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SCOPPOLA v. ITALY (No. 3): THE UNCERTAIN PROGRESS OF PRISONER VOTING RIGHTS IN EUROPE

JAVIER R. JARAMILLO*

Abstract: This Comment examines European disenfranchisement of prisoners in light of the European Convention on Human Rights, which guarantees a right to free elections through Article 3 of Protocol No. 1. While many European states continue the longstanding practice of denying wrongdoers the right to vote, at least under certain circumstances, this practice has come under increasing criticism over the last several decades. In recent years, the European Court of Human Rights (ECtHR) has decided several cases addressing this issue, but these decisions have failed to clarify under what circumstances it is permissible for a state to deny prisoners, and former prisoners, the right to vote. The ECtHR's ambiguous use of the margin of appreciation doctrine has only added to the confusion. This Comment suggests that the ECtHR should take a clear stand against prisoner disenfranchisement by only permitting the practice when truly necessary to protect the democratic process.

INTRODUCTION

In May 2012, the European Court of Human Rights (ECtHR) released its latest contribution to the muddled and oftentimes controversial issue of prisoner voting rights.¹ In *Scoppola v. Italy (No. 3)*, the Grand Chamber of the ECtHR ruled that the Italian government had not violated Article 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR) by permanently depriving an Italian citizen of the

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¹ *Scoppola v. Italy (No. 3)*, App. No. 126/05, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111044>; see *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01, 2005-IX Eur. Ct. H.R. ¶¶ 5–6 (2005) (joint opinion of Wildhaber, Costa, Lorenzen, Kovler, and Jebens, JJ., dissenting); C.R.G. Murray, *Playing for Time: Prisoner Disenfranchisement under the ECtHR after Hirst v. United Kingdom*, 22 KING'S L.J. 309, 309–10 (2011) (noting the six-year impasse following the ECtHR's ruling that U.K. disenfranchisement of prisoners violated the ECHR); *Controversy over Prisoner Voting Plans*, POLITICS.CO.UK (Mar. 4, 2005, 12:00 AM), available at <http://www.politics.co.uk/news/2005/03/04/controversy-over-prisoner-voting-plans>.

right to vote due to his conviction for murder.² Despite its immediate outcome, the decision was not a complete defeat for advocates of prisoner voting rights.³ Significantly, the ECtHR affirmed a prior decision, *Hirst v. United Kingdom* (No. 2), which had overturned the United Kingdom's policy of disenfranchising *all* convicted criminals.⁴

The ruling has generated mixed reactions.⁵ Some observers of the ECtHR consider the ruling a setback for prisoner rights.⁶ Not only does continued disenfranchisement deny prisoners a fundamental right, but it permits the continued stigmatization of an already unpopular and excluded group of citizens.⁷ On the other hand, some see the ruling as a defeat for national sovereignty.⁸ By affirming *Hirst* (No. 2), the ruling curtails the right of national legislatures to fashion domestic policies free from the interference of a distant, supranational judiciary.⁹ Viewed in this context, the *Scoppola* (No. 3) decision is the latest in a series of cases highlighting the tension between the ECtHR's role as a protector of human rights within member states and the need of those member states to implement policies that reflect unique national circumstances—what the ECtHR has termed the “margin of appreciation.”¹⁰

² *Scoppola* (No. 3), App. No. 126/05 ¶ 110; see European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol (ETS No. 9), art. 3, Sept. 3, 1953, 213 U.N.T.S. 222 (“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”).

³ See *Scoppola* (No. 3), App. No. 126/05, ¶¶ 95–96 (reaffirming prior holding that the general, automatic, and indiscriminate disenfranchisement of prisoners violates Article 3 of Protocol No. 1 of the ECHR).

⁴ See *id.* ¶ 96; *Hirst* (No. 2), 2005-IX Eur. Ct. H.R. ¶¶ 84–85.

⁵ See, e.g., Patrick Wintour & Andrew Sparrow, *Prisoner Voting Ruling from Strasbourg Must Be Followed, Says Attorney General*, GUARDIAN (Oct. 24, 2012, 7:00 EDT), <http://www.guardian.co.uk/society/2012/oct/24/prisoner-voting-ruling-attorney-general?>; *Votes for Prisoners: Cameron Says UK Will Fight European Court*, BBC NEWS (May 24, 2012, 7:52 ET), <http://www.bbc.co.uk/news/uk-politics-18177776>.

⁶ See, e.g., Reuven Ziegler, *Scoppola v. Italy* (No. 3): *A Step Backwards*, OXFORD HUMAN RIGHTS HUB (Aug. 17, 2012), available at <http://ohrh.law.ox.ac.uk/?p=173>.

⁷ See, e.g., Susan Easton, *Electing the Electorate: The Problem of Prisoner Disenfranchisement*, 69 MOD. L. REV. 443, 446 (2006); Jeffrey Reiman, *Liberal and Republican Arguments Against the Disenfranchisement of Felons*, CRIM. JUST. ETHICS 3, 3 (2005).

⁸ See, e.g., Stephen Pollard, *Prisoners Voting: Time to Ask Who Governs Britain?*, EXPRESS (May 24, 2012), <http://www.express.co.uk/posts/view/322045>.

⁹ See Ida Elisabeth Koch & Jen Vedsted-Hansen, *International Human Rights and National Legislatures—Conflict or Balance*, 75 NORDIC J. INT'L L. 3, 3–4 (2006); Dominic Raab, *Britain Must Defy Europe over Votes for Prisoners, for the Very Soul of Our Democracy's at Stake*, MAIL ONLINE (updated Oct. 25, 2012, 02:37 EST) <http://www.dailymail.co.uk/debate/article-2222701/Britain-defy-Europe-votes-prisoners-soul-democracys-stake.html>.

¹⁰ See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT'L L. & POL. 843, 843–45 (1999).

Part I of this Comment offers a brief summary of the procedural and factual history of the *Scoppola (No. 3)* case. Part II provides a broader contextual understanding of the case by discussing the appropriate portion of the ECHR, the relevance of the *Hirst (No. 2)* decision, and more generally, the disenfranchisement of prisoners as a social and governmental policy. In addition, Part II highlights the conflict engendered by the desire of member states to shape national policy and the purpose of the ECtHR as a supranational vehicle for the protection of human rights. Part III offers a more detailed analysis of the *Scoppola (No. 3)* decision, with a critique directed at the ECtHR for its failure to follow up *Hirst (No. 2)* with a stronger stand against the disenfranchisement of prisoners.

I. BACKGROUND

On September 2, 1999, Franco Scoppola, an Italian citizen, initiated a violent quarrel with his family that culminated in the murder of his wife.¹¹ He became enraged after discovering that his children broke his cellular phone.¹² When his wife called the police, Scoppola tried to throttle her with a telephone cord.¹³ After this attack failed, he fired several gunshots as his wife and children fled the residence.¹⁴ These gunshots killed Scoppola's wife and injured one of his children. The Italian police arrested Scoppola the next day.¹⁵

A. Domestic Legal Proceedings

After an initial investigation, prosecutors charged Scoppola with a variety of crimes, including murder and attempted murder.¹⁶ At his preliminary hearing, the presiding judge convicted him on all charges.¹⁷ Ordinarily this conviction would have triggered a sentence of life imprisonment, but because Scoppola chose to stand trial under summary procedure, a streamlined trial process permitting a reduced sentence in the event of conviction, he received a shorter thirty-year sentence.¹⁸

¹¹ *Scoppola v. Italy (No. 3)*, App. No. 126/05, Eur. Ct. H.R. ¶ 12 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111044>

¹² *Id.* ¶ 16.

¹³ *Id.* ¶ 15.

¹⁴ *Id.*

¹⁵ *Id.* ¶ 12.

¹⁶ *Id.* ¶ 13.

¹⁷ *Scoppola (No. 3)*, App. No. 126/05 ¶ 14.

¹⁸ *Id.*; *Scoppola v. Italy (No. 2)*, App. No. 10249/03, 51 Eur. H.R. Rep. 12 ¶ 127 (2010).

As a collateral punishment, his conviction included a lifetime ban from public office.¹⁹

Within the Italian legal system, bans from public office automatically accompany a conviction for an offense punishable by three years or more of imprisonment.²⁰ Under Article 29 of the Codice Penale Italiano, the Italian Criminal Code, a sentence between three and five years requires a five-year ban from public office, while a sentence of five years or more requires a lifetime ban from public office.²¹ Presidential Decree No. 223/1967 extends these penalties by imposing a simultaneous disqualification from voting.²² For persons under a temporary ban from public office, disenfranchisement lasts for the length of the ban, while persons under a permanent ban experience disenfranchisement for life.²³ Due to the length of his sentence, Scoppola received a lifetime ban from public office, which translated into a lifetime ban from voting.²⁴

Subsequently, both the prosecution and the defense appealed the sentence.²⁵ On January 10, 2002, relying on a legislative decree that entered into force on the day of Scoppola's conviction, the appeals court, the Rome Assize Court of Appeals, imposed a lengthier sentence—life imprisonment.²⁶

B. *Proceedings Before the ECtHR*

What followed were diverging stages of appeal in national and supranational courts, ultimately resulting in two separate decisions issued by the ECtHR.²⁷ Filing a claim with the ECtHR on March 24, 2003, Scoppola argued that his life sentence violated Articles 6 and 7 of the ECHR.²⁸ This application resulted in *Scoppola v. Italy* (No.2), a decision

¹⁹ *Scoppola* (No. 3), App. No. 126/05, ¶¶ 14, 33–34.

²⁰ *See id.* ¶ 36.

²¹ C.p. art. 29 (It.); *Scoppola* (No. 3), App. No. 126/05 ¶ 36.

²² D.P.R. 20 Marzo 1967, n. 223 (It.); *Scoppola* (No. 3), App. No. 126/05 ¶ 35. It should be noted that due to the complexities of the Italian parliamentary system, it is not uncommon for the executive to implement its legislative agenda through presidential decrees. Vincent Della Sala & Amie Kreppel, *Dancing Without a Lead: Legislative Decrees in Italy*, in EXECUTIVE DECREE AUTHORITY 175, 175–76 (John M. Carey & Matthew Soberg Shugart eds., 1998).

²³ *Scoppola* (No. 3), App. No. 126/05 ¶ 35.

²⁴ *Id.* ¶ 21.

²⁵ *Id.* ¶ 19.

²⁶ *Id.*; *Scoppola* (No. 2), 51 Eur. H.R. Rep. ¶ 12 (Malinverni, J., concurring).

²⁷ *See Scoppola* (No. 3), App. No. 126/05 ¶¶ 20, 29–30, 110.

²⁸ *Id.* ¶ 29 (arguing that disenfranchisement as a collateral punishment violated his Article 6 right to a fair trial and his Article 7 right to no punishment without law).

issued on September 17, 2009, which restored the thirty-year sentence initially set by the preliminary hearing's judge.²⁹

In addition, Scoppola filed a second claim with the ECtHR on December 16, 2004, alleging that disenfranchisement following a criminal conviction violated Article 3 of Protocol No. 1 of the ECHR, which guarantees a right to free elections.³⁰ The Second Section of the court heard this claim and rendered a decision on January 18, 2011.³¹ It found by a unanimous vote that his disenfranchisement violated the ECHR.³² On April 15, 2011, the Italian government successfully appealed the case to the Grand Chamber.³³ Both Scoppola and the Italian government filed briefs, while the United Kingdom submitted a comment as an interested third-party intervener.³⁴

The United Kingdom's interest in the outcome of *Scoppola (No. 3)* stemmed from a previous ECtHR decision, *Hirst v. United Kingdom (No. 2)*, which held that a statute adopted by the House of Commons depriving all criminal offenders of the right to vote violated Article 3 of Protocol No. 1.³⁵ In reaching this conclusion, the ECtHR rejected the United Kingdom's argument that parties to the ECHR enjoy a "wide margin of appreciation"—or, in other words, a wide degree of latitude—in complying with the terms of the treaty.³⁶ In its comment to *Scoppola (No. 3)*, the United Kingdom invited the ECtHR to reverse or modify the position it had adopted in *Hirst (No. 2)*.³⁷

The court explicitly declined to revisit its decision.³⁸ Rather, it distinguished *Hirst (No. 2)* by noting the "general, automatic and indiscriminate" nature of the disenfranchisement under scrutiny in that

²⁹ *Scoppola (No. 3)*, App. No. 126/05 ¶ 30; *Scoppola (No. 2)*, 51 Eur. H.R. Rep. ¶¶ 1, 153–154.

³⁰ See *Scoppola (No. 3)*, App. No. 126/05 ¶¶ 1, 3, 29.

³¹ *Id.* ¶ 5. The ECtHR is organized along geographic lines into four distinct sections. Each member state appoints a single judge to the ECtHR who serves in one of the four sections. Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F.L. REV. 1, 14, 16 (2005).

³² *Id.* ¶¶ 3–5.

³³ *Id.* ¶ 6.

³⁴ *Id.* ¶¶ 8–9, 75; *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶ 21; Merris Amos, *The Dialogue Between United Kingdom Courts and the European Court of Human Rights*, 61 INT'L & COMP. L.Q. 557, 578 (2012). Article 36 of the ECHR provides that a member state not party to a case may—in the interest of justice—"submit written comments or take part in hearings." ECHR, *supra* note 2, art. 36.

³⁵ See *Scoppola (No. 3)*, App. No. 126/05 ¶¶ 75–78; Murray, *supra* note 1, at 309.

³⁶ See *Scoppola (No. 3)*, App. No. 126/05 ¶¶ 75–78; *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶¶ 47, 85.

³⁷ *Scoppola (No. 3)*, App. No. 126/05 ¶ 78.

³⁸ *Id.* ¶¶ 94–96.

case.³⁹ In contrast, it found the disenfranchisement challenged by Scoppola to be more proportionate and limited in scope.⁴⁰ Ruling against Scoppola, the ECtHR found that the Italian government's disenfranchisement of prisoners fell within the "margin of appreciation" and thus did not violate Article 3 of Protocol No. 1.⁴¹ After *Scoppola* (No. 3), the breadth of the margin of appreciation doctrine remains uncertain.⁴² The ECtHR's decisions to date have not clarified when the margin of appreciation doctrine applies nor the degree of control over internal affairs that the doctrine grants to ECHR member states.⁴³ While European states will continue to invoke the margin of appreciation to defend laws disenfranchising criminal offenders, it is unclear how successful this defense will be.⁴⁴

II. DISCUSSION

The disenfranchisement of convicted prisoners has a lengthy legal and historical provenance, tracing its roots as far back as the ancient Greeks and Romans.⁴⁵ Living in a society that valued both citizenship and loyalty to the polis, or city-state, the ancient Greeks saw fit to punish certain crimes with "infamy"—the wholesale revocation of such civic rights as court appearances, military service, and voting.⁴⁶ The ancient Romans likewise sanctioned the revocation of civic rights as a

³⁹ *Id.* ¶ 108.

⁴⁰ *See id.* ¶¶ 106, 108–109.

⁴¹ *Id.* ¶ 110.

⁴² *See id.* ¶¶ 108–109 (noting that Italian law neither indiscriminately disenfranchises prisoners nor irrevocably deprives them of the right to vote following release); Jan Kratochvíl, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETH. Q. HUM. RTS. 324, 324–25 (2011); Adam Wagner, *European Court of Human Rights Retreats but Doesn't Surrender on Prisoner Votes*, UK HUMAN RIGHTS BLOG (May 22, 2012), <http://ukhumanrightsblog.com/2012/05/22/european-court-of-human-rights-retreats-but-doesnt-surrender-on-prisoner-votes/>.

⁴³ *See* Kratochvíl, *supra* note 42, at 324–26.

⁴⁴ *See Scoppola* (No. 3), App. No. 126/05 ¶ 102 (noting that the ECtHR must review national legislation disenfranchising prisoners on a case-by-case basis); Kratochvíl, *supra* note 42, at 330 (articulating the uncertainty the ECtHR's application of the margin of appreciation doctrine); *see, e.g.*, *Frodl v. Austria*, App. No. 20201/04, Eur. Ct. H.R. ¶ 20(2010), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-98132>; (arguing that Austria's prisoner disenfranchisement policy fell within the margin of appreciation); *Hirst* (No. 2), 2005-IX Eur. Ct. H.R. ¶ 47 (arguing that the United Kingdom's prisoner disenfranchisement policy fell within the margin of appreciation).

⁴⁵ *See* Easton, *supra* note 7 at 443.

⁴⁶ K. Cherry & E.A. Goerner, *Does Aristotle's Polis Exist 'By Nature'?*, 27 HIST. POL. THOUGHT 563, 566 (2006); *see* Walter Matthews Grant et al., *Special Project: The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941–42 (1970) (quotations omitted).

form of punishment for criminal behavior, although under Roman law, the loss of rights tended to be less wholesale.⁴⁷ The reach and influence of Roman thought ensured that civil disability would survive as a means of punishment within the political entities that succeeded the Roman Empire.⁴⁸

A. *The Theory and Practice of Prisoner Disenfranchisement*

Many modern European states still impose some form of criminal disenfranchisement.⁴⁹ Although seventeen European states impose no voting restrictions on prisoners, eleven ban all prisoners from voting and twelve ban some prisoners from voting.⁵⁰ Even in states that deprive convicted prisoners of the right to vote, disenfranchisement in practice may be rare.⁵¹ Since the vast majority of states that deny suffrage to all prisoners are former republics of the Soviet Union, there is a marked policy divide between Eastern Europe and much of the rest of continental Europe.⁵²

For states that exclude only some prisoners from voting, the criteria for disenfranchisement varies.⁵³ Some states—Italy, Belgium, Greece, and Luxemburg—condition disenfranchisement on the duration of the prison sentence.⁵⁴ Other states focus on the gravity or nature of the crime.⁵⁵ Poland disenfranchises prisoners who have committed intentional crimes when their sentences are more than three years

⁴⁷ See Grant, *supra* note 46, at 941–42 (“Civil disabilities as a consequence of crime can be traced to ancient Greece. . . . The Romans of a later age adopted the Greek practice of ‘infamy’ and refined it into laws imposing specific disabilities . . .”).

⁴⁸ See *id.* at 942 (noting the spread and continued influence of Roman legal concepts even after the dissolution of the Roman Empire).

⁴⁹ See Laleh Ispahani, *Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE 25, 25–26 (Alec C. Ewald & Brandon Rottinghaus eds., 2009).

⁵⁰ *Id.* at 26–27. The countries permitting all prisoners to vote are Austria, Albania, Croatia, Czech Republic, Denmark, Finland, Germany, Iceland, Ireland, Lithuania, Macedonia, Montenegro, the Netherlands, Serbia, Slovenia, Sweden, and Switzerland; the countries permitting some prisoners to vote are Belgium, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Portugal, and Romania; and the countries that deny all prisoners the right to vote are Belarus, Bulgaria, Estonia, Hungary, Kosovo, Latvia, Moldova, Russia, Slovakia, Ukraine, and the United Kingdom. *Id.*

⁵¹ See *id.* (noting, for instance, that prisoners in Norway seldom lose the right to vote).

⁵² See *id.* at 27, 31.

⁵³ See *id.* at 28–30.

⁵⁴ *Id.* at 27.

⁵⁵ See Ispahani, *supra* note 49, at 28–30.

in length.⁵⁶ France disenfranchises prisoners convicted of “crimes of moral turpitude or crimes against the public.”⁵⁷

States that disenfranchise criminals rely on a number of traditional rationales.⁵⁸ Many believe that a criminal’s decision to violate the social contract merits loss of the right to fully participate in the political community.⁵⁹ Others argue that convicted criminals have demonstrated a basic lack of civic responsibility that disqualifies them from exercising the right to vote.⁶⁰ Under this conception, criminal disenfranchisement is not a punitive measure, but rather an essentially regulatory device that allows a state to preserve the integrity of the electoral process.⁶¹

B. *Criticism of Prisoner Disenfranchisement*

Despite its grounding in historical practice, the compatibility of disenfranchisement with democratic values has come under increasing fire from modern scholars, legal observers, and judges.⁶² This legal cadre has questioned whether a government can provide a state interest sufficient to justify the deprivation of a fundamental right such as voting.⁶³ Under this view, it is impermissible for a democratic society embracing universal suffrage to exclude some citizens out of concern that they will potentially vote in a manner considered undesirable.⁶⁴ Accordingly, neither a punitive nor a regulatory rationalization for disenfranchisement is justified.⁶⁵

⁵⁶ *Id.* at 29.

⁵⁷ *Id.*

⁵⁸ See Adebayo Randle, *Prisoner Voting Rights and the Social Contract*, 1 DUBLIN LEGAL REV. Q. 60, 60 (2011); Reiman, *supra* note 7, at 3.

⁵⁹ Randle, *supra* note 58, at 60; Reiman, *supra* note 7, at 3.

⁶⁰ Reiman, *supra* note 7, at 3.

⁶¹ See Alec C. Ewald & Brandon Rottinghaus, *Introduction*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE, *supra* note 49, at 12–13.

⁶² See *Richardson v. Ramirez*, 418 U.S. 24, 78 (1974) (Marshall, J., dissenting) (“There is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen.”); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1169–70 (2004) (arguing that felon disenfranchisement punishes communities, as well as individuals, and taints the political process); Randle, *supra* note 58, at 68 (asserting that prisoner disenfranchisement interferes with rehabilitation); Reiman, *supra* note 7, at 4–5 (noting the disparate impact of prisoner disenfranchisement on minority groups).

⁶³ JAIME FELLNER & MARC MAUER, THE SENTENCING PROJECT & HUMAN RIGHT WATCH, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAW IN THE UNITED STATES* 14 (1998) (arguing that a compelling interest test should be applied to felon disenfranchisement laws).

⁶⁴ See *id.* at 15–16.

⁶⁵ See Randle, *supra* note 58, at 68–69.

In addition, prisoner disenfranchisement may threaten the democratic process it seeks to protect.⁶⁶ Rather than preventing crime and promoting civic responsibility, disenfranchisement may contribute to feelings of isolation and stigmatization that inhibit the reentry of former prisoners into society.⁶⁷ Moreover, voter disenfranchisement can disproportionately affect minorities or other disadvantaged groups which are statistically more likely to be convicted of qualifying crimes.⁶⁸

Meeting resistance from domestic political and legal institutions, prisoners in multiple European states have sought to vindicate a right to vote in the ECtHR.⁶⁹ They have pointed to Article 3 of Protocol No. 1 of the ECHR, which provides: “[t]he . . . Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”⁷⁰ These claims have met with some success.⁷¹ Although the text of Article 3 does not specifically address the rights of prisoners, the ECtHR has issued multiple decisions affirming its application to incarcerated citizens.⁷² Furthermore, in *Hirst v. United Kingdom (No. 2)*, the ECtHR explicitly noted that voting is a right and not a privilege.⁷³ On the other hand, the ECtHR has recognized that even a right may be limited under compelling circumstances.⁷⁴

⁶⁶ See *id.* at 68; Reiman, *supra* note 7, at 13–14.

⁶⁷ See Fellner & Mauer, *supra* note 63, at 16; Christopher Uggen et al., *Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE, *supra* note 49, at 74–75.

⁶⁸ See Karlan, *supra* note 62, at 1156–57; Darren Wheelock, *Collateral Consequences and Racial Inequality*, 21 J. CONTEMP. CRIM. JUST. 82, 84 (2005).

⁶⁹ See, e.g., *Scoppola v. Italy (No. 3)*, App. No. 126/05, Eur. Ct. H.R. ¶¶ 1–3, 24–28 (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111044>; *Frodl v. Austria*, App. No. 20201/04, Eur. Ct. H.R. ¶¶ 3, 15 (2010), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-98132>; *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01, 2005-IX Eur. Ct. H.R. ¶¶ 1–3, 14–17.

⁷⁰ ECHR, *supra* note 2; see, e.g., *Scoppola (No. 3)*, App. No. 126/05 ¶ 3; *Frodl*, App. No. 20201/04 ¶ 3; *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶ 3.

⁷¹ See, e.g., *Frodl*, App. No. 20201/04 ¶ 36 (finding that Austrian disenfranchisement policy violated Article 3); *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶ 85 (finding that U.K. disenfranchisement policy violated Article 3).

⁷² See *Frodl*, App. No. 20201/04 ¶ 36; *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶ 85; Murray, *supra* note 1, at 311.

⁷³ *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶ 59.

⁷⁴ *Id.* ¶ 60.

C. Role of the Margin of Appreciation Doctrine

For convicted criminals, the boundaries of the right to vote continue to be poorly defined.⁷⁵ Part of this confusion stems from the ECtHR's reliance on the margin of appreciation doctrine.⁷⁶ Under the doctrine, the ECtHR wields its judicial authority in a manner that gives national governments appropriate discretion in setting domestic policies.⁷⁷ The doctrine originated in French administrative law as a rule of judicial deference to administrative decisions.⁷⁸ The ECtHR adopted the doctrine through its jurisprudence rather than the language of the ECHR.⁷⁹ It first invoked the doctrine in relation to Article 15 of the ECHR, a provision allowing states to deviate from the ECHR during national security emergencies.⁸⁰ Later decisions applied the margin of appreciation doctrine to other portions of the ECHR, including Article 3 of Protocol No. 1.⁸¹

Although the heterogeneous nature of the parties to the ECHR makes some flexibility desirable in ECtHR decision making, the margin of appreciation doctrine conflicts with the ECtHR's role as a supranational protector of human rights.⁸² Because of the ambiguity this conflict creates, the extent to which convicted criminals are entitled to participate in the electoral process remains unclear.⁸³ In addition, member states lack clear guidance from the ECtHR on how to fashion domestic

⁷⁵ See Steve Foster, *Reluctantly Restoring Rights: Responding to the Prisoner's Right to Vote*, 9 HUM. RTS. L. REV. 489, 499 (2009).

⁷⁶ See Kratochvíl, *supra* note 42, at 325; Anne Marie Von Luttichau, *What Is the Meaning and Effect of the Principle of "Margin of Appreciation" Within the Jurisprudence of the European Convention on Human Rights?*, 26 BRACKTON L.J. 99, 101 (1994) (noting that application of the margin of appreciation doctrine has largely occurred on an *ad hoc* basis).

⁷⁷ See Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT'L & COMP. L.Q. 638, 640 (1999); Luttichau, *supra* note 76, at 99; Thomas O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474, 475 (1982).

⁷⁸ See Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 GERMAN L.J. 711, 713 (2007); Luttichau, *supra* note 76, at 99 n.1; O'Donnell, *supra* note 77, at 475 n.8.

⁷⁹ See Luttichau, *supra* note 76, at 99.

⁸⁰ See *id.*

⁸¹ Bakircioglu, *supra* note 78, at 713–15; Hutchinson, *supra* note 77, at 639 n.3; Luttichau, *supra* note 76, at 99; see, e.g., *Scoppola* (No. 3), App. No. 126/05 ¶ 83.

⁸² See Bakircioglu, *supra* note 78, at 716–18 (noting that the margin of appreciation doctrine does grant national governments unlimited power); Koch, *supra* note 9, at 22 (observing that the margin of appreciation doctrine gives states the freedom to pursue policies that account for localized needs); Benvenisti, *supra* note 10, at 843–44 (recognizing the conflict between universal standards and the margin of appreciation doctrine).

⁸³ See Kratochvíl, *supra* note 42, at 325; Foster, *supra* note 75, at 499; Hutchinson, *supra* note 77, at 640–41.

policies that appropriately restrict the voting rights of prisoners without engendering human rights violations.⁸⁴

III. ANALYSIS

Although the ECtHR declined to revisit the *Hirst v. United Kingdom (No. 2)* decision and thus affirmed its prior ruling prohibiting a blanket ban on prisoner voting, the *Scoppola v. Italy (No. 3)* decision was a setback for prisoner voting rights.⁸⁵ A number of observers of the ECtHR argued that the *Scoppola (No. 3)* decision functioned as a political compromise.⁸⁶ After strong opposition to implementation of the *Hirst (No. 2)* decision by the U.K. government, which was reluctant to overturn centuries of historical practice, the ECtHR understandably felt pressured to take a more incremental approach to prisoner voting rights.⁸⁷

Practical realities may play an important role in the ECtHR's past decision making.⁸⁸ There is a marked contrast between the strong rhetoric employed by the ECtHR in defense of prisoner voting rights and the faltering steps it has taken to protect these rights.⁸⁹ In *Hirst (No. 2)*, for example, the ECtHR described "[a]ny departure from the principle of universal suffrage" as potentially damaging to the democratic process.⁹⁰ Indeed, because it considered the U.K. blanket ban on prisoner voting so antithetical to the right to free elections, the ECtHR found

⁸⁴ See Luttichau, *supra* note 76, at 102–03; Marko Milanović, *Prisoner Voting and Strategic Judging*, EJIL: TALK! (May 22, 2012), <http://www.ejiltalk.org/prisoner-voting-and-strategic-judging/>; Wagner, *supra* note 42.

⁸⁵ See *Scoppola v. Italy (No. 3)*, App. No. 126/05, Eur. Ct. H.R. ¶¶ 28–29, (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111044> (Björgvinsson, J., dissenting) (“Regrettably the judgment in the present case has now stripped the *Hirst* judgment of all its bite as a landmark precedent for the protection of prisoners’ voting rights in Europe.”); Wagner, *supra* note 42 (noting that the *Scoppola (No. 3)* decision amounted a retreat by the ECtHR on the issue of prisoner voting rights).

⁸⁶ See, e.g., Milanović, *supra* note 84 (arguing that the ECtHR’s ruling was strongly influenced by the United Kingdom’s ongoing non-compliance with its *Hirst (No. 2)* decision).

⁸⁷ See *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01, 2005-IX Eur. Ct. H.R. (2005) ¶¶ 21–22; Milanović, *supra* note 84; Wagner, *supra* note 42; Ziegler, *supra* note 6.

⁸⁸ See Milanović, *supra* note 84.

⁸⁹ *Id. Compare* *Frodl v. Austria*, App. No. 20201/04, Eur. Ct. H.R. ¶ 25 (2010), <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-98132>; (“[P]risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty . . .”), and *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶ 70 (“There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction.”), with *Scoppola (No. 3)*, App. No. 126/05 ¶ 110 (holding that the Italian policy of prisoner disenfranchisement did not violate Article 3).

⁹⁰ See *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶ 62.

that the policy fell outside even the widest permissible “margin of appreciation.”⁹¹ Having issued this strong indictment of prisoner disenfranchisement, the ECtHR appeared poised to shift European states away from the practice.⁹² Its ruling in *Scoppola* (No. 3) proved otherwise.⁹³

A. Inconsistent Decisions Undermine the ECtHR’s Credibility

The *Scoppola* (No. 3) decision conflicts with past pronouncements by the ECtHR.⁹⁴ In *Frodl v. Austria*, the ECtHR noted that, with the exception of liberty, a prisoner continues to enjoy the same rights and privileges under the ECHR as any other citizen.⁹⁵ Moreover, in *Hirst* (No. 2), the ECtHR held that indiscriminate disenfranchisement of convicted felons violated the ECHR.⁹⁶ But aside from the safe haven it creates for prisoner serving sentences of less than three years, the Italian approach suffers from a similar deficiency.⁹⁷ All prisoners serving more than three years lose the right to vote, while those sentenced to terms of five years or more receive automatic disenfranchisement for life.⁹⁸

The policies in *Hirst* (No. 2) and *Scoppola* (No. 3) were similarly indiscriminate, yet only one was held in violation of the ECHR.⁹⁹ In analyzing the *Scoppola* (No. 3) decision, other considerations may have caused the ECtHR to stray from its strict adherence to the ECHR.¹⁰⁰ Although *Scoppola* (No. 3) received a mixed reception in the United Kingdom, at least some observers viewed the decision as proof that the United Kingdom’s refusal to comply with *Hirst* (No. 2) had worked.¹⁰¹

⁹¹ See *id.* ¶ 82.

⁹² See Murray, *supra* note 1, at 311 (2011) (noting the groundbreaking nature of the decision, which described voting as a right rather than a privilege).

⁹³ See *Scoppola* (No. 3), App. No. 126/05 ¶ 110; Wagner, *supra* note 42; Ziegler, *supra* note 6.

⁹⁴ See Ziegler, *supra* note 6.

⁹⁵ See *Frodl*, App. No. 20201/04 ¶ 25.

⁹⁶ See *Hirst* (No. 2), 2005-IX Eur. Ct. H.R. ¶¶ 82, 85; Ziegler, *supra* note 6.

⁹⁷ See *Scoppola* (No. 3), App. No. 126/05 ¶ 27–28 (Björgvinsson, J., dissenting); Milanović, *supra* note 84.

⁹⁸ See *Scoppola* (No. 3), App. No. 126/05 ¶¶ 35–36.

⁹⁹ See *id.* at 27–28 (Björgvinsson, J., dissenting).

¹⁰⁰ See Ziegler, *supra* note 6; Milanović, *supra* note 84.

¹⁰¹ See *Government Victory over Votes for Prisoners*, SKY NEWS (May 22, 2012), <http://uk.news.yahoo.com/government-victory-over-votes-prisoners-174425329.html>; Carl Gardner, *ECtHR Grand Chamber Judgment: Scoppola v. Italy*, HEADOFFLEGAL (May 22, 2012), available at <http://www.headofflegal.com/2012/05/22/ecthr-grand-chamber-judgment-scoppola-v-italy/>; Milanović, *supra* note 84.

Many critics of the decision reached the same conclusion: in the face of strong British opposition, the ECtHR retreated.¹⁰²

The ECtHR may have responded to pressure from the United Kingdom because of its dependency on the goodwill of national governments for enforcement of its rulings.¹⁰³ On January 26, 2011, for example, a resolution by the Parliamentary Assembly of the Council of Europe admonished a number of countries, including Greece, Italy, Poland, and Russia, for “extremely worrying delays” in the implementation of decisions issued by the ECtHR.¹⁰⁴ It is hardly surprising that the ECtHR should be concerned about noncompliance by member states.¹⁰⁵ Nevertheless, because the ECtHR is a judicial rather than legislative body, overtly political posturing may not only undermine the ECtHR’s moral authority, but also vitiate the very rights that the ECtHR is specifically obliged to protect.¹⁰⁶

B. *The ECtHR Should Prohibit ECHR Member States from Disenfranchising Prisoners Absent a Convincing Regulatory Reason*

A stronger stance against prisoner disenfranchisement would not require a radical shift by either the ECtHR or the ECHR member states.¹⁰⁷ The ECtHR has already declared in multiple decisions that the right to free elections guaranteed by Article 3 of Protocol No. 1 of the ECHR prohibits the disenfranchisement of at least some prisoners.¹⁰⁸ In addition, many states allow all prisoners to vote, without disastrous consequences to the democratic process: numerous European states—in-

¹⁰² See Milanović, *supra* note 84; Wagner, *supra* note 42; Ziegler, *supra* note 6.

¹⁰³ See Andrew Moravcsik, *Explaining International Human Rights: Liberal Theory and Western Europe*, 1 EUR. J. INT’L REL. 157, 171 (1995); *PACE Names Worst Performers in Implementing ECtHR Judgments*, SETIMES.COM (Jan. 28, 2011), http://setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2011/01/28/feature-01 [hereinafter SETimes].

¹⁰⁴ See SETimes, *supra* note 103.

¹⁰⁵ See Amos, *supra* note 34, at 576–77; Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT’L L. & INT’L REL. 35, 76 (2011); Milanović, *supra* note 84; SETimes, *supra* note 103.

¹⁰⁶ See Kratochvíl, *supra* note 42 at 352; Ziegler, *supra* note 6; see also Natasha Holcroft-Emmess, *Scoppola v. Italy (No. 3): Getting Prisoner Voting Right?*, OXFORD HUMAN RIGHTS HUB (Aug. 13 2012), <http://ohrh.law.ox.ac.uk/?p=157>.

¹⁰⁷ See Ispahani, *supra* note 49 at 26–27.

¹⁰⁸ See, e.g., *Frodl*, App. No. 20201/04, ¶¶ 35–36; *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶¶ 82, 85 (holding that prisoner disenfranchisement may not be applied indiscriminately against the entire felon population). Prisoner disenfranchisement must be governed by proportionality, a “sufficient link between the sanction and the conduct and circumstances of the individual concerned.” See, e.g., *Frodl*, App. No. 20201/04 ¶¶ 35–36.

cluding Germany, Switzerland, Sweden, Denmark, and Serbia—currently permit all prisoners to vote.¹⁰⁹

Because the ECtHR has already held that the right to free elections is relevant to the question of prisoner disenfranchisement, in any future cases raising this issue, it should go a step further and hold that states may not bar prisoners from voting—unless there is a convincing regulatory reason for doing so.¹¹⁰ Under this regime, a state should only disenfranchise prisoners under extraordinary circumstances when necessary to protect the democratic or electoral process.¹¹¹

Although this approach would be unpopular in the states that continue to disenfranchise prisoners, it logically follows from the weight the ECtHR has placed on universal suffrage and the participation of all citizens in the democratic process.¹¹² Because Article 3 protects the right to free elections, and voting is integral to the exercise of this right, the use of prisoner disenfranchisement as a tool of social or criminal policy should necessarily be limited.¹¹³ Thus, a punitive rationale for disenfranchisement fails altogether in light of other forms of punishment available to the state.¹¹⁴

To the extent, however, that concerns might remain about the effect of extensive prisoner participation in the electoral process, the margin of appreciation doctrine would still have a role to play.¹¹⁵ While the presumption would be that all prisoners should have the right to vote, if a state could show unique national circumstances requiring some restrictions on prisoner suffrage, the ECtHR would have the necessary discretion to uphold limited exceptions to universal suffrage.¹¹⁶

¹⁰⁹ See Easton, *supra* note 7 at 449; Ispahani, *supra* note 49.

¹¹⁰ See *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶¶ 57–58, 62.

¹¹¹ See Richard J. Wilson, *The Right to Universal, Equal, and Nondiscriminatory Suffrage as a Norm of Customary International Law: Protecting the Prisoner's Right to Vote*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE, *supra* note 49, at 110, 112 (arguing that universal suffrage is protected under international law).

¹¹² See *Frodl*, App. No. 20201/04 ¶ 25; *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. ¶ 70; Nora V. Demleitner, *U.S. Felon Disenfranchisement: Parting Ways with Western Europe*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE, *supra* note 49, at 82, 88; Ziegler, *supra* note 6.

¹¹³ See ECHR, *supra* note 2; see Easton, *supra* note 7, at 449; Reiman, *supra* note 7, at 3, 13.

¹¹⁴ See Demleitner, *supra* note 112, at 101, 102; Easton, *supra* note 7, at 449; Marc Maurer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 *How. L.J.* 549, 556 (2011) (arguing that it is incongruous to deny a fundamental right such as voting on account of incarceration).

¹¹⁵ See O'Donnell, *supra* note 77, at 484 (arguing that the protection of fundamental rights is compatible with a narrow margin of appreciation).

¹¹⁶ See Benvenisti, *supra* note 10, at 847.

By analogy to its early jurisprudence invoking the margin of appreciation doctrine, the ECtHR would permit limited derogations from Article 3 only to the extent necessary to protect against dangers threatening the electoral process.¹¹⁷

Under this regime, the ECtHR would give force to an interpretation of Article 3 that accords all citizens, including the incarcerated, the right to vote.¹¹⁸ Nevertheless, as it should, the margin of appreciation doctrine would continue to provide flexibility for European states confronting unique national circumstances.¹¹⁹ Thus, if a state's disenfranchisement policy were truly necessary to protect the integrity of the democratic or electoral process, the ECtHR would have the discretion to consider the merits of the state's arguments.¹²⁰

CONCLUSION

The ECtHR missed an opportunity in *Scoppola (No. 3)* to provide clarity and direction on the question of prisoner disenfranchisement. While its prior decision in *Hirst (No. 2)* stands for the proposition that a blanket ban on prisoner suffrage violates Article 3 of Protocol 1 of the ECHR, it remains unclear after *Scoppola (No. 3)* what other forms of prisoner disenfranchisement are impermissible. Given the seemingly political nature of the *Scoppola (No. 3)* decision, the ECtHR did nothing to advance either the progress of prisoner voting rights or its own credibility as the judicial body tasked with giving life to the ECHR. When the ECtHR addresses this issue in future cases, as it must, it should give force to its past rhetoric by finding that Article 3 guarantees suffrage for all citizens, including prisoners.

¹¹⁷ See Bakircioglu, *supra* note 78, at 713; Luttichau, *supra* note 76, at 99 & n.1.

¹¹⁸ See Mauer, *supra* note 114, at 565; Mark Day, *Comment: The Moral Case for Prisoners Getting the Vote*, POLITICS.CO.UK (Oct. 30, 2012, 10:25 AM), <http://www.politics.co.uk/comment-analysis/2012/10/30/comment-the-moral-case-for-prisoners-getting-the-vote> (arguing that numerous penal experts and advocates favor the enfranchisement of prisoners).

¹¹⁹ See *Scoppola (No. 3)*, App. No. 126/05 ¶ 83–84; Hutchinson, *supra* note 77, at 640.

¹²⁰ See *Scoppola (No. 3)*, App. No. 126/05 ¶ 83–84; Hutchinson, *supra* note 77, at 640.