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Prisoners' Right to Vote: the Danger of Constitutional Limitations

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On 30 March 2004 the European Court of Human Rights (Fourth Section) gave its judgment in the case of *Hirst v. the United Kingdom (no. 2)*, no. 74025/01[1]. The applicant, serving a discretionary life sentence, submitted that the blanket disenfranchisement of all prisoners from voting in parliamentary elections infringed his right to free elections under Article 3 of Protocol 1 to the European Convention on Human Rights. Referring to the judgment of the Supreme Court of Canada in *Sauvé v. the Attorney General* (31 October 2002), the Court has unanimously ruled it was not convinced that this automatic and blanket ban pursues any legitimate aim under the Convention and that in any event such a ban is disproportionate to any aim pursued.

The Court noted that despite the States' wide margin of appreciation in electoral matters, the absolute ban falls outside an acceptable margin.

Not only does Russian legislation contain a similar blanket disenfranchisement of any prisoner from voting (despite the nature of the crime and the duration of the sentence), but also this is a prohibition provided for in Article 32(3) of the Constitution of 1993. Since this article forms part of Chapter 2 ("Human and Civil Rights and Freedoms"), by virtue of Article 135(2) it can only be amended by way of adoption of a new Constitution either by referendum or by Constitutional Assembly (a special body convened for the purpose of adoption of a new Constitution).

It is to be noted that until 1989 Russian (as well as Soviet) constitutional acts didn't contain a prohibition of this type (usually, it was a matter of an 'ordinary' law). Starting with the Basic Laws of 1906 (though their constitutional nature is disputed) no blanket constitutional ban was imposed on prisoners' voting rights (though art. 10 of the Statute on Elections of the Duma of 1907 and art. 4 of the Statute of Elections of Constituent Assembly of 1917 - with their detailed regulations - disenfranchised the vast majority of convicted criminals). The same correlations were applicable to the Soviet constitutions and laws (however, the Soviet elections were a mere formality in any event). It was only with the Law of 27 October 1989, amending the Constitution of the RSFSR of 1978, that the prohibition was incorporated into the Constitution, although before 1993 this provision (Article 92(4)) was subject to parliamentary amendments.

It is suggested that contemporary legal doctrine does not provide any reasonable justification for the prohibition. One of the leading experts on the constitutional basis of electoral law, and Advisor to the Constitutional Court, Professor L. V. Lazarev, maintains that prisoners 'themselves waive the right to vote in elections and referendums by violating the law'[2] – an argument which is hardly convincing.

Thus the Russian legal order has to meet the challenge of evolving human rights developments in order to overcome the unreasonably vast and unamendable constitutional limitations. The possible solution may not even be '*contra legem'* but '*contra constitutionem'* jurisprudence of the Constitutional Court.

Endnotes

1: This case was referred to the Grand Chamber of the Court, under Article 43 of the Convention and a Grand Chamber. Hearing was held on 27 April 2005.

2. Commentary to the Constitution of the Russian Federation / Ed. by *Yu. V. Kudryavtsev*. – Moscow, 1996