House of Commons

Political and Constitutional Reform Committee

Voting by convicted prisoners: summary of evidence

Fifth Report of Session 2010–11

Volume I: Report, together with formal minutes, oral and written evidence

Additional written evidence is contained in Volume II, available on the Committee website at www.parliament.uk/pcrc

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The Political and Constitutional Reform Committee

The Political and Constitutional Reform Committee is appointed by the House of Commons to consider political and constitutional reform.

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The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume.

Additional written evidence may be published on the internet only.

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The current staff of the Committee are Steven Mark (Clerk), Lydia Menzies (Second Clerk), Hannah Stewart (Legal Specialist), Lorna Horton (Inquiry Manager), Emma Sawyer (Senior Committee Assistant), Annabel Goddard (Committee Assistant), Keith Pryke (Committee Support Assistant) and Rebecca Jones (Media Officer).

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Report

Report

1. We are publishing this short Report to make the evidence we have heard readily accessible in advance of the debate on voting by prisoners which is to take place on 10 February 2011.

2. We heard on 1 February from:

- Lord Mackay of Clashfern, the former Lord Chancellor,
- Aidan O'Neill QC, a leading human rights lawyer, and
- Dr Eric Metcalfe, Director of Human Rights Policy at JUSTICE.

3. The main purpose of the session was to gather expert evidence on how United Kingdom law in this area relates to the European Convention on Human Rights as interpreted through the binding judgments of the European Court of Human Rights (henceforth 'the European Court').

4. **We took the evidence summarised in this Report with a view to exploring the current legal position, not with a view to questioning whether extending the right to vote to convicted prisoners in certain circumstances would be philosophically, morally or politically justifiable. While recognising that this evidence is neither exhaustive nor conclusive, we hope it will help the House in its deliberations.**

Importance of the right to vote and the principle of proportionality

5. Aidan O'Neill identified the principle behind the European Court's decision in *Hirst v United Kingdom (No. 2)* and other related cases that "the deprivation of civil rights is too important to be assumed to be tied up completely with the deprivation of liberty".[1] Lord Mackay made clear that the right to vote "is not an absolute right" and "the Court does recognise that there may be situations in which the right to vote may be restricted or removed".[2] Aidan O'Neill told us that in the view of the Court, the ability to vote needed to be treated as a right and not a privilege:

> This is not about giving the prisoners the right to vote. It is setting out circumstances in which that right may lawfully be taken away.[3]
>
> What the European Court is telling us is, 'Take seriously the right to vote such that it is important. It is so important that if one is going to deprive anyone of it, it has to be done by an individual decision on those individual circumstances'.[4]
>
> I am here as a lawyer ... to tell you what I think we are obliged to do. My own personal views really count for nothing as to what we ought to be doing. What I

1 Q 9
2 Q 1
3 Q 42
4 Q 9

> would say is that it is quite clear from the decisions of the European Court of Human Rights that ... a distinction has to be made for how long you imprison somebody and for how long and whether you deprive them of their civil rights, including the right to vote. It is not good enough, it is not giving enough respect for the importance of the right to vote simply to say, 'You are in prison for four years and automatically you lose the right to vote for four years'. There has to be an element of individual decision-making.[5]

6. Eric Metcalfe expanded on this point:

> it is the basic principle of proportionality: the punishment should fit the crime. ... in hundreds of courts across the country this morning ... judges will be sentencing people who have been convicted of offences. They will have regard to sentencing reports, probation reports, social worker assessments, medical evidence and so forth. None of that goes on in relation to the punishment of disenfranchisement and this is the Grand Chamber's point. You have to have an assessment by the court about whether the punishment fits the crime. ...
>
> ... What the Court is saying is that you cannot disenfranchise an entire category of people—and in this case the category is between 70,000 to 80,000 people nation-wide—on a blanket basis. You have to have individualised assessment in each case.[6]

7. Lord Mackay on the same lines quoted from the judgment of the European Court:

> the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned ... As in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness.[7]

He also quoted from the judgment in December 2010 of Lord Justice Laws in the Court of Appeal in the case of *R (Chester) v The Secretary of State for Justice*:

> The law is that a blanket ban is impermissible, and there must be a discernible link 'between the sanction and the conduct and circumstances of the individual concerned' (*Hirst* paragraph 71). The government will no doubt consider carefully whether compliance with these standards requires a decision-making role in specific cases to be accorded to the judiciary.[8]

5 Q 2

6 Q 8

7 *Hirst v United Kingdom (No. 2)* (App. No. 74025/01), para 71

8 [2010] EWCA Civ 1439, para 35

8. While neither of these judgments specifies how a "discernible and sufficient link" is to be established, both suggest that it might be achieved through giving judges a decision-making role on disenfranchisement as part of their duties in sentencing convicted criminals. Lord Mackay told us, however, that "you certainly could not hand it over to the judges without very full elucidation of the rules", and that to fail to do so "would be utterly a derogation of the duties of Parliament in laying down the law".[9]

Proportionate disenfranchisement

9. Lord Mackay referred to the *Hirst* judgment for examples of situations in which convicted criminals might reasonably be deprived of the right to vote for a certain period:

> restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations.[10]

He also suggested that an argument could be made for restricting the voting rights of people convicted of crimes involving "a fundamental attack on the basic human rights of the victim".[11] Aidan O'Neill referred, however, to the case of *Scoppola*, in which the European Court found that the disenfranchisement of a murderer by Italian law was illegal because it was automatically linked to the crime he had committed, rather than considered on an individual basis.[12] But he also suggested that a consequence of decoupling disenfranchisement from imprisonment could in some cases be that a convicted criminal would be disenfranchised for a longer period than any term of imprisonment imposed.[13]

Conflict between United Kingdom statute law and international law

10. The three witnesses were clear that the current situation, under which all convicted prisoners lose the right to vote for as long as they are imprisoned, is in breach of the European Convention, because "it strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate".[14] As Lord Mackay told us,

> It has nothing to do with the nature or gravity of their offence and their individual circumstances and that, they say, is wrong. That is the decision in *Hirst* and it stands still. What it says effectively is a blanket ban is unlawful under the Human Rights Convention.[15]

9 Q 16

10 Q 1, quoting *Hirst* para 71

11 Q 38

12 Q 38

13 Q 9

14 *Hirst*, para 82

15 Q 3, quoting *Hirst*, para 82

Incompatibility of any blanket ban based on prison sentence length

11. Moreover, the view of our witnesses was that a change in the law to limit the right to vote by reference to the length of prison sentence imposed would fail to put right the breach found by the European Court:

> A blanket ban based on period of sentence, whatever the length, if it is one year or if it is 20 years, is going to be incompatible with the judgment in *Hirst*.[16]

> In *Frodl v Austria* it was a one-year ban and that was found to be incompatible. In *Scoppola* it was a three year ban. The problem is the blanket nature of the ban, of the lack of individual decision-making on it, not the length. So there is not a magic figure that with one leap we are free.[17]

12. We have heard that an element of individual assessment would need to be introduced into the process of deciding whether and for how long a convicted criminal should be disenfranchised, if the Government and Parliament are to satisfy the judgments of the European Court. We have heard no suggestion as to who could fulfil this role if not the sentencing judge.

Possible sanctions against the United Kingdom

13. All three of our witnesses were clear that a judgment of the European Court is binding on a country that is a party to the case. Lord Mackay told us that failure to comply would lead to sanctions:

> If you persist in ignoring a judgment of the court then I have no doubt whatever that the right to damages becomes a realistic expectation[18]

14. He also told us that the Courts would be unlikely to award damages if the law were to be changed in a way that constituted a genuine attempt to remedy the situation in the light of the judgments, even if the European Court decided subsequently that the remedy was insufficient:

> if the Parliament of the United Kingdom makes a genuine effort to deal with the *Hirst* problem, if I can call it that, I think it highly unlikely that they would sever any damages immediately if the court found that their solution was not absolutely up to the mark. In other words, we have tried hard to do what the court said; this is our best endeavour and the court have refused to tell us in advance what would be good enough. Therefore, I do not think it is at all likely that we would suffer any damages as a result of a second failure so long as it was seen to take account of what the European Court is saying and carefully weighing the kind of issues they raised as being necessary to consider before you deprive someone of the franchise.[19]

16 Q 43 [Eric Metcalfe]

17 Q 43 [Aidan O'Neill]

18 Q 19

19 Q 21

Importance of the rule of law

15. In any case, however, Lord Mackay saw the prospect of awards to prisoners as a secondary consequence of failing to respond to the judgments:

> our country has embraced the rule of law for many, many generations and it still is bound by the rule of law. Therefore, when we have taken on legal obligations, as we have under the Convention of Human Rights and Fundamental Freedoms in Europe, the rule of law requires us to obey the courts that are set up under that Convention whose judgments are binding. I do not myself regard politics and law as, in any way, in conflict because politics in our country should be carried on under the rule of law. Indeed, that is how it happens. The political decisions are made effective by acts of Parliament, which are then enforced by the enforceability powers of the State through the courts of law and so we are bound as a country. We have taken that on, to be bound by the rule of law, and that is the way it stands. Therefore, it is absolutely binding on us to obey the judgments of the European Court. Simply to say, 'Leave it till tomorrow', or, 'Leave it till the next year', or just say nothing about it, 'Let's ignore it', is not in accordance with the rule of law. I think to do that would be very wrong.[20]

> if you set up a system that includes decisions by the courts, until you change that system you are bound by these judgments. Now, different judges take different points of view and they are all individuals and none of them are perfect ... but if you want to change the system then you have to do that in an orderly fashion.[21]

16. At several points, he reinforced the importance of maintaining the rule of law, and of the Government and Parliament setting an example in this sphere:

> if we believe in the rule of law, we are just as much bound to observe the decisions of the European Court on matters within their competence as we are to obey the decisions of our own courts in matters within their competence.[22]

> personally, I do not believe that the rule of law should depend on what the punishment is. People are expected in our country to obey the law simply because that is what the law is that they are bound by.[23]

> the rule of law is very valuable to us. We tend to take it for granted but we need to make sure that we do not let it slip.[24]

17. Eric Metcalfe made a similar point:

> the United Kingdom cannot have its cake and eat it. It cannot say, 'We are abiding by our obligations under international human rights law', and at the same time refuse to implement the judgments of the court that has said, 'You are in the wrong'.[25]

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20 Q 13

21 Q 14

22 Q 3

23 Q 19

24 Q 52

International political consequences of failing to comply

18. Lord Mackay also reminded us of the political context in which the Court had been established:

> the Convention ... was initiated, I think, by the United Kingdom originally to deal with the situation of the persecution, terrible persecution, of minorities in Germany. It was hoped that by this kind of legislation—convention, agreement, legally binding—that that sort of treatment of minorities in the future would never happen[26]

19. Aidan O'Neill, meanwhile, drew our attention to what he saw as the political consequences of failing to respond to the judgments:

> In terms of the sanction, clearly suspension from the Council of Europe is not going to happen on this point. What is important, however, is the example one gives. One of the big issues facing the European Court of Human Rights is teaching newly democratic States about democracy. One of its biggest client cases is Russia. Another one in terms of democracy is Turkey. It is a problem with the Council of Europe mechanisms that some States simply do not fix their systems as they should do and it would be a great pity if a long-established State—the United Kingdom, which was there at the founding and there at the drafting—were to set an example to other States in the Council of Europe that they do not have to abide by the law. This is where politics and international relations come in. It is incredibly important that the rule of law be respected at an international level because if we have law/law then we do not have war/war.[27]

Public and political opinion

20. Our witnesses also commented on the fact that public opinion appears to be largely against allowing convicted prisoners to exercise the right to vote, and that this opinion may be reflected in the House. Aidan O'Neill told us:

> The law is not simply about majorities, about power being exercised by the State. It is also fundamentally ... about the protection of minorities against the will of the majorities sometimes. In some ways you can say, 'That is antidemocratic; that is lacking in sovereignty'; but it is an essential part to the notion of human rights that we now have: that individuals and minorities are protected by them.[28]

25 Q 28

26 Q 3

27 Q 13

28 Q 35

21. Lord Mackay concurred:

> I regard the position of the House of Commons, particularly, as very difficult indeed … The House of Commons has not followed public opinion in relation to the death penalty, for example … The problem is that if you go along with public opinion you may well find yourself with oppressed minorities.[29]

Conclusion

22. The House is being asked to decide whether it both "acknowledges the treaty obligations of the UK" and "supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand".[30] The evidence we have received from our witnesses, including a former Lord Chancellor, is that, however morally justifiable it might be, this current situation is illegal under international law founded on the UK's treaty obligations.

29 Q 41

30 Motion relating to Voting by Prisoners tabled for debate on Thursday 10 February 2011

Formal Minutes

Tuesday 8 February 2011

Members present:

Mr Christopher Chope	Mrs Eleanor Laing
Sheila Gilmore	Mr Andrew Turner
Simon Hart	Mr Stephen Williams

In the absence of the Chair, Mrs Eleanor Laing was called to the Chair for the meeting.

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Draft Report (*Voting by convicted prisoners: summary of evidence*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 22 read and agreed to.

Resolved, That the Report be the Fifth Report of the Committee to the House.

Written evidence was ordered to be reported to the House for publishing with the Report (in addition to that ordered to be reported for publishing on 1 February).

[Adjourned till Thursday 10 February at 9.45 a.m.

Witnesses

Tuesday 1 February 2011 *Page*

List of additional written evidence

(published in Volume II on the Committee's website www.parliament.uk/pcrc)

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–11

First Report	Parliamentary Voting System and Constituencies Bill	HC 422
Second Report	Fixed-term Parliaments Bill	HC 436 (Cm 7951)
Third Report	Parliamentary Voting System and Constituencies Bill	HC 437
Fourth Report	Lessons from the process of Government formation after the 2010 General Election	HC 528
Fifth Report	Voting by convicted prisoners: Summary of evidence	HC 776

Oral evidence

Taken before the Political and Constitutional Reform Committee

on Tuesday 1 February 2011

Members present:

Mr Christopher Chope
Sheila Gilmore
Andrew Griffiths
Simon Hart
Mrs Eleanor Laing
Mr Andrew Turner
Stephen Williams

In the absence of the Chair, Mrs Laing was called to the Chair.

Examination of Witnesses

Witnesses: **Lord Mackay of Clashfern KT**, a member of the House of Lords, **Aidan O'Neill QC** and **Dr Eric Metcalfe**, Human Rights Policy Director, JUSTICE, gave evidence.

Q1 Mrs Laing: Good morning, gentlemen, and thank you very much for coming to see the Committee this morning. May I begin by giving the apologies of the Chairman of the Committee, Mr Graham Allen, who is not here because he has been in hospital last week. He is fine by all reports. We do not have to worry about him but can I put it on record that the Committee wishes him well and that he sincerely apologises for not being here this morning.

We are very grateful to you for coming, especially as this meeting was arranged at fairly short notice. Our purpose as a Committee in holding this evidence session is to attempt to shed some light on the subject of the voting rights of prisoners; a subject that has had a lot of heat generated about it in the House of Commons and elsewhere in recent weeks particularly. We know there is going to be a debate on the floor of the House of Commons next week. There have been opinions, of course, on all sides of the argument and we are very grateful for having three differing opinions before us this morning.

We also appreciate that there are two aspects to this matter as far as the political situation is concerned: one is the straightforward question about when the right to vote should be withheld and the other is the interaction between the European Court, the European Convention and our own laws and law-making process. We are very grateful to you for coming to help clear up these difficulties this morning and what we hope to be able to do is to prepare, as a result of this evidence session, information that will help Members of Parliament when this matter is debated because it ought to be debated on the real facts, not upon conjecture or political prejudice.

I believe that each of you gentlemen is prepared to give us a short opening statement and the Committee would greatly appreciate that if you would care to give us a short opening statement. We then have plenty of time for questions and we hope that at the end of the session you may each be able to sum up with a closing statement as well. Lord Mackay?

Lord Mackay of Clashfern: Thank you very much, Chairman. I thought it might be helpful just to summarise with references, because I gather all of you will have the papers and it is better just to see what the court said than have some hearsay account of it. Just to put the very central pieces, these judgments are long and I do not intend to take you through them in any detail at all, except to try to get the essentials.

Mrs Laing: Thank you, we appreciate that.

Lord Mackay of Clashfern: The judgments in the European Court of Human Rights (ECHR) are a bit different from ours in form and so on but I think I can pick out the substance of it for the Committee. I have to say at the end of all this there are extremely difficult questions, probably political questions, but exactly what the law is going to be in relation to this is not all that easy to say. I just want to point that out because the court have said, "What you have done is wrong. You must go away and think again." But they have not told us in any detail what would meet their criteria. They say, "That is not our business. We are here to judge what you have done, not to tell you what to do". It is not the most helpful situation, I have to say, for people trying to be loyal to the court without getting into a muddle.

The first judgment that I refer to is the judgment in *Hirst*, which is the fundamental judgment and I think you have that. If you look at page 10 you see the essential and it is that Article 3 of Protocol 1, although it does not look like it when you read first, does guarantee individual rights including the right to vote and stand for election. So it is a right, it is not privilege. For all those who have signed up to Protocol 1, it is a binding obligation of the State. Paragraph 60 says, "It is not an absolute right. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere." In other words, the detail is not laid out in the position.

Just in passing, I have to point out that the Human Rights Convention, the European Convention, allows States to deprive a person of one of the fundamental rights, namely the right to liberty, as a consequence of contravening the criminal law but it does not mention any other right. But, of course, this right, in a sense, has come along later than the original community convention and, therefore, it may not be surprising that it is not mentioned. But the court does recognise that there may be situations in which the right to vote may be restricted or removed because it is not an absolute right. The circumstances in which that can

happen is the question that I think is for this Committee and for the House of Commons and eventually, possibly, if legislation is proposed, for the House of Lords.

Now, 62 is important, "It is, however, for the court to determine in the last resort whether the requirements of Article 3 of Protocol 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate." I just read these words to you. You have to think what exactly they mean because I have not found it very easy to say exactly what they mean. If you remove a person's right to vote at all, that right, so far as he is concerned, is completely ineffective. So how you remove the right of some and yet leave the rights effective is a somewhat difficult question; but it is one that we have to think about trying to resolve.

Now, they come on to deal with the question of prisoners on 63. The passages I have just referred are very general and 69 is important. But I go immediately to 71, which is on page 13. "This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention, Article 3 of Protocol 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations."

Now that is a very restricted type of activity and the question is how far that goes. The top of page 14, which is still 71, "The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction"—that is to say, the deprivation of voting rights—"and the conduct and circumstances of the individual concerned." In other words, it is questioning a very blanket disenfranchisement, "The court notes in this regard the recommendation of the Venice Convention that the withdrawal of political rights should only be carried out by express judicial decision. As in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness."

I think, Chair, you have the Venice Convention paper with you and I can just give you the reference to the passage in it that deals with this point. It is in the recommendations at the beginning and it is at the foot of page 5 and the top of page 6. It says, "Deprivation of the right to vote and to be elected." This is a convention set up by the Council of Europe. I think the situation is that it is not binding but it is a recommendation that if you follow it, hopefully what you are doing is all right, "Provision may be made for depriving individuals of the right to vote and to be elected but only subject to the following cumulative conditions: one, it must be provided for by law and, second, the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence."

Then number 5, and this is the one that has been referred to in the passage I mentioned, "Furthermore, the withdrawal of political rights or a finding of mental incapacity may only be imposed by express decision of a court of law." That is quite an important point. It is only a recommendation but it is what they say.

Mrs Laing: Lord Mackay, that is extremely helpful. Thank you very much. Can I ask you to pause there for a moment because we have one member of the Committee who has to leave to go to another Committee; if I may, although we would like to go further with your opening remarks, I think I am being told he does not have time to ask his question.

Stephen Williams: Not really. I will come back later.

Mrs Laing: Would you care to try to ask your question, Mr Williams. I apologise to Dr Metcalfe and Mr O'Neill, but we will come on to your opening remarks in a moment. Forgive us for doing this; it is a strange way around.

Q2 Stephen Williams: Thank you, Judges. Just to explain there is a Statutory Instrument Committee at 10.30 am and parliamentary time is rather unforgiving if you are late. I was going to ask some general questions in principle, in particular to Lord Mackay first as someone who presided over our legal system. Presumably when someone sentences somebody to prison, given that the vast majority of prisoners are released at some point—usually after a short period—the expectation is that they come out as better citizens than when they went in. That is a general assumption I assume you would agree with. If someone is going to be a better citizen then they should be able to exercise rights as a citizen in preparing them for the outside world. I would say that giving the prisoner the ability to think about the outside world and exercise the franchise is an important part of preparing them for the outside world. Is that a basic principle that any of you would agree with?

Lord Mackay of Clashfern: Yes, certainly. I suggest that one aspect of this that may be considered is, assuming that you think that a prisoner deserves to be disenfranchised to start with, within some distance of his release or her release—I say "his or her" in every context—the right to vote could be restored to that person as a preparation. Just in line with what you are saying, Stephen, you want to prepare the people for going back into the outside world. Well, give them back the vote. You can link that to their conduct and so on because if it is within a certain time of release the conduct during the prison time will have an effect on that. So if it is related to the time of release and a certain distance back from that, it does, by itself, connect with the conduct and individual concerned. I think that is a possibility that I have not heard fully discussed before. I meant to raise it but it rises very conveniently in answer to Stephen's question.

Mrs Laing: Thank you. Dr Metcalfe?

Dr Metcalfe: Yes, we agree.
Mrs Laing: Mr O'Neill?
Aidan O'Neill: I will try and be brief, too. In principle, of course, rehabilitation is one of the reasons why we have imprisonment. I am here as a lawyer, however, to tell you what I think we are obliged to do. My own personal views really count for nothing as to what we ought to be doing. What I would say is that it is quite clear from the decisions of the European Court of Human Rights that there has to be a distinction or a new decision made; a distinction has to be made for how long you imprison somebody and for how long and whether you deprive them of their civil rights, including the right to vote. It is not good enough; it is not giving enough respect for the importance of the right to vote simply to say, "You are in prison for four years and automatically you lose the right to vote for four years". There has to be an element of individual decision-making such as perhaps was being suggested, certainly by Lord Mackay.
Mrs Laing: Thank you very much.
Stephen Williams: I will now run to the other Committee and come back as soon as I can.

Q3 Mrs Laing: Stephen is forgiven because he is obliged to be there in case there is a vote; so we understand that. Lord Mackay, would you care to conclude your remarks? Thank you.
Lord Mackay of Clashfern: Yes. Now, I was referring to page 15 of *Hirst*. "The court notes that at the time of the passage of the latest legislation the Government stated that the aim of the bar on convicted prisoners was to confer an additional punishment. This was also the position espoused by the Secretary of State in the domestic proceedings brought by the applicant." There were decisions, of course, in the courts here. I do not trouble with these just now, "While the primary emphasis at the domestic level may have been the idea of punishment, it may nevertheless be considered as implied in the reference to the forfeiting of rights that the measure is meant to act as an incentive for citizen-like conduct." Now, they seem to say that that is possible; in other words citizen-like conduct is something that you can aim for and if disenfranchisement helps that might be all right.
Now, 76, "The Court notes that the Chamber"—that is the first court in Strasbourg—"found that the measure lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff"—in that case there was tariff representing punishment—"(that period representing retribution and deterrence) had expired."
There is a point mentioned here at the foot of that page and the top of the next page that I will not read but summarise. It says that in some cases a person convicted of an offence could be sentenced either to prison or to community service and it depends on circumstances other than the actual crime for which a penalty is imposed. Of course, if the person is sentenced to community service this blanket ban would not apply. So there was an arbitrariness about convicted prisoners being disenfranchised in that area, which they say was arbitrary.
The ultimate decision of the court in *Hirst*, of course, was that a blanket ban is unlawful. I should just refer you to paragraph 82 where it says, "Therefore, while the Court reiterates that the margin of appreciation is wide, it is not all-embracing." They improved the situation in 2000 but they say, "It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate." It has nothing to do with the nature or gravity of their offence and their individual circumstances and that, they say, is wrong. That is the decision in *Hirst* and it stands still. What it says effectively is a blanket ban is unlawful under the Human Rights Convention.
Now, in answer to the question that the Chair put at the beginning, the second question, we are bound, as a State—the United Kingdom—as a signatory of the Convention and we are bound as a State to give effect to the judgment of the European Court. Of course, they have means of backing that up by awards of damages and the like but the essential point is that we are bound in law to observe these decisions and act accordingly.
It is a different situation from the European Court at Luxembourg and sometimes there is confusion; I am sure none here but there is confusion in some places about that. But this is the Convention that was initiated, I think, by the United Kingdom originally to deal with the situation of the persecution, terrible persecution, of minorities in Germany. It was hoped that by this kind of legislation—convention, agreement, legally binding—that that sort of treatment of minorities in the future would never happen. It goes some distance in that direction but it is for us as a nation to observe, if we believe in the rule of law, we are just as much bound to observe the decisions of the European Court on matters within their competence as we are to obey the decisions of our own courts in matters within their competence.

Q4 Mrs Laing: Thank you, that is an extremely important point and we appreciate you making it so clearly. Thank you very much.
Lord Mackay of Clashfern: Now, I just want to refer to the judgment of Judge Caflisch, which is at page 23 of this report, because it says something that you may have discovered already. "There may well be, in contemporary democratic States, a presumption of universal suffrage." This is paragraph 2, "This does not mean, however, that the State is unable to restrict the right to vote, to elect and to stand for election and it may well be that the Contracting States 'enjoy' a wide margin of appreciation in this respect"—this is what he says—"although this expression carries little meaning, except to suggest that the States have some leeway." So he does not put a lot of faith on this wide margin of appreciation and he suggests "reasonable", as you notice at the end of his paragraph.
I think at the foot of the page he says that the Contracting States cannot just do what they like; they are subject to European controls. So he is saying that whatever we do the European Court can test whether it is right.

Q5 Mrs Laing: May I ask you on that exact point: in your opinion, would that mean that there is a test of reasonableness to be applied by the European Court and if the UK Government were now to enact some legislation to get around the blanket ban by, let us say for the sake of argument, giving discretion to a judge in passing sentence as to the question of the franchise, then the passing of that legislation by our Parliament could be challenged on the grounds of reasonableness?

Lord Mackay of Clashfern: Yes, that is what he is saying. He is saying that a wide margin of appreciation, in his judgment, just means that you have to be reasonable about it all. Of course, all of you know better than I that what is reasonable is quite a difficult question. Anyway, he is leaving that question to the parliaments, the legislative bodies of the Contracting State.

There is a joint concurring opinion of another two judges. I did not have anything very much to say. At page 27, just at the very end, they say, "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 a 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." That is the situation in *Hirst*.

I do not really think I need to refer to all these other cases. The courts here have—and it was a Scottish court that did it first—in effect, said that our blanket ban is inconsistent with that judgment and, therefore, incompatible with the Convention under the Human Rights Act, the provision that allows courts to make a declaration of incompatibility, and the expectation is, if a court has done that, that Parliament will put it right. That is the purpose of it. It will change the law. Our courts, particularly the Scottish court but the English court, will say, "You do not need to do it twice. If it was done once, that is it". It happens to have been a Scottish court that declared that the present statute is incompatible with the Human Rights Act and, therefore, the expectation is that Parliament will change that. That has been ruled for some time.

Now, I thought the most helpful thing I could do to finish is to go to the judgment on page 9 of item 10 in the bundle that you have and it is at page 32. It is a judgment of the Court of Appeal in the second case—maybe the third case—that has come along since *Hirst*. This is Lord Justice Laws speaking and I think it is worth just looking at this because he is trying to summarise for us what the law is.

Q6 Mrs Laing: Lord Mackay, which case are we on?

Lord Mackay of Clashfern: It is on page 9 of 10. It is the Court of Appeal in *R (Chester) v Secretary of State for Justice*. I think it is slightly out of order from what you would expect from the index but, anyway, it is there.

Mrs Laing: Thank you.

Mr Chope: Page 154 of the bundle.

Mrs Laing: Excellent, thank you very much.

Lord Mackay of Clashfern: I think this is the most helpful passage that I can lay before you from the authorities. Lord Justice Laws speaking, "As I have indicated, the nature and scope of measures amending or replacing ROPA s.3 is likely to be acutely controversial." Well, he was not far wrong in that assumption, "The controversy will not be about the law, but about the wisdom or unwisdom of social policy. There are deep philosophical differences of view between reasonable people upon the question of prisoners' suffrage." He quotes the justification that was given in the earlier case—that is the case of *Hirst*—before it went to Europe and then he says what opponents say.

Then he says at 34, "But there are arguments the other way. It might in particular be said that a person convicted of very grave crime has so far distanced himself from the values of civil society that it would be a travesty of justice to allow him to participate in its governance. In such a case the prisoner's disfranchisement is rightly regarded as an element in his punishment. 35. I articulate these points not to express my agreement or disagreement with any of them, but to demonstrate that the choices for government—are delicate and difficult, and are by no means to be concluded, as it were, cut and dried by the law. It is a political responsibility, and that is where it should remain. The law is"—and he is stating this authoritatively—"that a blanket ban is impermissible, and there must be a discernible link 'between the sanction and the conduct and circumstances of the individual concerned'. The government will no doubt consider carefully whether compliance with these standards requires a decision-making role in specific cases to be accorded to the judiciary."

I just have to say that that is a very concise summary of the position but, in doing so, Lord Justice Laws has not expressed the matter that is raised in *Hirst* in the passages I read to you about the aims of the disenfranchisement. What is the purpose of them? They give the example of people who have done something in relation to trying to subvert Government or something of that kind.

Mrs Laing: Yes, indeed.

Lord Mackay of Clashfern: But that is just an example and I think we have to think quite carefully about what are the justifications. If you decide, for example, that people committing violent crime of a certain level of gravity should be disenfranchised; why is that? Well, it could be said, for example, that if somebody is committing a violent crime he is damaging very severely the human rights of the person against whom the violence is being exercised. Therefore, you have to expect that at least when he goes to prison first he may not be very respectful to human rights generally and if he is legislating or taking part in the legislature in the sense of voting, then that is not a very adequate situation. Therefore, unless and until he has changed—as he comes near the end he may well be changed—then he should be disenfranchised. That is a possible line that one can take.

Mrs Laing: That is very helpful and perhaps that is a guide to the margin that we have been discussing.

Lord Mackay of Clashfern: Thank you. I am done. Thank you very much.

Q7 Mrs Laing: Thank you very much, Lord Mackay. That was enlightening and it is the purpose of this Committee to give the House of Commons the facts; the light rather than the heat of the situation and you have shed light. Thank you very much indeed. Before I ask the Committee for their questions, I ask Dr Metcalfe and Mr O'Neill—Dr Metcalfe first—if you would care to give us your opening.

Dr Metcalfe: I will make an extremely brief opening statement; simply to reiterate one of the key passages from *Hirst*, which has also been subsequently taken up by different chambers of the court in in *Frodl v Austria* and *Scoppola v Italy*, earlier this year. The Grand Chamber said in *Hirst*, "The severe measure of disenfranchisement must not be resorted to lightly and the principle of proportionality requires a discernible and sufficient link"—that is the phrase that Lord Mackay just gave to you—"between the sanction and the conduct of the circumstances." The Grand Chamber in *Hirst* gives two examples of that in relation to subversion of democratic institutions or abuse of public office. Another example that I think might be useful to consider is offences against the democratic order such as terrorism. Guy Fawkes caught trying to blow up the Houses of Parliament: it would have been an appropriate punishment in his case if he was subject to disenfranchisement, I think most people would agree.

Q8 Mrs Laing: I should think he would have been delighted if he had merely the franchise withdrawn.

Dr Metcalfe: He was hung, drawn and quartered.

Mrs Laing: That is somewhat harsher punishment but it is a good example, we understand, thank you.

Dr Metcalfe: That is a good example, I think, of a category of crime where there is a discernible and sufficient link between the offence and the punishment. It is put in rather elegant language by the court but it is the basic principle of proportionality: the punishment should fit the crime. We wouldn't, in this country, levy a fine against an individual—a Magistrates Court, a County Court or a Crown Court, would not levy a fine against an individual of, say, £10,000 without first inquiring whether the individual is able to pay.

You do not in any ordinary sentencing case and you will find this in hundreds of courts across the country this morning. Judges will be sentencing people who have been convicted of offences. They will have regard to sentencing reports, probation reports, social worker assessments, medical evidence and so forth. None of that goes on in relation to the punishment of disenfranchisement and this is the Grand Chamber's point. You have to have an assessment by the court about whether the punishment fits the crime. We take the view that it is only in a very narrow category of cases that people should be disenfranchised—those identified by the Grand Chamber, and subsequently in *Frodl* and *Scoppola*—and that there has been no good reason for a five-year delay in implementing the Grand Chamber's judgment. It has since been confirmed several times.

Obviously there is a wide degree of latitude. The point about the margin for appreciation, the court is saying, "We are an international court. We are not in the business of giving prescriptions about how you organise your democracy". There are lots of different electoral systems: you can have first-past-the-post; you can have proportional representation; you can have one House; you can have two; you can have geographical representation; you can have differing sizes of constituencies. The court is not going to get into the business of saying that you have to have one way or another way or a particular method. What the court is saying is that you cannot disenfranchise an entire category of people—and in this case the category is between 70,000 to 80,000 people-wide—on a blanket basis. You have to have individualised assessment in each case. Thank you.

Q9 Mrs Laing: Thank you very much. Mr O'Neill?

Aidan O'Neill: Again, I hope to be brief in my statement because I am here to answer your questions. In order to set out the parameters of that, though, I think it is useful just to highlight one aspect. There seems to me to be a lot of mutual distrust among three groups of interest that might be said: journalists, politicians and lawyers.

Mrs Laing: There is a surprise.

Aidan O'Neill: Indeed. But each of those groups thinks that they are telling the absolute truth and that the other two groups are telling partial truths. As a result there is more misunderstanding and more mistrust. But I think what it is: one is answering the truth for different questions. Journalists see what they are doing as telling us what is going on, what is being done. Politicians, if politics is the art of the possible, "What can be done?" Lawyers are telling you what you are obliged to do. Now, what anyone thinks as to whether one should be obliged to do or what one ought to be doing: clearly, as individuals and as citizens, we will all have different views.

I think the most useful thing I can tell you from my perspective, wearing my lawyer's wig, is what it is we are obliged to do because of the situation. It seems to me that that can be summarised, whether one likes it or not, politically, individually—I may not like it, although in fact I act in these cases as a lawyer. But there has to be a distinction, as Lord Mackay said, between the deprivation of civil rights, the vote, and the deprivation of liberty. One cannot assume that those should march together because the deprivation of civil rights is too important to be assumed to be tied up completely with the deprivation of liberty.

In principle, you could have a shorter period for the deprivation of civil rights than you could for the deprivation of liberty; but you could even have a longer period, depending on the circumstances. This is not about giving prisoners the right to vote. What the European Court is telling us is, "Take seriously the right to vote such that it is important. It is so important that if one is going to deprive anyone of it, it has to be done by an individual decision on those individual circumstances". As I say, it might well mean, for example, that people who are given suspended sentences and not deprived of their liberty can, consistent with the European Court, still be deprived of certain of their civil rights if that is appropriate in their particular case.

Q10 Mrs Laing: That is a very helpful suggestion. Thank you.

Aidan O'Neill: Bear that always in mind is what I say. Those two matters should not be seen as running together and that is the problem the European Court identifies.

The second point I would make is a political one or a realpolitik one. There are elections coming up on 5 May 2011 in Scotland and Wales. Those elections on the current franchise are going to be Convention-incompatible again; so there is an urgency about that. There is an added urgency to that because elections to the Scottish and Welsh parliaments are covered by not just European human rights law but European Union law. There could be a whole new raft of arguments about the legality of those elections and the possibility—frankly I have to say it—of compensation claims, because at some levels compensation claims for prisoners is what focuses politicians' and governments' minds. In order to avoid that, something has to be done and it has to be done very quickly.

Q11 Mrs Laing: Can I just clarify this point because it is a very important one? Are you suggesting that if no action is taken before 5 May this year—and many people currently who might argue that they would have a right to take part in the Scottish and Welsh elections and, indeed, local government elections throughout the United Kingdom do not have the right to vote—that the very result of those elections could be challengeable in the same way as the *Hirst* case was brought?

Aidan O'Neill: It would be challengeable on stronger grounds and it might even be challenged beforehand in terms of the legality of going ahead with them, as a potential legal argument. It is another thing one has to bear in mind because—when it comes to municipal elections, local government elections throughout the UK, Scottish parliamentary elections and Welsh parliamentary elections—one is entering into the area of European Union law, which is an added string to the bow of those saying that their rights are being violated. We have waited five or six years since *Hirst* but this is reaching crunch point now.

Mrs Laing: Thank you very much indeed.

Aidan O'Neill: Thank you.

Simon Hart: Thank you very much for your opening remarks. Can I go back to the point made earlier about where politics and the law collide, because so far we have been quite heavy on the law and light on the politics. There are general elections, assembly elections, local government elections; there are various referendums coming up. There are open primaries for the selection of candidates and there is even likely to be election of police commissioners. What are the legal implications of making a distinction between those forms of elections in terms of prisoner voting rights? The Government has a political conundrum here and I was interested to know what you think the legal implications may be about separating out those different forms of elections. For example, there would be some who would think it be odd for prisoners to vote for police commissioners. I would like your view on that. Secondly, what are the real penalties of simply ignoring the situation and proceeding as we are or perhaps giving prisoners a certain amount of voting rights but falling short of what you are arguing is the legal minimum? These are political decisions; these are political concerns, mixed in with the law. These are real. These are the ones we are going to have to take, as you rightly point out, Mr O'Neill, possibly this side of May.

Aidan O'Neill: In the first instance, in terms of separating out the different kinds of elections: Article 3 of Protocol 1 refers to elections in the choice of the legislature; so what it covers in principle are general elections. The European Court has said it does not cover, in principle, a right to vote, for example, in purely local government matters. It would not cover police commissioners and the like. The problem or the interesting area is: would it cover something with substantial devolved administration such as in Scotland and Wales and the weight of the authority of the court is to say that they are regarded as legislatures for the purposes of that Article. So one can, in order to be Convention-compatible, say that there has to be a change for general elections and for the devolved parliaments and assemblies but not necessarily required by the Convention in any other relation.

Q12 Simon Hart: If I can just interrupt. A referendum on voting arrangements for a general election: does that count?

Aidan O'Neill: Well, that gets into that very interesting lawyers' grey area. That would be heading towards the idea of the free expression of the opinion of the people in the choice of the legislature; so the referendum could be covered.

Mrs Laing: We certainly are opening a can of worms here; barrel of worms, I think.

Aidan O'Neill: Absolutely. No cases that I know of talk about straightforward referenda but it is a very interesting legal point.

Dr Metcalfe: You raised the question about the consequences of ignoring the judgment. Just a point: the ultimate sanction is suspension from the Council of Europe. I am not saying that that is going to happen in this case but, if a country continues to defy or ignore or refuse to honour its obligations under the European Convention, eventually a country would be suspended and it has happened in the past. I think Greece in the 1970s, when you had the rule of the generals, was suspended from the Council of Europe. Ultimately, because of the relationship with the European Union—membership of the Council of Europe is a pre-requisite for joining the European Union—there is obviously a further eventual sanction—and I stress "eventual"—of being suspended from the European Union. Again, I am not saying that this is going to happen in relation to one particular case but these are the ultimate sanctions that would apply in relation to a country that refused to abide by its obligations under the Convention.

Q13 Simon Hart: My question is: to what extent? You can nod in the direction of the law but just stop short of where you have been arguing we should be.

Dr Metcalfe: The court in the most recent judgment of *Greens and MT,* which was a pilot judgment—something that the court does in situations where there are likely to be a large number of repeat judgments. Obviously when you have potentially 70,000 to 80,000 people who may be affected, they could all bring cases. In order to cut down on its workload it uses this pilot judgment procedure. It declined to lay out specifics but it did say that when the Westminster Parliament enacted new legislation it was highly likely that it would be looking at that and reviewing that again. Ultimately it will come to the question of: is it compatible or is it not. If the court says that it is not compatible then the United Kingdom will continue to be under an obligation to remedy the situation. If you do not get it right, you will only be back here again in a few months or a few years.

Aidan O'Neill: In terms of the sanction, clearly suspension from the Council of Europe is not going to happen on this point. What is important, however, is the example one gives. One of the big issues facing the European Court of Human Rights is teaching newly democratic States about democracy. One of its biggest client cases is Russia. Another one in terms of democracy is Turkey. It is a problem with the Council of Europe mechanisms that some States simply do not fix their systems as they should do and it would be a great pity if a long-established State—the United Kingdom, which was there at the founding and there at the drafting—were to set an example to other States in the Council of Europe that they do not have to abide by the law. This is where politics and international relations come in. It is incredibly important that the rule of law be respected at an international level because if we have law/law then we do not have war/war.

Lord Mackay of Clashfern: I would just like to say that our country has embraced the rule of law for many, many generations and it still is bound by the rule of law. Therefore, when we have taken on legal obligations, as we have under the Convention of Human Rights and Fundamental Freedoms in Europe, the rule of law requires us to obey the courts that are set up under that Convention whose judgments are binding. I do not myself regard politics and law as, in any way, in conflict because politics in our country should be carried on under the rule of law. Indeed, that is how it happens.

The political decisions are made effective by acts of Parliament, which are then enforced by the enforceability powers of the State through the courts of law and so we are bound as a country. We have taken that on, to be bound by the rule of law, and that is the way it stands. Therefore, it is absolutely binding on us to obey the judgments of the European Court. Simply to say, "Leave it till tomorrow", or, "Leave it till the next year", or just say nothing about it, "Let's ignore it", is not in accordance with the rule of law. I think to do that would be very wrong.

Mrs Laing: That has been done for some years. I will not ask for any comments on that.

Simon Hart: We fall short of our obligations in EU law every day of the week but I take your point.

Lord Mackay of **Clashfern:** We ought not to. None of us is perfect and I understand that. We are all very much defective. On the other hand, we are supposed to obey the law—speed limits and all that kind of thing—and I hope we do so.

Mrs Laing: A salutary lesson.

Q14 Mr Chope: Just on that last point about sovereignty, at the Council of Europe Assembly this last week the new Secretary General said that he regarded the sovereignty of the people as a very important element in the rule of law. My concern is that what is happening now with the European Court of Human Rights, in its interpretation of the Convention, it is engaging in what you might describe as judicial activism—I am not saying necessarily in this particular instance but in general—whereas, in our own system, if the courts engage in judicial activism we, as a sovereign parliament, can legislate to repeal or amend those decisions.

We cannot, as a country, deal with judicial activism in an international court because we signed up to the original Convention. Rather than extend that Convention to cover, for example, the issues of capital punishment, there was a Protocol and that was dealt with democratically by the individual countries signed up to that Protocol. What is happening now is that, instead of putting forward new Protocols, the court is extending its remit and scope through judicial activity. Do you see that there is a growing problem there in terms of the distance between what the court is saying and what the people, exercising their sovereignty, believe are the right balances to have in relation to human rights?

Lord Mackay of Clashfern: As you probably know, Lord Hoffman expressed himself towards the end of his judicial career in relation to the Court of Human Rights in Strasbourg and every court is subject to criticism. The problem is that if you set up a system that includes decisions by the courts, until you change that system you are bound by these judgments. Now, different judges take different points of view and they are all individuals and none of them are perfect, as we were saying a moment ago; but if you want to change the system then you have to do that in an orderly fashion.

What changes one would want to make in relation to Strasbourg I am not sure. I have not really given much thought to that so far because it would be a big job but do not forget that this judgment relates to an Article in a Protocol. One of the problems, of course, is, as I said, that the rights conferred by that Protocol were not in existence when the original Convention was signed. Therefore, there is no express reference in the original Convention to deprivation of these rights in respect of a conviction; although there is in respect of liberty, which is of course the fundamental right.

Dr Metcalfe**:** If I could just make the point that we did sign up to the Protocol and we also, under international law, always have the option of entering a reservation, which we have done in relation to other Protocols under the Convention. So if we think that a particular right is a problem, it may give rise to difficulties, we can always say so. We did not say so in relation to prisoners.

More generally, we are very strongly opposed to criticisms made by Lord Hoffman of the court's role

and I do not think it is fair to say that it has engaged in judicial activism. What the court has responsibility for is assessing the law in 47 different countries with approximately 800 million people. So the jurisdiction of the court stretches a long way; all the way from Iceland to Vladivostok on the Pacific coast of the Russian Federation.

It is easy to criticise the court's judgments and sometimes you will have judgments which are less clear than others. That is a consequence of the court's enormous workload but I think that the court has been established to perform a task and, as Lord Mackay says, if you are going to have a Convention and where the Member States agree to have the meaning of the Convention determined by an independent court, it stands to reason that the court will sometimes take decisions that will be unpopular. To use a very crude analogy: is like belonging to a tennis club. You sign up; you agree to abide by the rules and if the committee governing the club decides to change the rules and you do not like them, you have the option of leaving.

Q15 Mr Chope: Can I just interrupt there? Aren't we in a situation here where we are powerless; the sovereign parliament is powerless to change the interpretation of the rules? Whereas if you have a tennis club and you do not like the ruling, then at the next AGM you can get together and you can clarify the terms.

Dr Metcalfe: You can get together—the United Kingdom Government can get together with the other governments of the Council of Europe and it can agree a Protocol. We have changed the meaning of rights this way. For example, originally under the Convention the death penalty was not unlawful. That was amended. The exceptions to the death penalty were removed by Protocols but, in principle, it could go the other way. In practice I do not see that is ever going to be realistic, that other countries in the Council of Europe, all 47, are going to agree to make it possible to limit rights. More to the point, the judgment gives a great deal of leeway; so it is not necessarily the case that you would need to go.

Ultimately—the tennis club analogy is a very crude one—it is not a violation of the United Kingdom Parliament's sovereignty. You are a sovereign parliament and you remain free to do what you want. But you cannot do that and remain within the terms of the Convention because part of the Convention that you agreed to was to have these disputes determined by an independent court. So you can complain that you do not agree with the court's definition of the right to vote in these circumstances but you can't have your cake and eat it; remain within the terms of the European Convention on Human Rights and at the same time say that you are free to do what you want. The Westminster Parliament remains free to do what it wants.

Q16 Mr Chope: On the issue of remedies, I understand, from reading the judgments, that in France prisoners may vote if they are given that right by the court. In other countries it is a question of whether the court wishes to take the right away from them. Is there not a lot to be said for saying this whole issue should be handed over to the judiciary and let the legislators keep their noses out of it and rely upon the judiciary to deal with this as part of—I will call the sentencing—the disposal, of the people who come before the courts.

Aidan O'Neill: Absolutely. It does seem to me that the only way in which one is going to have a robust Convention-compatible approach is to have that notion that the deprivation of civil rights is taken by judges in the individual case and it is handed over, in a sense, to the judges to make decisions in individual cases. As you have sentencing guidelines, you could have deprivation of civil rights guidelines and there could be an input there in the usual way. Do not quote me but I think if one had such a system whereby an individual decision was being made by the judge at the same time as sentencing, on civil rights, guided by such appropriate factors in the individual case and what happens generally, then that would resist any further challenges in Strasbourg on Article 3 of Protocol 1.

Lord Mackay of Clashfern: It is not for me to speak for the judges any longer. I have not had that privilege for a while. This is an extremely difficult issue and you certainly could not hand it over to the judges without very full elucidation of the rules. The judges could apply the rules but you need rules, in my view. I am sure you all understand just how difficult sentencing has become. They have about 16 or 17 different things they have to keep in mind and they are all human after all. To give them this kind of responsibility, I think, would be utterly a derogation of the duties of Parliament in laying down the law.

You must not forget that the Venice Convention does say that it has to be in accordance with the law. You could have a situation in which the rules were laid down by Parliament to be applied by the judges and, for example, the rules might distinguish between different types of crime. For example, where there was a deliberate act—*mens rea* as they tend to call it—or something of that kind was involved, then it might be easier to deprive the convicted person sentenced to a substantial term of his voting rights for a time.

On the other hand, if it is a crime that is an absolute liability crime as they call it, then the situation might be different. Parliament could distinguish between different types of crime and then it would be for the judge to say, in any particular case, whether this was a sentence in relation to that type of crime or not, so that a certain degree of judicial input came. I think the judges would find it extremely difficult just to be handed this problem: Parliament saying, "Well, we do not know what to do; let us hand it over to the judiciary". I think that would not be satisfactory.

Q17 Mrs Laing: Dr Metcalfe, did you have something to say on that point?

Dr Metcalfe: I was simply going to add that you cut down the workload of the judges by restricting the situation in which judges are required to consider deprivation as a punishment to a very narrow category of cases, instead of saying to judges that they have to consider this every time that a criminal offence is considered. I have to stress, it is not just in relation to

people who are given custodial sentences. It may be appropriate to give disenfranchisement to someone who has not received a prison sentence. Phil Woolas, for example, who was disenfranchised as a consequence of his recent electoral offence; that is a good example of someone who may not require a custodial sentence but may well be justified in being disenfranchised for a period of time. But you can cut down on the workload of judges and it is going to be a massive workload if you say to judges in every single criminal offence when they sentence that they also have to consider disenfranchisement. Much better and much more practical to say it is only in this relatively small category of cases.

Q18 Mr Chope: I am not going to go into details as to how much of a burden it would be on judges but I doubt very much whether much of the plea in mitigation put forward on behalf of most defendants would be devoted to the issue of whether or not the defendant was being deprived of his voting rights, but leave that as it is.

Can I move on to the issue of damages, because we know that in the *Hirst* judgment the court reached the conclusion that, as far as the damages were concerned and what they described as the "concept of just satisfaction", that would be enough that the remedy would be put right by the United Kingdom Parliament. We have heard since, and not least from Mr O'Neill today, of the possibility of massive numbers of cases coming forward where people would be claiming damages. That was seized upon by the Prime Minister as being one of the justifications for introducing the four-year rule, although that seems to have been modified since.

Where does this idea come from, that if we come up with the wrong answer—and we have agreed that it could be very difficult to know necessarily whether what Parliament decides is the right answer by the court until there was another case. But, in this area, why are we saying that there would be a big risk of millions of pounds in damages being payable when we know that even in the *Hirst* case no damages were payable?

Aidan O'Neill: It would certainly require a development in the case law. You are absolutely right. *Hirst* in the Grand Chamber says the finding of violation in that case was sufficient just satisfaction. However, it has been six years since *Hirst*. The court has to have something else to recognise the failure of the Government and Parliament to enact something in response to that judgment.

In more recent cases that involved deprivation of the right to vote, but not from prisoners, damages have been awarded. One can see the development in a series of cases in which people in Italy were disenfranchised in Italy by reason of their bankruptcy; damages were awarded of €1,500. At the beginning of this year, *Kiss v Hungary*; damages of €3,000 were awarded to an individual who was disenfranchised by reason of he was under a Mental Incapacity Guardianship Order.

The general principle within the Convention is that you do not get deserving and undeserving victims and so there is certainly space for argument. It would require further argument and further case law to say that if one is awarding damages to bankrupts for disenfranchisement and to those disenfranchised by reason of mental incapacity, then, given that it is entirely clear that the blanket disenfranchisement of people by reason simply of deprivation of their liberty—one has to bear in mind if one is a convicted individual who then gets out of prison on life licence or on parole, you get your vote back immediately. Again, it is this automaticity that is the problem. It is not taking the right seriously enough.

I am saying, as a lawyer advising as to, is there a possibility for damages? Yes, I think there is. I am not saying it definitely is here now but it definitely must be borne in mind.

Q19 Mr Chope: Do you think the Government was rather exaggerating the quantum of the threat?

Aidan O'Neill: You might say that but I could not possibly comment.

Mrs Laing: We will forgive you, Mr O'Neill.

Lord Mackay of Clashfern: I think that the problem really arises this way. In *Hirst* it was a new decision and the statute had stood for a while and we had modified it. Originally it was anyone who was in prison and it was recommended, as a result of the Speaker's Conference, that those who were not convicted should not be deprived simply because they happened to be in prison on remand, because that was what had been decided before there was any trial. So *Hirst* was a new imposition, as it were, and a decision on a general matter that had arisen for the first time.

If you persist in ignoring a judgment of the court then I have no doubt whatever that the right to damages becomes a realistic expectation. I am not able to quantify. The Prime Minister would be in a better position than I am, because he will have a knowledge of numbers. But, personally, I do not believe that the rule of law should depend on what the punishment is. People are expected in our country to obey the law simply because that is what the law is that they are bound by. To say, "Well, if you do this"—like these advertisements about, "If you do not pay your fare you will get a criminal record"—is a slightly insubordinate way of enforcing the law.

We ought to be principled enough to seek to obey the law as it is laid down to us and if we do not like the way it has been laid down, then we have opportunities to change it. As you said, Parliament in the United Kingdom can change the way the courts run. Indeed, they have changed them extraordinarily in a whole lot of ways in recent times; sometimes to recall what they have already decided. It does not make the position of the courts particularly easy. Once the decision has been handed down in accordance with existing rules then I think we are duty bound, as individuals and as governments, to obey that decision.

Q20 Simon Hart: One last point. Mr O'Neill was raising the spectre of the EU Charter of Fundamental Rights coming into play in all this. This is the Charter that we were told, by the previous Government, we had locked out from but it seemed as though we had not. How would that Charter of Fundamental Rights interact with the interpretation of the European

Convention on Human Rights? The court has already said that we have time as a country to consider this; as long as there is something before Parliament by July that is going to be all right. How could the European Union start interfering in cutting across that and saying that, because we had not sorted something out by 5 May in Scotland, we were now going to open ourselves up to lots of damages claims? Do you have potential clients waiting for you in the wings on this subject, Mr O'Neill, or is that unfair?

Aidan O'Neill: It is not unfair, I am afraid. There are plenty of clients waiting in the wings certainly. It is a very interesting point. The European Court of Human Rights said one has six months, but they did that on the basis of not taking into account the forthcoming Scottish elections and Welsh elections—this is devolved aspects, generally—which was perhaps unwise, but there it is. So the court in Greens, in giving six months, was looking solely at UK-wide elections.

The second point is that, as a matter of EU law, there is a right to vote in municipal and devolved elections. That is an EU citizenship right. There was no opt-out from EU citizenship rights in the Charter; those rights are confirmed in the Charter. The opt-out was specific to social rights—workers' rights, basically. So those citizenship rights apply in full to the UK, as they do across the European Union. It is a lawyers' argument. I am not saying it is necessarily going to win—it will certainly have an uphill battle before the courts here—but it is another avenue that has opened up. In fact, it was an avenue that was suggested by the UK Government in Greens. They said, "Here is a point you have not taken; so, therefore, you have not exhausted your rights". Well, maybe they are right. I will follow the UK Government's advice on this perhaps, if a client wishes it.

Mrs Laing: Mr O'Neill is enjoying this barrel of worms.

Aidan O'Neill: It is my job.

Q21 Mrs Laing: It is always good when there is plenty of meat for lawyers. That is just fine. Thank you. Lord Mackay?

Lord Mackay: Well, I have no clients as you understand. I think the precise position in the European Union is difficult. My own consideration has been in relation to the UK as a whole and the judgment of the European Court of Human Rights and I think the longer that we leave that over—disobeying, in effect, the court—the more likely it is that we will have trouble of one kind or another in relation to the elections; because, as Mr O'Neill says, there are plenty of people wanting to look into this and the options are fairly numerous. For my part, I would like to have them shut down as soon as possible.

I would say this: if the Parliament of the United Kingdom makes a genuine effort to deal with the *Hirst* problem, if I can call it that, I think it highly unlikely that they would sever any damages immediately if the court found that their solution was not absolutely up to the mark. In other words, we have tried hard to do what the court said; this is our best endeavour and the court have refused to tell us in advance what would be good enough. Therefore, I do not think it is at all likely that we would suffer any damages as a result of a second failure so long as it was seen to take account of what the European Court is saying and carefully weighing the kind of issues they raised as being necessary to consider before you deprive someone of the franchise.

Q22 Mrs Laing: That is a very helpful point. Thank you. Dr Metcalfe?

Dr Metcalfe: I was just going to say very briefly: your rights under EU law are distinct from your rights under the Convention and, in fact, in many ways they have more force, they have more bite, in our domestic law because of the European Union treaties. There is a very complicated relationship between the European Union and the European Convention because the European Union is now party to the European Convention. The courts in Strasbourg and the courts in Luxembourg are working out a memorandum as we speak to agree how they are going to align the jurisdictions in the future. I would only say that if you can solve the matter in a principled way before the elections then that is obviously good because, as a former Government lawyer, I would say that EU law would only add a massive headache to the Government's attempt to deal with the problem.

Q23 Mr Chope: Just a final point. Would any of this be different if we had not enacted the Human Rights Act 1998?

Lord Mackay of Clashfern: No.

Mrs Laing: Do you concur?

Aidan O'Neill: Well, in the cases that have gone to Strasbourg and it is Strasbourg cases that are requiring this, so "no" is the short answer.

Q24 Mr Turner: Can we go back a bit? What is the cost of introducing rights—in this case for prisoners, some of whom will vote and some of whom will not vote—to the people who are administering the prisoners' rights to vote?

Dr Metcalfe: I should imagine very little. The prison services are already administering prisoners' rights to vote; people who are on remand, for example.

Mr Turner: I am sorry?

Dr Metcalfe: Remand prisoners already have the right to vote.

Q25 Mr Turner: What is "very little"?

Dr Metcalfe: I do not imagine that, administratively, it is very difficult merely to extend the administration system that already exists in relation to remand prisoners and draw in prisoners generally. You are increasing the piles of paper, I would guess, but I cannot foresee that the administrative costs would dramatically increase.

Q26 Mr Turner: You would have to notify their home address, wherever they lived.

Dr Metcalfe: There are a variety of different ways and these were raised in the Government's consultation paper. The option that we had favoured was simply to take their address at the time that they were sentenced and use that as their relevant constituency and then serve them with papers on that basis. I am not exactly

sure how it is done on the basis of remand prisoners but it does not seem to me a particularly difficult system to adapt, given that the machinery is already in place.

Lord Mackay: Just to supplement that slightly, if Parliament was giving rights to convicted prisoners it would be wise to stipulate the basis on which it was done; that is to say, whether it was residence in prison, which is the fact, or their residence at the time they were recently charged or something like that. Of course, it would be a postal vote, I assume.

Mrs Laing: We had all made that assumption, although I think you are the first person to have stated it, Lord Mackay. Let us hope it would be a postal vote.

Lord Mackay: I would think so. There is a point to be settled, if this Section 3 is to be modified, as to where the vote is to be exercised.

Q27 Mr Turner: Yes. I say this because I have three prisons in my constituency and I have a certain view on which way they vote. Can you tell me how many laws, as it were, we have broken and put things right subsequently?

Dr Metcalfe: In the history of the Convention or since the Human Rights Act has come into force?

Mr Turner: Either, really.

Dr Metcalfe: There has been approximately between 17 or 23 somewhere around that region declarations of incompatibility by the UK courts. So there have been at least that many cases where we have set the law right following an adverse judgment of our own courts. There has been, I would guess, at least 20 or so, probably more, adverse judgments since the Human Rights Act came into force from the Strasbourg courts in which we have put things right. We have a certain period of time; there is always a period of implementation. It is not a huge number, but—

Mr Turner: No. What is concerning me, though, is that there is a sort of ratchet scheme. What seems to me to have been quite unreasonable for us even to think about in 1950 has suddenly become the imminent law, in this country now; that is, prisoners have gained the right to vote following it being withdrawn before. I am worried that we will go on with the building up of these rights until, say, the next—and I do not know if it will be this one but you can imagine it happening, "Stop allowing the first-past-the-post vote because it is not democratic. AV is democratic, STV is democratic; but the first-past-the-post is not because they do not have half the vote". I am sure you can imagine that happening—whether it is true or not true, it is a threat or not a threat—but the problem is we do not know where the law is going to come next. What is your view on that or is it your view that that is nothing to do with you; it is up to we politicians?

Dr Metcalfe: Speaking as someone who works for a human rights organisation, we are in the daily business of pointing out to Government the defects in those laws and every time you pass a piece of legislation that has major human rights implications we are always diligent in supplying a briefing to identify all those points where we think the law is incompatible and you are likely to be challenged in Strasbourg. I hate to blow our own horns but if Parliament had listened to us a wee bit more they might have lost a few less cases in Strasbourg.

Mr Turner: Or they might have decided to leave the ECHR.

Dr Metcalfe: Well, I think that would be an extreme step. But just to give two examples where the UK Courts had said there was no problem in terms of compatibility, which is retention of DNA of people who have not been charged or convicted of a criminal offence and the use of stop-and-search powers under Section 44 of the Terrorism Act without reasonable suspicion. Those were two areas where we thought the law was incompatible. The Government won in the British Courts and it lost in the Strasbourg. Both those judgments have now been accepted by the coalition Government as—

Mr Turner: Yes, but "accepted" is a rather biased view. Just say, "It has no longer ceased to affect the law". I think that is a more—

Dr Metcalfe: Well, these are settled agreed areas of policy in any event; but, even if there was a collision between the Government's policy and the Strasbourg ruling, the Government would be bound by its obligations under the European Convention.

Q28 Mr Turner: Yes. I think the problem is: when will the point come—and I suspect it will come although I do not know when, just as I expect we will leave the European Union for the same reason—when it becomes wholly unsatisfactory that we have a whole range of things over which we have no power? We represent our electors and our electors, in the view of many of them, are more important than the view of European decisions. Do you understand that view?

Dr Metcalfe: I understand that view. I do not agree with it. As I said earlier, the United Kingdom is under a legal obligation because it signed up to the Convention. That is something that the United Kingdom did as a sovereign power. Under international law a State is free to honour the Conventions it signs up to and if it decides it no longer wants to live up to those Conventions it can denounce them and withdraw. My point is that the United Kingdom cannot have its cake and eat it. It cannot say, "We are abiding by our obligations under international human rights law", and at the same time refuse to implement the judgments of the court that has said, "You are in the wrong". We may disagree with those judgments but we cannot say that we are abiding by international human rights law if we are not.

Q29 Mr Turner: But what I do not quite understand is why was it not the law in 1950 and became the law at some point before 2010? Why did that happen?

Dr Metcalfe: I do not want to get too drawn into a jurisprudential debate, but these are in the nature of general principles and one of the—

Q30 Mr Turner: Yes, but what do you mean by "general principles"?

Dr Metcalfe: They are not clear, precise legal rules in the way they set out in each and every simple circumstance, all possible eventualities. In fact, no legislation can ever hope to do that. It is one of the

reasons why Parliament is still in business, because if you were able to get all the laws and anticipate them you could have closed up shop years ago. The point is that legislation always has to adapt to face new circumstances. One of the inherent problems of human rights from a legal standpoint is that they are general principles; so, for example, no person shall be tortured. It does not set out each individual circumstance in which that individual right may come into play. For example, is depriving a person—

Q31 Mr Turner: Sorry, you did not explain: why it was not the law in 1950 but is the law at your court now?
Dr Metcalfe: One argument is that it was inherently the law in 1950. It just had not been fully appreciated because we had not crossed that particular bridge.
Mr Turner: I see.

Q32 Mrs Laing: Lord Mackay and Mr O'Neill: do you agree with that analysis?
Lord Mackay: I am old enough to have seen quite a few changes in the law in our country over the years that I did not expect, but that is probably due to my lack of expectation as to what happened. There have been tremendous changes in the law. I entirely agree that the electors are very important, but one of the things the electors perhaps need help with is understanding fully what the system is and what is required in that system. When, for example, the law is suddenly changed in relation to careless driving so that if you cause death by careless driving you are suddenly liable to a much more serious penalty, that is a big change in the law. It was not in the law before it was enacted; it is in the law now. This is supposed to be development. This is what Parliament is for. This is why we have institutions to view in these matters.

Q33 Mr Turner: That is for Parliament to make those decision, not some people over in Europe.
Lord Mackay: Absolutely right, but then Parliament agreed to set up this Council for International—because we appreciated that things were happening in Germany that our Parliament had no control over. If we could have stopped the Holocaust in our Parliament we would have done so, I feel certain. But we discovered that we could not do that because there were certain authorities in Germany that thought they could do what they liked. When we came after the war to think what to do, we set up this Convention—we were certainly among the originators of it; not the European Union, but the Council of Europe—in order to try to bring the human rights values of the people of Europe to bear on the people who would try to oppress minorities. That is what this is for and this is part of the consequences of that working out and progressing over the years and, of course, Article 3 of Protocol 1 is something we agreed to separately from that particular Convention.

Q34 Mrs Laing: In fact, just taking forward Mr Turner's question about the law having changed, let us say, at some point between 1950 and the present, is it simply that the law has not changed and had the *Hirst* case been brought, let us say, in 1972 rather than later it would have resulted in the same judgment and the same position for the UK Government?
Aidan O'Neill: It would not. If it had been brought in 1972 they would have lost, and I think Mr Turner does have a point in fact. There is a development in the understanding of the law. The texts do not stay the same. The texts do not even stay necessarily the way they were intended by the authors in 1950. But that is the way the common law has worked and that has been the tradition in these islands for centuries, going on a millennium; that as new factual situations come up they are considered by the judges and the texts are then applied in the context of present day understanding.
So you are entirely right; if this case had been brought in 1950 they would have lost; in 1972 they would have lost; 1995 there would have been difficulties. But things move on. A general consensus gathers as to what the approach should be and one of the aspects of the consensus is: how are things generally done, because this is an international Convention among the members of the Council of Europe. So at some levels you could say, "Well this is bringing in foreign, non-British ideas into our system", but, as Lord Mackay so eloquently put it, no man is an island; this nation is not simply an island anymore.

Q35 Mr Turner: The United States will not join in outside domination.
Aidan O'Neill: Apart from the United Nations, which it formed. The United States was absolutely central to the understanding of international law and human rights that we now have. The United States was instrumental in setting up the Nuremburg trials and in creating a United Nations and the Declaration of Human Rights and the American Charter on Human Rights. The United Nations, in the 1940s and 1950s, was incredibly pro-internationalist. We are the heirs one could say, of Nuremburg. As Lord Mackay has said, the European Convention on Human Rights could be seen as a photographic negative of a legal system that has gone wrong. It is the German Nazi legal system. The law is not simply about majorities, about power being exercised by the State. It is also fundamentally, they say, about the protection of minorities against the will of the majorities sometimes. In some ways you can say, "That is antidemocratic that is lacking in sovereignty"; but it is an essential part to the notion of human rights that we now have: that individuals and minorities are protected by them.

Q36 Mrs Laing: That is very helpful. Would it be right to say, in answer to Mr Turner's question, that between, let us say, 1950 and 2000 there has not been an act of the UK Parliament that has changed the law that brought about the *Hirst* judgment? Is that what you are saying: it is a development of understanding of ideas and where we are in interpreting the law, but that no act has been taken by the UK Parliament, passed by the UK Parliament, which has changed how *Hirst* would have been interpreted in 1950 and 2000?
Lord Mackay: We did change the law in this area in 2003 to exempt or take out of the ban people who were in prison on remand; un-convicted prisoners.

That was a development that the UK Parliament decided on. So this area has developed, although not so fully here as in Europe, on this aspect of convicted prisoners and their rights.

Q37 Mr Turner: I think the real problem is: why does nothing appear to be done about Serbia and the surrounding countries, for example, where they did use not only force but an antidemocratic group who people regarded as a minority, but they are willing to do something which is much less—the prisoners in this country and they do not even seem satisfied that we, as people, have democratic rights. People do have democratic rights. They have the right to say, "We do not wish these people to decide that they should have a vote".

Dr Metcalfe: Well, I think, to address the Balkan situation, that was the subject of NATO military action. So it was clearly something dealt with beyond the machinery of the ECHR. It would not have been appropriate to deal with that by way of going through the parliamentary Assembly of the Council of Europe. So the appropriate action was taken at the appropriate level. Did the European Court of Human Rights rule in relation to complaints arising from the situation in the Balkans? Many times. We can go through the court's case law and look at all the decisions arising from there, just as now the court's case list is being filled up with decisions arising from the Georgia conflict when Georgia and Russia had their brief skirmish a couple of years ago. There is now a whole load of cases before the European Court in relation to that.

Mrs Laing: Thank you Dr Metcalfe, I am going to limit the discussion on Serbia lest we run out of time for the actual issue before us. Perhaps we will come back to that if we have time at the end.

Q38 Sheila Gilmore: I would like to thank the witnesses very much. I came in here not knowing as much about the subject as I probably should have done and I do feel very much clearer; so I thank the witnesses for clarifying a lot in my head and I hope that the transcript of evidence will help the debate Parliament is going to have next week. It seems to me, from what all of you are saying, that, short of deciding that we are going to pull out of the European Convention on Human Rights and review our own human rights legislation, legally we have to change. What I would like to ask you is whether you think that the Italian case, *Frodl*, is the only exceptions that would be considered to be reasonable? A lot of the discussion here, as I understand it, is centred on things like length of sentence, should it be one year, two year, three years, or the nature of the offence. *Scoppola* talks about the nature of the offence but in a very limited way and I would be interested to hear your views on that.

Lord Mackay: I think that distinctions could be made. I was suggesting some earlier, for example where there is what is usually referred to as *mens rea*; one of the places for Latin has remained. It means "a guilty mind" I think. Where a guilty mind is involved, I think that might be the first essential. I think it is an absolute liability as, for example in the *Factories Act* and that type of case; it might be different. On the other hand, I think that if somebody commits a crime of serious violence—sexual violence, sexual assault, assault on children, abuse of children, that kind of thing—one can argue, and it would be good to have that expressed as part of the argument, that is a fundamental attack on the basic human rights of the victim.

Attacks on human rights and on electoral rights and so on are important. It seems to me that attack against individuals of that sort is fundamentally a breach of human rights of these victims and, therefore, it is perfectly reasonable, as part of the punishment, that the deprivation of the right to vote should be imposed. But I would suggest that it is a very important part of rehabilitation to give them the right back when you are hoping they are going to re-join society. This seems to me to be a possible way of dealing with the matter, but I think the debate should certainly take account of what the court said about the aim of the disenfranchisement and deprivation of others' human rights seem to me to be perfectly reasonable as a way of doing that.

There are others like, for example, fraud and that kind of thing. It is deprivation of the right of property of somebody else, which is another human right guaranteed under a Protocol. So it is possible, with a bit of thought, to construct human rights arguments for deprivation in quite a range of cases. Then, I think, it may be wise, so long as it is clear what the cases are, that the court should be responsible for ultimately saying, "In addition to going to prison for seven years you will lose your right to vote until you are eligible for parole", or something like that.

Aidan O'Neill: If I might say, it is an excellent question that goes to the heart of this in fact. *Scoppola* was, of course, a convicted murderer. The Italian law disenfranchised him and the Italian Government argued, "Well, only certain crimes are covered by this". My French is not good enough but it is to do with crimes that are characteristic of breaking the social contract that one has with one's fellows. So they list them as crimes of fraud, of aiding certain crimes against the administration of justice, certain crimes about the abuse of public office and power. They say if you are sentenced, just for those crimes, for more than five years then you lose the right to vote forever; if it is for more than three years then you lose the right to vote for a certain period; I think it is two years.

The court says, "No, that is not good enough". It is, again, that automatic application of the law. It was not a specific: looked at by a court, a judge saying, "You will lose your right to vote for a certain period for these reasons", rather than the judge simply saying, "Well, that's what the law says; over five years, lifetime ban". That was in the case of a murderer; where they found that there was a breach of his rights. There is not a much greater breach when you think of the social contract, which is why my line on this is that, if you get the judges to make the decision about disenfranchisement at the time of sentence and say why they are doing it, then that is the way forward, rather than specifying particular crimes because it might not stand up to scrutiny.

Dr Metcalfe: I agree with Mr O'Neill's point in *Scoppola* and also in *Frodl*. Both involved people who had been convicted of murder. I take Lord Mackay's point about the argument that you can construct about crimes by their nature generally involve the violation of someone else's fundamental rights. I fear that if you drew that argument too broadly you might end up in the situation where most people were disenfranchised in the event. I tend to think that the point made by the court in *Hirst* is that there has to be a sufficient and discernable link between the conduct and the nature of the punishment. I think electoral offences and abuse of public office are the two examples that the court gave. I have given a third of terrorism. I think that is a very good example of a crime of serious violence. Striking against the democratic order, someone like Guy Fawkes would be an obvious candidate for disenfranchisement. I think at the heart of it there has to be this individual assessment that the punishment fits the crime.

Q39 Sheila Gilmore: If there is to be an individual assessment, that is putting a considerable onus on our judges. Do you think that there should be, maybe even beneath that, some threshold below which there should not be disenfranchisement, for example, which might be in years or types of crime, and above that an individual assessment? I am just thinking that in terms of individual—I mean where one has a sentence up to a fairly high level, for example. So in those cases are they going to have to look at it every single time or is there a case for a—

Mrs Laing: Would you suggest there should be a tariff rather than—

Sheila Gilmore: I was thinking of a threshold where in certain types of crime, or lengths of imprisonment perhaps, there would automatically be a right to vote and above that it might be taken away in certain cases. I am just envisaging whether in every single case a judge is supposed to make that decision on top of all the other things.

Mrs Laing: Gentlemen, can I ask you for brief answers on this one because I want to bring in the rest of the Committee.

Dr Metcalfe: You could have the very simple approach of saying the judge always has to do individual assessments. It is a massive increase in the workload, I would expect. We would favour the situation where you just enfranchise everyone. You could have a situation where you presume disenfranchisement where they have been sentenced to more than ten years, for argument's sake; but it would be for the prosecution to apply for disenfranchisement as an additional punishment, not as an automatic imposition.

Lord Mackay: Given my view about this, I do not think I can elaborate further. It is a very difficult issue and I think there is a good deal to be said for a variation, but I do not think the judge should be left with the whole thing to do. I think it has to be within rules, fairly definite rules laid down by Parliament; otherwise the judicial task becomes very difficult indeed. You can just imagine the sort of comment that would be made on an individual judge standing out on his own trying to decide a case like this.

Aidan O'Neill: Again, I think this is very apposite. If there is a presumption in favour of enfranchisement then I think you are on safe ground or even if there is a rule in favour of enfranchisement you are not going to be in breach of the Convention. So one could see that only crimes of a certain seriousness might then have procedures about also applying for disenfranchisement and that might cut the workload while keeping one on the right side of human rights requirements.

Q40 Andrew Griffiths: Can I draw you back to Lord Justice Laws' judgment in the *Chester* case just a few months ago. He cites the Secretary of State for Justice where he says, "By committing offences which by themselves or taken with any aggravating circumstances including the offender's character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have a say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative." What the Secretary of State was arguing there was that voting is a privilege and not a right. I think what we have heard today is that you view the opposite.

Lord Mackay: But you see that that sentence contains the word "right" in it and that is what Lord Justice Laws pointed out; it is contradictory within itself.

Q41 Andrew Griffiths: Absolutely. I speak as a constituency MP who has received dozens of letters and emails from constituents who are outraged at the thought of giving the vote to prisoners and having received one in support and that was from a convicted murderer. Do you accept that this is a case where the legal system, the judiciary, is not only at odds with the will of Parliament but is also completely out of step with the view of the vast majority of the British public who oppose giving the vote to convicted criminals?

Lord Mackay: I certainly understand that and that is why I regard the position of the House of Commons, particularly, as very difficult indeed. This has been left for six years and I think there is work to do in having people understand the situation. The House of Commons has not followed public opinion in relation to the death penalty, for example, and that was a decision taken when I was chairing the Committee. I am sorry; I am going on a little too long. The problem is that if you go along with public opinion you may well find yourself with oppressed minorities.

Q42 Andrew Griffiths: You cited the death penalty. In that case, of course, Parliament was of a different view from society. In this case, Parliament and society are of one mind, which is to oppose this proposal.

Lord Mackay: Well that's for Parliament to decide but, if so, Parliament has to think about its responsibility in relation to the rule of law.

Aidan O'Neill: Certainly, one should never talk about the right to vote as a privilege. In a democracy the principle is that all of us have the right to participation by our vote in how we are governed. That is what

makes it a democracy. The history of our islands constitutionally is one in which democracy, or the democratic principle, has become more fully realised. Mr Turner asked about changes in law: why are things not as they were? In 1828 I would have been deprived of the vote because I am a Catholic. Up until the early 1900s the women in this room would have been deprived of the vote because of their gender. Things move on. One realises more fully what the principle of democracy requires, which is the principle that as a matter of right—not somebody giving you the right to vote—you have the right to vote. That is not to say that everyone should be able to exercise it. This is not about giving the prisoners the right to vote. It is setting out circumstances in which that right may lawfully be taken away.

Mrs Laing: That is a very important point, Mr O'Neill, and I am grateful for you making it so succinctly. As far as this Committee's mission to inform the debate is concerned, the answers that you have all just given us are very important.

Q43 Andrew Griffiths: That was a general question about the principle. In the few minutes I have left if I could just get into the nitty-gritty of the practicalities of any changes. It appears to me that a lot of this hangs around the *Hirst* judgment and this definition of "Margin of Appreciation". Dr Metcalfe and I are on opposing scales on this. I think Dr Metcalfe wants it to be the minimum ten years, maybe just for terrorists, maybe just for politicians.

Dr Metcalfe: Politicians convicted of criminal offences.

Andrew Griffiths: Whereas on the other side, I would like to see the minimum. Would we, in your opinion, be breaching our obligations if rather than an arbitrary four years, or ten years, as you argue, Dr Metcalfe, it was one year? Would we be meeting our obligation?

Dr Metcalfe: If it was a blanket ban based on people who had been convicted for more than one year yes, you would. Unless you had a system of individualised assessment, that the punishment fitted the crime, then you would have breached the judgment in *Hirst* that says there has to be a discernible link and there has to be individualised assessment.

One of the ironies of the current blanket ban that we have is that someone who serves four and a half years—which is half a sentence for someone who has been, say, convicted of rape or serious burglary—can entirely avoid the effects of the ban if they serve their prison sentence within the period of two general elections. On the other hand, the person who serves a prison sentence of six months will be deprived of their right to vote. So the person who is convicted of a relatively minor theft, who goes inside for six months but it just happens to be that there is a general election on a particular time that they are inside—it seems to me that if your constituents are very concerned about the effect of people convicted of serious crimes voting, they should be concerned about that. Why is the rapist able to vote, the guy who served four and a half years in prison, and the petty thief is disenfranchised. A blanket ban based on period of sentence, whatever the length, if it is one year or if it is 20 years, is going to be incompatible with the judgment in *Hirst*.

Aidan O'Neill: I would agree with Dr Metcalfe. In *Frodl v Austria* it was a one-year ban and that was found to be incompatible. In *Scoppola* it was a three year ban. The problem is the blanket nature of the ban, of the lack of individual decision-making on it, not the length. So there is not a magic figure that with one leap we are free.

Mrs Laing: So the key to it is that the punishment fits the crime?

Aidan O'Neill: Absolutely.

Q44 Andrew Griffiths: I am attracted to Lord Mackay's suggestion of restoring the right to vote at the end of a sentence. Do we feel that that would meet our obligations?

Lord Mackay: I think so. I have tried to apply my mind to it myself if I had to decide this question. For example, in relation to the *Hirst* case, *Hirst* had served his punishment and he was just in there for protection; a very light remand in a sentence, although he had been convicted, naturally, of a serious crime. I think that if you fix it to the length of sentence still to be served, you immediately go to the circumstances of the particular person and the particular crime, but I do not think it would be wise to leave it on that alone. I think a degree of distinction between crimes would be useful also, particularly if the distinction was seen to be based on the crime's relationship to fundamental rights.

Q45 Mrs Laing: Thank you. Would either of you like to take that forward?

Aidan O'Neill: I can see the idea of restoring a right to vote. I think it is absolutely required after a punishment element has ended and somebody is being detained for reasons of public protection. I think it is absolutely clear from the judgments of the ECHR that that has to be done, but I still have a difficulty. I do differ from Lord Mackay on this, I think, in that I accept that there have to be rules but I see that those rules have to be applied by an individual decision-maker and I think that has to be by a judge at some point, whether that is at the time of sentencing or subsequently where convicted prisoners are applying for the vote.

Q46 Mrs Laing: But rules laid down by Parliament and then interpreted and applied by judges?

Aidan O'Neill: Absolutely.

Mrs Laing: I think on that do we have agreement?

Aidan O'Neill: Yes.

Mrs Laing: Yes. Thank you.

Q47 Andrew Griffiths: Just one more question with two minutes remaining, one last question. The other option available to us is to leave it to judges when sentencing to decide whether the right to vote should be withdrawn or not. If that were applied, what would be the implications for those prisoners already serving sentences? Would we have to have a review by the sentencing judge of every single case of every prisoner currently serving a custodial sentence?

Lord Mackay: I personally would think not. It depends a bit on how long they are there and how many there are. I do not know exactly how many there might be but certainly if you can get the law right now, as it were, I think that is a pretty considerable step. Some of these people might bring cases if they were left out, but it is quite difficult to be retrospective about this. I suppose that you could have a system of review but it would be awkward.

I do think that if you make a step in the right direction, even if it does not happen to take you the full distance, it would be quite an important step and, of course, it has a great deal to do with people accepting it. I understand the difficulty about the views of the public and maybe half a loaf at the start is better than going completely against public opinion, but going with a judgment a certain distance may be quite wise.

Dr Metcalfe: Let me just make a simple economic point. You currently have 70,000 prisoners in the prison systems who are ineligible. Whatever transitional arrangements you have, there is going to be a situation in which they will bring cases to the court. That is a massive expenditure of public money. It would be much simpler and much more practical to just enfranchise the vast bulk of them and save a massive amount of public money.

Mrs Laing: Gentlemen, can we run over a few minutes?

Lord Mackay: Yes, certainly.

Mrs Laing: We are supposed to conclude at 12.00 pm but we still have some outstanding points if you do not mind. Thank you. Mr O'Neill?

Aidan O'Neill: Very briefly to Mr Griffiths. If you want to avoid more cases then you will have to have a review mechanism. I think what Lord Mackay is saying is that one might well have cases, but having done, in good faith, something to try and remedy the issue then you might win them. That is a political judgment. Cases will definitely be brought if there is not a review mechanism for existing prisoners because all matters become publicised and it is an issue.

Q48 Mr Chope: It is a very quick one. Can anybody help us on what they think is the monetary value of the right to vote? I will give you an example. I was monitoring elections in Albania and met a group of people and I was unclear as to whether they were complaining that their votes were being bought or whether they were not being bought at a high enough price. It turned out it was the latter. Be that as it may, it then turned out that their votes were being sold for about €5 each. What value do you put upon the right to vote in the United Kingdom in monetary terms.

Lord Mackay: I would say invaluable.

Dr Metcalfe: I would agree with Lord Mackay.

Aidan O'Neill: Priceless.

Mr Turner: On the other hand, who is the Conservative who was put in prison? Five years ago, 10 years ago.

Mrs Laing: I can't remember, but—

Mr Turner: Aitken yes. He said he did not think that this would be a matter for daily discussion in the prisons.

Mrs Laing: But it is our duty to do what is right, regardless of public opinion or prison opinion. Stephen Williams had to leave the committee half way through his questions and now, at last, I will bring him in to ask his questions.

Q49 Stephen Williams: Which are all the practical questions I would have asked about location, because of my constituency as well. They have all been dealt with. I will come back to the general principle that we seem to be considering of minority rights and when Parliament should withhold those minority rights. I would differ from a fellow member of the Committee, Andrew Griffiths. Sometimes Parliament, people and the courts are out of kilter. Within the last decade, gay men and women would not have been allowed to serve their country in our armed forces. The last Government fought that in the courts, lost a case; but then, lo and behold, at the last general election my Labour opponent was trumpeting that as an achievement, a civil rights achievement of the last Labour Government. So opinion moves on these issues and sometimes it needs a jolt from an external source to make us do it. Can any of the three of you think of another occasion when an outside intervention has brought about a societal change or a legal change that is now broadly accepted but at the time it was made would not have been contemplated?

Lord Mackay: I think the corporal punishment in schools is one area where it took some time to bring the matter into Parliament in a full way. You may remember there were one or two different suggestions as to how these cases should be met. I appeared for the Government in that. It was long ago now, but that is an example of where public opinion had to be moulded. After all, Members of Parliament we respect as our opinion formers.

Aidan O'Neill: I would say I am old enough to remember the passing of the Race Relations Act in the late 1960s and the kind of society one had then, at some levels Parliament was quite ahead of popular opinion where racist epithets and racism were thought to be part of the common currency, which is utterly unacceptable now. So Parliament was ahead of public opinion then and, in a sense, formed it and moulded it. I was also going to say the Sex Discrimination Act and Equal Pay Act, but I am not sure quite how much that has percolated through here.

Mrs Laing: I was going to suggest the Sex Discrimination Act and the Equal Pay Act have still to come to fruition.

Aidan O'Neill: Absolutely so.

Mrs Laing: In public and other opinion. Dr Metcalfe?

Dr Metcalfe: I would agree with those two examples. Discrimination and punishment, I think, in response to your earlier question, are two examples where if you took the European Convention in 1950 when it was first agreed, our conception of what constituted discrimination and cruel and unusual punishment in those days would have been very different from now and, of course, decisions would have been very different from now. That is a good example of where the court provides an evolving standard by reference to change in circumstances. At the same time, the court is very careful not to move too far ahead, as we have seen in recent cases about gay marriage. So the

court is very circumspect in general about pushing what are these common standards too far too fast.

Q50 Stephen Williams: One slightly off-piste question then, Chairman. Another oppressed minority, arguably, who might do not have a franchise might be peers. Should peers have the right to vote?
Lord Mackay: I thought to mention that but I was—
Mrs Laing: We will forgive you for special pleading. It is allowed in this case.
Lord Mackay: It has other countervailing advantages, as had been shown—well, countervailing opportunities, I should say.

Q51 Mrs Laing: Thank you. I think we have exhausted the questions from the Committee. Gentlemen, you have been very kind to give us so long this morning. Our investigation has shed considerable light on this issue. Just before we conclude would you like to give us concluding remarks? Dr Metcalfe?
Dr Metcalfe: I have no concluding remarks, thank you.
Mrs Laing: Mr O'Neill?
Aidan O'Neill: I think you have heard enough from me. I certainly have.

Q52 Mrs Laing: We are grateful for what we have heard from you, thank you. Lord Mackay?
Lord Mackay: Well, I appreciate fully the difficulties that Members of Parliament face in this area and I think there is a question of courage and leadership possibly that I have to think about in this area. I think the rule of law is very valuable to us. We tend to take it for granted but we need to make sure that we do not let it slip.
Mrs Laing: Thank you very much indeed. I am sure that as a consequence of our investigations this morning and your very kind cooperation and input we will be able to put before Parliament a paper that will help in the forthcoming arguments and discussions on this important issue. Thank you very much indeed.

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