bans, as depending on interpretation, "blanket" arguably suggests an absolute restriction without allowing for exceptions – yet, the UK does allow for some exceptions. In a subsequent prisoner voting case, *Firth,* Judge Wojtyczek disputed the utility of the term "blanket" restriction and noted it 'seems to be useless as a tool for identifying "suspicious" restrictions on rights because of its relativity. If the Court means that the personal scope of a restriction was too broad, then it should say so clearly and explain why'.[108]

Further, in *Nicklinson,* an assisted suicide case, Lord Neuberger encapsulated the problem with defining issues as 'blanket bans', noting it 'is not helpful, as everything depends on how one defines the width of the blanket.'[109] As Plaxton and Lardy note, this opacity is further compounded by the Court's lack of scrutiny of the UK's 'objectives', as it failed to 'explain why some people might be disenfranchised but not others' and therefore, the reasons for the UK's ban being 'outside the range of reasonable interpretations of the right to vote' is obscured.[110] Therefore, the terminology of blanket bans seems unhelpful, as it raises further questions regarding the acceptable limits that can be placed on a right.

[104] *Hirst* (n.1) para 81.
[105] ibid.
[106] ibid.
[107] ibid.
[108] *Firth v United Kingdom* (2016) 63 EHRR 25, para OII-6 (*Firth*).
[109] *R (Nicklinson) and another v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 [63] (Neuberger JSC).
[110] Plaxton and Lardy (n.23) 123.

5.3.3.2. Did consensus affect the MoA?

Dzehtsiarou defines European consensus 'as a general agreement among the majority of Member States … about certain rules and principles identified through comparative research of national and international law and practice'.[111] European consensus operates as a 'rebuttable presumption' in favour of the approach adopted by the majority of States.[112] As Dothan explains, generally the ECtHR will hold that 'policies' violate the ECHR where 'they contradict the policies of the majority of states in Europe', which indicates a narrower MoA.[113] Conversely, where there is a lack of consensus this usually indicates a wider MoA.[114] However, in some cases, a lack of consensus may result in no MoA being granted.[115] The application of consensus is highly context dependent, which can lead to unpredictability, fuelling perception that the ECtHR's jurisprudence is inconsistent.[116]

In *Hirst* the Court stated that *even* if there is an absence of consensus it 'cannot of itself be determinative of the issue'.[117] As Vogiatzis explains, the 'Court was *not* deferential despite the *lack* of European consensus' - it did not lead to a wider MoA.[118] Nevertheless, whilst the lack of consensus was not determinative, the Court utilised the lack of consensus to justify leaving Parliament 'to decide on the choice of means' for rectifying the incompatibly with A3P1.[119] In doing so, as Murray argues, the Court afforded 'broad leeway' to the UK to determine the means to remedy the violation.[120]

In contrast, the dissenting judges argued the majority judgment (that disenfranchisement falls outside the wide MoA accorded to States) 'is difficult to reconcile', as case law consistently held A3P1 provides States with a wide MoA.[121] Consequently, greater significance should have been placed on the *lack* consensus which should have corresponded to a deferential

[111] K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12(10) GermanLJ 1730, 1731 ('European Consensus').
[112] ibid 1733; K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 29 ('*European Consensus*').
[113] Dothan (n.43) 383.
[114] D. McGoldrick, 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' [2016] ICLQ 21, 28.
[115] N. Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2018) 25(3) EPL 445, 453.
[116] ibid 478; E. Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 NYUL Int'l L & Pol 843, 852-853.
[117] *Hirst* (n.1) para 81; For discussion of different Contracting States' practices see - Dothan (n.43) 382-386.
[118] Vogiatzis (n.115) 456-457.
[119] *Hirst* (n.1) para 84.
[120] C.R.G. Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after *Hirst v United Kingdom*' (2011) 22 KLJ 309, 313 ('Playing for Time').
[121] *Hirst* (n.1) para O-III5.

approach.[122] Moreover, the dissenting judges argued the Court wrongly applied 'evolutive' reasoning, as this should be grounded in 'an emerging consensus' which is not present in this case.[123] As Dzehtsiarou explains, consensus can enhance the legitimacy of the judgment, as the Court utilises 'updated consent' alleviating criticism that States did not originally consent to an issue.[124] However, as Vogiatzis argues, 'the evolution in the respective human rights standards will be *supported* but not *based exclusively* on consensus'.[125]

It is worth reflecting on whether the judgment was evolutive. In chapter one, it was noted the ECtHR in *Mathieu-Mohin* held that rather than being a purely inter-state obligation, A3P1 enshrines an individual right to vote.[126] However, Dzehtsiarou contends that A3P1 as drafted 'does not guarantee any precise individual rights'[127] and the Court in *Mathieu-Mohin* 'effectively redrafted the Article in order to insert a voting rights protection clause into the Convention', which is indicative of dynamic reasoning and therefore, Strasbourg jurisprudence on voting rights did not have a firm legal basis.[128] Moreover, Dzehtsiarou argues that prior to *Hirst* the Court 'delivered judgments on the merits in fewer than ten cases in which [A3P1] was invoked. So it cannot be claimed that there was a clear and established approach by the ECtHR in relation to voting rights'.[129] However, despite *Mathieu-Mohin* constituting an innovative judgment in 1987, by the time *Hirst* was decided in 2005, even though there were few cases on A3P1, it was settled that a right to vote had been established: the ECtHR 'was not creating a right to vote where none had previously existed'.[130] Further, as Murray argues, the Grand Chamber in *Hirst* 'did not explicitly' apply the 'living instrument' doctrine, rather, the Court noted there was a presumption in favour of inclusion of 'universal suffrage' which 'would have been as salient when the ECHR was drafted'.[131] The Court clearly regards voting rights of significant importance.[132] Therefore, the primary issue of uncertainty concerned the *scope* of the right to vote, as the Court in *Mathieu-Mohin* emphasised the right to vote is 'not

[122] ibid para O-III6.
[123] ibid.
[124] Dzehtsiarou, *European Consensus* (n.112) 152.
[125] Vogiatzis (n.115) 464.
[126] *Mathieu-Mohin* (n.10) paras 48-51.
[127] Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 96.
[128] ibid 96-97.
[129] ibid 97.
[130] C.R.G. Murray, 'Monstering Strasbourg over prisoner voting rights' in M. Farrell, E. Drywood and E. Hughes (eds), *Human Rights in the Media: Fear and Fetish* (Routledge 2019) 105 ('Monstering Strasbourg').
[131] ibid.
[132] ibid; H.M. Napel, 'The European Court of Human Rights and Political Rights: The Need for More Guidance' (2009) 5 EuConst 464**,** 467.

absolute … there is room for implied limitations' and States have a wide MoA.[133] Due to the wide MoA, it was not guaranteed that the UK's ban would be held incompatible with A3P1, but when the Court's inclusive and protective approach to minorities and democracy is considered and its prior recognition of a right to vote, it is unsurprising that the Court found s.3 RPA 1983 wanting. Murray contends that *Hirst* demonstrates the ECtHR 'engaging with a novel issue, rather than the Court partaking in novel modes of interpretation'.[134] This analysis therefore suggests that the dissenting judges' criticism of the Court in *Hirst* for its evolutive reasoning is overstated.

Is minimisation of the lack of consensus problematic? Does it challenge the Court's legitimacy? As Dzehtsiarou explains, consensus aids 'clarity and foreseeability' but crucially, it 'has never been the *sole* basis of a judgment'.[135] Therefore, Vogiatzis argues that consensus, where relevant, 'adds *as well* to the legitimacy of the Court's conclusions'.[136] The Court's minimisation of consensus will not by itself deal a fatal blow to the legitimacy of the Court's judgments.[137] Dothan argues the Court's departure from the lack of consensus in *Hirst* was 'justified' as the 'fundamentally different conceptions of the right to vote' precluded 'the court from finding a true majority solution'.[138] However, considering the other challenges identified so far with the Court's reasoning, its dismissal of the lack of consensus without clear explanation, provides a further indication as to the judgment's lack of transparency. Notably, Vogiatzis argues it is 'preferable' for consensus to feature 'as *one* of the available forms of reasoning within proportionality', rather than it being completely dismissed or it being relied on 'primarily (or perhaps exclusively)'.[139] This supports the ECtHR's 'multi-dimensional legitimacy' in protecting human rights in such a way which respects its subsidiary role.[140] In recognition of the Court's multi-dimensional legitimacy the lack of consensus in *Hirst* should have at the very least, prompted greater reflection. From the UK Government's perspective the lack of consensus should equate to greater deference.[141] However, just because States have an expectation of deference does not mean the Court will necessarily defer to States. Deference is

[133] *Mathieu-Mohin* (n.10) para 52.
[134] Murray, 'Monstering Strasbourg' (n.130) 106.
[135] K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] PL 534, 534.
[136] Vogiatzis (n.115) 473.
[137] ibid 473-474.
[138] Dothan (n.43) 393-394.
[139] Vogiatzis (n.115) 475.
[140] ibid.
[141] *Hirst* (n.1) para 47.

not guaranteed – 'invoking the consensus argument does not automatically lead to more or less deferential judgments'.[142] Yet, greater clarity as to why the lack of consensus did not widen the MoA would have enhanced the cogency and transparency of the judgment.

5.3.4 Guidance?

The UK Government in their submissions to the Grand Chamber of the ECtHR in *Hirst* criticised the lack of guidance from the Chamber of the ECtHR and argued '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 Art.3 of Protocol No.1 and urged that in the interests of legal certainty Contracting States received detailed guidance'.[143] However, the majority held the Court's role is to determine 'compatibility' and it is for the legislature to ascertain the means to comply with the judgment.[144] Apart from stating the issue should be left to the legislature, the Court refrained from specifying the means to remedy the incompatibility. Murray praises the Court's lack of guidance as evidence that the Court respected the UK's wide MoA which shows *Hirst* constitutes 'a restrained decision'.[145] Yet the lack of guidance exemplifies the contradictory nature of the judgment, as the Court oscillates between respecting and then undermining the supposed "wide" MoA.

As Bates argues, the majority judgment is unclear as the Court held it would not provide guidance, but in holding legislation disproportionate the Court detailed flaws in s.3 RPA.[146] For example, in paragraph 77 of the judgment, the Court observed that s.3 RPA: disenfranchises a 'significant' number of prisoners, 'includes a wide range of offenders and sentences' and 'in sentencing the criminal courts … make no reference to disenfranchisement and it is not apparent … there is any direct link between the facts of any individual case' and disenfranchisement.[147] Whilst this is not guidance, these flaws highlight aspects that *could* be rectified in amending legislation to ensure compatibility. As Murray explains, the majority judgment illustrates the 'interplay' between the proportionality test and the MoA, the Court held the ban was 'disproportionate … but allowed states to deny the vote to particular prisoners

[142] Vogiatzis (n.115) 478.
[143] *Hirst* (n.1) para 52.
[144] ibid para 83 (emphasis added).
[145] Murray, 'Playing for Time' (n.120) 314-315.
[146] E. Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 HRLRev 503, 509 ('Analysing the Prisoner Voting Saga').
[147] *Hirst* (n.1) para 77.

on the basis of the seriousness or nature of their offences', which suggests States can place limitations on prisoner voting.[148]

In contrast to the majority, Judge Caflisch (concurring) provided a list of 'parameters', which included the suggestion that 'disenfranchisement must remain confined to the punitive part of the sentence and may not be extended to the remainder of the sentence'.[149] Such an approach could be deemed less deferential. The dissenting judges were critical of the Court's reluctance to provide guidance to Contracting States regarding the 'solutions compatible with the Convention', as 'it would have been desirable to indicate the correct answer'.[150] Although they refrained from providing examples, they criticised the majority approach for implying that Contracting States could 'either abolish disenfranchisement for prisoners or to allow it only to a very limited extent' – narrowing the MoA.[151] As Bates observes, the dissenting Judges suggest the Court had essentially provided two options (narrowing the MoA).[152] However, the dissenting Judges were too restrictive in their assessment of the majority approach as there is no suggestion that the majority sought to limit disenfranchisement to two options.

To what extent would the width of the MoA be affected if the majority had provided guidance, reflecting or building on Judge Caflisch's approach? Arguably, due to Strasbourg's conditional legitimacy the Court may be wary of being too prescriptive. Guidance could narrow the MoA, being less deferential, undermining subsidiarity and impinging on State sovereignty, potentially fuelling criticism of Strasbourg.[153] However, despite being less deferential, in other cases the Court has shown willingness to provide guidance.[154]

Briant argues the lack of guidance in *Hirst* contributed to the Court's confused approach in subsequent prisoner voting judgments, arguably providing the Government with greater leeway to procrastinate.[155] Moreover, the Government indicated receptiveness to receiving guidance to aid 'legal certainty'.[156] Arguably the Government sought to engage in dialogue by

[148] C.R.G. Murray, 'We Need to Talk: Democratic Dialogue and the Ongoing Saga of Prisoner Disenfranchisement' (2011) 62 NILQ 57, 61-62.
[149] *Hirst* (n.1) para O-I7(d).
[150] ibid para O-III8.
[151] ibid para O-III9.
[152] Bates, 'Analysing the Prisoner Voting Saga' (n.146) 508-509.
[153] L.A. Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments Under Article 46 ECHR' (2014) 32 NQHR 235, 250.
[154] C. Paraskeva, 'European Court of Human Rights: from declaratory judgments to indications of specific measures' [2018] EHRLR 46, 47; as noted in *Hirst* (n.1) para 83.
[155] S. Briant, 'Dialogue, diplomacy and defiance: prisoners' voting rights at home and in Strasbourg' [2011] EHRLR 243, 245 ('Dialogue, diplomacy').
[156] *Hirst* (n.1) para 52.

collaborating with the Court.[157] However, it is contradictory for the Government to request that the Court respects the wide MoA, whilst also requesting that it adopts a more prescriptive approach - the two aims appear antithetical.

Arguably, the Government requested guidance to increase the pressure on the Court, to show that where the Court identifies a violation it should also identify a solution. Therefore, perhaps the Government hoped the absence of a clear solution, could support arguments that the Court should not have interfered in prisoner voting and that no violation should be found. Yet it seems more likely that the Government's request for guidance formed part of the Government's delay tactics, perpetuating non-compliance. Whilst guidance could have reduced some of the subsequent confusion, possibly resulting in more efficient resolution,[158] on balance, due to the controversy of prisoner voting, the Government may have ignored or rejected the guidance. As will be shown in *Greens*, the Court specified legislative amendments were required,[159] yet this did not resolve the clash, rather non-compliance continued. Nevertheless, the Court could have focused on form rather than content by clarifying that legislative amendment was required in the *Hirst* judgment. This could have reduced confusion in subsequent cases and might have attenuated the political prevarication. Further, the Court should have clarified in *Hirst* that paragraph 77 of its judgment was not intended to be a test but rather the Court was identifying flaws in domestic prisoner voting legislation. Generally, the Court's application of the MoA lacked clarity and coherence. This ambiguity provided further scope for the UK Government to criticise the Court's approach and challenge Strasbourg's legitimacy. The reasons for the clash are further explored in section 5.8 but first, the following sections proceed with the case analysis to unravel the consequences of *Hirst.*

5.4 *Frodl v Austria*:[160] an off-piste interpretation

Although *Frodl* is not a case to which the UK was party, the case is significant as the Court considered *Hirst*. However, rather than eliciting clarification *Frodl* precipitated further confusion. This therefore exposes the consequences of the lack of clarity in *Hirst*. Following *Hirst,* the Court wrestled with the effects of its own case law and the UK Government resolutely resisted compliance which contributed to the ECtHR's "loss".

[157] A. Young, *Democratic Dialogue and the Constitution* (OUP 2017) 113, 232.
[158] S. Briant, 'The requirements of prisoner voting rights: mixed messages from Strasbourg' [2011] CLJ 279, 281 ('The requirements of prisoner voting').
[159] *Greens and MT v United Kingdom* (2011) 53 EHRR 21, para 112 (*Greens*).
[160] *Frodl v Austria* (2011) 52 EHRR 5 (*Frodl*).

Under s.22 of the National Assembly Election Act, prisoners in Austria who committed an offence with intent and were sentenced to more than one year imprisonment, were disenfranchised and the disenfranchisement would end 'six months later'.[161] In accordance with Austrian law the applicant was excluded from the electoral register and argued this breached A3P1.[162] The Court (majority of six to one) noted the parallels with *Hirst* and detailed the 'criteria' established in *Hirst* 'which had to be respected by Member States in imposing such restrictions'.[163] These criteria were that first, removal of the right to vote can only apply to prisoners sentenced to a 'lengthy term of imprisonment'; second, it should include 'a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and third, such a measure should 'preferably be imposed … by the decision of a judge following judicial proceedings'.[164] Whilst the Court may of course develop or provide clarification on its jurisprudence, this is a surprising interpretation of *Hirst,* as the Court in *Frodl* interpreted or read in a prescriptive set of guidelines.

The Court held Austrian law pursued a legitimate aim.[165] By contrast, in the assessment of the proportionality of the measure, the Court held that *despite* Austrian law limiting disenfranchisement to a 'more narrowly defined group' and being less restrictive than UK law, it did not fall within the MoA, as applying 'the *Hirst* test … it is an essential element that the decision on disenfranchisement should be taken by a judge'.[166] Further, the Court emphasised that 'proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances' and held that A3P1 had been violated.[167]

The Court in *Frodl* provided a gloss on *Hirst* and determined that a test - that disenfranchisement should be determined by a judge - had been established. The Court did not entirely invent this test but based it on factors put forward by the majority in *Hirst.* For example, in *Hirst* the Court held there must be a 'discernible and sufficient link between the sanction and the conduct and the circumstances' and noted the 'Venice Commission' recommended that 'withdrawal of political rights should only be carried out by express judicial decision'.[168] Further, the Court in *Hirst* noted UK courts did not refer to disenfranchisement in sentencing[169]

[161] ibid para 14.
[162] ibid paras 6–12.
[163] ibid para 28.
[164] ibid.
[165] ibid para 30; Murray, 'Playing for Time' (n.120) 325.
[166] ibid paras 33–34.
[167] paras 35–36.
[168] *Hirst* (n.1) para 71.
[169] ibid para 77.

which might be interpreted as the Court identifying an omission in UK law which *could* be remedied. However, the Court in *Hirst* did not suggest these factors should be interpreted as establishing a "test".[170]

Arguably, the Court was influenced by the UK's delays in implementing *Hirst* and to avoid delay in Austria, the Court outlined requirements.[171] Yet the Court's off-piste interpretation added to subsequent confusion. For instance, the Court's more 'activist' approach[172] contributes to doubts regarding the true width of the apparently "wide" MoA. The MoA is beset with caveats, which has the effect of narrowing the MoA so that it 'appears vanishingly small'.[173] Despite this, in contrast to the UK, Austria implemented the ECtHR's judgment.[174] However, with the UK political branches adopting a disobedient stance towards enfranchising prisoners, a disobedience exacerbated by scepticism towards European rights protection, the Court's bold approach in *Frodl* potentially validated and intensified 'challenges to the Court's legitimacy'.[175]

5.5 *Greens and MT v United Kingdom*[176] (*Greens*)

Following *Frodl* the law on prisoner voting was unsettled. The more Strasbourg pushed, the more the UK elected branches resisted, adding to the layers of conflict. Prisoner voting returned to Strasbourg in *Greens*. This case concerned UK prisoners and the UK Government was party to the proceedings.

The applicants in *Greens* sought judicial review of their disenfranchisement from voting in European Parliament elections, the general election and pending Scottish Parliament election, which they claimed violated A3P1.[177] However, the Government argued the applicants had failed to exhaust domestic remedies.[178] The Government contended the applicants should have first issued a separate challenge domestically, challenging their disenfranchisement from voting in European Parliament elections, as 'a sympathetic interpretation' of s.8 European Parliamentary Elections Act 2002 (EPEA 2002) could represent 'a potential effective remedy'

[170] ibid para 84.
[171] Briant, 'The requirements of prisoner voting' (n.158) 281.
[172] Bates, 'Analysing the Prisoner Voting Saga' (n.146) 533; see also, Murray, 'Playing for Time' (n.120) 324.
[173] Briant, 'Dialogue, diplomacy' (n.155) 247.
[174] Bates, 'Analysing the Prisoner Voting Saga' (n.146) 510.
[175] Murray, 'Playing for Time' (n.120) 325.
[176] *Greens* (n.159).
[177] ibid paras 7–18, 73.
[178] ibid paras 60-61.

which the applicants 'had not exhausted'.[179] Essentially, the Government argued the applicants could have claimed that s.3 HRA could be used to 'read down' s.8 EPEA 2002.[180] Yet, the Court held that 'a challenge to s.8 of the 2002 Act is "purely parasitic" to the real challenge which is to s.3 of the 1983 Act' and there was no 'possibility of seeking to circumvent the ban on prisoners voting in European elections by lodging a separate challenge to s.8 of the 2002 Act' as it had no 'reasonable prospects of success'.[181] As noted in chapter four, the Court also cast doubt on the effectiveness of the declaration as a remedy and endorsed the domestic courts' approach, and questioned the utility of a second declaration.[182]

Regarding the violation of A3P1, as both applicants were to be released before the Scottish Parliament election, the Court stated it would only review their claim in relation to the European Parliament elections and the general election.[183] The Court observed the UK had not modified s.3 RPA 1983 and due to the 'parasitic' nature of s.8 of the 2002 Act this disenfranchised the prisoners in relation to both national and European elections and there was a violation of A3P1 'in both cases'.[184]

5.5.1 The pilot judgment procedure: an effective tool?

The Court held due to 'the lengthy delay in implementing' *Hirst* 'and the significant number of repetitive applications … it is appropriate to make findings under art.46 of the Convention'.[185] To ensure implementation the Court explained it would 'adopt a pilot judgment procedure'.[186] This enables the Court to 'facilitate effective implementation', by identifying 'structural problems underlying the violation' and then indicating 'specific measures or actions to be taken by the respondent state to remedy them'.[187] The development of the pilot judgment procedure occurred alongside broader reform to the ECHR,[188] its use was supported by the

[179] ibid paras 60-61.
[180] ibid para 67.
[181] ibid para 70.
[182] ibid para 68.
[183] ibid para 76.
[184] ibid para 79.
[185] ibid para 105.
[186] ibid para 107-108.
[187] ibid para 107.
[188] e.g. Protocol No.14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention; C. Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At Home' (2008) 12(3) IJHR 415, 433-434.

CM[189] and subsequently developed in case law.[190] Post *Greens*, after '31 March 2011', the procedure was enshrined in Rule 61 of the Rules of the Court.[191] The purpose of the procedure is to 'facilitate the speediest and most effective resolution of a dysfunction' in a Contracting State.[192] The procedure also helps 'induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level, thus implementing … subsidiarity'.[193] As Buyse clarifies, the procedure supports subsidiarity in recognising the 'bulk of decision-making' should arise domestically.[194] The Court emphasised the application of the procedure was complementary to the CM's role.[195] Therefore, as Guerra explains, the pilot judgment procedure indicates a move away from the Court's traditional approach which consisted of 'purely declaratory rulings', demonstrating the Court is willing to be more 'proactive'.[196]

The Court was critical of the UK's delay, noting thousands of pending applications and the gravity of the UK's non-compliance, which affected not only the UK but also the effectiveness of the ECHR.[197] Crucially, the Court went further than *Hirst* by stipulating that '*legislative* amendment' was required.[198] The Court considered whether it should provide 'guidance'[199] and noted the *Hirst* "test" which had been propounded in *Frodl,* but clarified that in *Hirst* the Court had not provided guidance due to the variable ways States could comply, as the Court's role is 'subsidiary'.[200] Therefore, the Court considered it inappropriate to include guidance.[201]

[189] Committee of Ministers, CMRes/(2004)3 (114th Session 12 May 2004) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd190> accessed 14 April 2022; see A. Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures' (2017) 17 HRLRev 451, 452.
[190] *Broniowski v Poland* App No 31443/96 (ECtHR, 22 June 2004).
[191] European Court of Human Rights, Rule 61 of the Rules of the Court <https://www.echr.coe.int/Documents/Rule_61_ENG.pdf> accessed 14 April 2022.
[192] *Greens* (n.159) para 108.
[193] ibid paras 107-108.
[194] A. Buyse, 'Flying or landing? The pilot judgment procedure in the changing European human rights architecture' in O.M. Ardardóttir and A. Buyse, *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU, and National Legal Orders* (Routledge 2016) 102.
[195] *Greens* (n.159) para 107.
[196] L.L. Guerra, 'Compliance with Strasbourg Court Rulings: A General Overview', in K. Ziegler, E. Wicks and L Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 336.
[197] *Greens* (n.159) para 112.
[198] ibid (emphasis added).
[199] ibid para 122.
[200] ibid para 113.
[201] ibid para 115.

Whilst the Court did not overrule *Frodl*, it 'distanced itself' from the more activist reasoning[202] and adopted a more 'minimalist' approach.[203]

Yet despite this "sensitivity" the Court was critical of the UK's non-compliance and stated the UK had six months to 'introduce legislative proposals to amend' s.3 RPA 1983, and if necessary, s.8 EPEA 2002.[204] In applying the pilot judgment procedure, the Court noted it had a different application in this case, as in contrast to other cases, no individual measures were required: 'the relief available from this Court is of a declaratory nature. The only relevant remedy is a change in the law'.[205] To avoid over-burdening the Court with its already 'considerable caseload' the Court suspended consideration of 'comparable cases'.[206] The Court added that if the UK failed to comply, it could exercise its discretion to reconsider applications.[207] In reconsidering these applications, there was the spectre of possible financial compensation being awarded to disenfranchised prisoners.[208]

Arguably, the Court's more robust approach is understandable, as the UK's non-compliance was negatively affecting the UK's relationship with Strasbourg. The Court sought to demonstrate that sustained non-compliance would not be tolerated.[209] Yet despite this, even though the UK eventually put forward legislative proposals, these were not adopted – this exposes the Court's limits in securing implementation.[210] Following the Court's judgment, both Mr Greens and the Government sought a referral to the Grand Chamber.[211] The Government utilised the referral letter to vent its issues with *Hirst* and criticised the confusion following *Frodl*.[212] The referral request was denied[213] and the prisoner voting clash continued.

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[202] Briant, 'Dialogue, diplomacy' (n.155) 246.
[203] Bates, 'Analysing the Prisoner Voting Saga' (n.146) 510; Murray, 'Playing for Time' (n.120) 331.
[204] *Greens* (n.159) para 115; T. Zwart, 'More human rights than Court: Why the legitimacy of the European Court of Human Rights is in need of repair and how it can be done' in S. Flogaitis, T. Zwart and J. Fraser (eds), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 71, 87.
[205] *Greens* (n.159) para 118, 120.
[206] ibid para 122.
[207] ibid paras 121-122.
[208] Bates, 'Analysing the Prisoner Voting Saga' (n.146) 512; Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL 103, HC 924) 31-32.
[209] A. Donald and A.K. Speck, 'The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments' (2019) 19 HRLRev 83, 99.
[210] Buyse (n.194) 114.
[211] The process of referral to the Grand Chamber is provided for in ECHR (n.45) Article 43.
[212] Prisoners: prisoner disenfranchisement – failure to introduce general measures – pilot judgment' [2011] EHRLR 209, 211-212; Bates, 'Analysing the Prisoner Voting Saga' (n.146) 514.
[213] A. Horne and I. White, *Prisoners' voting rights (2005 to May 2015)* (House of Commons Library, Parliament and Constitution Centre, 11 February 2015) 39.

5.6 *Scoppola v Italy*: an exercise of 'damage limitation'?[214]

The ECtHR subsequently extended the UK's six month deadline, enabling the UK Government to account for its referral as a third-party intervener to the Grand Chamber in *Scoppola*.[215] In *Scoppola* the applicant, who had been convicted of murder, claimed his disenfranchisement violated A3P1.[216] According to Italian law, as 'an ancillary penalty' a prisoner can be banned from public office, which leads to 'forfeiture of the right to vote' and can be 'temporary (where the sentence is three years or more) or permanent (for sentences of five years or more and life imprisonment)'.[217] Alternatively, prisoners may be disenfranchised where the prisoner is convicted of 'specific offences for which express provision is made by law, irrespective of the duration of the sentence'.[218] Three years after completion of the 'principal penalty … an application for rehabilitation could be made'.[219] Therefore, due to the length of the sentence, the applicant was banned from public office and was 'permanently' disenfranchised.[220] The Court classed Italian legislation as falling into the 'intermediate approach' amongst contracting States.[221] This is despite the fact Italian law provides for possible permanent disenfranchisement post-incarceration.

Regarding the applicant's case, the Court held the measure pursued a legitimate aim.[222] The Court then assessed the proportionality of the measure and considered whether *Hirst* 'should be confirmed'.[223] The UK Government, as third-party intervener, argued the Grand Chamber 'should revisit its decision' in *Hirst*, as it was wrongly decided.[224] The Government noted the 'wide margin of appreciation' and that the Commons debate found 'by 242 to 22' in favour of not amending the RPA 1983 and that contrary to *Frodl* there was no requirement of 'a case-

[214] E. Bates, 'Democratic Override (or Rejection) and the Authority of the Strasbourg Court: The UK Parliament and Prisoner Voting' in M. Saul, A. Føllesdal and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (CUP 2017) 303 ('Democratic Override').
[215] *Scoppola v Italy (No.3)* (2013) 1 Costs LO 62, (2013) 56 EHRR 19 (*Scoppola*).
[216] ibid paras 3, 14.
[217] ibid paras 33, 34.
[218] ibid paras 105, 33.
[219] ibid para 69.
[220] ibid para 21.
[221] ibid para 47.
[222] ibid paras 91, 92.
[223] ibid paras 93-96.
[224] ibid para 78.

by-case' decision.[225] However, the UK's arguments 'failed to convince the Court'.[226] This shows the relevance of parliamentary debate 'remains highly questionable'.[227]

Whilst the ECtHR is not bound by precedent, to aid 'legal certainty, foreseeability and equality before the law it should not depart, without good reason, from precedents'.[228] Therefore, the Court confirmed *Hirst* and noted the trend now suggested there were 'fewer restrictions on convicted prisoners' voting rights'.[229] In 2005, thirteen Contracting States had a blanket prisoner voting ban.[230] Whereas, in 2012, only seven States 'automatically deprive all convicted prisoners … of the right to vote'.[231] Whilst not necessarily amounting to 'consensus', it showed other States endorsed Strasbourg's approach, arguably enhancing the legitimacy of the Court's approach.[232]

Significantly, the Grand Chamber held the finding in *Frodl* that 'the decision on disenfranchisement should be taken by a judge' was *not* an essential element.[233] Contracting States took a varied approach with only 'eleven' stipulating that a decision must be taken 'on a case-by-case basis'.[234] Therefore, 'removal of the right to vote without any *ad hoc* judicial decision does not, in itself, give rise to a violation of' A3P1.[235] The Court's confirmation that *Frodl* had gone too far by establishing a test could fuel resistance, as it exposes an inconsistency in the Court's decision-making. Whilst domestic case law can also produce inconsistencies, with courts overruling previous decisions or clarifying the law, the constitutional controversy surrounding prisoner voting, combined with question marks regarding the Court's legitimacy (discussed in chapter three and section 5.8), magnified the significance of these inconsistencies.

In contrast to s.3 RPA 1983, the Court held Italian legislation was not 'general, automatic and indiscriminate', rather, prisoners were disenfranchised to differing degrees depending on the type of offence and length of sentence imposed.[236] Even prisoners who are permanently

[225] ibid paras 75, 79, 80.
[226] P. Cumper and T. Lewis, 'Blanket bans, subsidiarity, and the procedural turn of the European Court of Human Rights' (2019) 68(3) ICLQ 611, 633.
[227] ibid 633.
[228] *Scoppola* (n.215) 83.
[229] ibid paras 95, 96.
[230] Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 104.
[231] *Scoppola* (n.215) para 46.
[232] Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 104.
[233] *Scoppola* (n.215) paras 98, 100.
[234] ibid para 101.
[235] ibid para 104.
[236] ibid para 108.

disenfranchised from voting can 'recover that right'.[237] Consequently, Italian law was proportionate and the Court held by a majority of sixteen to one that there was no violation of A3P1.[238] The Court clarified that provided legislation was not disproportionate, then restrictions, such as those imposed by Italian legislation, could be placed on the right to vote.

In *Scoppola* the Court conducted some 'damage limitation' to remedy the confusion after *Frodl*.[239] Following *Scoppola*, the UK Government had six months from the judgment (22 May 2012) to introduce legislative proposals.[240] Therefore, by intervening this afforded the UK more time to comply – it furthered the UK's dilatory tactics.

5.6.1. Dissent – *Scoppola*: a dilution of *Hirst*?

In dissenting, Judge Björgvinsson argued that in terms of voting rights, a 'narrower' MoA was preferable, as limitations placed on voting rights 'must be subject to close scrutiny'.[241] Björgvinsson argued whilst the fact Italian legislation limits disenfranchisement to prisoners serving more than three years is 'more lenient' than UK law, 'it is also stricter … it deprives prisoners of their right to vote beyond the duration of their prison sentence'.[242] For Björgvinsson, a violation should have been found as 'the judgment … has now stripped … *Hirst* … of all its bite'.[243] Is Björgvinsson's observation correct - has *Hirst* been stripped 'of all its bite'?

Depending on interpretation, the majority judgment in *Scoppola* potentially weakened *Hirst*, as broader boundaries were demarcated. For instance, the majority held the Italian legislation compatible as disenfranchisement varied depending on the length of the sentence and type of offence. However, Björgvinsson argues this ignores that the legislation still *automatically* disenfranchises prisoners.[244] Moreover, in finding Italian legislation compatible, the majority provided examples of the types of conditions that could be placed on disenfranchisement. Notably, *Scoppola* was applied by the Supreme Court in *Chester* to justify dismissing the

[237] ibid para 109.
[238] ibid paras 109-110.
[239] Bates, 'Democratic Override' (n.214) 303; Zwart (n.204) 80.
[240] S. Foster, 'Prisoners' voting rights and the ECHR: still hazy after all these years' [2012] CovLJ 75, 75; I. White, *Commons Library Standard Note: Prisoners' voting rights* (UK Parliament and Constitution Centre, 4 July 2013) 40.
[241] *Scoppola* (n.215) page 89, N.B. there are no paragraph numbers in Björgvinsson's dissenting judgment – page numbers will be used instead.
[242] ibid page 92.
[243] ibid page 93.
[244] ibid page 92 ; see R. Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the Hirst Case' in A. Føllesdal, J.K. Schaffer and G. Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 257-258.

appellants' claims.[245] Prior to *Scoppola*, the Supreme Court could not have reached this conclusion with such confidence.[246]

Conversely, rather than diluting *Hirst,* arguably the majority clarified *Hirst* by affirming the principles in *Hirst* were correct - a finding that was reinforced by fewer States allowing for blanket prisoner disenfranchisement.[247] The Court consistently maintained "blanket" bans were precluded - the UK's blanket ban *still* violated A3P1. Additionally, the majority was right to reject the *Frodl* test,[248] as there is no evidence that the majority in *Hirst* considered these factors should be interpreted as a test.

Therefore, the dilution of *Hirst* must not be overstated, after *Scoppola* UK legislation *still* violated A3P1. Nevertheless, following *Scoppola,* despite the UK Government making some attempts to comply, non-compliance continued.

5.7 Additional prisoner voting cases

Post-*Scoppola,* the clash persisted.[249] In *Firth* the Court held the applicants' disenfranchisement from voting in elections to the European Parliament in June 2009 violated A3P1.[250] In accordance with earlier prisoner voting case law the Court declined damages, as 'the finding of a violation constitutes sufficient just satisfaction'.[251] There was limited criticism of the UK's delay, perhaps demonstrating the Court's reluctance to exacerbate the UK political branches' hostility towards Strasbourg. Although a further violation was found, the Court's judgment was restrained. Most recently, in *Miller* the Court held the ban violated A3P1.[252] The Court noted the Government had introduced administrative measures, although importantly, as the matter arose before the implementation of the administrative amendments, no comment was made as to the adequacy of these measures.[253] Therefore, it remains to be seen whether the Court will deem future claims admissible and if so, whether the amendments will be deemed adequate.

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[245] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 [40] (Mance JSC).
[246] K. Ziegler, 'The missing right to vote: The UK Supreme Court's judgment in Chester and McGeoch' (*UKConstLBlog,* 24th October 2013) <http://ukconstitutionallaw.org)> accessed 14 April 2022.
[247] Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 104.
[248] Bates, 'Analysing the Prisoner Voting Saga' (n.146) 535.
[249] *McLean and Cole v United Kingdom* (2013) 57 EHRR SE8; *Dunn v The United Kingdom* App no 7408/09 (ECtHR, 13 May 2014); *Firth* (n.108); *McHugh v The United Kingdom* 51987/08 (ECtHR, 20 January 2015).
[250] *Firth* (n.108) para 15.
[251] ibid para 22.
[252] *Miller v The United Kingdom* 70571/14 (ECtHR, 11 April 2019) paras 7, 13.
[253] ibid para 7.

Notably, Strasbourg has also found violations in relation to Bulgaria[254] Georgia,[255] Romania,[256] Russia[257] and Turkey.[258] Significantly, the ECtHR's adjudication on prisoner voting has also proved controversial in other States, as illustrated by the constitutional clash between Russia and the ECtHR on the issue of prisoner voting.[259] In *Anchugov and Gladkov* the ECtHR held Article 32(3) of Chapter 2 of the Russian Constitution, which prohibits prisoners from voting, violated A3P1.[260] However, Russia determinedly defied compliance, with Russia's Constitutional Court (RCC) asserting the supremacy of Russia's constitution and clashing with the ECtHR.[261] Yet Russia subsequently circumvented amendment to the Constitution by introducing 'community work' as 'a criminal punishment under which prisoners are placed in correctional centres'.[262] Those sentenced to community work were still 'deprived of their liberty … but retain the right to vote'.[263] The CM deemed this effective implementation and closed its supervision.[264] However, the Constitution had not been amended. Perhaps due to the gravity of the standoff with Russia, the CM endorsed these measures to expedite resolution of the clash. Yet, as will also be shown regarding the UK's administrative amendments, the Russian measures do not comport to the ECtHR's standards.[265] Further, Turkey also opted for minor amendments which were endorsed by the CM,[266] with the effect that 'all prisoners

[254] *Kulinski and Sabev v Bulgaria* App no 63849/09 (ECtHR, 21 July 2016).

[255] *Ramishvili v Georgia* App no **Error! Hyperlink reference not valid.** (ECtHR, 31 May 2018).

[256] *Calmanovici v Romania* App no 42250/02 (ECtHR, 1 July 2008); *Cucu v Romania* App no 22362/06 (ECtHR, 13 November 2012); *Branduse v Romania (No 2)* App no 42250/02 (ECtHR, 27 January 2016).

[257] *Anchugov and Gladkov v Russia* App no 11157/04 (ECtHR, 4 July 2013); *Isakov v Russia* App no 54446/07 (ECtHR, 4 July 2017)

[258] *Söyler v Turkey* App no 29411/07 (ECtHR, 17 September 2013); *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 October 2014).

[259] See K. Dzehtsiarou, 'The Russian Response to the Prisoner Voting Judgment' (*ECHR Blog*, 29 April 2016) <http://echrblog.blogspot.com/2016/04/the-russian-response-to-prisoner-voting.html> accessed 14 April 2022; this thesis was written prior to Russia's recent expulsion from the Council of Europe, see Ministers' Deputies, Resolution CM/Res(2022)2 on the cessation of membership of the Russian Federation to the Council of Europe (Adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51> accessed 14 April 2022.

[260] *Anchugov and Gladkov* (n.257) paras 110, 112.

[261] Space precludes analysis, see L. Mälksoo, 'Russia's Constitutional Court Defies the European Court of Human Rights Constitutional Court of the Russian Federation Judgment of 14 July 2015 No 21-П/2015' (2016) 12 EuConst 377.

[262] Ministers' Deputies, Resolution CM/ResDH(2019)240 Execution of the judgments of the European Court of Human Rights Two Cases against Russian Federation (1355th meeting, 25 September 2019) <https://hudoc.exec.coe.int/eng?i=001-196634> accessed 14 April 2022.

[263] ibid; see also Secretariat of the Committee of Ministers, Action report (27/06/2019) DH-DD(2019)740 (1355th meeting, September 2019) <https://hudoc.exec.coe.int/eng?i=DH-DD(2019)740E> accessed 14 April 2022.

[264] ibid.

[265] See E. Celiksoy, 'Execution of the Judgments of the European Court of Human Rights in Prisoners' Right to Vote Cases' (2020) 20(3) HRLRev 555, 568.

[266] Ministers' Deputies, Resolution CM/ResDH(2019)147 Execution of the Judgments of the European Court of Human Rights Two Cases against Turkey (1348th meeting, 6 June 2019) <https://hudoc.exec.coe.int/eng?i=001-194040> accessed 14 April 2022.

convicted of an offence committed with intent and serving a prison sentence' remain disenfranchised.[267] Therefore, the CM's endorsement of these measures may have deleterious consequences to the effectiveness of the Convention system (assessed in chapter six).[268]

5.8 Prisoner voting: an internecine clash – a "loss" for the ECtHR

The analysis of prisoner voting case law has shown how at times the Court's application of key factors relevant to the MoA lacked coherence. Some factors respected the wide MoA, whilst others narrowed the MoA. The apparently "wide" MoA is beset with caveats. The lack of clarity is problematic, as it provided the UK Government with ammunition to attack the cogency of the judgment and to resist implementing *Hirst*. Further, it led the Court in subsequent judgments to contend with how best to interpret *Hirst.* Therefore, having analysed key prisoner voting case law, this section explores the reasons for the clash and the key issues which emerge from the case law are further unravelled. As part of this, the following sections further elucidate how and why the clash resulted in a "loss" for the ECtHR.

5.8.1 The 'preconditions' for conflict?

In exploring the reasons for the clash, arguably the 'preconditions' for conflict were present, which necessitated a clearer approach from the Court.[269] For example, Dzehtsiarou argues the ECtHR's judgment may cause issues where 'three key preconditions are met'; where parliament 'can block the execution', if the judgment is based on 'unpopular minorities' and if there is a 'hostile environment' where the State considers the ECtHR 'actively and illegitimately' encroaches on State sovereignty.[270] These preconditions apply 'cumulatively'.[271]

Addressing the first precondition, Dzehtsiarou explains that if the Court prohibits 'extradition of an alleged terrorist' it is unlikely to cause issues as 'the national parliament will rarely be able to directly block it'.[272] In terms of prisoner voting, although the UK generally complies with ECtHR judgments, the UK elected branches were able to block the execution for thirteen

[267] CM/ResDH(2019)240 (n.262).
[268] G. Bogush and A. Padskocimaite, 'Case Closed, but what about the Execution of the Judgment? The closure of Anchugov and Gladkov v. Russia' (*EJIL:Talk!,* 30 October 2019) <https://www.ejiltalk.org/case-closed-but-what-about-the-execution-of-the-judgment-the-closure-of-anchugov-and-gladkov-v-russia/> accessed 14 April 2022.
[269] Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 94
[270] ibid 94-95.
[271] ibid.
[272] ibid.

years. Yet, failure to comply is not without costs.[273] For example, where a State resists execution, the CM can issue sanctions and ultimately, expel a State from the Council of Europe.[274] Flouting legal obligations could damage a State's reputation. It also has negative ramifications for Strasbourg's authority, undermining its 'legitimacy'.[275]

Regarding the second precondition, prisoners are generally considered an unpopular minority, as demonstrated by the UK Government's submissions in *Hirst*. Subsequent domestic cases, particularly *Chester*, highlight the extent of prisoners' unpopularity. Moreover, regarding the third precondition, the hostility in relation to prisoner voting is multi-layered, as there is hostility towards the unpopular minority and pre-existing hostility towards Strasbourg. Significantly, Dzehtsiarou notes that States, such as Austria, accepted and implemented the ECtHR's ruling on prisoner voting without equivocation, as there was less hostility.[276] Whereas, other States, including 'Russia, Turkey and the UK' have been more resistant due to pre-existing hostility.[277] Dzehtsiarou argues that a core reason for the clash was due to 'the symbolic distribution of powers' between Strasbourg and the UK.[278]

Therefore, a core precondition for the clash stems from the institutional and territorial power struggle, with an aversion to European powers. Prisoner voting was deemed by the political branches' to be in Parliament's remit and was not for Strasbourg to determine (discussed in chapter six). It is an internecine clash. With the 'preconditions' for conflict evident, the Court's judgment in *Hirst* was the catalyst for the resultant clash.

5.8.2 Challenges to the ECtHR's legitimacy

Throughout this chapter, challenges to the Court's legitimacy have been noted. In chapter three, a detailed explication of legitimacy was provided. The normative legitimacy, the 'compliance-eliciting force' of the Court's judgments on prisoner voting was strained, with the UK prevaricating with compliance.[279] Due to the breadth of the issues regarding legitimacy, some legitimacy related factors are also explored in chapter six. The following sections therefore

[273] Bellamy (n.244) 266, 268.
[274] ibid 266.
[275] K. Dzehtsiarou and D. Coffey, 'Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times' (2019) 68 ICLQ 443, 444.
[276] Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 95.
[277] ibid.
[278] ibid 94; K. Dzehtsiarou, 'Prisoner Voting and Power Struggle: a Never-Ending Story? (*VerfBlog*, 30 October 2017) <https://verfassungsblog.de/prisoner-voting-and-power-struggle-a-never-ending-story> accessed 14 April 2022.
[279] A. Føllesdal, 'The Legitimacy Deficits in the Human Rights Judiciary: Elements and Implications of a Normative Theory' (2013) 14 Theo Inq Law 339, 345.

explore: the procedural legitimacy of the Court's judgments, the extent to which it is legitimate for the Court to consider domestic sensitivities and the potential legitimising effect of dialogue between courts. The combined analysis of legitimacy in both chapters five and six highlights how the prisoner voting clash demonstrates the Court's legitimacy tightrope was fraying, as the threads of the Court's legitimacy were unravelled by the scale of the constitutional clash.

Strasbourg's legitimacy can be assessed on a case-by-case basis. Whether a judgment is legitimate, depends on 'different stakeholders' perspectives (explored in chapter six).[280] In the UK, the finding of a violation was evidently unwelcome. This is significant, as Popelier and Van de Heyning note, 'support for international courts such as the ECtHR drops precipitously if the Court takes unpopular decisions that trigger public controversy'.[281] Flaws with the judgment's reasoning can reinforce resistance. Yet just because the case is problematic does not mean the ECtHR necessarily lacks legitimacy. But as the prisoner voting clash shows, the unpopular outcome and arguable flaws with the judgment can trigger and bolster broader challenges to the Court's general legitimacy. It is the cumulative effect of these challenges which creates the overall impression that Strasbourg's overarching legitimacy is challenged.[282] Such challenges to the Court's legitimacy were key factors which contributed to the ECtHR's "loss".

5.8.2.1 A reasoning deficit?

The following sections explore the legitimacy of the Court's judgments which, as detailed in chapter three, can be measured by the 'substantial persuasiveness and procedural clarity' of the judgments.[283] There are both 'procedural factors', such as 'legal certainty' and 'substantial' factors, which concern the extent to which the Court is 'well-informed'.[284] Regarding the substantial factors, prior to *Hirst* there was case law which established the importance of voting rights and the judgment is not unduly evolutive.[285]

Procedural legitimacy or 'input legitimacy' may be measured by assessment of the 'method', cogency, 'quality' and 'transparency' of the judgment.[286] The 'consistency, coherence, legal

[280] De Londras and Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 HRLRev 523, 526-527.
[281] Popelier and Van de Heyning 'Subsidiarity post-Brighton' (n.66) 7.
[282] Dzehtsiarou, 'Prisoner Voting Saga' (n.2) 96.
[283] Dzehtsiarou, 'Does Consensus Matter?' (n.135) 553.
[284] ibid 539.
[285] *Mathieu-Mohin* (n.10) [48]-[51].
[286] De Londras and Dzehtsiarou, *Great Debates* (n.36) 6-7.

certainty and predictability' of the Court's judgments are fundamental to the legitimacy of the Court's methods.[287] The Court's application of doctrines such as the MoA and subsidiarity can enhance legitimacy,[288] demonstrating a 'stance of self-restraint'.[289] However, the prisoner voting clash exposes the malleability of these doctrines, arguably undermining the procedural legitimacy of the judgments.

The Court's reasoning in *Hirst* is at times strained and disjointed, as the Court's application of the proportionality test is strict but brief, and the Court was inconsistent in its application of the wide MoA. Prisoner voting case law demonstrates the MoA can be deployed as a 'smoke screen' with the level of scrutiny not necessarily corresponding to the width of the MoA.[290] For example, judicial reference to legislative debate was misplaced, especially considering the sensitivity of the issue. Further, in *Hirst* the Court's approach was largely untethered from consensus. However, as discussed, whilst consensus may be a factor which contributes to the judgment's legitimacy, where consensus and the MoA do not align, it does not fatally undermine the judgment's legitimacy.[291] Nevertheless, to enhance transparency, it would have been preferable for the Court to have provided further justification regarding why the lack of consensus did not equate to greater deference.

The clarity and the quality of reasoning is essential to 'ensuring consistency from one case to another' and are fundamental components to 'judicial claims of legitimacy'.[292] Yet a problem with prisoner voting jurisprudence is that the lack of clarity contributed to inconsistency, denting legitimacy. Despite conforming to the wide MoA, paradoxically, the lack of guidance later contributed to the clash. As Bellamy notes, *Hirst* is imbued with ambiguity, with interpretations regarding the means execute the judgment varying 'widely'.[293] The perils of this ambiguity are exposed in *Frodl*, as the Court adopted an off-piste interpretation and imposed stricter requirements. In subsequent cases the Court had to remedy the confusion. There is a persistent "why" and "what" deficit that undermines the cogency of prisoner voting case law, especially in *Hirst*. For example, *why* did the Court in *Hirst* regard the lack of

[287] ibid 6-7.
[288] P. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AmJInt'lL 38, 74–75; see Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms [2013], Article 1.
[289] J.P. Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 EuConst 173, 180.
[290] Kratochvil (n.59) 337.
[291] Vogiatzis (n.115) 473-474.
[292] De Londras and Dzehtsiarou, *Great Debates* (n.36) 6.
[293] Bellamy (n.244) 244.

legislative debate as important and *what* factors did the court use in its determination? *Why* did the Court minimise the importance of the lack of consensus? *What* significance did the Court intend to be placed on paragraph 77 of the *Hirst* judgment? The Court superficially ascribes to a wide MoA but does so inconsistently. If the Court had been more consistent and transparent, the effect would have been a more coherent judgment.

The *overall* cogency of the judgment matters because, as Vogiatzis explains, 'the clearer the methodology, the more likely applicants will trust the Court's reasoning, and the more likely respondent states will implement the Court's judgments'.[294] Issues regarding procedural legitimacy adversely affect the 'outcome legitimacy' of the Court's judgments as the UK was unreceptive and resisted compliance.[295] As compliance is connected to the Court's legitimacy,[296] non-compliance can pose a challenge to the Court and may undermine 'the long-term effectiveness of the' ECHR.[297] However, it is conceded that there are limits to what improved procedural legitimacy can achieve. It would be unlikely to transform the outcome of the judgment, i.e. the finding of a violation. Therefore, it is likely the UK would still have disagreed with the judgment, considering it a "bad" decision. Further, improved clarity could have been unwarranted in relation to some issues. For instance, if the Court had provided more detail regarding the lack of legislative debate this could have exacerbated the violation of parliamentary privilege, possibly inflaming the controversy. More detail may have provided the UK with greater scope to criticise the judgment.

However, as will be discussed in chapter six, the cracks in the Court's reasoning caused the Court's loss as they fuelled political criticism that the ECtHR lacked legitimacy. Moreover, the inconsistency arguably had a pernicious effect and facilitated political procrastination, as demonstrated by the UK's intervention in *Scoppola*. Further, despite the Court consistently maintaining the UK's ban violated A3P1, the lack of consistency and clarity in the Court's case-law and evidence of judicial equivocation arguably created further scope for the UK Government to question the authority of *Hirst* and resist the judgment. Ultimately it emboldened the Government to opt for minimal compliance in the form of administrative amendments, which subverted the Court's stipulation of legislative amendments. The fact the

[294] Vogiatzis (n.115) 467.
[295] De Londras and Dzehtsiarou, *Great Debates* (n.36) 3.
[296] C.J. Carrubba and M.J. Gabel, 'Courts, Compliance, and the Quest for Legitimacy in International Law' (2013) 14 Theo Inq Law 505, 509.
[297] H. Keller and C. Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2016) 26(4) EJIL 829, 830.

CM then permitted these amendments then solidified the ECtHR's loss (discussed further in chapter six). The legislative ban remains intact, which shows the outcome of the years of strain resulted in the ECtHR's standards of rights protection being diluted, signifying a "loss" for the ECtHR.

5.8.2.2 Legitimacy of deference to domestic political and legal sensitivities

As discussed in chapter three, subsidiarity and the MoA may reduce States' concerns regarding the Court's democratic illegitimacy, demonstrating 'the Court's respect for democratic decision making'.[298] Yet importantly, 'the margin of appreciation does not mean a total surrender of the Court to the choices made by the national authorities'.[299] As Gerards argues, 'the Court must steer a careful course between respecting national values and providing for effective protection of individual fundamental rights'.[300] Yet, in steering this course, to what extent should the Court have regard to domestic political and legal sensitivities?

The ECHR does not require the Court to defer just because an issue is politically or legally sensitive – rather the Court has a strong mandate to ensure the observance of the ECHR.[301] However, despite this, Feldman contends that considering 'States' internal structures and political realties' are important in ensuring the Court's 'effectiveness and legitimacy'.[302] The ECHR's effectiveness is premised 'on States' willingness to take action to secure the rights domestically'.[303] As such, reform to the ECtHR repeatedly highlighted subsidiarity and the MoA, showing the importance of national values.[304] Therefore, De Londras and Dzehtsiarou explain the Court may consider 'non-legal factors' such as the 'strength of domestic or international feeling' regarding an issue.[305] The ECtHR *may* consider 'anticipated government responses', as Judges are keen for their judgments to be implemented.[306]

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[298] A. Føllesdal, 'Subsidiarity and International Human Rights Courts: Respecting Self-Governance and Protecting Human Rights – or Neither' (2016) 79 LCP 147, 157.
[299] C. Rozakis, 'Is the Case-law of the European Court of Human Rights a Procrustean Bed? Or is it a Contribution to the Creation of a European Public Order? A Modest Reply to Lord Hoffmann's Criticisms' (2009) 2 UCL HumRtsRev 51, 64.
[300] J. Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Right' (2018) 18 HRLRev 495, 497.
[301] e.g. ECHR (n.45) Articles 19 and 32.
[302] Feldman (n.85) 224.
[303] ibid 218-219.
[304] See High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration (19-20 April 2012) 3.
[305] De Londras and Dzehtsiarou, 'Managing Judicial Innovation' (n.280) 535; e.g. *Animal Defenders* (n.90).
[306] E. Voeten, 'Politics, Judicial Behaviour, and Institutional Design' in J. Christoffersen and M.R. Madsen (eds), *The European Court of Human Rights Between Law and Politics* (OUP 2011) 76.

Yet to what extent should the Court be influenced by 'non-legal factors'? Should the Court modify its reasoning due to concerns its judgment may be greeted by hostile challenges to its legitimacy, possibly culminating in non-compliance? Arguably, it is understandable that the Court may seek to minimise instances where States clash with the Court, as such challenges can damage its reputation.[307] However, heeding domestic sensitivities might also pose challenges to the Court's legitimacy, demonstrating to States that if they emphasise an issue is sensitive, then the Court is more likely to be lenient.[308] This may lead to an insidious erosion of rights protection – which may *also* subvert the Court's legitimacy. It is a delicate balancing exercise, as "excessive" deference to political preferences may result in rights protection being diluted, undermining the Court's role in protecting rights. Equally, "insufficient" deference to political sensitivities can also lead to challenges to the Court's legitimacy.[309]

It can therefore be questioned whether the Court in *Hirst* achieved the "right" balance in terms of prisoner voting. Zwart argues that due to the UK's good track record, the ECtHR 'calculates' that 'high compliance States' will 'bear the political costs of such demanding judgments in order to preserve their reputation'.[310] Arguably the Court pursued this 'strategy' in *Hirst.*[311] Yet, this strategy backfired, as it sparked resistance.[312] But *Hirst* is exceptional and most of the Court's judgments do not result in such clashes. Cases such as *Hirst* stand out and 'they provoke debate and contestation precisely because they are unusual and step on politically sensitive toes', yet this is also 'essential in establishing the outer limits of the Court's competences'.[313] However, where the Court misjudges the level of sensitivity it can jeopardise its legitimacy.[314]

Therefore, to avert or lessen the "loss" it remains questionable whether the Court *should* have given domestic sensitivities more weight. For instance, in *Hirst,* the dissenting judges emphasised 'the sensitive political character' of prisoner voting.[315] However, Zeigler is critical of the dissenting judgment and argues courts should not utilise sensitivity as 'a justification for

[307] F. de Londras and Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights' (2017) 66 ICLQ 467, 469.
[308] De Londras and Dzehtsiarou, 'Managing Judicial Innovation' (n.280) 544.
[309] Feldman (n.85) 223-224.
[310] Zwart (n.204) 80.
[311] ibid.
[312] ibid 80.
[313] A. Føllesdal, J.K. Schaffer, G. Ulfstein, 'International human rights and the challenge of legitimacy' in A. Føllesdal, J.K. Schaffer, G. Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 5.
[314] Feldman (n.85) 223.
[315] *Hirst* (n.1) O-III9.

deference'.[316] For Zeigler, the Court could have adopted a stronger approach and it was the Court's timidity which contributed to the prisoner voting controversy.[317] Arguably, a stronger approach may require the Court to abandon its pretence of a wide MoA, increasing the judgment's coherence.

Conversely, arguably the Court's approach was *too* strong and this sparked the constitutional clash. From the UK Government's perspective, the Court went too far, it failed to adequately take its sensitivities into account. For instance, the Court's criticism of legislative debate was controversial. The sensitive context should have represented a warning against drawing a negative inference. For Bates, the Court's judgment was 'a bold decision for its day' and the dissenting judgment adopted the 'correct' approach, the Court could have refrained from finding a violation.[318] Therefore, arguably the dissenting Judges were sagacious to acknowledge the sensitivity of prisoner voting, in recognition of the constitutional contentiousness of the issue. The even stronger approach advocated by Zeigler might have inflamed the controversy.

Overall, this thesis argues the Court did not adopt a timid approach – it adopted a confident approach in finding a violation. However, arguably the preconditions for conflict indicate that the Court should have been alert to institutional and constitutional tensions. The Court ascribes to a wide MoA, yet at times this appears artificial, which arguably contributed to the Government's antipathy towards the Court. This reveals a disparity in the Government's expectations of what a wide MoA should entail and the Court's approach. However, it is conceded that these observations are informed by hindsight and knowledge of the clash that followed looms over the analysis of the Court's approach. This may unfairly cloud and exacerbate the criticism of the Court for not anticipating the scale of the constitutional clash that was to arise. Consequently, it is not argued that prisoners' voting rights should *not* have been upheld. Rather, the Court in *Hirst* could have exhibited increased regard to domestic sensitivities *but* in doing so, this does not mean the Court should have relaxed its standard of review to the extent that no violation was found.

Therefore, *how* could the Court have given domestic sensitivities more weight? As discussed, the Court can already consider such matters.[319] Due to the sensitive political context, the Court

[316] Zeigler (n.23) 184.
[317] ibid 190-191.
[318] Bates, 'Analysing the Prisoner Voting Saga' (n.146) 536.
[319] De Londras and Dzehtsiarou, 'Managing Judicial Innovation' (n.280) 535.

in *Hirst* could have refrained from drawing a negative inference from parliamentary debates – it was simply too contentious. Conversely, in relation to other factors, rather than "relaxing" its standard of review, the Court simply needed to be clearer. For instance, the Court could have explained why the lack of consensus did not widen the MoA. Further, it could have stated that paragraph 77 of the judgment was not a test but rather the Court was identifying the ways in which domestic prisoner voting legislation breached A3P1. However, as the Government had requested some guidance, the Court could have stipulated that legislation was required to amend the incompatibility. Whilst the Court acknowledged that the MoA 'is wide' but 'not all-embracing … s.3 … remains a blunt instrument' necessitating the finding of a violation,[320] the Court could have explicitly recognised that due to the importance of the right, a more probing assessment was required, with the practical effect that the MoA was narrowed.

Considering the Court's conditional legitimacy, caution and clarity were required – this *might* have reduced criticism of the Court. The preconditions for conflict, *plus* unclear and at times, insensitive reasoning,[321] *plus* the finding of the violation, was a recipe for resistance. However, even if the Court's reasoning in *Hirst* had been different, it cannot be conclusively determined whether this would have changed the clash. It remains unlikely this would have changed the ultimate "loss" to the ECtHR. The preconditions for conflict *plus* the violation might still have precipitated controversy. Further, arguably increased transparency could be counterproductive, providing new grounds for criticism.

Notably, in subsequent prisoner voting jurisprudence, the Court adjusted its approach. The Court in *Greens* and *Scoppola* attenuated the *Frodl* test, which arguably demonstrates awareness of domestic sensitivities. Further, in *Scoppola* the Court indicated that broad restrictions on voting rights could be proportionate. Moreover, the Court consistently declined damages, as the finding of the violation constituted just satisfaction. Yet, as Foster argues, in preceding prisoner voting cases the Court declined damages partly on the basis it assumed compliance would arise.[322] The Court in *Firth* removed the threat of compensation, but as Foster contends, the very threat of compensation was one of the key motivations for compliance.[323] That Strasbourg consistently denied compensation to prisoners demonstrated

[320] *Hirst* (n.1) para 82.
[321] N.B. the Court *was* sensitive regarding how the UK should remedy the violation and accorded a wide MoA.
[322] S. Foster, 'Prisoners' rights – right to vote – European Court of Human Rights – just satisfaction' [2014] CovLJ 79, 81.
[323] ibid 81-82.

the threat of compensation was without substance.[324] However, arguably, the Court was wise to avoid aggravating the UK's antagonism towards Strasbourg, the decision in *Firth* reflects the Court's increased awareness of the 'political context', providing evidence of 'self-restraint' regarding prisoner voting.[325] The Court was mindful of the contentious context, to award damages could have been provocative, especially considering that the UK was taking steps to comply (however superficial these steps proved to be). This further highlights how the context, 'subject matter' and 'timing' of the case are key factors in informing the Court's approach.[326]

5.8.2.3 Dialogue between courts: another component of legitimacy[327]

As discussed in chapter three, dialogue between the domestic and European courts can increase the legitimacy of the ECtHR's judgments, indicating 'shared values and authority/expertise'.[328] In chapter four, it was considered whether the domestic courts attempted to engage in dialogue with the ECtHR. This section predominantly explores whether the ECtHR "interacted" with domestic courts. Amos explores the prisoner voting clash and notes the Court in *Hirst* criticised the domestic court's judgment in *Pearson* which had failed to consider the 'proportionality of the measure'.[329] Arguably, this indicates the importance of ensuring domestic courts adequately assess proportionality. Following *Hirst,* a declaration was made in *Smith v Scott* and in light of Strasbourg jurisprudence, the domestic court adjusted its position.[330] Amos frames this as evidence of 'dialogue' but notes that the 'legitimacy conferred by dialogue' is limited, especially 'when it is up against the legitimacy conferred via the democratic process'.[331] Despite the domestic courts seemingly supporting Strasbourg, this was insufficient to ensure compliance, demonstrating 'a lack of real judicial power when it comes to difficult political issues'.[332]

[324] S. Foster, 'I Can't Get No (Just) Satisfaction: Remedies for the Loss of Prisoners' Voting Rights' (2013) 177 JPN 546, 547.
[325] De Londras and Dzehtsiarou, 'Managing Judicial Innovation' (n.280) 538.
[326] ibid 541.
[327] see K. Lemmens, 'Protocol no 16 to the ECHR: managing backlog through complex judicial dialogue' (2019) 15(4) EuConst 691, 692.
[328] M. Amos, 'The dialogue between United Kingdom courts and the European Court of Human Rights' [2012] ICLQ 557, 575.
[329] *Hirst* (n.1) para 80.
[330] Amos, 'The dialogue between' (n.328) 578-579; see *Smith v Scott* [2007] CSIH 9, 2007 SC 345.
[331] ibid 579.
[332] M. Amos, 'From Monologue to Dialogue' in R. Masterman and I. Leigh, *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (2013 OUP) 156.

In *Greens* the Court considered domestic cases[333] and was thorough in detailing Burton J's judgment in *Chester*.[334] For example, in determining admissibility, Court noted:

> 'Even if a declaration of incompatibility were to be considered an effective remedy, … the Court recalls in this regard that it has recently reiterated that the practice of giving effect to the national courts' declarations of incompatibility by amending offending legislation is not yet sufficiently certain for this to be so'[335]

This casts doubt on the utility of the declaration as a remedy.[336] Therefore, 'There was no advantage in obtaining' a 'second' declaration, 'there was nothing to be achieved'.[337] This demonstrates Strasbourg's endorsement of the domestic approach. Further, the ECtHR affirmed domestic case law to argue there was no possibility of utilising s.8 EPEA 2002 to launch a 'parasitic' challenge.[338] Notably, the Court emphasised its conclusion was not dependent on the opinion of the domestic courts, perhaps to highlight institutional independence or autonomy.[339] In considering the prescriptiveness of the judgment, the Court utilised domestic judgments to justify the wide MoA.

Subsequent ECtHR case law also considered domestic jurisprudence, but the ECtHR in *Greens* provided the most extensive engagement with domestic case law. The ECtHR generally applied domestic case law in an affirmative, co-operative manner, as an expression of comity, which is arguably indicative of a form of 'constitutional collaboration'.[340] This reflects how the ECtHR tends to adopt a restrained, respectful and deferential approach to domestic case law.[341] Therefore, such a cooperative approach may support the legitimacy of the ECtHR's judgments.[342] Yet, it cannot be conclusively determined whether the Court intended for its consideration of domestic case law to be deemed as dialogue. As Lord Kerr argues, the metaphor of dialogue between domestic courts and the ECtHR 'can be overworked'.[343] Further

[333] *Greens* (n.159) paras 27-33.
[334] ibid paras 34-40.
[335] ibid para 68.
[336] *Burden v United Kingdom* (2008) 47 EHRR 38, paras 40 and 43.
[337] *Greens* (n.159) paras 68.
[338] ibid para 70.
[339] ibid.
[340] Young (n.157) 262-268.
[341] P. Mahoney, 'The relationship between the Strasbourg court and the national courts' [2014] LQR 568, 570-571.
[342] Amos, 'The dialogue between' (n.328) 575.
[343] B. Kerr, 'The need for dialogue between national courts and the European Court of Human Rights' in S. Flogaitis, T. Zwart and J. Fraser (eds), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 105.

in terms of prisoner voting, the extent to which it ameliorates broader challenges to the Court's legitimacy is arguably limited, highlighting the importance of a contextual analysis. The most compelling evidence of inter-institutional interactions arise between the UK Government, the ECtHR and the CM, as exemplified by the UK's intervention in *Scoppola*. However, Strasbourg has not always been a willing participant, as referrals have been refused (discussed in chapter six).

5.9 Broader implications

Whilst prisoner voting is one case study and the resultant clash between the UK and Strasbourg is exceptional, potentially broader implications can be identified (discussed in chapter seven). This section reflects on: the Court's challenges in applying the MoA and giving effect to subsidiarity; the tensions that arise from the Court's multifaceted legitimacy; the limits of Strasbourg's institutions in securing compliance and the vulnerability of European rights protection to domestic challenge.

Throughout this chapter it has been noted how the Court must engage in a careful balancing exercise between upholding human rights protection, whilst also having regard to its subsidiary 'role as jurisdiction of last resort'.[344] The prisoner voting clash highlights the possibilities and limitations of the ECtHR in protecting rights. For instance, it illustrates the broader challenges associated with the Court's application of the MoA. Whilst 'malleability is inherent' in the MoA,[345] this can contribute to the impression that there is a lack of coherence and transparency. Therefore, the procedural legitimacy of its judgments should be as unassailable as possible to diminish the risk of misinterpretation in subsequent cases, as where a clash arises, any flaws will be magnified and may contribute to a clash.

Further, prisoner voting illustrates that in respecting its subsidiary function, the Court should be alert to the possibilities of conflict. Yet equally, the Court must be careful in considering domestic sensitives that it does not inadvertently undermine its own role in upholding rights. As Lübbe-Wolff observes, 'the Court cannot make it its primary objective to avoid opposition. It is there to protect Convention rights … it is bound to meet some criticism'.[346] This exposes the fundamental tension in the Court's role. The Court is limited by its conditionality - its

[344] Vogiatzis (n.115) 447.
[345] K. Brayson, 'Securing the Future of the European Court of Human Rights in the Face of UK Opposition: Political Compromise and Restricted Rights' (2017) 6 IHRLRev 53, 59.
[346] European Court of Human Rights, *Dialogue Between Judges, "How can we ensure greater involvement of national courts in the Convention system?"* (Strasbourg 2012) 15.

multifaceted legitimacy is shaped by States' willingness to comply. Yet it is not limited to the extent that innovation is precluded, it must also strive to further rights protection, as reluctance to do so may be detrimental to its authority and the effectiveness of the ECHR. Whilst this shows the ECtHR should not necessarily capitulate to domestic sensitives in furthering rights protection, especially where the preconditions for conflict are evident, the Court should tread cautiously and with extra clarity to minimise potential attacks to its legitimacy.

Notably throughout the clash the Court remained unyielding in its finding of a violation. However, prisoner voting demonstrates there are limits to the Court's role in effectively encouraging compliance. Fundamentally, its judgments are non-coercive.[347] Whilst the CM has primary responsibility for supervising States' compliance, the Court also has a role in ensuring compliance and there is some overlap in responsibilities with the Court.[348] Yet despite the Court taking a more active role in *Greens*, it was insufficient to ensure effective compliance. Prisoner voting also highlights the tensions between the Court and the CM, as the CM ultimately sanctioned administrative amendments undermining the Court's requirements. [349] This raises questions as to which institution, the Court or the CM, should have the final say on what constitutes compliance (explored in chapter six).[350]

Prisoner voting therefore exposes the challenges of European rights protection, as the administrative amendments are irrefutably negative for rights protection. Lack of effective implementation can dent the Court's legitimacy.[351] The outcome represents a "loss" for the ECtHR, as the UK circumvented the Court's requirements for legislative amendments. But crucially, the "loss" for the ECtHR cannot be solely attributed to the ECtHR. Other institutions had significant roles in undermining the Court's jurisprudence. As will be discussed in chapter six, the ECtHR's jurisprudence was undermined by the political responses to prisoner voting at both the domestic *and* European level.

Whilst issues with the procedural legitimacy of the Court's judgments arguably provided a gateway for the political branches to attack the Court's legitimacy, even if these issues had been remedied, the finding of the violation may still have triggered hostility. The UK's broader

[347] Keller and Marti (n.297) 830.
[348] B. Çali and A. Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe' (2014) 14 HRLRev 301, 309.
[349] A. von Staden, 'Guest Blog: Minimalist Compliance in the UK Prisoner Voting Rights Cases' (*ECHR Blog*, 16 November 2018) <http://echrblog.blogspot.com/2018/11/guest-blog-minimalist-compliance-in-uk.html> accessed 14 April 2022.
[350] ibid.
[351] Keller and Marti (n.297) 830.

objections to European rights protection were central in driving the clash. Political hostility was generally not about prisoner voting but instead centred on objections to Strasbourg's role in rights protection (discussed in chapter six).[352] Therefore, it is arguable that due to mounting tensions that at some point a clash was an inevitability. Arguably, the UK's constitutional landscape shaped and possibly caused the controversy. It was shaped by the domestic drive to reclaim domestic ownership of rights, to assert sovereignty.[353] The judgment was the catalyst for the clash but the clash was also caused and fuelled by the constitutional context, as disquiet about European rights protection bubbled over, with prisoner voting providing a "convenient" outlet to air discontent. Whilst the UK can air discontent through other channels, such as at High Level Conferences on reform of the ECHR, the UK's message can get diluted or disregarded at these forums.[354] Therefore, resisting compliance provided another and perhaps more impactful means to assert domestic power. Yet despite the arguable inevitability of the clash, the issues with the ECtHR's judgments arguably heightened the controversy. The prisoner voting clash demonstrates the system of European rights protection is vulnerable to domestic challenges and can be limited in effectively resolving such challenges. Yet prisoner voting also shows that such clashes can be highly detrimental for *all* institutions involved – with no institution emerging unscathed.

5.10 The EU and prisoner voting

Having reviewed Strasbourg's jurisprudence on prisoners' voting rights, it is necessary to consider the CJEU's approach to prisoner voting in *Delvigne*. This case warrants consideration because it highlights how the involvement of the CJEU in the highly contentious issue of prisoner voting was inflammatory, as it contributed to the general political opposition towards external, European rights review.[355] Moreover, the application of EU law highlights the different constitutional and institutional issues that arise when compared with Strasbourg. For instance, the CJEU is not a human rights court equivalent to that of the ECtHR. Nevertheless, *Delvigne* illustrates the CJEU's willingness to expand rights protection, as the Court recognised a right to vote, independent from the exercise of free movement rights.[356] Yet this section will show that the CJEU's reasoning is at times strained and there is scope for further clarity.

[352] De Londras and Dzehtsiarou, 'Mission Impossible?' (n.307) 477.
[353] F. Cowell, 'Understanding the causes and consequences of British exceptionalism towards the European Court of Human Rights' (2019) 23 The International Journal of Human Rights 1184, 1187-1189.
[354] Popelier and Van de Heyning, 'Subsidiarity post-Brighton' (n.66) 6; see *Brighton Declaration* (n.304) 3.
[355] P. Craig, 'The United Kingdom, the European Union, and Sovereignty' in R. Rawlings, P. Leyland and A. Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (2013 OUP) 175.
[356] S. Coutts, 'Delvigne: a multi-levelled political citizenship' [2017] ELRev 867, 874.

Further, this section considers the implications of *Delvigne* for the UK and argues that the CJEU's approach casts doubt on the Supreme Court's reluctance to make a preliminary reference in *Chester*. This section then finally explores the possible "threats" to the UK posed by *Delvigne*.

5.10.1 *Delvigne*

Delvigne was granted a preliminary reference to the CJEU.[357] In 1988, Delvigne was sentenced to twelve years imprisonment in France for murder and under the old French Criminal Code, due to the severity of his conviction, Delvigne was permanently deprived of the right to vote.[358] However, in 1992, following the enactment of the new Criminal Code, the 'ancillary penalty' of the 'automatic', permanent loss of the right to vote following conviction of a serious offence was removed and instead, the new Criminal Code stipulated that 'the total or partial deprivation of civic rights must be the subject of a court ruling and may not exceed ten years'.[359] As Delvigne was convicted under the old Criminal Code, he was unable to vote in both national and European Parliament elections.[360]

In *Delvigne*, the CJEU was asked to consider the compatibility of French law on prisoner disenfranchisement with Article 39 and Article 49 of the Charter of Fundamental Rights of the European Union (the Charter).[361]

5.10.1.1 CJEU's judgment

Having regard to *Åklagaren v Fransson* and other relevant authorities,[362] the CJEU stated it had jurisdiction to consider the case.[363] Following *Spain* and *Eman*[364] Articles 1(3) and Article 8 of the Direct Elections Act 1976 (the 1976 Act), 'do not define expressly and precisely who' can vote and therefore, 'the definition of the persons entitled to exercise that right falls within the competence of each member state in compliance with EU law'.[365] The CJEU stated that Article 1(3) of the 1976 Act and Article 14(3) TEU when read together established that Member States are required to 'ensure that the election of Members of the European Parliament is by

[357] *Delvigne* (n.3) para 19.
[358] ibid paras 14, 15
[359] ibid paras 16, 23.
[360] ibid paras 17-20.
[361] ibid para 20.
[362] Case C-617/10 *Åklagaren v Åkerberg Fransson* EU:C:2013:105.
[363] *Delvigne* (n.3) paras 25, 27, 34.
[364] Case C-145/04 *Spain v United Kingdom* EU:C:2006:543; Case C-300/04 (*Spain*); *Eman and Sevinger v College van Burgemeester en Wethouders van Den Haag* EU:C:2006:545 (*Eman*).
[365] *Delvigne* (n.3) para 31.

direct universal suffrage'.[366] When a State is 'implementing its obligation' in accordance with the aforementioned articles, it is implementing EU law under Article 51(1) of the Charter.[367] Van Eijken and Van Rossem explain that:

> 'the essential element that links national electoral laws with EU law is that elections to the European Parliament should be based on direct universal suffrage in a free and secret ballot. … the presence of a set of general principles is deemed sufficient to activate the scope of EU law'.[368]

Therefore, the CJEU endorsed a 'broad' approach to implementing EU law.[369]

The CJEU then addressed the substance of the case and held Article 39(1) of the Charter corresponds to Article 20(2)(b)TFEU.[370] The CJEU noted that Article 20(2)(b) TFEU applied to 'the principle of non-discrimination on grounds of nationality to the exercise of the right to vote in elections to the European Parliament'.[371] Therefore, Article 39(1) of the Charter did not apply, as the case 'concerns an EU citizens' right to vote in the member state of which he is a national'.[372] Instead, in accordance with the explanations to the Charter, the CJEU asserted that Article 39(2) corresponds to Article 14(3) TEU.[373] However, pivotally, the Court held that Article 39(2) of the Charter 'constitutes the expression in the Charter of the *right of EU citizens to vote* in elections to the European Parliament in accordance with Article 14(3) TEU and Article 1(3) of the 1976 Act'.[374] These Articles enshrine a commitment that elections 'of Members of the European Parliament is by universal suffrage'.[375] Crucially, a right to vote in European Parliament (EP) elections independent of the exercise of free movement rights was established.

The CJEU held Delvigne's disenfranchisement was 'a limitation of the exercise of the right guaranteed in Article 39(2) of the Charter'.[376] Therefore, Article 52(1) of the Charter states that

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[366] ibid para 32.
[367] ibid para 34.
[368] H. van Eijken and J.W. van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship? [2016] 12 EuConst 114, 122.
[369] ibid 122.
[370] *Delvigne* (n.3) para 41; note this reflects the explanations to the Charter regarding Article 39 - Official Journal of the European Union Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) ('Charter Explanations').
[371] ibid para 42
[372] ibid paras 41-43.
[373] ibid para 41; see Charter Explanations (n.370).
[374] ibid paras 41, 44.
[375] ibid para 32.
[376] ibid para 45.

limitations must be provided for by law and are subject to the principle of proportionality.[377] The CJEU held the limitation was prescribed by law and it 'respects the essence of the right to vote', as it excludes 'certain persons, under specific conditions and on account of their conduct'.[378] The CJEU held the legislation was proportionate, as it specified conditions for disenfranchisement and 'the nature and gravity of the criminal offence'.[379] Further, Delvigne could apply for the ban to be lifted.[380] The CJEU's proportionality analysis was therefore brief. As Coutts states, a core part of the proportionality test is that public interest must be balanced 'with an individual right' but the CJEU did not assess this.[381] The CJEU also neglected to explore the 'underlying rationale' for disenfranchisement.[382] Further, in contrast to AG Cruz Villalón's opinion in the case,[383] the CJEU did not refer to Strasbourg case law. Therefore, the Court held 'article 39(2) of the Charter does not preclude legislation of a member state, such as that at issue in the main proceedings'.[384] This CJEU therefore adopted a deferential approach in terms of voting rights.

In contrast with AG Cruz Villalón's opinion,[385] the CJEU considered the claim under Article 49(1) of the Charter in relation 'to the retroactive effect of a more lenient criminal law', as Delvigne was convicted before the new Criminal Code came into force, he remained 'subject to an indefinite voting ban'.[386] The CJEU held the national legislation was not 'precluded', as Delvigne could have his ban from voting reviewed.[387] Therefore, the impugned French legislation did not violate the relevant Charter rights.

5.10.2 The EU and rights protection

Delvigne is indicative of the CJEU's increasingly bold and broad approach to rights protection. As Coutts notes, *Delvigne* has:

> 'now recognised in art.39(2) CFR … a political right applicable directly even in one's home Member State and unrelated to free movement or non-discrimination. … its

[377] ibid para 46.
[378] ibid paras 47-48.
[379] ibid paras 48-49.
[380] ibid para 51.
[381] Coutts (n.356) 878.
[382] ibid.
[383] ibid, Opinion of AG Cruz Villalón paras 118, 119.
[384] ibid para 52 (Judgment).
[385] ibid, Opinion of AG Cruz Villalón paras 92, 107.
[386] ibid paras 53, 55 (Judgment).
[387] ibid paras 56-57.

affirmation by the Court of Justice develops the supranational and political dimensions of Union citizenship'.[388]

Therefore, on what basis did the CJEU reach this decision? According to Article 51(1) of the Charter, the Charter applies to 'Member States only when they are implementing Union law'.[389] Therefore, the CJEU adopted an expansive approach to Article 51(1) of the Charter to determine that French legislation implemented EU law and this comports with the general approach of the CJEU to interpret the Charter broadly.[390] As Van Eijken and Van Rossem argue, although it is unsurprising that national law disenfranchising prisoners from voting in the EP elections came within EU law, they contend that 'the manner in which this conclusion is reached is nonetheless remarkable', as the CJEU utilised the requirement that EP elections should be by way of universal suffrage to link 'national electoral laws with EU law'.[391]

Further, in terms of the substance of the case, Van Eijken and Van Rossem note that although the CJEU had not 'singled out' the importance of universal suffrage, on analysis, universal suffrage proved pivotal, as demonstrated by the CJEU's reliance on Article 39(2) of the Charter, Article 1(3) of the 1976 Act and Article 14(3) TEU.[392] Yet, ''universal' does not seem to be about conferring a right, but about informing a right that is already conferred'.[393] For example, these provisions do not mention 'the Union citizen', and prior to *Delvigne*, voting rights had only been recognised in conjunction with non-discrimination and the right to vote was deemed in the domain of national law.[394] As Kornezov observes, the Charter 'cannot be applied alone: it needs *another* provision of EU law as a proxy' but in *Delvigne* the Court deployed 'circular' reasoning, as the aforementioned provisions essentially 'repeat … the same' requirement ('direct universal suffrage in a free and secret ballot') and this amounts to 'semi-autonomous application of Article 39(2) of the Charter'.[395] Whilst the Court's circular reasoning is questionable and unclear,[396] it arguably demonstrates that a right to vote always existed, it had just not been explicitly recognised by the CJEU.[397]

[388] Coutts (n.356) 874.
[389] Charter of Fundamental Rights of the European Union [2012] OJ C326/02, Article 51
[390] Van Eijken and van Rossem (n.368) 121.
[391] ibid 122.
[392] ibid 123-125.
[393] ibid 125.
[394] ibid 125.
[395] A. Kornezov, 'Case Comment: The right to vote as an EU fundamental right and the expanding scope of the application of the EU Charter of Fundamental Rights' [2016] CLJ 24, 26-27.
[396] Van Eijken and van Rossem (n.368) 123.
[397] ibid 126.

So why did it take until 2015 for the CJEU to recognise a right to vote for EU citizens not exercising free movement rights?[398] Coutts contends the recognition of the right to vote is part of wider advancements within the EU, such as the legally binding status of the Charter and developments such as the 'Citizens' Initiative', which is designed to further 'democracy' in the EU.[399] Arguably *Delvigne* is part of a broader EU agenda to establish support for the 'supranational' nature of 'Union citizenship', which is independent of any 'transnational dimension'.[400] This demonstrates how there are different constitutional and institutional issues at play in *Delvigne* when compared to Strasbourg jurisprudence. Also, arguably Strasbourg jurisprudence on prisoners' voting rights provided further impetus for the CJEU to recognise equivalent rights in EU law.

However, significantly, the CJEU made no explicit reference to Strasbourg case law, which is arguably surprising as Article 52(3) of the Charter requires that Charter rights should reflect rights recognised in the ECHR to ensure 'consistency'.[401] Yet, despite this, the CJEU's judgment broadly comports to the wider standard set in *Scoppola* and confirmed the 'nature and gravity' of the offence 'and the duration of the penalty' are key factors in assessing proportionality.[402] Nevertheless, the CJEU's consideration of proportionality is brief and the CJEU swiftly held that French legislation was proportionate.[403] This lack of detailed reasoning is generally consistent with the CJEU's judgments, as their 'default style … remains fairly formulaic and minimalist'.[404] In contrast to the ECtHR, the CJEU does not have a doctrine equivalent to that of the MoA,[405] but as Young notes it 'can exercise comity when it recognizes that the determination of a human rights issue may be better suited to the national court'.[406] Comity may be expressed through adjustment to the proportionality test, by 'requiring less proof that the measure is … proportionate'.[407] The CJEU's less detailed approach could be

[398] ibid 126.
[399] Coutts (n.356) 874-877.
[400] ibid 875; e.g. Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* EU:C:2011:124.
[401] Van Eijken and van Rossem (n.368) 129; yet note, the CJEU does not always 'observe the Strasbourg case law', see W. Weiß, 'Is the CJEU Turning into a Human Rights Court?' in S. Morano-Foadi and L. Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart 2015) 80.
[402] Van Eijken and van Rossem (n.368) 129-130.
[403] ibid.
[404] De Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20 Maastricht J Eur & CompL 168, 177.
[405] Young (n.157) 282; *although* Shuibhne points to instances when the MoA has been applied in EU law see - N. Shuibhne, 'The Court of Justice and fundamental rights: If margin of appreciation is the solution, what is the problem?' in O.M. Ardnadóttir and A. Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU, and National Legal Orders'* (Routledge 2016) 118-122, 142-143.
[406] Young (n.157) 282.
[407] ibid.

perceived as an expression of comity. Further, the Charter enshrines a commitment to 'the principle of subsidiarity'.[408] Gerards contends the intensity of the CJEU's review will vary depending on whether the 'very essence of a certain fundamental right has been affected' and this appears 'to copy some elements of the margin of appreciation doctrine'.[409] It is 'rare' that the CJEU adopts an 'intensified review'.[410] In *Delvigne*, the CJEU stated the 'limitation respects the essence of the right to vote'[411] and the intensity of review was relaxed.

However, whilst broad restrictions can be placed on prisoners' voting rights, as Foster notes, the level of discretion afforded to States *remains* unclear, it was still ambiguous 'at what point' both the ECtHR and the CJEU would regard legislation disenfranchising prisoners 'as disproportionate'[412] (although "blanket" bans are precluded by Strasbourg, the UK's administrative amendments have now been approved by the CM). Therefore, to enhance the judgment's procedural legitimacy, more transparent engagement with the proportionality test would be preferable. However, Coutts goes further and argues the CJEU could have been more robust than the ECtHR, as it concerned 'national law limiting a supranational right'.[413] Yet, in light of the constitutional controversy of prisoners' voting rights, a more "robust" assessment could have been inflammatory.[414] The CJEU had already been bold in establishing that a right to vote existed.[415] Therefore, such scrutiny of domestic legislation, especially regarding voting rights, necessitated caution.

5.10.3 Implications of *Delvigne* for the UK

Domestically, the involvement of another European court in an already controversial issue, caused ripples of discontent in the UK (discussed in chapter six). Although *Delvigne* did not affect the UK directly, it had the potential (especially pre-Brexit) to provide disenfranchised prisoners with an alternative route to challenge the UK's legislative ban. Whilst the CJEU adopted a hands-off approach in relation to the proportionality test, it would be unlikely that the UK's ban would satisfy the CJEU's proportionality assessment (especially considering

[408] Charter of Fundamental Rights of the European Union [2012] OJ C326/02, Article 51 ('The Charter').
[409] Gerards, 'Pluralism, Deference' (n.38) 100-101.
[410] ibid.
[411] *Delvigne* (n.3) para 48.
[412] S. Foster, 'Thierry Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde (Case C-650/13): prisoners' rights – right to vote – European elections – European Court of justice' [2015] CovLJ 46, 48 ('Thierry Delvigne').
[413] Coutts (n.356) 880.
[414] ibid.
[415] Van Eijken and van Rossem (n.368) 130.

Article 52(3) of the Charter).[416] This is significant, as EU law has stronger potential remedial implications.[417] Moreover, the domestic constitutional ramifications of EU law are more extensive than the ECHR. As Van Eijken and Van Rossem note, whilst *Delvigne* purely concerns voting rights to elections to the European Parliament there is the potential for it to:

> 'have a spill-over effect to other electoral arrangements. As restrictions on electoral rights in national law are usually not linked to elections of specific representative bodies, denouncing such a restriction with regard to one particular body might lead to a reform of the whole system'.[418]

Further, as discussed in chapter four, the Supreme Court in *Chester* dismissed claims under EU law.[419] Although *Delvigne* is unconnected to the Supreme Court's judgment in *Chester*, there is a disparity between domestic and European approaches to the adjudication of prisoners voting under EU law. For example, whilst it transpired that Lord Mance was right to deem that following *Spain* and *Eman* Articles 20 and 22 TFEU concerned equal treatment and did not extend the right to vote to nationals,[420] Lord Mance gave limited attention to pivotal provisions relied on by the CJEU, especially regarding the importance of universal suffrage enshrined in the 1976 Act[421] and Article 14(3) TEU.[422] Further, despite Counsel for the appellants having submitted that the Charter (alongside other key provisions) gave rise to an individual right to vote, Lord Mance afforded the Charter merely cursory consideration and rejected Counsel's submissions.[423] Moreover, the CJEU's approach in *Delvigne* supports Coutts' assessment that the CJEU in *Spain* and *Eman* had not stated 'unequivocally that no such right existed for Union citizens'.[424] However, it *could* be argued the CJEU's reasoning in *Delvigne* was so strained that the Supreme Court could not have predicted the CJEU's approach. Conversely, the very fact the CJEU took a different approach, could demonstrate a preliminary reference should have been made – it comports to the CJEU's more expansive approach to rights protection. It arguably highlights the Supreme Court was too restrictive in its assessment of *Spain* and *Eman*

[416] The Charter (n.408) Article 52(3).
[417] e.g. *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33, [2016] QB 347; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777.
[418] Van Eijken and van Rossem (n.368) 131.
[419] *Chester* (n.245) [84] (Mance JSC).
[420] See *Delvigne* (n.3) paras [31], [41]; *Spain* (n.364) and *Eman* (n.364).
[421] *Chester* (n.245) [57]-[58] (Mance JSC) –Lord Mance argued the 1976 Act demonstrates voting eligibility is 'a matter for national Parliaments'.
[422] Although noted at ibid [44], [46], [57] (Mance JSC).
[423] ibid [46], [58]-[59] (Mance SCJ).
[424] Coutts (n.356) 873, 874.

and demonstrates the potential perils on 'placing weight on the reasoning of previous CJEU judgments and on that basis determining that a matter is *acte clair*'.[425] Yet even so, as discussed in chapter four, if *Delvigne* had been decided at the time of the Supreme Court's judgment in *Chester*, it is possible that the Supreme Court might have disagreed with the CJEU's circular reasoning for effectively rewriting Article 39(2) of the Charter or extending it beyond that which the legislator intended.[426]

In any event, the judgment posed a dual threat, providing an alternative way for disenfranchised prisoners to challenge the UK ban[427] and/or it could lead to further claims to Strasbourg. However, in terms of the first "threat", due to Brexit, the Charter will no longer apply, which means UK prisoners will no longer be able to challenge their disenfranchisement under EU law.[428] Brexit has arguably removed the most potent "threat" of disapplication of UK legislation. Nevertheless, arguably the "threat" of further claims to Strasbourg remains viable. *Delvigne* could provide renewed impetus for prisoners to challenge their disenfranchisement in Strasbourg - the CJEU's judgment could reinforce the ECtHR's approach. Although the prisoner voting clash between the UK and Strasbourg is seemingly resolved, if future litigation regarding UK prisoners' voting was deemed admissible, a prisoner might contest the adequacy of the administrative amendments and that s.3 RPA 1983 remains intact. A litigant could refer to *Delvigne* to argue the CJEU would not condone the UK's ban, especially considering Article 52(3) of the Charter. Of course, this argument would have been significantly strengthened if the CJEU had considered a case concerning the UK's approach to prisoner disenfranchisement or if the CJEU had adjudicated on other cases regarding prisoner voting, in which it had stated its position regarding the proportionality of more severe restrictions on voting rights, such as "blanket" bans. Yet even in the absence of such case law, when compared to EU law, the CM has potentially endorsed a lower standard of rights protection than the CJEU which might add weight to arguments that the amendments are inadequate. The CJEU's reasoning broadly corresponds with the standard set by ECtHR jurisprudence on prisoner voting.[429] This might influence or 'inspire' the ECtHR's decision-making so that it maintains its standard of

[425] M. Demetriou, 'Does the CJEU Need a New Judicial Approach for the 21st Century? A CJEU User's Perspective' (Bingham Centre for the Rule of Law, 2 November 2015) 12 <https://www.biicl.org/documents/776_marie_demetriou_paper.pdf> accessed 14 April 2022.
[426] *HS2* (n.87) [172], See also [158]-[162] (Neuberger PSC, Mance JSC).
[427] J. Shaw, 'Prisoner voting: now a matter of EU law' (*EU Law Analysis*, 15 October 2015) <http://eulawanalysis.blogspot.com/2015/10/prisoner-voting-now-matter-of-eu-law.html> accessed 14 April 2022.
[428] European Union (Withdrawal) Act 2018, s.5(4)-(5).
[429] Foster, 'Thierry Delvigne' (n.412).

protection, to ensure it does not fall below the standard that is now also upheld by the CJEU.[430] However, equally, the ECtHR might deem the issue of prisoner voting resolved and support the CM's conclusions - although to do so would cast doubt on the cogency of its earlier jurisprudence, potentially further undermining its legitimacy.

Yet, even if future litigation were to arise, it is questionable whether anything constructive would be achieved. Further litigation could trigger a resurgence of domestic political hostility towards Strasbourg, expose a clash of competences between the ECtHR and the CM and may not be fruitful for the litigant. Therefore, such litigation may inflict further wounds to institutions already scarred from years of being locked in a clash. Notably, however, the CJEU has not "lost" in terms of the prisoner voting clash as it did not have the opportunity to adjudicate on the compatibility of the UK approach with EU law. Whilst EU law had been raised in domestic prisoner voting case law, the preliminary reference procedure was avoided. Therefore, the CJEU had a more indirect role in the clash.

5.11 Conclusion

The prisoner voting clash accentuates underlying tensions in rights protection as it triggered challenges to the ECtHR's legitimacy. The ultimate outcome of the clash represents a "loss" for the ECtHR, as its own legitimacy was undermined by the UK's protracted non-compliance which resulted in the dilution of the Court's standards of rights protection. Yet, as will be further explicated in chapter six, other institutions had a key role in contributing to the ultimate "loss" to the ECtHR – this in turn further reveals how other institutions also "lost".

With the building blocks for the clash in place, the ECtHR played a key role in the prisoner voting controversy. The main criticism against the ECtHR in terms of its role in the clash, is that its judgments on prisoner voting lacked procedural legitimacy which caused the ECtHR's loss. This reasoning deficit highlighted the inconsistency and lack of transparency in the application of the "wide" MoA. The persistent "why" and "what" deficit hampered the cogency of prisoner voting jurisprudence and the ECtHR was left in subsequent judgments to grapple with how best to approach prisoner voting. Therefore, the procedural legitimacy of the judgment should ideally have been as watertight as possible, as the clash intensified flaws in its judgment in *Hirst* which contributed to the clash. Further, the preconditions for conflict

[430] Re. how the ECtHR may consider EU Law, see: M.L. Paris, 'Paving the Way: Adjustments of Systems and Mutual Influences between the European Court of Human Rights and European Union Law before Accession' (2014) 51 IJ 59, 62.

indicate the ECtHR should have been alert to the possibility of causing political upset. Whilst this does not mean a violation should not have been found, due to the ECtHR's conditional legitimacy, caution, clarity and consistency were required. Fundamentally, the ECtHR should have refrained from drawing a negative inference from the arguable lack of parliamentary debate, as this was too controversial. Further, the ECtHR should have ensured that its reasoning was as clear as possible, to limit scope for confusion and potential challenge. The Court could have focused on form rather than content by clarifying that legislative amendment was required in the *Hirst* judgment. This earlier clarification could have attenuated some of the confusion that arose in subsequent cases and may have reduced scope for political non-compliance. Further, the Court should have clarified in *Hirst* that paragraph 77 of its judgment was not intended to be a test but rather the Court was identifying the possible ways in which domestic prisoner voting legislation breached A3P1. The identification of such flaws highlighted the aspects that *could* have been remedied in amending legislation to ensure compatibility. However, arguably *even* if such issues were rectified, the existence of the preconditions for conflict plus the finding of the violation, may still have sparked the controversy. The strained constitutional context indicates there was an inevitability to the clash. Yet even so, it remains arguable that the issues with the ECtHR's judgments further *compounded* the controversy. Whilst the clash might not have been avoided, rectifying these issues could have lessened the scale of the controversy. Prisoner voting exposes the boundaries of the ECtHR's own competence in terms of securing effective implementation – the ECtHR cannot force States to comply. As will be discussed in chapter six, whilst the CM has a vital role in monitoring compliance, ultimately effective compliance requires cooperation from the State.

The CJEU's involvement in prisoner voting further added to the controversy. The CJEU's approach to finding a right to vote, independent of the exercise of free movement rights, is emblematic of the CJEU's expansive approach to rights protection. *Delvigne* posed a potential dual threat to the UK. Yet post-Brexit, redress under EU law is no longer an option for UK prisoners. Despite this, even though the CM has deemed UK prisoner voting cases closed, if future litigation were to arise in Strasbourg, *Delvigne* may be utilised to reinforce prisoners' claims.

CHAPTER SIX: THE POLITICAL RESPONSES TO PRISONERS' VOTING RIGHTS: A NO-WIN CLASH*

6.1 Introduction

Having explored domestic and European judicial approaches to prisoner voting, this chapter assesses both the UK's and Strasbourg's *political* responses to prisoner voting. After years of political and legal wrangling, the UK Government introduced administrative amendments and the protracted non-compliance with *Hirst*[1] "appears" resolved. However, these amendments undermine the European Court of Human Right's (ECtHR's) stipulation that legislative amendments were required, as the executive opted for minimal compliance and the Committee of Ministers of the Council of Europe (CM) permitted a form of corrective compliance.

This chapter draws on and ties together the conclusions in chapters four and five that the domestic courts and ECtHR "lost" in the prisoner voting clash, and argues that the administrative amendments to prisoner voting illustrate the shortcomings of *multiple* institutions' approaches to prisoners' voting rights. The clash resulted in multi-institutional losses. In further explicating these losses this chapter explores the domestic political response to prisoner voting which is largely characterised by deep-rooted recalcitrance towards enfranchising prisoners, which persisted throughout the clash (section 6.2). This was inextricably linked to hostility towards Strasbourg. Political hostility is especially evident in the backbench debate on prisoner voting in which a combination of key constitutional and institutional issues surfaced. In particular, parliamentary sovereignty is applied to justify non-compliance. However, on analysis, MPs' understanding of parliamentary sovereignty is highly politicised and is broadened to subsume concerns regarding national sovereignty. Further, MPs use of parliamentary sovereignty is confused, it is used as both a reason and an instrument to defend non-compliance which raises questions regarding the relevance of sovereignty in the prisoner voting context. The administrative amendments show that the executive seized control and parliamentary involvement was circumvented, representing a "loss" for parliamentary protection of rights. Yet arguably there was still parliamentary power at play as Parliament could have intervened and taken a more active role if deemed necessary. Moreover, whilst it is

* This chapter draws on some material published in E. Adams, 'Prisoners' Voting Rights: Case Closed?' (*UKConstLBlog*, 30 January 2019) <https://ukconstitutionallaw.org/> accessed 14 April 2022.

[1] *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41 (*Hirst*).

arguable the amendments constitute a "win" as the executive "resolved" the clash, this resolution was only reached after several years of protracted conflict, in which the executive faced numerous clashes and it sustained repeated criticism for its recalcitrant response to prisoner voting, resulting in reputational damage. Therefore, the executive has not emerged from the clash unscathed and also sustained a "loss".

The political reception to domestic case law on prisoner voting is assessed (section 6.3). Domestic case law was largely met with political indifference as the clash was principally framed as conflict between the UK and Strasbourg. Therefore, the declaration of incompatibility (the declaration) failed to have the intended impact to compel political action. This further informs understanding of s.4 of the Human Rights Act 1998 (HRA), demonstrating it may not result in dialogue. The generally non-interventionist, detached domestic judicial approach signifies a "loss" for domestic courts as they failed to hold the Government to account in terms of its role in prisoner voting. This reinforces how domestic courts, especially the Supreme Court in *Chester*,[2] should take a less reticent approach to s.4 and sustained human rights violations. Courts should not avoid declarations due to fear of adverse political reactions. Rather, s.4 clearly allows for the exercise of political discretion at the second filter stage and therefore, judges should make a declaration as this at least represents a clear, authoritative statement from the judiciary that the impugned legislation is incompatible with a Convention right.

This chapter then explores the political criticism towards Strasbourg, which centres on challenges to Strasbourg's legitimacy (section 6.4). For instance, Strasbourg's purported lack of democratic legitimacy is a core strand of criticism which fuelled political discontent. However, the political branches did attempt to engage in "dialogue" with Strasbourg, which arguably counterbalances some of the UK's attacks to Strasbourg's legitimacy. Nevertheless, whilst some interactions were constructive, they largely involved the UK 'striking back' against Strasbourg, resulting in a weakening of rights protection.[3] This highlights how normative conceptions regarding how dialogue should function can fail to reflect practice. It reveals that interactions can at times be disingenuous and damaging; the political branches largely utilised them to stall compliance and articulate resistance, rather than to achieve a

[2] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 (*Chester*).
[3] C. Harlow and R. Rawlings, 'Striking Back' and 'Clamping Down': An Alternative Perspective on Judicial Review' J. Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 301.

genuine resolution of the clash. This demonstrates how interactions do not necessarily facilitate "good" outcomes for rights.

This chapter next assesses Strasbourg's political response, focusing on the CM's role in the prisoner voting clash (section 6.5). The CM sanctioned a form of minimal compliance overriding the requirements of the ECtHR's jurisprudence. This is a "loss" for the ECtHR as the potency of its judgment is diluted and also a "loss" for the CM, highlighting how Strasbourg's peer pressure mechanisms to facilitate compliance can succumb to the 'perils of … politicisation'.[4] The CM's endorsement of the administrative amendments undermines the ECtHR's reasoning and reveals tensions in the relations between the (judicial) ECtHR and the (political) CM.

Finally, the EU dimension to the prisoner voting clash highlights that following *Delvigne*,[5] the dominant UK political narrative was largely dismissive and sought to minimise its potential impact (section 6.6). However, not all MPs were impervious to the potential legal implications of *Delvigne* with the prospect of future domestic litigation relying on EU law. Yet with the threat of adjudication under EU law now removed, this arguably contributed to the "loss" for prisoners' voting rights as it loosened 'the screws on the UK government'.[6]

6.2 Prisoner voting: domestic constitutional issues surface

6.2.1 A constitutional mix: the rule of law, the separation of powers and parliamentary sovereignty

The HRA embodies an inherent tension as Hiebert argues it seeks 'to reconcile rights protection with democratic principles'.[7] There is a tension between 'judicial interpretations of liberal constitutional norms' and also 'democratic principles', that Parliament should have 'the final say on whether and how to respond to a contrary rights judgment'.[8] The prisoner voting clash brought these tensions to the fore. This is exemplified in the backbench debate and in the general political discourse regarding prisoner voting, during which a mix of key constitutional principles surfaced.[9] The following discussion reveals there is a malleability in constitutional

[4] B. Çali and A. Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe' (2014) 14 HRLRev 301, 304.
[5] Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc* EU:C:2015:648 (*Delvigne*).
[6] H. van Eijken and J.W. van Rossem, 'Prisoner disenfranchisement and the right to vote in elections to the European Parliament: universal suffrage key to unlocking political citizenship?' [2016] EuConst 114, 130.
[7] J. Hiebert, 'The Human Rights Act: Ambiguity about Parliamentary Sovereignty' (2013) 14 GermanLJ 2253, 2266 ('The Human Rights Act').
[8] ibid 2266-2267.
[9] See prisoner voting timeline in chapter one.

principles, that they are both political and legal and can be utilised to advance both political and legal agendas.

For instance, the rule of law was a key constitutional principle during the prisoner voting clash. As discussed in chapter two, understandings of the rule of law are wide-ranging. At the European level, the importance of the rule of law is enshrined in the Statute of the Council of Europe which states that Contracting Parties' 'must accept the principles of the rule of law'.[10] Article 46(1) of the European Convention on Human Rights (ECHR) requires States who are party to a judgment 'to abide by the final judgment of the Court' and there is an international legal obligation to execute judgments.[11] The ultimate sanction for non-compliance is expulsion from the Council of Europe.[12] However, on analysis, domestic interpretations regarding the content and application of the rule of law differed during the prisoner voting clash. Those in favour of the motion in the backbench debate argued that the ECtHR in *Hirst* had flouted the rule of law as it had acted 'beyond its legal powers'.[13] For some MPs, the ECtHR had contravened the rule of law as it had unjustifiably strained the meaning of the Convention.[14] It is questionable whether such concerns were in good faith or whether they were merely used to legally justify the platform for their political agenda. On balance, however, having regard to the general nature of the discourse, the latter is more likely to apply. Conversely, 'only a minority' of MPs viewed the rule of law as requiring the UK to comply with the UK's international legal obligations.[15] Prior to the backbench debate, the Political and Constitutional Reform Committee endorsed this understanding of the rule of law which required the UK to comply with its 'treaty obligations'.[16] Moreover, it is evident that the Joint Committee on Human Rights (JCHR) has an important role in ensuring the political branches safeguard the rule of law in terms of upholding human rights.[17] As noted in chapter one, the JCHR critically monitored the recalcitrant political response and strongly advocated compliance with Strasbourg's prisoner voting jurisprudence. Therefore, as Harlow argues, prisoner voting

[10] The Statute of the Council of Europe (London, 5.V.1949, European Treaty Series - No.1), Article 3.
[11] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) 1950, Article 46(1) (ECHR).
[12] The Statute of the Council of Europe (n.10) Article 8; see K. Dzehtsiarou and D. Coffey, 'Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times' (2019) 68 ICLQ 443.
[13] D. Nicol, 'Legitimacy of the Commons debate on prisoner voting' [2011] PL 681, 683.
[14] ibid 684.
[15] ibid 685.
[16] House of Commons Political and Constitutional Reform Committee, *Voting by convicted prisoners: summary of evidence* (HC 2010-11, 776-I) 8.
[17] M. Hunt, 'The Joint Committee on Human Rights' in A. Horne, G. Drewry and D. Oliver (eds), *Parliament and the Law* (Hart 2013) 226.

appears 'to epitomise the dualistic character of the law/democracy debate'.[18] The rule of law was framed differently depending on the stance adopted, i.e., whether it was considered that *Hirst* should or should not be complied with. Most MPs advocated that prisoner voting should be determined by democratic Parliament rather than upholding the judicial interpretation of rights.[19] This demonstrates how the rule of law can be manipulated to suit different ends, providing a gloss of respectability to justify political agendas.

Arguments that Strasbourg unjustifiably extended its role were also based on implicit understandings of the separation of powers, as the issue of prisoner voting was understood by the majority of MPs as in Parliament's remit. The separation of powers was not expressly referred to in the backbench debate but, as Nicol argues, there was 'support for a clear division between courts and Parliament with each having distinct roles'.[20] For example, it was noted in the backbench debate that domestically the court in *Pearson* deemed the issue of prisoner voting to be in Parliament's remit, especially as it concerned a democratic, political right.[21] This supported the contention that the ECtHR's adjudication in this area unjustifiably trespassed into legislative territory. Prisoner voting was to be determined by Parliament, not the courts. However, the ECtHR deemed the issue within its remit and found UK legislation incompatible. In doing so, the ECtHR was careful to afford the UK wide discretion to develop a solution and it can be inferred the ECtHR considered this approach respected its subsidiary role. However, MPs viewed this differently and instead focused on the ECtHR's finding of a violation to argue the ECtHR had trespassed into Parliament's territory. Yet advocating adherence to rigid institutional roles in terms of prisoner voting overlooks the fact the HRA and supranational rights adjudication have reshaped the relationship between courts and legislatures, arguably creating greater institutional overlap, as opposed to rigid barriers delineating and separating different institutions' roles.[22] Nevertheless, the dominant political narrative perpetuated the view that prisoner voting firmly resided in the political domain.

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[18] C. Harlow, 'The Human Rights Act and 'Coordinate Construction': Towards a 'Parliament Square' Axis for Human Rights?' in N.W. Barber, R. Ekins and P. Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 162.

[19] G. Bryan, 'Lions under the Throne: The Constitutional Implications of the Debate on Prisoner Enfranchisement' (2013) 2(2) CJICL 274, 275.

[20] Nicol (n.13) 688.

[21] HC Deb 10 February 2011, vol 523, col 496; *R (Pearson) v Secretary of State for the Home Department* [2001] EWHC Admin 239, [2001] HRLR 39 (*Pearson*).

[22] A. Kavanagh, 'The Constitutional Separation of Powers' in D. Dyzenhaus and M. Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 237; see also R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011) 248; S. Wheatle, *Principled Reasoning in Human Rights Adjudication* (OUP 2017) 81-86.

The backbench debate also demonstrates how parliamentary sovereignty was asserted to emphasise Parliament's superior 'democratic accountability'.[23] As will be discussed below, parliamentary sovereignty became the primary constitutional principle utilised by politicians to justify non-compliance.

6.2.2 Spot the difference: an issue of parliamentary and/or national sovereignty?

Despite recurrent references to parliamentary sovereignty throughout the prisoner voting clash ultimately the administrative amendments reveal the executive had the final say, as the amendments bypassed legislative scrutiny and with hindsight, this renders pleas to uphold parliamentary sovereignty hollow.[24] Parliament's ultimate say in the issue of prisoner voting was circumvented. This will reveal that the prisoner voting clash was largely underpinned by a defence of national sovereignty, rather than parliamentary sovereignty.

First, it is necessary to distinguish parliamentary sovereignty from national sovereignty. As discussed in chapter two, parliamentary sovereignty is a core constitutional principle in the UK[25] and in terms of rights protection, the HRA was drafted to respect parliamentary sovereignty, as domestic courts cannot strike out legislation. Conversely, national sovereignty concerns the interactions and power dynamics between the 'UK as a state' and supranational institutions.[26] Tucker defines national sovereignty as requiring 'that … the UK can use its domestic political institutions to make its own decisions, without fear of interference from external institutions' - national sovereignty may be threatened by external institutions overriding 'domestic decisions'.[27] The UK exercised its national sovereignty when it accepted the legally binding status of the ECtHR's judgments[28] but, as Elliott notes, in doing so this 'compromised' the UK's national sovereignty as the UK accepted the authority of supranational institutions.[29] Therefore, national 'sovereignty is not absolute. It operates within the limits of international law and may also be limited factually', yet whilst 'sovereignty is

[23] Nicol (n.13) 686.
[24] E. Adams, 'Prisoners' Voting Rights: Case Closed?' (*UKConstLBlog*, 30 January 2019) <https://ukconstitutionallaw.org/> accessed 14 April 2022.
[25] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan Education Ltd, 1985) 40; see also M. Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015).
[26] M. Gordon, 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond' (2016) 27(3) KLJ 333, 335 ('The UK's Sovereignty Situation').
[27] A. Tucker, 'Taking sovereignty seriously' in F. Cowell (ed), *Critically Examining the Case Against the 1998 Human Rights Act* (Routledge 2017) 105.
[28] D. Feldman, 'Sovereignties in Strasbourg' in R. Rawlings, P. Leyland and A. Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013) 218.
[29] M. Elliott, 'The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective' in J. Jowell, D. Oliver and C. O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015) 46.

reduced by collaboration within Europe' the UK 'remains a sovereign State'.[30] This reveals a core tension, as despite voluntarily relinquishing a portion of the UK's national sovereignty, the prisoner voting clash exposes a pervasive unease with this partial erosion of sovereignty. Such qualms arguably centre on political and ideological objections to power being exercised at the supranational level - it is a matter of political power play. The distribution of political power is in itself a political decision, regarding which there are different ideological positions. As Feldman notes, there is risk of a 'clash' in instances where first, 'international law imposes an obligation to behave in a way that is contrary to a State's perception of its own interests'.[31] Second, there can 'be a tension between dominant political forces within a State and the demands of public international law'.[32] There is potential for friction, as the UK must reconcile multifaceted and co-existing relationships between domestic institutions and supranational institutions. However, reconciling these complex relationships and power dynamics is in practice challenging and sometimes fraught, as exemplified by prisoner voting, in which the majority of MPs objected to Strasbourg's purported encroachment into domestic institutions' remit and therefore, asserted national sovereignty, and also parliamentary sovereignty, as a means to resist European rights enforcement.

It is important to maintain a clear difference between conceptions of sovereignty, as there is evidence that in some instances, these understandings can be blurred. For example, such blurring occurred in relation to the EU referendum, as Gordon observes there was a 'conflation of different understandings of sovereignty' as there 'has been a failure to appreciate the distinction between internal and external ideas of sovereignty'.[33] During the EU referendum there were erroneous assertions that parliamentary sovereignty had been undermined by being part of the EU.[34] Therefore, Gordon argues it is important 'to understand the true nature of the problems that underlie national concerns about sovereignty, rather than distort those concerns by constructing false problems relating to domestic legislative authority which required no solution'.[35] Moreover, Dimelow notes there have been 'misplaced' conceptions of sovereignty, in which parliamentary sovereignty is broadened to provide 'a more comprehensive' explanation of the UK's 'balance of power', to support assertions that Parliament has complete

[30] E. Wicks, K. Ziegler and L. Hodson, 'The UK and European Human Rights: Some Reflections' in K. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 502.
[31] Feldman, 'Sovereignties in Strasbourg' (n.28) 215.
[32] ibid.
[33] Gordon, 'The UK's Sovereignty Situation' (n.26) 335.
[34] ibid 336.
[35] ibid 342.

freedom to do as it wishes.[36] Yet, as Gordon argues it is well-recognised that Parliament is not entirely free to act as there are '*non*-legal constitutional limits' on parliamentary sovereignty.[37] Therefore, such broad conceptions of parliamentary sovereignty may subsume concerns regarding national sovereignty, which may confuse understandings of parliamentary sovereignty.

Regarding the ECHR, Masterman contends that although 'parliamentary sovereignty provided the conceptual framework' for the HRA, the general anti-Strasbourg discourse is largely driven by 'concerns relating to *national* sovereignty'.[38] Therefore, as will be shown, the issue of prisoner voting reveals the blurring of sovereignties in relation to the UK's relationship with Strasbourg. Parliamentary sovereignty may be used as a justificatory label to advance broader discontent regarding external intrusion into national sovereignty. The prisoner voting clash is part of a broader picture of political discontent with European rights protection, as exemplified by the UK Government's proposals to introduce a British Bill of Rights.[39] There are deep-seated concerns regarding the erosion of national sovereignty and domestic political protection of rights is emphasised. These concerns are arguably exacerbated by the fact voting rights constitute crucial political rights and MPs are arguing for political protection of political rights, that such rights belong in the political domain.[40]

A fundamental strand of hostility underpinning political resistance to Strasbourg centres on opposition to the foreignness of the ECtHR which is used to bolster challenges to the ECtHR's legitimacy.[41] Prisoner voting litigation appeared to substantiate and reinforce political claims that Strasbourg had gone too far and its reach must be resisted and ultimately attenuated. Whilst the HRA facilitates domestic enforcement of Convention rights,[42] for some MPs this is insufficient to negate the fact the ECtHR is an external, foreign *court*.[43] Moreover, *Delvigne* provided further evidence of alleged European aggrandisement and raised the hackles the UK

[36] S. Dimelow, 'An ingenious failure? The Human Rights Act 1998 and parliamentary sovereignty' in F. Cowell (ed), *Critically Examining the Case Against the 1998 Human Rights Act* (Routledge 2019) 83.
[37] Gordon, 'The UK's Sovereignty Situation' (n.26) 337 (emphasis added).
[38] R. Masterman, 'The United Kingdom: From Strasbourg Surrogacy towards a British Bill of Rights?' in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights* (Intersentia 2016) 456.
[39] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (CP 588, 2021).
[40] C.R.G. Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2013) 66 ParlAff 511, 530 ('A Perfect Storm').
[41] K. Dzehtsiarou and A. Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' (2011) 12 GermanLJ 1707, 1711.
[42] ibid 1712.
[43] D. Feldman, 'Democracy, law, and human rights: politics as challenge and opportunity' in M. Hunt, H. Hooper and P. Yowell, (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 97.

political branches. *Delvigne* posed a greater potential "threat" (section 6.6) as national legislation which conflicts with EU law can be disapplied. The general political resistance to foreign powers is linked to broader Euroscepticism,[44] culminating in the UK's withdrawal from the EU.[45] This antipathy is exacerbated by a conflation of 'the EU and the ECHR, fudging 'Europe' so that it becomes an amorphous, huge, almost omnipresent beast … onto which all sorts of scepticisms are transferred'.[46]

As Von Staden notes, whilst Brexit is 'formally' separate from the issue 'of ECHR membership and the HRA', it has become 'politically intertwined … since it foregrounds the question of independent British self-governance free from intervention by multilateral governance institutions'.[47] This intertwinement of issues exacerbated antipathy towards Strasbourg and fuelled a defensive political approach in which parliamentary sovereignty was broadened to subsume concerns regarding national sovereignty. This became the political armour against European intrusion. Prisoner voting became 'the terrain on which those opposed to human rights legislation chose to take forward their case for withdrawal from … the European Court'.[48] Crucially, this shows the UK's recalcitrance is 'not *really* about prisoner voting: it is about fundamental disagreements between the United Kingdom and the Court about the role and nature of human rights and about the judicial function'.[49] The issue of prisoner voting itself was given minimal attention in parliamentary debates.[50]

The following sections seek to disentangle political references to sovereignty and explore the extent to which the prisoner voting clash raises questions regarding parliamentary and/or national sovereignty.

[44] P. Craig, 'The United Kingdom, the European Union, and Sovereignty' in R. Rawlings, P. Leyland and A. Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013) 175; F. Cowell (ed), *Critically Examining the Case Against the 1998 Human Rights Act* (Routledge 2019) 25-27; D. Giannoulopoulos, 'The Eurosceptic right and (our) human rights: the treat to the Human Rights Act and the Convention on Human Rights is alive and well' (2020) 3 EHRLR 255.
[45] Murray, 'A Perfect Storm' (n.40) 530.
[46] Wicks, Ziegler and Hodson (n.30) 506.
[47] A. von Staden, *Strategies of Compliance with the European Court of Human Rights* (University of Pennsylvania Press 2018) 72 ('*Strategies of Compliance*').
[48] D. McNulty, N. Watson and G. Philo, 'Human Rights and Prisoners' Rights: The British Press and the Shaping of Public Debate' (2014) 53(4) HowLJ 360, 375.
[49] F. de Londras and Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights' (2017) 66 ICLQ 467, 477 ('Mission Impossible').
[50] McNulty, Watson and Philo (n.48) 374.

6.2.3 Application of parliamentary and national sovereignty

The ECtHR's requirement that the UK implement legislative change constituted a 'general measure' which is intended to preclude 'new violations' or prevent 'continuing violations'.[51] However, such measures are deemed to have 'the highest sovereignty costs'.[52] They curtail the political branches' 'ability to engage in domestic self-government', as States' are required to amend 'law or policy that the government would not have contemplated' but for the Court's judgments, which can conflict with States' 'substantive legal or policy preferences'.[53] However, as already noted, the ECtHR does not have the power to strike out domestic legislation and cannot 'force' compliance.[54] Further, Parliament could exercise its sovereignty by opting for a different means of compliance to that specified by the ECtHR, or despite the potential political and legal ramifications, Parliament could resist compliance.

Therefore, in exploring references to sovereignty during the prisoner voting clash some MPs emphasised that Parliament should have the final say and would resist compliance with Strasbourg. For example, in the backbench debate, Chris Bryant MP argued that parliamentary sovereignty was the UK's version of 'a democratic safety valve' which enables 'Parliament to overrule the courts'.[55] As Gary Streeter MP astutely observed this issue 'is not really about whether prisoners in this country have the right to vote, but about whether this House has the right to make its own laws for its own people'.[56] The issue of prisoner voting was utilised to air broader discontent. Underpinning such statements are concerns regarding national sovereignty and resisting Strasbourg. Andrew Bridgen MP argued that the House needed to 'act like a sovereign Parliament … and resist … an unelected European body that is seeking to push itself further into domestic UK affairs'.[57] As Nicol observes, MPs adopted 'a looser, more political conception of parliamentary sovereignty'.[58] The debates show how parliamentary sovereignty is used to justify non-implementation of *Hirst* - it reinforces the UK "versus" Strasbourg narrative. In terms of overt references to national sovereignty, Claire Perry MP

[51] Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies) Rule 6, <https://rm.coe.int/16806eebf0> accessed 14 April 2022 ('Rules of the CM').
[52] Von Staden, *Strategies of Compliance* (n.47) 86.
[53] ibid.
[54] K. Dzehtsiarou, 'Dialogue or diktat? The nature of the interaction between national courts and the European Court of Human Rights and how it influences criticism of the Human Rights Act' in F. Cowell (ed), *Critically Examining the Case Against the 1998 Human Rights Act* (Routledge 2019) 91.
[55] HC Deb 10 February 2011, vol 523, col 521.
[56] ibid col 505.
[57] ibid col 561.
[58] Nicol (n.13) 685.

acknowledged that one of the core issues concerned the 'encroachment of the European Court of Human Rights into matters of *British* sovereignty'.[59] Some MPs recognised the UK had conceded some of its national sovereignty, for instance, Jeremy Corbyn MP acknowledged that 'every time a country signs up to a treaty in any sphere of influence or activity, it removes some of its own sovereignty.'[60]

In May 2012, David Cameron (then Prime Minister) reiterated that he opposed prisoner enfranchisement and stated it 'is a matter for Parliament to decide, not a foreign court'.[61] Again, the foreignness of Strasbourg is emphasised, being linked to broader Euroscepticism. Subsequently, these views were reflected in a statement in the House of Commons debate regarding the draft Bill on prisoner voting, Chris Grayling MP stated that 'the government are under an international law obligation to implement the Court judgment', but 'Parliament is sovereign, ... The current law passed by Parliament remains in force unless and until Parliament decides to change it'.[62] Other MPs ardently echoed this view and the debate is peppered with references to parliamentary sovereignty.[63] The fundamental tension between asserting parliamentary sovereignty and the UK's legal obligations to comply with Strasbourg persisted.

It can be inferred that parliamentary sovereignty was at times used to further broader claims regarding national sovereignty – the two sovereignties have been merged in the minds of many MPs. As Dimelow notes, parliamentary sovereignty is expanded and used 'as shorthand for saying that Parliament, or even the government, can act as it pleases free from any influence or shackles'.[64] Arguably, this political shorthand is used where politicians consider that a case raises issues of protecting national sovereignty from the encroachment of supranational institutions and therefore, it is for the domestic legal or political system to determine the issue. In emphasising the domestic system, this means the issue is for Parliament to determine - it is an issue of parliamentary sovereignty. Yet rather than utilising the shorthand, it would be preferable to separate understandings of sovereignty to avoid perpetuating confused understandings of parliamentary sovereignty. The Joint Committee on the Draft Voting Eligibility Bill recognised that whilst Parliament was sovereign, 'that sovereignty resides in Parliament's power to withdraw from the Convention system; whilst we are part of that system

[59] HC Deb 10 February 2011, vol 523, col 553 (emphasis added).
[60] ibid 538.
[61] HC Deb 23 May 2012, vol 545, col 1127.
[62] HC Deb 22 November 2012, vol 553, col 745.
[63] ibid cols 755-760.
[64] Dimelow (n.36) 83.

we incur obligations that cannot be the subject of cherry picking'.[65] For the Committee, parliamentary sovereignty did not conflict with adherence to Strasbourg's jurisprudence as parliamentary sovereignty is formally preserved. Therefore, it was unnecessary to frame this as a conflict of obligations, rather the obligations could be framed as reconciled, diffusing tensions. As discussed in chapter one, some MPs attempted to find a solution and arguably the draft Bill was a step in the right direction. However, the core UK "versus" Strasbourg narrative prevailed, which was counterproductive, as it constitutes a misrepresentation of the realities of the UK's obligations. It compounds constitutional confusion. Therefore, the UK needs to sincerely engage with its obligations, rather than hiding behind distortive narratives.[66]

6.2.4 Parliamentary sovereignty: a reason or an instrument for non-compliance?

Throughout the clash parliamentary sovereignty is deployed differently, as both a *reason* for resisting compliance or an *instrument* which allows non-compliance, where there are other reasons to not comply. In terms of parliamentary sovereignty as a reason in itself for non-compliance, Bates argues the Government's approach arguably highlights an 'inability' to rectify *Hirst*, as opposed to defiance 'due to constitutional difficulties'.[67] Parliamentary sovereignty provided a *reason* for non-compliance - it gave the Government an 'explanation' for non-implementation.[68] The Government referred to 'a higher source of domestic constitutional power as rendering *it* (too) powerless' to secure compliance.[69] Moreover, parliamentary sovereignty had *instrumental* application, it was used strategically to pursue the end of non-compliance. In doing so, some MPs argued that non-compliance was justified for other reasons, such as objecting to the judgment because it was wrongly decided[70] or fundamentally opposing prisoners' enfranchisement.[71] MPs then utilised parliamentary sovereignty as the UK's trump card, representing the ultimate legitimising tool to allow non-compliance.

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[65] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* (2013-14, HL 103, HC 924) 33.
[66] M. Gordon, 'Brexit: a challenge for the UK Constitution, of the UK Constitution?' [2016] EuConst 409, 442.
[67] E. Bates, 'Democratic Override (or Rejection) and the Authority of the Strasbourg Court: The UK Parliament and Prisoner Voting' in M. Saul, A. Føllesdal and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (CUP 2017) 300 ('Democratic Override').
[68] E. Bates, 'The Continued Failure to Implement *Hirst v UK*' (*EJIL:Talk!,* 15 December 2015) <https://www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/> accessed 14 April 2022 ('The Continued Failure').
[69] Bates, 'Democratic Override' (n.67) 300.
[70] HC Deb 10 February 2011, vol 523, col 495.
[71] ibid col 502.

The fact parliamentary sovereignty was applied differently matters, as it shows the imprecision of sovereignty in the prisoner voting context. This imprecision compounded the confused approach to sovereignty. This then raises questions regarding the role and relevance of parliamentary sovereignty in deciding not to comply with *Hirst*. Whether parliamentary sovereignty is used as a reason and/or an instrument, it can be questioned *why* parliamentary sovereignty became the key constitutional principle to justify non-compliance. Arguably, the fact parliamentary sovereignty accords 'primacy' to democracy,[72] imbues parliamentary sovereignty with substantial legitimising force to justify non-compliance. Therefore, as prisoner voting concerned a key democratic right, parliamentary sovereignty was used to argue that prisoner voting was for democratic Parliament to determine. For some MPs, parliamentary sovereignty was "threatened" by *Hirst*. The "threat" was further exacerbated by the blurring of types of sovereignty, as discussed, assertions of parliamentary sovereignty often subsumed broader claims regarding national sovereignty. Yet it is questionable whether the threat to parliamentary sovereignty was merely "perceived" as Parliament *could* exercise its sovereignty to resist Strasbourg. However, in practice parliamentary sovereignty has not been used to resist Strasbourg and therefore, arguably for some MPs, the ECtHR's judgments constituted a "real" threat to parliamentary sovereignty.[73] Some MPs utilised the issue of prisoner voting to assert parliamentary sovereignty, to demonstrate that if Strasbourg strays too far, parliamentary sovereignty still exists and can be deployed as the UK's armour to shield it from external intrusion.[74] However, it cannot be conclusively determined whether MPs who invoked parliamentary sovereignty were genuinely concerned about upholding it, or whether they were just using parliamentary sovereignty to further their political agendas, or both. Regardless, it shows that parliamentary sovereignty, however imprecisely applied, became fundamental in legitimising the UK's approach to prisoner voting, demonstrating that it has significant rhetorical clout. This raises questions regarding the legitimacy of using parliamentary sovereignty in these ways.

For instance, using parliamentary sovereignty as a reason for non-compliance with Strasbourg is, in and of itself, problematic.[75] For example, Hiebert states that despite Waldron being a renowned sceptic of strong-form constitutional review, Waldron argued in evidence to the

[72] Gordon, *Parliamentary Sovereignty* (n.25) 46.
[73] HC Deb 10 February 2011, vol 523, cols 505, 531, 537, 553, 561, 568.
[74] ibid cols 510, 524, 576, 580.
[75] T. Hickman, 'Bill of Rights Reform and the Case for Going beyond the Declaration of Incompatibility Model' [2015] NZLRev 35, 62.

JCHR that 'Parliament's legitimacy and supremacy … is based on the fact that the leading part of Parliament has electoral credibility. Parliamentary decision-making and legislation is legitimate because people have the right to vote, not the other way round'.[76]

Waldron emphasised the right to vote is 'the right of rights … the grounds for limiting it would have to be very serious indeed'.[77] Therefore, parliamentary sovereignty should not be used as a reason for non-compliance. Further, Fredman also argues the approach is problematic as the 'elected majority is attempting to use its legislative power to deprive a part of the population of it is very ability to voice its concerns through the political process'.[78] The denial of voting rights, potentially undermines Parliament's own legitimacy and democratic credentials - parliamentary sovereignty should not be used to justify depriving prisoners of voting rights.[79] However, whilst it might be problematic from a legitimacy perspective to use parliamentary sovereignty in this way, technically Parliament could still exercise its sovereignty by refusing to amend the law. Although, equally, whilst viable under domestic law, as Bates argues, parliamentary sovereignty does not constitute 'a defence at international law for failure to' implement a judgment.[80]

Arguably, the instrumental use of parliamentary sovereignty appears more justifiable – basing non-compliance on other reasons helps mitigate the criticisms above of purely using parliamentary sovereignty as a reason for non-compliance. However, as the following section shows, use of parliamentary sovereignty, as a reason or an instrument, was ultimately hollow as parliamentary sovereignty was circumvented. It arguably shows that reliance on parliamentary sovereignty appears disingenuous. This again raises questions about the role of parliamentary sovereignty in the prisoner voting context.

6.2.5 Administrative amendments

Addressing the administrative amendments (discussed in chapter one), David Lidington MP stated that 'UK laws are a matter for elected lawmakers in the United Kingdom and [they] have not enacted any change to legislation'.[81] The amendments were shrewd, from the

[76] Hiebert, 'The Human Rights Act' (n.7) 2270-2271; Joint Committee on Human Rights, *Human Rights Judgments Oral Evidence* (Q1-61, 15 March 2011) 21 (JCHR, '*Human Rights Judgments*').
[77] JCHR, *Human Rights Judgments* (n.76) 22.
[78] S. Fredman, 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Rights to Vote' in M. Hunt, H. Hooper, P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 465.
[79] Hiebert, 'The Human Rights Act' (n.7) 2271.
[80] Bates, 'The Continued Failure' (n.68).
[81] HC Deb 2 November 2017, vol 630, col 1007.

Government's perspective parliamentary sovereignty was ostensibly respected, it was unnecessary to consult Parliament on such minor administrative amendments, which left s.3 RPA 1983 unaffected. Mr Lidington concluded the measures complied with the judgment in *Hirst* 'in a way that respects the clear direction of successive Parliaments and the strong views of the British public' on prisoner voting.[82] Mr Lidington maintained that the proposals complied with the UK's 'international legal obligations' as 'there is no requirement to enfranchise all prisoners'.[83]

Ultimately, despite the ECtHR repeatedly holding that legislative amendments would be required to comply with the judgment, the administrative amendments were approved by the CM (section 6.6). This undermined the ECtHR's jurisprudence on prisoner voting and shows the UK's resistance "paid off" as it diluted the effect of the ECtHR's judgment. It also undermined both the European and domestic courts' stipulation that *Parliament* should decide prisoner voting.[84]

6.2.5.1 An indication of 'executive dominance'?[85]

That the executive determined the ultimate outcome raises issues regarding the executive's role in the prisoner voting clash. Notably, executives 'are the interlocutors' with the Council of Europe and are 'the principal gatekeepers of information'.[86] The executive relays information to Parliament during 'the implementation process', liaises with Strasbourg and directs the domestic response to ECtHR judgments.[87] This does not mean that executive resolution is necessarily problematic as some 'controversies' have uncontestably been remedied by the executive.[88] In some cases, the ECtHR can provide that appropriate general measures might include administrative amendments or changes to policy.[89] However, in *Greens* the ECtHR clearly stipulated that as the blanket nature of the legislation violated A3P1, legislative amendments were required. The problem with the executive's amendments is that for those who vehemently oppose prisoner voting, enfranchising up to an extra one hundred prisoners

[82] ibid col 1008.
[83] ibid col 1011.
[84] Adams (n.24).
[85] A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 396.
[86] A. Donald, 'Parliaments as Compliance Partners in the European Convention on Human Rights System' in M. Saul, A. Føllesdal and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (CUP 2017) 84.
[87] ibid 84.
[88] Bates, 'Democratic Override' (n.67) 286.
[89] A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (OUP 2016) 38 ('*Parliaments and the ECtHR*').

could be a step too far.[90] Conversely, for those who argue that prisoners should have the right to vote, such amendments are negligible.[91]

The executive's amendments fundamentally contradict repeated political and judicial assertions that *Parliament* should have the final say on prisoner voting.[92] This further demonstrates why issues regarding parliamentary sovereignty matter, as both the 'reason' or 'instrument' approaches suggest that Parliament should have had the key role, but Parliament's involvement was evaded. Arguably, the administrative amendments demonstrate that paradoxically the "threat" to parliamentary sovereignty came from the executive, rather than the ECtHR, representing a "loss" for parliamentary protection of rights as the amendments were driven by a political agenda to assert and protect executive power.[93] The issue of prisoner voting was successfully removed from Parliament's remit, which might be evidence of 'Executive dominance'.[94] Notably, Kavanagh argues that whilst often Parliament and the courts are presented as 'rivals vying for prime position … this deflects our attention away from the most powerful branch of government … the Executive'.[95] This 'is a serious blind-spot' and it is necessary to be mindful of 'the power of an overweening Executive'.[96]

However, the "blind spot" in relation to prisoner voting is relatively minor, as the executive's amendments were only feasible as there was no legislative change. More substantial changes would have required legislation. Further, Parliament could have been more active and intervened if deemed necessary. Whilst the clash might have been partly motivated by the executive's desire to safeguard its own power, the clash was predominately framed as the three branches of government united in their resistance of Strasbourg. The core point of conflict focused on resisting Strasbourg's involvement in domestic political affairs. Therefore, qualms regarding executive dominance in relation to prisoner voting should not be overstated. Nevertheless, such minor amendments remain undesirable, especially considering the protracted and conflict-ridden nature of the clash. There is a hollowness to the "resolution" as the impugned legislation remains intact, prisoners remain disenfranchised – this represents a

[90] HC Deb 2 November 2017, vol 630, col 1013; Adams (n.24).
[91] ibid cols 1011, 1013; Adams (n.24).
[92] Adams (n.24).
[93] H. Hardman, 'In the name of parliamentary sovereignty: conflict between UK Government and the courts over judicial deference in the case of prisoner voting rights' (2020) 15 British Politics 226, 244.
[94] Kavanagh, *Constitutional Review* (n.85) 396; A. Young, *Democratic Dialogue and the Constitution* (OUP 2017) 206-208; A. Young, 'The Relationship Between Parliament, the Executive and the Judiciary' in J. Jowell and C. O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 347-350.
[95] A. Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30(1) KLJ 43, 58.
[96] ibid.

"loss" to the litigants. It could be argued that the executive "succeeded" in furthering its political agendas and achieving the bare minimum in terms of compliance. Yet this outcome was only after years of conflict which was damaging to all institutions involved, *including* the executive, as it sustained repeated criticism which caused damage to the UK Government's reputation, revealing a lack of respect for human rights and a political agenda to resist and dilute supranational rights protection. Further, the CM's acceptance of the administrative amendments, despite the fact that they undermine the ECtHR's jurisprudence on prisoner voting, exposes the Government to the risk that the issue of prisoner voting will be re-litigated in the future (see section 6.5.1).

The administrative amendments demonstrate that ultimately references to parliamentary sovereignty were hollow, contributing to the "loss" for parliamentary protection of rights. The core of the clash centres on political desire to attenuate the reach of the ECHR, which was underpinned by concerns regarding the erosion of national sovereignty.[97] The constitutional and institutional issues discussed highlight how underlying tensions between institutions can be exacerbated, intensifying institutional intransigence which ultimately operates to the detriment of rights protection.

6.3 Political branches' response to domestic case law and the declaration: a "loss" for the domestic courts

This section explores the political reaction to *domestic* prisoner voting case law and further elucidates the domestic courts "loss". The declaration granted in *Smith v Scott* (*Smith*)[98] was met with political inactivity which highlights the importance of a context specific analysis of inter-institutional interactions.

As discussed in chapters two and four, whilst s.4 HRA can be framed as a tool for democratic dialogue, declarations will not necessarily result in inter-institutional interactions between courts and the political branches. As Sathanapally notes, prisoner voting demonstrates there may be instances where a declaration is made but fails to 'promote careful reflection … or even principled justification by lawmakers' on why the incompatibility should remain.[99] Nevertheless, the declaration did result in some interactions between the political branches. For instance, in the 2006-2007 session following the declaration, the JCHR wrote to the Lord

[97] Adams (n.24).
[98] *Smith v Scott* [2007] CSIH 9, 2007 SC 345 (*Smith*).
[99] A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP 2012) 180.

Chancellor regarding *Hirst* and requested information concerning 'the Government's views on the declaration' in *Smith*.[100] The Lord Chancellor replied that the Government was aware of the Scottish Court's judgment and was considering the 'implications'.[101] Further, the Government did not agree with JCHR's assessment that 'urgent action' was required to change the law, as *Smith* did 'not establish any new principle beyond that established in the *Hirst* judgment'.[102] The issue of prisoner voting required 'careful consideration and deliberation', which supported the 'two-stage consultation' on prisoner voting[103] and the Government believed 'primary legislation to be the appropriate vehicle for changing the law'.[104] However, subsequent JCHR reports reveal that following the JCHR's communication with the Ministry of Justice the Government changed its position and contested 'the need for legislative reform'.[105]

In resisting compliance, Murray observes that after the declaration, the Labour Government used *Hirst*, in which the ECtHR had linked 'the operation of a 'wide' margin of appreciation to a requirement of a fulsome parliamentary debate' on prisoner voting, to avoid using a s.10 HRA remedial order which would have 'expedited reform'.[106] S.10 provides a Minister with discretion to use a remedial order to modify legislation to ensure compatibility with Convention rights.[107] A remedial order gives the executive potent remedial powers.[108] However, the procedure to make a remedial order requires the Minister to put the draft order before Parliament.[109] The JCHR has a central role in scrutinising remedial orders.[110] Therefore, if a s.10 remedial order had been made, it *might* have improved the outcome, as it would have required Parliamentary oversight. However, the Government declined to use s.10. The JCHR

[100] Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights* (2006-07, HL 128, HC 728), 64-86 ('JCHR').
[101] ibid 85, 87.
[102] ibid 87.
[103] ibid.
[104] ibid.
[105] JCHR, *Legislative Scrutiny: Political Parties and Elections Bill: Fourth Report of Session 2008-09* (2008-09 HL 23, HC 204) 23.
[106] C.R.G. Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom' (2011) 22 KLJ 309, 321; notes, HL Deb 15 July 2009, vol 712, col 1212.
[107] J. Beatson and others, *Human Rights: Judicial Protection in The United Kingdom* (Sweet & Maxwell 2008) 710.
[108] ibid - provided certain 'conditions' are met under Human Rights Act 1998 ss.10(1)-(3), there must be; 'a declaration' of incompatibility ("judicial decision")'; 'necessity to amend legislation to remove the incompatibility' ("necessity")'; and 'compelling reasons for proceeding by order' ("compelling reasons")'.
[109] ibid 714-715; Human Rights Act 1998, Schedule 2 (HRA).
[110] J. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4(1) ICON 1, 18, 21-22; J. King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 167.

questioned the Government as to why it considered that a remedial order would 'not provide adequate opportunity to debate the issues … in *Hirst*.[111] The Government stated that due to the ECtHR's criticism regarding the lack of debate it considered the remedial order was 'inappropriate', as it 'is a summary procedure to the usual process for enacting primary legislation', Parliament needed to debate prisoner voting.[112] Therefore, the Grand Chamber's criticism of the lack of legislative debate inadvertently provided a means for the elected branches to further justify postponing compliance by holding a debate in Parliament. This thwarted the Scottish Court's efforts in *Smith* to impel urgent action.[113]

Sathanapally argues the backbench debate signified 'open' opposition to the declaration made in *Smith*.[114] However, whilst non-compliance with *Hirst* meant the declaration remained outstanding, upon analysis, the debate was not expressly directed at the domestic court's declaration, rather it was directed towards the ECtHR. There was minimal mention of domestic case law.[115] Further, analysis of the debate reveals no mention of the declaration. For example, David Davis MP noted that 'British courts themselves are clear on the matter. They rejected the claims of Mr Hirst … at every stage. The High Court said … this was "plainly a matter for Parliament, not the courts"'.[116] *Pearson*[117] was used to demonstrate that prisoner voting should not be determined by the courts (both domestic and European).

However, in fact, the domestic judiciary had avoided any detailed proportionality assessment, as in *Pearson* the Court deferred to Parliament and in *Smith* the court adopted the ECtHR's approach.[118] This could partly explain the lack of political engagement with domestic case law, there was little for MPs to engage with. Alternatively, arguably MPs did not refer to the declaration in the debate because it did not support the dominant "UK institutions versus Strasbourg" narrative. As King argues, prisoner voting 'is generally viewed by parliamentarians as a contest between the UK and Strasbourg, instead of between the UK courts

[111] JCHR, *Enhancing Parliament's role in relation to human rights judgments: Fifteenth Report of Session 2009-10* (2009-10, HL 85, HC 445) 26.
[112] ibid.
[113] Murray, 'Playing for Time' (n.106) 321.
[114] Sathanapally (n.99) 217.
[115] S. Briant, 'Dialogue, diplomacy and defiance: prisoners' voting rights at home and in Strasbourg' [2011] EHRLR 243, 251.
[116] HC Deb 10 February 2011, vol 523, col 496.
[117] *R (Pearson) v Secretary of State for the Home Department* [2001] EWHC Admin 239, [2001] HRLR 39 (*Pearson*).
[118] Sathanapally (n.99) 220; Hardman (n.93) 237; C.R.G. Murray, 'We Need To Talk: "Democratic Dialogue" and the Ongoing Saga of Prisoner Disenfranchisement' (2011) 62 NILQ 62, 70.

and the UK Parliament and Government'.[119] Hickman argues the prisoner voting clash demonstrates the limits of s.4 being a tool for 'generating a sophisticated debate' regarding rights.[120] The declaration was overshadowed by the conflict with Strasbourg. Therefore, constructive dialogue between courts and the political branches is not guaranteed following a declaration.

Beyond the backbench debate, in the UK's referral request regarding *Greens*[121] to the Grand Chamber, the UK Government noted that whilst the 'Grand Chamber dismissed the relevance of the domestic courts having ruled upon s.3 of the 1983 Act' as there had been no proportionality assessment, the Government argued 'in fact, the Divisional Court did examine the proportionality of s.3, but held that the judgment of the legislature should be respected. … This was a factor in favour of, and not against, a broad margin of appreciation'.[122] However, this is a *very* generous interpretation of the court's judgment. Whilst the court briefly considered whether there was a legitimate aim, in considering the terms of 'the means employed to restrict' the rights, the court simply deferred to the legislature.[123] The Government cited the Court of Appeal's judgment in *Chester* in which the Court highlighted the diversity of views regarding prisoner voting.[124] *Smith* was conveniently overlooked. This shows the Government selectively utilised prisoner voting case law to demonstrate the domestic courts were aligned with Parliament against Strasbourg.

Evidently, the declaration in *Smith* failed to have the intended impact to impel urgent political action. What does this reveal about the effect of s.4? The political branches' inaction challenges the general trend of compliance with declarations and, therefore, the impact of a declaration may not be as "strong" or effective in prompting remedial action as the general record of compliance with declarations suggests. Yet importantly, the political resistance demonstrates that s.4 HRA 'permits delay as a type of passive resistance to a judicial decision'.[125] The executive can passively defy declarations in divisive cases by using delay tactics and/or opting

[119] King (n.110) 170.
[120] Hickman (n.75) 62-63.
[121] *Greens and MT v United Kingdom* (2011) 53 EHRR 21, para 112 (*Greens*).
[122] Secretariat of the Committee of Ministers, Communication from the Government in the Case of Hirst No. 2 against the United Kingdom, DH-DD(2011)139 (1108th meeting, 8-10 March 2011). <https://hudoc.exec.coe.int/eng?i=DH-DD(2011)139E> accessed 17 January 2022 ('DH-DD(2011)139').
[123] *Pearson* (n.117) [41].
[124] DH-DD(2011)139 (n.122); *R (Chester) v Secretary of State for Justice* [2010] EWCA Civ 1439, [2011] 1 WLR 1436.
[125] Sathanapally (n.99) 180.

for minimal compliance with a judgment.[126] Therefore, the 'permissiveness of the' declaration can pose a problem as there is 'no serious discipline on the executive or the legislature', perpetuating delay.[127] Prisoner voting shows 'delay is possible *even* under circumstances where there is a Strasbourg ruling requiring legislative action' and a declaration can 'be met with hostile failure to consider remedial action' due to the political contentiousness of the issue.[128] The political branches *actively* resisted compliance and the Government ultimately resorted to minimal compliance. The political delay to the declaration was inextricably linked to resistance to Strasbourg. The declaration would not be remedied whilst the clash was ongoing, as remedying the declaration could have been perceived as the political branches' capitulating to Strasbourg.

However, fundamentally, the Government opposed enfranchising prisoners and therefore, Sathanapally questions whether even if there had been no Strasbourg judgment on prisoner voting, 'this might have been one occasion where the Government would' disagree with the declaration.[129] As Ewing observes, it is important to retain scope to allow the Government to disagree with a declaration, as was emphasised by Jack Straw MP at the Report Stage during the passage of the HRA.[130] As discussed in chapter four, the second filter of political discretion was designed to encompass scope for political disagreement. For instance, Jack Straw MP suggested that a judgment which held that abortion was incompatible with the ECHR, would generate 'controversy' and 'considerable social anxiety' which would mean that the declaration would not be remedied.[131] Ewing proposed that 'provisions of constitutional significance' including the RPA 1983, and also 'provisions dealing with emergencies', would probably 'survive a declaration'.[132] Therefore, perhaps the political branches' considered that the constitutional 'controversy' and 'social anxiety' regarding prisoner voting meant the declaration could be "legitimately" ignored, as remedying the declaration would likely lead to amendment of the constitutionally significant s.3 RPA.

Sathanapally asks whether in cases where there is 'popular hostility towards rights claimants, political actors may prefer that changes to the law did not emanate from them, but came from

[126] ibid 148.
[127] ibid 186; see e.g. *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184, [2006] 1 WLR 505.
[128] ibid 180.
[129] ibid 184.
[130] K. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 MLR 79, 92.
[131] ibid – cites HC Deb 3 June 1998, vol 317, col 1301.
[132] ibid.

the courts'.[133] If the courts had instead opted to take a stronger stance and remedied the ban *then* Parliament could have responded to the judicial 'intervention' and this 'stronger judicial action' could have initiated 'deliberation' - as occurred in *Suave v Canada (No 1)*.[134] However, a more interventionist approach could have had the opposite effect. If domestic courts had opted for a s.3 HRA interpretation, due to the controversy of the issue, it could have inflamed rather than ameliorated the controversy and rather than prompting deliberation, could have contributed to the political impasse. Therefore, there was a judicial reluctance to opt for an interventionist approach, as exemplified by *Smith* in which the Court declined to use s.3 and subsequently, successive courts declined to grant a second declaration.[135]

By the time of the decision in *Chester*, the Supreme Court opted 'to keep a distance from such a controversial human rights issue'.[136] In considering the political response to *Chester*, Hiebert and Kelly note the initial reception was positive, David Cameron stated it was a 'victory for common sense'.[137] However subsequently, *despite* the Supreme Court adopting a deferential tone and declining to make a second declaration, Dominic Raab MP criticised the Court for 'spineless capitulation' in following Strasbourg jurisprudence.[138] As Murray observes, such opposition sought to resist 'the threat of juridification'.[139] Raab's criticism must be considered in relation to its political context, as it exemplifies the UK political branches narrative that UK courts are aligned with Government and Parliament in resisting Strasbourg. Of course, legally, Raab's criticism fails to account for s.2 HRA which requires courts to take into account Strasbourg jurisprudence.[140] Raab's observations fail to engage with the substance of the judgment. This shows that once judgments are in the public domain they are capable of being misconstrued to support political ends. As discussed in chapter four, this may fuel judicial reticence to grant declarations, the judiciary may become fearful of upsetting the political branches, leading to a hands-off approach. Yet significantly this shows that *even* opting for the

[133] Sathanapally (n.99) 184.
[134] ibid 185; *Sauvé v Canada (No.1)* [1993] 2 SCR 438.
[135] ibid.
[136] ibid.
[137] J. Hiebert and J. Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (CUP 2015) 388.
[138] ibid; citing D. Raab, 'Even when we win we still lose: MPs should refuse to be browbeaten into giving prisoners the vote' *Daily Mail Online* (16 October 2013) <https://www.dailymail.co.uk/news/article-2463642/DOMINIC-RAAB-Even-win-lose-MPs-refuse-browbeaten-giving-prisoners-vote.html> accessed 14 April 2022.
[139] Murray, 'A Perfect Storm' (n.40) 527.
[140] *Chester* (n.2) [27] (Mance JSC).

minimum does not guarantee political contentment. Arguably, the Supreme Court's hands-off approach, partly stifled the potential for effective inter-institutional interaction.

Whilst it is understandable from an institutional perspective that domestic courts sought to avoid becoming further mired in the constitutional controversy, prisoner voting demonstrates that judicial reticence may afford leeway to the executive.[141] The administrative amendments represent another "acceptable" response to declarations in which legislation remains unaltered. However, as King comments, 'deliberative democracy' is hindered where the Government opts for 'minimal compliance'.[142] Therefore, it is questionable whether the domestic courts would approve of such amendments, especially as they considered Parliament was being granted leeway to make legislative amendments. The domestic courts (bar the Scottish court) have been hesitant actors in the prisoner voting controversy, but arguably this helped empower the executive to opt for minimalism.

Therefore, as domestic courts are important in human rights protection, arguably they could have had a more active role. For instance, Young suggests courts could engage in 'constitutional road-mapping' to outline 'possible ways of remedying a breach of Convention rights'.[143] This reflects Laws LJ's judgment in the Court of Appeal in *Chester*, in which he suggested courts *could* develop 'a strategic partnership between the branches of government', where the Court could issue 'an advisory opinion as to the legality of forthcoming legislation'.[144] However, crucially, Laws LJ argued that to do so in relation to prisoners' voting rights, was 'quite beyond the pale'.[145] Courts may be wary of 'constitutional road-mapping', fearing criticism for being too prescriptive and trespassing into legislative territory.[146] Such qualms are also evident in the High Court's judgment in *Chester*, as Burton J argued the court should not assess future prisoner voting reform proposals as this would undermine parliamentary privilege.[147] It can narrow the political remedial space.[148] Although the Supreme Court stated that post-tariff lifers would remain disenfranchised under new proposals, the Court

[141] see S. Stark, 'Facing facts: judicial approaches to section 4 of the Human Rights Act 1998' (2017) 133 LQR 631, 633.
[142] King (n.110) 178.
[143] Young, *Democratic Dialogue* (n.94) 234.
[144] *R (Chester)* (n.124) [31] (Laws LJ).
[145] ibid.
[146] Cf *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, [127] (Neuberger PSC).
[147] *R (Chester) v Secretary of State for Justice* [2009] EWHC 2923 (Admin), [2010] HRLR 6 [48] [52] (Burton J).
[148] C. Chandrachud, 'Reconfiguring the discourse on political responses to declarations of incompatibility' [2014] PL 624, 625, 635-641.

refrained from constitutional road-mapping.[149] Arguably, this is understandable, as providing such suggestions had the potential to be especially inflammatory, with prisoner voting having been subject to sustained political wrangling.

There was not only minimal political compliance with Strasbourg case law but also minimal political engagement with the domestic court's declaration. However, importantly, political inaction to the declaration was driven by resistance to Strasbourg. Whilst generally the domestic courts have played a part in perpetuating the clash, the blame cannot and should not solely be directed at the domestic courts. Rather, as this chapter shows, this inertia forms part of a multi-institutional picture which was dominated by political recalcitrance. It is implicit the domestic courts were reluctant to have this political ire redirected at them. However, *even* reticence does not necessarily facilitate political appeasement. Judicial wariness can provide scope for political re-interpretation or manipulation of the judgment to support political ends. Arguably, regardless of the Supreme Court's approach, minimal political compliance would always have been the result.

However, as argued in chapter four, at the very least the Supreme Court could have critically noted the protracted delay in compliance, which *may* have instigated some recognition from the political branches that they had also ignored the declaration. Whilst such a judicial assessment might still have been ignored by the political branches, it would have demonstrated that domestic courts were active actors in addressing breaches of Convention rights. Alternatively, the Supreme Court should have made a further declaration, as different constitutional considerations could have been applied to support making a declaration. Judges should not decline to grant declarations due to fear that they will upset the political branches. Instead, the judiciary should ensure that they grant declarations in recognition that they allow for the exercise of political discretion at the second filter stage and respect parliamentary sovereignty. A more robust and clearer approach, especially from the Supreme Court, would have highlighted to the political branches that sustained breaches of Convention rights are also not approved of domestically. As it stands, the prisoner voting clash represents a "loss" for the domestic courts in terms of their role in rights protection.

6.4 Political criticism of Strasbourg: a legitimacy precipice?

[149] *Chester* (n.2) [40] (Mance JSC).

The prisoner voting timeline (outlined in chapter one) demonstrates that debates on prisoner voting repeatedly included criticism of *Hirst*, which triggered expressions of discontent regarding the role of the ECtHR with allegations that Strasbourg had acted beyond its original mandate.[150] Such claims were used to justify political recalcitrance.[151] It also contributed to broader political hostility towards the ECHR, which fuelled political calls for a British Bill of Rights. These issues underpinned the prisoner voting clash. To what extent is the discontent directed towards Strasbourg justified?

The political discontent predominately focused on issues which relate to Strasbourg's perceived lack of legitimacy.[152] The multifaceted nature of legitimacy has been explored in chapter three. Feldman argues sovereignty discourse can be 'unhelpful in illuminating what is going on', and when we step away from sovereignty, it exposes the complexity of the relationship between domestic institutions and the ECtHR 'in which the legitimacy of each depends to some extent on the actions of the other'.[153] Institutions at the domestic and European level must be cognisant of the complex nature of legitimacy as it has 'different dimensions'.[154] The ECtHR must avoid circumstances where the State can 'dictate' on rights interpretation, but equally, the ECtHR must be careful to demonstrate awareness of the domestic context.[155] There is a fine balance between upholding rights whilst also keeping States onside, both of which are key components of the Court's legitimacy.

The enfranchisement of prisoners is an issue the UK refutes it consented to, as some MPs argued the Court had applied evolutive reasoning.[156] This was arguably compounded by the UK's stance towards the ECHR being rooted in minimalism and therefore any perceived "excessive" use of dynamic reasoning could cause discontent, representing an encroachment into the UK's national sovereignty. This context 'magnified the perception of just how revolutionary Strasbourg review of the legislature has been'.[157] The UK questioned the ECtHR's legal legitimacy which fed into discontent regarding the ECtHR's normative

[150] HC Deb 10 February 2011, vol 523, cols, 497, 502, 506, 547.
[151] C. O'Cinneide, 'Saying 'No' to Strasbourg: When Are National Parliaments Justified in Refusing to Give Effect to Judgments of International Human Rights Courts?' in M. Saul, A. Føllesdal and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (CUP 2017) 309.
[152] E. Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 HRLRev 503, 520 ('Analysing the Prisoner Voting Saga').
[153] Feldman, 'Sovereignties in Strasbourg' (n.28) 235.
[154] ibid.
[155] ibid.
[156] K. Dzehtsiarou, 'Prisoner Voting Saga: Reasons for Challenges' in H. Hardman and B. Dickson, *Electoral Rights in Europe Advances and Challenges* (Taylor and Francis 2017) 96 ('Prisoner Voting Saga').
[157] Bates, 'Democratic Override' (n.67) 285.

legitimacy. As Dzehtsiarou contends, there is an absence of a 'clear legal basis' for *Hirst*, which explains some of the political hostility.[158] This is reflected by David Davis MP's view that *Mathieu-Mohin* expanded A3P1 'beyond its proper and intended meaning'.[159] Arguably, therefore, the UK's sustained non-execution of *Hirst* can be framed as a 'principled' objection to the 'perceived appropriate division of authority between domestic and international' institutions.[160] Refusal to comply was based on *'fundamental'* objections to the Court's judgment.[161] To legitimise non-compliance, States could argue the Court has gone too far and therefore it is not bound by the judgment.[162] However, as O'Cinneide argues, by consenting to the ECHR States cannot refuse to apply a judgment just because they 'disagree': under international law the judgments remain binding.[163] States could legitimately refuse to do so if the ECtHR has 'clearly abused its interpretative mandate', such as by acting 'in bad faith' or due to 'wholly inadequate reasoning'.[164] However, prisoner voting does not reveal the Court has 'abused' its mandate or acted 'in bad faith'. As discussed in chapter five, the persuasiveness of arguments that the ECtHR had gone too far are diminished when it is considered that *Mathieu-Mohin* was held in 1987 and by the time of *Hirst* a right to vote was established. Therefore, it was argued that criticism levelled at the ECtHR in *Hirst* for evolutive reasoning seems exaggerated.

However, as discussed in chapter five, a fundamental issue with *Hirst* is its lack of clarity which undermined its legal legitimacy. Of particular relevance is the Court's criticism of the lack of parliamentary debate which ignored the domestic constitutional position regarding parliamentary privilege.[165] Whilst, as Feldman explains, the ECtHR is not required to take such domestic constitutional matters into account, overlooking important constitutional features can backfire, as the ECtHR's judgment 'was seen as a challenge to the dignity of the two Houses of Parliament'.[166] Further, the judgment seemed to trespass into domestic 'political autonomy', as it challenged the UK's generally robust approach to tackling crime.[167] As Feldman argues,

[158] Dzehtsiarou, 'Prisoner Voting Saga' (n.156) 106.
[159] D. Davis, 'Britain must defy the European Court of Human Rights on prisoner voting as Strasbourg is exceeding its authority' in S. Flogaitis, T. Zwart and J. Fraser (eds), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 68.
[160] de Londras and Dzehtsiarou, 'Mission Impossible?' (n.49) 474.
[161] ibid 486.
[162] O'Cinneide (n.151) 310.
[163] ibid.
[164] ibid.
[165] Feldman, 'Sovereignties in Strasbourg' (n.28) 227.
[166] ibid.
[167] ibid.

there is a tension between 'national autonomy' to decide national issues and also the fact the State has voluntarily consented to Strasbourg's jurisdiction.[168] Whilst the Court showed some respect for the UK's national autonomy by giving the UK flexibility regarding implementation, this contributed to ambiguity, as cases such as *Frodl* exacerbated confusion, which undermined the judgments' coherence. [169]

Despite the ambiguities, the ECtHR's reasoning was not 'wholly inadequate' and it appears insufficient to entirely justify the political furore and resistance to the Court's judgment.[170] Yet it was the *compound* effect of these issues which led the UK political branches to react defensively and informed politicians' dilatory tactics. As Masterman argues, the Court's judgment in *Hirst* 'provided critics with ample evidence of the extension of the meaning of the Convention' which demonstrated 'the imperialising tendencies of the Court, of the counter-democratic consequences of its (therefore illegitimate) decisions'.[171] This increased political resistance to Strasbourg,[172] with the perceived disadvantages and limits of European rights protection scathingly scrutinised. The general resistant approach and lack of compliance undermined Strasbourg's 'outcome legitimacy' and reinforced doubts regarding its normative legitimacy, contributing to the ECtHR's loss.[173]

6.4.1 Legitimacy – a question of perspective?

The political debates on prisoner voting reveal that the 'perception' of Strasbourg's legitimacy also affects States' reception to, and implementation of, Strasbourg's judgments.[174] Diffuse support is the 'support for the institution rather than for particular decisions it may make'[175] and this support will vary depending on 'stakeholders' 'standpoint and desired outcome'.[176] For example, Dothan explores the general public's support and explains that in terms of legitimacy: "diffuse support"[177] addresses instances in which 'the public is generally inclined

[168] ibid.
[169] C.R.G. Murray, 'Monstering Strasbourg over prisoner voting rights' in M. Farrell, E. Drywood and E. Hughes (eds), *Human Rights in the Media: Fear and Fetish* (Routledge 2019) 106 ('Monstering Strasbourg).
[170] O'Cinneide (n.151) 310.
[171] Masterman, 'From Strasbourg Surrogacy' (n.38) 460.
[172] ibid.
[173] F. de Londras and K. Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 3.
[174] ibid 2.
[175] F. de Londras and K. Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 HRLRev 523, 524 ('Managing Judicial Innovation').
[176] ibid 526.
[177] The term 'diffuse support' was coined by D. Easton, *A Systems Analysis of Political Life* (University of Chicago Press 1979).

to accept a court's judgments, even if they disagree with a specific judgment'.[178] Whereas "specific support" concerns 'whether the public supports the content of an individual judgment'.[179]

Dothan clarifies there are 'different actors' (including the State) and the public affords these actors different 'weight', as their 'interaction with a court, affect its legitimacy'.[180] Regarding the Court's 'interaction with States', if a court is perceived as 'legitimate, the public will demand compliance with its judgments and criticize a state if it fails to comply' and where a state with a 'high-reputation' (such as the UK) refuses to comply with a judgment, the criticism of the Court will carry more weight.[181] Therefore, perceived legitimacy has different input points. Different actors can influence the public's perception. As the Government resisted prisoner voting and propagated anti-Strasbourg discourse, this attracted support from the media and the media fuelled the anti-prisoner voting agenda and influenced the public's perception.[182] It operates like a feedback loop. As Dothan argues: 'A court that is concerned about its legitimacy should know how to target its efforts in a way that keeps these powerful individuals on its side'.[183]

The media had a central role in, as Murray argues, 'making a monster of *Hirst*'.[184] *Hirst* was whipped up by the media into a 'controversial judgment more because of its subject matter rather than its reasoning'.[185] Hirst was not a claimant who engendered sympathy having been convicted for manslaughter and therefore, the media was generally concerned with 'Hirst's crimes rather than the wider issue of prisoner voting'.[186] Moreover, the lack of media focus on the Court's reasoning led to 'spurious claims that Strasbourg had required that all prisoners be enfranchised'.[187] Arguably, this also shows how the Court's lack of clear guidance had the unintended consequence of contributing to media misrepresentation, especially as the media can twist issues to the most extreme version to sell papers or generate 'clickbait'.[188] Further,

[178] S. Dothan, 'How International Courts Enhance Their Legitimacy' (2013) 14 Theo Inq Law 455, 456 ('How International Courts Enhance').
[179] ibid.
[180] ibid 457.
[181] ibid 459-460.
[182] ibid 477; McNulty, Watson and Philo (n.48) 360.
[183] Dothan, 'How International Courts Enhance' (n.178) 477.
[184] Murray, 'Monstering Strasbourg' (n.169) 116.
[185] ibid 110.
[186] ibid 108-109; see L. Gies, 'Human Rights, the British Press and the Deserving Claimant' in K. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 473.
[187] Murray, 'Monstering Strasbourg' (n.169) 109.
[188] ibid 109, 116.

there are also 'think tanks' which have been established to criticise perceived judicial aggrandisement, with prisoner voting being lauded as emblematic of such judicial overreach.[189] This contributed to negative public perception of prisoner voting.[190] The consequence of this negative discourse and negative perception is that the Court's legitimacy is dented. A study by Voeten reveals that 'international courts quickly lose support when they get embroiled in public controversy'.[191] The Court's social legitimacy is undermined as the controversy chips away at the 'public belief' that the ECtHR 'has *rightful authority*' to 'secure general *compliance*'.[192]

This negativity towards enfranchising prisoners reinforced the UK political branches' hostility to prisoner voting and challenges to the Court's legitimacy. A study by McNulty, Watson and Philo reveals some of the media sought to influence the policies that the Government should pursue regarding the UK's 'relationship with Europe'.[193] The anti-Europe and 'demonisation of human rights' agenda, which was also supported by 'many conservative politicians', had the effect of constraining 'the government's room for manoeuvre ... to the point where it could find no resolution to … prisoner's right to vote'.[194] Therefore, although the UK was a high compliance State, which might indicate the political branches had diffuse support for the Court, this support was on conditional, tenuous ground and as there was an absence of *specific* support for the judgment in *Hirst,* this then further undermined diffuse support for the Court.[195] For example, David Davis MP maintained that the UK 'should defy the ECtHR on prisoner voting' as the ECtHR had 'exceeded its authority'.[196] As discussed above, whether Strasbourg 'exceeded its authority' is intertwined with questions of legitimacy, as the legitimacy of supranational courts is strained when its judgments are alleged to lack legal legitimacy. Therefore, the UK Government's more minimalist understanding of Strasbourg's role underpinned the resistance and the lack of specific support for the judgment in *Hirst,* was the catalyst that unleashed broader criticism of Strasbourg. Murray explains that domestically the 'Minister of Justice is supposed to shield judges from ministerial criticisms which would

[189] ibid 116.
[190] McNulty, Watson and Philo (n.48) 373-374; e.g. see opinion poll in which 63% of those surveyed stated prisoners' should not be enfranchised in YouGov/Sunday Times Survey Results (22-24 November 2012) 8 <http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/lmlmhdqllh/YG-Archives-Pol-ST-results%20-%2023-251112.pdf> accessed 14 April 2022.
[191] E. Voeten, 'Public Opinion and the Legitimacy of International Courts' (2013) 14 Theo Inq Law 411, 435.
[192] Donald and Leach, *Parliaments and the ECtHR* (n.89) 120; A. Føllesdal, 'The Legitimacy Deficits in the Human Rights Judiciary: Elements and Implications of a Normative Theory' (2013) 14 Theo Inq Law 339, 345 ('The Legitimacy Deficits').
[193] McNulty, Watson and Philo (n.48) 366.
[194] ibid.
[195] De Londras and Dzehtsiarou, 'Managing Judicial Innovation' (n.175) 537.
[196] Davis (n.159) 65.

undermine public confidence in the legal system', whereas the ECtHR does not have 'equivalent protection'.[197] Political criticism of the ECtHR is more pronounced in 'its ferocity against the backdrop of respect generally shown to domestic judges'.[198] The purported lack of legal legitimacy of the judgment and broader criticism of the ECHR challenged perceptions regarding the Court's normative legitimacy, demonstrating how the '*normative "pull"* or compliance-eliciting force' of the ECtHR is inherently fragile.[199]

Therefore, challenges to the ECtHR's legitimacy were instigated by political resistance, fuelling media opposition to *Hirst*, skewing 'public discourse' and reinforcing political resistance and inaction.[200] The negative perception and attempts to undercut Strasbourg's legitimacy are mutually reinforcing, as the 'echo chamber' of negative discourse crystallised political resolve against prisoner enfranchisement and perpetuated anti-ECHR rhetoric.[201] It is conceded that prisoner voting is an example which generated especially vehement and sometimes inappropriate political resistance. It is of course possible that other cases might arise where political resistance is less inflammatory and therefore, may not significantly challenge the ECtHR's legitimacy in the same way.

6.4.2 A problem of democratic illegitimacy?

Another key component of the political challenges to the ECtHR concerned the ECtHR's purported lack of democratic legitimacy. As Bellamy argues, the fundamental issues inherent in *Hirst* boil down to questions regarding the ECtHR's democratic legitimacy, or lack thereof.[202] This brings us back to key questions: how legitimate is it that European courts decide human rights issues? Are European courts better placed to address human rights than contracting States?

The centrality of parliamentary sovereignty in the UK constitution supports 'general political resistance to … judicially-enforced rights'.[203] The supranational status of the ECtHR heightens issues associated with constitutional review.[204] As the UK traditionally favours political

[197] Murray, 'Monstering Strasbourg' (n.169) 112.
[198] ibid.
[199] Føllesdal, 'The Legitimacy Deficits' (n.192) 345.
[200] Murray, 'Monstering Strasbourg' (n.169) 103.
[201] ibid 111.
[202] R. Bellamy, 'The democratic legitimacy of international human rights conventions: political constitutionalism and the Hirst case' in A. Føllesdal, J.K. Schaffer, G. Ulfstein (eds), *The Legitimacy International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 246.
[203] Masterman, 'From Strasbourg Surrogacy' (n.38) 454
[204] A. Føllesdal, 'Why the European Court of Human Rights Might be Democratically Legitimate - A Modest Defense' (2009) 27(2) Nordic Journal of Human Rights 289, 290-291.

protection of rights, European rights protection may be regarded with even more scepticism, as States are keen to safeguard their own power. Bellamy notes that *Hirst* could be viewed as 'undermining democracy', as the Court found against 'the decision of a democratically elected legislature' *or* the decision could be viewed as a triumph for democracy as prisoners' voting rights are upheld.[205] For example, on the one hand, from a rights-based perspective, *Hirst* was progressive and upheld the protection of prisoners' voting rights.[206] It shows the ECtHR's critical role in upholding rights, especially the rights of unpopular minorities. On the other hand, from the domestic political branches' perspective, the decision trespassed into their democratic territory and this is a key factor that underpins criticism of the Court's approach.[207] Strasbourg struck a raw nerve, as the right to vote is fundamentally a democratic right and Contracting States' may assert autonomy over this right as it strikes at the core of sovereignty. Further, from the political perspective the Court failed to adequately respect the UK's margin of appreciation (MoA) and it was inconsistently applied, which undermined the judgments' legitimacy. Consequently, the UK acted defensively, protecting and asserting Parliamentary sovereignty, by for example, highlighting the conditional status of the ECHR and challenging Strasbourg's legitimacy.

This fed into the 'democratic constitutionalist' opposition towards the ECtHR, that domestic institutions 'should have primary responsibility' for rights issues, as the ECtHR's lack of democratic credentials 'is inherently problematic'.[208] Judgments which trespass into this democratic domain could can be 'resisted'.[209] As Bates argues, concerns regarding Strasbourg 'exceeding authority', contributed to MP's arguments that Strasbourg's influence needs to be limited, which was further reinforced by concerns that the ECtHR is assuming stronger, almost 'strike-down' powers of review – that it is 'acting like a European Supreme Court.'[210] As Dzehtsiarou and Greene argue the political branches' opposition to *Hirst* was a 'crystallization of Euroscepticism' as opposed to objecting 'to prisoners' right to vote'.[211]

[205] Bellamy (n.202) 246.
[206] S. Dothan, 'In defence of expansive interpretation in the European Court of Human Rights' [2014] CJICL 508, 521.
[207] Bates, 'Democratic Override' (n.67) 280.
[208] O'Cinneide (n.151) 311.
[209] ibid.
[210] Bates, 'Democratic Override' (n.67) 280; see also W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9(3) HRLRev 397, 401-402, 450.
[211] Dzehtsiarou and Greene (n.41) 1711.

As noted in chapter three, in high compliance States the standard of constitutional review might be understood as having the *effect* of a soft version of strong-form review, as judgments are routinely complied with,[212] arguably representing a greater "threat" to democratic determination of rights. However, the prisoner voting clash demonstrates that this effect is not immune to erosion. Fundamentally, Strasbourg adopts a system of weak-form review and despite potential adverse political implications, even high compliance States can resist its rulings. The executive's administrative amendments demonstrate the ECtHR's stipulation that *legislative* amendments were required, was simply disregarded. Therefore, the clash shows the standard of review can be eroded and the potency of Strasbourg's jurisprudence diluted. Ultimately, the conditionality of Strasbourg's authority is one of its core limitations, as European judicial protection of rights clashed with domestic political protection, with the latter triumphing. This was at the expense of rights protection.

6.4.3 Political branches – dialogue with Strasbourg?

Whether dialogue occurred between the domestic and European courts was explored in chapter five, as dialogue between institutions may be a legitimacy enhancing factor. This section questions whether the political branches engaged in dialogue with Strasbourg and the impact (if anything) of these inter-institutional interactions on the prisoner voting clash.

Arguably the ECtHR's criticism of the lack of parliamentary debate in *Hirst* could be viewed as generating dialogue with the UK political branches, prompting the UK to reflect on its arguable lack of debate.[213] The Attorney General noted the debate represented an opportunity to open the channels of 'dialogue' with the ECtHR, which may boost the Government's chances of success in future prisoner voting litigation.[214] As such, the Attorney General sought to steer the debate to 'the main legal issues on prisoner voting', in order 'to shape the dialogue with the Court'.[215] Yet despite some MPs attempts to find a solution, the proliferation of anti-Strasbourg views undermined the potential for constructive discourse. The backbench debate constituted an opportunity to express political agendas against the ECHR rather than genuinely seeking to engage with prisoner disenfranchisement.[216]

[212] Bellamy (n.202) 268.
[213] P. Cumper and T. Lewis, 'Blanket bans, subsidiarity, and the procedural turn of the European Court of Human Rights' (2019) 68(3) ICLQ 611, 626; Briant (n.115) 250-251.
[214] Briant (n.115) 250; HC Deb 10 February 2011, vol 523, col 511.
[215] HC Deb 10 February 2011, vol 523, col 513.
[216] ibid cols 496-497, 502, 553, 564, 569, 582.

Despite this, throughout the clash there were indications of possible future compliance, such as the two-stage consultation, the Constitutional Reform and Governance Bill and the Voting Eligibility (Prisoners) Draft Bill. These could be seen as attempts to comply, or more cynically, as delaying tactics. Yet, the JCHR had a valuable role in attempting to persuade the political branches to seriously engage with prisoner voting and the Political and Constitutional Reform Committee also attempted to secure a resolution (see chapter one). Nevertheless, these recommendations went unheeded.

However, following *Greens*, in March 2011 the UK Government made a referral request to the Grand Chamber[217] which is arguably indicative of an attempt to engage in dialogue with the ECtHR. The Government highlighted a range of issues, including that 'the margin of appreciation should be broader than the Court stated', because the legislature and domestic courts had considered the issue and there was a lack of consensus on prisoner voting amongst States.[218] As Bates notes, the Government 'sought to reinvigorate the debate about the margin of appreciation, and the division of opinion on that that had occurred in *Hirst*'.[219] Yet, the referral request was denied, which arguably shows that the ECtHR was reluctant to engage in dialogue with the UK.[220] Although the ECtHR did not provide reasons for the refusal it could be inferred that the ECtHR might have been concerned about undermining its own authority, as the Government's referral request predominately focused on criticising *Hirst*.[221] Perhaps the Court was also mindful of the UK's procrastination, possibly viewing the request as further evidence of the UK delaying compliance.

Nonetheless, subsequently the ECtHR permitted a six month extension to the UK's compliance deadline, enabling the Government to intervene in *Scoppola.*[222] In *Scoppola*, the UK Government as third-party intervener stressed the wide MoA and 'submitted that the court's findings in the Hirst … judgment … were wrong and that the court should revisit its decision'.[223] This shows the UK Government attempting to engage in dialogue with the ECtHR to prompt reconsideration of its judgments.[224] Alternatively, it could be viewed as the

[217] DD(2011)139 (n.122).
[218] ibid.
[219] Bates, 'Analysing the Prisoner Voting Saga' (n.152) 514.
[220] Briant (n.115) 250.
[221] ibid 251.
[222] Bates, 'Analysing the Prisoner Voting Saga' (n.152) 515; *Scoppola v Italy (No.3)* (2013) 1 Costs LO 62, (2013) 56 EHRR 19 (*Scoppola*).
[223] *Scoppola* (n.222) para 78.
[224] F. Davis, 'Parliamentary Supremacy and the Re-Invigoration of Institutional Dialogue in the UK' (2014) 67 ParlAff 137, 147.

Government strategically prolonging non-compliance.[225] Whilst the ECtHR in *Scoppola* maintained that *Hirst* still applied, the ECtHR could be viewed as softening '*Hirst* by expanding the margin of national discretion'.[226] This softening is arguably indicative of a form of compromise.

The Government also engaged in political dialogue with the CM. The CM adopts a 'twin-track supervision system' regarding the execution of the ECtHR's judgments, including the standard procedure and the enhanced procedure.[227] The UK was subject to enhanced supervision by the CM, as prisoner voting raised 'complex' problems.[228] This means the CM requires a 'more intensive and pro-active cooperation with the States'.[229] For instance, the CM may provide support regarding action plans and there may be 'expertise assistance' regarding 'the type of measures envisaged' or there may be a 'bilateral/multilateral co-operation programmes (e.g. seminars or round-tables)'.[230] The CM stipulated the UK must engage in 'high-level dialogue' regarding prisoner voting.[231] The requirement for 'action plans and reports' are fundamental components in facilitating 'enhanced dialogue' between institutions.[232] An action plan can include 'the measures the respondent state has taken and intends to take to implement a judgment' of the ECtHR.[233] An action report outlines 'all the measures taken to implement a judgment … and/or an explanation of why no measures, or no further measures are necessary'.[234] The UK also kept the CM informed via letters and through meetings.[235] Some of this communication was directed at changing Strasbourg's approach,[236] other letters simply

[225] ibid 147.
[226] Harlow (n.18) 163.
[227] Department for the Execution of Judgments of the European Court of Human Rights, CM/Inf/DH(2010)37, *Supervision of the execution judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Plan – Modalities for a twin-track supervision system* (6 September 2010) 2 (CM/Inf/DH(2010)37) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804a327f> accessed 14 April 2022.
[228] Committee of Ministers (CM), 1243DH meeting – 8-9 December 2015, Hirst no2 group v the United Kingdom, Supervision of the execution of the Court's judgments, CM/Notes/1243/H46-263 <https://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2015)1243/H46-26> accessed 14 April 2022.
[229] CM/Inf/DH(2010)37 (n.227) 5.
[230] ibid.
[231] Ministers' Deputies, Notes on the Agenda 1302nd Meeting, 5-7 December 2017, Hirst No.2 Group v the United Kingdom, CM/Notes/1302/H46-39 (1302nd meeting, 5-7 December 2017) <https://hudoc.exec.coe.int/eng?i=CM/Notes/1302/H46-39E> accessed 14 April 2022.
[232] Donald and Leach, *Parliaments and the ECtHR* (n.89) 39.
[233] Directorate General Human Rights and Rule of Law, *Guide for the drafting of action plans and reports for the execution of judgments of the European Court of Human Rights*, 3 (2015) <https://rm.coe.int/guide-drafting-action-plans-reports-en/1680592206)> accessed 14 April 2022.
[234] ibid 3.
[235] Communication for the authorities (05/02/2016) DH-DD(2016)188E <https://hudoc.exec.coe.int/ENG?i=DH-DD(2016)188E> accessed 14 April 2022.
[236] DH-DD(2011)139 (n.122).

stated the UK's present position regarding its progress (or lack thereof).[237] The CM also applied pressure on the UK to comply. Interim resolutions enable the CM 'to provide information on the state of progress of the execution or … to express concern and/or to make suggestions with respect to the execution'.[238] Chapter one showed the CM expressed concern regarding the UK's delay and also made suggestions, urging action.[239] The CM also adopted decisions in which it outlined actions required by the UK and strongly criticised the UK's delays.[240] Yet the outcome of this sustained dialogue was watered-down compliance. This sits incongruously with the CM's previous pronouncements in which it specified that legislative amendments were required to comply with the ECtHR's judgments (explored in section 6.6).[241] However, there were indications that if the UK eventually opted to comply that compliance would be minimalist. For instance, as part of the dialogue between the UK and Strasbourg, an action plan submitted in November 2017 reveals the UK sought to execute the judgments in a way that *avoided* legislative amendment.[242] It is also probable that in private meetings with the CM that alternatives, such as the administrative amendments, were mooted. This shows how multi-level negotiations between the domestic and European political institutions resulted in significant compromises which were more aligned with the UK's objectives.

Harlow argues there is evidence of 'multi-level dialogue in which the participants change position and inch forward towards compromise'.[243] Even 'fragmentary, disconnected, incoherent and incomplete … exchanges are nonetheless part of a dialogue'.[244] However, as discussed in chapter two, Carolan criticises 'the notion of dialogue' as it 'disguises conflict as principled conversation'.[245] Whilst the *aim* is that institutional conflict should be fruitful, there

[237] Communication for the authorities (10/07/2015) DH-DD(2015)767 <https://hudoc.exec.coe.int/ENG?i=DH-DD(2015)767E> accessed 14 April 2022.
[238] Rules of the CM (n.51) Rule 16.
[239] Committee of Ministers, Interim Resolution on Execution of the judgment of the European Court of Human Rights Hirst against the United Kingdom No.2, CM/ResDH(2009)160 (1072nd meeting, 3 December 2009) <https://hudoc.exec.coe.int/eng?i=001-97148> accessed 14 April 2022 (CM/ResDH(2009)160); CM, Interim Resolution, CM/ResDH(2015)251, Execution of the judgments of the European Court of Human Rights Hirst and three other cases against the United Kingdom (1243rd meeting, 9 December 2015) <https://hudoc.exec.coe.int/eng?i=001-159677> accessed 14 April 2022.
[240] see 'Committee of Ministers Decisions': <http://hudoc.exec.coe.int/ENG?i=004-2204> accessed 14 April 2022.
[241] e.g. CM/ResDH(2009)160 (n.239).
[242] Secretariat of the Committee of Minsters, Action plan (02/11/2017) – Communication from the United Kingdom concerning the case of HIRST (No.2) v the United Kingdom, DH-DD(2017)1229 (1302nd meeting, December 2017) <https://hudoc.exec.coe.int/eng?i=DH-DD(2017)1229E> accessed 14 April 2022; noted by von Staden, *Strategies of Compliance* (n.47) 139.
[243] Harlow (n.18) 163-164.
[244] ibid 164.
[245] E. Carolan, 'Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations' (2016) 36(2) LS 209, 226; cf Young, *Democratic Dialogue* (n.94) 114, 140.

is no requirement that institutions reach 'compromise or concession'.[246] Carolan recognises the existence of 'constitutional contestation'.[247] As Harlow and Rawlings observe, political branches may engage in 'striking back' in which their 'responses to court rulings … are deliberatively negative' to enable the Government to distance itself from judgments 'it finds inconvenient or otherwise dislikes'.[248] 'Clamping down' occurs when the Government may guard against future judgments, by restrictively altering 'the rules of the game'.[249] Prisoner voting predominately exemplifies 'striking back' as it was an intractable issue, where political institutions were mainly uncooperative due to entrenched disagreement between political and legal interpretations on prisoners' voting rights. However, even in cases largely characterised by striking back there *may* also be evidence of collaboration[250] – for instance, there was some evidence the UK sought to comply, such as the draft Bill. The ECtHR also showed willingness to compromise (*Scoppola*) and the CM showed exceptional willingness to compromise by accepting the UK's administrative amendments. However, whilst the amendments might be a 'fruitful' compromise in terms of ostensibly resolving the prisoner voting clash, the outcome of the sustained conflict was not 'fruitful' for rights protection.[251]

6.5 Strasbourg's political institutions: problems ensuring compliance

This section further unravels Strasbourg's political institutions' approach to prisoner voting. The measures taken by the CM and the multifaceted interactions with the UK regarding prisoner voting have been outlined (section 6.5.3). Notably, Çali and Koch argue the CM constitutes a form of 'peer review' which is potentially problematic as ministers 'are politically motivated, build alliances, have enemies and friends and do not show equal interest in each and every human rights case'.[252] There is a 'discretionary space' regarding the steps required to implement the judgment which enables 'lobbying and negotiation' with the CM.[253] However, there are institutional 'safeguards' which can ameliorate the potential drawbacks of politicisation.[254] The CM can issue 'general recommendations', provide 'quarterly review of … compliance' and can resort to 'procedural tools' to induce compliance (e.g. interim

[246] ibid 225.
[247] ibid 226.
[248] Harlow and Rawlings (n.3) 301.
[249] ibid.
[250] Harlow (n.18) 162.
[251] E. Carolan, 'Leaving behind the commonwealth model of rights review' in J. Bell and M.L. Paris (eds), *Rights-Based Constitutional Review* (Edward Elgar 2015) 224.
[252] Çali and Koch (n.4) 311.
[253] ibid 312.
[254] ibid 311.

resolutions).[255] The CM can also suspend a State's 'rights of representation' and ultimately expel the State.[256]

Other institutions also increasingly support the CM's role, and whilst this does not eliminate politics, it may mitigate politicisation. For example, the CM can delegate to the Department for Execution of Judgments of the European Court of Human Rights, which 'provides support to … states' to facilitate execution.[257] Further, the Parliamentary Assembly of the Council of Europe (PACE),[258] also has a role in the execution of judgments.[259] Its 'Committee on Legal Affairs and Human Rights' ('the Committee')[260] held 'innovative hearings' which required 'heads of parliamentary delegations' to explain non-execution.[261] Further, PACE can also require the State's 'minister of justice' to explain its non-execution to the Assembly.[262] Notably, the UK was required to explain its non-implementation of *Hirst.*[263] However, as Donald and Leach observe, whilst delegates should encourage 'compliance' the delegate for the UK at the time of the prisoner voting backbench debate, Robert Walter MP, failed to encourage compliance with *Hirst,*[264] whereas, at the Committee's hearing, he stated the UK needed to comply.[265] This shows how it may be difficult for delegates to encourage compliance domestically when faced with hostile political opposition.[266] Moreover, it further demonstrates how executive politics can dominate multi-level human rights protection which can leave human rights clashes vulnerable to executive political solutions which may undermine rights. Arguably these issues are exacerbated by the fact that there is a lack democratic oversight of UK ministers dealing with human rights issues at the supranational level and that the Council of Europe does not actively involve domestic parliaments in the same way as the executive. The executive still ultimately takes the lead in terms of negotiations with the CM. Therefore,

[255] ibid 319.
[256] Statute of the Council of Europe (n.10) Article 8.
[257] Council of Europe, Department for the Execution of Judgments of the Court, General Information, <https://www.coe.int/en/web/execution/presentation-of-the-department> accessed 14 April 2022; e.g. Çali and Koch (n.4) 314, 317-318, 325.
[258] PACE is comprised 'of 324 parliamentarians from the national parliaments of the Council of Europe', Council of Europe, Parliamentary Assembly <https://www.coe.int/en/web/no-hate-campaign/parliamentary-assembly1> accessed 14 April 2022.
[259] E.L. Abdelgawad, 'The Court as part of the Council of Europe: The Parliamentary Assembly and the Committee of Ministers' in A. Føllesdal, B. Peters, G. Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National and Global Context* (CUP 2013) 283.
[260] ibid 283-284.
[261] Donald and Leach, *Parliaments and the ECtHR* (n.89) 50.
[262] Abdelgawad (n.259) 286.
[263] Donald and Leach, *Parliaments and the ECtHR* (n.89) 50.
[264] ibid 52.
[265] ibid.
[266] ibid.

to help redress this, the JCHR could be assigned the role of requiring UK ministers to report back to the UK Parliament on their meetings at the supranational level which would increase democratic oversight. Further, the Council of Europe should also continue to work to increase the role of domestic parliaments.

Further, as discussed in chapter five, the Court also has a role in ensuring compliance.[267] Significantly, following implementation of Protocol 14, the CM can now ask the ECtHR to provide support where 'execution of the judgment is hindered by a problem of interpretation' under Article 46(3) ECHR[268] or where the CM deems a State has failed to execute a judgment under Article 46(4) ECHR.[269] Yet arguably a referral to the Court shows the CM 'accepts that politics has failed', as it underscores deficiencies in the Council of Europe's political institutions.[270] It also further politicises what is arguably already quite a political court, blurring institutional roles and boundaries.

Whilst the collective institutional approach to securing compliance can foster a 'positive synergy' between institutions,[271] prisoner voting demonstrates it is not without flaws, as despite peer pressure to comply, persistent political negotiating can ultimately triumph. The political structure of the CM can foster political concessions and therefore the CM's 'reliability' in securing execution is not guaranteed. Von Staden contends that prisoner voting illustrates how:

> 'The recurrent deferral of adopting legislative measures to remedy the violation ... shows … voluntary compliance may reach its limits even in the case of liberal democracies when the intervention of the Court into domestic law and policy is seen as being excessively activist and "illegitimate" to the extent that it appears to usurp powers of self-government … believed to be more properly located and exercised at the national level'.[272]

[267] H. Keller and C. Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2016) 26(4) EJIL 829, 835-836.
[268] ECHR (n.11) Article 46(3).
[269] ibid Article 46(4); Notably, the infringement procedure under Article 46(4) was use for the first time, in *Mammadov v Azerbaijan* (2020) 70 EHRR 8; see K. Dzehtsiarou, 'How many judgments does one need to enforce a judgment? The first ever infringement proceedings at the European Court of Human Rights' (*Strasbourg Observer*, 4 June 2019) <https://strasbourgobservers.com/category/cases/mammadov-v-azerbaijan/> accessed 14 April 2022.
[270] De Londras and Dzehtsiarou, 'Mission Impossible?' (n.49) 484, 490; cf H. Keller and C. Marti (n.267) 849-850.
[271] Abdelgawad (n.259) 288.
[272] Von Staden, *Strategies of Compliance* (n.47) 206.

The UK's sustained non-execution represented 'a significant challenge for the Convention system'.[273] This is because the ECHR's 'efficacy and effectiveness … depends on the implementation of judgments'.[274] This non-execution was particularly significant, as the UK predominantly complies with Strasbourg's judgments.[275] Nevertheless, in complying the UK has 'sought to contain, where possible, their domestic impact through minimalist compliance'.[276] Where discretion is left to the UK regarding remedying a violation Von Staden contends 'it is likely to be exploited', the 'political-legal preferences' will be prioritised, so that change is minimised.[277] Whilst minimalism may dilute the standard of human rights protection, Von Staden contends it is a viable trade-off between reconciling the authority of the ECtHR with the authority of States and therefore, 'within certain limits' is arguably a 'normatively appropriate balancing of the decision-making of two legitimate sites of politico-legal authority'.[278] Minimal compliance may be justified on the basis that it is 'democratically legitimate'.[279]

However, in relation to prisoner voting, the ECtHR specified legislative change which sought to limit the UK's post-judgment discretionary space. Therefore, the executive's administrative amendments do not conform to the requirements for legislative amendments: s.3 RPA has *not* been amended (explored below). Arguably, the Court should have refrained from specifying legislative amendments in *Greens* and should have kept the discretionary space as broad as possible to appease the UK. However, as discussed in chapter five, the UK had requested further guidance[280] and it was the UK's sustained non-compliance which prompted the Court to adopt a more prescriptive approach by specifying legislative amendments.[281]

Does the CM place emphasis on which domestic institution complies? Does it matter that the executive seized control? Donald and Leach note 'no inherent value is placed on the involvement of parliament in the execution process; the Committee of Ministers is … entirely neutral about which state actor executes a judgment … as long as it *is* implemented'.[282]

[273] De Londras and Dzehtsiarou, 'Mission Impossible?' (n.49) 474.
[274] M. Marmo, 'The Execution of Judgments of the European Court of Human Rights – A Political Battle' (2008) 15(2) MJECL 235, 235.
[275] Von Staden, *Strategies of Compliance* (n.47) 142.
[276] ibid 145.
[277] ibid 144.
[278] ibid 213.
[279] ibid.
[280] *Hirst* (n.1) para 52.
[281] *Greens* (n.120) para 112.
[282] Donald and Leach, *Parliaments and the ECtHR* (n.89) 45.

Therefore, in some cases, it is less important which institution takes control of an issue. However, where the ECtHR specifies 'legislative reform', then 'parliamentary involvement' is required.[283] However, in some instances where legislative amendment has been stipulated, judges have taken 'the initiative, resulting in action which may ultimately satisfy the Committee of Ministers'.[284] Nevertheless, in terms of prisoner voting, it *does* matter that the executive determined the outcome as *Parliament* should have been involved. The quest to secure final resolution of a contentious issue might impel the CM to sanction a lower standard of "compliance" as Parliament's involvement was evaded. This does not comport to the ECtHR's requirements. Such extreme minimalism can problematically weaken human rights standards and may ultimately lead to further litigation of the issue.[285]

6.5.1 Minimal compliance or democratic override? A "loss" for Strasbourg

With the executive opting for the bare minimum in terms of compliance, the years of political prevarication did not "pay off" for rights protection. The executive's view as to the 'form that the law should take' prevailed[286] - the legislation remains resolutely intact. Arguably, this goes beyond minimalist compliance and the political branches' reluctance to enfranchise prisoners throughout the clash could constitute an exercise of 'democratic override', meaning the political 'legislature's (or other official expression of the democratic view) position on the form that the law should take prevails, as opposed to that of the judiciary'.[287] There is no formal mechanism in the ECHR which enables democratic override. However, there is scope for States to resist judgments, as whilst States are under an international legal obligation to abide by Strasbourg's judgments, they are not directly enforceable and require 'cooperation and consent' from domestic institutions.[288] The ECHR has no power to compel domestic institutions 'to defer to their determinations' as such the 'state remains the locus of legitimate legal and political authority'.[289] Regarding the UK, parliamentary sovereignty becomes the 'potential shield against the (mere) normative superiority of' the ECHR.[290] Conceptions of national sovereignty were also subsumed into political understandings of parliamentary sovereignty, to further inflate parliamentary sovereignty's shielding effect. This provides

[283] ibid 45-46.
[284] ibid 46.
[285] ibid 256.
[286] Bates, 'Democratic Override' (n.69) 278.
[287] ibid.
[288] ibid 279.
[289] O'Cinneide (n.151) 305.
[290] Bates, 'Democratic Override' (n.69) 280.

further scope for domestic institutions to resist or 'reject' the ECtHR's judgments but in doing so there are political costs.[291] However, Bates contends that arguably due to such costs the prisoner voting clash is indicative of more of an 'impasse' rather than 'rejection'.[292] The *threat* of rejection persisted throughout the prisoner voting clash to challenge Strasbourg's authority.[293]

Føllesdal argues that some cases of political 'disobedience' may be framed as 'not only … protest and avoidance but also as a constructive mode of correcting the law making of the ECtHR', it should be viewed 'as an extreme form of multi-level law making'.[294] However, in terms of prisoner voting the purpose 'of … non-compliance does not appear to be a revision of ECHR norms' but rather, largely represents an assertion that the 'UK should be exempt from the requirements' established by the ECtHR. [295] Yet, whilst political discourse largely centred on this exemption narrative the CM's acceptance of the administrative amendments demonstrates that non-compliance resulted in the endorsement of a *different* form of compliance from the ECtHR's requirements. For instance, as Von Staden observes, the ECtHR consistently held 'the current regime was incompatible' with A3P1, 'the violation related expressly to the disproportionality' of the ban and the 'violations' stemmed from the legislation itself.[296] Yet, the administrative amendments would:

> 'not have prevented the finding of violations in most of the cases before the Court which … concerned applications largely from people actually in prison at the time of a relevant election from which they were barred, not subject to temporary license or home detention curfew'.[297]

The administrative amendments constitute an attenuation of the potency of the ECtHR's judgment as the executive *rejected* the ECtHR's requirement of legislative amendment.[298] Whilst the CM framed the amendments as compliance, the effect is to override the Court's

[291] ibid 280.
[292] ibid 298.
[293] ibid 300-301.
[294] A. Føllesdal, 'Law Making by Law Breaking? A Theory of Parliamentary Civil Disobedience against International Human Right Courts' in M. Saul, A. Føllesdal and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (CUP 2017) 330.
[295] ibid 348.
[296] A. von Staden, 'Guest Blog: Minimalist Compliance in the UK Prisoner Voting Rights Cases' (*ECHR Blog*, 16 November 2018) <http://echrblog.blogspot.com/2018/11/guest-blog-minimalist-compliance-in-uk.html> accessed 14 April 2022 ('Minimalist Compliance').
[297] ibid.
[298] Adams (n.24).

stipulation that legislative amendments were required. Therefore, there *has* been 'multi-level' correction of the judgment. The CM's endorsement of the executive's amendments casts doubt on the cogency of Strasbourg's jurisprudence and also challenges the Court's authority, compounding the ECtHR's loss. As Von Staden argues, it represents 'a recalibration of applicable compliance standards and an attempt to override parts of the Court's judgments'.[299] The CM essentially sanctioned a form of "corrective compliance". It demonstrates how political preferences for minimal compliance can potentially undermine the output and outcome legitimacy of the Court's judgments which then further challenges the Court's normative legitimacy. This may embolden States to push the boundaries of minimalism, to test how far the Court's judgments can be diluted, signifying a "loss" for Strasbourg's jurisprudence.[300] For instance, the CM's authorisation of the UK's approach had broader problematic effects, demonstrated by the CM also sanctioning minimal forms of compliance in relation to Russia and Turkey's prisoner voting violations.[301] This further undermines Strasbourg's jurisprudence on prisoner voting, diluting compliance and gives States, such as Russia, with less reputable compliance credentials, further wriggle room to evade their obligations.[302] As Bougush and Padskocimaite argue, the CM's closure of the Russian prisoner voting cases undermines the 'legitimacy of the judgment execution supervision mechanism' and 'also sets a worrying precedent for other Contracting Parties unwilling to execute the Court's judgment in good faith'.[303] Therefore, this may also dilute the standards of compliance in relation to other rights violations.

This exposes the pitfalls of the CM's peer review structure as the politically charged context fostered politically motivated concessions, demonstrating a "loss" to the political authority of the CM. As Von Staden observes, 'the Committee should have withheld its endorsement' as its own rules state the CM must ensure that 'new violations' or current violations must be put to 'an end'.[304] Instead, the CM should have supported the ECtHR and referred to Strasbourg case-law to reinforce the requirement that legislative changes should be made through

[299] Von Staden, 'Minimalist Compliance' (n.296).
[300] Adams (n.24).
[301] E. Celiksoy, 'Execution of the Judgments of the European Court of Human Rights in Prisoners' Right to Vote Cases' (2020) 20(3) HRLRev 555, 578.
[302] ibid 579; as noted in chapter five, this thesis was written prior to Russia's expulsion from the Council of Europe.
[303] G. Bogush and a Padskocimaite, 'Case Closed, but what about the Execution of the Judgment? The closure of Anchugov and Gladkov v. Russia' (*EJIL:Talk!,* 30 October 2019) <https://www.ejiltalk.org/case-closed-but-what-about-the-execution-of-the-judgment-the-closure-of-anchugov-and-gladkov-v-russia/> accessed 14 April 2022.
[304] Von Staden, 'Minimalist Compliance' (n.296): 'Rules of the CM' (n.51) Rule 6(2).

Parliament. It also reveals the limits of the Department for Execution, PACE and the Court in acting as safeguards against politicisation. Moreover, it illustrates the limits of the CM's enforcement mechanisms, that its peer pressure tools may be insufficient to secure effective compliance. It shows a fundamental tension between which institution, the (political) CM or the (judicial) ECtHR, should have the 'final interpretative authority' regarding 'the requirements of compliance within the European human rights regime'.[305] These 'tensions' illustrate the relationship between the Court and the CM is at times 'complicated' and can conflict.[306]

Why did the CM endorse the amendments? Von Staden speculates the CM may have endorsed the amendments as it was worn down by years of disagreement and 'simply' sought to end the clash.[307] The sustained non-compliance was damaging to the Convention system,[308] and consequently, arguably, from the CM's perspective *any* form of resolution, however hollow, was preferable to non-compliance. Alternatively, it shows the CM 'considers non-legislative changes sufficient to bring the UK into compliance with the Convention'.[309] The CM is therefore 'intentionally juxtaposing' its view regarding what constitutes compliance 'against the Court's' – arguably showing that the CM considered the Court had gone too far.[310] As the CM is political with 'intergovernmental underpinnings',[311] the CM's approval of the amendments arguably illustrates 'another manifestation' of the renewed commitment to subsidiarity[312] - after all, 'implementation is thoroughly rooted in the principle of subsidiarity'.[313] For instance, reforms to the ECHR have sought to address the ECtHR's backlog in tackling cases and to redress the ECtHR's 'perceived loss of legitimacy'.[314] Such reforms show that Strasbourg has taken domestic 'political signals' for reform seriously

[305] ibid.
[306] Abdelgawad (n.259) 281-821.
[307] Von Staden, 'Minimalist Compliance' (n.296).
[308] De Londras and Dzehtsiarou, 'Mission Impossible?' (n.49) 474; Marmo (n.274) 235.
[309] Von Staden, 'Minimalist Compliance' (n.296).
[310] ibid.
[311] D. Anagnostou 'Untangling the domestic implementation of the European Court of Human Rights' judgments' in D. Anagnostou (ed), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh University Press 2013) 6.
[312] Von Staden, 'Minimalist Compliance' (n.296).
[313] Anagnostou (n.311) 1.
[314] N. O'Meara, 'Reforming the European Court of Human Rights: The Impacts of Protocols 15 and 16 to the ECHR' in K. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 92.

(Protocols 15 and 16).[315] More recently, the Copenhagen Declaration stressed the importance of subsidiarity,[316] however, in doing so it stated that strengthening subsidiarity:

> 'is not intended to limit or weaken human rights protection, but to underline the responsibility of national authorities to guarantee the rights … in the Convention…. the most effective means of dealing with human rights violations is at the national level … [which] will increase ownership of and support for human rights'.[317]

Yet, whilst ensuring respect for domestic decision-making is of paramount importance, cases such as prisoner voting show this can facilitate the prioritisation of political power at the expense of effective rights protection.

Would a formal mechanism enabling democratic override prevent such clashes becoming 'monstrous'?[318] As Donald and Leach observe, possible inclusion of democratic override has been mooted at various points, for instance: in 'proposals' to the Commission on a Bill of Rights; 'in evidence to the JCHR'; and by 'senior judicial figures'.[319] Enshrining a formal mechanism of override in the ECHR might expedite resolution of entrenched disagreement. Formal parameters could be established to ascertain when the threshold of "justifiable" non-compliance is met. For instance, Bellamy advocates for a mechanism of 'democratic override', as 'courts may be as mistaken as legislators' and so 'representatives of the democratic governments' will monitor whether 'compliance' is achieved.[320] Whilst the CM is already the 'ultimate arbiter of whether states have complied with a human rights judgment or not'[321] the CM would also, according to Bellamy, be the ultimate arbiter as to whether override is justifiable.[322] In terms of prisoner voting, such formalisation *might* have deterred the CM from accepting hollow compliance to close the case. Yet Donald and Leach mount a convincing critique of Bellamy's proposal, arguing that allowing the CM to have the 'final word' regarding whether a ECtHR judgment can be disregarded risks exacerbating the current 'perils of over-politicization' and is *'less* democratically accountable'.[323] Moreover, it creates a poor precedent for States with questionable democratic and rights credentials and they argue that

[315] ibid.
[316] von Staden, 'Minimalist Compliance' (n.296).
[317] High Level Conference meeting in Copenhagen at the initiative of the Danish Chairmanship of the Committee of Ministers, Copenhagen Declaration (12-13 April 2018) ('Copenhagen Declaration').
[318] Murray, 'Monstering Strasbourg' (n.169) 124.
[319] Donald and Leach, *Parliaments and the ECtHR* (n.89) 145, 149.
[320] Bellamy (n.202) 1034.
[321] Çali and Koch (n.4) 308.
[322] Bellamy (n.202) 1037.
[323] Donald and Leach, *Parliaments and the ECtHR* (n.89) 146-147.

Bellamy's 'faith in the sincerity of states' motives is highly contestable'.[324] Further, there are several 'practical' issues regarding how the mechanism would work, such as the effect of political override on the ECtHR's original judgment, would it lead to the invalidation of the judgment in 'whole' or in part?[325] Additionally, O'Cinneide argues that to amend international treaties to incorporate a formal mechanism of override, could lead to 'destabilising the already fragile equilibrium of these treaty systems'.[326] Crucially, States *already* have sufficient scope to resist judgments.[327] For instance, the prisoner voting clash shows the CM seems to have informally assumed the role put forward by Bellamy by sanctioning a different form of compliance, amounting to a form of corrective override. This shows how political pressure can result in rights protection being compromised.

Therefore, as States can already resist compliance, O'Cinneide postulates that a 'heavy burden of justification' should be placed on States in resisting judgments: the 'red-line' of disregarding judgments should only be crossed in exceptional circumstances'.[328] For instance, in terms of States' justifying their reasons for resistance, political branches may cite 'democratic constitutionalist' issues, where a judgment exceptionally appears to undermine 'the principle of popular sovereignty'.[329] Yet, it may be challenging to discern when the 'line' has been crossed.[330] Therefore, O'Cinneide suggests factors which may indicate that States are justified in resisting compliance, such as: first, the State itself adheres to a reasonable standard of 'democratic constitutionalism'; second, a 'tipping point' must be attained where there is a 'fundamental concern – which cuts to the core of what it means to be a self-governing state'; third, the State must balance the risk of incursion into sovereignty against the 'positive contribution' made by the Court and fourth, the State must carefully consider the negative 'impact of state disobedience on the authority' of courts.[331]

Whilst it is normatively desirable for States to apply such factors to ensure they take the 'heavy burden' of justifying override seriously, prisoner voting demonstrates that when political agendas gain momentum, being inflamed by public discourse, the factors suggested by O'Cinneide could in practice be manipulated, minimised, or simply overlooked. The political

[324] ibid 147.
[325] ibid 148.
[326] O'Cinneide (n.151) 327.
[327] ibid.
[328] ibid.
[329] ibid 321.
[330] ibid 322.
[331] ibid 322-327.

branches' 'tipping point' arose in reaction to the lack of specific support for the judgment, which unearthed underlying dissatisfaction regarding the partial relinquishment of national sovereignty to Strasbourg. The Government could argue the tipping point applies to prisoner voting as it 'cuts to the core of what it means to be a self-governing state'. Essentially, this is a subjective assessment and is open to manipulation by the State, as it has scope to argue that it considers the tipping point has been met. Politics seems inexorable. Further, whilst Committees such as the JCHR repeatedly drew attention to the political branches' obligations and the consequences of non-compliance, the bulk of mainstream political discourse minimised the implications of such factors. Additionally, as discussed, some politicians also manipulated and reframed these factors to present them as a clash of competing obligations in which parliamentary sovereignty wins over international legal obligations to comply. For the political branches, the damage to Strasbourg which could be caused by non-compliance, did not compare to the potential damage to sovereignty which could result from compliance with a judgment that it fundamentally opposed.

Therefore, despite the requirement under international law to abide by the ECtHR's judgments, States retain scope to resist compliance. This arises from the conditionality of Strasbourg's authority and lack of supremacy of Strasbourg jurisprudence. Enshrining a formal mechanism of override (whether legislative or executive) would on balance be undesirable due to the potential for it to exacerbate politicisation and the sheer complexity of enshrining a workable framework. Even the informal factors suggested by O'Cinneide could be open to manipulation or overlooked by States. Yet, *Hirst* reveals States' tools of resistance and also the CM's role in sanctioning such compliance needs to be carefully monitored to ensure that minimal forms of compliance, such as the administrative amendments, are not deemed as an acceptable standard of "compliance". This is a form of "corrective compliance", the effects of which override the ECtHR's stipulation for legislative amendments and leave the disproportionate ban unaltered. This has the effect of diminishing the potency of the Court's judgment, denting the ECtHR's authority. The door remains open for future litigation of prisoners' voting rights in which the standards of the Court may clash with the CM's endorsement of the UK's amendments, as legal and political interpretations of rights may conflict.[332]

[332] Von Staden, 'Minimalist Compliance' (n.296).

6.5.2 Implications of political losses - the State: key to compliance?

The imperfect reliability of the Council of Europe institutions in securing compliance has led some to argue that the principal focus should be the State - Hillebracht argues that 'domestic, not international, institutions are the linchpin to securing human rights'.[333] The functioning of the Convention system depends on national implementation of the ECtHR's judgments.[334] Indeed, reforms to the Convention system incorporate commitments to emphasise national implementation and respect national sovereignty by strengthening subsidiarity and the MoA.[335] Therefore, it is important to 'understand both the institutional capacity *and* the political culture' of the State regarding compliance.[336]

A study by Anagnostou and Mungiu-Pippidi reveals that out of the nine States selected for the study the UK was 'the best performing country' in terms of 'successful human rights implementation', as it has 'designated domestic structures for implementing the ECtHR's judgments' which illustrate 'a strong capacity to enact and enforce laws and policies'.[337] Therefore, 'the greater the legal infrastructure capacity and government effectiveness, the more expeditious the implementation of the ECtHR's rulings'.[338] The judiciary, executive and legislature have key roles in securing compliance.[339] The HRA has empowered the domestic judiciary to uphold Convention rights. Moreover, the executive is responsible for liaising with Strasbourg and in terms of implementation in the UK, the Foreign, Commonwealth and Development Office informs the relevant 'government department(s) responsible for the violation(s) to the judgment', and the Ministry of Justice is then responsible for the 'co-ordination of the executive response'.[340] It provides 'light-touch coordination of the process'

[333] C. Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' (2012) 13 HumRtsRev 279, 284 ('Implementing International Human Rights'); see also, M. Hunt, 'Enhancing Parliament's Role in the Protection and Realisation of Human Rights' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 469-475.
[334] E. Mottershaw and R. Murray, 'National responses to human rights judgments: the need for government coordination and implementation' [2012] EHRLR 639, 640-641.
[335] High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration, (19 February 2010) 6; High Level Conference on the Future of the European Court of Human Rights Brighton Declaration (19-20 April 2012) 2-3 ('Brighton Declaration'); High Level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility" Brussels Declaration (27 March 2015) ('Brussels Declaration') .
[336] Hillebrecht, 'Implementing International Human Rights' (n.333) 284.
[337] D. Anagnostou and A. Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter' (2014) 25 EJIL 205, 221-222.
[338] ibid 225.
[339] A. Donald, 'The Implementation of European Court of Human Rights Judgments Against the UK: Unravelling the Paradox' in K. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 136 ('The Implementation').
[340] Donald and Leach, *Parliaments and the ECtHR* (n.89) 240.

as 'lead responsibility rests with the relevant government department for each case'.[341] There are numerous 'reporting procedures' the executive may utilise, such as the provision of annual reports to Parliament and also action plans to the CM.[342] Further, in terms of parliamentary involvement, 'the JCHR is the principal site of engagement with human rights judgments'.[343] As Horne and Conway argue the JCHR provides 'democratic legitimacy to human rights discourse'.[344] Kavanagh notes the JCHR ensures that the 'quality of legislative scrutiny' regarding rights is improved and also helps foster the Government's accountability to Parliament regarding rights.[345] It has a key role in providing 'oversight' and monitors compliance with the ECtHR's judgments.[346] Whilst the JCHR had an important monitoring role in fostering accountability regarding prisoner voting, interestingly, Donald and Leach observe the 'JCHR has at no point proposed a specific remedy or options for remedying' *Hirst.*[347] They note that advisers to the JCHR believe that such 'reluctance to propose specific options … betrayed the lack of consensus on the matter'.[348] Moreover, the JCHR is unable to 'stop Parliament violating rights. It can only warn and seek to influence each House'.[349] Therefore, despite the JCHR's monitoring role, it was unable to induce compliance.[350] Notwithstanding the value of the JCHR in providing parliamentary oversight,[351] the growing anti-Strasbourg feeling fuelled the lack of political will to take effective steps to comply with *Hirst*, which ultimately side-lined parliamentary involvement. This shows the power of politics, exposing the limitations of the JCHR in effectively holding the executive to account.[352] More broadly, it demonstrates how human rights issues may inevitably generate disagreement regarding the appropriate rights standards - it highlights the contestability of rights. Despite

[341] Ministry of Justice, *Responding to human rights judgments Report to the Joint Committee on Human rights on the Government's response to human rights judgments 2018-2019* (CP182, October 2019) 8.
[342] A. Donald and P. Leach, 'The Role of Parliaments Following Judgments of the European Court of Human Rights' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 73-75.
[343] ibid 259.
[344] A. Horne and M. Conway, 'Parliament and Human Rights' in A. Horne and G. Drewry (eds), *Parliament and the Law* (2nd edn, Hart 2018) 265.
[345] A. Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 116 ('The Joint Committee on Human Rights').
[346] Donald and Leach, *Parliaments and the ECtHR* (n.89) 232.
[347] ibid 246.
[348] ibid 257.
[349] D. Feldman, 'Can and Should Parliament Protect Human Rights?' (2004) 10 EPL 636, 647.
[350] Sathanapally (n.99) 162.
[351] The impact of the JCHR is multifaceted (space precludes analysis). See: Kavanagh, 'The Joint Committee on Human Rights' (n.345) 131-138; P. Yowell, 'The Impact of the Joint Committee on Human Rights on Legislative Deliberation' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 141-163.
[352] J. Hiebert, 'Governing under the Human Rights Act: the limitations of wishful thinking' [2012] PL 27, 42.

these issues, Donald and Leach maintain that the JCHR has 'provided a regular burden of justification upon ministers for their action or inaction'.[353] Moreover, there have also been 'improvements to the executive system of implementation' regarding 'its increased responsiveness to parliament'.[354] As Donald and Leach argue, 'the implementation of the ECtHR decisions in not only a legal and technical, but also an intensely political process'.[355]

Therefore, although the UK has the 'institutional capacity' to secure compliance this must be balanced by the fact that implementation is contingent on the context of the case and 'measures required'.[356] Essentially, the political branches have to *want* to use the institutional capacity, States must have 'political will' to implement the judgment.[357] Von Staden's analysis reveals the UK tends to opt for minimalist compliance[358] and compliance can be 'begrudging'.[359] Even though the UK traditionally has a rights friendly 'political culture', as it seeks to set a good 'example' regarding rights,[360] anti-Strasbourg rhetoric indicates a tainting of this political culture. A good compliance record is not necessarily indicative of political satisfaction with the ECHR system and whilst the UK has a comprehensive institutional infrastructure in place to secure compliance, the prisoner voting clash exposed political dissatisfaction with Strasbourg and the perceived excessive intrusion into the domestic sphere.[361]

Ensuring compliance with the ECtHR's judgments is multi-layered, requiring Strasbourg to be strong *but* sensitive, and for domestic institutions to have the capacity *and* willingness to comply. Implementation is a 'shared responsibility between the States Parties the Court and the Committee of Ministers'.[362] To facilitate this shared responsibility, the Copenhagen Declaration reiterates the importance of dialogue between domestic and European institutions 'at both judicial and political levels'.[363] Moreover, there are measures that Strasbourg's institutions can take to make political willingness to comply more likely, such as ensuring

[353] Donald and Leach, *Parliaments and the ECtHR* (n.89) 260.
[354] ibid.
[355] ibid 255.
[356] K. Brayson and G. Swain, 'The European Court of Human Rights and minorities in the United Kingdom: catalyst for change or hollow rhetoric?' in D. Anagnostou (ed), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy* (Edinburgh University Press 2013) 188.
[357] Donald and Leach, *Parliaments and the ECtHR* (n.89) 65.
[358] Von Staden, *Strategies of Compliance* (n.47) 145.
[359] C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (CUP 2013) 112.
[360] Hillebrecht, 'Implementing International Human Rights Law' (n.333) 293.
[361] Donald and Leach, *Parliaments and the ECtHR* (n.89) 260.
[362] Brussels Declaration (n.335) 2.
[363] Copenhagen Declaration (n.317) 5.

ECtHR judgments are 'clear and consistent' to foster 'legal certainty',[364] which may further assist Council of Europe institutions in ensuring the ECtHR's judgments are respected. Some have also argued the role of PACE should be enhanced, as it has a vital role in ensuring misconceptions regarding Strasbourg are corrected and also in promoting the importance of compliance.[365] At high-level conferences on reform to the ECHR, recommendations were put forward regarding how States' could ensure effective national implementation, 'to develop domestic capacities and mechanisms to ensure the rapid execution of the Court's judgments'.[366] For instance, the increased role of national parliaments in securing compliance has been advocated.[367] Donald and Leach emphasise the importance of highlighting Parliament's role regarding human rights protection as it can be considered 'as *conferring* legitimacy'.[368] *Democratic* parliamentary protection of rights should be enhanced, as it can reduce concerns regarding the ECtHR's lack of democratic legitimacy.[369] Donald argues Parliament's early intervention should be promoted, as whilst *Hirst* might be viewed as showing that legislative debate can intensify human rights disagreement, leading to delay, Donald maintains it actually reveals Parliament should be involved early to consider 'legislative proposals and justificatory arguments regarding the meaning and scope of the rights at stake' which will strengthen its ability to 'hold governments to account'.[370] However, crucially, as Bates argues, those who seek to enhance 'the role played by Parliament (and the executive) presumably do so on the basis that it actually engages with the matter in issue in a careful, considered and responsible way'.[371] Despite the valuable role of the JCHR and other committees, the prisoner voting clash reveals that the Government adopted avoidance tactics and was reluctant to engage sincerely with the issue. Therefore, political involvement must be emphasised in a way that facilitates genuine, credible attempts to engage in rights issues.

[364] Brighton Declaration (n.335) 7.
[365] Donald and Leach, 'The Role of Parliaments' (n.342) 81; A. Drzemczewski and J. Lowis, 'The Work of the Parliamentary Assembly of the Council of Europe' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 309
[366] Brighton Declaration (n.335) 8; see also Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights (Adopted by the Committee of Ministers on 6 February 2008, 1017th meeting of the Ministers' Deputies) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae618> accessed 14 April 2022.
[367] Brighton Declaration (n.335); Brussels Declaration (n.335); Copenhagen Declaration (n.317).
[368] Donald and Leach, *Parliaments and the ECtHR* (n.89) 72.
[369] M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 13.
[370] Donald, 'The Implementation' (n.339) 161-162.
[371] Bates, 'The Continued Failure to Implement' (n.68).

Although responsibility for compliance is shared, prisoner voting demonstrates that domestic political willingness to comply is ultimately determinative: it is the bottom line. As the discussion in section 6.5.1 shows, the negative political perception was reinforced and inflamed in a cycle of condemnation. Building domestic institutional resilience against such corrosive negativity is normatively desirable to ensure the effective functioning of the Convention system (discussed in chapter seven).[372] Yet in practice some issues are such that even a generally compliant political culture can quickly be dismantled and reshaped into unremitting negative discourse.[373] The road to securing compliance is one with potential obstacles. Whether these obstacles become roadblocks to compliance fundamentally depends on the context of the case.

6.6 The EU dimension: the UK's political response to *Delvigne*

Having predominately considered the UK's political response to Strasbourg's jurisprudence on prisoner voting, it is necessary to consider the EU dimension to the prisoner voting clash. Regarding the CJEU's judgment in *Delvigne*, the UK's political stance was unyielding. For instance, David Cameron (then Prime Minister), firmly maintained prisoners would not be enfranchised: 'the British Parliament has spoken. The Supreme Court in Britain has spoken. So I'm content to leave it there'.[374]

Therefore, Cameron promulgated a political narrative which minimised the significance of *Delvigne*. Yet this political dismissiveness jarred with the potential legal implications of the judgment. For the UK political branches *Delvigne* posed a potential problem: it tightened 'the screws on the British government'.[375] *Delvigne* could 'open the door' for UK challenges, as the UK's prisoner voting ban was disproportionate and therefore, likely to be held 'incompatible with the EU Charter'.[376] Notably, Cameron's statement glossed over the fact that whilst the Supreme Court had spoken, its interpretation of EU law differed from the CJEU's judgment.[377] Again, the general political perspective regarding prisoner voting is that domestic courts are aligned with the political branches against European courts. Yet not all politicians

[372] A. Müller, 'Domestic authorities' obligations to co-develop the rights of the European Convention on Human Rights' (2016) 20(8) IJHR 1058.
[373] Donald and Leach, *Parliaments and the ECtHR* (n.89) 260.
[374] A. Travis, 'Voting ban on prisoners convicted of serious crimes is lawful, EU court rules' *The Guardian* (6 Oct 2015) <https://www.theguardian.com/politics/2015/oct/06/uk-ban-on-prisoner-voting-is-lawful-eus-highest-court-rules> accessed 14 April 2022.
[375] van Eijken and van Rossem (n.6) 130.
[376] F. Simpson, 'CJEU ruling on prisoner voting – open door for successful UK challenge?' (*UK Human Right Blog*, 9 October 2015) <https://ukhumanrightsblog.com/2015/10/09/cjeu-ruling-on-prisoner-voting-open-door-for-successful-uk-challenge/> accessed 14 April 2022.
[377] N. Johnston, *Prisoners' voting rights: developments since May 2015* (HC Briefing Paper No.07461, 2020) 15.

were impervious to the implications of the contradictory domestic and European legal positions. For instance, in evidence to the European Union Committee, Dominic Grieve MP conceded that the Supreme Court's judgment in *Chester* regarding EU law was now 'questionable'.[378] If a prisoner were to challenge their disenfranchisement from European Parliament elections there was 'a reasonable prospect that they would be successful'.[379]

Conversely, other witnesses who gave evidence to the Committee adopted a more dismissive attitude to *Delvigne*, being underpinned by broader Euroscepticism. In evidence to the Select Committee, Michael Gove MP and Dominic Raab MP made their opposition to the CJEU clear, as Raab described the CJEU as 'predatory' and Gove concurred, and argued 'the image of it is as a sort for raptor'.[380] The CJEU 'can play the ace of trumps at the moment' in stating that EU law prevails and 'as a believer in parliamentary sovereignty … it is preferable if the British Parliament and British courts can decide on these matters'.[381] Parliamentary sovereignty is the UK's defence against European intrusion. As with objections to the ECtHR, fundamentally these criticisms against the EU are premised on a political desire to reassert national sovereignty.

In further evidence to the Committee, Raab was asked whether following *Delvigne* legislation would be amended. Raab initially evaded the question and instead focussed on compliance with Strasbourg and answered it was:

> 'unlikely - or unrealistic - that the ban will be lifted in the foreseeable future. …We will keep engaging constructively with the Committee of Ministers, but I do not sense an appetite on either side for a tectonic clash over this, so I do not think … it will be necessary'.[382]

Raab eventually addressed *Delvigne* and argued he did not foresee 'any imminent risk of litigation' although noted there was some 'legal uncertainty'.[383] There were 'all sorts of rather

[378] House of Lords, *Revised transcript of evidence taken before The Select Committee on the European Union*: *Justice Sub-Committee, Inquiry on the Potential Impact on EU Law of Repealing Human Rights Ac*t (Evidence Session No.2, 27 October 2015).
[379] ibid.
[380] House of Lords, *Revised transcript of evidence taken before The Select Committee on the European Union, Justice Sub-Committee, Inquiry on the Potential Impact on EU Law of Repealing Human Rights Act*, (Questions 79-90, Evidence Session No.8, 2 February 2016) (Select Committee on the European Union, Evidence Session No.8).
[381] ibid.
[382] ibid.
[383] ibid.

esoteric facts applied in that case that are different from the situation in the UK. We do not have any UK cases before the CJEU – and long may that continue'.[384] Therefore, unless and until litigation arose, for some MPs it was preferable to remain detached from seriously considering the potential legal implications following *Delvigne*.

However, the European Union Committee concluded that, based on evidence given by the majority of witnesses, *Delvigne* 'was likely to lead to EU law-based challenges in the UK's courts seeking to overturn the blanket ban on voting in European Parliament elections'.[385] Crucially, it was also noted in chapter five that the potential remedial implications of a successful challenge under EU law are stronger in comparison to the ECHR.[386] It could therefore pose more of a threat.

Nevertheless, with Brexit subsequently monopolising the political agenda, any concerns regarding prisoner voting being litigated were eclipsed by more pressing issues. The likelihood of UK prisoners challenging their disenfranchisement under EU law is now remote, as under the European Union (Withdrawal) Act 2018 the Charter no longer applies.[387] Significantly, in the House of Commons, Raab used *Delvigne* to demonstrate that the Charter should *not* be incorporated into domestic law due to the possibility of it conflicting with domestic human rights law.[388] Moreover, Raab argued *Delvigne* highlights how it 'is very unclear how the case law in the Luxembourg and Strasbourg Courts meshes together. It is possible to argue in favour of one or the other, but they are not entirely consistent or compatible'.[389] Therefore, cases such as *Delvigne* represented a warning to Government that the reach of EU law must be further diminished by ensuring the Charter was no longer part of domestic law. In relation to Article 39 of the Charter and the right to vote, the Government explained that Article 39 will no longer be relevant, as the 'UK is leaving the European Union and so will not have representation at the European Parliament'.[390] This will close the door on UK prisoners litigating the issue of

[384] ibid.
[385] House of Lords, European Union Committee, *The UK, the EU and a British Bill of Rights* (12th Report of Session 2015-16, HL Paper 139, 9 May 2016) 30.
[386] e.g., *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33, [2016] QB 347; *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777.
[387] European Union (Withdrawal) Act 2018, s.5(4)-(5); N.B. AG Collins held that UK nationals lose their rights to EU citizenship in C-673/20 *Préfet du Gers and Institut National de la Statistique and des Études Économiques* EU:C:2022:129.
[388] HC Deb 21 November 2017, vol 631, cols 901-902.
[389] ibid.
[390] Charter of Fundamental Rights of the EU Right by Right Analysis 5/12/2017, 62 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf> accessed 14 April 2022.

prisoner disenfranchisement under EU law. This also removes some possible issues that might have arisen if there had been further domestic cases on prisoner voting.[391] Arguably however, as discussed in chapter five, if future UK prisoner voting litigation in relation to the ECHR were to arise, there may be some scope for EU law on prisoner voting to have some impact.[392]

The political reaction to *Delvigne* was therefore mixed, some MPs perpetuated denial, yet others were more realistic in terms of the potential legal implications. The more dismissive approaches have seemingly been vindicated as litigation has not transpired regarding EU law and UK prisoner voting. Yet depending on the ECtHR's future position regarding prisoner voting, there is potential for further litigation in Strasbourg. The more dismissive political views were underpinned by the pervading anti-external control narrative, as the involvement of *another* supranational court, and one with greater remedial powers, was greeted with political resentment. Brexit represents a culmination of this Eurosceptic discourse and with the Charter ceasing to apply, the threat of an adverse ruling on prisoner voting, which may have ultimately led to disapplication of the impugned UK law, has been removed. Yet, from a rights-based perspective, the removal of the potential avenue of redress under EU law is a negative development, as it has now *loosened* 'the screws on the British government'. This loosening effect may have been a further factor which facilitated the Government's minimalist compliance.

6.7 Conclusion

This chapter argues the prisoner voting clash has revealed multiple institutions shortcomings with regards to rights protection. The clash resulted in multi-institutional losses. It is a "loss" for parliamentary protection of rights, as Parliament's involvement was circumvented and the clash has ostensibly been resolved by the executive's administrative amendments. It is also a "loss" for the UK Government, as its resolution of the clash was only reached after several years of prolonged conflict in which it sustained repeated criticism for its recalcitrant response to prisoner voting, resulting in reputational damage. The domestic political approach to prisoner voting was largely characterised by defensive defiance. The clash centred on a power struggle between institutions rather than the issue of prisoner voting itself. Key constitutional

[391] The domestic courts may have faced with issues regarding the 'range of authorities to navigate': J. Caird, 'The Return of the Prisoner Voting Saga?' (House of Commons Library, 13 June 2016) <https://commonslibrary.parliament.uk/the-return-of-the-prisoner-voting-saga//> accessed 14 April 2022.
[392] e.g. M.L. Paris, 'Paving the Way: Adjustments of Systems and Mutual Influences Between the European Court of Human Rights and European Union Law before Accession' (2014) 51 IJ 59, 77-85.

principles were applied by the political branches to justify non-compliance, with a 'looser, more political conception of parliamentary sovereignty' being deployed as the main armour against external intrusion.[393] This looser conception subsumed claims regarding national sovereignty. Parliamentary sovereignty was applied differently, as a reason and an instrument for non-compliance, which compounds confusion regarding the role and relevance of parliamentary sovereignty in the prisoner voting context.

The domestic courts "lost" in the prisoner voting clash as their reticence to utilise their powers under the HRA meant that they failed to hold the Government to account in terms of its role in prisoner voting. The prisoner voting case study highlights that even when courts grant a declaration, s.4 allows for the exercise of political discretion at the second filter stage. Therefore, rather than avoiding a declaration of incompatibility in anticipation of political reactions, judges should grant declarations as the political decisional space whether to accept the declaration clearly still exists and parliamentary sovereignty remains respected. Domestic courts should grant declarations in the confidence that they are fulfilling their constitutional role, as Parliament has legislated for them to do so under the HRA. This would at the very least demonstrate that courts are active actors in alerting or reiterating to the political branches that there is a rights incompatibility – it would constitute a clear statement from the judicial branch. The Supreme Court in *Chester* should therefore have granted a further declaration.

Moreover, political antipathy was mainly directed towards Strasbourg, as evidenced by political challenges to Strasbourg's legal, normative and democratic legitimacy. It is a "loss" for the ECtHR as its jurisprudence and its legitimacy were undermined by the UK's non-compliance. This loss was compounded by the CM's endorsement of the UK Government's administrative amendments. At the European level, the clash represents a "loss" to the political authority of the CM, as the CM was culpable in sanctioning a form of "corrective compliance" and in doing so, demonstrated that protracted stalemates may ultimately dent its resolve. Prisoner voting exposes challenges in Strasbourg's institutions ensuring effective compliance, revealing a disconnect between judicial and political standards of compliance.

In responding to *Delvigne* there was evidence of anti-EU discourse in which some MPs made their hostility to the CJEU clear.[394] However, with the threat of adjudication under EU law now

[393] Nicol (n.13) 685.
[394] Select Committee on the European Union, Evidence Session No.8 (n.380); *Delvigne* was also used to support arguments that the Charter should not be incorporated into domestic law post-Brexit - HC Deb 21 November 2017, vol 631, cols 901-902.

removed, this might have emboldened the Government to opt for minimal compliance, contributing to the multi-institutional losses that occurred regarding prisoners' voting rights.

CHAPTER SEVEN: CONCLUSION

7.1 Introduction

In assessing the prisoner voting clash, this thesis analysed the domestic courts, European courts and political approaches to prisoners' voting rights. The prisoner voting clash gave rise to multi-institutional losses and it is proposed this could be phrased as a "lose-lose-lose-lose-lose". It is a "loss" for the domestic courts, as the general judicial reticence towards prisoner voting undermined rights protection and revealed a lack of confidence regarding the exercise of their powers under the Human Rights Act 1998 (HRA). It is a "loss" for parliamentary protection of rights, as the amendments, however minor, bypassed Parliament's scrutiny. Further, it is a "loss" for the UK Government, as whilst the Government "resolved" the clash, this resolution was only reached after several years of sustained conflict in which it sustained repeated criticism for its non-compliance, resulting in reputational damage. It is a "loss" for Strasbourg's judicial *and* political institutions - the European Court of Human Right's (ECtHR's) own legitimacy was challenged by the UK's protracted non-compliance and by the Committee of Ministers of the Council of Europe's (CM's) endorsement of minimal compliance, demonstrating a divergence between Strasbourg's judicial and political institutions. The fact the CM capitulated to the UK Government represents a loss to the authority of Strasbourg's political institutions. More generally, it is also a "loss" to the litigants and prisoners, with only up to one hundred extra prisoners able to vote. Therefore, in terms of rights protection the prisoner voting saga represents a "no-win" clash. This multi-dimensional analysis of the various losses in the prisoners' voting rights case study is therefore the key contribution of this thesis.

Explication of these losses revealed the institutional tensions that exist within and between institutions in navigating their roles in rights protection. When institutional relationships are placed under pressure this can generate tensions, exposing the challenges and weaknesses in the mechanisms of rights protection. Ideally, institutions should strive to ensure that rights are upheld to the highest standard possible. However, the prisoner voting clash demonstrates this ideal can fail to live up to the reality, as the protection of rights may give way to institutional compromises and eventually, capitulation, eroding the protection of the right to vote. This could have consequences for rights protection more generally, as it demonstrates that even the

ECtHR's judgments on key democratic rights such as the right to vote are not immune from erosion and suggests that other rights could also be vulnerable to such compromises.

Consideration of the Court of Justice of the European Union's (CJEU's) role in prisoners' voting rights revealed the multi-dimensional nature of European rights protection. The EU dimension was therefore an important part of this thesis' framework, as it was shown how *Delvigne*[1] contributed to the pressure on the UK to comply with the ECtHR's judgment in *Hirst*.[2] However, whilst the UK Government objected to *Delvigne,* the CJEU did not have the opportunity to adjudicate on a UK prisoners' voting rights case and therefore, the CJEU was not directly involved in the prisoner voting clash. This makes it challenging to reach clear conclusions regarding institutional losses in relation to EU institutions, especially as Brexit means that UK prisoners are now unable to challenge their disenfranchisement under EU law. Further, this chapter does not consider the reform implications in relation to the EU, as Brexit has now rendered this irrelevant.

Therefore, in unravelling the prisoner voting clash, chapters two and three explored core foundational principles relevant to the prisoner voting case study. In chapter four, the domestic courts' adjudication of prisoner voting was assessed, which was largely characterised by reticence and this thesis presented a novel way of understanding s.4 as a "double filter mechanism". Chapter five explicated the ECtHR's "loss" and a detailed analysis of the ECtHR's prisoner voting jurisprudence exposed challenges with the ECtHR's judgments. The lack of clarity and consistency in the ECtHR's prisoner voting case-law revealed problems with its procedural legitimacy which then provided further ammunition for the Government to attack the cogency of the ECtHR's case-law and its overarching legitimacy. Further, the implications of the CJEU's judgment in *Delvigne* were considered. Chapter six assessed both the UK's and Strasbourg's political responses to prisoner voting. The domestic political approach was largely characterised by hostility towards European systems of rights protection. This exposed the challenges facing Strasbourg's political institutions in securing effective compliance. This concluding chapter therefore reflects on the multi-institutional losses (section 7.2) and considers the broader lessons which can potentially be learnt regarding human rights reform at the domestic and European level (section 7.3)

[1] Case C-650/13 *Thierry Delvigne v Commune de Lesparre-Médoc* EU:C:2015:648 (*Delvigne*).
[2] *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41.

7.2. Reflections on multi-institutional losses: lessons to be learnt?

Arguably, the multi-institutional losses were mutually reinforcing. For instance, the ECtHR's judgment in *Hirst* was the catalyst for the controversy, as problems with the judgment's lack of clarity and consistency undermined its procedural legitimacy and fuelled the anti-Strasbourg political narrative and the Government's non-compliance. Crucially, the political branches' vociferous objections to *Hirst* generated further institutional losses. The political response fed into the Supreme Court's reticence, meaning the political branches' sustained non-compliance remained largely legally unchallenged. The domestic courts' reticence is especially evident in their decision not to grant a further declaration. This afforded leeway to the Government and enabled it to present UK institutions as united in their resistance of Strasbourg and allowed parliamentary oversight to be bypassed. Although the Joint Committee on Human Rights (JCHR) endeavoured to encourage compliance, its impact was limited, as the pervading political anti-Strasbourg narrative thrived and ultimately Parliament failed to take an active role in the issue of prisoner voting. This gave the Government greater scope to resist compliance. Further, whilst the domestic courts mirrored Strasbourg jurisprudence, in doing so, they predominately refrained from considering the political branches' non-compliance. This contributed to Strasbourg's losses (both judicial and political). The ECtHR was hindered by its own variable jurisprudence and whilst the ECtHR attempted to encourage compliance, it was stifled by the boundaries of its own competences. Ultimately, the ECtHR's "loss" was solidified by the CM's capitulation to the Government's administrative amendments. This revealed an institutional disconnect in the standards of rights protection under the European Convention on Human Rights (ECHR). Rather than supporting the ECtHR, the CM capitulated to the Government's administrative amendments which reveals a loss to Strasbourg's political authority. The CM's endorsement also enabled the executive to bypass Parliament, undermining parliamentary protection of rights.

Each loss contributed to other losses. The losses were fundamentally interconnected and together resulted in the dilution of rights protection. Therefore, blame cannot solely be laid on the courts. Neither can blame solely be laid on the political institutions. No institution discussed has emerged from the clash unscathed. There are potentially broader problematic consequences following the clash. It highlights that where rights protection is placed under pressure, normative conceptions of how rights protection should function can fail to match reality, as cracks in systems are exposed. Institutions do not protect rights in an 'institutional vacuum',

rather their decisions have a knock-on effect on other institutions approaches and outcomes.[3] Systems of rights protection inherently give rise to institutional interconnectedness.[4] This interconnectedness means that whilst it is preferable for institutions to work collaboratively and for such collaboration to constructively further rights, conflict can and frequently does form part of institutional relationships.[5] Ideally, this conflict should still further rights protection. However, prisoner voting shows how extreme, sustained conflict can be detrimental. It can expose the fragility of inter-institutional relationships, revealing that conflict does not necessarily lead to "good" outcomes as rights protection may be diluted and in the process of this dilution, the institutions and their relationships also sustain damage.

Therefore, what do we learn from this clash? It *could* be questioned whether the multi-institutional losses that occurred in prisoner voting are "typical" of such human rights clashes.[6] For instance, due to the nature of the UK's system of rights protection in which institutions have different roles in and approaches to rights protection, where a rights issue is especially controversial it is arguably more likely that institutions will disagree. Such disagreement may, to differing degrees, result in multi-institutional losses. Arguably, these losses are simply the ineluctable reality of these systems of rights protection. However, on balance, prisoner voting *is* exceptional in terms of the losses that occurred. Prisoner voting was manipulated for political reasons which compounded multi-institutional losses. The strained constitutional context shaped the clash and *Hirst* exacerbated political resistance towards European rights protection. But even if it is conceded that the political context shaped the clash, this does not mean losses were guaranteed.

Even though prisoner voting is especially politically controversial, it is still possible to learn broader lessons regarding the structural weaknesses of multi-level human rights protection. The context of a human rights case such as prisoner voting can explain why an issue is particularly politically contentious. The context can also explain the degree of strain placed on different institutional mechanisms for rights protection at different levels. In assessing how the mechanisms function (or not) when they are placed the most pressure, it is then possible to learn broader lessons regarding whether and how those mechanisms can then be improved

[3] A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 408-409.
[4] See more generally, A. Kavanagh, 'Recasting the Political Constitution - From Rivals to Relationships' (2019) 30(1) KLJ 43, 66-67, argues the 'constitutional order' consists of 'interconnected components'.
[5] ibid 67.
[6] N.B. To ascertain whether losses are "typical" further research is necessary, comparing outcomes of different cases - this is outside the scope of this thesis.

across the board. Prisoner voting demonstrates that due to the interconnectedness of multi-level institutional decision-making, institutions must remain alert to the institutional consequences of their decisions, as the losses that occurred each contributed together to the dilution of rights protection. Further, due to the interconnected nature of the losses, in order to redress these losses, the robustness across the multi-levels and across multiple institutions must be improved. If the institutions had been more consistent and more robust in their approach towards protecting rights this might have lessened the institutional losses. For instance, it demonstrates that domestic courts should be confident in exercising their powers under the HRA and should have granted a declaration to maximise the political decisional space – doing so would respect parliamentary sovereignty. In terms of prisoner voting, as Parliament was already aware of the incompatible legislation, a further declaration was necessary to reiterate the incompatibility. In future cases, it is imperative that where the impugned legislation is deemed wanting that courts do not contribute to uncertainty and perpetuate reticence by refraining from utilising their powers under the HRA where warranted. This might have encouraged political compliance with Strasbourg's jurisprudence which might have meant the CM would have refrained from sanctioning "corrective compliance". There is also a need for: the UK Parliament to have greater oversight of the executive's role in human rights issues at the supranational level; Strasbourg's institutions should further enhance domestic parliament's involvement; the ECtHR's judgments should be as clear and as consistent as possible to increase its procedural legitimacy; and there should be institutional cohesion between CM and the ECtHR. Therefore, where an issue is especially controversial and a rights violation has been found which is met with political disagreement, ideally, there needs to be multi-institutional robustness to ensure the rights violation is remedied (section 7.3.2).

7.3. Reform: broader reflections

This section reflects on whether and how the prisoner voting clash can inform debates about rights reform at the domestic and ECHR level. Arguably, the mechanisms of national and European systems in themselves contributed to the challenges in finding a workable legal solution to the clash. This therefore suggests that broader reform to the systems of rights protection is required. However, whether future reform would ultimately operate to enhance rights protection is questionable – as will be shown, it is unlikely that such reform will be forthcoming.

7.3.1 Domestic reform

To what extent can prisoner voting inform us about human rights reform at the domestic level? The Conservatives have long contended that the HRA requires amendment, with calls for reform dating back to 'at least 2005'.[7] This was driven by concerns regarding the impact on 'parliamentary sovereignty', the HRA's 'suspect European pedigree'[8] and also the prisoners' voting rights controversy.[9] Plans to replace the HRA with a British Bill of Rights were put forward by the Conservatives in their 2015 manifesto, in which they pledged to 'scrap the Human Rights Act and curtail the role of the European Court of Human Rights, so that foreign criminals can be more easily deported from Britain'.[10] The suggested reforms sought to ensure the ECtHR 'is no longer binding over the UK Supreme Court', the ECtHR 'becomes an advisory body' and that 'a proper balance between rights and responsibilities in UK law' is reached.[11] As Masterman argues, the plans revealed a common 'refrain … amongst a number of high profile Conservative politicians', mainly that the role of the ECtHR requires dilution, the HRA needs repealing and that national institutions should have responsibility for making decisions about rights.[12]

More recently, the Conservatives have put forward plans 'to replace the Human Rights Act with a modern Bill of Rights'[13] but crucially, in doing so, the Government states it will remain committed to being party to the ECHR.[14] Arguably this commitment to the ECHR was influenced by Brexit negotiations as the Political Declaration to the 2018 Withdrawal agreement committed the UK to remaining part of the ECHR.[15] However, during subsequent negotiations on the future relationship between the EU and the UK, the Government seemed

[7] R. Masterman, 'The United Kingdom: From Strasbourg Surrogacy towards a British Bill of Rights?' in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-dynamics at the National and EU Level* (Intersentia 2016) 463; for an exposition of 'the political case' against the HRA, see F. Cowell (ed) *Critically Examining the Case Against the 1998 Human Rights Act* (Routledge 2019) 10-16.
[8] C. Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (OUP 2016) 3.
[9] e.g. Conservatives, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (2014) 3, 5 ('*Protecting Human Rights*').
[10] The Conservative Party Manifesto, *Strong Leadership A Clear Economic Plan A Brighter, More Secure Future* (2015) 58, 60.
[11] Conservatives, *Protecting Human Rights* (n.9) 5.
[12] Masterman, 'Strasbourg Surrogacy' (n.7) 465.
[13] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (CP 588, 2021) 3 (MoJ, *HRA Reform*).
[14] ibid 5.
[15] Political Declaration Setting Out the Framework for the Future Relationship between the European Union and the United Kingdom, 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom__.pdf> accessed 14 April 2022.

to renege on its commitment to the ECHR in the Declaration and instead, refused to commit to the ECHR.[16] Despite this, the Trade and Cooperation agreement between the EU and the UK reveals the EU succeeded in including commitments to human rights protection.[17] For instance, the agreement includes a clause which stresses 'the importance of giving effect to the rights and freedoms' in the ECHR 'domestically'.[18] Further, the agreement provides that if the UK denounces the ECHR, the EU reserves the right to terminate Part Three of the agreement which concerns 'law enforcement and judicial cooperation in criminal matters'.[19]

The extent to which the UK will comply with these obligations if and when the HRA is reformed remains to be seen. As part of the Government's reform agenda, the 'Independent Human Rights Act Review (IHRAR)' was established to review whether reform to the HRA is required.[20] In particular, the IHRAR considered: 'the relationship between domestic courts and the ECtHR' and the HRA's impact 'on the relationship between the Judiciary, the Government and Parliament'.[21] Notably, the IHRAR did not focus on whether the UK should remain party to the ECHR.[22] Nevertheless, some have still greeted the IHRAR with scepticism and criticised it for constituting 'an attack' on the HRA.[23] Upon publication of the IHRAR, the Government also published its consultation regarding 'the government's proposals to revise and replace the Human Rights Act 1998 with a Bill of Rights'.[24]

In terms of the IHRAR's focus on s.2 HRA, it considered: whether s.2 requires amendment, the way in which domestic courts have 'approached issues falling within the margin of appreciation' and whether 'judicial dialogue between domestic courts and the ECtHR' enables 'domestic courts to raise concerns as to the application of ECtHR jurisprudence' and whether

[16] D. Giannoulopoulos, 'The Eurosceptic right and (our) human rights: the treat to the Human Rights Act and the Convention on Human Rights is alive and well' (2020) 3 EHRLR 255, 236-239.
[17] Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part' [2021] OJ L149/10, Preamble, Article 524.
[18] ibid Article 524.
[19] ibid Article 692; see S. Peers, 'Analysis 3 of the Brexit deal: Human Rights and EU/UK Trade and Cooperation Agreement' (*EU Law Analysis*, 4 January 2021) <http://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html> accessed 14 April 2022.
[20] *The Independent Human Rights Act Review* (CP 586, 2021) (IHRAR); N.B. The Government also established the Independent Review of Administrative Law, which considers reform options regarding judicial review – *The Independent Review of Administrative Law* (CP 407, 2021).
[21] ibid v.
[22] ibid 2.
[23] e.g. K. Devlin, 'Ministers accused of launching attack on human rights in middle of pandemic' *The Independent* (London, 7 December 2020) <https://www.independent.co.uk/news/uk/politics/human-rights-act-review-law-society-b1767581.html> accessed 14 April 2022.
[24] MoJ, *HRA Reform* (n.13) 5.

this can be strengthened.[25] The report recommended s.2 should be modified to ensure that domestic legislation and then the common law and other case law is applied, prior to considering ECtHR jurisprudence.[26] This reflects the trend to reassert domestic ownership of rights.

It is not within the scope of this thesis to review the adequacy of the IHRAR's recommendations in depth, but it may briefly be questioned whether prisoner voting indicates that s.2 requires reform. In *Chester*, the Supreme Court conceded that dialogue was foreclosed, due to the Grand Chamber's repeated consideration of prisoner voting.[27] In reaching this decision the Court sought to keep both the political branches *and* Strasbourg onside. In *Moohan,* whilst the majority endorsed the flexibility of the partial mirror principle, a more restrained approach to s.2 was adopted, as Strasbourg *consistently* refrained from finding a right to vote in referendums.[28] Conversely, the minority advocated a more expansive approach, that the Supreme Court should go further than Strasbourg and recognise a right to vote in referendums, as there was a *lack* of ECtHR jurisprudence on the issue.[29] This demonstrates that depending on judicial interpretation, s.2 can be applied differently. If the Court had decided this case in accordance with the IHRAR's recommendation, perhaps this would have emboldened more of the judges to adopt an approach aligned with the minority. Yet, as discussed in chapter four, if the Court had recognised a right to vote in referendums this could have inflamed pre-existing political controversy - a more creative approach to s.2 might have precipitated political criticism of the domestic courts' approach. As Fenwick and Masterman observe, judicial 'creativity' might be more 'likely to arise only in the *less* politically difficult areas of human rights law'.[30] Further, whilst the IHRAR states the judiciary will be constrained in the development of common law by 'judicial restraint' and parliamentary sovereignty,[31] Lord Hodge's swipe at parliamentary sovereignty in *Moohan*, demonstrates how the common law could challenge parliamentary sovereignty.[32] Depending on the case, domestic ownership, especially where an issue is politically contentious, might equally be criticised politically for

[25] IHRAR (n.20) 1, 95, 133.
[26] ibid 24; this reflects *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455, [46] (Mance JSC); *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, [55]-[57] (Reed JSC).
[27] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 [27] (Mance JSC) (*Chester*).
[28] *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901 [9]-[12], [15]-[18] (Hodge JSC) (*Moohan*).
[29] ibid [105] (Wilson JSC).
[30] H. Fenwick and R. Masterman, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?' (2017) 80(6) MLR 1111, 1127 (emphasis added) ('The Conservative Project').
[31] IHRAR (n.20) 63.
[32] *Moohan* (n.28) [35] (Hodge JSC).

"excessively" expanding rights protection. Enshrining priority to domestic rights protection and common law rights is also not straightforward, raising complex issues regarding how courts would effectively navigate this duty, with common law rights protection having 'limitations'.[33] Further, the IHRAR acknowledges the need to ensure a 'significant gap' between domestic and ECtHR rights protection does not emerge[34] – but it has been questioned whether this could lead to the HRA being 'sidelined'.[35]

Notably, the IHRAR concluded that s.2 does facilitate 'effective formal dialogue' between courts and enshrining priority to domestic protection will further strengthen such dialogue.[36] Prisoner voting illustrates that where Strasbourg jurisprudence is followed, this can restrict dialogue. Further, depending on the case, there are different consequences for following Strasbourg. For instance, following Strasbourg jurisprudence might result in domestic courts endorsing Strasbourg's more expansive approach to rights protection, as shown in *Chester*. Conversely, in other cases such as *Moohan*, mirroring Strasbourg might result in a more restrained approach. Therefore, s.2 allows for a flexible approach. Institutional considerations might be prioritised and domestic courts may opt to mirror Strasbourg, as the context and surrounding constitutional considerations might constrain domestic courts from adopting a different approach, as this might undermine institutional relationships (both domestic and European). Undermining such relationships might be more detrimental to rights, possibly providing further impetus for the political branches to weaken rights protection through reform. Yet, conversely, as discussed in chapter three, exceptions to the mirror principle might apply and domestic courts have shown willingness to engage in dialogue with the ECtHR. Therefore, in terms of domestic rights reform, prisoner voting further demonstrates that s.2 does not require amendment, it provides for sufficient flexibility, as the judiciary have delineated exceptions to mirroring Strasbourg[37] and a case-by-case assessment is required to determine the "suitability" of the judicial approach.

[33] Fenwick and Masterman state 'the potential of the common law as a tool of rights' protection should not be overstated', being subordinate 'to statute' and having a 'lack of a defined catalogue of rights, and … uncertain remedial capacity' in Fenwick and Masterman (n.30) 1133-1134; Clayton, argues 'the weak status the common law accords to rights protection is a fundamental obstacle to their future development', in R. Clayton, 'The empire strikes back: common law rights and the Human Rights Act' [2015] PL 3, 12.
[34] IHRAR (n.20) 78-79.
[35] R. Masterman and S. Wheatle, 'A common law resurgence in rights protection' [2015] EHRLR 57, 62.
[36] IHRAR (n.20) 138-139.
[37] see Fenwick and Masterman (n.30); Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act Third Report of Session 2021-22* (HL 31, HC 89, 2021-22) 17-18.

The IHRAR also questioned whether sections 3 and 4 HRA require amendment. S.4 will be addressed here as it was central to the prisoner voting clash. In terms of s.4, the IHRAR questioned whether it should 'be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament'.[38] Ultimately, it was concluded that due to 'practical and principled problems' such changes were not required.[39] This thesis also argues that reform of the 'initial process' would be unnecessary, as prisoner voting revealed that if courts alter their approach to the double filter mechanism to reflect the approach put forward in chapter four, this should enhance multi-institutional involvement.[40] Upholding rights is a 'shared responsibility'.[41] The suggested approach to the double filter mechanism ensures the potential for political consideration of the rights issue is maximised. It also demonstrates that domestic courts are active actors in addressing breaches of Convention rights, showing they are willing to utilise their powers under the HRA, rather than leaving rights issues in a judicial vacuum. Whilst prisoner voting shows that multi-institutional involvement does not guarantee improved rights protection, it arguably increases its likelihood as the majority of declarations have been remedied.

Prisoner voting therefore illustrates that in terms of reform, the proposed possible changes to the mechanisms of s.2 and s.4 would be unwarranted. S.2 accords the judiciary the necessary flexibility and s.4 does not warrant change, rather the judiciary should instead alter their approach to the double filter mechanism. Whether the judiciary use these sections to improve rights protection is determined by the context of the case, but courts should strive to uphold rights.

Further, prisoner voting demonstrates that reform plans to give greater responsibility to political actors will have some limits. For instance, the impugned legislation which disenfranchised prisoners was enacted through Parliament[42] and the clash that followed was then shaped and caused by political intransigence and hostility. Therefore, in terms of some

[38] IHRAR (n.20) 180.
[39] ibid 224, see also 221-223.
[40] Cf for ideas regarding s.4 reform, see T. Hickman, 'Bill or Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model' [2015] NZLR 35.
[41] M. Hunt, H. Hooper and P. Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 2.
[42] N.B. s.3 RPA 1983 was enacted prior to the HRA, but the RPA 2000 was passed with a statement of compatibility.

issues, political actors may consistently fail to protect rights.[43] Nevertheless, it remains important to try and encourage better political engagement, as preferably political actors *should* strive to take their responsibilities for upholding 'rights seriously' (section 7.3.2).[44] As the IHRAR states 'what is needed is for Parliament to exercise its scrutiny role robustly', as this will aid 'a more effective and more collaborative form of rights protection'.[45] Parliament should strive to utilise its role under the HRA more effectively.[46] For instance, as Lock, De Londras and Hidalgo argue, 'Parliament needs to more fully and consistently engage with rights in its pre- and post-legislative work'.[47] In terms of s.4, after a declaration, there must be the political will and means to 'fully' engage with the rights issue. Similarly, where the ECtHR has found a violation, there must be political will to implement the judgment (section 7.3.2).[48]

Moving on from the IHRAR to briefly consider the Government's proposals regarding the modern Bill of Rights, it is notable the proposals assert familiar sceptical human rights rhetoric, evidenced by plans to 'restore common sense' and 'reverse the mission creep' of 'human rights law'.[49] Reflecting this, in terms of s.2 HRA, the Government criticises the 'over-reliance on Strasbourg case law.[50] This glosses over the more nuanced judicial approach to s.2. Consequently, the Government propose as 'option 1' that domestic law should be prioritised and that domestic courts are *not* required to apply ECtHR jurisprudence.[51] This seeks to distance the UK from Strasbourg and in doing so, exacerbates the concerns regarding a gap emerging between UK and Strasbourg jurisprudence. Whilst the Government intends to enhance domestic rights protection, such proposals may result in domestic rights protection being weakened, with more claimants having to litigate in Strasbourg, as the HRA will be 'ECHR minus, so that applicants will have to apply to Strasbourg to obtain the full effects of Convention rights'.[52] The consultation also proposes that the Supreme Court must be strengthened with it having 'ultimate responsibility for the interpretation of the rights'.[53] The

[43] N.B. Feldman contends it is 'unreasonable to expect politicians to have human rights as their primary focus' in D. Feldman, 'Democracy, Law, and Human Rights: Politics as Challenge and Opportunity' in M. Hunt, H. Hooper and P. Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 107.
[44] ibid 111.
[45] IHRAR (n.20) 226.
[46] see Hunt, Hooper and Yowell (n.41).
[47] D. Lock, F. de Londras, P. Hidalgo, 'Parliamentary Engagement with Human Rights during COVID-19 and the Independent Human Rights Act Review' (*UKConstLBlog,* 3 March 2021) <http://ukconstitutionallaw.org> accessed 14 April 2022.
[48] See A. Donald and P. Leach, *Parliaments and the European Court of Human Rights* (OUP 2016) 232-242.
[49] MoJ, *HRA Reform* (n.13) 5.
[50] ibid 62.
[51] ibid 95.
[52] ibid.
[53] ibid 5, 97.

Government states there should be an emphasis on upholding 'fundamental rights' with a 'permission stage' to filter claims.[54] The importance of democratic decision-making is repeatedly asserted.[55] Whilst space precludes full analysis of these proposals, they are more extensive than the IHRAR's recommendations, with contentious consequences if implemented.

Further, in terms of prisoner voting, it is unclear how much difference these proposals, if implemented at the time of the controversy, would have made to the clash. For instance, regarding 'option 1' in relation to s.2, this might have encouraged domestic courts to depart from Strasbourg jurisprudence. Yet it is unlikely this would have significantly changed the trajectory of the clash, as the political branches were largely accorded latitude from the domestic courts. More generally, such changes might have further supported domestic intransigence, which might have exacerbated tensions between UK institutions and Strasbourg - but it seems unlikely the ultimate outcome of the clash would have been changed.

It is evident that the different institutional approaches and attitudes to the protection of prisoners' voting rights, and rights protection more broadly, were fundamental in contributing to the controversy. For instance, domestic political resistance to *Hirst* was central to the clash and judicial reluctance to inflame political ire informed the way the domestic judiciary utilised their powers under the HRA. Therefore, prisoner voting highlights how the Government's reform proposals (described above) are unnecessary and that generally domestic rights protection mechanisms do not require change.[56] For instance, as discussed, s.2 HRA already provides for sufficient flexibility. This does not mean that reform is futile but that the Government's reform proposals are misdirected. The Government's proposals are informed by sceptical rights discourse, they come from a place of largely misguided negativity, which means the reform proposals are framed defensively. This means the resultant proposals could operate to intensify inter-institutional tensions and contribute to rights protection being undermined. Therefore, instead, as will be further discussed below, reform should strive to positively encourage multi-institutional robustness to redress rights violations.

7.3.2 ECHR reform

[54] ibid 65.
[55] ibid e.g. 7, 52, 54-57, 68-69.
[56] MoJ, *HRA Reform* (n.13) 69. N.B. the Government also seek to replace s.3 HRA with 'an alternative provision setting out clearly how to interpret legislation' - space precludes analysis.

It is now necessary to consider what, if anything, can be learnt from prisoner voting in terms of ECHR reform. In the CM's 2019 Annual Report, it was noted the ten-years of reform to the ECtHR initiated at Interlaken led to positive developments resulting in improvements to the 'efficiency of the execution process'.[57] This was due to changes in the CM's 'working methods' which 'improved the prioritisation and transparency' of the CM and also the 'reinforcement of domestic capacity'.[58] Yet the Report notes there remains room for improvement, such as by enhancing 'parliamentary involvement in the domestic execution process' and addressing 'resistance to execution'.[59] Further, there is a 'need to boost the effectiveness of the supervisory framework' by, for instance, reviewing 'the adequacy of the resources devoted to execution at each level'.[60] The Report concludes that 'concrete steps and effective political action' are needed to 'better secure the implementation' of ECtHR judgments.[61] However, the Report does not elucidate what these 'concrete steps' should be. The Steering Committee for Human Rights (CDDH) also conducted an evaluation of the Interlaken reform process and states that implementation of the ECHR nationally 'had been improved by measures which raise awareness of the Convention standards among all stakeholders'.[62] Further, the CDDH report notes that 'national implementation' of the ECHR may be enhanced by ensuring there are measures to 'prevent specific breaches of the Convention' or where a breach occurs, ensuring that 'an effective remedy' can be provided domestically.[63] The CDDH praised the deepened dialogue between 'different actors' and concluded that Interlaken, as also supported by 'the effects of Protocol No.14 … has led to significant advances, which also bode well for the system's capacity to meet new challenges and to consolidate and further develop the progress made' and therefore, 'major revision of the system' is not necessary.[64]

Despite this, Strasbourg's role in securing effective execution of judgments still requires improvement. Although most of the ECtHR's 'judgments are executed without any particular

[57] Council of Europe 13th Annual Report of the Committee of Ministers, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights 2019* (June 2020) 18 ('13th Annual Report'); cf L. Glas, 'From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights?' (2020) 20 HRLRev 121.
[58] ibid 18.
[59] ibid 19.
[60] ibid 20.
[61] ibid.
[62] ibid.
[63] ibid 21.
[64] Steering Committee for Human Rights (CDDH), *The Interlaken Process: Measures taken from 2010 to 2019 to secure the effective implementation of the European Convention on Human Rights* (Council of Europe 2020) 24-25 (CDDH 2019) <https://rm.coe.int/processus-interlaken-eng/1680a059c7> accessed 14 April 2022.

difficulty', cases which are politically contentious or technically complex can cause issues.[65] In terms of the ECtHR's role, increasing the procedural legitimacy of the ECtHR's judgments could enhance States' compliance with its judgments.[66] However, where compliance issues arise in controversial cases such as prisoner voting, there are limits to the ECtHR's role in aiding effective compliance. As discussed in chapter five the ECtHR applied the pilot judgment procedure and adopted a more prescriptive approach by specifying that legislative amendments were required.[67] These tools can 'facilitate' and support the CM's 'monitoring task'.[68] Such tools demonstrate that despite the renewed emphasis on subsidiarity this does not necessarily equate to the ECtHR according States increased deference in all cases – the ECtHR *will* step in when required. Yet, in terms of prisoner voting, the deployment of the pilot judgment procedure and specification of general measures proved insufficient, as whilst they may aid compliance in some cases, they cannot 'guarantee' that the measures will be implemented domestically.[69] Moreover, prescription could also further inflame pre-existing controversy.

Reform has also focused on improving dialogue between institutions, as exemplified by Protocol 16 and the Copenhagen Declaration, in which it was stated that: 'For a system of shared responsibility to be effective, there must be good interaction between the national and European level' which entails:

> 'constructive and continuous dialogue between the State Parties and the Court on their respective roles in the implementation and development of the Convention. … Such interaction may anchor the development of human rights more solidly in European democracies'.[70]

The Declaration noted that 'dialogue' can be facilitated by 'third-party interventions' and through the Grand Chamber's 'development of the case law'.[71] Regarding prisoner voting, the UK made a third party intervention in *Scoppola,* and whilst the principles in *Hirst* were

[65] Steering Committee for Human Rights (CDDH), *CDDH report on the longer-term future of the system of the European Convention on Human Rights* (Strasbourg 11 December 2015) 87 <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> accessed 14 April 2022.
[66] Note CDDH 2019 (n.64) 72, states 'clear and consistent case-law is a prerequisite for an effective national implementation of the Convention, facilitates the execution of the Court's judgments and helps reducing the Court's case-load'.
[67] *Greens and MT v United Kingdom* (2011) 53 EHRR 21, para 122.
[68] H. Keller and C. Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2016) 26(4) EJIL 829, 839-840.
[69] ibid 840.
[70] High Level Conference meeting in Copenhagen at the initiative of the Danish Chairmanship of the Committee of Ministers, Copenhagen Declaration (12-13 April 2018) ('Copenhagen Declaration').
[71] ibid 4.

affirmed, there was a partial softening of *Hirst*, as the ECtHR confirmed that broader restrictions could be placed on voting rights.[72] Arguably, this softening was influenced by the UK's sustained non-compliance and the general negative political dialogue. However, it exposed a chip in Strasbourg's judgments which was subsequently emphasised in *Chester* to support the decision not to grant a declaration.[73] This demonstrates how such "dialogue" does not necessarily result in improved outcomes for rights. More broadly, whilst Protocol 16 has been extolled as the dialogue protocol, as yet, there have been only been two advisory opinions[74] and the utility of the Protocol has been questioned.[75] Whether such advisory opinions develop into an effective tool for dialogue remains to be seen – currently, the UK has not ratified Protocol 16. It could be questioned whether reform focused on dialogue might therefore be misplaced, as dialogue may arguably be ineffective in achieving 'shared responsibility' and enhancing rights protection. Yet conversely, there are instances where dialogue has been effective.[76] It is clear therefore that whether *constructive* dialogue arises is context dependent.[77] Arguably, future reform proposals should define 'constructive' dialogue and ensure there is greater clarity regarding how constructive dialogue can be achieved and also what such dialogue can realistically achieve. Yet it may be challenging to effectively translate abstract terminology into more precise obligations and this is something that requires further research.

Further, regarding the ECtHR's role in 'post-judgment' compliance, due to Article 46(2) ECHR, the ECtHR must be careful to show 'respect for the institutional balance set up by the

[72] C. Harlow, 'The Human Rights Act and 'Coordinate Construction': Towards a 'Parliament Square' Axis for Human Rights?' in N.W. Barber, R. Ekins & P. Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 163; *Scoppola v Italy (No.3)* (2013) 1 Costs LO 62, (2013) 56 EHRR 19, para 108.

[73] R. Ziegler, 'The missing right to vote: The UK Supreme Court's judgment in Chester and McGeoch' (*UKConstLBlog*, 24 October 2013) <http://ukconstitutionallaw.org)> accessed 14 April 2022 (emphasis added); *Chester* (n.27) [101] (Hale JSC).

[74] See Advisory opinions under Protocol No. 16: <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/advisoryopinions&c=> accessed 14 April 2022; L. Lavrysen, 'The Mountain Gave Birth to a Mouse: The First Advisory Opinion Under Protocol No. 16' (*Strasbourg Observers*, April 24 2019) <https://strasbourgobservers.com/2019/04/24/the-mountain-gave-birth-to-a-mouse-the-first-advisory-opinion-under-protocol-no-16/> accessed 1 February 2022; L. Lavrysen, 'Advisory Opinion No. 2: A Slightly Bigger Rodent' (*Strasbourg Observers*, June 5 2020) <https://strasbourgobservers.com/2020/06/05/advisory-opinion-no-2-a-slightly-bigger-rodent/> accessed 14 April 2022.

[75] see K. Lemmens, 'Protocol no 16 to the ECHR: managing backlog through complex judicial dialogue' (2019) 15(4) EuConst 691, 692; K. Dzehtsiarou and N. O'Meara, 'Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?' (2014) 34(3) LS 444, 445; cf N. Vogiatzis, 'The Second Advisory Opinion by the Strasbourg Court under Protocol 16: A Contextual Analysis' [2021] European Convention on Human Rights Law Review 1.

[76] e.g. *R v Horncastle* [2010] 2 AC 373, [2010] 2 WLR 47.

[77] A. Kavanagh, 'The Lure and Limits of Dialogue' (2016) 66(1) UTLJ 83, 120.

ECHR', which accords primary responsibility for monitoring compliance to the CM.[78] Therefore, as discussed in chapter six, in considering the ECtHR's role beyond prisoner voting it was noted that Protocol 14 reinforced the ECtHR's role in compliance, allowing for referrals to the ECtHR (Article 46(3) and 46(4) ECHR).[79] Keller and Marti advocate strengthening the ECtHR's role to review non-compliance where requested by the applicant upon the expiry of a 'binding time frame provided by the Court', to enable 'legal accountability' where political channels of compliance have 'failed'.[80] This would enhance 'shared responsibility'.[81] Yet by contrast, strengthening the ECtHR's role could highlight the political failings of the CM, exposing deficits in the Council of Europe's political institutions.[82] It is also questionable whether reform aimed at strengthening post-judgment legal accountability would necessarily instigate compliance, as it might instead further entrench political recalcitrance.[83] This shows the complexity of ensuring effective compliance in especially controversial cases, particularly post-judgment, with the ECtHR's role being potentially limited in its effectiveness.[84]

Therefore, with the legal means of enhancing compliance arguably being limited, reform focusing on the political role in facilitating compliance might be more effective. Whilst the UK is generally 'a high compliance State', prisoner voting illustrates that intractable issues may arise in terms of ensuring the effective execution of judgments.[85] As discussed in chapter six, the CM's role in supervision was enhanced by the introduction of the 'twin track system of supervision' and in relation to prisoner voting, the CM placed the UK under enhanced supervision.[86] However, the steps taken by the CM to ensure compliance were undermined by the CM sanctioning the administrative amendments. Yet, notably, reforms have consistently sought to strengthen subsidiarity, as illustrated by Protocol 15[87] and therefore, considering Strasbourg's subsidiary function and also the CM's political composition, political concessions

[78] Keller and Marti (n.68) 845.
[79] Copenhagen Declaration (n.70) 4.
[80] Keller and Marti (n.68) 850.
[81] ibid.
[82] F. de Londras and Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights' (2017) 66 ICLQ 467, 490.
[83] ibid 468, 486-489.
[84] ibid 468, 484-486.
[85] ibid 475.
[86] Department for the Execution of Judgments of the European Court of Human Rights, CM/Inf/DH(2010)37, *Supervision of the execution judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Plan – Modalities for a twin-track supervision system* (6 September 2010) 2.
[87] Donald and Leach, *Parliaments and the ECtHR* (n.48) 135; see N. Vogiatzis, 'When 'reform' meets 'judicial restraint': Protocol 15 amending the European Convention on Human Rights' (2015) 66(2) NIrLegalQ 127.

might be necessary, possibly leading the CM to sanction minimal compliance.[88] However, in some cases, especially those which are politically controversial, arguably the increased emphasis on subsidiarity can have undesirable consequences post-judgment, leading to suboptimal political concessions which undermine rights.[89] This can have a damaging effect on the effectiveness of the Convention system, demonstrating that sustained political opposition can "pay off", resulting in the dilution of the ECtHR's judgments. Therefore, whilst it is important to retain flexibility regarding the execution of judgments to give effect to Strasbourg's subsidiary status, where the case is especially controversial and the ECtHR has adopted a more prescriptive approach, by for instance, specifying that legislative amendment is required, it is also imperative that there is a level of cohesion between the standards set by the ECtHR and those sanctioned as acceptable by the CM.[90] For instance, this thesis proposes that where the CM's endorsement of State's amendments would fundamentally override, undermine or contradict the ECtHR's judgment, then the CM should refrain from authorising this as compliance. The CM could communicate its findings via its action reports.[91] This would help ensure the ECtHR's judgments are not excessively diluted. However, evidently the relationship between the CM's and the ECtHR's roles in monitoring compliance is complex and possible reform requires further research. As part of this research, the role of other Strasbourg institutions such as the Parliamentary Assembly of the Council of Europe (PACE) in ensuring compliance would also require further consideration (space precludes this discussion).[92]

Moreover, due to the central role of Contracting Parties in implementing judgments, further reform could occur at the domestic level.[93] This illustrates that there is an inevitable interconnection between domestic and European issues – discussion of European reform leads to consideration of domestic reform. As Paraskeva argues, 'one of the basic elements of the ECHR system is the balance between national and international protection; both components

[88] A. von Staden, *Strategies of Compliance with the European Court of Human Rights* (University of Pennsylvania Press 2018) 213.
[89] M.I. Vila, 'Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights' (2017) 15(2) IJCL 393, 402.
[90] see CDDH 2019 (n.64) 80 details the ways the ECtHR and the CM engage in dialogue.
[91] N.B. exactly how this would be implemented in institutional terms requires further research.
[92] A. Donald and P. Leach, 'The Role of Parliaments Following Judgments of the European Court of Human Rights' in M. Hunt, H. Hooper and P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 81.
[93] 13th Annual Report (n.57) 19.

must function effectively if the system is to work'.[94] Reform to the ECtHR has repeatedly recognised the importance of 'shared responsibility'.[95] However, as the CDDH report notes, 'the absence of political will to execute a judgment' represents an on-going challenge.[96] Although the UK's 'formal' compliance record is good, the UK tends to opt for minimalist compliance.[97] Where the ECtHR is more prescriptive, the 'sovereignty costs' generally 'increase', which might reduce State's willingness to comply.[98] As Von Staden argues, when such 'costs … become too large in the eyes of the relevant decision-makers, other considerations, such as conflicting demands of rival norms or instrumental cost-benefit considerations, may trump the pro-compliance norm'.[99] Determining when costs become too large, depends on a mixture 'country-, context-, and issue-specific factors'.[100]

Prisoner voting demonstrates that despite the normative pull of compliance with the ECtHR's judgments being challenged, it still exerted some force as there was some reluctant engagement from the political branches with Strasbourg.[101] Yet any residual normative pull was overshadowed by the costs of compliance which informed the excessively minimalist outcome.[102] These costs were magnified by a "snowballing" of issues which further eroded political will to comply. For instance, chapter six demonstrated how the negative political perception regarding prisoner voting was reinforced by broader public and media discourse. As Von Staden notes, the issue became 'entangled with the broader issue of the UK's continued involvement in the Convention scheme, and of a domestic bill of rights'.[103] A cycle of condemnation can lead to and/or exacerbate a snowballing effect, in which the actual rights issue gets lost in broader political agendas, undermining rights protection. As Donald and Leach argue, paradoxically, the UK has a good implementation record, and yet there is also mounting negative discourse regarding the ECtHR.[104] There is an increasingly 'populist tone' which 'appears at times wilfully misinformed' and is 'driven as much by opportunism as by

[94] C. Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At Home' (2008) 12(3) IJHR 415, 438.
[95] e.g. High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration (19 February 2010); High Level Conference on the Future of the European Court of Human Rights Brighton Declaration (19-20 April 2012) ('Brighton Declaration').
[96] CDDH 2019 (n.64) 24; see also, E. Mottershaw and R. Murray, 'National responses to human rights judgments: the need for government coordination and implementation' [2012] EHRLR 639, 645.
[97] Von Staden (n.88) 144.
[98] ibid 77, 103.
[99] ibid 39.
[100] ibid.
[101] ibid 140.
[102] ibid.
[103] ibid.
[104] Donald and Leach, *Parliaments and the ECtHR* (n.48) 232.

principled reservations about the constitutional proprietary of review by a supranational human rights court'.[105]

Regarding prisoner voting, there was a proliferation of negative discourse against the *Hirst* judgment. Negative discourse can have a corrosive effect and make the 'normative compliance pull' of the ECHR less compelling.[106] This undermining of the normative compliance pull *plus* the increased political costs associated with the judgment, increased the likelihood of the UK opting for minimalist compliance.[107] Therefore, building political willingness to comply and domestic institutional resilience against snowballing negativity is desirable. However, this might be difficult to achieve in practice. As discussed in chapter two, rights *are* 'contestable'[108] and such contestability can generate disagreement and potentially conflict. Not all rights issues provoke conflict and some rights issues attract more negativity than others. However, prisoner voting demonstrates that political disagreement with judicial interpretations of rights can be conflict-ridden. Of course, normatively, it would be preferable that where conflict arises, such conflict results in constructive outcomes for rights. But the reality of conflict is that at times it is destructive for rights.

Therefore, to build institutional willingness, resilience and capacity, arguably Parliament's role in securing compliance could be enhanced.[109] Indeed, the CM's Annual Report emphasised 'the importance of parliamentary involvement in the domestic execution process'.[110] As Donald and Leach argue, Parliament should be involved as soon as possible to consider 'justificatory arguments' and 'hold governments to account'.[111] This might encourage greater political willingness to redress rights issues, perhaps bolstering institutional resilience against broader negative discourse. Notably, the Government propose in their consultation that a formal Parliamentary process should be established for considering an adverse ECtHR judgment.[112] This process may include 'debate' in Parliament, enabling the Government 'to

[105] ibid.
[106] Von Staden (n.88) 7, 39, 103.
[107] ibid 103.
[108] R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (CUP 2011) 35-36.
[109] A. Donald and A.K. Speck, *Handbook for parliamentarians: National parliaments as guarantors of human rights in Europe* (PACE September 2018) <http://www.assembly.coe.int/LifeRay/JUR/Pdf/Handbook/HumanRightsHandbook-EN.pdf> accessed 14 April 2022; Donald and Leach, *Parliaments and the ECtHR* (n.48) 72.
[110] 13th Annual Report (n.57) 19.
[111] A. Donald, 'The Implementation of European Court of Human Rights Judgments Against the UK: Unravelling the Paradox' in K. Ziegler, E. Wicks and L. Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart 2015) 161-162.
[112] MoJ, *HRA Reform* (n.13) 86-87.

test the temperature of Parliament, either on a proposed course of action to address an adverse ruling, or by holding a vote on a particular issue'.[113] This might beneficially increase Parliamentary engagement with ECtHR judgments. Yet it is questionable whether this process would necessarily facilitate *constructive* engagement with ECtHR judgments – such debates could reflect the backbench prisoner voting debate, which largely avoided engaging with *Hirst*, but rather, was used to resist Strasbourg. Further, the Government proposes where there is an adverse ruling it 'intends to include a legislative provision that affirms Parliamentary sovereignty'.[114] Therefore, the Government states these proposals constitute a 'democratic shield', ensuring that 'Parliament … has the last word on how to respond to adverse rulings'.[115] It is unclear whether this shield encompasses a form of democratic override - as discussed in chapter six, enshrining such a mechanism would be complex and could have undesirable consequences. Overall, the Government's proposals seem premised on a defensive stance towards Strasbourg and it is questionable whether they would be used to foster compliance.

Therefore, the JCHR continues to represent an important counterbalance to possible political negativity in ensuring constructive parliamentary engagement with human rights and promoting rights compliance. However, the JCHR remains limited in what it can achieve, as disagreement about rights is often inexorable and this can create obstacles which the JCHR is unable to redress. Moreover, the JCHR is also limited by the fact it is just one Committee.[116] Politics can be unwieldly and once political rhetoric takes hold the JCHR may be constrained. This shows how reinforcing institutional willingness and resilience is beset with challenges. Yet it remains preferable for political institutions to safeguard against the snowballing of rights issues – otherwise, the purpose of rights protection risks being undermined. The JCHR still has a key role in this regard.

Crucially, therefore, *multi*-institutional robustness is required. For instance, whilst deference or restraint often feature in judicial decision-making,[117] domestic courts should strive to adopt a more consistent approach to their powers under the HRA. Further, Mottershaw and Murray suggest that due to the executive having primary responsibility in securing implementation of judgments, the 'co-ordinating role on the part of the executive is fundamental' and could be

[113] ibid 86.
[114] ibid 87.
[115] ibid 86-87.
[116] Lock, de Londras, Hidalgo, 'Parliamentary Engagement' (n.47).
[117] A. Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 UTLJ 23, 27.

improved – again, this is an issue requiring further research.[118] The UK Parliament should have greater democratic oversight of the executive's role in human rights issues at the supranational level. There are also steps that Strasbourg's institutions could take to increase the likelihood of political compliance, such as by further enhancing domestic parliament's involvement. Moreover, the ECtHR should ensure its judgments are as procedurally legitimate as possible,[119] especially where the 'preconditions' for conflict are evident.[120] Further, a level of institutional cohesion between the ECtHR and CM should be ensured and the CM should refrain from sanctioning hollow forms of compliance. Bolstering institutional robustness and emphasising the importance of a combined institutional effort in upholding rights could therefore aid reform by increasing the likelihood of effective compliance.

[118] Mottershaw and Murray (n.96) 640, 652-653.
[119] Brighton Declaration (n.95) 7.
[120] K. Dzehtsiarou, 'Prisoner Voting Saga: Reasons for Challenges' in H. Hardman and B. Dickson (eds), *Electoral Rights in Europe Advances and Challenges* (Taylor and Francis 2017) 94.

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