PUSHING THE ENVELOPE:

MINIMALIST COMPLIANCE IN THE UK PRISONER VOTING RIGHTS CASES

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A long, arduous journey may soon come to an end—at least for the time being. It is now over thirteen years ago that the European Court of Human Rights (ECtHR), in the 2005 judgment of *Hirst v. The United Kingdom (no. 2)*, declared the UK's blanket ban on prisoner voting to be disproportional and in violation of Article 3 of Protocol No. 1 to the European Convention on Human Rights (ECHR). What initially appeared to be a simple matter of executing a rather straightforward judgment by making appropriate amendments to the domestic law in question—Section 3 of the Representation of the People Act 1983—soon turned into a fundamental political dispute over the proper allocation of competences between the ECtHR and UK, with the latter arguing that the Court had forayed into matters that were more appropriately decided at the national level. A period in which the UK and other states stressed the principle of subsidiarity and states' margin of appreciation in implementing the ECHR ensued, resulting, *inter alia*, in the adoption of Protocol No. 15 (2013) which, upon entry into force, will insert an express reference to the margin into the ECHR's preamble. Without much fanfare, and with public attention transfixed by the BREXIT drama, the UK recently adopted a set of remedial measures which it considers sufficient to close the prisoner voting rights cases, with the Committee of Ministers seemingly concurring. In this contribution, I argue that these measures fail to respond adequately to the judgments and that if the Committee indeed adopts a final resolution on their basis, this would represent a recalibration of applicable compliance standards and an attempt to override parts of the Court's judgments.

Liberal Democracies and the European Court of Human Rights

In a book published last summer titled *Strategies of Compliance with the European Court of Human Rights*, I had argued that liberal democracies, notwithstanding recurrent delays and occasional foot-dragging, will generally make an effort eventually to comply with adverse judgments issued against them. In choosing measures to comply with a judgment, or set of judgments, however, governmental actors should be expected to remain rational actors and seek to minimize political and/or material costs or to retain some decision-making authority for themselves, resulting in what I termed patterns of "minimalist compliance." I tested this expectation against empirical evidence drawn from two comprehensive case studies of two unquestionable liberal democracies, Germany and the United Kingdom. The evidence from both countries generally appeared to buttress the theoretical expectations and, by fall 2017, in nearly all cases examined at least some meaningful steps had been taken to move towards achieving compliance—save for the prisoner voting rights cases involving the UK. I noted that *"Hirst (no. 2)* and its clone cases are the one set of judgments in which the stipulated compliance pull has … failed to bring about any, if only minimally compliant, remedial response to the Court's decision" (140). For the study as a whole, this led me to conclude that "[t]he recurrent deferral of adopting legislative measures to remedy

the violation identified in the UK prisoner voting cases … shows … that … 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 that are believed to be more properly located and exercised at the national level" (206).

Shortly after the manuscript had been finalized, it transpired that new developments were afoot in the prisoner voting rights cases and it now appears that the supervision of their execution by the Committee of Ministers is on the verge of being ended, signaling the recognition that sufficient compliance has been achieved. But, as will be shown below, the remedial measures adopted do not address the root cause of the violations found, namely, their statutory source, but instead appear to be an attempt to minimize compliance by pushing the envelope as to what are being considered sufficient remedies in these cases.

Remedying the Prisoner Voting Rights Violations: The Present Solution

In its recent Action Report on the *Hirst (no. 2)* group of cases, dated September 1, 2018, the UK informed the Committee of Ministers that it had implemented three remedial measures to address the violations of Article 3 of Protocol No. 1 found by the Court and had informed all prison authorities accordingly in mid-2018. The first two policy changes extend the right to vote to prisoners who are released on temporary license, normally in order to be able to take up employment outside of prison, and to prisoners released on Home Detention Curfew. The UK emphasized that both forms of release usually apply to prisoners with short prison terms and that the fact that "prisoners who are in the process of being reintegrated back into society … can vote" reflected the "proportionality" of the UK's voting ban regime (paras. 7 & 11), a regime that already provides for the retention of the right to vote for three other inmate groups (those in prison on remand, for contempt of court, and for default in paying fines). The third policy change seeks to remedy the failure to inform those sentenced to prison terms that they will be disenfranchised during that time; that information is now included in the Warrants of Committal in England, Wales, and Northern Ireland, and conveyed in different form in Scotland. In light of these changes, the UK concluded that the "*Hirst* group of cases can now be closed" (para. 16).

The UK had announced this set of measures to the Committee of Ministers in an Action Plan in November 2017 to probe whether the Committee would consider them sufficient for ending its supervision and had declared that it would implement them if endorsed by the Committee. The proposed "remedial triad" was the result of an extended period of consultations, noted in a 2016 Action Plan, during which the UK expressly sought to identify options that would enable it to address issues raised in *Hirst (no. 2)* without a legislative amendment, an option that continued to be opposed by Parliament. The UK's assertion that the identified "administrative measures are the best approach to credibly, effectively and swiftly address the *Hirst* group of cases" (2017 Action Plan, para. 10) apparently had some purchase in the Committee of Ministers which in a related decision noted the proposed package "with satisfaction" and "considered that, in light of the wide margin of appreciation in this area, these measures respond to the European Court's judgments in this group of cases." The Secretariat had made the same assessment. A final resolution has not yet been adopted, but should, against this backdrop, not be too long in the making.

Identifying Causes and Consequences of the Violation: What the Court Had Said

But can the conclusion that "these measures respond to the European Court's judgments in this group of cases" stand muster in light of the Court's findings and *ratio decidendi*? Specifically, can there be full compliance without a legislative amendment of the relevant domestic statutory provision—Section 3 of the Representation of the People Act 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"?

If one takes the Court's words seriously, then the above conclusion appears difficult to sustain. In *Hirst (no. 2)*, the Court had linked the violation of Article 3 of Protocol No. 1 specifically to the "blunt" and "indiscriminate" nature of section 3 of the 1983 Act, given that the above "provision imposes a blanket restriction on all convicted prisoners *in prison* … irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances" (para. 82 (emphases added in this and the following quotes). In the 2010 pilot judgment of *Greens & M.T.*, triggered by the UK's inaction since *Hirst (no. 2)*, the Court's argument is even more straightforward: The ECtHR notes that the set of applications at issue in *Greens & M.T.* was due specifically to the failure to amend the 1983 Act and to thereby "put an end to the current incompatibility of the electoral *law* with Article 3 of Protocol 1" (paras. 78 & 111). Reaffirming that "the general, automatic and indiscriminate restriction on the right to vote *imposed by section 3 of the 1983 Act* must be seen as falling outside any acceptable margin of appreciation, *however wide that margin may be,*" the Court notes that "[i]t is … clear that *legislative amendment is required* in order to render the electoral law compatible with the requirements of the Convention" and that "the respondent State must introduce *legislative proposals* to amend section 3 of the 1983 Act … with a view to the enactment of an electoral *law* to achieve compliance with the Court's judgment in *Hirst …*" (paras. 110, 112 & 115). In the three sets of clone cases—*Firth & Others* (2014), *McHugh & Others* (2015), and *Millbank & Others* (2016)—the Court subsequently linked the finding of a violation to the fact that no amendment of Section 3 of 1983 Act had yet occurred, expressly noting once again in the last judgment that "the *statutory* ban on prisoners voting in elections is, by reason of its blanket character, incompatible with Article 3 of Protocol No. 1" (para. 9).

Against this backdrop, I submit that the Court's position can be restated as follows:

» The Court came to the conclusion that the current regime was incompatible with the Convention and outside of the UK's generally wide margin of appreciation in full knowledge of the parameters of the current regime, i.e., the regaining of voting rights upon release from prison (including early release) and the continued ability to vote of those in prison on remand, for contempt of court and for failure to pay fines.

» The finding of a Convention violation related expressly to the disproportionality of the blanket voting ban as it applied to prisoners while in prison, not to the fact that certain categories of offenders on temporary license or subject to home detention curfew—and thus no longer physically in prison all of the time—had not been re-enfranchised. (This also seems to be the position in *Scoppola v. Italy (no. 3)* (2012), para. 96, where the Court argued that "disenfranchisement [that] affects a group of people generally, automatically and indiscriminately, based solely on the fact that they are *serving a prison sentence*" lacks proportionality).

» Since the violations caused by the blanket ban resulted directly from applicable legislation, Section 3 of the 1983 Act, compliance with the judgments requires a change of that legislation.

Recalibrating Compliance in the 'Age of Subsidiarity'

The UK's eventual response to the prisoner voting rights judgments can be understood as an archetypical example of minimalist compliance: As a liberal democracy, it would have been difficult for the United Kingdom to continue to resist taking just any remedial measures in these cases and thereby to opt for open and persistent non-compliance. The fact that the United Kingdom continued to engage with the Committee of Ministers and the Council of Europe's Department for the Supervision of Judgment of the ECtHR to find a solution suggests that the legal commitment to comply with the Court's judgments enshrined in Article 46 (1) ECHR exerted some normative pull effect, given the Council of Europe's lack of enforcement means beyond naming-and-shaming (the effectiveness of which, it should be noted, is ultimately also based on shared norms and values). At the same time, in light of domestic political majorities being consistently against enfranchising prisoners, it was to be expected that the UK would seek to minimize the material and especially political costs of liberalizing prisoner voting rights, as no UK government would reap any benefits at the polls for doing so.

Just how minimalist the eventual response turned out to be is still remarkable. The UK's remedies provide for only very marginal adjustments to the current prisoner voting rights regime—*The Guardian* had estimated in December 2017 that merely about one hundred people would benefit from the administrative changes—and stay far behind earlier domestic proposals such as enfranchising those with prison sentences of less than six or twelve months (see e.g. the 2013 Joint Committee on the Draft Voting Eligibility (Prisoners) Bill's report at paras. 2 & 227). What is particularly notable is that the implemented remedial measures would not have prevented the finding of violations in most of the cases before the Court which, judging on the basis of the available case information, 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. Against this background it seems all but certain that new applications by people with prison sentences at the shorter end of the spectrum will come to the Court after the next elections to which the ban applies have been held, giving the ECtHR the opportunity to clarify its earlier jurisprudence and to assess the UK's slightly modified prisoner voting rights regime in its light.

Perhaps even more surprising than the sheer minimalism of the remedial measures adopted by the UK is the fact that the Committee of Ministers and the Council of Europe Secretariat endorsed them as being sufficient to achieve compliance. If the analysis that the current remedial triad would not have prevented the bulk of the violations found in the *Hirst* group of cases is correct, then the Committee should have withheld its endorsement: Rule 6 (2) of its own Rules for the Supervision of the Execution of Judgments stipulates, after all, that the Committee, when supervising the execution of judgments, shall ascertain, *inter alia*, whether "general measures have been adopted, *preventing new violations similar to that or those found* or putting an end to continuing violations." This requirement appears not to have been met. Instead the Secretariat and Committee highlighted the Court-affirmed "wide

margin of appreciation in this area"—notwithstanding the fact that the Court, as noted, had already factored in this wide margin in its findings of violations of the Convention and had, in the context of the judgments' execution, linked it specifically to the introduction of "legislative proposals" (see *Greens & M.T.*, para. 114)—and both seemed content that the voting ban could now be seen as no longer being of a blanket nature since some offenders that were formally subject to a prison sentence could vote again as a result of spending at least some of their time outside of prison. The Secretariat also referred to the Court's statement that "a wide range of policy alternatives are available to the Government in the present context" (*Greens & M.T.*, para. 114) as support for the current solution, without addressing, however, how the chosen alternatives relate to the ECtHR's finding that the violation had a legislative source and thus implied a legislative remedy.

At least two (not mutually exclusive) explanations for the Committee's (and the Secretariat's) assessments suggest themselves. The first is of pragmatic character: The Committee may simply want to put an end to what Ed Bates has labeled the "prisoner voting saga" and possibly to cut the UK, a long-time democratic member of the Convention system, some slack, in light of many much graver ECHR violations by some other states which had begun to justify their own non-compliance by reference to the UK's inactivity in the prisoner voting rights cases. The second explanation is more principled: The Committee—composed of member state representatives—might want to signal that, in contrast to the Court's recurrent foregrounding of a legislative solution, it considers non-legislative changes sufficient to bring the UK into compliance with the Convention. This move could be read as intentionally juxtaposing the Committee's interpretation of what is required by the Convention to be compliant with Article 3 of Protocol No. 1 against the Court's. Given that the governance arrangement spawned by the ECHR does not provide for the equivalent of legislative overrides, the Committee might want to use its decision in the *Hirst* group of cases to signal to the Court that it considers the latter's jurisprudence with respect to prisoner voting rights as too activist and the margin of appreciation granted to states as too narrow. If this interpretation is correct, then the Committee's endorsement of the UK's remedial triad might be seen as another manifestation of what Judge Robert Spano had pithily termed the "age of subsidiarity" in which states assert, or seek to reclaim, greater decision-making freedom for national authorities *vis-à-vis* international institutions. Notable in this respect is also the fact that the likely resolution of the prisoner voting rights cases follows on the heels of the 2018 High-level Conference on Reform of the Convention System which in its Copenhagen Declaration repeatedly emphasized subsidiarity and the margin of appreciation as core operational principles within the European human rights system (see paras. 4, 7, 10, 13, 28 & 31).

Whatever the concrete reasons driving the Committee's decision, it seems all but certain that ending the supervision of the *Hirst* group of cases will end neither the Court's nor the Committee's engagement with the issue of prisoner voting rights in the UK. It is only when the Court addresses new, post-reform cases that it will become clearer whether the Committee and the UK succeeded in setting minimalist terms for compliance in this issue area or whether the Court will find the slightly modified regime still to be in violation of the Convention. If the latter is the case, then this could set the stage for a possibly lengthy struggle between the Court and the Committee over the final interpretive authority with respect to the requirements of compliance within the European human rights regime.