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Case Comment

"Difficult and slippery terrain": Hansard, human rights and Hirst v UK

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European Convention on Human Rights 1950 Protocol 1 Art.3

Human Rights Act 1998 s.2

Bill of Rights 1689 Art.9

Consumer Credit Act 1974 s.127 (3)

Cases: Hirst v United Kingdom (74025/01) (2005) 155 N.L.J. 1551 (ECHR (Grand Chamber))

Wilson v First County Trust Ltd (No.2) [2003] UKHL 40; [2004] 1 A.C. 816 (HL)

***P.L. 209** In *Hirst v UK (No.2)* the Grand Chamber of the European Court of Human Rights ("the Court") held, by a majority of twelve votes to five, that the United Kingdom's blanket ban on convicted prisoners voting in general and local elections constituted a breach of Art.3 of Protocol 1 of the European Convention on Human Rights ("the Convention").¹ In so doing it disagreed with the domestic court which had rejected the claims of three prisoners that the ban constituted a breach of their Convention rights.² The case raises serious issues on the question of prisoners' disenfranchisement.³ More generally, and perhaps more importantly, it raises serious issues concerning the adjudication of claims under the Human Rights Act 1998 ("HRA"). In particular the Court suggested that a failure by Parliament to give adequate reasons for its enactments may result in a finding that those measures violate Convention rights. This approach is at odds with a foundational principle of the United Kingdom's constitution as expressed in Art.9 of the Bill of Rights 1689 that: "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".⁴

This article will set out, very briefly, the background to the ban on prisoner voting and the challenge to it in the UK and Strasbourg courts. It will then examine the apparent conflict between the approaches of the Grand Chamber and the House of Lords on the question of the relevance of words spoken in Parliament to the adjudication of human rights claims. Reference will also be made *en passant* to the different approaches adopted by the UK and Strasbourg courts to the vexed question of judicial deference and the margin of appreciation.

Prisoner disenfranchisement

Section 3(1) of the Representation of the People Act 1983 provides:

"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."

***P.L. 210** This section re-enacted the ban imposed by s.4 of the Representation of the People Act 1969 which itself dated back to s.2 of the Forfeiture Act 1870 and before that to the common law principle that a convicted felon suffered "civic death".

The prohibition does not apply to those imprisoned for contempt of court⁵ or those imprisoned for non-payment of fines.⁶ The Representation of the People Act 2000 relaxed the provisions by extending the exclusion from the ban to prisoners on remand or unconvicted mental patients.⁷ At the time of the passage of the 2000 Act George Howarth M.P., speaking for the government, stated that it was "right and appropriate that those ... convicted and serving a prison sentence should be deprived

of the right to vote as part of their punishment".⁸

The challenge to the ban on convicted prisoner voting

Article 3 of Protocol 1 ECHR requires that states "undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". Whilst not apparent on its face, the article has been interpreted as conferring an individual "right to vote".⁹ This right is not absolute: limitations may be imposed as long as they essentially pursue a legitimate aim and are proportionate.¹⁰ The European Court has held, however, that states are entitled to a wide margin of appreciation in Art.3 of Protocol 1 ECHR cases since there are "numerous ways of organising and running electoral systems and a wealth of differences ... in historical development, cultural diversity and political thought within Europe which it is for each ... state to mould into their own democratic vision".¹¹

Prior to the litigation in *Hirst* the European Commission on Human Rights had held that prisoner disenfranchisement in various circumstances did not violate Art.3 of Protocol 1 ECHR. Whilst the right to vote was considered vital in the Convention's scheme, helping to safeguard the integrity of the representative democracy considered to be so essential to the protection of human rights, it could be overridden in individual prisoner voting cases due to the wide margin of appreciation afforded to states.¹²

It was against this somewhat unpromising Strasbourg background that three convicted prisoners, Hirst, Martinez and Pearson, brought their challenge in the English courts seeking a declaration that s.3(1) of the Representation of the People Act 1983 was incompatible with Art.3 of Protocol 1 ECHR.

***P.L. 211** Kennedy L.J. declined to make a declaration of incompatibility, finding that the ban pursued a legitimate aim¹³ and did not constitute a disproportionate interference with Art.3 of Protocol 1 ECHR.¹⁴ In reaching this conclusion he said that "in deference to the legislature courts should not easily be persuaded to condemn what has been done".¹⁵ The United Kingdom's position on the "broad spectrum" of approaches among democratic societies was "plainly a matter for Parliament and not the courts".¹⁶

This decision attracted criticism by academic commentators primarily on the grounds that the court had been overly deferential to the legislature's decision to impose a complete ban on convicted prisoner voting.¹⁷ As a result of this deference the court only engaged in the most perfunctory analysis of whether the interference was in pursuit of a legitimate aim and was proportionate.

Hirst v UK (No.2)

Having been refused leave to appeal, Hirst applied to the European Court. The Fourth Chamber of the Court found that his rights under Art.3 of Protocol 1 ECHR had been violated.¹⁸ The government's request that the case be referred to the Grand Chamber was acceded to.

Having reviewed the practice elsewhere in Europe as well as in Canada and South Africa, the Court took the opportunity to restate and elaborate upon the Art.3 of Protocol 1 ECHR principles outlined above.¹⁹ On the particular facts it went on to consider whether the UK government's stated aims of the ban--to help prevent crime by "sanctioning the conduct of convicted prisoners" and to "enhanc[e] civic responsibility and respect for the rule of law"--were legitimate. Whilst hinting at some reservations about the efficacy of achieving these aims through a ban on voting, the Court accepted that the ban "may be regarded as advancing these aims" and found "no reason in the circumstances ... to exclude these aims as untenable or *per se* incompatible with the right guaranteed under [Art.3 of Protocol 1 ECHR]".²⁰

The Court then went on to consider the proportionality of the ban. Even though it only impacted on convicted offenders whose criminality was serious enough to warrant a custodial sentence, it still encompassed a wide range of offenders--from those sentenced to "one day to life" and from "relatively minor offences" to those of the "utmost gravity". Even in the case ***P.L. 212** of offenders whose offences were serious enough to warrant an immediate custodial sentence, it was possible that the sentencing judge would impose a non-custodial sentence that would not deprive the individual of the vote. Furthermore the domestic courts, in sentencing to custody, made no reference to disenfranchisement and it was "not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there [was] any direct link between the facts of any individual case and the removal of the right to vote". Despite these points it is interesting that the

Court's judgment omits some of the substantive points going to the disproportionality of the measure that had been relied on by the Chamber.²¹ Instead the Court subjected the *decision-making process* of the domestic authorities to more intense scrutiny in order to assess whether the United Kingdom had overstepped its margin of appreciation.

First the Court considered the deliberations in Parliament. Emphasis was placed on the fact that:

"[T]here [was] no evidence that Parliament had ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote ... it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote."²²

With regard to the position adopted by the domestic court the Court noted that it had treated the matter as one "for Parliament and not for national courts ... [it] therefore did not undertake any assessment of the proportionality of the measure itself".²³

The government's argument²⁴ that there was no European consensus on the question of prisoner disenfranchisement was held not "of itself to be determinative of the issue". The margin of appreciation may be wide, but it was "not all embracing". Such a general, automatic and indiscriminate restriction on a vitally important Convention right had to be seen as falling outside any acceptable margin of appreciation, however wide that margin might be.²⁵

Judicial reference to parliamentary debates

There are clearly problems with a method of human rights adjudication that requires a court to assess the adequacy of parliamentary debate on an enactment **P.L. 213* and, if that debate is found wanting, to take this into account in its assessment of the measure's proportionality. These problems were alluded to by the Court's dissentient minority who commented that if, during the parliamentary passage of the Representation of the People Act 2000, a majority of M.P.s had disagreed with the opinion that it was right for convicted prisoners to lose the right to vote, "it would have been open to them to decide otherwise". Furthermore, to the majority's observation that there was not any substantive debate on the matter in Parliament, they said that "it [was] not for the Court to prescribe the way in which national legislatures carr[ied] out their legislative functions".²⁶ In their joint concurring opinions Judges Tulkens and Zagrebelsky expressed serious reservations about the Court taking into account the adequacy of the legislative debate:

"This is an area in which two sources of legitimacy meet, the Court on the one hand and the national parliament on the other. This is difficult and slippery terrain for the Court in view of the nature of its role, especially when it itself accepts that a wide margin of appreciation must be given to the Contracting States."²⁷

The terrain becomes yet more treacherous when one transposes this aspect of the judgment to the United Kingdom as would seem to be required by s.2 HRA.²⁸

Recourse to parliamentary debates has been permitted in English courts in limited circumstances in order to resolve ambiguities in statutory wording ever since the House of Lords' decision in *Pepper (Inspector of Taxes) v Hart*.²⁹ However the judgment of the Court would seem to require domestic courts to go far beyond this: to require them to undertake an assessment of the very adequacy of Parliament's reasoning for its enactments. Where the reasoning does not pass muster, or where there has been no significant debate at all, this itself may result in the measure being held to be disproportionate.

The approach of the House of Lords

The question of reference to parliamentary debates for the purposes of assessing the compatibility of primary legislation was considered by the House of Lords in *Wilson v First County Trust Ltd*.³⁰ The case concerned the compatibility of s.127(3) of the Consumer Credit Act 1974 with Convention rights. In the Court of Appeal Andrew Morritt V.C. had considered that in order to decide whether the issue was one on which the courts should defer to the "considered **P.L. 214* opinion of the elected body" it was necessary to "identify the particular issues of social policy which the legislature or the executive thought it necessary to address, and the thinking which led to that issue being dealt with in the way that it was".³¹ "It was one thing" he continued "to accept the need to defer to an opinion based on policy [but] quite another ... to be required to accept, without question, an opinion for which no reason

of policy [was] advanced”.³² Upon examination of the material he found that it provided no answer and “tend[ed] to confuse rather than to illuminate”.³³ This absence of a clear policy aim behind the provision was taken as a factor leading the court to a finding of incompatibility.³⁴

By the time the case came to be considered by the House of Lords this issue had caused so much concern within Parliament that the Speaker of the House of Commons and the Clerk of the Parliaments had taken the highly unusual step of seeking to address the Appellate Committee.³⁵ They argued that there were no circumstances in which it was appropriate for courts to refer to parliamentary debates so as to enable them to assess the compatibility of legislation.

Their Lordships confirmed that the role of the court had changed under the HRA. It did not now simply interpret and apply legislation but was required to “evaluate the effect of primary legislation in terms of Convention rights and where necessary make a declaration of incompatibility”.³⁶ In order to do this it “had to compare the effect of the legislation with the Convention right”.³⁷ It was necessary to assess whether the legislation pursued, in Convention terms, a legitimate objective,³⁸ and was proportionate to the achievement of that objective.³⁹ In order to perform this task it was necessary to assess the “practical effect” of legislation. Although the need would “seldom arise”⁴⁰ and “a cautious approach” was needed⁴¹ it might occasionally be necessary to take into account words spoken “by a minister or, indeed, any other member of either House in the course of a debate on a Bill” as “relevant background information”.⁴² In doing this the court would not be “questioning” proceedings in Parliament or “intruding improperly into the legislative process”. It would “merely be placing itself in a better position to understand the legislation”.⁴³

***P.L. 215** All this was “constitutionally unexceptionable”. Indeed the courts would be failing in the new duty assigned to them by Parliament itself if they were to exclude from consideration relevant background information whose only source was such a statement.⁴⁴ However their Lordships stressed that beyond their use as a source of background material, the content of parliamentary debates had “no direct relevance” in compatibility cases. Lord Nicholls stated emphatically that:

“[I]t is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis ... [it] is not to be judged by the quality of reasons advanced in support of it in the course of parliamentary debate ... Lack of cogent justification in the course of parliamentary debate is not a matter which ‘counts against’ the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute.”⁴⁵

The Court of Appeal had, in suggesting that the debate in Parliament had tended “to confuse rather than illuminate”, crossed the constitutional boundary into the “forbidden territory of questioning proceedings in Parliament”.⁴⁶

Thus the view of the House of Lords is that reference may be made to statements in Parliament as “background information” to ascertain Parliament's policy objective in enacting a particular measure and as one factor in finding out what it had in mind so as to be able to assess the proportionality and hence compatibility of the measure. But an absence of any, or any adequate, reasons advanced in Parliament cannot itself be used as a ground on which to base a finding of incompatibility. For this would constitute a “questioning” of freedom of speech, debates or proceedings in Parliament contrary to Art.9 of the Bill of Rights.

Leaving the door ajar--and unforeseen consequences

The views of the Grand Chamber and the unanimous House of Lords on this issue are therefore diametrically opposed. Indeed the approach of the Grand Chamber in *Hirst* is a European echo of the Court of Appeal's approach so roundly rejected by the House of Lords in *Wilson*. If such methodology had been adopted by the domestic court in *Pearson* this would, according to their ***P.L. 216** Lordships' reasoning, have been contrary to Art.9 and would have contravened the cardinal principle that the “proportionality of a statutory measure is to be judged objectively and not by the quality of the reasons advanced in support of the measure in the course of Parliamentary debate”.⁴⁷

It may be that the difficulties here are caused, in part, by the international undercurrents to the European Court's decision in *Hirst* that made it disinclined to give a stronger, principled judgment on the substance of prisoner disenfranchisement. It maintained, as it had to given the wide diversity of

practice across Europe,⁴⁸ its long held position that states enjoy a wide margin of appreciation when it comes to the restriction of Art.3 of Protocol 1 ECHR rights.⁴⁹ Indeed the Court conceded that the UK government's stated aims of the ban (sanctioning the conduct of convicted prisoners and enhancing civic responsibility) were legitimate.⁵⁰ Restrictions on prisoner voting were not in breach of Art.3 of Protocol 1 ECHR *per se*.⁵¹ The majority fought shy of utilising *principled* arguments. Instead they adopted what at first blush seems like a less far reaching fall-back position; saying that it was essentially *procedural* defects in the United Kingdom's ban which took it beyond its margin of appreciation.⁵² This procedural adjudicative methodology allowed the Court to leave the door ajar for states to retain some restrictions on prisoner voting, as long as their legislatures give good reasons and their courts undertake adequate proportionality analyses of those measures. However the ironic, and no doubt unforeseen, consequence of this muted procedural approach is that, in trying to *limit* the ramifications of its decision, the European Court actually seems to be requiring British courts to behave in a way which is in *conflict* with one of the United Kingdom's cardinal constitutional principles.

***P.L. 217 Resolving the conflict?**

The extent to which British courts will be bound to adopt the adjudicative methodology of the Grand Chamber in *Hirst* would seem to lie in their approach to s.2 HRA.⁵³ Some guidance on the court's role under s.2 was provided by the House of Lords in *Alconbury*. Lord Slynn of Hadley stated:

"Although the [HRA] does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court ..."⁵⁴

some indication of what might be meant by "special circumstances" was provided by Lord Hoffmann:

"[I]f I thought that ... [decisions of the European Court] compelled a conclusion fundamentally at odds with the distribution of powers under the British constitution, I would have considerable doubt as to whether they should be followed."⁵⁵

These dicta are instructive on the question of the extent to which the European Court's judgment in *Hirst* should be used as a template by British courts in their adjudication under the HRA. On the question of judicial deference to Parliament it is clear that this should not fetter the proportionality analysis as it was allowed to do in *Pearson*. This conclusion is perfectly in accord with constitutional principles; there is no "special circumstance" as to why it ought not to be followed. Indeed it has been persuasively argued that the court in *Pearson*, by employing the doctrine of deference at the initial stages of adjudication, neglected its constitutional responsibility to protect human rights.⁵⁶ Given that the right to vote is vital to the effectiveness of that political democracy so central to the scheme of the Convention it might be questioned whether deference is appropriate *at all*.⁵⁷

However, with regard to the European Court's apparent injunction on domestic courts to assess the adequacy of Parliament's reasoning for its enactments, it is clear that this would be "fundamentally at odds with the distribution of powers under the British constitution".⁵⁸ Instead the UK courts, free from the international cross-currents discernible beneath the surface of the Court's judgment, should be able to undertake proportionality analyses based on the substance and objective impact of legislative enactments rather than the adequacy of the reasoning behind those measures.

***P.L. 218 Conclusion**

These are deep constitutional waters and there is not the space to explore them here. A single exploratory probe might be launched however. The constitutional settlement reached at the end of the 17th century, of which Art.9 forms part, laid the foundations for the ultimate sovereignty of Parliament.⁵⁹ In 1998 Parliament decided to give greater protection to human rights, whilst preserving its sovereignty.⁶⁰ It has been argued that the way in which Parliament attempted to achieve this compromise was through the establishment of a constitutional "dialogue".⁶¹ This may be so, but in any truly candid dialogue the courts would not be precluded from looking at and assessing the adequacy of reasons given by the legislature for measures interfering with fundamental rights. The conversational form introduced by the HRA does not, however, permit such candour; for the courts themselves, in obedience to the settlement of 1689 and the principle of sovereignty, have insisted that Parliament does *not* have to justify or even explain its actions. A forum for dialogue may have been created by the HRA in 1998; but it is not one that facilitates a full and frank exchange of views between Parliament and the courts.

Tom Lewis⁶²

P.L. 2006, Sum, 209-218

1. App. no.74025/01; *The Times*, October 10, 2005.
2. *R. (on the application of Pearson and Martinez) v Secretary of State for the Home Department ; Hirst v Att.-Gen.* [2001] EWHC Admin 239; [2001] H.R.L.R. 39.
3. See generally H. Lardy, "Prisoner Disenfranchisement: Constitutional Rights and Wrongs" [2002] P.L. 524; S. Foster, "Prisoners and the Right to Vote--The decision in *Hirst v UK (No.2)*" [2004] E.H.R.L.R. 436.
4. Bill of Rights 1689 (1 Will & Mary, ss.2, c.2).
5. Representation of the People Act 1983, s.3(2)(a).
6. *ibid.* , s.3(2)(c).
7. Representation of the People Act 2000, ss.5 and 2 respectively.
8. *Hansard*, HC Vol.342, col.342 (January 12, 2000).
9. *Mathieu-Mohin and Clerfayt v Belgium* (1987) 10 E.H.R.R. 1 at [47]-[50].
10. *ibid.* , at [52].
11. *ibid.*
12. See, e.g. *Holland v Ireland* [1998] 93 A.D.R. 15.
13. fn.2 above, at [40].
14. *ibid.* , at [41].
15. *ibid.* , at [20].
16. *ibid.* , at [41].
17. fn.3 above. See also R. Edwards, "Judicial Deference under the Human Rights Act" (2002) 65 M.L.R. 859, pp.861-862; F. Klug, "Judicial Deference under the Human Rights Act 1998" [2003] E.H.R.L.R. 125, p.131; C. Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2004), pp.58-59 and 140.
18. *Hirst v UK (No.2)* (2004) 38 E.H.R.R. 40.
19. fn.1 above, at [56]-[71].
20. *ibid.* , at [75]. The Chamber had been more inclined to doubt the legitimacy of these aims, fn.18 above, at [42]-[47]. Judge Costa, in his separate dissenting opinion in the Grand Chamber at [3], also expressed reservations about their legitimacy.
21. fn.18 above, at [49]: e.g. the fact that whether the right to vote was actually lost depended somewhat arbitrarily on whether an election fell within the period of the sentence; the anomaly of the post tariff lifer being detained purely for public *protection* (as was Hirst) and not for punishment--how could the removal of his vote be part of his "punishment"?.
22. fn.1 above, at [79]. See also the Chamber decision, fn.18 above, at [51].

- [23.](#) fn.1 above, at [80]. The Chamber did not comment on this aspect.
- [24.](#) *ibid.* , at [47].
- [25.](#) *ibid.* , at [82].
- [26.](#) Judges Wildhaber (President), Costa, Lorenzen, Klover and Jebens at [7].
- [27.](#) fn.1 above.
- [28.](#) s.2 HRA obliges a court in “determining a question which has arisen in connection with a Convention right” to “take into account any judgment ... of the European Court ... so far as, in the opinion of the court ... it is relevant to the proceedings in which that question has arisen”.
- [29.](#) [1993] A.C. 593. In recent years the decision has been the subject of criticism. See, e.g. Lord Steyn, “*Pepper v Hart* : a Re-examination” (2001) 21 O.J.L.S. 59; A. Kavanagh, “*Pepper v Hart* and Matters of Constitutional Principle” [2005] 121 L.Q.R. 98.
- [30.](#) [2003] UKHL 40; [2004] 1 A.C. 816.
- [31.](#) [2001] EWCA Civ 633; [2002] Q.B. 74, p.93.
- [32.](#) *ibid.* , at 93-94.
- [33.](#) *ibid.* , at 94.
- [34.](#) *ibid.* , at 96.
- [35.](#) Indeed this was the *first time* that the parliamentary authorities had sought to be heard on the use of *Hansard* by the courts, fn.30 above, at [54].
- [36.](#) *ibid.* , at [61] (Lord Nicholls); [116] and [118] (Lord Hope).
- [37.](#) *ibid.* , at [61] (Lord Nicholls).
- [38.](#) *ibid.* , at [61] (Lord Nicholls); [142] (Lord Hobhouse).
- [39.](#) *ibid.* , at [62] (Lord Nicholls); [142] (Lord Hobhouse).
- [40.](#) *ibid.* , at [66] (Lord Nicholls).
- [41.](#) *ibid.* , at [117] (Lord Hope).
- [42.](#) *ibid.* , at [64] (Lord Nicholls); [118] (Lord Hope).
- [43.](#) *ibid.*
- [44.](#) *ibid.* , at [61] (Lord Nicholls); [116] (Lord Hope); [141] (Lord Hobhouse).
- [45.](#) *ibid.* , at [67] (Lord Nicholls). Their Lordships all agreed with this conclusion: Lords Hope at [115]-[118], Hobhouse at [140]-[145], Scott at [173], and Rodger at [178]. See also *R. v Secretary of State for the Education and Employment, Ex p. Williamson* [2005] UKHL 15, [2005] 2 A.C. 246 at [51] (Lord Nicholls); *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] Q.B. 728 at [113]-[114] (Laws L.J.).
- [46.](#) fn.30 above, at [117] (Lord Hope); [143] (Lord Hobhouse).
- [47.](#) *Williamson*, fn.45 above, at [51] (Lord Nicholls).

- [48.](#) According to evidence presented to the Court, 18 states allow prisoners to vote without restriction, in 15 all prisoners are barred from or are unable to vote, and in 13 the prisoners' right to vote can be limited in some other way: [33]-[34].
- [49.](#) fn.1 above, at [61]. The doctrine is based, in part, on the premise that where there is a lack of consensus between European states a degree of latitude should be afforded to national authorities. See, e.g. *Handyside v UK* (1979-80) 1 E.H.R.R. 737 at [48].
- [50.](#) fn.20 above.
- [51.](#) fn.1 above, at [71]. The government argued, at [49], that even if the UK's ban had been more finely tuned so as to affect only the most serious offenders, Hirst, serving a discretionary life term, would *still* have been disenfranchised. The government claimed that the Chamber decision therefore was *in abstracto*. The Court addressed this argument, not altogether adequately, at [72]. See the joint dissenting opinion, fn.26 above, at [8]: "It is ... difficult to see in what circumstances restrictions on voting rights would be acceptable, if not in the case of persons sentenced to life imprisonment".
- [52.](#) For the sort of *substantive* arguments that could have been employed by the Court see the decision of the majority of the Canadian Supreme Court in *Sauvé v Canada (No.2)* (2002) 3 S.C.R. 519, e.g. prisoner disenfranchisement has the effect of *undermining democracy* since the very legitimacy of and obligation to obey the law stemmed from the right of every citizen to vote; entails the *loss of an important means of inculcating democratic values* and social responsibility; *runs counter to the democratic principles* of inclusiveness, equality and citizen participation; is *arbitrary* ; and *lacks a valid criminal law purpose* as there is no evidence that it contributes to deterrence or rehabilitation. See also Lardy, fn.3 above.
- [53.](#) fn.28 above. See R. Masterman, "Section 2 of the Human Rights Act 1998: binding domestic courts to Strasbourg?" [2004] P.L. 725.
- [54.](#) *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2004] 1 A.C. 295 at [26].
- [55.](#) *ibid.* , at [76].
- [56.](#) See, e.g. Lardy, fn.3 above, p.544. See also Edwards, fn.17 above, pp.868-870 and Gearty, fn.17 above, pp.58-59 and 140.
- [57.](#) *ibid.* See also *Sauvé (No.2)* , fn.52 above, at [13]-[19].
- [58.](#) fn.55 above.
- [59.](#) See, e.g. J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999), Ch.7.
- [60.](#) White Paper, *Rights Brought Home*, Cm.3782 (1997), para.2.13.
- [61.](#) See, e.g. Jack Straw M.P., Home Secretary, *Hansard*, HC Vol.314, col.1141 (June 24, 1998); D. Nicol, "Are Convention Rights a no-go Zone for Parliament?" [2002] P.L. 438-448; F. Klug, fn.17 above; R. Clayton, "Judicial deference and 'democratic dialogue': the legitimacy of judicial intervention under the Human Rights Act 1998" [2004] P.L. 33; T. Hickman, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2005] P.L. 306.
- [62.](#) Nottingham Law School, Nottingham Trent University. I would like to thank Peter Cumper, Michael Gunn, Catherine Lewis and Adrian Walters for their helpful comments on an earlier draft. Any errors and omissions remain my own.