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How important is public debate to the process of states' compliance with international treaties? A case study of electoral reform in the context of the European Convention on Human Rights (ECHR)[1]

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Abstract

Electoral reform is a domain that political elites jealously guard and a process, which governments are reluctant to initiate at the behest of the Council of Europe. This therefore offers fertile ground for identifying what factors are crucial to mobilising the political will for compliance. This paper investigates the conditions under which governments amend (or fail to amend) electoral laws or practices. Existing paradigms of compliance, which focus exclusively on the sufficient conditions of democratic regime type, transnational activism and public debate, work well as a framework to explain the transgressions of authoritarian regimes, but evidently fail to explain democratic regimes' non-compliance with international treaties[2]. Research into the cases of the UK and Russia[3] suggests that this paradigm does, arguably, still work: In the UK there was a lack of media coverage and civil society activism to adequately inform public debate on the issue of prisoners' voting rights. In the case of Russia there was an unprecedented surge in public activism, facilitated by NGOs, which culminated in mass demonstrations following the fraudulent 2011/2012 elections. Demonstrators demanded electoral reform and the Russian Government quickly tabled a new law on elections to the Duma, introduced contested elections for regional governors and amended the law on political parties, addressing a number of issues that the Council of Europe had persistently urged the Russian Government to address for some years. Since then, however, the Putin presidency has introduced a series of repressive measures to prevent NGOs from mobilising the public's future involvement in politics in this way.

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[2] A. Jetschke and A. Liese (2013), 'The power of human rights a decade after' in T. Risse, S. Ropp, K. Sikkink, *The Persistent power of human rights: from commitment to compliance*, Cambridge: Cambridge University Press, pp.26-42; p.27.

[3] 'Electoral rights in the UK and Russia as a test-case for compliance with the ECHR', from a joint research project 2012-2013 with Prof. Brice Dickson, Queen's University, Belfast, funded by the Centre for Russian, Central and East European Studies (CRCEES).

Since the UK and Russian governments have each received European Court judgments requiring that the blanket ban on voting for prisoners be lifted, the issue of prisoners' voting rights was selected as a common focal point for all cases. For this purpose, Hungary (a), Liechtenstein (b) and Romania (c) were selected for the secondary stage of research as three unlike cases where, respectively, (a) there is a blanket ban and as yet the European Court has not issued a judgment regarding prisoners' voting rights; (b) the government amended the law to lift the blanket ban without the prompt of a European Court judgment and (c) the law provides some prisoners the right to vote but the European Court has nonetheless issued judgments to the government finding a violation of Article 3 of Protocol 1 regarding prisoners' voting rights. The present paper focuses on data from Hungary and Liechtenstein, owing to considerations of space and because the desk research on Romania is incomplete. More mainstream electoral reforms and electoral rights in these two states were also examined in the context of Council of Europe standards. Data was collected through 15 semi-structured interviews in Budapest, Bendern and Vaduz in May 2014[4] and through desk research. Interviewees in these states comprised parliamentarians, Council of Europe representatives, NGOs, academics and legal representatives.

Introduction: existing paradigms of compliance

Existing paradigms of compliance, which focus exclusively on the sufficient conditions of democratic regime type, transnational activism and public debate, work well as a framework to explain the transgressions of authoritarian regimes, but evidently fail to explain democratic regimes' non-compliance with international treaties[5]. The paradigm excludes the possibility that enlightened democratic governments might be reluctant or refuse to implement judgments. The assumption is that these states have the political will to implement judgments in accordance with their obligations under international law, or through a coincidence of interests between the international treaty and the government,[6] and there are sufficient freedoms to allow informed public debate and civil society to urge parliament to take action. This assumption that long-standing democracies, such as the UK, always meet these necessary criteria, was challenged by the European Court in their 2010 *Greens and M.T.* judgment, when they intimated that the UK Government had failed to take action and present to Parliament any proposed concrete solutions following a series of consultations on the issue of prisoners' voting rights,[7] following the Court's judgment in Hirst no.2, which had identified a lack of debate on the issue.[8]

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[4] Additionally interviews were conducted in Bucharest in June 2014, for a further case-study, relating to prisoners' voting rights and electoral reform, which is to be written up in the future.

[5] A. Jetschke and A. Liese (2013), 'The power of human rights a decade after' in T. Risse, S. Ropp, K. Sikkink, *The Persistent power of human rights: from commitment to compliance*, Cambridge: Cambridge University Press, pp.26-42; p.27.

[6] J. Goldsmith and E.A. Posner (2005), *The Limits of International Law*, Oxford University Press, p.39.

[7] *Greens and M.T. v the United Kingdom* (*nos. 60041/08 and 60054/08)*, 23.11.2010, paras 41, 47, 110-112

[8] *Hirst v the United Kingdom no.2 (no. 74025/01*). Grand Chamber, 6.10.2005, paras. 22; 79

Refusal or failure to comply may equally be explained as the result of an error in the treaty itself, or its misinterpretation by the Court,[9] which is the UK Government's justification for its refusal to implement the Court's decisions in *Hirst* and subsequently the *Greens and MT* case.[10] The UK government's stance has been supported by recent scholarship, which identifies a growing inconsistency between European Court judgments and existing case-law[11] and a sudden extension of the Court's jurisdiction to impose more stringent requirements on governments.[12] While these scholars acknowledge the need for case-law to change, because the ECHR is a 'living instrument', they point out that this should not become a 'fig-leaf' for creating new rights not included in the Convention.[13] While the UK and Russia provide examples of non-compliance over the issue of prisoners voting rights, both apparently as a result of a lack of political will and public debate, Hungary and Liechtenstein offer a much more nuanced account of the compliance mechanism in two other Council of Europe democracies. Whereas their compliance (and partial compliance) might be interpreted as the result of a 'coincidence of interests' this factor only partially explains why these states opted to amend their respective provisions on the issue, and instead appears better explained by a normative commitment to comply with the European Convention and the influence or examples of other convention states.

In Liechtenstein, in 2012 the parliament unanimously endorsed an amendment to the law to provide that a court decide whether to enfranchise certain categories of prisoners serving a sentence of less than 5 years. In Hungary, the blanket ban on voting for prisoners was removed from some legislation (the Constitution and the Criminal Code) in 2011 and 2012, respectively, and yet the ban remains in the 2011 law on elections to the parliament.

What is common to both cases is that public debate did not play a part in determining whether the government should lift the blanket ban on voting, nor has the European Court issued either the Hungarian or Liechtenstein governments judgments relating to prisoners' voting rights. Respondents in both states confirmed that the motivation for

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[9] H. Hongju Koh (1997), 'Review essay: Why do nations obey International Law?' *Yale Law Journal*, 106: pp. 2599-2659; p. 2603 ; L. Seminara (2009), *Les effets des arrêts de la Cour interaméricaine des droits de l'homme*, Bruylant, p.301.

[10] D. Davis (2013), 'Britain must defy the European Court of Human Rights on prisoner voting as Strasbourg is exceeding its authority' in S. Flogaitis, T. Zwart and J. Fraser (eds.) (2013), *The European Court of Human Rights and its discontents : turning criticism into strength*, Cheltenham: Edward Elgar, pp. 65-70.

[11] T. Zwart (2013), 'More human rights than Court: Why the legitimacy of the European Court of Human Rights is in need of repair and how it can be done' in Flogaitis et al, *The European Court of Human Rights and its discontents,* p. 86.

[12] M. Bossuyt (2013), 'Is the European Court of Human Rights on a slippery slope?' in Flogaitis et al., *The European Court of Human Rights and its discontents,* pp. 27-36.

[13] T. Zwart (2013), 'More human rights than Court' in Flogaitis, et. al.,*The European Court of Human Rights and its discontents,* pp. 87-89.

action was the *erga omnes* principle: that in principle states should amend their legislation to comply with the ECHR as clarified through European Court case-law. As in the UK and Russia, respondents in Hungary stated that the general public is likely to be against the idea of granting prisoners the right to vote. In Liechtenstein respondents said that the general public would be more likely to be in favour. But, the question is whether or not public opinion should count on matters relating to human rights. As the UK Supreme Court stated in its judgment of October 2013 in the context of prisoners' voting rights, the rights of minorities (including unpopular ones such as prisoners) must be protected in spite of public opinion,[14] and in accordance with Strasbourg case-law.[15] The importance of debate regarding more mainstream electoral procedures and electoral rights, within the context of new constitutions introduced in these states, again threw up similarities and some interesting differences. The Council of Europe considered introducing a monitoring procedure for Hungary in 2013 and for Liechtenstein in 2002 over the substance of their respective constitutions and the way in which these had been introduced.

Respondents in both Hungary and Liechtenstein emphasised the importance of the European Court as an effective and vital channel for redress and some expressed concern about the implications of the UK government's failure to implement the *Hirst*[16] and *Greens and M.T. judgments*[17]. Some in Hungary stated that the UK set a poor example, which the Hungarian government appeared to be following. Some in Liechtenstein stated that the UK's stance on prisoners' voting rights could weaken the convention system and jeopardise the security of smaller states in the Council of Europe, such as Liechtenstein.

Prisoners' voting rights in Europe

The vast majority of the 47 Council of Europe states provide some prisoners with the right to vote. Those states that were identified in a UK parliamentary report in 2012 as maintaining a blanket ban on voting rights were: Andorra, Armenia, Bulgaria, Estonia, Georgia, Hungary, San Marino, Russia and the UK, and that the Liechtenstein parliament was considering a bill to introduce voting rights for some prisoners.[18] Some of these states, do however, in principle, grant certain prisoners the right to vote: According to

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[14] UK Supreme Court, *R (Chester) v Secretary of State for Justice &McGeoch v The Lord President of the Council and another (Scotland)* [2013] UKSC 63 [2010] EWCA Civ 1439; [2011] CSIH 67, 16.10.2013, para 88. Although the Supreme Court rejected the appeals, it nonetheless upheld Strasbourg case-law in the judgment and urged the government to amend the law in accordance with the Greens and M.T. judgment.

[15] Ibid., para. 35

[16] *Hirst v the United Kingdom no.2*, (*no. 74025/01)* 30.3.2004*; Hirst v the United Kingdom* (no. 2*74025/01) Grand Chamber* 6.10.2005

[17] *Greens and M.T. v the United Kingdom* (*nos. 60041/08 and 60054/08)*, 23.11.2010

[18] I. White (2013), *Prisoners' voting rights*, House of Commons Library, SN/PC/01764; I. White and A. Home (2014) *Prisoners' voting rights*, House of Commons Library, SN/PC/01764, Appendix (last updated August 2014).

Andorran law those serving prison sentences are to lose the right to vote only by the decision of a court[19] and the Georgian law on elections provides those serving sentences for a 'misdemeanour' the right to vote.[20] In San Marino the law provides voting rights for those prisoners serving sentences of less than a year who have not committed political crimes.[21]

So, at time of writing, only Armenia, Bulgaria, Estonia, Hungary, Russia and the UK retain a blanket ban on prisoners' voting, and the European Court has issued judgments to the Russian and UK governments finding a violation of A3-P1 with regard to cases issuing from these states (*Anchugov and Gladkov v Russia*[22] and *Hirst v UK no.2*; *Greens and M.T. v UK*). An application from Hungary was filed at the Court in 2008, but at time of writing, this has not yet been communicated to the Hungarian Government. Following the judgments of *Greens and M.T. v UK* and *Alajos Kiss v Hungary*[23], the Hungarian government removed the blanket ban on voting for both prisoners and those under guardianship from the 2011 Constitution. Nonetheless, the ban was retained in the 2011 law on elections. Similarly, although the Estonian law on elections to the Parliament maintains a blanket ban[24], the Constitution provides that those convicted and serving a sentence 'may' have their right to vote circumscribed by law.[25] In Russia, the blanket

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[19] United Nations. General Assembly (2010), Human Rights Council on the working group of the periodic universal review 9th session, Geneva, 1-12 November, 2010, *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Andorra*, A/HRC/WG.6/9/AND/1, p.13 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/155/48/PDF/G1015548.pdf?OpenElement

[20] Georgia. *Organic law of Georgia: Election Code of Georgia adopted 27 December 2011, translated by IFES Georgia*, Art. 3 a.c. http://transparency.ge/sites/default/files/August%202012,%20Election_Code_of_Georgia_EN_-_codified.pdf

[21] San Marino. *Legge 31 gennaio 1996 n.6 (pubblicata il 7 febbraio 1996) Legge Elettorale Noi Capitani Reggenti la Serenissima Repubblica di San Marino Promulghiamo e mandiamo a pubblicare la seguente legge approvata dal Consiglio Grande e Generale nella seduta del 31 gennaio 1996*, Art.2 (1) b-d. http://www.consigliograndeegenerale.sm/on-line/home/archivio-leggi-decreti-e-regolamenti/scheda17014400.html

[22] *Anchugov and Gladkov v. Russia (no. 11157/04 and no. 15162/05)* 4.7.2013

[23] *Alajos Kiss v Hungary* (no.38832/06) 20.5.2010

[24] Estonia. *Riigikogu Election Act, adopted 12.06.2002,* last amended 17.10.2012, Art. 4(3) https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/504062014003/consolide. This information has not been verified from the text of the latest version of the law published in Estonian (Riigikogu valimise seadus https://www.riigiteataja.ee/akt/105022014004) last amended 1.4.2014, although at time of writing the notes to this law indicate that the provision relating to voting rights in Article 4 has not been amended since 17.10.2012, which corresponds with the date in the English language version (so the author assumes that there has been no further change to date in this provision).

[25] Estonia. *The Constitution of the Republic of Estonia, 28.06.1992, amended 27.4.2011*, translation into English https://www.riigiteataja.ee/en/eli/530102013003/consolide, Art. 58

ban on prisoner voting remains[26] as it does in Bulgaria[27] and in Armenia.[28] The Court's case-law on this issue is well-established, and judgments finding violations have been issued not only to states that have a blanket ban, as the cases of *Calmanovici v Romania*[29], *Cucu v Romania*[30], *Frodl v Austria*[31] and *Söyler v Turkey*[32] demonstrate.[33]

Hungary

Prisoners' voting rights

In Hungary, the court determines at the time of sentencing whether or not the convicted person shall additionally lose their right to participate in public affairs which includes the right to vote (among other rights such as the right to hold public office).[34] This penalty begins when the prison sentence has ended,[35] and this ban may extend from 1 to 10 years.[36] The law provides that only those prisoners serving a sentence for a crime committed with deliberate intent are to be banned from voting.[37] Since many crimes are judged to have been committed with criminal intent, courts tend to hand down these additional penalties to the vast majority of those sentenced to a term of imprisonment. The vast majority of prisoners (94.39% in 2012) have these rights removed at the time of sentencing, and this figure has risen sharply from 89.86% in

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[26] Russian Federation. *Федеральный закон Российской Федерации от 22 февраля 2014 г. N 20-ФЗ "О выборах депутатов Государственной Думы Федерального Собрания Российской Федерации"* (Art. 4(6)) = *Federal law of the Russian Federation of 22 February 2014 No. 20-F3 "On the election of deputies to the State Duma of the Federal Assembly of the Russian Federation*
http://www.rg.ru/2014/02/26/gosduma-dok.html

[27] Bulgaria. *Конституция България = Constitution of Bulgaria,* last amended 6.2.2007, Art. 42(1)
http://www.parliament.bg/bg/const

[28] Armenia. *Избирательный Кодекс Республики Армения принят 26 мая 2011 года (translation into Russian) = Electoral Code of the Republic of Armenia adopted 26 May 2011*, Art.2(3)
http://www.arlis.am/DocumentView.aspx?docid=82122

[29] *Calmanovici v Romania (44250/02)* 1.7.2008

[30] *Cucu v Romania (22362/06)*, 13.11.2012

[31] *Frodl v Austria (20201/04)*, 8.4.2010

[32] *Söyler v Turkey (29411/07)*, 17.9.2013

[33] Y. Lécuyer (2014), *Le droit á des élections libres*, Council of Europe

34 Criminal Code of Hungary 2012, Art.61(2)a
http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200100.TV&timeshift=1#lbj18param

[35] Ibid. Art.62(2)

[36] Ibid. Art. 62 (1)

[37] Ibid. Art.61(1)

2007.[38] This additional penalty is handed down automatically with little consideration for each individual case and as a result the loss of these rights is often disproportionate with the aims of the penalty for the crime committed.[39] For this reason, some respondents consider this indiscriminate practice to be a violation of Article 3 of Protocol 1 to the ECHR.[40] Moreover, since 2012, the prohibition of voting during the prison sentence itself is provided differently in various laws.

Under the 1978 Criminal Code and the 1989 Constitution, all those in Hungary serving a prison sentence had their right to vote suspended for the duration of their imprisonment.[41] In 2012 a new criminal code was adopted which lifted the blanket ban on prisoners' voting yet left the existing provision whereby the removal of this right was to be decided by a court at the time of sentencing.[42] The new fundamental law (Constitution) of 2011 similarly lifted the blanket ban on voting for prisoners and provided that the voting rights of prisoners and those under guardianship[43] are to be decided by a Court.[44]

Although there have been no hearings at the European Court, to date, of Hungarian cases relating to prisoners' voting rights[45], the Government made these amendments to the Constitution and the Criminal Code to comply with European Court case-law following the UK Greens and MT judgment of 2010[46] and the Alajos Kiss case of 2010[47]

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[38] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, May 2014, who pointed out that the proportion rose annually on average by 0.37% between 2004 and 2007 from 88.88% to 89.86% and has risen more sharply between 2008 and 2012 by on average 0.98% each year from 90.69% to 94.39%. See, Chief Prosecutor's annual reports on the criminal courts, 2007 to 2012 in Hungary. Legfőbb Ügyészség, *Büntetőbíróság előtti ügyészi tevékenység főbb adatai év*,
2007, http://www.mklu.hu/repository/mkudok4165.pdf, p. 77;
2008, http://www.mklu.hu/repository/mkudok6006.pdf, p. 84;
2009, http://www.mklu.hu/repository/mkudok6267.pdf, p. 84;
2010, http://www.mklu.hu/repository/mkudok6381.pdf, p. 84;
2011, http://www.mklu.hu/repository/mkudok5771.pdf, p. 82;
2012, http://www.mklu.hu/repository/mkudok8246.pdf, p. 76.

[39] Interviews with an analyst from the Hungarian Civil Liberties Union, Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, ** and *** , Budapest, May 2014

[40] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May 2014

[41] Ibid., See: Hungarian Constitution, 1989 Art. 70(3) Criminal Code, 1978, Art. 41(3); Constitution, 1989 Art. 70(3)

[42] Interview with an analyst, Hungarian Civil Liberties Union, May 2014

[43] For a thorough account of how voting rights for those with disabilities has been amended in Hungary, see: J. Lord, M. Ashley Stein and J. Fiala-Butora, 'Facilitating an Equal Right to Vote for Persons with Disabilities', *Journal of Human Rights Practice*, 6 (1), pp. 115–139

[44] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May 2014; Telephone interview with the legal representative for Alajos Kiss, János Fiala-Butora, May 2014. See: *The fundamental law of Hungary*, 25.4.2011, Art. 23(6)

[45] Evidently one case has been communicated to the European Court in 2008/2009 and is being represented by the Hungarian Helsinki Committee, but there is as yet no decision. Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest May 2014

[46] Interview with an analyst, Hungarian Civil Liberties Union, Budapest, May 2014

regarding voting rights for prisoners and those under guardianship, respectively.[48] In each judgment, the Court decided the blanket ban on voting for prisoners and those under guardianship to be a violation of Article 3 of Protocol 1 to the Convention, which protects the right to participate in elections.[49] The Helsinki Committee filed an application at the European Court in 2008/2009 relating to the loss of voting rights for prisoners which the NGO considers to be analogous with these other cases, and so expect a similar judgment in due course.[50]

In spite of these changes to the Hungarian Criminal Code and the Constitution, the 2011 law on elections of deputies to the Parliament maintains the blanket ban on voting for prisoners serving sentences,[51] and the government is not currently planning to amend this law,[52] because there is no political will to do so.[53] The Venice Commission, in their opinion of 2012 on the law on elections to the parliament, expressed concern that the ban on voting for prisoners and those under guardianship was not clarified with a legitimate aim.[54] While provision has since been made for those under guardianship to vote in elections, through the 2013 law on electoral procedure,[55] there is no similar provision in this law for prisoners. But, since the blanket ban which applies to the duration of the prison sentence (following pre-trial detention) is no longer provided in the Constitution or Criminal Code this ban in the 2011 and 2013 election laws appears to be unconstitutional.[56]

Why there is this discrepancy between the laws is not known. One explanation might be that these amendments to the Criminal Code and the Constitution were prepared by the Ministry of Justice to comply with European Court case-law, but that their significance was not noted by the Government or perhaps even the Parliament when they scrutinised and endorsed these laws. Or, alternatively, the Hungarian Government may in the interim have since changed its policy on the matter.[57] When asked at interview whether the UK's failure to comply with the European Court's judgments, over the issue of voting rights, was sending a message more generally to other states that there was

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[47] *Alajos Kiss v Hungary* (no.38832/06) 20.5.2010
[48] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, May 2014; Telephone interview with the legal representative for Alajos Kiss, János Fiala-Butora, May 2014.
[49] *Greens and M.T. v the United Kingdom* (*nos. 60041/08 and 60054/08)*, 23.11.2010, paras. 77-79; *Alajos Kiss v Hungary (*no. *38832/06)*, 20.5.2010, paras. 39-44.
[50] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, May 2014
[51] 2011 law on elections of deputies to the Parliament, Art.2(3) http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100203.TV
[52] Interview with former KDNP MP (until April 2014) Ferenc Kalmán, Budapest, May 2014
[53] Interview with ***, Budapest, May 2014.
[54] Venice Commission (2012), *Draft joint opinion on the Act on the elections of members of parliament of Hungary, 2012, Opinion no. 662/2012*, para. 37.
[55] 2013 law XXXVI on the procedure of elections, Art. 13A
[56] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May 2014.
[57] These are my own assertions.

no need to implement judgments, politicians were reluctant to reply.[58] Other respondents, from the legal community, agreed that this was a very serious matter and sent a poor message.[59] One respondent said that Hungary appeared to be following the example set by the UK, and that this was evident from the recent increase in anti-Council of Europe sentiment in the media over the last couple of years. During a television interview with a government minister, about a European Court judgment issued to Hungary, the interviewer asserted, "but Hungary does not need to implement this judgment, does it?" And the minister's response to this question implied that judgments are not binding.[60]

The European Court is very likely to issue a similar judgment to the Hungarian government in the near future.[61] Because the 2011 election law explicitly states that prisoners do not have the right to vote, the blanket ban on prisoners' voting in the UK is analogous with the blanket ban in Hungary and neither state's laws comply with the ECHR.[62] Whether the Hungarian government would comply with such a judgment was disputed by respondents. One suggested that the current government is unlikely to amend the law to lift the blanket ban and instead is more likely to pay compensation to any claimants.[63] Others consider that the Hungarian government would amend the law to satisfy the requirements of the European Court.[64]

Public awareness of the issue

To date, prisoners' voting rights has not been an issue of debate in Hungary.[65] Generally, citizens are not interested in this issue.[66] Nor has the issue received media coverage.[67] This was evident from the fact that a number of respondents (political analysts, academics and one parliamentarian) were not aware of the 2011 and 2012 amendments to the provisions for voting rights in the Constitution and the Criminal Code.[68] One former member of the Hungarian delegation to the Parliamentary Assembly (until April

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[58] Interview with former KDNP MP (until April 2014) Ferenc Kalmán, Budapest, May 2014; Interview with MSzP MP Vilmos Szabo, Budapest, May 2014.
[59] Interviews with * and *** Budapest, May 2014.
[60] Interview * Budapest, May 2014
[61] Interview with *** Budapest, May 2014
[62] Interview with *** Budapest, May 2014
[63] Interview with *** Budapest, May 2014
[64] Telephone interview with legal representative for Alajos Kiss, János Fiala-Butora, May 2014; interview with ** Budapest, May 2014
[65] Interview with former KDNP MP (until April 2014), Ferenc Kalmán, Budapest, May 2014
[66] Interview with ** Budapest, May 2014
[67] Except for a 2002 article, kindly provided by Gábor Győri, Political Solutions, in which FiDeSz claim that prisoners are supporters of the socialist opposition (MSzP) http://www.origo.hu/itthon/20020410fidesz.html
[68] Similarly, my first port of call was to look at the 2011 law on elections, which reiterated the blanket ban. It was only from interviews that I discovered that provisions for voting rights had been amended in the Criminal Code and Fundamental Law.

2014) stated that he was not aware of this amendment,[69] and another said that he was aware of it, but that it had not been the subject of debate because it simply did not feature in the context of the major constitutional amendments and new fundamental laws that were introduced around the same time.[70] Yet, the fact that there is a discrepancy between the Criminal Code, Fundamental law (on the one hand) and the law on elections of deputies to the Parliament (on the other) suggests that this issue has not been conclusively resolved yet.

Needless to say, prisoners' voting rights is a very minor issue compared to the raft of laws that the FiDeSz-KDNP coalition have introduced, which have very significantly changed the political landscape in Hungary. While many of these new provisions have received a good deal of media attention, and the NGO Political Capital generated through the media wide coverage of the implications of the 2011 law on elections, the complexity of the Hungarian electoral formula since 1990 has confused the general public and left people feeling that they will never understand how parliamentary mandates are allocated, and so they remain unable to evaluate the new provisions.[71] The Venice Commission expressed concern that there had been no debate or negotiation about the law during the drafting stages and urged that fundamental changes involving electoral formulae and the allocation of mandates must be discussed with other parties and decided through broad political consensus.[72] Instead, the law was imposed by an elite majority.[73]

Council of Europe motion to place Hungary under monitoring

The far-reaching implications of the Hungarian fundamental laws, including the law on elections, and the way in which these were introduced led the EU and Council of Europe to consider introducing a monitoring process of Hungary, and this has again, recently come under discussion.[74] The Council of Europe Parliamentary Assembly followed the recommendations of the Bureau of the Parliamentary Assembly and decided against monitoring. Within the Parliamentary Assembly there had been a good deal of support in favour of the monitoring procedure, and it came as a surprise when the Assembly suddenly rejected the idea.[75] The agenda-setting body of the Parliamentary Assembly, the Bureau, composed of 22 members, voted 13 to 7 against imposing monitoring and proposed that this motion be put to the Parliamentary Assembly.[76] The Assembly voted

[69] Interview with former KDNP MP (until April 2014) Ferenc Kalmán, Budapest, May 2014
[70] Interview with MSzP MP, Vilmos Szabo, Budapest, May 2014
[71] Interview with Robert László, Political Capital, Budapest, May 2014
[72] Venice Commission (2012), *Draft joint opinion on the Act on the elections of members of parliament of Hungary, 2012, Opinion no. 662/2012*, para. 30
[73] A. Renwick (2011), 'Electoral reform in Europe since 1945', *West European Politics* 34(3), pp. 456-77
[74] K. Eddy (2014), 'EU urged to monitor Hungary as Orban hits at 'liberal democracy'' *Financial Times*, 30.7.2014, http://www.ft.com/cms/s/0/0574f7f2-17f3-11e4-b842-00144feabdc0.html#axzz3B8FfrJ6t
[75] Interview with MSzP MP Vilmos Szabó, Budapest, May 2014
[76] Bureau of the Parliamentary Assembly of the Council of Europe, AS/BUR/CB (2013) 6 *To the members of the Assembly: synopsis of the meeting held in Yerevan on 30 May 2013*

135 to 88 against introducing monitoring.[77] What is surprising is the Parliamentary Assembly's very different appraisal of the facts from the Venice Commission's interpretation of the matter[78], in justifying their decision on the ground that *there had* been 'intensive' debate on the matter with opposition parties in parliament and civil society:

> The Assembly notes that the new Hungarian Parliament, for the first time in the history of free and democratic Hungary, amended the former constitution – inherited from the one-party system – into a new and modern Fundamental Law through a democratic procedure, after intensive debates in the parliament and with contributions from Hungarian civil society.[79]

This statement conflicts substantially with a Parliamentary Assembly report from just a few weeks earlier, which provided strong evidence to suggest that the Government had not facilitated meaningful debate with the opposition and civil society, because only one day was provided for this process.[80] Moreover, the bulk of these laws were introduced through individual bills which do not trigger a consultation procedure.[81] According to this earlier report, all opposition parties maintained that they had not been included in a consultation process.[82] In this context, the Parliamentary Assembly's resolution that there had been 'intensive' debate appears to be an exaggeration. Interviewees in May 2014 strongly maintained that there had not been any meaningful consultation with opposition parties in the parliament nor broadly with civil society when the FiDeSz Government prepared these laws, nor that there has been any debate or consultation on the matter since then.[83]

A special rapporteur from the European Democrat Group, UK Conservative Party MP, Robert Walter[84] of the UK delegation to the Parliamentary Assembly, visited Hungary in June 2014 and met with representatives of the new Hungarian Parliament and Government to assess the progress in amending the fundamental laws in accordance

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[77] Reuters, *Rights watchdog votes against monitoring Hungary*, 25.6.2013, http://uk.reuters.com/article/2013/06/25/uk-eu-hungary-idUKBRE95O18020130625

[78] See the Venice Commission opinion cited above.

[79] Parliamentary Assembly of the Council of Europe, *1941 (2013), Request for the opening of a monitoring procedure in respect of Hungary*, *Resolution.* Assembly debate of 25.6.2013. final version, para. 3

[80] Parliamentary Assembly of the Council of Europe, Doc. 13229, 10 June 2013, *Request for the opening of a monitoring procedure in respect of Hungary, Report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) Co-rapporteurs: Ms Kerstin Lundgren, Sweden, Alliance of Liberals and Democrats for Europe, and Ms Jana Fischerová, Czech Republic, European Democrat Group*, para. 22

[81] Ibid., para. 23

[82] Ibid., para. 24

[83] Interviews with MSzP MP Vilmos Szabó; former FiDeSz MP István Hegedűs; Political Capital; Political Solutions; *; **, Budapest, May 2014.

[84] Robert Walter expressed the view to the 2013 Joint Select Committee on the Voting Eligibility (Prisoners) Draft Bill that the option of extending the franchise for those prisoners serving a sentence of less than a year be proposed, which was ultimately the recommendation the Committee made in their 2013 report, see I. White and A. Home (2014), *Prisoners voting rights*, p.49.

with the Venice Commission and PACE recommendations.[85] The rapporteur is to present the report to the Parliamentary Assembly's Committee on Political Affairs and Democracy in October 2014.[86] Although in light of the fact that the Parliamentary Assembly asserted that there had been 'intensive debate' about these constitutional changes, what this report will ultimately bring remains to be seen.

The 2011 law on elections of deputies to the Parliament

The 2011 law on elections of deputies to the Parliament was one component of a large swathe of other 'fundamental laws' that were given Constitutional status, and require a two-thirds parliamentary majority to amend. There are a number of provisions in the law that respondents pointed out as problematic. The implications of these amendments have already been highlighted explicitly by scholars[87] and the Venice Commission.[88] The system remains mixed-member majoritarian with partial compensation and has been simplified slightly to combine the second and third tier party list elections at the district and national level into one single tier at the national level.[89] But, the new provisions have been tailored to provide a very significant advantage to the largest party, the FiDeSz coalition,[90] as is evident from the 2014 election results. Overall, the new law provides conditions for free but not fair elections.[91] Although the FiDeSz coalition garnered 8.19% fewer votes overall (44.54%), the coalition received 68.1% of the overall seats, as opposed to their performance in 2010 when they secured 52.73% of the total votes and 67% of the seats.[92] So, quite clearly, the new electoral formula facilitated the FiDeSz coalition's two-thirds landslide victory in 2014.

In 2010 the FiDeSz coalition performed particularly well in the SMD elections, securing 172/176 of seats allocated at this tier. In contrast, the FiDeSz coalition secured much

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[85] Interview with MSzP MP Vilmos Szabó, Budapest, May 2014; Parliamentary Assembly of the Council of Europe, *Information documents SG-AS (2014) 04*, p.9 http://website-pace.net/documents/10643/60519/20140416-SGAP-CM1197-EN.pdf/be389f71-4991-46db-bd80-b95d02926e00

[86] PACE, Committee on Political Affairs and Democracy (2014), *Reports under preparation* : *Situation in Hungary following the adoption of Assembly Resolution 1941 (2013)* p.7 http://website-pace.net/documents/10643/59254/RepPrepPOL-E.pdf/eb1eeaf7-4ea7-42aa-86b1-13ea8ded8d78

[87] A. Renwick (2012), *Electoral reform in Europe: Hungary* (see references therein for other sources) http://www.electoralsystemchanges.eu/Files/media/MEDIA_213/FILE/Hungary_summary.pdf

[88] Venice Commission (2012), *Draft joint opinion on the Act on the elections of members of parliament of Hungary, 2012, Opinion no. 662/2012*

[89] A. Renwick (2012), *Electoral reform in Europe: Hungary* http://www.electoralsystemchanges.eu/Files/media/MEDIA_213/FILE/Hungary_summary.pdf

[90] A. Renwick (2011) Hungary's new electoral law, part 2, Analysis, Dec. 2011 http://blogs.reading.ac.uk/readingpolitics/2011/12/26/hungary%E2%80%99s-new-electoral-law-part-2-analysis/

[91] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May 2014.

[92] Policy Solutions (2014), *Analysis: Winners and losers, Hungarian politics in-depth, election edition 8.4.2014*

fewer seats through the party list tiers[93] of elections, acquiring only 90/210 of these. In 2010 FiDeSz reduced the number of seats in Parliament from 386 to 199 (or a maximum of 200) and provided that a greater proportion of these were to be allocated through SMDs (106/199).[94] To bolster its performance in the party list tier of elections, the FiDeSz coalition amended the 'compensatory' mechanism, which apportioned unused votes from the SMD tier of elections to the party list totals.

The 'Compensatory' mechanism

Before 2011, the law contained a compensatory mechanism which allocated seats at the party list tier of the elections to those parties that had not secured SMD seats, using the unused votes that they garnered at this tier of elections.[95] Controversially, the 2011 law instead provides that winning parties from the SMD tier would also receive compensatory votes.[96] Winning parties are to receive additional votes to the amount of the difference (minus one vote) between the total number of votes they have secured and the party or candidate with the second highest number of votes.[97] As a result of this new provision, the FiDeSz coalition garnered an extra 765,003 'unused' votes from the 96 constituencies where they won SMD seats which were added to the party list vote total, as well as the 176,183 votes from those 10 constituencies where they did not win.[98] So, a total of 941,186 votes were added to their party list total and those that were added from the constituencies where the FiDeSz coalition had won constituted an extra 81% votes. Through this 'compensatory' mechanism the FiDeSz coalition secured an extra 6 seats at the party list tier of elections,[99] which provided the party with a two-thirds (qualified) majority of seats in parliament. Without this new provision, the FiDeSz coalition would not have secured its two-thirds majority. The next largest party, the MSzP, were only granted an extra 22,374 votes from the 10 constituencies where its candidates won SMD seats.[100] After the elections in 2014, a member of the left opposition coalition lodged a Constitutional complaint about the new compensatory mechanism, which the Constitutional Court rejected.[101] In support of their decision, the

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[93] The 2011 law scrapped the regional allocation of mandates and these are now all allocated according to nationwide party lists. A. Renwick (2012), *Electoral reform in Europe: Hungary*

[94] A. Renwick (2012), *Electoral reform in Europe: Hungary* http://www.electoralsystemchanges.eu/Files/media/MEDIA_213/FILE/Hungary_summary.pdf

[95] Ibid.

[96] Ibid.

[97] A. Renwick (2012), *Electoral reform in Europe: Hungary*, http://www.electoralsystemchanges.eu/Files/media/MEDIA_213/FILE/Hungary_summary.pdf

[98] These figures have been calculated (on the basis of the formula provided in Alan Renwick's paper cited above) by the author from the 2014 election results on the electoral commission's website. I have not had the opportunity to double check my calculations. http://valasztas.hu/hu/ovb/content/2014_ogy_valasztasi_eredmeny.pdf

[99] Interview with Robert László, Political Capital, Budapest, May 2014

[100] This has been calculated as above at note 87

[101] The complaint, IV/00870/2014, was lodged by the Együtt-Korszakváltók Party 29.4.2014. The Constitutional Court rejected the complaint on 5.5.2014. See: a Kúria Kvk.III.37.512/2014/3. számú végzése, illetve a 2011. évi CCIII. törvény 15. § (1) bekezdés b) pontja elleni alkotmányjogi panasz

Constitutional Court referred to the European Court case of *Yumak and Sadak v Turkey*, in which a party that had secured 45.95% of the votes in one particular province was not granted mandates because it failed to secure the necessary 10% national threshold.[102] The reasoning behind the Constitutional Court's decision was that although the Court appreciated that the mechanism no longer served its compensatory purpose, the provision was not described explicitly as compensatory in the new law and so the fact that the new provision fails to actually compensate losing parties could not be determined as 'unconstitutional'.[103] Another issue which has been the subject of dispute is the provision of voting rights for non-resident new Hungarian citizens.

The right to vote for non-resident ethnic Hungarians

According to a former KDNP MP (from the FiDeSz governing coalition), from the Hungarian delegation to the Parliamentary Assembly of the Council of Europe, the model for providing voting rights for non-resident ethnic Hungarians was adopted from the Romanian model, which similarly provides ethnic Romanians abroad the right to vote in national elections, as does the Serbian law. When this provision was discussed in the Parliamentary Assembly, only the Slovak delegation objected to it.[104] Some worry that this could lead to the Hungarian community in Slovakia demanding secession.[105] The Venice Commission expressed concern that this new provision potentially extends the vote to a further 5 million people, which is considerable in comparison to the electorate of 8 million living in Hungary and questioned whether those entitled to vote should have closer ties with the country than is provided in the new citizenship law.[106] Many of those granted this right to vote with their new citizenship have never lived in Hungary, and it was clear before they were enfranchised that this contingent would be pro-FiDeSz.[107]

A number of interviewees asserted that the new provision which grants ethnic Hungarian citizens abroad the right to vote helped the FiDeSz coalition secure an extra seat in the 2014 elections, because the vast majority of this Hungarian diaspora, that is

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(töredékszavazatok megállapítása-győzteskompenzáció).
http://public.mkab.hu/dev/dontesek.nsf/0/6EF7470F49B0A567C1257CC90033F3C7?OpenDocument
Thanks are owed to Dr. Eszter Bodnár, Department of Constitutional Law, Eötvös Loránd Tudományegyetem Budapest, for identifying the correct documents and explaining the decision.

[102] *Yamak and Sudak v Turkey, 10226/03*, 8.7.2008, para. 16; Hungary, Constitutional Court, *Kúria Kvk.III.37.512/2014/3. számú végzése, illetve a 2011. évi CCIII. törvény 15. § (1) bekezdés b) pontja elleni alkotmányjogi panasz (töredékszavazatok megállapítása-győzteskompenzáció)*, para. 35.

[103] Interviews with ** and ***, Budapest, May 2014.

[104] Interview with former KDNP MP (until April 2014) Ferenc Kalmán, Budapest May 2014

[105] *Greater Hungary: an imminent danger*, Lidové Noviny, 24.5.2010, re-printed in English at http://www.voxeurop.eu/en/content/article/257021-greater-hungary-imminent-danger&action=edit

[106] Venice Commission (2012), *Draft joint opinion on the Act on the elections of members of parliament of Hungary, 2012, Opinion no. 662/2012*, paras 42-44.

[107] R. Bauböck (2010), 'Dual citizenship for the transborder minorities? How to respond to the Hungarian-Slovak tit-for-tat', *EUI Working Papers, RSCAS 2010/75*, pp.1-2

more than 90%, voted in favour of the FiDeSz coalition.[108] These individuals are grateful to have received the new opportunity for citizenship, which the FiDeSz Government provided and have been promised support from Prime Minister Viktor Orbán, who has encouraged that the contingent territories where these Hungarian communities reside should choose whether or not to secede by popular vote and become incorporated into Hungary (in accordance with the territorial boundaries of Hungary before the Treaty of Trianon in 1921). At present, this group comprises about 130,000 people,[109] but this figure is likely to increase substantially.

What is particularly contentious is that this group has been granted a postal vote, which facilitates their participation in elections, whereas Hungarian residents abroad at the time of elections have to travel to the local embassy or consulate to vote.[110] This pool of individuals comprises about 500,000 people, but only about 10,000 of these voted.[111] Anecdotal evidence suggests that the group of residents abroad is much less supportive of FiDeSz than the diaspora community, which has led people to interpret the prohibitive voting procedure as politically motivated to reduce residents' abroad participation in elections.[112] The Hungarian Civil Liberties Union has lodged a Constitutional Complaint about this discriminatory treatment of Hungarian residents abroad on the basis of one particular individual affected, although analogous complaints with similar argumentation have already been rejected.[113] Moreover, the Constitutional Court is perhaps less likely to retroactively strike down provisions in this law because it could delegitimize the government.[114] Another concern is that the Constitutional Court has been disproportionately peopled with judges who are ideologically affiliated with the governing FiDeSz coalition: this again limits the remedies available to complainants.[115] In the event that the Constitutional Court does not issue a favourable decision soon, the HCLU intends lodging the case at the European Court.[116]

Redistricting and gerrymandering

Another element to the election law, which opposition supporters claim the FiDeSz coalition imposed without consultation, is the electoral district map. This has been a matter of dispute for a number of years because of the disproportionate size of various districts. For this reason, in 2005 the Constitutional Court struck down the relevant

[108] Telephone interview with Janos Fiala-Butora, May 2014; Interview with an analyst from the HCLU, Budapest, May 2014

[109] Interview with Robert László, Political Capital, Budapest, May 2014.

[110] Interviews with an analyst from the Hungarian Civil Liberties Union and Robert László, Political Capital, Budapest May 2014; telephone interview with Janos Fiala-Butora, May 2014

[111] Interview with Robert László, Political Capital

[112] Interviews with Robert László, Political Capital and *, Budapest, May 2014.

[113] Interview with an analyst, Hungarian Civil Liberties Union, Budapest, May 2014.

[114] Interview with *, Budapest, May 2014

[115] Ibid.

[116] Interview with an analyst, Hungarian Civil Liberties Union, Budapest, May 2014.

provisions in the law on elections of deputies and required that districts be redrawn.[117] Neither the government nor parliament addressed the issue for some years because they were aware that they would not be able to easily come to an agreement on redistricting. So, in 2009 the Hungarian NGO *Political Capital* lodged a Constitutional complaint (through *Actio Popularis*) regarding the issue and in 2010, after the parliamentary elections, the Constitutional Court decided (again) that the provisions were unconstitutional. The Court required that guidelines on delimiting districts be introduced into the law on elections, but that the district map itself was to be included in another law, which would not require a two-thirds majority to amend.[118] Without precedent, in 2011, the Parliament published a new district map on their website but did not disseminate information as to who had devised this or how.[119] The new law on elections provided some very general guidelines, which stated that districts could only vary in size by 15% and that district boundaries would need to be re-drawn if this exceeded 20%.[120] The law did not provide how seats were to be apportioned to the districts and the new constituency map was included in the law on elections (requiring a two-thirds majority to amend).[121] In their 2012 opinion on the law, the Venice Commission recommended that district size should not vary by more than 10% in size[122], that the district map should be included in secondary legislation, and reiterated the need for wider consultation and political consensus in the process of redistricting.[123] Since the 2014 elections, analysts have statistically proved gerrymandering in the redistricting procedure.[124] The possibility to lodge an analogous Constitutional Complaint to that of Political Capital's in 2009 is no longer available because the right of *Actio Popularis* has now been removed.[125]

Party financing

The new party financing regulations introduced by the FiDeSz coalition provided that all parties competing in the party list tier of elections that secured 500 signatures during the registration process, were to receive state campaign funding. What has been controversial is that these parties were not required to repay this money in the event that they failed to secure any votes at all. In contrast, SMD candidates are required to repay these funds in the event that they do not secure a minimum percentage of all

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[117] Interview with Robert László, Political Capital, Budapest, Budapest, May 2014
[118] Ibid.
[119] Ibid.
[120] Law on elections of deputies to the Parliament, Art.4.2, A. Renwick, 2012, http://www.electoralsystemchanges.eu/Files/media/MEDIA_213/FILE/Hungary_summary.pdf
[121] Interview with Robert László, Political Capital, Budapest, May 2014
[122] Venice Commission (2012), *Draft joint opinion on the Act on the elections of members of parliament of Hungary, 2012, Opinion no. 662/2012*, para. 35
[123] Ibid., para. 34.
[124] Interviews with Gábor Győri, Political Solutions and Robert László, Political Capital, Budapest, May 2014. Gábor Győri and Robert László have each compiled statistical analyses which are to be published.
[125] M. Bánkuti, G. Halmai, K. Lane Scheppele (2012), 'Disabling the Constitution' *Journal of Democracy*, July, 138-146.

votes in the district where they are competing.[126] This provision resulted in the proliferation of parties competing in the party list tier of elections in 2014, and a number of these newcomers were identified as sham parties.[127] One of these absconded with the money before the elections[128] and some of these parties adopted very similar names to opposition parties.[129] Although these parties did not impact significantly on the results, in that the most successful of them only secured less that 1% of the total votes at the party list tier of elections, they nonetheless impeded the opposition parties' electoral campaign.[130]

Media coverage of elections

The FiDeSz coalition introduced very strict regulations for TV media coverage of the 2014 electoral campaign which resulted in very little broadcasting about the forthcoming elections. All television channels, both public service and private networks, were required by law to broadcast party campaign material for all parties without accepting a fee.[131] If broadcasting coverage of one party, networks were required to offer the same service to all other competing parties. Because of the proliferation of parties competing in the 2014 elections, private networks declined to cover the campaign. This resulted in exclusive coverage of the campaign by the public service channels, and since only 15% of the population watches these channels[132], there was very little information disseminated about the elections through media that the public popularly consumes. The electorate was therefore not adequately informed about the various competing parties' programmes.[133] The Venice Commission foresaw that these restrictions on political advertising would diminish the scope for opposition parties to advertise during the electoral campaign and provide ample opportunity for the government to broadcast material.[134] At the 2014 elections, there were a number of government broadcasts on public service and commercial channels which amounted to campaign material, because these broadcasts were very similar both visually and in content to the FiDeSz coalition election advertisements.[135] In light of the fact that these

[126] Interview with Robert László, Political Capital
[127] Ibid.
[128] Interview with former KDNP MP (until April 2014) Ferenc Kalmán,
[129] Interview with ***, Budapest, May 2014.
[130] Ibid.
[131] OSCE Hungarian parliamentary elections 6 April 2014, Interim report, 5-18 March, 2014, p.8; see *2013. évi XXXVI. törvény a választási eljárásról* Art. 146-148
[132] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May, 2014
[133] Interviews with former FiDeSz MP, István Hegedűs; MSzP MP Vilmos Szabo; Robert László, Political Capital; * and ***, Budapest, May 2014
[134] Venice Commission (2013). *Opinion on the fourth amendment to the Fundamental Law of Hungary*, 17.6.2013, Para. 45
[135] Interviews with Gábor Győri, Political Solutions; Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May 2014.

broadcasts were practically interchangeable, campaign broadcasting was heavily biased in favour of the FiDeSz party.[136]

Conclusion

Overall, respondents all emphasised that there had been no public debate about the new election laws and regulations. There is unanimity amongst all opposition parties that there was no consultation with them about these, or the adoption of the fundamental law.[137] In February 2011 the FiDeSz party added some veneer of public discussion through their 'National Consultation' project about the Constitution.[138] The questions in this public opinion survey were very general, and leading, and hence the apparent public endorsement of FiDeSz's Constitutional design through this instrument must be viewed with some scepticism.[139] Respondents emphasised the importance of Strasbourg as a channel for them to contest their electoral rights and laws,[140] and explained that there is no alternative effective domestic remedy available because these election laws require a two-thirds parliamentary majority to amend.[141] Similarly, since the right to individual complaint through the *Actio Popularis* has been removed by the FiDeSz administration, again, this significantly reduces the available domestic channels for individuals to contest laws at the Constitutional Court.[142]

The nature of constitutional change in Liechtenstein similarly triggered a series of discussions within the Parliamentary Assembly to initiate a monitoring procedure but on this occasion the issue was more satisfactorily resolved because the electorate was consulted directly through a referendum. On the issue of voting rights for prisoners, however, there was no public consultation because compliance with human rights conventions is non-negotiable with the electorate.

Liechtenstein

The Constitution of the Principality of Liechtenstein was amended in 2003 to considerably strengthen the Prince's powers. Unlike other monarchs in Europe, the Prince of Liechtenstein still today plays a very active role in politics,[143] and has the

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[136] Interviews with former FiDeSz MP, István Hegedűs; Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May 2014.
[137] Interview with MSzP MP, Vilmos Szabó. Budapest, May 2014.
[138] Nemzeti Konzultáció http://www.fidesz.hu/hirek/2011-02-14/nemzeti-konzultacio-kerdesek-az-uj-alkotmanyrol/
[139] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May 2014
[140] Interviews with ** and Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May 2014
[141] Interview with Dr Zoltán Pozsar-Szenthiklósy, Hungarian Helsinki Committee, Budapest, May 2014
[142] Interview with Robert Lászlo, Political Capital, Budapest, May 2014
[143] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014

power to veto legislation, dismiss the Government.[144] In this respect, Liechtenstein would perhaps qualify as a 'ruling monarchy'.[145] According to the 1921 Constitution, the Prince could only dismiss the Government with Parliament's consent whereas the 2003 Constitution grants either the Prince or the Parliament the power (independently) to dismiss the Government.[146] So, when drafting new legislation, the Government and Parliament have to seriously consider the Prince's wishes and keep abreast of his views to avoid a Princely veto.[147] Similarly, the people try to avoid conflict with the Prince. In 2011, there was a people's initiative to legalise abortion and before the referendum was held, the Prince declared that if passed by a popular majority he would in any event veto the law. This influenced the electorate to vote against the legalisation of abortion by a small majority.[148] At the same time, the electorate has enjoyed very extensive powers of direct democracy through citizens' initiatives and referendums since 1921 and these powers exceed those available to the electorate in Switzerland.[149] Citizens can initiate, through a petition, a new bill (with 1000 signatures) or even a constitutional amendment (with 1500 signatures).[150] The constitution, which articulates the powers of the Prince and people respectively, is therefore 'dualistic' in nature and so the system in Liechtenstein cannot be described as purely democratic,[151] but perhaps fits better the classification of 'constitutional monarchy' and yet in some respects, the electorate's powers exceed those of 'democratic parliamentary monarchies'. [152] So, the Liechtenstein system is rather anomalous in this respect and the strengthening of the Prince's powers through the 2003 Constitution raised concerns in the Parliamentary Assembly, in part, about how this impacted on the electorate's right to free and fair elections.

The Council of Europe and the Constitution of 2003

In 2002, the Parliament drafted an amendment to the 1921 constitution which was to significantly curtail the Prince's powers, but the Prince drafted other amendments which confirmed (and even strengthened) his political powers and he initiated a citizen's

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[144] W. Marxer (2010), 'Liechtenstein', in D. Nohlen and P. Stöver eds., *Elections in Europe: a data handbook*, Nomos, pp.1155-1186

[145] A. Stepan, J. Linz and J. Minoves (2014), 'Democratic parliamentary monarchies,' *Journal of Democracy*, 25(2), pp. 35-51; p.36

[146] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern.

[147] Ibid; Interview with ****, Vaduz, May, 2014.

[148] Ibid. At the same time a citizens' initiative voted in favour of legalising same sex civil partnerships. See for example, 'Liechtenstein votes against legalising abortion', Expatica.com, 18.9.2011, http://www.expatica.com/ch/news/swiss-news/liechtenstein-votes-against-legalising-abortion_176243.html

[149] W. Marxer (2007) 'Direct democracy in Liechtenstein', *International Conference on Direct Democracy in Latin America*, Buenos Aires, 14-15 March 2007

[150] W. Marxer (2010), 'Liechtenstein', in D. Nohlen and P. Stöver eds., *Elections in Europe: a data handbook*, Nomos, pp.1155-1186; 1161-1162.

[151] W. Marxer (2007) 'Direct democracy in Liechtenstein', *International Conference on Direct Democracy in Latin America*, Buenos Aires, 14-15 March 2007

[152] A. Stepan, J. Linz and J. Minoves (2014), 'Democratic parliamentary monarchies,' *Journal of Democracy*, 25(2), pp. 35-51; p.36

petition which mobilised the necessary two-thirds support of the electorate to endorse his draft of the Constitution.[153] Concerned at the prospect of the Prince extending his constitutional powers, the Parliamentary Assembly of the Council of Europe asked the Venice Commission for an opinion on the Constitution drafted by the Prince and supported by the people's initiative.[154] The Venice Commission described the draft Constitution as a "step backwards towards a rather anachronistic constitutional situation as existed before the establishment of constitutional monarchies in Europe,"[155] and stated that, in contrast, all other monarchies in Council of Europe states had been reformed to make them compatible with democratic principles.[156] The Venice Commission suggested that the Prince's powers as articulated in the new Constitution impinged on voting rights, as protected in Article 3 of Protocol 1 to the Convention:

> "the right to free elections implies that the parliament to be elected must be an effective parliament exercising its powers independently. It may well be argued therefore that the possibility of exercising important legislative and executive powers, and of vetoing proposed legislation, without direct or indirect legitimisation by a democratically elected body, violates the aim of Article 3 of Protocol no. I to the ECHR. Moreover, it conflicts with the common constitutional heritage of European monarchies."[157]

So although in essence the same powers were retained by the Prince, the new provisions for citizens to abolish rule by the Princely House through a referendum extended the people's power. Whether this ultimately satisfied the Council of Europe is not known, but in any event there have been no further requests for monitoring since then.[158] What is apparent from the process, however, is that the people's public engagement and debate about the new Constitution and the strong majority at the popular referendum in favour of adopting the Constitution demonstrated that the issue had been resolved in a democratic way, even if the new provisions in the Constitution could not be described as democratic.

In the context of Liechtenstein, what is crucial to the adoption of Council of Europe standards and compliance with European Court case-law is that citizens' initiatives and petitions to change the law are first screened by the Constitutional Court to verify that they are compatible with the constitution and international law. If they are not compatible then they are rejected. In this way, popular sovereignty is limited in the area

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[153] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014

[154] Venice Commission, *Opinion 227/2002, Draft opinion on the amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein on the basis of comments from Mr H. Zahle (Member, Denmark), Mr P. Dijk (Member, Netherlands), Mr J.C. Scholsem (member, Belgium),* 9.12.2002

[155] Ibid., para. 17

[156] Ibid., para. 9

[157] Ibid., para. 23

[158] Interviews with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern and **** Vaduz, May 2014

of human rights,[159] and it prevents the endorsement of a citizens' initiative that is non-compliant with the ECHR. The matter of amending legislation to comply with European Court case-law is therefore perceived to be a procedural technicality which is non-negotiable and which does not give rise to significant debate. The case of prisoners voting rights exemplifies this well.

Prisoners voting rights

The main reason why the government amended the law to provide some prisoners with the right to vote was the European Court's judgment in *Frodl v Austria (20201/04* 8.4.2010).[160] Additionally, the Constitutional Court issued a judgment in 2011 which stated that the provision banning all those under guardianship from voting was unconstitutional, and that the removal of this right must be decided by a court.[161] Since the blanket ban on voting for those under guardianship was contained in the same article of the law as the ban on voting for prisoners,[162] this implicitly raised the question as to whether a court should also decide this issue for prisoners. These two factors led the Government to amend the law.[163] The issue of amending the law for prisoners was not considered in any way to be controversial and the amendment was considered by all involved as a technicality.[164] The amendment was proposed by the Ministry of Home Affairs, and endorsed by the Government which then sent draft amendments to the Parliament.[165]

There is one national prison in Liechtenstein, which contains 18 rooms for 20 people, and the facilities are never fully occupied. In total, in 2013, there were 68 people imprisoned for a total of 3089 days.[166] So, in 2013, on average, each individual was detained for an average of 45 days. Those serving sentences less than two years are kept in this prison facility.[167] Since 1982, Liechtenstein has transferred all prisoners sentenced to terms longer than two years to prisons in Austria under a contractual agreement between the two states.[168] In 2013 this group of prisoners comprised 15

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[159] W. Marxer (2007) 'Direct democracy in Liechtenstein', *International Conference on Direct Democracy in Latin America*, Buenos Aires, 14-15 March 2007, p.7

[160] Interview with Manuel Frick, Representative to the Council of Europe, Ministry of Foreign Affairs, Liechtenstein, Vaduz, May 2014

[161] Liechtenstein Supreme Court. SStGH 2011/023 decision of 18.5.2011

[162] Liechtenstein Landtag. *Gesetz vom 17 Juli 1973 betreffend die Ausübung der politischen Volksrechte in Landesangelegenheiten*, Art. 2

[163] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014

[164] Interview with Manuel Frick, Representative to the Council of Europe, Ministry of Foreign Affairs, Liechtenstein, Vaduz, May 2014

[165] Ibid.

[166] Ibid.; Liechtenstein Ministry of Justice (2014), [Annual Report delivered by the Government to the Parliament] *Inneres, Justiz und Wirtschaft*, pp. 279-280.

[167] Interview with Manuel Frick, Representative to the Council of Europe, Ministry of Foreign Affairs, Liechtenstein, Vaduz, May 2014.

[168] Ibid.

people.[169] Since the Liechtenstein law was originally based on the Austrian law and the two are today still very similar, the Liechtenstein Government simply amended the law following the *Frodl* judgment and the subsequent amendments to the Austrian law.[170] Additionally, to ensure compliance with Austrian standards, all Liechtenstein prisoners across the border would also need to share the same rights (so as to comply with *Frodl v Austria*). Since many of Liechtenstein's laws are similar to Austrian or Swiss laws, many amendments are simply imported from these states' respective laws.[171] So, compliance according to the *erga omnes* principle, whereby in principle all states should act to amend laws and practices to comply with European Court judgments issued to any member state, appears to have been the main rationale behind the Liechtenstein Government's initiative to amend the law in this instance, as well as an interest to remain in step with Austrian amendments to voting rights.

Until 2012, there had been a blanket ban on prisoners voting in Liechtenstein.[172] In 2012, the Government issued the Parliament a report on the draft amendments to the law on elections to the Parliament. In this report the government explained the amendment was necessary because of the European Court's judgment in the case of Frodl which was issued to Austria.[173] In the Frodl case, the European Court decided that the blanket ban on voting for all those sentenced to more than a year of imprisonment was not justified in the law because this ban is qualified simply by the status of the individual as a prisoner (serving more than a one year sentence), and therefore this provision appears discriminatory.[174] The Court explained that disenfranchisement must be proportionate with the aims of the penalty for the crime committed.[175] Disenfranchisement should preferably be decided by a court at the time of sentencing, rather than through the application of a law, and that it should apply only to longer sentences.[176] Although Mr Frodl was serving a life sentence for murder,[177] because of the absence of a provision in the law which adequately justified Mr Frodl's disenfranchisement the Court found a violation of Article 3 of Protocol 1 to the Convention. The Liechtenstein Government recounted the European Court's decision in its report to the Parliament, the fact that the Austrian Government had amended the

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[169] Ibid.; Liechtenstein Ministry of Justice (2014), [Annual Report delivered by the Government to the Parliament] *Inneres, Justiz und Wirtschaft*, p. 280.
[170] Interview with **** Vaduz, May 2014.
[171] Interviews with Manuel Frick, Representative to the Council of Europe, Ministry of Foreign Affairs, Liechtenstein, Vaduz and Dr Wilfried Marxer, Director, Liechtenstein Institute, Bendern, May 2014.
[172] Liechtenstein Landtag. *Gesetz vom 17 Juli 1973 betreffend die Ausübung der politischen Volksrechte in Landesangelegenheiten*, Art. 2(c)
[173] Liechtenstein Landtag. *Bericht und Antrag der Regierung des fürstentums Liechtenstein. Betreffend die Abänderung des Gemeindegesetzes, des Volksrechtegesetzes und weiterer Gesetze*, no. 66/2012, pp. 44-45., Abs. 1 Bst. c)
[174] *Frodl v Austria, (20201/04, 8.4.2010),* para. 25.
[175] Ibid., para. 26
[176] Ibid., para. 28
[177] Ibid., para. 7

Austrian law to comply with the ECHR, and explained that since the Liechtenstein law is practically identical to the Austrian one, similar amendments had to be made.[178]

The new law provides that at the time of sentencing, the court is to decide for those serving less than five years imprisonment whether to impose the additional penalty of disenfranchisement for the duration of the prison sentence.[179] So this adheres to the requirements in the Strasbourg judgment, in that the court decides on a case by case basis.[180] For this reason, the court in Liechtenstein will review all prisoners' cases by the time of the next elections in 2017 to determine whether or not they should be granted the right to vote.[181]

Media coverage and public debate

There was very detailed coverage of the amendments to the law on elections relating to the bulk of provisions regarding the administration of elections in the municipalities, in both the national Liechtenstein newspapers, but there was no mention in either newspaper of the new provision for prisoners to vote.[182] The Liechtenstein newspaper with the largest circulation (of around 13,000[183]), *Vaterland*, was not informed about this via a government press release, which is the way such news would usually be conveyed to the newspaper.[184] The issue may not have been considered newsworthy because the prison population in Liechtenstein is so small and generally those convicted usually only serve very short prison sentences of a few months, so the probability of missing a parliamentary election is relatively small, so the provision itself is not likely to impact much on the vast majority of prisoners.[185] There is, however, a citizen's initiative (referendum) about once a year, which these individuals would be more likely to miss.[186] The possible pool of people that the new provision affects is further reduced by the factor that the majority of detainees are not Liechtenstein citizens.[187] So, this would

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[178] Liechtenstein Landtag. *Bericht und Antrag der Regierung des fürstentums Liechtenstein. Betreffend die Abänderung des Gemeindegesetzes, des Volksrechtegesetzes und weiterer Gesetze*, no. 66/2012, pp. 44-45., Abs. 1 Bst. c)

[179] Liechtenstein Landtag. *Gesetz vom 17. Juli 1973 über die Ausübung der politischen Volksrechte in Landesangelegenheiten (Volksrechtegesetz, VRG)*, as amended in September 2012, Art. 2 (1) c) and Art.2 (2)

[180] Interview with Manuel Frick, Representative to the Council of Europe, Ministry of Foreign Affairs, Vaduz, May 2014.

[181] Ibid.

[182] Interviews with Janine Köpfli, Editor in Chief of Vaterland newspaper and Manuel Frick, Representative to the Council of Europe, Ministry of Foreign Affairs, Liechtenstein, Vaduz, May 2014.

[183] This is a large circulation, constituting about two thirds of the electorate (68% of those on the 2013 electoral register of 19,251)

[184] Interview with Janine Köpfli, Editor in Chief of Vaterland newspaper, Vaduz, May 2014

[185] Ibid.

[186] Ibid.

[187] Interview with Manuel Frick, Representative to the Council of Europe, Ministry of Foreign Affairs, Vaduz, May 2014

in no way be perceived as controversial because it could not in any way impact on the results of an election.[188]

Another reason why the issue received no media attention is because it was considered in parliament to be a technicality, which received unanimous support during the session when it was endorsed.[189] At the first reading of the bill in June 2012, nobody in Parliament raised any objections to this provision and it passed through without any discussion.[190] So the issue was not mentioned again, because there was no need to change the wording of the provision and it was unanimously endorsed by Parliament.[191] As mentioned above, this provision was just one of a number of other more important changes to the law on elections.[192] In conclusion, although the general public's view on the issue of prisoners voting rights is not known, respondents anticipated that people would most likely be sympathetic to the amendment.[193]

Administrative procedures for implementing the law

As yet, there is no experience of how these new provisions will work out in practice, but the administrative procedure and those responsible are clearly identified in the amended criminal laws, which should facilitate the procedure.[194] The Court in charge of the criminal records' list is to contact the official in charge of the constituency register, where the convicted person is registered to vote, according to their place of permanent residence, and their name is to be struck off the register if disenfranchised.[195] Those enfranchised in accordance with these new provisions who are detained in a prison in Liechtenstein are to receive a postal vote (from the constituency where they are resident) as are those Liechtenstein citizens abroad in Austrian prisons.[196] There was no contentious debate about these provisions, and the law is very clear about the procedures so there should be no cause for any dispute in the future, either.[197]

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[188] Ibid.

[189] Interviews with Wilfried Marxer Director, Liechtenstein Institute, Bendern, and **** Vaduz, May 2014

[190] Interview with Manuel Frick, who kindly provided a copy of the text of the relevant parliamentary debate and indicated this. See: Liechtenstein Landtag, *Abänderung des Gemeindegesetzes, des Volksrechtegesetzes und weiterer Gesetze* (Nr 66/2012); 1. Lesung, 22.6.2012

[191] Liechtenstein Landtag (2012) *Stellungnahme der Regierung an den Landtag des fürstentums Liechtenstein zu den anlässlich der ersten Lesung betreffend die Abänderung des Gemeindegesetzes, des Volksrechtegesetzes und weiterer Gesetze aufgeworfenen fragen* (Nr 105/2012).

[192] Interview with **** Vaduz, May 2014.

[193] Interviews with Janine Köpfli, Editor in Chief of Vaterland newspaper, Vaduz; Dr Wilfried Marxer, Director, Liechtenstein Institute, Bendern and **** Vaduz, May, 2014.

[194] Liechtenstein Landtag, *Gesetz vom 2. Juli 1974 über das Strafregister und die Tilgung gerichtlicher Verurteilungen*, Art. 5(3) Amended 2012*, Strafprozessordnung* Art. 352a

[195] Liechtenstein Landtag. *Strafprozessordnung* Art. 352a, added as a supplement in 2012.

[196] Interview with Manuel Frick, Representative to the Council of Europe, Ministry of Foreign Affairs, Vaduz, May 2014

[197] Ibid.

With regard to the issue of whether or not respondents would recommend the Liechtenstein model to the UK, certainly the provisions adopted were not at all contentious, so from that perspective, these are to be recommended.[198] One respondent expressed the view that the UK case is quite different insofar as the numbers of prisoners, and the politics on the issue.[199] Although statistically the prison community of 85,228[200] in the UK may appear much larger than that of Liechtenstein's 68 people[201], the UK prison community is actually smaller as a percentage of the population of 62.8 million people.[202] In the UK, the prison community comprises 0.14% of the population, whereas the percentage of those in prison in Liechtenstein is 0.18% of the population of 36,838.[203] As a percentage of the electorate, these figures are 0.35% in Liechtenstein and 0.18% in the UK.[204]

Moreover, the case-law on this issue is very well-established. There have been a number of cases relating to prisoners voting, so it is very clear from these judgments what the Strasbourg Court requires of member states on this issue.[205] And in Strasbourg, those representing the member states' governments at the Court (although not necessarily among Parliamentary Assembly delegations), are unanimous on this issue.[206] The issue was also very easily resolved in Austria: When amending the law to make it compliant with the ECHR, the government simply followed the basic formula that the Court had set out in its judgment.[207]

Women's voting rights

Another example of Council of Europe influence over the extension of the franchise in Liechtenstein was that of women's voting rights in 1984. Women were granted the right to vote in Switzerland in 1971 following a popular referendum which passed the motion

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[198] Ibid.
[199] Ibid.
[200] UK. HM Prison Service. *Statistics: Prison population figures, 2014*, 'Population and capacity briefing for 13.06.2014', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319982/prison-population-figures-13-june-2014.xls
[201] Liechtenstein. Ministry of Justice (2014), [Annual Report delivered by the Government to the Parliament] *Inneres, Justiz und Wirtschaft*, pp. 279-280.
[202] UK. Office for National Statistics (2013), *Population Estimates for UK, England and Wales, Scotland and Northern Ireland, Mid-2001 to Mid-2010 Revised, 17.12.2013* http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2001-to-mid-2010-revised/index.html
[203] Principality of Liechtenstein, Office of Statistics, *Liechtenstein in figures, 2014*, p.11
[204] In 2012 the UK electorate was recorded at: 46,353,900. See: UK Office of National Statistics, *Electoral statistics for 2012*. In Liechtenstein, the electorate at the 2013 elections was recorded at 19,251. See: *Information und Kommunikation der Regierung. Landtagswahlen 2013* http://www.landtagswahlen.li/resultate.aspx?eeid=8&ukid=14
[205] Interview with Manuel Frick, Representative to the Council of Europe, Ministry of Foreign Affairs, Vaduz, May 2014
[206] Ibid.
[207] Ibid.

through a small majority. Liechtenstein followed suit with a similar referendum, but the majority voted against the motion in 1971 and again in 1973.[208] By the 1980s women had become more mobilised and increasingly frustrated that there had been no further action by the Government. So, in 1983 a group of Liechtenstein women went to Strasbourg to demand their rights under the ECHR[209] and generated significant media coverage in Liechtenstein on the issue. Although this publicity stunt was considered scandalous by many in Liechtenstein, it nonetheless pushed the issue back onto the agenda. Embarrassed by this, the Parliament debated the matter and expressed strong support in favour of granting women the right to vote. When the Government initiated another popular referendum in 1984 the motion was endorsed by a small majority.[210] Equal voting rights for women are provided in the law, but in practice, culturally, this has taken some time to take effect, especially in the area of passive voting rights, and as elsewhere in Europe, this is still a work in progress.[211] In practice, women's rights in particular, and human rights more generally in Liechtenstein, still require much more attention than they currently receive.[212] In 1986 women were proposed as candidates for parliamentary elections but because the election law provides open party lists with the option of preference voting (and panachage to select from other party lists), these female candidates were deselected from lists.[213] For many years there were just one or two female members elected to parliament and the largest number elected to date has been 6/25, which was during the last parliamentary term.[214] Although not good, this is similar to the proportion of female representation in other parliaments in Europe.[215] At the 2013 elections, women candidates' names were deselected almost as often as male candidates, so women's passive voting rights are now in practice almost the same as men's.[216]

The right to vote for citizens who are resident abroad

Apart from those Liechtenstein citizens in prison in Austria, who might be granted the right to vote under the new 2012 provisions, citizens abroad do not as yet have the right to vote. At the 2013 elections, there were 19,251 people on the electoral register.[217] There are additionally about 8000 Liechtenstein citizens living abroad who do not have the right to vote. Some of these may never have lived in Liechtenstein and could be

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[208] Interview with ****, Vaduz, May 2014.
[209] Liechtenstein acceded to the Council of Europe in 1978.
[210] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014.
[211] Ibid.
[212] Interview with Janine Köpfli, Editor in Chief of Vaterland newspaper, Vaduz, May 2014
[213] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern. May 2014.
[214] Ibid.
[215] W. Marxer (2013), *Landtagswahlen 2013 – Frauen im Fokus*, Arbeitspapiere Liechtenstein-Institut Nr.41 http://liechtenstein-institut.li/Portals/0/contortionistUniverses/408/rsc/Publikation, see Table 1, pp.13-14
[216] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern.
[217] Liechtenstein Landtag. *Information und Kommunikation der Regierung. Landtagswahlen 2013* http://www.landtagswahlen.li/resultate.aspx?eeid=8&ukid=14

second or even third generation.[218] Some, however, maintain very strong ties with the country. In light of the geographical size of Liechtenstein, which is only 160 square kilometres,[219] and the absence of border control with Switzerland, some citizens reside in Switzerland, because they marry and establish families there, for example, but they remain working in Liechtenstein. These individuals do not have the right to vote in Liechtenstein.[220] The rationale behind this ban on voting to date has been that world news contains very little information about what is going on in Liechtenstein politics and therefore these individuals would not be able to make an informed choice at elections.[221] There is no home-grown Liechtenstein TV channel, so all information relating to the principality's politics is disseminated through the national newspapers: *Vaterland* and *Volksblatt*. The newspapers serve also as a forum for political debate. If people are opposed to a new law or practice et cetera, then they write a letter to the editor to complain about this. If the view expressed is popularly supported, then it could lead to a citizen's initiative to amend the law.[222] Politicians are therefore under some pressure to keep abreast of citizens' views because they are aware that if they introduce a law which turns out to be unpopular, then this can be overturned by the electorate.[223] So, instead of simply worrying about being re-elected every four or five years, parliament has to consider whether or not laws or amendments passed will be contested and overturned by the electorate.[224] If overturned, by law the bill cannot be tabled again in Parliament for another two years, and in practice, it is not advisable to table it again for another ten years.[225] So, when tabling a bill, politicians need to consider whether or not this will be palatable to the electorate, as well as to the Prince.[226] There is still very strong party identification in Liechtenstein, with 70% of voters identifying with a particular party. Parliament would find it difficult to gauge the views of citizens' abroad.[227] The Venice Commission Code of Good practice in Electoral Matters makes no explicit recommendation that residents abroad should have the right to vote, and instead suggests that residency may be applied as a necessary condition to vote.[228] Nor does European Court case-law require such a provision. In 1999, the European Court dismissed a Liechtenstein application regarding this ban on voting to citizens abroad. A Liechtenstein citizen living in Switzerland lodged a case at the European Court in 1996 alleging a violation of Article 3 of Protocol 1 to the Convention,

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[218] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014.
[219] Principality of Liechtenstein, Office of Statistics, *Liechtenstein in figures, 2014*, p.4
[220] 62.1% of all Liechtenstein citizens marry spouses of other nationalities. See: Principality of Liechtenstein, Office of Statistics, *Liechtenstein in figures, 2014*, p.13
[221] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014.
[222] Ibid.
[223] Interview with **** Vaduz, May 2014.
[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014.
[228] Venice Commission*, Code of good practice in electoral matters: guidelines and explanatory report*, 1.1.(c)(i);(v), Opinion 190/2002, CDL-AD (2002)23, 30.9.2002.

on account that he was refused the right to register to vote in Liechtenstein elections. The Court declared the application inadmissible on the grounds that the number of non-resident Liechtenstein citizens was sizeable (in 1993 this was 2,700 and the resident population only 14,000) and that if all citizens abroad were granted the right to vote this would impact on the election results.[229] As a proportion of the electorate, the number of citizens abroad was 16.2%.

In 2014, a proposal was made by the Fatherland Union, which is the centre-left party, in government coalition with the more right wing Progressive Citizens' Party, to discuss possible provision for citizens abroad to vote.[230] The proposal asks the Government to consider whether the law should be amended to provide that citizenship should be a sufficient condition to vote in the context of the free movement of Liechtenstein citizens across national borders under the Schengen Agreement.[231] The government is currently considering possible minimum requirements for citizens abroad to vote, such as residency of at least 5 years in Liechtenstein with a proviso that these citizens must not have lived abroad for more than 20 years.[232] These requirements would ensure sufficient familiarity with the Liechtenstein system and keep the group small enough to mitigate the impact these voters would have on election results.[233] The number of citizens abroad that would meet these requirements is about 2000-3000.[234] So if enfranchised, this group would constitute something in the region of 9.4-13.4% of the total electorate, instead of 29.4% in the event that all 8000 were given the right to vote.

What may have influenced the government's sudden attention to this issue was the new provision which could in principle grant non-resident citizens in prisons abroad in Austria the right to vote. Whether or not this was an influential factor in the matter was not ultimately ascertained from the research. What is clear, though, is that if the law provides for prisoners abroad to vote and yet other Liechtenstein citizens abroad remain disenfranchised, then there would be inconsistency in voting rights generally among the broader category of Liechtenstein citizens abroad, and could be interpreted as unfairly penalising those not in prison.

At present, Liechtenstein is one of the few Council of Europe states that have an electoral threshold that exceeds the Venice Commission's recommended maximum of

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[229] *Hilbe v Liechtenstein (no. 31981/96)*, 7.9.1999

[230] Liechtenstein Landtag. *Postulat betreffend die Bedeutung und Sinnhaftigkeit des Instituts des Gemeindebürgerrechts*, bill drafted by Judith Oehri, Violanda Lanter-Koller, 27.2.2014

[231] Ibid. see point b)

[232] Liechtenstein Landtag *Postulat betreffend die Bedeutung und Sinnhaftigkeit des Instituts des Gemeindebürgerrechts*, bill drafted by Judith Oehri, Violanda Lanter-Koller, 27.2.2014; Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern

[233] For an in-depth analysis of the issue, see: W. Marxer and S. Sele (2012) *Auslandswahlrecht – Pro und Contra sowie Einstellungen liechtensteinischer Staatsangehöriger im Ausland*, Arbeitspapiere Liechtenstein-Institut Nr. 38.

[234] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014.

5%. The threshold for parties to compete in elections in Liechtenstein is 8%. The electoral system is PR (open party lists) and seats are distributed using the Hare quota.[235] The size of the parliament, comprising just 25 MPs, itself provides a natural threshold of 4%: Without a threshold, to secure a seat in parliament under the current PR system would require 4% of all votes cast. So, the 8% threshold equates with securing at least two seats and this has been maintained in the interests of forming a stable government, which appears reasonable under these circumstances, although it hampers the possibility of new parties forming.[236]

Conclusions

Public debate and pressure from Strasbourg were crucial in Liechtenstein to the process of women securing the right to vote in 1984. Similarly, this debate was fundamentally important in achieving the necessary democratic process to legitimise the highly unusual provisions in the 2003 Constitution. By contrast, in Hungary, there was very little meaningful consultation with civil society or with other political parties in drafting the constitution and new electoral provisions (as well as a raft of other new laws). Because of this lack of debate, and the removal of the right to lodge a complaint at the Constitutional Court through *Actio Popularis*, most respondents in Hungary said that they do not consider these new laws to be legitimate and that the only effective remaining channel for them to contest these provisions appears to be the European Court and other Council of Europe institutions.

In Liechtenstein, both the Government and Parliament demonstrated the political will to lift the blanket ban on prisoners' voting in accordance with Strasbourg case-law. In Hungary, the Government demonstrated some willingness to remove the ban from certain legislation and yet has stalled in finally carrying this through into the law on elections. Whether the example of the UK Government's failure to lift the blanket ban on prisoners' voting rights since the 2004, 2005 and 2010 judgments[237] has influenced the Hungarian Government, was not ultimately determined from the research, although some respondents may have felt unable to express such views for publication in May 2014 in light of the fact that a UK Conservative parliamentarian was to visit as rapporteur the following month. What was clearly expressed by respondents, though, was the importance of implementation by larger, more influential states and that the failure by these states to comply with the ECHR could weaken the convention system for all states.[238] But, needless to say, this will not stop the European Court from issuing analogous judgments on the same issue, as was demonstrated by the Court's

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[235] Wilfried Marxer (2010), 'Liechtenstein', in Dieter Nohlen and Philip Stöver eds., *Elections in Europe: a data handbook*, Nomos, pp.1155-1186, pp.1160-1161

[236] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014.

[237] *Hirst no.2 v United Kingdom (no. 74025/01)* 30.3.2004*; Hirst no.2 v United Kingdom (74025/01) Grand Chamber,* 6.10.2005; *Greens and M.T. v United Kingdom (60041/08 and 60054/08)* 23.11.2010.

[238] Interviews with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern ; * and *** Budapest, May 2014.

subsequent judgment to the UK Government in August 2014 in the case of *Firth and Others*.[239]

Governments of smaller states are more likely to have the political will to implement judgments on issues relating to electoral reform, which lie in the contested area between political and human rights, as articulated in Article 3 of Protocol 1 to the Convention. These states rely more on the Convention system for their security and also need to maintain excellent relations with stronger neighbouring states. Liechtenstein relies on the security that other states around it provide through treaties such as the Council of Europe.[240] International treaties must therefore be adhered to, especially by larger member states such as the UK.[241] For example, since the onslaught against tax havens, Liechtenstein in particular has suffered financially from the tough new regulations that have been applied.[242] This is perfectly reasonable if these standards apply equally to all states, and not just to Liechtenstein, but if larger states with an otherwise good track-record fail to comply with international treaties then this is perceived as both highly problematic and unfair.

[239] *Firth and Others v the United Kingdom* (*47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09),* 12.8.2014
[240] Interview with Dr Wilfried Marxer, Director Liechtenstein Institute, Bendern, May 2014.
[241] Ibid.
[242] Ibid.