Justice as Legitimacy in the European Court of Human Rights

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1. Introduction

How far should an international human rights court go to protect unpopular minorities from the tyranny of the domestic majority? At first glance, the legitimacy challenges faced by the European Court of Human Rights (Court) after its prisoner voting cases would seem to reflect a more limited ability of human rights courts to protect unpopular minorities when faced with substantial opposition among important compliance communities. Outcry in the United Kingdom in response to the Court’s decisions finding the UK ban on prisoner voting inconsistent with the European Convention on Human Rights (Convention) was unusually vociferous, with several in the government even calling for withdrawal from the Convention. Although the Court has refused to reconsider its prior judgments, it has gone to great lengths since then to narrow its earlier decisions—even going so far as to uphold an Italian law more restrictive of prisoners’ rights than the original law at issue in the United Kingdom.

Yet the controversy over prisoner voting is not necessarily a story about the limitations on human rights courts’ ability to do justice when needed. Doing justice even when it requires interpreting their mandates expansively in order to protect unpopular groups can be an affirmative source of legitimacy for human rights courts. For such courts, making explicitly moral decisions is both normatively legitimate and also fosters perceptions of legitimacy. Thus, expanding the reach of the European Convention on Human Rights in order to protect vulnerable and unpopular groups contributes to, rather than undermines, the legitimacy of the Court. Indeed, the Court’s retroactive narrowing of its earlier decisions on prisoner voting may be a greater threat to its legitimacy than the original reaction its judgment provoked in the United Kingdom. When a court that derives its legitimacy from its moral compass bows to political pressure, it risks doing violence to the perception that it is a moral actor, which may be a critical part of the foundation of its legitimacy. Thus in some cases, human rights courts may have to be principled to survive.

* Professor of Law and Human Rights, University of Connecticut School of Law and Human Rights Institute. Many thanks to Richard Kay and to the participants in the Legitimacy and International Courts Symposium at the University of Baltimore for helpful comments and feedback. Stacey Samuel and Dorothy Diaz-Hennessey provided excellent research assistance.
Using the example of the European Court of Human Rights, this chapter builds on the existing literature regarding the legitimacy of judicial institutions to consider the role of justice with respect to the normative and sociological legitimacy of international human rights courts. In so doing, the chapter identifies the pursuit of just outcomes as a significant independent influence on the legitimacy of these courts. The chapter first provides an overview of the ways in which justice, as a form of moral legitimacy, is viewed in the literature. Then, it examines the case law of the European Court of Human Rights to illustrate the way in which justice appears to be functioning as an independent basis for the Court’s legitimacy. As the Court expands the rights protected by the Convention and applies them to new situations, the legitimacy of reaching just outcomes seems to be doing considerable work in building the legitimacy of the Court.

In considering the role justice plays in the work of the Court, the chapter also contributes to the ongoing discussion about how to promote compliance with the judgments of human rights courts. The chapter argues that the perceived justice of the Court’s decisions fosters a culture of obedience that allows the Court to function as a kind of constitutional court. As a result, the potential injustice of the Court’s retreat from the potential of its earlier decisions on prisoner voting may in fact pose a greater risk to this culture of obedience and the continued compliance pull of the Court’s judgments than the initial backlash against its position on prisoner voting.

2. Justice and Legitimacy

It seems that there are at times as many definitions of legitimacy as there are scholars writing about it. Broadly, however, most distinguish between two different ways of thinking about the legitimacy of an institution. The first is a sociological or empirical approach, which asks whether the institution is perceived as legitimate by relevant constituencies. The second is a normative approach, typically used in philosophy and political theory, that asks whether the institution in fact possesses justified authority, such as in terms of law or expertise. Fundamentally, the distinction between normative and sociological legitimacy is one between fact and belief about facts—that is, whether the institution ‘has the right to rule’ and ‘is widely believed to have the right to rule.’

Although empirical and normative approaches to legitimacy are different in terms of what they are measuring, when, and by whom, the distinction between the two is often blurred in practice. Moreover, the two approaches are complementary, interdependent, and mutually constitutive. They are complementary because normative and sociological legitimacy can be understood as

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4 Bodansky, ‘Concept of Legitimacy,’ pp. 313, 315.
different ways to measure justified authority.\(^5\) The concepts are interdependent because they depend on one another for meaning; we cannot understand beliefs about legitimate authority unless we examine the normative grounds upon which those beliefs built.\(^6\) Finally, normative and sociological legitimacy are also mutually constitutive, since acting in a normatively legitimate way can promote public perceptions of legitimacy.\(^7\) This chapter uses both conceptions of legitimacy to evaluate the role of justice in the legitimacy of the European Court of Human Rights. It considers justice as an aspect of normative legitimacy, like legality or efficacy,\(^8\) and evaluates the extent to which acting in a just manner increases the extent to which the Court is perceived as legitimate.

Justice as an independent dimension of the legitimacy of international tribunals has been less well developed in the literature. Nienke Grossman, however, has recently called for an alternative approach to legitimacy, one that includes both procedural and substantive justice as independent determinants of a tribunal’s legitimacy.\(^9\) Substantive justice, in this view, relates to the just-ness of the outcomes of the tribunal’s decision-making process, separate and apart from the extent to which these outcomes correspond to the law.\(^10\) At the same time, while justice and legality are different concepts, they are nonetheless closely related. The legitimacy of law depends on the extent to which it conforms with ‘broadly held notions of justice.’\(^11\) Moreover, it may be difficult for courts to be seen as legitimate in rendering decisions in tension with the law given their position as guardians and interpreters of the law.\(^12\)

This chapter builds on Grossman’s work to consider justice as a factor which by itself can foster a tribunal’s normative and sociological legitimacy. Typically, when justice is discussed with reference to an international court’s legitimacy, it is as a necessary but not a sufficient condition of legitimacy. The presence of injustice can undermine the legitimacy of an institution,\(^13\) but it is unclear whether and if so how doing justice can affirmatively promote such an institution’s

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\(^11\) Shany, Assessing the Effectiveness, p. 140.

\(^12\) Treves, ‘Aspects of Legitimacy’, p. 178.

\(^13\) See, e.g., Shany, Assessing the Effectiveness, p. 144 (the legitimacy of a decision is limited if it ‘sharply conflicts with basic notions of justice’); Grossman, ‘Normative Legitimacy’, 103 (failing to protect human rights undermines the legitimacy of human rights courts); Treves, ‘Aspects of Legitimacy’, p. 177 (the legitimacy of an international tribunal can be negatively affected if it fails to reach issues due to jurisdictional limits).
legitimacy. Indeed, in most accounts, affirmatively doing justice is seen as illegitimate, thus depleting a court’s legitimacy reserves, especially if the court disregards law in the process. This chapter argues, in contrast, that for human rights courts, achieving just outcomes can in the right circumstances also bolster their general legitimacy.

This is not to say that ‘justice’ by itself can legitimize otherwise illegitimate conduct, except perhaps in extreme cases. Nor is it to argue in favor of justice-oriented legitimacy over any other particular measure. Legitimacy is not an ‘on/off’ switch, and the legitimacy of any given institution is at any one point in time a product of many different factors. The purpose is merely to interrogate the extent to which achieving just outcomes plays a role in fostering the perception of legitimacy of one particular international human rights court. The chapter focuses on a human rights court because of the unique mandate of such courts to protect individual rights. The different demands placed on different kinds of adjudicatory bodies call for different theories of legitimacy, and for human rights tribunals, justice may have a uniquely important role to play.

Although substantive justice refers to just outcomes, what constitutes a ‘just’ outcome may depend on the court and the context in question. Those who have considered the role of just outcomes in promoting the legitimacy of institutions have defined such outcomes as those which reflect and embody general principles of morality or human rights. In arguing that justice should be understood as an independently legitimating factor for international tribunals, Grossman, for example, defines substantive justice as respect for a minimum core of human rights. At the same time, although respect for a minimum core of human rights would seem to be an appropriate baseline for evaluating the justice of the decisions of international courts as a whole, justice for human rights courts—with their special and unique obligations and mandate—must mean something more. In addition, while failure to protect human rights would certainly deprive a human rights court of its justified authority, this does not necessarily answer the question of what it means for such a court to act in a just manner.

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15 Shany, *Assessing the Effectiveness*, p. at 144 (‘second-order considerations relating to the epistemological uncertainty surrounding questions of justice support reference to morality as a counterweight to formal authority only in exceptional cases where the conflict between law and morality is clear’). Even in extreme cases, there are a variety of factors that may lead judges to enforce positive law at odds with their moral convictions. See R. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975) (antislavery judges enforcing the Fugitive Slave Acts); Tyler, *Why People Obey*, p. 68 (noting that people may comply with the law because it is the law, even if it is unjust).


17 Bodansky, ‘Concept of Legitimacy’, pp. 315-16.


This chapter defines just outcomes for human rights courts as outcomes that expand human rights protection and, in particular, the protections available for those in society who are most vulnerable. This definition draws inspiration from two sources. First, it evokes the progressive nature of human rights law, which evolves both to meet new challenges and to continually increase levels of protection. Buchanan and Keohane, for example, define minimum moral acceptability as achieving ever higher human rights standards as those rights evolve. Second, this definition of justice draws on both the unique role of courts in general and human rights courts in particular. Human rights courts can be viewed as trustees that are empowered to exercise their authority on behalf of victims of human rights violations, and it is this emphasis on the interests of the least powerful that distinguishes the use of a human rights framework. Finally, courts in general are also often viewed as having a special role in protecting the powerless from the tyranny of the majority.

What it means for a court to act in a just manner under this definition will depend on the particular court in question and the context in which the decision occurs. For a young human rights court, even reaching a decision may be a significant step toward consolidating its authority and thereby moving progressively forward toward greater rights protection. In some of its earliest cases, for example, the European Court of Human Rights solidified its position by refraining from issuing judgments that would have significantly challenged state sovereignty. In the 1970s, after it was more established, the Court progressively moved the law forward with a series of decisions that signaled a more assertive approach. Today, at least with respect to its jurisprudence regarding the United Kingdom, the cases that have raised the most pressing justice questions are those involving the Court’s protection of unpopular minorities—namely, prisoners and suspected terrorists. In a series of decisions, the Court has expanded the rights of prisoners

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22 Buchanan & Keohane, ‘Legitimacy of Global Governance Institutions’, p. 44.
24 E. Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’, New York University Journal of International Law and Policy, v. 31 (1998-1999), 843, 850 (‘One of the main justifications for an international system for the protection of human rights lies in the opportunity it provides for promoting the interests of minorities.’).
25 See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (finding it unnecessary to determine ‘whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry’). This chapter considers only the potential effect of just outcomes on the normative and perceived legitimacy of human rights courts. It does not address the related counter-majoritarian, anti-democratic objection to international courts overruling the decisions of national legislatures. See Føllesdal, ‘The Legitimacy Deficits of the Human Rights Judiciary’.
to vote in public elections\textsuperscript{29} and, for those sentenced to life in prison, to review of the possibility of early release.\textsuperscript{30} The Court’s judgments have also limited the ability of the government to detain and deport terrorism suspects, constrained the use of secret evidence, and required suspects to have avenues for legal recourse.\textsuperscript{31}

For human rights courts, achieving just outcomes that expand the protection of human rights and protect the interests of society’s most vulnerable would seem to be strongly legitimate from a normative perspective. As Føllesdal notes, ‘[t]he first reason why the human rights judiciary may be justifiable and hence normatively legitimate is that a well-functioning international human rights judiciary provides further protection of vulnerable domestic groups.’\textsuperscript{32} Yet as a practical matter, the ability of a court to act in this normatively justified way also depends in part on whether its pursuit of just outcomes is perceived as legitimate. That is the question this chapter addresses in the context of the prisoners’ rights cases.

3. Legitimacy Challenges at the ECtHR

The European Court of Human Rights currently faces two different types of legitimacy challenges. The first relates to its very large caseload, which has impeded its ability to deliver procedural fairness. Despite substantial reforms designed to reduce the backlog of cases, the Court still had over 64,000 pending applications as of March 31, 2015.\textsuperscript{33} The second legitimacy challenge relates to its balance of concern for sovereignty and human rights—namely, that the Court unduly limits the first in order to protect the second.\textsuperscript{34} These legitimacy challenges are not necessarily unrelated; some have argued that the Court’s caseload would be smaller if it adopted more restrictive interpretive approaches that deferred more to member states, although this is not likely given that most of its caseload relates to issues relatively well settled under the Court’s jurisprudence.\textsuperscript{35}

\textsuperscript{29} \textit{Hirst v. United Kingdom (no. 2)} [GC], no. 74025/01, ECHR 2005-IX; \textit{Greens and M.T. v. United Kingdom}, nos. 60041/08 and 60054/08, ECHR 2011.

\textsuperscript{30} \textit{Vinter and Others v. United Kingdom} [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013.

\textsuperscript{31} \textit{A. and Others v. United Kingdom} [GC], no. 3455/05, ECHR 2009.

\textsuperscript{32} Føllesdal, ‘Legitimacy Deficits’, p. 355.


This chapter focuses on the second of these legitimacy challenges in order to consider the role of just outcomes in the legitimacy of the Court. This section argues that the Court’s judgments appear in many instances to be driven by the logic of justice rather than law. While certainly remaining within the boundaries of the law, the Court’s adoption of a teleological approach that is only weakly tethered in many instances to the Convention’s text and drafting history evidences a preoccupation with achieving just outcomes—namely, ever greater protection of rights, with special attention to the vulnerable.

3.1 Expansionist Methodologies

Although much of the criticism of the Court today claims it overreaches into state sovereignty, early critiques saw it as too respectful of sovereignty, relying on deferential doctrines such as the margin of appreciation to provide states with latitude in protecting the rights enumerated in the Convention. As demonstrated in its 2010 decision in A, B and C v. Ireland, addressing restrictive laws in Ireland governing access to abortion, the margin of appreciation continues to fulfill this function today, at least in part. Nonetheless, the Court has clearly expanded the scope of the Convention’s protections over time. Letsas argues that this shift occurred with the introduction of Protocol 11 in November 1998, while others locate the timing of the shift in the mid-1970s. Shany and Lovat cite in particular the Court’s decisions in Golder, Tyrer, Marckx and Airey as marking the Court’s turn to a more assertive mode of interpretation.

In addition to extending the Convention to new areas such as procedural and economic rights, the Court also expands the protections of Convention through the use of interpretive doctrines.

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37 A, B and C v. Ireland [GC], no. 25579/05, ¶¶ 241, 267, ECHR 2010. Although the Court ultimately found a procedural violation of the Convention, it relied on the margin of appreciation to hold that Ireland’s restriction of access to abortion within Ireland to cases in which the health of the mother is in danger, was consistent with the Convention. The state was to be afforded a broad margin of appreciation given the ‘acute sensitivity of the moral and ethical issues’ involved. Ibid. ¶ 233-36.


41 Shany (with H. Lovat), Assessing the Effectiveness, p. 266.

such as the living instrument approach, the doctrine of effective protection, the principle of autonomous interpretation, and in some instances, the margin of appreciation itself.

- The living instrument approach is founded on the idea that the Convention must be interpreted in light of conditions existing at the time of interpretation, rather than what the drafting parties may have intended.\(^43\) This approach, also called ‘evolutive’ or ‘dynamic’ interpretation,\(^{44}\) allows the Court to privilege its own interpretation of the rights protected by the Convention and to revise its position if it finds that rights once within the margin of appreciation now constitute violations of the Convention.

- The principle of practical and effective protection counsels adoption of interpretations of Convention rights that have practical impact.\(^45\) It provides a vehicle for the Court to reject formalistic interpretations that, while perhaps complying with the letter of the law, would have little to no practical impact.\(^46\) In other instances, the principle of effective protection is invoked when the Court is faced with a choice between two different interpretations, in order to justify the choice of the interpretation that is more protective of Convention rights.\(^47\)

- The principle of autonomous interpretation states that the Court is not bound by classifications established by the state. Developed in *Engel v. Netherlands*, this doctrine provides that the Court is not required to use the classifications of rights given to them by state\(^48\) but must exercise independent judgment to ascertain the meaning of Convention rights.

- Finally, the margin of appreciation also supports expansionist lawmaking in some cases. Although the margin has historically been associated with deference, the Court also invokes the margin of appreciation to find that European consensus precludes the national action in question. In *Hirst (no. 2)*, for example, the Court invoked the margin but found that there was in fact a European consensus against disenfranchising prisoners.\(^49\)

This expansionist lawmaking has resulted in ever higher standards of protections under the Convention. I use Helfer and Alter’s definition of expansionist lawmaking as a court’s identification of ‘new legal obligations or constraints not found in treaty texts or supported by the intentions of their drafters, and when these obligations or constraints narrow states’

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\(^{43}\) *Tyrer v. United Kingdom* [GC], no. 5856/72, ¶ 31, ECHR 1978-A26.


\(^{46}\) For example, in *Artico v. Italy*, the Court rejected the state’s position that its obligation to provide a lawyer was fulfilled by the initial appointment even though the attorney then withdrew. *Artico v. Italy*, no. 6694/74, ¶ 33, ECHR 1980-A37.

\(^{47}\) *Soering v. United Kingdom*, no. 14038/88, ¶ 90, ECHR 1989-A161 (choosing an interpretation of Article 3 that required consideration of the harm the applicant would suffer if he were extradited to the United States).

\(^{48}\) For example, in *Engle and Others v. Netherlands*, the Court was not bound by the determination by the state as to whether a proceeding was criminal in nature. *Engle and Others v. Netherlands*, nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, ¶ 81, ECHR 1976-A22.

\(^{49}\) *Hirst (no. 2)* [GC], ¶ 81.
discretion.\textsuperscript{50} The Court clearly uses its interpretive methodologies to constrain state discretion in ways that are not tied to text or intent. In a recent case, for example, the Court explicitly disavowed reliance on the text of the Convention, finding that trafficking ran counter to the ‘spirit and purpose’ of Article 4 regardless of whether it constituted ‘slavery,’ ‘servitude’ or ‘forced or compulsory labour.’\textsuperscript{51} In addition, although drafting history is only a supplementary means of treaty interpretation\textsuperscript{52} and there are reasons to be cautious about the use of drafting history to interpret a multilateral human rights treaty,\textsuperscript{53} the Court’s disregard of the drafters’ intent can also be troubling. In \textit{Young, James and Webster}, for example, the Court has recognized a right to be free from compelled association that the drafting history clearly indicated had been intentionally omitted from the Convention.\textsuperscript{54}

Although expansionist interpretations of the Convention have a reasonable legal basis given the object and purpose of the Convention, it does seem that something other than law is motivating the Court when it uses these methodological approaches. As Wheatley notes: ‘In developing a dynamic and teleological interpretation of Convention rights, the ECHR has brought into being an autonomous legal order that is subject neither to the individual will of a state party nor the collective wills of state parties.’\textsuperscript{55} The untethering of its interpretive methodologies from text and intent has the function of allowing the Court far more discretion with respect to the outcome—and the ability to ensure its outcomes are just.\textsuperscript{56}

3.2 The Prisoner Voting Cases

The Court has most recently faced significant criticism in connection with its decisions regarding prisoner voting in the United Kingdom. Those decisions have led to charges of unchecked expansionist lawmaking and fueled opposition to the Court within the United Kingdom. This


\textsuperscript{51} \textit{Rantsev v. Cyprus and Russia}, no. 25965/04, ¶¶ 279, 282, ECHR 2010. See also \textit{Golder v. The United Kingdom}, no. 4451/70, ¶ 36, ECHR 1975-A18 (finding a right of access to court inherent in the fair trial guarantee of Article 6 of the Convention).


\textsuperscript{54} \textit{Young, James and Webster v. The United Kingdom}, nos. 7601/76 and 7806/77, ¶ 57, ECHR 1981-A44.


\textsuperscript{56} Letsas, \textit{A Theory of Interpretation}, p. 3 (describing critiques of the Court’s use of ‘illegitimate judicial discretion’); T. Zwart, ‘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, Zwart, and Fraser (eds.), \textit{The European Court of Human Rights and Its Discontents}, p. 79 (arguing that ‘the Court makes policy judgments while using standards like European consensus to rationalize them’).
sub-section provides background on the prisoner voting cases; the next section will consider the role that justice has played in the debate.

In 2004, the Fourth Section issued a decision in a case brought by applicant John Hirst challenging a law in the United Kingdom that barred him from voting in parliamentary or local elections as inconsistent with Article 3 of Protocol 1.57 Article 3 governs elections but has been interpreted by the Court to also protect the individual rights to vote and to stand for election.58 The UK law at issue withdrew the franchise from prisoners for the duration of an individual’s incarceration. The Fourth Section left open the question about whether disenfranchisement could serve a legitimate purpose, finding the UK’s law incompatible with Article 3 of Protocol 1 because ‘[i]t applies automatically to all such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence.’59 The Court noted in particular that continued disenfranchisement of the applicant did not seem to be warranted since he had served his sentence and was only being held in custody on the grounds that he was a danger to society.60 The Fourth Section referred the decision to the Grand Chamber.

In 2005, the Grand Chamber of the Court issued a decision confirming that the that the United Kingdom could not, consistently with the Convention, deny prisoners the right to vote in this way. The Court emphasized that the removal of the right to vote must be tailored in two ways. First, it must be both proportional to the gravity of the offense, noting that the ‘[s]evere measure of disenfranchisement must not . . . be resorted to lightly.’61 Second, states must establish a ‘discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.’62 In discussing this link, the Court explained that the right to vote could be limited in order to protect against acts that would destroy Convention rights and freedoms, and cited as permissible limitations the removal of the right to vote from an ‘an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations.’63 Finally, the Court noted the recommendation of the European Commission for Democracy Through Law that decisions to withdraw political rights should be made by courts.64 The Court agreed that punishment and incentivizing citizen-like behavior were permissible purposes under the Convention.65 It concluded, however, that although there was a margin of appreciation to be afforded states in determining how to guarantee the right to vote, the United Kingdom’s ban nonetheless fell outside this margin because of it applied ‘automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.’ 66 According to the Court, ‘Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of

57 Hirst v. United Kingdom (no. 2), no. 74025/01, ¶ 11, ECHR 2001.
58 Ibid. ¶ 36.
59 Ibid. ¶ 49.
60 Ibid.
61 Hirst (no. 2) [GC], ¶ 71.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid. ¶¶ 74-75.
66 Ibid. ¶ 82.
appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1. 67

The UK government was slow in implementing *Hirst* from the start. 68 Domestic legal challenges were unsuccessful; national courts acknowledged that Section 3(1) of the 1983 Representation of the People Act, the provision that removed the right to vote from incarcerated individuals, was inconsistent with the Convention and the UK’s Human Rights Act, but determined it was for the legislature to resolve the conflict. 69 The government engaged in a process of consultation but delayed in bringing proposals to the legislature; this delay was critiqued by the Joint Committee on Human Rights and identified as a subject of concern in a resolution by the Council of Ministers. 70 Several additional decisions of the Council of Ministers followed, condemning the United Kingdom’s failure to implement the *Hirst* decision and allowing the 2010 elections to occur with the blanket ban in effect. 71

Continued delay in the United Kingdom eventually brought another case to the Court. In *Greens and M.T. v. United Kingdom*, two incarcerated individuals challenged their inability to vote in the 2009 European parliamentary elections and a general election in the United Kingdom in 2010. 72 The decision, handed down in November 2010, noted that Section 3(1) had not been amended and determined that the United Kingdom was in continued non-compliance with the Convention. 73 In *Greens*, the Court also used the pilot judgment procedure to give the United Kingdom six months to amend the blanket voting ban, although it refrained from indicating what amendments would be acceptable. 74

The Court’s decision in *Greens* sparked a new round of intense domestic resistance. The *Daily Mail* tabloid used the cases as an opportunity to launch a full-fledged attack on the Court as a whole. 75 Debates on proposed amendments took place in early 2011, but the British House of Commons voted in February of that year to reject the proposed amendments and uphold the voting ban. 76 In connection with that debate, Member of Parliament Philip Hollobone asked, ‘[H]ow has it come about that we, in a sovereign Parliament, have let these decisions be taken by a kangaroo court in Strasbourg, the judgments of which do not enjoy the respect of our constituents?’ 77 Reflecting on this time period, Michael O’Boyle observes that ‘[t]he Court has

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67 Ibid.
69 *Greens*, ¶¶ 27-40.
70 Ibid. ¶ 41, 44.
71 Ibid. ¶ 45-47.
72 Ibid. ¶ 73.
73 Ibid. ¶¶ 78-79.
74 Ibid. ¶ 114-15.
77 Dzehtsiarou, ‘Interaction Between the European Court of Human Rights and Member States’, p. 123.
never, in its 50-year history, been subject to such a barrage of hostile criticism as that which occurred in the United Kingdom in February 2011.’78 These criticisms even prompted calls for the United Kingdom to withdraw from the Convention.79

Further action on Greens was then postponed to await the Court’s 2012 decision on a similar issue in a case brought against Italy. In Scoppola v. Italy (no. 3), handed down in May 2012, the Court affirmed its holding in Hirst but distinguished the Italian law in ways that allowed it to uphold Italy’s restriction on prisoner voting.80 Rather than a blanket ban, Italy only prohibited voting by prisoners who were sentenced to more than three years in prison. In addition, it varied the length of the ban based on the gravity of the offense; those sentenced to three to five years in prison lost the right to vote for five years, while those sentenced to greater than five years in prison lost the right permanently, with the ability to apply for rehabilitation under certain conditions.81 According to the Court, this approach ‘show[ed] the legislature’s concern to adjust the application of the measure to the particular circumstances of the case in hand’ and, as a result, did not have the same ‘general, automatic and indiscriminate character’ that mandated the result in Hirst.82

4. The Legitimacy of Justice

Although the reaction to the prisoners’ rights cases in the United Kingdom would seem to indicate the presence of a significant legitimacy crisis, ‘[a] court that is controversial is not the same as one whose legitimacy is suspect.’83 The question is whether the reaction in the United Kingdom indeed indicates a challenge to the court’s overall legitimacy.84 The answer to this question turns at least in part on the extent to which the Court’s decision to engage in expansionist lawmaking in order to protect the rights of highly unpopular85 but vulnerable groups contributes to or detracts from its perceived legitimacy.

This section argues that the prisoner voting cases illustrate two ways in which the pursuit of just outcomes can augment the legitimacy of a court. First, a court’s legitimacy is fostered when compliance constituencies view its decisions as just. Although the public and politicians in the

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80 Scoppola v. Italy (no. 3) [GC], no. 126/05, ¶¶ 96, 110, ECHR 2012.
81 Ibid. ¶¶ 105-106, 109. The permanent ban on voting was a result of the fact that those sentenced to five years or more in prison are ineligible to hold public office, and a ban on holding public office is accompanied by a forfeiture of the right to vote. See ibid. ¶¶ 33-34.
82 Ibid. ¶¶ 106, 108.
84 Shany, Assessing the Effectiveness, p. 139; Dothan, ‘How International Courts Enhance Their Legitimacy’, 456 (distinguishing between diffuse and specific support).
85 Daily Mail coverage of the debate provides insight into the depths of unpopularity of the applicants in these cases. See, e.g., J. Slack and G. Peev, ‘Toasting Victory with Cannabis and Bubbly, the Axe Killer Who Won Convicts the Vote’, Daily Mail, 3 November 2010, http://www.dailymail.co.uk/news/article-1325930/Axe-killer-toasts-prison-vote-victory-cannabis-Champagne-Youtube.html (‘Drinking champagne and smoking a cannabis joint, evil axe killer John Hirst smirkingly toasts David Cameron for giving the vote to the UK’s worst criminals.’).
United Kingdom opposed the Court’s position on prisoner voting, the decision enjoyed the support of other important groups. Second, even when decisions conflict with national policy preferences, the existence of a robust domestic human rights culture raises the costs of non-compliance. As long as the Court appears to be a moral actor, divergence between domestic policies and the court’s pronouncements creates a kind of cognitive dissonance promotes compliance and thereby bolsters legitimacy.

4.1 Justice as Perceived Legitimacy

First, a court’s legitimacy is fostered when compliance constituencies view its decisions as just. Empirical evidence indicates that the Court’s expansionist approach does in fact promote the extent to which it is perceived as legitimate. In a study measuring attitudes toward the ECtHR, Çali, Koch and Bruch found that interviewees cited the protection of human rights as an important factor influencing the Court’s legitimacy.\(^6\) While some considered the Court’s limitation of national sovereignty to be ‘legitimacy eroding, others described it as legitimacy boosting.’\(^7\) The extent to which the Court has been effective in promoting reforms in national law also augments its perceived legitimacy.\(^8\)

The role of justice in promoting perceptions of legitimacy in the United Kingdom is more complicated, however, when a decision enjoys only relative legitimacy. Relative legitimacy is when an institution or decision is accepted by some groups but not others.\(^9\) Without taking a position on how precisely to assess relative legitimacy,\(^10\) it is important to note at the very least that resistance to the Court’s more progressive judgments is not shared among all compliance constituencies.\(^11\) Human rights advocates, for example, appear to view the Court’s decisions more positively than the general public.\(^12\) Judges in the United Kingdom refer to Court judgments ‘with a frequency and diligence hardly matched anywhere else in Europe’ and have manifested ‘close attention and loyalty to Strasbourg judgments.’\(^13\) Even when they take a position that is difficult to reconcile with Court precedent, ‘they usually go to great lengths to achieve reconciliation through detailed exegesis and thus maintain the authority of the Strasbourg court.’\(^14\) This may be because judges see the Court as promoting harmonization

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\(^6\) Çali, Koch, and Bruch, ‘The Legitimacy of Human Rights Courts’, 966; see also O’Boyle, ‘The Future of the European Court of Human Rights’, 1867 (noting that the Court derives legitimacy from its ‘collective guarantee of human rights’).

\(^7\) Çali, Koch, and Bruch, ‘The Legitimacy of Human Rights Courts’, 968.

\(^8\) Loth, ‘Courts in a Quest for Legitimacy’, p. 277.

\(^9\) Shany, Assessing the Effectiveness, p. 139.

\(^10\) Dothan argues that in cases of relative legitimacy, we should look for a ‘prevailing view’ generated by ‘aggregate[ing] the views of all the different actors within the public’ while also ‘giv[ing] the views of different actors varying weight depending on their power to affect the court’s interests and the intensity of their beliefs.’ Dothan, ‘How International Courts Enhance Their Legitimacy’, 457.

\(^11\) Compliance constituencies include both compliance partners, who can directly influence implementation of an international court’s decisions domestically, and compliance supporters, who can mobilize to pressure compliance partners to take action. Alter, The New Terrain of International Law, pp. 20-21.

\(^12\) Zwart, ‘More Human Rights Than Court’, p. 79 (arguing that activist decisions have triggered a decline in the perceived legitimacy among the general public, but noting that at the same time, the Court’s decisions are popular ‘in human rights circles’ and that expansionist decisions are favorably received ‘as they are perceived as strengthening human rights’).

\(^13\) Krisch, ‘Open Architecture’, 202-03.

\(^14\) Ibid. 203.
across Europe. Lawyers and opposition politicians also view the Court’s expansionist approach as significantly enhancing the Court’s legitimacy. Expansionist approaches likely foster the Court’s legitimacy with advocates, lawyers, and opposition politicians because they share at least in part the Court’s view on appropriate outcomes from a policy perspective.

Consistent with this data, descriptive accounts of the debate around prisoner voting in the United Kingdom indicated that while the public and politicians were outraged by the prisoner voting cases (encouraged in no small part by the Daily Mail campaign), judges, lawyers, and human rights advocates were more receptive. The Joint Committee of Human Rights, the national institution charged with considering human rights matters and drafting orders under the 1988 Human Rights Act, for example, took strong positions on the importance of compliance with the Court’s judgment, ‘not only declaring that future elections could be declared illegal but also demanding that the government explain its reticence and lack of cooperation.’ Justice Minister Michael Wills also spoke out in favor of the decision. Although it ultimately declined to issue a decision on the merits, the Supreme Court of the United Kingdom accepted the applicability of the European Court’s prisoner voting jurisprudence in a 2013 judgment. Hearing two appeals from prisoners who had been denied the right to vote, the Supreme Court rejected the explicit invitation of the Attorney General to refuse to follow the European Court’s decisions, although it in the end decided not to make a declaration of incompatibility. Thus, it seems that even on this controversial issue, there was more diversity of opinion than a quick media survey might initially indicate.

Finally, the extent to which a human rights court is perceived as legitimate in taking more activist positions may depend on the age, strength, and efficacy of the human rights tribunal. Achieving just outcomes may be more legitimizing for mature courts, for example, because they enjoy more general legitimacy, which in turn helps them influence conceptions of justice among relevant groups. On the other hand, tribunals that issue decisions that have domestic political consequences may need to be more sensitive to the risks of doing justice.

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96 Ibid. 972-73.
97 Hillebrecht, Domestic Politics and International Human Rights Tribunals, p. 110.
98 Ibid.
100 There were several reasons given for this decision: first, a declaration of incompatibility had already been made in another case by a lower court, rendering an additional declaration unnecessary; second, the seriousness of the crimes committed by the appellants would render them ineligible to vote even were the law more tailored; and third, it was in the first instance a task for the Parliament rather than the Court to determine how best to reform the prisoner voting laws. Ibid. ¶¶ 39-42.
101 See Shany, Assessing the Effectiveness, p. 156 (‘While changes in societal norms and values may indeed occur over time, it is also possible that a more legitimate court can rely on its own authority to generate compliance with “high-cost” judgments, even in the face of competing conceptions of justice (which a more legitimate court is better suited to influence).’).
102 Helfer and Alter, ‘Legitimacy and Lawmaking’, 482 (legitimacy crises triggered not by activism but by extent to which decisions have domestic political consequences).
4.2 Justice as Moral Dissonance

Second, expansionist approaches that seek to increase levels of human rights protections, especially for the powerless, can also contribute to a human rights court’s sociological legitimacy even when such decisions are not perceived as just by important compliance communities if they create dissonance between the community’s self-perception and the judgments of an external moral actor. In such situations, the sociological legitimacy of a human rights court might be measured not in terms of what the constituencies say, but rather by reference what they do—namely, the extent to which the court’s decisions exert a compliance pull on those constituencies.\(^{103}\) Just outcomes can promote compliance when they create cognitive dissonance with strongly held faith in the justice of domestic institutions, as long as the court issuing the decision is itself seen as a moral actor. In the case of prisoner voting, this dissonance has not been enough to compel compliance. The purpose of this sub-section is to consider how dissonance can promote compliance in general; the remainder of this section will evaluate the Court’s response to these competing pressures in the prisoner voting cases.

Although some compliance communities in the United Kingdom may have viewed the prisoner voting cases as just, the vision of justice of many others seems to have collided with that of the Court—politicians and the public alike did not tend portray granting prisoners voting rights as a just outcome.\(^{104}\) Prime Minister Cameron made this point most vividly when he said that providing prisoners with voting rights made him ‘physically ill’ and vowed that he would not comply with the Court’s judgments.\(^{105}\) Nonetheless, the history of the United Kingdom’s relationship with the Court indicates that this disconnect between visions of justice has historically played a role in the United Kingdom’s high levels of compliance with the Court’s judgments. Viewed as a moral actor, the Court’s decisions can exert compliance pull when they create dissonance between external and internal perceptions.

The pattern of the United Kingdom’s response to decisions of the Court has been one of ‘begrudging compliance,’ in which the United Kingdom protests vociferously but in the end complies with the Court’s decisions.\(^{106}\) Although many in the United Kingdom may be skeptical of the Court as an institution, they share a strong commitment to human rights and a belief in domestic human rights culture.\(^{107}\) According to Hillebrecht, the United Kingdom’s strong record of compliance with Court decisions is attributable to both domestic institutions and ‘the

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\(^{103}\) Sociological legitimacy can be measured not only with reference to actual perceptions but also rates of compliance. Shany, *Assessing the Effectiveness*, p. 139.


\(^{106}\) Thus, despite the ‘skepticism and inflammatory language’ often triggered by Court decisions, the United Kingdom has one of the highest rates of compliance in Europe. Hillebrecht, *Domestic Politics and International Human Rights Tribunals*, pp. 98, 101.

\(^{107}\) *Ibid.*, p. 101 (‘Although Britons do not care much for the ECtHR, they do care about the protection of their rights. In a 2008 poll commissioned by Liberty, a British human rights organization, 96 percent of the respondents stated that legal protection for rights in Great Britain was important.’).
country’s history and identity as a staunch supporter of human rights.’ 108 This strong support for and belief in the legitimacy of domestic institutions can foster resistance to decisions of the Court that are perceived to weaken those institutions.109 At the same time, the affinity of domestic elites to cosmopolitan ideas acts as a counter-balance to Euro-skepticism and forces compromises in the form of acceptance of the Court’s judgments.110 This commitment also delegitimizes intentional law breaking. As Lord Wolf, the Lord Chief Justice, explained in talking about national security cases, the temporary unpopularity of the judiciary for upholding the rights of terrorism suspects ‘is a price well worth paying if it ensures that this country remains a democracy committed to the rule of law.’111

This pattern of begrudging compliance illustrates the second way in which justice can play a role in fostering compliance and legitimacy. Just outcomes issued by a court perceived as a moral actor promote compliance because they can shame the state into changing its practices, even when the change is undesired and believed unnecessary.112 In this way, resistance to the Court’s decisions may illustrate not the vulnerability of the Court, but rather one of the means by which its norms can be incorporated domestically. Nico Krisch argues that the Court’s decisions are implemented through a process of dialogue that leads to ever greater harmonization over time.113 In this process of dialogue, ‘temporary crises and controversies’ indicate not defeat but evolution.114 So viewed, debate over the decisions of Strasbourg is part of the inevitable political struggle that follows an articulation of rights.115 The Court issues an authoritative statement of rights, which is then used domestically to delegitimize interpretations of the law raised by opponents.116 Whether or not the Court should be thought of as a ‘constitutional’ court,117 this process can over time contribute to the emergence of what Karen Alter calls a ‘constitutional culture’—a ‘culture of constitutional obedience where domestic actors see violations of higher

108 Ibid. p. 98.
111 Hillebrecht, Domestic Politics and International Human Rights Tribunals, p. 112.
112 The United Kingdom’s response to the Court may illuminate at least in part an observation made by Tom Tyler in his study of the relationship between fairness and legitimacy. Tyler observed that both distributive and procedural justice influence compliance, but in different ways: Procedural fairness more strongly influences perceptions of legitimacy, which then promotes compliance, while distributive fairness influences behavior directly. Tyler, Why People Obey, pp. 103-04. Due process primarily affects perceptions of fairness, while just outcomes create pressure to comply through either example or shame.
117 Compare Wheatley, ‘The Construction of the Constitutional Essentials’, pp. 158, 164 (noting that the Court has described itself as a ‘constitutional instrument of European public order’ and has reviewed national constitutions for their compatibility with the Convention), with Krisch, ‘Open Architecture’, 185 (arguing that the European human rights system is better thought of as pluralist rather than constitutional).
order laws as ipso facto illegitimate.’118 Resistance to the Court is thus itself part of the process by which the Court is legitimated.119

Yet for the Court’s judgments to make contrary interpretations of the Convention more costly, the Court must be seen as not only a legal but also a moral actor. As Kim Lane Scheppele explains in her work on constitutional courts in Russia and Hungary, ‘Judicial power has a moral basis because constitutions and laws are typically normative documents as well as strictly legal ones, and courts must be seen as engaging in something bigger and more important than legalism.’120 The moral force of a court’s decision increases the cost of non-compliance, since failure to comply is then not only illegal but also immoral. Correspondingly, courts can undermine their authority when they are seen as acting in an explicitly political as opposed to moral manner.121 When a court loses its standing as a moral actor, it is easier or less costly for domestic actors to disregard the decisions and the discrepancy between the judgment and national practice, and thus decreases the compliance pull of the court’s decisions.

In part, the moral authority of human rights courts stems from the fact that they declare the existence and violations of rights; their power, in other words, derives in part from the authority of rights themselves. Although rights are also political constructs that can be deployed in ways that have distributional consequences, the ‘myth of rights’ posits rights as removed from politics. Rights are ‘the ideological manifestation of law,’ timeless manifestations of social justice that serve to guide society through processes of change.122 As such, rights are powerful symbols that are often invoked as higher order principles that take precedence over law.123 Indeed, it may be that human rights courts are able to rely on justice narratives more than other courts because of both their special mandate to protect human rights and the ‘natural law’ resonance of the human rights framework.124

These insights about the legitimacy of justice counsel that an international human rights court like the Court must be sensitive not only to the risks of ignoring political pressures, but also the risks of responding to them. It is not unusual for an international court to be sensitive to the political context in which it operates and in some instances to refrain from reaching decisions that would be viewed as exceeding its mandate. At the same time, an understanding of justice as legitimacy should lead human rights courts in particular to be cautious about deferring too obviously to political pressure, since revealing itself as a political actor may also undermine its perceived legitimacy.

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119 Madsen, ‘Explaining the Power of International Courts in their Contexts’, p. 23 (calling for greater attention to the processes by which international courts ‘develop means of legitimization in their interface with democratic politics and other environments key to their practices’).
123 See *ibid.*, p. 13 (‘We believe that politics *is and should be* conducted in accordance with patterns of rights and obligations established under law.’).
124 Cf. Letsas, ‘The ECHR as a Living Instrument’, p. 271-72 (arguing that human rights violations, even if democratically supported and supported by state consent, would still be invalid).
4.3 Competing Illegitimacy in the Prisoner Voting Cases

In the prisoner voting cases, the Court is caught between two competing sources of illegitimacy. The first and most obvious is the United Kingdom’s continued non-compliance, coupled with the credible albeit unlikely risk of the United Kingdom’s withdrawal from the Convention. The purpose of this section is to argue that the Court, in attempting to navigate this first challenge, should not neglect a second source of illegitimacy—namely, the risk that bowing to this political pressure could reveal it as a political as opposed to moral actor and thus decrease the compliance pull of its decisions. The course the Court has charted has been to moderate its position in ways that would enable the United Kingdom to more easily comply, while maintaining a robust legal doctrine that can be expanded later as needed. Only time will tell whether this will be a successful strategy, or whether the Court’s retroactive narrowing of its decision in *Hirst* has undermined the extent to which prisoner voting is viewed as an issue of justice.

*Hirst* itself was a principled and strong decision, and individual sections of the Court in subsequent cases began applying this decision in robust ways. In *Frodl v. Austria*, for example, the First Section heard a challenge to an Austrian law that removed the right to vote from prisoners convicted of intentional offenses carrying a sentence longer than one year.\(^\text{125}\) The Court emphasized the importance of three factors in evaluating prisoner disenfranchisement laws:

> Disenfranchisement may only be envisaged for a rather narrowly defined group of offenders serving a lengthy term of imprisonment; there should be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and such a measure should preferably be imposed not by operation of a law but by the decision of a judge following judicial proceedings.\(^\text{126}\)

Thus, according to the Court in *Frodl*, tailoring the penalty to the severity of the offense in order to avoid removing such an important civil right for minor infractions, is only the first step. In addition, there must also be a substantive relationship between the nature of the offense and the punishment of disenfranchisement—for example, a state might decide to remove the right to vote from someone who had abused a public position.\(^\text{127}\) Finally, the punishment should be ideally judicial and not legislative. Although the Austrian law, which was limited to prisoners convicted of intentional offenses receiving sentences of more than one year, was narrower than the one at issue in *Hirst*,\(^\text{128}\) the Court found it nonetheless incompatible with the Convention because there

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\(^{125}\) *Frodl v. Austria*, no. 20201/04, ¶ 21, ECHR 2010.

\(^{126}\) *Ibid.*, ¶ 28. These elements had also been identified by the Third Section in *Calmanovici v. Romania*, no. 42250/02, ¶ 153, ECHR 2008 (‘’[P]ar ailleurs, le principe de proportionnalité exige l’existence d’un lien discernable et suffisant entre la sanction et le comportement ainsi que la situation de la personne touchée. . . . Si une telle interdiction n’était pas à exclure d’emblée dans le cas d’un délit commis en tant que fonctionnaire public, la Cour ne saurait l’accepter eu égard aux circonstances de l’espèce, et notamment aux dispositions du droit interne, au caractère automatique et indifférencié de l’interdiction et à l’absence de tout examen de la proportionnalité de la part des tribunaux internes en raison de leur défaut de compétence sur ce point.’’).

\(^{127}\) *Hirst* (no. 2), ¶ 71.

\(^{128}\) *Frodl*, ¶ 31. The Court declined to consider the effect of a provision that allowed the judge discretion in determining whether to impose the consequence because it was not in effect at the time the applicant’s sentence was handed down. *Ibid.*, ¶ 32.
was no substantive link between offense and sanction and the judiciary had no ability to tailor the sanction.\textsuperscript{129}

Continued non-compliance on the part of the United Kingdom eventually led the Court to engage in a retroactive narrowing of \textit{Hirst} in an Italian case called \textit{Scoppola (no. 3)}. In \textit{Scoppola}, the Court offered an interpretation of \textit{Hirst} that was much narrower than the interpretation put forward in \textit{Frodl} and which appeared to limit \textit{Hirst} to its facts. In \textit{Scoppola}, the Court found that Italy’s law passed muster because it was tailored to the circumstances of the crime. Prisoners who were sentenced to fewer than three years did not lose the right to vote; those who had been sentenced to between three and five years of imprisonment lost the right to vote temporarily; and those who were sentenced to five or more years lost the right to vote permanently.\textsuperscript{130} The Court found that ‘defining the circumstances in which individuals may be deprived of the right to vote show the legislature’s concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offence committed and the conduct of the offender.’\textsuperscript{131} The Italian system did not have the ‘general, automatic and indiscriminate’ character that led the Court to reject the United Kingdom’s law in \textit{Hirst}.\textsuperscript{132}

The decision in \textit{Scoppola} was a retroactive narrowing of the Court’s jurisprudence on prisoner voting for several reasons. First, it explicitly repudiated the idea that a court must be involved in tailoring the penalty. Disagreeing with \textit{Frodl}, in which the absence of judicial involvement in assessing proportionality had been decisive,\textsuperscript{133} the Grand Chamber in \textit{Scoppola} noted that what is critical is that the measures be tailored and that this tailoring could be accomplished either by a court or by legislation.\textsuperscript{134} Second, the Court in \textit{Scoppola} discussed only the importance of tailoring the sentence based on the severity of the offense and did not address whether there was a substantive link between the nature of the offense and the penalty of disenfranchisement—that is, whether this was the \textit{kind} of offense for which removal of the right to vote would further a legitimate purpose of the state.

Third, \textit{Scoppola} narrowed the rule in \textit{Hirst} to its facts, thereby transforming it from an exceptionally severe example of disenfranchisement into a rule against blanket bans on prisoner voting. In \textit{Hirst}, the Court emphasized that the automatic and indiscriminate nature of the United Kingdom law at issue ‘must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be.’\textsuperscript{135} Thus, under \textit{Hirst}, a blanket restriction on prisoner voting was only the clearest example of a national law contravening the Convention. By emphasizing that the United Kingdom’s fell ‘outside any acceptable margin,’ it implicitly indicated that measures short of a blanket ban could also fall afoul of the Convention if the penalty was not proportional to the crime in both severity and nature. In \textit{Scoppola}, in contrast, the Court abandoned its proportionality analysis, upholding the Italian law because it was

\textsuperscript{129} \textit{Ibid.} ¶ 35-36.

\textsuperscript{130} \textit{Scoppola (no. 3)}, ¶ 105. Those who permanently lost the right to vote could regain it by applying for rehabilitation. \textit{Ibid.} ¶ 109.

\textsuperscript{131} \textit{Ibid.} ¶ 106.

\textsuperscript{132} \textit{Ibid.} ¶ 108.

\textsuperscript{133} \textit{Frodl}, ¶ 35-36.

\textsuperscript{134} \textit{Scoppola (no. 3)}, ¶¶ 99, 102.

\textsuperscript{135} \textit{Hirst (no. 2)} [GC], ¶ 82.
tailored even though the consequences of that law were arguably more severe than in *Hirst*; while the UK law deprived individuals of the right to vote only while incarcerated, the Italian law resulted in permanent loss of the right to vote for those serving five or more years. Although the Court noted that the Italian system was not ‘excessively rigid’ because prisoners subject to permanent disenfranchisement could apply to have their voting rights restored, it assessed neither the impact of a permanent loss of these rights nor the burden associated with seeking rehabilitation. In disregarding proportionality, the Court appeared to send the message that as long as a law was not a blanket ban, it would pass muster under the Convention. Indeed, a dissenting judge argued that in disregarding the relative severity of the two laws, the *Scoppola* decision ‘stripped the *Hirst* judgment of all its bite as a landmark precedent for the protection of prisoners’ voting rights in Europe.’

Reaction to *Scoppola* has portrayed it as a necessary partial retreat in the face of overwhelming political pressure. Commentators have characterized the decision as a reasonable response to the legitimacy challenges the Court faced due to the United Kingdom’s refusal to comply with *Hirst* and *Greens*. The United Kingdom’s continued non-compliance with the Court’s decisions was a threat to the Court’s legitimacy, especially given the United Kingdom’s significant political influence. The Court needed to find a way out of the standoff it was in with the United Kingdom, but without overruling *Hirst* and *Greens*—which also would have done considerable damage to the Court’s legitimacy. Upholding the Italian ban, even based on a distinction difficult to defend as either logical or just, allowed the Court to signal that any policy change, even a minor or formalistic one, would likely be acceptable. This move, while not principled, was a pragmatic response to a significant legitimacy challenge.

In this debate about prisoner voting, the Court is caught between two sources of illegitimacy. On the one hand, the United Kingdom’s continued resistance presents a problem for the Court. Courts in crisis often do reach decisions that are politically rather than legally or morally motivated. Further, even when not in crisis, courts—especially international courts—are highly aware of the political context in which they operate, and they respond to that context. The dialogue that occurs between international courts and member states is in many ways an appropriate and natural part of the way international law is created and internalized. Yet on the

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136 As the dissenting opinion of Judge Björgvinsson notes, the Italian legislation ‘it deprives prisoners of their right to vote beyond the duration of their prison sentence and, for a large group of prisoners, for life.’ *Scoppola* (no. 3), para. 17 (dissenting opinion of Judge Björgvinsson).
141 Milanovic, ‘Prisoner Voting and Strategic Judging’ (calling *Scoppola* ‘hardly a decision born out of principle’).
142 S. Dothan, ‘Judicial Tactics in the European Court of Human Rights’, *Chicago Journal of International Law*, v. 12 (2011), 115, 136-37 (discussing the Court’s backtracking from *Osman v. the United Kingdom* in *Z and Others v. United Kingdom* after the first decision ‘provoked severe academic criticism’).
143 See Krisch, ‘Open Architecture’, 208 (arguing that the relationship between the European Court of Human Rights and member states is not a ‘one-way street’ but a ‘mutual process in which signals from political actors, including courts, feed back into the ECtHR jurisprudence’).
other hand, there is also a risk that the Court might undermine its moral authority by responding
to political pressure. The authority of rights—and of the courts that declare them—depends at
least in part on maintaining the illusion that the courts are removed from politics. The power of
courts can be augmented when they are perceived as advancing independently derived and
apolitical understandings of law; revealing courts and judges as explicitly political actors may
undermine the extent to which they are perceived as authoritative.  

Cases addressing violations of Article 3 of Protocol I indicate that the Court may be attempting
to balance these concerns by reviving, in cases against Turkey and Russia, some of the elements
that were left out of its decision in Scoppola. First, the Court has not in fact accepted any effort
to tailor laws. In Anchugov and Gladkov v. Russia, for example, the Court did not accept
Russia’s argument that the law in question was not indiscriminate because it only applied to
prisoners who had been sentenced to a custodial term. In Söyler v. Turkey, the Court rejected
Turkey’s argument that limiting the law to intentional crimes was reconcilable with Article 3 of
Protocol No 1. Second, the Court seems to be reviving the substantive link first discussed in
Hirst and later emphasized in Frodl. In Söyler, the Court critiqued the decision to deprive
the applicant of his ability to vote because it was ‘unable to see any rational connection between the
sanction and the conduct and circumstances of the applicant,’ who had been convicted of passing
bad checks. The Court ‘reiterated in this connection that the severe measure of
disenfranchisement must not be resorted to lightly and that the principle of proportionality
requires a discernible and sufficient link between the sanction and the conduct and circumstances
of the individual concerned.’ Finally, the Court may even be reviving the importance it had
placed in having a judicial determination of proportionality.

5. Conclusion

This chapter has argued that doing justice can indeed play a role in establishing and maintaining
the legitimacy of international human rights courts. It is both a necessary condition of legitimacy
and, in at least some cases, perhaps also a sufficient one. Doing justice can promote the extent to
which a human rights court is perceived as legitimate both when it is explicitly seen as doing
justice, and when it is not. The perception on the part of a court’s compliance constituencies that
the court is acting in a just way can increase its legitimacy. Yet a court can also bolster its
sociological legitimacy in reaching just decisions if it is perceived as a moral actor, even if
constituencies disagree about the morality of the particular decision in question.

144 Scheppele, supra note 120, at 1848 (discussing the authority of the first two Presidents of the Hungarian and
Russian Constitutional Courts as a function of their ‘explicitly disavowing political influence’).
145 Anchugov and Gladkov v. Russia, nos. 11157/04 and 15162/05, ¶ 105, ECHR 2013.
146 Söyler v. Turkey, no. 29411/07, ¶ 42, ECHR 2013; see also Murat Vural v. Turkey, no. 9540/07, ¶¶ 79-80, ECHR
2015.
147 Ibid., ¶ 45.
148 Ibid.
149 In Cucu v. Romania, the Court found Romania’s law incompatible with the Convention citing its earlier decision
in Calmanovici, including the emphasis in that case on the need for judicial involvement in the determination of
penalty. Cucu v. Romania, no. 22362/06, ¶ 111, ECHR 2012 (‘The Court has already found in respect of Romania a
violation of Article 3 of Protocol No. 1 on account of an automatic withdrawal of the right to vote as a secondary
penalty to a prison sentence and of the lack of competence of the courts to proceed with a proportionality test on that
measure.’).
By handing down a more limited decision in *Scoppola* while maintaining a robust legal foundation that could later be expanded, the Court did its best to minimize both sources of potential harms to its legitimacy—not only the risk of ignoring political pressure, but also the risk associated with responding to it. The ‘justice’ of its position on prisoner voting was not having an effect in the United Kingdom, so sending a message that emphasized the limited nature of the burden associated with its decisions was reasonable, even if such a move could be seen as unprincipled and political.

Yet this compromise was not, in the end, successful. Unfortunately, *Scoppola* weakened the moral position the Court had staked out in *Hirst*—without obtaining the desired result. In October 2012, Prime Minister Cameron reiterated that he did not believe the United Kingdom should change its law,¹⁵⁰ and the Court has found against the United Kingdom on this issue in two separate judgments since then.¹⁵¹ Given the long term cost to its perceived legitimacy from acting politically, it appears that the Court must for the time being simply hold its course; it has survived the initial crisis, and while continued non-compliance is costly, domestic resistance may fade over time.

Focusing on the way in which a human rights court’s pursuit of just outcomes promotes legitimacy and strengthens the compliance pull of its decisions may be able to assist these courts in thinking critically about how to navigate periods of political crisis. At the very least, it is important for human rights courts to consider that pragmatic but unprincipled stands in response to political pressure can undermine the compliance pull of their decisions. Moreover, in some instances, taking an unpopular position may even be a source of strength for these courts. In other words, sometimes stretching the law and displeasing states is precisely what human rights courts are supposed to do—and in so doing, they may end up strengthening their position in the long term.