Special Issue—*Political Constitutions*

The Human Rights Act: Ambiguity about Parliamentary Sovereignty

By Janet L. Hiebert[*]

Abstract

The United Kingdom has long resisted the idea of adopting a judicially reviewable bill of rights, which historically has been considered inconsistent with a core constitutional principle of parliamentary sovereignty. When adopting the Human Rights Act (HRA), the political framers insisted on preserving Parliament's final say on the legality of legislation.

The decision to authorize judicial review, while also constraining the scope of judicial remedies by withholding a power to invalidate inconsistent legislation, has introduced serious ambiguity about the function of the HRA and also about where political legitimacy resides for resolving institutional disagreements about how rights appropriately guide or constrain legislation. The first example of ambiguity is with respect to how institutional actors understand the principal function of the HRA. For example, does rights protection occur primarily through judicial review, either by authorizing the judiciary to engage in interpretive techniques that force legislative compliance, or by identifying rights constraints that parliament is expected to address by enacting remedial measures? Or instead does rights protection occur via altered political practices: by engaging bureaucrats, the executive, and Parliament in a more conscious role of identifying how rights are implicated in proposed legislation, increasing intra-institutional deliberation about justification, and facilitating pressure to implement rights-inspired amendments? The second example of ambiguity occurs with respect to political actors' responsibilities in circumstances where courts disagree that legislation complies with protected rights, as judicially interpreted. Specifically, how does the principle of parliamentary sovereignty relate to the mission of a recently adopted bill of rights? Notwithstanding formal constraints on judicial power, can Parliament's contrary judgment be considered a compelling interpretation of rights and, if so, under what circumstances and according to what criteria?

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This paper explores this ambiguity in the context of debate about disenfranchising prisoners.

The United Kingdom has long considered a bill of rights as both unnecessary and inconsistent with the constitutional principle of parliamentary sovereignty. This view of inconsistency arose from the assumption that an effective bill of rights requires a judicial remedial capacity to set aside inconsistent legislation, and thus this judicial power contradicts the idea that parliament has the final say on the legality of duly enacted legislation. Yet a political willingness to experiment with where responsibility resides for remedial action helped overcome reticence to adopt a bill of rights. The HRA came into effect in 2000 and incorporates the European Convention of Human Rights into domestic law. Yet the HRA differs significantly from conventional assumptions about how a bill of rights functions. Instead of conceiving of rights protection in a court-centric manner, as occurring through binding judicial remedies to redress rights infringements that have already occurred, the HRA instead represents a more politically-oriented bill of rights. Such a politically-oriented bill of rights embodies the optimistic ideals of facilitating proactive rights protection through more rights-oriented legislative processes and relying on political willingness to enact remedies if the judiciary subsequently disagrees that legislation is consistent with Convention rights.

The HRA represents an ambitious model for rights protection that envisages rights-based scrutiny occurring at four institutional stages, three of which are oriented around the legislative process. The first of these four stages, pre-legislative review, arises from a new ministerial reporting requirement in section 19 to alert Parliament that a legislative bill is either compatible with Convention rights or that the minister is unable to claim compatibility. This reporting obligation has precipitated regular assessments by government lawyers and relevant policy officials of whether legislative initiatives are consistent with Convention rights before these become legislative bills. The second stage, parliamentary rights review, is facilitated by the creation of a specialized parliamentary rights committee—the Joint Committee on Human Rights—to review legislation from a rights perspective, which provides Parliament regular and often critical reports on the persuasiveness of the minister's earlier claim that a bill is consistent with the Convention rights. Judicial review, the third stage, occurs as a result of a new authority for judges to consider whether legislation is consistent with Convention rights. If judges determine that legislation is inconsistent with Convention rights, judicial censure can take an interpretive form under section 3 of the HRA, by altering the scope or effects of legislation through a judicial interpretation that strives to render legislation compatible with Convention rights, or it can take a more explicit form by declaring that the legislation is not compatible with Convention rights under section 4 of the HRA. The fourth stage arises from a legislative process for implementing remedial legislation in section 10 and reflects the political framers' expectations that Parliament will regularly comply with domestic and European Court of Human Rights (ECtHR) rulings of incompatibility.

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Yet this highly idealized model of rights protection reflects deep and unresolved ambiguity about the nature of parliament's responsibility to pass remedial measures. This ambiguity is a direct consequence of a political attempt to construct a rights project that emphasizes a juridical approach for interpreting liberal constitutional values and yet also relies on political willingness to enact remedies. The significance of this ambiguity is intensified by the rhetorical dissonance between the claim that a strong expectation of compliance with British and ECtHR rulings exists and the very different claim that parliamentary sovereignty protects parliament's capacity to have the final say on all judgments including those involving rights.

The seriousness of this ambiguity is particularly clear in political responses to judicial rulings that the UK's comprehensive ban on prisoners' voting is inconsistent with ECtHR rulings. The paper examines political reactions to ECtHR rulings on prisoner voting in Part One. Part Two draws on the work of Jeremy Waldron to suggest the benefit of Parliament developing processes or criteria to revisit judicially-impugned legislation in order to reassess the merits of its earlier judgment and/or the justification of political reticence to implement remedial measures. Although some might interpret this argument that Parliament should reassess the justification of legislation from a rights perspective as being in serious tension with ideas associated with political constitutionalism, the author rejects this interpretation. This perception is only valid if the argument for re-evaluation is predicated on the idea that courts alone are capable of, or have legitimacy for, judgments about rights. If one rejects a court-centric position on this issue, as does the author, and yet also takes seriously the idea that a polity's fundamental rights should be respected, it is incumbent upon Parliament to find a way to critically assess and distinguish when its dissenting judgment is justified as a reasonable response to legitimate rights-based concerns, from when Parliament's dissenting opinion can only be explained as an assertion of political and constitutional power.

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A. Part One

I. Political Reticence to Allow Prisoner Voting

The practice of disenfranchising prisoners in the United Kingdom dates back more than a century. Until 1969, the denial of prisoners' right to vote occurred indirectly as a consequence of penalties that prevented prisoners from qualifying to vote.[1] The prohibition on voting for prisoners was made more explicit in the 1969 Representation of the People Act, which denied the vote to persons detained in penal institutions, including those convicted abroad and repatriated to UK prisoners. The prohibition did not distinguish between those in penal institutions who were on remand and those convicted. Parliament maintained the practice of disenfranchising prisoners in the Representation of the People Act in 1983. In 1990 the legislation was changed to allow those on remand but not yet subject to custodial sentences to register to vote, while maintaining a ban on voting for all convicted prisoners.[2]

The denial of prisoners' ability vote was challenged in 2001 by John Hirst, who was serving a life term for manslaughter. The High Court dismissed his claim[3] and Hirst subsequently sought redress before the European Court of Human Rights.

The Labour government defended the ban in order to prevent crime and punish offenders, and to enhance civic responsibility and respect for the rule of law. The government argued that judges should accord the UK parliament a wide margin of appreciation because national legislatures are the competent venue for determining the conditions under which the right to vote should be exercised, and because the issue has already been considered fully by the national courts which have taken into consideration Convention principles.[4]

The ECtHR ruled in 2004 that the ban breached Article 3 of Protocol 1 of the European Convention on Human Rights, which protects "free elections . . . under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."[5] Unhappy with this ruling, the Labour government sought a hearing before the Grand Chamber of the ECtHR, which confirmed by a 12–5 majority that the UK prohibition on prisoner voting was a breach of Article 3.[6] The Grand Chamber characterized the

[1] DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, VOTING RIGHTS OF CONVICTED PRISONERS DETAINED WITHIN THE UNITED KINGDOM, 2006, CP29/06 (U.K.).

[2] ISOBEL WHITE, U.K. HOUSE OF COMMONS LIBRARY, PRISONERS' VOTING RIGHTS, 2011, SN/PC/01764.

[3] Hirst v. Attorney General, [2001] EWHC (Admin) 239.

[4] DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, *supra* note 1.

[5] Hirst v. United Kingdom (No. 2), ECHR App. No. 74025/01, para. 52 (Mar. 30, 2004), http://hudoc.echr.coe.int/.

[6] *Id.* at para. 85.

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legislation as a blunt instrument that imposes an automatic and indiscriminate denial of a vitally important right, and thus falls outside of any acceptable margin of appreciation.[7] The Grand Chamber also rejected the government's assertion that its decision to ban prisoners had been made in a measured way, stating no evidence exists "that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on right of a convicted prisoner to vote" or whether the continued practice of prisoner disenfranchisement is justified in light of "current human rights standards."[8]

The legislative disenfranchisement affects prisoners in Scotland, Wales and Northern Ireland, where courts have also heard challenges to this denial. In Scotland, the Registration Appeal Court ruled that the blanket ban on prisoner voting was incompatible with human rights.[9] The High Court in Belfast rejected an application to postpone the 2007 election until two prisoners' names were added to the electoral register. The UK government has argued that any requirement to enfranchise prisoners applies only to the UK Westminster parliamentary and European parliament elections, and that elections to the Northern Ireland Assembly fall outside the scope of the right to free and fair elections in Article 1 of Protocol 3 of the ECHR.[10]

II. Political Reluctance to Pass Remedies

Both Labour and Conservative-led coalition governments have demonstrated strong opposition to introducing remedial legislation. The Joint Committee on Human Rights (JCHR) has reported on this issue on several occasions and has criticized governmental inaction with respect to remedial measures.[11] Neither JCHR reports nor the reasons in the ECtHR rulings appear to have prompted the government or parliament to reassess their opposition to prisoners' voting. To the extent governments have indicated any willingness to change the law, this has only occurred after acknowledging that remedial legislation is

[7] *See id.* at para. 82.

[8] *Id*. at para 79.

[9] William Smith (AP) v. KD Scott Electoral Registration Officer, [2007] CSIH 9 (Scot.).

[10] Mark Harper, House of Commons Debates, Feb. 4, 2011, col 99.

[11] *See* JOINT COMMITTEE ON HUMAN RIGHTS (JCHR), LEGISLATIVE SCRUTINY: FIFTH PROGRESS REPORT, 2005-06, H.L. 115, H.C. 899; JCHR, IMPLEMENTATION OF STRASBOURG JUDGMENTS: FIRST PROGRESS REPORT, 2005-06, H.L. 133, H.C. 954; JCHR, MONITORING THE GOVERNMENT'S RESPONSE TO COURT JUDGMENTS FINDING BREACHES OF HUMAN RIGHTS, 2006-07, H.L. 128, H.C. 728; JCHR, MONITORING THE GOVERNMENT'S RESPONSE TO HUMAN RIGHTS JUDGMENTS: ANNUAL REPORT 2008, 2007-08, H.L. 173, H.C. 1078 [hereinafter JCHR 2008 ANNUAL REPORT]; JCHR, LEGISLATIVE SCRUTINY: POLITICAL PARTIES AND ELECTIONS BILL, 2008-09, H.L. 23, H.C. 204 [hereinafter JCHR 2008 LEGISLATIVE SCRUTINY REPORT]; JCHR, GOVERNMENT REPLIES TO THE SECOND, FOURTH, EIGHTH, NINTH AND TWELFTH REPORTS OF SESSION 2008-09, 2008-09, H.L. 104, H.C. 592; JCHR, ENHANCING PARLIAMENT'S ROLE IN RELATION TO HUMAN RIGHTS JUDGMENTS, 2009-10, H.L. 85, H.C. 455; JCHR, LEGISLATIVE SCRUTINY: (1) SUPERANNUATION BILL; (2) PARLIAMENTARY VOTING SYSTEM AND CONSTITUENCIES BILL, 2010-11, H.L. 64, H.C. 640.

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legally unavoidable, and due to the government's serious apprehension of the significant financial costs for continued non-compliance.

A year after the Grand Chamber ruling, the Labour government conceded that despite its strong disagreement with the ruling, it was required to respond to the Grand Chamber's judgment. Nevertheless, the first stage in the consultation process was prefaced with a position paper built around a strong defense of the blanket ban on voting and relied on the same arguments that the ECtHR had found unpersuasive. The government argued that individuals who are convicted of an offense serious enough to warrant incarceration have forfeited the privilege and entitlement to vote for the duration of their sentence, and that the denial of prisoners' ability to vote is justified to enhance civic responsibility and respect for the rule of law. The government also insisted that the ban on prisoners' voting is proportionate with respect to its objectives.[12] The second stage of the consultation process was initiated in 2009 by another position paper that set forth details of how compliance with *Hirst* might be achieved. Proposals suggested basing prisoners' ability to vote on the length of the custodial sentence—options ranged from less than one year to less than four years—and all proposals were subject to exceptions based on the type of offense for which the prisoners had been convicted. An alternative option was to require judicial permission to vote. By the government's account, to enfranchise all prisoners serving less than four years would involve 28,800 prisoners—or forty-five percent of the entire prison population.[13]

Although the JCHR characterized the need for remedies as a matter of urgency,[14] the government incurred weak parliamentary pressure to speed up the process for remedial legislation. The Liberal Democrats criticized the government for delay, and for lacking courage to lift the ban. However, Liberal Democrats could not generate parliamentary support for repealing the ban beyond their own party membership and had to contend with the legacy of earlier political taunts by the Labour government that the Liberal Democrats were "soft on criminals" because of their commitment to prisoners' voting.[15] The Conservative opposition disputed the justification for remedial action. Then Conservative shadow Justice Secretary Dominic Grieve rejected the merits of any legislative change, and claimed that the "principle that those who are in custody after

[12] DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, *supra* note 1, at 11.

[13] MINISTRY OF JUSTICE, VOTING RIGHTS OF CONVICTED PRISONERS DETAINED WITHIN THE UNITED KINGDOM: SECOND STAGE CONSULTATION, 2009, CP6/09 (U.K.).

[14] *See* JCHR 2008 ANNUAL REPORT, *supra* note 11, at para. 63.

[15] *Some Inmates to Get Voting Rights*, BBC NEWS, Apr. 9, 2009, http://news.bbc.co.uk/2/hi/uk_news/politics/7992045.stm.

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conviction should not have the opportunity to vote is a perfectly rational one."[16] Likely reinforcing the government's continued delay of introducing remedial legislation was the perception that the public opposed the idea of prisoner voting, as indicated in a public opinion poll that more than 60 percent of those surveyed disagreed with the European Court of Human Rights ruling, and the disapproval rate increased to 70 percent for voters over age fifty-five.[17]

In a 2009 report, the JCHR elevated the importance of the issue from urgent to an emergency situation so as to redress the situation before the next election.[18] In December 2009 the Council of Europe's Committee of Ministers also expressed serious concern about the UK's "substantial delay" in complying with the *Hirst* judgment.[19] Notwithstanding pressures from the JCHR and the Council of Europe to address the situation before the next election, the 2010 general election occurred without remedial measures in place.

III. Increased Incentives to Introduce Remedial Legislation

After the 2010 election, the Chair of the Committees for the Council of Europe reported that the UK's lack of action had resulted in a dramatic increase in the number of related applications to the Court, and called on the UK to "prioritise the implementation of [the Hirst] judgment."[20] The prospect of a substantial increase in the number of claims also meant an increase in the costs of defending government inaction—both for litigation and compensation. This concern was amplified by the announcement that several law firms would launch claims on behalf of thousands of UK prisoners who were demanding compensation for what they considered their illegal disenfranchisement.[21]

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[16] Robert Winnett & Tom Whitehead, *Prisoners to Get Right to Vote after 140 Years Following European Ruling,* THE TELEGRAPH, Apr. 9, 2009, http://www.telegraph.co.uk/news/uknews/law-and-order/5126647/Prisoners-to-get-right-to-vote-after-140-years-following-European-ruling.html.

[17] *Most Britons Believe Prisoners Should Not Vote in Elections*, ANGUS REID PUBLIC OPINION, Nov. 22, 2010, http://www.angus-reid.com/wp-content/uploads/2010/11/2010.11.22_Prisoner_BRI.pdf.

[18] *See* JCHR 2008 LEGISLATIVE SCRUTINY REPORT *supra* note 11, at para. 1.13.

[19] Committee of Ministers Interim Resolution (EC) No. CM/ResDH(2009)160 of Dec. 3, 2009, https://wcd.coe.int/wcd/ViewDoc.jsp?id=1556821&Site=CM.

[20] Chair of the Comm. of Ministers to the Parliamentary Assembly (EC), Communication on the Activities of the Committee of Ministers, ¶ 16, CM/AS(2010)7rev (Oct. 4, 2010), https://wcd.coe.int/wcd/ViewDoc.jsp?id=1678647&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

[21] Jamie Doward, *Europe Pressures Westminster on Votes for Prisoners*, THE GUARDIAN, May 29, 2010, http://www.guardian.co.uk/uk/2010/may/30/europe-pressure-westminster-prisoners-vote.

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The 2010 election outcome meant the responsibility for remedial legislation, litigation costs, and financial compensation would fall to a new Coalition government, in which the two partners had contrary positions on whether to allow prisoners to vote. The Conservative Party maintained its strong opposition to the idea, while the Liberal Democrats, the junior Coalition partner, supported enfranchising all prisoners.

The prospect of serious fiscal costs from prolonged inaction on remedial measures loomed even more likely when the European Court of Human Rights issued a blunt warning in November 2010 that if the UK did not soon change the law, the court would reinstate earlier cases that would escalate the compensation costs for which the government would be responsible. This message appeared in what the Court characterized as a pilot judgment—*Greens & M.T. v. United Kingdom*—with the express object of facilitating a speedy and effective resolution of the issue. The Court gave a deadline of six months after the finalization of the *Greens* judgment for the government to introduce legislation to comply with the *Hirst* ruling. In the meantime, the Court indicated it would not hear any more comparable cases.[22] Further, should the UK fail to repeal its blanket prohibition on prisoners' voting within the six-month deadline, approximately 2,500 similar applications would be reinstated—and countless more could be added as each of the approximate 70,000 UK prisoners would be entitled to launch an action—for which the UK would bear legal costs, as well as compensation claims. In the *Greens* case, the claimants were awarded £5,000 in costs and compensation.[23] A published report estimated that, should the government fail to revise the law within the required timeline, the costs of compensation would be in excess of £50 million.[24]

Despite the Conservative side of the coalition's strong resistance to passing remedial measures, the government announced in November 2011 that legislation allowing some prisoners to vote was forthcoming. Mark Harper, Minister for Constitutional Reform, characterized the decision as responding to a legal obligation rather than a change by the Conservative government on the merits of this issue[25] and promised to minimize the number of prisoners being given the vote.[26] Prime Minister David Cameron confirmed that

[22] Greens & M.T. v. United Kingdom, ECHR App. Nos. 60041/08 & 60054/08, para. 115, 120 (Nov. 23, 2010), http://hudoc.echr.coe.int/.

[23] *Id*. at para. 101.

[24] Andrew Porter, *Prisoners to Get the Vote for the First Time*, THE TELEGRAPH, Nov. 1, 2010, http://www.telegraph.co.uk/news/uknews/law-and-order/8103580/Prisoners-to-get-the-vote-for-the-first-time.html.

[25] 517, PARL. DEB., H.C. (6th ser.) (2010) 771–72 (U.K.).

[26] *Prison Votes 'Will be Kept to a Minimum'*, BBC NEWS, Jan. 20, 2011, http://www.bbc.co.uk/news/uk-politics-12233938.

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his party was considering reforms only because of the threat of costly litigation, and indicated he was both “exasperated” and “furious” about allowing prisoners to vote.[27]

On the day before the 2010 Christmas recess—a date likely chosen to mitigate the political impact of the announcement—the Coalition government announced that legislation would be introduced to make any prisoner serving a sentence of under four years eligible to vote, a measure expected to include more than 28,000 prisoners.[28] Cameron subsequently declared that the action left him “physically ill” and reiterated that a remedy of the blanket ban was unavoidable because of the possibly crippling financial cost of failure to comply, now reported to be in excess of £160 million.[29]

IV. Parliament Rejects the Merits of Remedial Legislation

Before new legislation was introduced, a parliamentary motion in February 2011 demonstrated the depth of Parliament’s opposition to remedial measures. Jack Straw, the former Secretary of State for Justice with responsibility for the Labour government’s earlier failure to comply with the *Hirst* ruling, and Conservative Member David Davis joined forces to utilize a new power for backbench members to debate topics of their own choosing; in this case, to debate the propriety of maintaining the existing ban on all prisoners’ abilities to vote.[30] Debate occurred on the motion in favor of maintaining the current situation[31] and, by implication, a vote on parliament’s authority in determining whether the restriction on voting rights is valid.[32] Neither the government nor opposition front benches voted on the motion, which carried by 234 votes to 22.

The debate is notable not only for MPs’ willingness to repudiate the idea that Parliament should comply with the European court, but also for encouraging a broader debate about whether Parliament should withdraw from the Convention. Political criticism of the ruling

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[27] Porter, *supra* note 24.

[28] James Kirkup, *30,000 Prisoners Will be Able to Vote*, THE TELEGRAPH, Jan. 6, 2011, http://www.telegraph.co.uk/news/uknews/law-and-order/8241920/30000-prisoners-will-be-able-to-vote.html.

[29] *Prison Votes ‘Will be Kept to a Minimum’*, *supra* note 26.

[30] *See* http://www.parliament.uk/business/committees/committees-a-z/commons-select/backbench-business-committee.

[31] 523 PARL. DEB., H.C. (6th ser.) (2011) 493 (U.K.).

[32] *Id*. The full wording of the motion was: “That this House notes the ruling of the European Court of Human Rights in *Hirst v. 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 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.”

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was sharp and cutting. As Danny Nicol argues, the debate provided ample evidence that "MPS expressed their opposition to *Hirst* in terms of basic constitutional doctrine: the rule of law, the sovereignty of parliament and the separation of powers."[33]

Parliament's vote on this motion fuelled uncertainty about how the government would respond in light of its earlier announcement of forthcoming remedial legislation. Shortly before the parliamentary vote, former Lord Chancellor Lord MacKay stated categorically that the government must comply with the ruling as a matter of obeying the rule of law,[34] while Justice Secretary Ken Clarke rejected the possibility that the UK would defy the European Court, even if this meant doing only what was minimally necessary to ensure compliance."[35] As Clarke was reported in a BBC interview, the "government does not defy the ruling of courts whose jurisdiction it has always accepted."[36]

V. Flirtation with the Idea of Defying Strasbourg

Soon after the parliamentary vote, some Conservative politicians argued that the government should accept Parliament's judgment on this issue and defy Strasbourg. For example, David Davis argued that the lack of effective sanctions would allow the UK to continue ignoring the ruling, with little fallout other than to "remain on the long list of unenforced judgments reviewed by the Committee of Ministers."[37] Dominic Raab, a former Foreign Office lawyer, speculated that the United Kingdom would incur encounter negligible political or financial costs for failure to implement *Hirst.*

> The reassertion of our democratic prerogatives will come at negligible cost. The Strasbourg machinery contains the safeguard that it cannot enforce its own judgments or compensation awards. The worst that can happen is that the unimplemented judgment will sit—with hundreds of others—on the Committee of Ministers' list for review. There is no prospect of a fine,

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[33] Danny Nicol, *Legitimacy of the Commons Debate on Prisoner Voting*, P.L. 681, 683 (2011).

[34] POLITICAL AND CONSTITUTIONAL REFORM COMMITTEE, PRISONER VOTING: UNCORRECTED TRANSCRIPT OF ORAL EVIDENCE, 2010-11, H.C. 776 (U.K.).

[35] Hélène Mulholland & Patrick Wintour, *UK will not Defy European Court on Prisoners' Votes, Says Kenneth Clarke*, THE GUARDIAN, Feb. 9, 2011, http://www.guardian.co.uk/politics/2011/feb/09/government-defy-european-court-vote-prisoners.

[36] *No Votes for Jailed Murderers and Rapists—Ken Clarke,* BBC NEWS, Feb. 9, 2011, http://www.bbc.co.uk/news/uk-politics-12402704?.

[37] VAUGHNE MILLER, U.K. HOUSE OF COMMONS LIBRARY, EUROPEAN COURT OF HUMAN RIGHTS RULINGS: ARE THERE OPTIONS FOR GOVERNMENTS?, 2011, SN/IA/5941, at 12.

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> let alone Britain being kicked out of the Council of Europe.[38]

These latter two statements that Parliament could afford to ignore the European Court of Human Rights bore strong resemblance to leaked legal advice reportedly prepared for Deputy Prime Minister Nick Clegg[39] about the political and fiscal consequences of defying Strasbourg. This advice, published by *The Times*, outlined three arguments. The first was that, although there is no doubt that the UK is obliged to implement the *Hirst* ruling, a failure to pass remedial measures will not likely result in the United Kingdom being suspended or expelled from the Council of Europe. Nevertheless, failure to comply will likely expose the government to criticism from the Committee of Ministers in Strasbourg and undermine the UK's international credibility in terms of its commitment to human rights. This advice was qualified to distinguish between open defiance and an unsuccessful attempt to pass remedial legislation. The advice noted that, although no country to date had been expelled for failure to comply, it was also the case that no country had been excluded from the Council for non-execution of a judgment.[40] The second argument was that if there is a possibility of suspension or expulsion, the UK could significantly mitigate the likelihood of this occurring if it introduces remedial measures, even if the legislation is subsequently defeated by parliament—a suggestion that fuelled speculation that the government might orchestrate the defeat of the legislation by allowing members to vote against it.[41] The third argument was that the financial impact for the UK of litigation and compensation costs—the latter estimated in a worst-case scenario as high as £143 million—could be mitigated in two ways. One way would be by "confiscating the money paid to prisoners in compensation" and levying it against some other purpose such as "a fee for accommodation in prison." The second way would be attempting to pass remedial measures, even if ultimately unsuccessful, which would likely lower the number of cases heard and compensation awards provided.[42]

This advice—that the costs of financial compensation would not be as significant a problem as earlier anticipated—was reinforced, at least at the domestic level, by the decision of the High Court the very day the leaked advice was published, that prisoners would not be granted compensation for the parliament's delay in implementing the

[38] Dominic Raab, *What Happens if We Defy Europe? Nothing*, THE TELEGRAPH, Feb. 2, 2011, http://www.telegraph.co.uk/news/politics/8299615/What-happens-if-we-defy-Europe-Nothing.html.

[39] Tim Shipman, *Cameron CAN Defy Euro Court Diktats: UK 'May Deny Votes for Inmates Without Penalty',* DAILY MAIL ONLINE, Feb. 18, 2011, http://www.dailymail.co.uk/news/article-1358199/Cameron-CAN-defy-Euro-court-diktats-UK-deny-votes-inmates-penalty.html.

[40] *See* Sam Coates, *Cameron is Clear to Defy Europe on Human Rights*, THE TIMES, Feb. 18 2011, at 1, 9.

[41] Miller, *supra* note 37, at 5.

[42] Coates, *supra* note 40.

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European Court's ruling. Close to 600 prisoners each sought £5,000 in compensation for the denial of the ability to vote in the 2010 election. Not only were prisoners denied compensation, but each of the more than 500 claimants was ordered to pay £76—equivalent to about two months work in prison—towards the costs incurred by the Ministry of Justice for the court action.[43]

In addition to the government's cost/benefit analysis of openly defying Strasbourg, it also attempted to utilize parliamentary opposition to the idea of enfranchising prisoners to get relief from the obligation to modify the ban on prisoners' rights to vote. In an updated communication with the Committee of Ministers, the government explained its significant difficulties implementing the *Hirst* and *Greens and MT* judgments. The government acknowledged that although the 2011 parliamentary motion was not binding, the government anticipated great difficulty passing legislative reforms. The government also requested that the *Greens* case be referred to the Grand Chamber of the Court, and argued that the margin of appreciation should be broad enough to exclude a ban on prisoners voting in the UK so as to reflect parliament's strong views that the ban is justified.[44] However, in April 2011 the Grand Chamber of the European Court of Human Rights rejected the UK government's request to rehear the case, which triggered a sixth-month deadline, dating from 11 April 2011, for the government to introduce legislation to ensure compliance with the court's jurisprudence.[45]

Despite losing this argument for a rehearing, the Government was able to gain yet another delay after Attorney General Dominic Grieve made a submission as a third party in *Scoppola v. Italy*, which raised issues analogous to those that arose in *Hirst* and in *Greens and MT*. Grieve argued that the European court had not given sufficient weight to "different approaches between states to the same social issue" and urged the Court to "not follow the road of seeking to impose restrictive uniform solutions."[46]

[43] Tovey and Hydes v. Ministry of Justice, [2011] EWHC (QB) 271, [64] (Eng.).

[44] EUR. CONSULT. ASS., *Communication from the Government in the Case of Hirst No. 2 Against the United Kingdom*, 1108th Meeting, App. No. 74025/01 (Mar. 1, 2011), *available a*t https://wcd.coe.int/ViewDoc.jsp?id=1753877&Site=CM.

[45] Press Release, Eur. Court of Human Rights, Court's Judgment Concerning Blanket Ban on Prisoner Voting in the U.K. Becomes Final (April 12, 2011), *available at* http://adam1cor.files.wordpress.com/2011/04/referral-to-grand-chamber-rejected-greens-and-m-t-v-the-united-kingdom-12-04-11-2.pdf.

[46] Rowena Mason, *Government Tells European Judges No Right to Meddle with UK Prisoner Vote Policy,* THE TELEGRAPH, Nov. 2, 2011, http://www.telegraph.co.uk/news/8865204/Government-tells-European-judges-no-right-to-meddle-with-UK-prisoner-vote-policy.html.

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VI. Exhausting Legal Options to Avoid Remedial Legislation

The Grand Chamber handed down its judgment in *Scoppola* on 22 May 2012, which set in motion a six-month deadline for remedial legislation. A 16–to–1 majority ruled that the deprivation of an Italian convicted murder of the right to vote was not in breach of Article 3. However, this ruling did not negate the UK's legal obligation to pass remedial legislation. The Grand Chamber distinguished the Italian rules from the current British position, emphasizing the difference between an absolute and partial ban. In Italy, the loss of prisoners' voting rights applies only to those guilty of specific types of offences that incur a custodial sentence of at least three years, as distinct from the "general, automatic, indiscriminate ban" in the United Kingdom. The implication of the ruling was that the UK would not be required to allow all prisoners to vote and that it would be afforded a wide margin of appreciation when deciding on the specific scope of this right to vote.[47]

The day after the ruling, Prime Minister Cameron indicated that he would continue supporting parliament's earlier decision against allowing prisoners to vote, arguing that this issue should be a matter for parliament to decide, not a foreign court.[48] Conservative members ramped up their anti-ECtHR rhetoric and predicted the inevitability of a clash between the UK Parliament and the European Court. One backbench member characterized this as a "test for the Government" whether to support the UK parliament and stick to its guns or cave in "to this Mickey Mouse court."[49]

The prolonged delay implementing remedies meant that the government had to acknowledge an inability to claim that its House of Lords Reform Bill 2012-13 was compatible with Convention rights. This bill sought to ensure that the franchise for House of Lords elections were identical to the franchise for elections to the House of Commons.[50]

In October 2012, Prime Minister Cameron responded to a question in the House of Commons on whether he intended to be faithful to his earlier assurances in May 2012 of respecting parliament's judgment on this issue. Despite Cameron's reply that he could "absolutely" provide this assurance, political aides indicate that the government was considering a draft bill introducing limited prisoner voting rights to comply with the

[47] *See* Scoppola v. Italy (No. 3), ECHR App. No. 126/05, 868 EUR. CT. H.R. 23 (2012).

[48] *See* Rowena Mason & Tom Whitehead, *David Cameron: Britain Will Decide on Votes for Prisoners Not a "Foreign Court*,*"* THE TELEGRAPH*,* May 23, 2012, http://www.telegraph.co.uk/news/politics/9284892/David-Cameron-Britain-will-decide-on-votes-for-prisoners-not-a-foreign-court.html.

[49] PA, *David Cameron to Fight Prisoner Voting Plan,* THE INDEPENDENT, May 23, 2012, http://www.independent.co.uk/news/uk/politics/david-cameron-to-fight-prison-voting-plan-7781521.htm.

[50] House of Lords Reform Bill, 2012–13, H.C. Bill [52] explanatory notes.

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ECHR.[51] One could speculate that the government's legal strategy was a stalling tactic because of the length of time for a draft bill to actually reach the statute book. As one unnamed senior Whitehall spokesperson indicated that as the *Scoppola* ruling does not require all prisoners to have a right to vote, this means that the government will be able to delay implementing the judgment for years, by drawing up consultations and draft laws.[52] The idea of introducing draft legislation as a stalling tactic is also consistent with the earlier leaked legal advice that suggested the UK would be less susceptible to significant political or fiscal consequences if it at least tried to develop legislation, even if ultimately unsuccessful.

In November 2012, the Lord Chancellor Chris Grayling made a statement to the House of Commons that the government was publishing a draft bill, the Voting Eligibility (Prisoners) Draft Bill, for pre-legislative scrutiny. The bill sets out three options for parliament: A ban for prisoners who are sentenced to four years or more, a ban for prisoners sentenced to more than six months, and a ban for all convicted prisoners.[53] A joint committee of both houses is examining the bill, which is expected to report by the end of 2013.

B. Part Two

I. Tension Between Competing Constitutional Principles

Commentary on the HRA characterizes its design as the outcome of a prudential attempt to reconcile rights protection with democratic principles.[54] The HRA has been described in dialogic terms,[55] where Parliament is recognized as the hegemonic partner in an inter-institutional project of improving compliance with Convention rights because of the deliberate decision to retain the principle of parliamentary sovereignty.

A political expectation of compliance with European Court of Human Rights rulings reduces the practical consequences of having formally retained the principle of parliamentary sovereignty. However, it does not eliminate the tension that undercuts the HRA between respecting judicial interpretations of liberal constitutional norms and democratic principles that allow Parliament the final say on whether and how to respond to a contrary rights

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[51] Patrick Wintour & Andrew Sparrow, *I Won't Give Prisoners the Vote, Says David Cameron,* THE GUARDIAN, Oct. 24, 2012, http://www.guardian.co.uk/society/2012/oct/24/prisoners-vote-david-cameron.

[52] Mason & Whitehead, *supra* note 48, at 3–4.

[53] The Voting Eligibility (Prisoners) Draft Bill, 2012–13, CM 8499 (Gr. Brit.).

[54] *See* HELEN FENWICK, CIVIL LIBERTIES AND HUMAN RIGHTS 61–162 (4th ed. 2007).

[55] *See* ALISON L YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT (2009).

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judgment. As Murray Hunt argues, these conflicting principles have resulted in a tendency to invoke whichever one best serves the argument at hand:

> A review of both the literature and of court judgments concerning the HRA reveals a mixture of utterances from a democratic positivist's perspective on the one hand, with its formalistic notion of the separation of powers and romantic attachment to the idea of parliamentary sovereignty, and a liberal constitutionalist's perspective on the other, with its equally romantic judicial supremacism about the priority of individual rights and the sovereignty of the courts as their ultimate guardian . . . .
>
> More interesting by far, however, than the existence of this spectrum of views is the fact that, despite their radically different theoretical underpinnings, the two views are often espoused by the same judge or commentator, depending on the issue they are addressing or whether they are seeking to justify judicial interference or abstention in a particular case . . . .
>
> This is the contemporary manifestation of our Diceyan inheritance: a constitutional discourse which selectively invokes democratic positivism and liberal constitutionalism in order to justify or explain a particular decision, but which lacks an overarching coherent vision of democratic constitutionalism in which the apparent contradiction of these foundational commitments is explicitly confronted and an attempt made to reconcile them without resort to the language of sovereignty. So long as we are dependent on crude notions of sovereignty and authority for our underlying conceptions of law and legality, our public law will remain condemned to this perpetual lurching between democratic positivism and liberal constitutionalism.[56]

[56] Murray Hunt, *Reshaping Constitutionalism*, *in* JUDGES, TRANSITION, AND HUMAN RIGHTS 467, 468–69 (John Morison et al. eds., 2007).

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Curiously lacking from academic and political debates about the HRA is the question of how to assess the justification of Parliament's dissenting rulings in circumstances of profound inter-institutional disagreement, such as occurred in the context of redressing the ban on the ability of prisoners to vote. I can anticipate skepticism about the utility of developing criteria or processes for assessing parliamentary dissent, both from juridically oriented and politically oriented constitutional perspectives.

For those who emphasize compliance with judicial norms as the benchmark for respecting rights, no process for assessing the virtue of Parliament's dissenting opinion can likely validate this political judgment from a rights perspective. It is not surprising *t*hat many consider Parliament's dissenting judgment as constituting an exception to rights rather than as a valid judgment. Framing and conceiving rights in a legal context alters perceptions of institutional competence for judgments about rights. To expect otherwise is not realistic when a polity adopts a legal framework that presents rights as normative constraints on legislation, authorizes courts to determine whether legislation is consistent with rights, and characterizes judicial disagreements with parliamentary decisions in the language of "incompatibility."

On the other side of the juridical/political constitutional debate, those who emphasize a political constitutional perspective might interpret the idea of justifying Parliament's dissenting judgment as eroding parliament's moral authority for determining the scope of rights and the merits of political judgment. However, my argument is not that Parliament should engage in arm-chair judging when assessing the merits of its judgment but instead should develop political processes or criteria for reassessing this judgment in cases of profound inter-institutional disagreement. The UK has willingly adopted codified rights as the normative framework for evaluating legislation, while at the same time vesting final legal authority about whether and how to comply with judicial interpretations of rights with Parliament. However, in the absence of processes or criteria to reassess the justification of parliamentary judgments that contradict judicial rulings, the ensuing debate about Parliament's obligations to pass remedial legislation will inevitably be portrayed as a conflict between liberal constitutional norms and the legitimate exercise of parliamentary power. As Hunt has suggested, opposing sides will invoke which of the two conflicting principles best suits their purposes, which will have the effect of participants in the debate speaking—or shouting—past each other without any common language or agreed criteria for critically assessing government inaction or parliamentary refusal to pass remedial measures.

Parliament's strong opposition to remedy the ban on prisoners' voting rights demonstrates the importance of establishing standards or processes for reassessing the merits of Parliament's earlier judgment. This suggestion is not intended to convey the idea that governmental inaction or parliamentary dissent will necessarily represent a reasoned or reasonable judgment about rights. Exercising the legal capacity to disagree with courts is an exercise of power, and not necessarily a reasonable judgment about rights. Thus, a

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critical question from a rights project that authorizes judicial rights review and yet also allows for parliamentary dissent from judicial rulings is the following: How should Parliament assess the justification of legislative dissent?

II. Working Toward Assessing Justification

The paper will conclude by suggesting four considerations for assessing the justification of governmental inaction or parliamentary refusal to pass remedial measures. The intention here is not to propose a specific theory of justification but is a much more modest contribution of providing four ideas to facilitate this discussion.

First, a starting point is to draw from the logic of the kind of rights-protecting project the HRA represents. As discussed earlier, although the HRA authorizes an important judicial role, at heart it is a parliamentary-centered model of rights protection where the legislative process is the venue for three of the four stages of rights review contemplated. At each of these three legislative stages of review, rights protection is heavily predicated on the assumption that the development and scrutiny of legislation be guided by consideration of the justification of legislative decisions that implicate rights. Thus, ministers are required to explain whether bills are compatible with rights or be prepared to argue the merits of the bill when unable to claim compatibility, while Parliament's specialized rights committee scrutinizes these claims, corresponds with ministers when uncertain about government assumptions or explanations for why bills are compliant, and provides background and a set of recommendations to facilitate broader parliamentary deliberation about whether compatibility concerns should result in calls for amendments or even rejection of the bill. Murray Hunt refers to this obligation as a "culture of justification" and argues that, "all exercises of powers which infringe upon fundamental rights, interests or values require public justification by reference to reasons."[57] For Hunt, this reference to reasons is a requirement of rational explanations for why a particular action or decision has been taken, or why there has been an omission to act.[58]

It is reasonable to extend the HRA's emphasis on justification in the pre-legislative process to the post-judicial phase of considering remedial legislation. Arguably, parliamentary debate on prisoner disenfranchisement did not focus sufficiently on the justification for the ban on prisoners' voting. It was not the case that a lively parliamentary debate was lacking or that broad constitutional principles were ignored. However, as Danny Nicol's analysis demonstrates, parliamentarians did not ask the question of whether legislation is consistent with rights but instead focused on broader constitutional principles such as the separation of powers, in which the charge was that the European Court of Human Rights had violated his principle by acting beyond its legal powers, and arguments for the exercise

[57] *Id.* at 470.

[58] *Id.*

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of parliamentary sovereignty justified Parliament's will prevailing on this issue.[59] Moreover, in making arguments based on claims of parliamentary sovereignty, MPs emphasized the idea of democratic accountability as an essential justification for Parliament's will, prevailing over that of the ECtHR.[60] Yet, Parliament's insistence on the primacy of its opinion failed to confront a serious legitimacy problem with the very objective of the legislation. This problem arises from the claim to represent the people when a specific segment of the adult population was deliberately excluded from voting for their representatives. The seriousness of this exclusion was exacerbated by the fact that those denied the vote were the very same people who would continue to be disadvantaged by Parliament's decision to refuse to enact remedial legislation.

Those critical of Parliament's refusal to consider remedies can find support for their position from someone who might seem to be an unexpected ally. Despite openly acknowledging his reputation as a "fanatical opponent of strong judicial review,"[61] Jeremy Waldron acknowledged difficulty with the claim that parliamentary sovereignty justifies disenfranchising prisoners. This admission occurred in testimony before the JCHR when Waldron was asked to comment on the implications of his writings on participation for the UK debate about the right to vote, and his opinion about whether there can be restrictions on a prisoner's right to vote in a democracy. In essence, Waldron was being asked whether his argument about the "right of rights," as a rights-based reason for resisting strong form judicial review, justifies a parliamentary decision to maintain the ban on prisoners voting. Waldron responded that he considered voting to be such a fundamental right in a democracy that the notion that this right can be taken away because it seems easy to do so is a "serious mistake."[62] As he argued, the justification of parliamentary sovereignty does not rest in some abstract or historical convention but is rooted in the legitimacy of the democratic process, of which the right to vote is an integral requirement:

> The position that I defend, the misgivings I have about judicial review and the democratic basis that I embrace as a foundation of that position run into their deepest challenge when the majoritarian institution is actually addressing the basis its own electoral credentials. It runs into the deepest challenge where the parliament

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[59] Nicol, *supra* note 33, at 681–87.

[60] *See* 523 PARL. DEB., H.C. (6th ser.) (2011) 531 (U.K.).

[61] Jeremy Waldron, *Compared to What? Judicial Activism and New Zealand's Parliament*, N.Z. L.J., 441, 442 (2005).

[62] Jeremy Waldron, *Uncorrected Transcript of Oral Evidence Taken Before Joint Committee on Human Rights*, Human Rights Judgments 39, 50 (2011) (to be published at H.C. 873-i), *available at* http://www.parliament.uk/documents/joint-committees/human-rights/HumanRightsJudgments/Transcript150311.pdf.

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> is actually addressing the right to vote and the integrity and continuance of the electoral and democratic process . . . . Parliament's legitimacy and supremacy in our constitution is not based upon history and is not an abstract proposition; it is based on the fact that . . . Parliament has electoral credibility. Parliamentary decision-making and legislation is legitimate because people have the right to vote, not the other way round. Parliament is a guardian of that."[63]

Waldron's skepticism that appeals to parliamentary sovereignty justify a ban on prisoners' abilities to vote is not difficult to understand in light of the importance he attaches to participation, which he sees as a "*rights-based* solution" to the problem of disagreement about rights,[64] and what he considered to be the only plausible rights-based theory to authority.[65] Voting is the means by which citizens contribute to the collective decision of determining policy, leadership and authority, [66] and exercise their "right of rights."[67] Thus, a serious problem with relying on the concept of parliamentary sovereignty to deny prisoners' the right to vote is that the legitimacy of Parliament itself is contingent upon the integrity of the electoral and democratic process.[68]

A second consideration for assessing parliamentary dissent is the importance of being skeptical about parliamentary motives for legislative decisions that affect political participation. As noted above, Waldron acknowledges the most serious challenge to his argument for parliamentary sovereignty occurs when parliament is legislating on issues that influence the integrity and continuance of the electoral and democratic process.[69] For this reason, Parliament's inherent self-interest in the consequences of rules that relate to the election process can never escape doubts about whether these rules are fair and equitable in terms of establishing the conditions for robust participation or instead were adopted to reproduce previous outcomes that benefit incumbents, entrench benefits for established parties, and marginalize dissenting perspectives. It is precisely this concern that

[63] *Id.* at 47–48.

[64] JEREMY WALDRON, LAW AND DISAGREEMENT 252 (1999) (emphasis in original).

[65] *Id.* at 254.

[66] *Id.* at 254.

[67] *Id.* at 232. Waldron borrows the phrase "right of rights" from a much earlier discussion by WILLIAM COBBETT, ADVICE TO YOUNG MEN AND (INCIDENTALLY) TO YOUNG WOMEN, IN THE MIDDLE AND HIGHER RANKS OF LIFE: IN A SERIES OF LETTERS, ADDRESSED TO A YOUTH, A BACHELOR, A LOVER, A HUSBAND, A FATHER, A CITIZEN OR A SUBJECT (1829).

[68] *See* Waldron, *supra* note 61, at 49–50.

[69] *Id.*

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explains theories of why political leaders voluntarily choose judicially reviewable bills of rights to constrain the decisions of future politicians.[70] My purpose in raising this concern is not to define the specific bounds of legitimate parliamentary authority, but instead to emphasize the importance of caution when assessing the merits of legislation affecting democratic or participation claims since, as Waldron reminds us, the very legitimacy of Parliament's legal authority is contingent upon the political legitimacy of the processes by which its power was derived.

A third consideration is to focus on the quality of the parliamentary debate: both in the first instance of passing legislation that was subsequently ruled inconsistent with rights and also in the post-judicial phase of assessing whether remedies are appropriate. This idea also draws from Waldron but in a different context. Quite separate from the question of prisoner voting, Waldron earlier offered a critique of claims of parliamentary sovereignty as a basis for criticizing judicial review in New Zealand.[71] His argument was based on concerns of the ascendency of executive dominance and the lack of sufficient parliamentary checks on power. Waldron argued that the democratic character of legislation upon which claims of parliamentary sovereignty rely requires a "complex and delicate interplay back and forth" among the following four elements: General and multi-faceted deliberation among the people; voting among the people for representatives; multi-layered deliberation among the representatives; and successive rounds of voting among representatives.[72] By his account, New Zealand fails to reasonably satisfy all of these criteria due to its unitary system, the dominance of the executive, the lack of quorum for legislation, the ability to call upon the votes of party members even when absent from the legislature, frequent use of closure motions, and rules against frequent interventions. Taken together, these characteristics of how the New Zealand legislative process functions seriously undermine its democratic credentials.[73]

Waldron's skepticism that claims of parliamentary sovereignty are warranted when democratic processes are deficient invites a focus on whether the democratic character of the initial legislative debate and the post-judicial review sequel justify Parliament's insistency on the primacy and virtue of its judgment. Arguably, Parliament's response to the *Hirst* rulings would have a difficult time satisfying a quality criterion. It focused more on the desire to maintain a historical position rather than on a frank reassessment of the justification of the legislation, whether in terms of how a ban on prisoners' voting affects

[70] *See, e.g.*, *TOM* GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

[71] Waldron, *supra* note 61, at 41.

[72] *Id.* at 45.

[73] *Id.* at 43–45.

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the integrity of the political process or in terms of the human rights norms Parliament has affirmed and accepted by adopting the HRA.

The fourth consideration is to reflect on debates in similar political systems that also confront this tension of how to reconcile judicial review with democratic concerns. Although judicial power in Canada allows courts to invalidate inconsistent legislation, provincial and federal legislatures nevertheless have the power to insist upon the primacy of legislation—for most sections of the Charter on a temporary and renewable basis—even when so doing contradicts judicial interpretations of Charter rights. This power is authorized by the section 33 notwithstanding clause, a late-minute concession to provincial premiers who, for ideological and democratic reasons, opposed the idea of assigning courts new powers to constrain Parliament and hoped this notwithstanding power would mitigate the constraints judicial review might otherwise have on legislation. Although the triggering mechanism for dissent differs between these two rights projects because Canadian legislatures must act affirmatively to disagree with the judiciary whereas the United Kingdom Parliament must act affirmatively to give effect to a judicial ruling, both jurisdictions encounter a similar tension between the reconciliation of democratic principles and liberal constitutional norms.

The overwhelming majority of scholarship on the notwithstanding clause suggests use of this power is inconsistent with the broader mission of a juridical rights project. However, some scholars who reject the assumption that Parliament lacks a valid role to play when contributing to judgment about the scope of rights or how rights validly guide or constrain state actions, such as the author, believe that Parliament should develop institutional procedures or normative criteria to govern use of this power. The intent would be to encourage reasoned deliberation about the relationship between the significance of the rights claim at issue and the importance and purposes of the impugned legislation. Reform suggestions include the requirement for a larger majority than a simple plurality for approving this power and parliamentary committee hearings where government is expected to bear the burden of persuasion for demonstrating why legislation should not comply with judicial interpretation of rights.[74] The United Kingdom might also reflect on ideas in statutory bills of rights in the Australian Capital Territory and in the state of Victoria that require the Attorney-General to notify the legislative assembly shortly after courts rule that legislation is not compatible, and also present the legislative assembly a written response to the declaration of incompatibility. Although the UK's JCHR regularly monitors the government's response to negative judicial rulings, the government should assume responsibility to promptly alert Parliament when courts have disagreed with parliamentary assessments of compatibility, and notify Parliament of its proposed

[74] *See, e.g.*, CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM 181–95 (2000); JANET L. HIEBERT, WRESTLING WITH RIGHTS: JUDGES, PARLIAMENT AND THE MAKING OF SOCIAL POLICY 30–31 (1999).

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response within a reasonable timeframe. To return to how governments have responded to the *Hirst* rulings, prolonged delay on introducing remedial legislation has contributed to a political environment that trivializes the significance of the ban on prisoners' right to vote and portrays the obligation to enact remedies as both optional and unimportant.

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